SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE:

IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS PORTFOLIO

Inquiry into the Administration and Operation of the Migration Act

INTRODUCTION

The Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) provides the following in response to a request from Senator Crossin to address specific witness allegations arising out of the Senate Legal and Constitutional References Committee's Inquiry into the Administration and Operation of the Migration Act.

The Department has not responded to every individual allegation, but instead has tried to cover the broad range of issues raised, and offer clarification about our processes and operations. Allegations and corresponding responses have been organised under the following headings:

1. Record keeping, contract management, auditing, risk management................11
2. Quality/accuracy/adequacy of information..13
3. Lack of training/awareness of decision-makers...17
4. Litigation..21
5. FOI 24
6. Cultural issues 26
7. Compliance...31
8. Processing 36
9. Poor/inconsistent/hostile/tardy decision making..41
10. Lack of accountability/oversight 48
11. 'Dob-ins'...50
12. Detention – facilities, access, rights, conditions...54
13. Health/medication issues in detention..60
14. Settlement/release issues...66
15. Legal assistance/migration advice 68
16. Ministerial intervention..71
17. Protection issues 74
18. Women – trafficking, domestic violence 80
19. Removal/deportation 86
20. Cancellation..93
21. Students...99
22. Removal Pending/Residence Determinations...109

The Department is happy to take on notice any further requests the Committee may have with respect to any specific allegation that we may not have responded to; as well as to provide further assistance and information on those areas of the administration of the Migration Act that are of particular interest to the Committee.

In addition, the Department has attached relevant parts of the Secretary's recent opening statement to the Senate Legal and Constitutional Legislation Committee Estimates, which outlines the significant changes that have been made to the administration of the Department since this Inquiry commenced. This may assist the Committee in their assessment of the Department's responses to the allegations, and provide a useful context in which to understand further initiatives that are being implemented.

EXCERPTS FROM THE OPENING STATEMENT
ESTIMATES, NOVEMBER 2005

ANDREW METCALFE
SECRETARY, DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

I commenced as Secretary of DIMIA on 18 July 2005. The circumstances of my appointment are well known so I do not intend to go into the detail again today. Suffice it to say my appointment followed a period of focused public scrutiny of the Department.

The agenda which has been set for me is substantial and one of my first actions was to establish a Change Management Taskforce in DIMIA to lead the Department in a process of administrative and cultural reforms. This process is focused on shifting DIMIA from an organisation that was described by Mr Mick Palmer as 'process rich and outcomes poor' to one that is client-focused, and effective in its decision-making and operational roles. The Taskforce has been an effective mechanism, working closely with me and the other members of the senior executive to develop both the responses to the Palmer Report on the Circumstances of the Immigration Detention of Cornelia Rau and the Comrie Report on the Circumstances of the Vivian Alvarez Matter and to develop initiatives to address the broader concerns both Mr Palmer and Mr Comrie expressed about the culture in DIMIA.

My initial task was to develop a costed Implementation Plan responding to the 49 recommendations in the Palmer Report. As you know, this Implementation Plan was tabled in Parliament on 6 October 2005. I have also provided a report to the Minister in response to the Comrie Report and this too was tabled in Parliament.

Three major themes emerge from the Palmer Report. In order to meet the expectations of the Government, the Parliament and the wider community DIMIA must:

- become a more open and accountable organisation;
- deal more fairly and reasonably with clients; and
- have staff that are well trained and supported.

These key themes go to the heart of the recommendations in the Palmer Report but for me and my senior executive they go further. Leadership, governance, values and behaviour; our dealings with clients; a lack of openness; a lack of clear instructions, insufficient training and support for staff, including the need for better integrated systems are all areas which need attention in DIMIA. I am addressing these through over 60 initiatives developed to respond to the Palmer Report and through my broader change agenda.

As you know the Government accepted the findings and recommendations of the Palmer and Comrie Reports and I fully accept the criticisms made. Let me quote from page XV of the main Findings of Mr Comrie's Report: "DIMIA's overall management of Vivian's case can only be described as catastrophic." I can only agree. I have publicly apologised to Ms Alvarez. I do so again now.

Changing an organisation of around 6000 people will take time, resources and ongoing commitment. I recognise that, quite correctly, we will be under close scrutiny. This is not a task that I can do alone. It will be successful because of the strong support and commitment I have from my Minister, Senator the Hon Amanda Vanstone. Over the last three months Senator Vanstone has openly engaged with me in the change agenda. She has clearly articulated her expectations of me and the Department and together we have established a process of open dialogue. The Government has committed over $230 million over five years to achieve the change process.

I have also been encouraged by the strong support I have from DIMIA staff, in Australia and overseas, and colleagues across the Australian Public Service. I am heartened by the enthusiasm and drive shown by existing and new staff. One of my key goals has been to harness that enthusiasm and the range of ideas that have been put forward to improve the way DIMIA operates. Both I and the Change Management Taskforce have discussed the issues facing us widely with staff and with many key people and organisations who have a legitimate interest in the activities of DIMIA.

To assist with this agenda for change I quickly moved to restructure the organisation and to build the capacity of the senior executive to both lead and embed the change process. Three new Deputy Secretaries were appointed to assist me and provide clearer lines of responsibility and accountability for the Department's activities. Just last week, the Acting Secretary, Mr Correll, announced over 40 promotions, transfers and appointments to DIMIA's Senior Executive ranks. These include a number of new positions I established under the new structure and will involve many appointments from outside the Department. I was overwhelmed at the number of officers at these senior levels who sought to join DIMIA and am encouraged that they too recognised that with challenge comes opportunity.

The Change Agenda

So, how am I going to change a large, diverse Department and how can I demonstrate to you and the wider public that change is happening?

First let me say what I have been doing.

Each Monday and Friday I send an all staff message to let people know about a current issue. In return I am asking staff to contribute their ideas, their energy and their commitment to rebuilding DIMIA and its reputation. Hierarchy is important in any large organisation, but great organisations go beyond hierarchy to encourage engagement across all levels of the organisation. This is how I work. That is how I want people in the Department to work.

Over the last few months I have been to several DIMIA offices around Australia and, among other things, had the great pleasure of sitting down and talking with many of our staff and some newly arrived refugees from Africa and Afghanistan. I have had some very good discussions with our clients, our critics and people we work with in other organisations. The feedback has been wide-ranging and constructive. We are taking it into account.

I have presented three keynote addresses to all staff to outline to them the thrust of the criticisms in the Palmer and Comrie Reports and to set the vision and tone for the responses to these reports and the broader change agenda.

It might be useful here if I use our three key themes to demonstrate the initiatives underway.

An open and accountable organisation

Becoming an open and accountable organisation is a multi-layered objective. Part of the solution is to improve Departmental structure and governance arrangements. As I mentioned earlier, this process is well underway and will be fully implemented by the end of December 2005. A high level Values and Standards Committee with external representation, including from the Commonwealth Ombudsman's Office and the Australian Public Service Commission, has been established to ensure that the Department is meeting community expectations and focusing on meeting the Australian Public Service values.

I have created a new branch led by a Chief Internal Auditor to manage an enhanced internal audit programme that will strengthen compliance checking. The auditor will be checking whether DIMIA officers are actually doing what the law and instructions require. In addition, a new national quality assurance framework, particularly around decision-making will be developed. $12.9 million has been set aside to improve quality assurance and decision-making in DIMIA.

A Strategic Policy Group will monitor and report on the implementation of the Palmer program and will play a pivotal role in the coordination, development and delivery of policy in DIMIA.

I have also established DIMIA National, a project to examine State and Territory office arrangements, including current internal funding mechanisms. I need to have the resources where the work is being done. The DIMIA National team is working with State and Territory offices to examine these issues and will report before the end of the year.

Fair and reasonable dealings with clients

DIMIA has a diverse client base. It is therefore important that we listen to our clients and provide them with a range of choices to contact us. Some people like face-to-face contact, others prefer telephone or email. Visa applicants can apply in paper and in a number of visa categories over the internet.

It is because of the range of services we provide, the monopoly we hold and the diversity of our clients that we must provide the best service that we can. We must be fair and reasonable in dealings with clients and provide clear, commonsense and lawful decisions that are properly recorded.

To put DIMIA on a much better footing to respond to client needs a newly created Client Service Branch will develop and introduce new tools so that clients can let us know how we are doing. $25.5 million has been allocated for Centralised Client feedback response management, the finalisation of a Client Service Charter and

Strategy, overseas call handling arrangements, Client Surveys and Integrated email/telephone enquiries.

There has already been wide community consultation on the draft Client Service Charter and Client Services Strategy for Visa and Citizenship Services. Much of the feedback received has been positive and constructive. Both documents, along with improved client feedback handling arrangements, will be finalised in the near future. A program of client surveys will start in early 2006.

Senator Vanstone has already outlined the many projects we are undertaking to improve the delivery of health services to detainees so I won't go into more detail here, except to advise that in all some $17.9 million will be directed at improving immigration detention health services.

$19.2 million has been allocated to improving immigration compliance and detention case management and coordination, including the pilot of a community care model. A national case management framework will be developed in the new Compliance Policy and Case Coordination Division. In keeping with my objective to drastically improve governance and accountability arrangements, this new division will have better organisational arrangements, better systems support and a more clearly defined role for the non-government sector. The framework will be developed by the end of 2005 for implementation during 2006. The community care pilot study will run in Melbourne and Sydney for 12 months, commencing early next year.

$15.7 million has been made available for improving detention facilities, including in Queensland. A detention services strategy, developed by the end of 2005 will examine infrastructure issues in light of the changing detention population. The Minister has already announced a major development program for Baxter and spoke to you earlier about her concerns around the lack of an appropriate facility in Queensland.

Well trained and supported staff
Additional funding will provide a very significant boost to training. As you know both Mr Palmer and Mr Comrie were critical of the leadership within the Department and the apparent lack of specific training for staff to undertake their roles.

$50.3 million will be provided for the establishment in 2006 of a College of Immigration Border Security and Compliance. This will not be a bricks and mortar site, but we will partner with training providers and educational institutions to ensure that we can provide all new compliance and detention staff with a comprehensive induction program across five streams:

- compliance,
- investigations,
- detention management,
- border management, and
- immigration intelligence.

Existing staff in these operational areas will complete regular refresher training each year. Importantly, the funding is based on increasing staffing capacity so that staff on initial training can be back-filled, meaning that there will be no reduction of operational capacity while that training is being delivered.

What does all this mean? It means that each year, some 200 or so of our State and Territory network staff will spend 15 weeks learning the business of DIMIA operations. In the interim, enhanced training will be provided focusing on the application of 'reasonable suspicion', emerging legal issues, identity investigations, search warrant training and capacity to search and interrogate all DIMIA systems.

A further $16.6 million is being provided to support training initiatives beyond the College. I have appointed an SES level National Training Manager to head the newly developed Training Branch. One of the early tasks for new Training Branch will be to develop a national training strategy for DIMIA. In the meantime, a number of training initiatives have started.

An Executive Leadership Programme started on 19 September. This course is mandatory for every EL1 and EL2 in the Department and all staff at these levels will have undertaken the course by mid-2007.

A Development Programme for APS6 level officers will start before the end of November with three courses planned each year. This course is intended to increase participant's knowledge and awareness of the complexity of DIMIA's business, and increase skills in the development and implementation of policy and legislation, and better prepare them to perform their jobs.

A records management improvement plan is being developed and $10.3 million has been set aside for this task. The plan will be developed in consultation with the National Australian Archives and will include a training component so that DIMIA staff understand their role and responsibilities in relation to records management.

Both Mr Palmer and Mr Comrie stressed the need for better information management systems. DIMIA has taken this criticism on board and an independent review of information requirements and systems is underway and expected to be completed by the end of January 2006. Medium and long term actions will be presented for consideration by the Government. We have also commissioned a review which I call a 'health check'. This review will examine whether we have the right mix and deployment of our technical platforms to support the work we are doing now and our future business needs.

How will you know that we have been successful?

We have been given a significant budget for our task. Last month the Government agreed to a budget of some $230 million to make the changes in DIMIA. $165 million is new funding. I have committed a further $44 million in existing funding to the task and my Department will work to make savings of some $22 million.

I accept that this money comes with an equally serious commitment to deliver and an expectation that we will be closely scrutinised as we do so.

To monitor progress on the implementation of the Palmer Projects I have established a Palmer Program Office. To ensure that DIMIA staff, including those in the Senior Executive Service understand the principles of project management, a series of information sessions and one and two day workshops are underway. Response to project training has exceeded my expectations and regular project management training will be part of the long term training strategy.

There will be regular reporting to the executive via the Executive Management Committee. We are required to report quarterly on implementation to the Cabinet Implementation Unit (CIU) of the Department of the Prime Minister and Cabinet. This task will be facilitated by the Program Office who have been working closely with the CIU to develop an appropriate reporting model.

I am also required to report to the Minister on progress, for tabling in Parliament in September 2006.

Our success in achieving change will be measured by improvements in reputation and the confidence the Department is able to inspire in the broader community. This will be achieved through the development of national strategies for client service, case management, detention health service delivery, detention infrastructure, and staff training and their implementation through the remainder of the 2005 and 2006. Success will be reflected in the fact that our decisions are fair and reasonable, that implementation of policy is open and there are clear lines of accountability through the DIMIA executive, to the Minister and Government and to the Parliament and the broader community.

DIMIA's successes

The deserved criticism in some areas should not mean that we lose sight of the very real and significant achievements of the Department and the substantial programs it manages. In his announcement regarding administrative reform in DIMIA on 14 July 2005 Dr Peter Shergold noted that "those who work in DIMIA do a difficult and demanding job". I can only agree.

We are a Department serving people both in Australia and overseas, 24 hours a day, 7 days a week. The Minister has outlined for you some statistics on the scale of activity undertaken in the Department. Senator Vanstone and I have recently returned from an overseas trip where we had first hand and very positive feedback on some of our programs.

Commitment to change

Clearly the task facing DIMIA is substantial and I do not underestimate the commitment necessary to achieve the changes necessary. I have mentioned the high level of support I have from the Minister, staff and the wider public service. We have been given the necessary financial resources and the recent recruitment rounds give me access to a diverse and capable SES to lead the change process. While under no illusions about the scale of the task, I am very confident that we have the capacity to deliver on the change agenda.

LIST OF RELEVANT WITNESSES

Appearing Monday 26 September 2005

BIRSS, Ms Thea, Managing Solicitor, Refugee Advocacy Service of South Australia Inc.

BOYLAN, Mr Paul Ignatius, Woomera Lawyers Group

CLARK, Ms Kerry Emma, Member, Human Rights Committee, Law Society of South Australia

ESZENYI, Ms Dymphna ('Deej'), President elect, Law Society of South Australia

HARBORD, Mr Graham Alexander, Board Member, Refugee Advocacy Service of South Australia Inc.

LOWES, Ms Sasha Jane, Member Human Rights Committee, Law Society of South Australia

MOORE, Ms Jane Frances, Woomera Lawyers Group

MOORE, Mr Jeremy James, Woomera Lawyers Group

O'CONNOR, Ms Claire, Private capacity

Appearing Tuesday 27 September 2005

BURNSIDE, Mr Julian William Kennedy, Private capacity

CLUTTERBUCK, Mr Martin, Legal Coordinator, Asylum Seekers Resource Centre

JOCKEL, Ms Maria, Committee Member, Law Institute of Victoria

NEWMAN, Dr Louise, General Councillor, Royal Australian and New Zealand College of Psychiatrists

NICHOLLS, Dr Glenn Andrew, Private capacity

ROST, Ms Michaela, Private capacity

THORNTON, Mr Michael, Committee Member, Law Institute of Victoria

Appearing Wednesday 28 September 2005

BIOK, Ms Elizabeth Mary, Legal Officer, Civil Litigation Section, Legal Aid Commission of New South Wales

BITEL, Mr David, President, Refugee Council of Australia

DOMICELJ, Ms Tamara, Coordinator, Asylum Seekers Centre

EVERSON, Ms Naleya, Researcher, A Just Australia

GAUTHIER, Ms Kate, National Coordinator, A Just Australia

GEROGIANNIS, Mr Bill, Legal Officer, Government Law Unit, Civil Litigation Section, Legal Aid Commission of New South Wales

HIGHFIELD, Mrs Trish Margaret, Advocate

HITCHCOCK, Mr Neil Evan, Fellow, Founding Member, Former New South Wales President and Former National Executive Member, Migration Institute of Australia

LEAVEY, Sister Margaret Carmel, Volunteer Researcher, Edmund Rice Centre

McNALLY, Mr Nicholas, Honorary Treasurer, International Commission of Jurists (Australian Section)

Appearing Thursday 29 September 2005

KERHYASHARIAN, Mr Stepan, Chairperson, Community Relations Commission For a Multicultural New South Wales

MALAK, Mr Abd-Elmasih, Chairperson, Federation of Ethnic Communities Councils of Australia

POULOS, Reverend Elenie, National Director, Uniting Justice Australia

THOM, Dr Graham, Refugee Coordinator, Amnesty International Australia

Appearing Friday 7 October 2005

LE, Mrs Marion Rose, OAM, Private Capacity

McMILLAN, Mr John Denison, Commonwealth Ombudsman

MEERT, Mr John, Group Executive Director, Performance Audit Group, Australian National Audit Office

VON DOUSSA, Mr John, QC, President, Human Rights and Equal Opportunity Commission

WRIGHT, Mr David Neill, Regional Representative, United Nations High Commissioner for Refugees

1. Record keeping, contract management, auditing, risk management

(i) Mr John Meert said:

… there is a lack of definition, a lack of measurement and poor record keeping…on lawful, appropriate, humane, effective or efficient detention. A constant theme throughout these reports is DIMIA's risk management…and risk assessment…In contract B we talk about the poor identification of the ownership of assets and poor asset management record keeping.

When we deal with contract management we talk about the lack of clarification of who is responsible for what activities between DIMIA and the contractor; lack of clarity and consistency in some of the definitions used; again, poor performance monitoring; shortcomings in the terms and conditions attached to insurance liability—again, monitoring contract performance is really on an exception basis rather than on a proactive basis, so it reacts to events—and the discretion that is provided within the agency with respect to its reporting. Our reports have a consistency through them and a message about the quality of its administration.

Response:

Mr Meert's opening statement mainly relates to the ANAO's findings and recommendations arising from the *Management of the Detention Centre Contracts - Parts A and B* ANAO Audits. DIMIA accepted the ANAO's recommendations of both reports in full.

In relation to Part B, DIMIA provided a response to the ANAO's findings which the ANAO included in Appendix 3 to their report. The Department has made the following progress towards implementing the ANAO's Part B recommendations:

Recommendation 1 - Insurance, Liability and Indemnity
The current insurance, liability and indemnity regime in the contract will be independently reviewed as part of the detention services contract review process in response to Palmer. The ANAO has been invited to assist the Department in the context of the contract review.

Recommendation 2 - Planning, Performance and Monitoring
The Department is reviewing components of its broad governance framework, including examining options for improved business planning and performance information frameworks.

As well as the independent review, an internal review of the risk management and monitoring plan commenced in October 2005, based on a comprehensive analysis of relevant data from the previous year.

A new business plan for the detention function will be developed in coming weeks to articulate the objectives of the restructured detention services division, and the ANAO's comments will be incorporated into this process.

The Department's internal auditor is currently conducting an audit of risk management processes in the division (and across the Department), and the recommendations arising from that report will also be incorporated into future planning processes.

Recommendation 3 - Financial Reporting
The current detention services contract defines service delivery in a particular environment. If changes are made to the environment, the Department will obviously need to renegotiate costings with the services provider to accommodate these changes. The Department is continuing to pursue value for money outcomes within this context.

The Department agrees with the ANAO's recommendations, and further progress will be made towards implementing these suggestions once the new detention environment is defined. In this way costings can be measured in an appropriate, long-term environment.

Costing schedules under the current detention services contract will be independently reviewed as part of the contract review process.

Recommendation 4 - Management of Commonwealth equipment and assets at each detention facility
Joint onsite stocktakes with GSL have been successfully completed for every operational centre, with some outstanding issues being resolved at Baxter IDF. Common agreement has been reached regarding ownership of assets, including a volume of items in great detail not normally recorded in departmental stocktakes.

More broadly, the Department is responding to criticism of its record-keeping practices raised in both the Palmer and Comrie Reports. A Records Management Improvement Plan (RMIP) is being developed and implemented by the Department in partnership with the National Archives of Australia. Improved records management practices, training, guidelines and systems support will all be addressed through the RMIP.

2. Quality/accuracy/adequacy of information

(i) Ms Lowes said:

…the Minister has the power to shorten the time frame for someone to be eligible for a permanent protection visa. The basic position is that you must have held a temporary protection visa for 30 months before you can be considered for a grant of a permanent protection visa. The minister has the discretion to waive that 30-month period so that the person is eligible for the permanent visa within a shorter time frame. However, there is absolutely no guidance in either the regulations or the policy documents as to what considerations might be relevant to the exercise of that discretion…So there are situations where not only is it not up to date but there is no policy document on it which can be used to inform people about what their position is.

Response:

Currently this waiver power is only exercised by the Minister personally unless the power is being used to align family outcomes. Guidance on this aspect of the waiver power for decision-makers is provided in the Protection Visa Procedures Manual (PVPM), part of the Department's Procedures Advice Manual volume 3 (PAM III) in the section "Further PV Applications by TPV and THV holders".

(ii) Ms Everson said:

These people sat in detention for another three years because the Department had the wrong information on which it made the decision that they could return to Syria. Obviously, wrong country information can have devastating effects and there is no process for a decision to be changed if new information becomes available.

Response:

In the cases to which Ms Everson refers, the decisions to refuse protection visas based on the assessment that the applicants had effective protection in Syria were appropriate at the time. By the time the individuals had exhausted all their avenues for review and possible ministerial intervention, however, the circumstances with regard to Syria had changed, and Australian case law in respect of 'effective protection' had further developed. As a result, the Department sought agreement from the Minister to lift the bar under s48B to allow the individuals to make further applications for protection visas. The applications were then assessed against all applicable information, including the latest country information about Iraq and Syria's position in relation to Iraqis being returned there from third countries. This outcome reflects the ability of the systems to adjust to changing circumstances.

(iii) Ms Everson said:

There was a DFAT report which was based on an interview with one person from some church. He said that Christians were not persecuted in Iran, on the basis of which a great number of decisions were made in relation to Christians in Iran. Later a member of that church was executed but DFAT were still using the information. So advocates and migration agents had to submit the information that a member of the church, which was saying that it was all fine, had actually being executed. So the information is not always reliable and sometimes they use information which is quite old until new information is brought to their attention by migration agents. They do not always go out and look for the most up-to-date information, I believe.

Response:

Around 80 percent of all information sourced for the Country Information Service (CIS) database comes from media based in countries being monitored or the surrounding region or from international agencies. A further 10 percent is sourced from United Nations agencies. Information sourced from non-government organisations, other government, academic and special interest groups make up the remaining 10 percent. Information provided by the Department of Foreign Affairs and Trade (DFAT) comprises 0.5 percent of holdings. DFAT has in place an Administrative Circular that provides policy guidance to overseas posts tasked to collect country information for use by the CIS, the Refugee Review Tribunal and the Migration Review Tribunal. In summary, these guidelines specify the purpose for which the information is being gathered, and indicates that information provided by overseas posts should contain factual information to the extent possible and should not contain any unsolicited comment. It clearly instructs the post not to divulge the name or any other details of the applicant or their family, unless specifically asked to do so in the tasking cable.

The CIS database contains a range of information concerning Christians in Iran including information from DFAT. The DFAT material consists predominantly of factual reporting of the situation in Iran and in relation to specific questions. It includes a report of February 2003 of discussions between DFAT and a regular interlocutor from a particular church in Iran. This appears to be the report alluded to in evidence to the Committee.

The DFAT document reports the view of the interlocutor that the particular church did not believe there has been any deterioration in the situation for Christians in Iran at that time. DFAT reported that the interlocutor also advised that the situation can be more complex for converts who publicly state their conversion, but this has not resulted in criminal charges for some time. The interlocutor in question did not say that “Christians were not persecuted in Iran.”

The views of the interlocutor reported by DFAT form only a small part of a wider range of information available to decision-makers. The relevance and weight of any particular item of information will depend on the circumstances of the individual case. At the time of the DFAT report, the comments of the interlocutor were broadly consistent with other available information.

A search of CIS holdings and internet sources has located no evidence to support the assertion given to the Committee that another member of the interlocutor's church had since been executed. Publicly available information from a range of credible sources report that the most recent execution of converts from Islam to Christianity for apostasy in Iran was in 1994.

(iv) Ms Gauthier (and Senator Crossin) said:

Ms Gauthier – …when new country information comes out, they then do not review decisions they made recently using the old information. That is where with a lot of cases, say, from Afghanistan there has been the problem of the high rate of rejections and then reappraisals. Some of those, having been through the process in previous months, were at different stages and were caught by the reappraisals. It was not until they forced their cases to be reopened—unfortunately by some of them going on a hunger strike and bringing themselves to the notice of the public—that they were reassessed. Instead, the Department should have been proactive and said, 'We are aware of this new information; we are aware of cases where we made incorrect decisions because at the time we did not have up-to-date information.' But they did not take that proactive step.
CHAIR—You are suggesting that, if the situation changes in a country, that does not automatically trigger a response in DIMIA to review or reassess cases?
Ms Gauthier—No, it does not. It is entirely up to the individual applicant. Many people in detention come to the notice of legal advocates, so they are more likely to get assistance. Someone living in the community on a bridging visa is not necessarily going to come to anyone's notice to be informed that there is new information with which they can reapply for a visa.

Response:

In relation to Afghanistan, the country mentioned in the question, Afghan asylum seekers have benefited from relatively high approval rates from DIMIA decision-makers. For example, for the unauthorised boat arrivals between 1999 and 2001, DIMIA approved some 85 percent of applications from Afghan nationals in the first instance. The Department's approval rate in relation to applications for further protection for Afghan nationals was some 67 percent. Approval rates in comparable European countries in 2004 for Afghan nationals ranged from less than 2 percent to some 50 per cent, with approval rates in many countries being below 20 percent.

The *Migration Act 1958* (the Act) prevents a person refused a protection visa from lodging a valid fresh protection visa application unless the Minister uses a personal non-compellable power to allow this in the public interest under section 48B of the Act. In many cases it is reasonable to expect that a person found not to be owed protection who subsequently develops a well founded fear of persecution will draw these circumstances to the Department's attention.

Specific units have been established in New South Wales, Victoria, Western Australia and DIMIA National Office to conduct assessments of such cases, and to provide advice to the Minister in considering her power to intervene under section 48B of the Act to allow fresh protection visa applications to be made.

The Department actively monitors the cases of persons in detention or facing removal, and where appropriate, refers these cases to the Minister for her consideration of the use of her section 48B power. The Department also initiates and conducts broader assessments of Australia's obligations under other international instruments, prior to involuntary removals, to identify and refer for Ministerial attention any case which raises other non-refoulement obligations.

Reflecting the approach set out above, formal reassessment of Afghan and Iraqi nationals found not to be refugees was initiated by DIMIA in 2004 in response to significant changes in the situation in these countries, as reflected, for example, in major new country information updates provided by UNHCR.

3. Lack of training/awareness of decision-makers

(i) Ms Clark said:

It is our experience that some delegates appear to be unaware of certain aspects of the regulations and also differ greatly in their application of them in terms of things like preparation for interviews. When applicants are being interviewed there is great variation in the degree of preparedness shown by the delegates. For example, some will be very well prepared and narrow their questions to particular issues; some ask the applicant to relay everything. In terms of the complexity of the regulations it does appear that some delegates are simply unaware of some legal issues.

Response:

There is no legislative requirement that a protection visa (PV) applicant be interviewed. If, after full consideration of all relevant issues, case managers decide that an interview is necessary, the procedures outlined in the Protection Visa Procedures Manual (PVPM) provide comprehensive guidance on the procedures to be followed. The PVPM states that the interview should:

- explore claims/information raised by the applicant;
- focus on specific issues that require clarification; and
- be a vehicle for natural justice in putting adverse information to the applicant.

It is reasonable, therefore, that case managers may approach interviews differently depending on the nature of the claims raised by applicants, taking into account the overall credibility of the applicant as presented in their application.

The PVPM states that case managers should be clear as to the purpose of the interview, focusing their questions on specific issues pertaining to the applicant that require clarification, particularly if critical to a decision. They are advised that questions should be succinct and discussion of more general issues (for example, non-specific country information) should not occur.

All decision-makers have access to Legend, which is a database holding all migration legislation, the procedures advice manual (incorporating the PVPM) and migration series instructions, with a search facility for easy reference.

(ii) Mrs Le and Ms O'Connor raised issues about the lack of training and cultural awareness of decision-makers:

Mrs Le – I would also like to raise again the lack of cultural training and awareness of many DIMIA officers. They lack formal qualifications and training. I would say that very few Departmental officers who are dealing with refugees have any knowledge of the history, the culture or the countries from which those people come. They do an interview with them and there is often total ignorance on the part of the interviewing officer as to what situation these people have come from or, as I say, the historical context from which they have come.

Ms O'Connor – The case officers do not have the appropriate training and understanding. There are stories all the time about particular case officers who have a consistently ignorant approach to a particular country or regional application—for example, a case officer saying to a detainee: 'Well, I don't believe you were locked up for nothing. What government would waste money locking someone up for no reason?' That is a complete lack of understanding of what happens in Iran. That is where the errors first occur. So you are then compounding the randomness of the situation. I know clients who have been transferred to another detention centre as they are about to be deported, then a lawyer gets hold of the case, we get a stay for a short time, and suddenly they have a permanent visa. There is randomness all the way through. If you made the case officer system more informed and appropriate and people were allowed to have legal advice before they presented their case to a case officer, I think all the rest of the randomness and accountability would not be a problem.

Response:

The statements by Mrs Le and Ms O'Connor raise questions of country information available to decision-makers, training and legal representation. These are addressed below:

Country Information Service for decision-makers
DIMIA maintains a comprehensive Country Information Service (CIS) to support protection visa decision-makers. As at end June 2005 there were 15 full time country researchers in the CIS, with up to 19 at various times throughout the year. All had research related qualifications and/or research related experience.

At the end of June 2005, the CIS held 7,690 hard copy publications and documents dealing with human rights and refugee issues in other countries. The service also held copies of major human rights and country information collections from several other governments, including the United States, Canadian and United Kingdom governments.

The CIS also maintains a systems database of country information standing at some 87,500 individual information items drawn from over 2,600 different sources. Some 26,500 of these information items were added during 2004-2005, with over 25 percent of them added within one day of publication and two-thirds within five days of publication. This information is accessible and searchable from the decision-makers' desktop computers. All of DIMIA's CIS holdings are available to the Refugee Review Tribunal (RRT), with the electronic data holdings searchable from Tribunal personal computers. All RRT sourced information used in a Tribunal decision is provided to DIMIA and is added to the Department's CIS holdings.

As discussed above at page 14, around 80 percent of all information sourced for the CIS database comes from media based in countries being monitored or the surrounding region or from international agencies. A further 10 percent is sourced from United Nations agencies. Information sourced from non-government organisations, other government, academic and special interest groups make up the remaining 10 percent. Information provided by the Department of Foreign Affairs and Trade (DFAT) comprises 0.5 percent of holdings. DFAT has in place an Administrative Circular that provides policy guidance to overseas posts tasked to collect country information for use by the CIS, RRT and the Migration Review Tribunal (MRT).

In summary, these guidelines specify the purpose for which the information is being gathered, and indicates that information provided by overseas posts should contain factual information to the extent possible and should not contain any unsolicited comment. It clearly instructs the post not to divulge the name or any other details of the applicant or their family, unless specifically asked to do so in the tasking cable.

Decision-makers are able to conduct their own inquiries and to consider information they assess to be relevant and reliable from any source, including from clients and advocates. The decision-makers have desktop access to the internet. All of the information used in protection visa decisions is required to be included in CIS holdings for audit and reference purposes. Any adverse information used by a decision-maker must be provided to the applicant for comment.

In addition, where information is not immediately available to case managers, for example where there are highly specific issues in question, the officers are able to make requests to the CIS to conduct research. Some research requests are referred to overseas posts and/or overseas organisations such as the United Nations High Commissioner for Refugees, as appropriate, for specific advice. This generally takes place where available information is ambiguous or is not sufficiently precise to address the specific issues under assessment. As a result, country information sought through this process, for example from DFAT, tends to be focused on key issues of direct relevance to protection visa decision making on individual cases or groups of cases in Australia.

Training for decision-makers
Protection visa decisions are made by Departmental officers of a higher classification than other decision-makers under the Migration Act, who have undertaken induction training and refresher training for this work including:

- Refugee law and international obligations;
- Cultural, gender and age sensitivities;
- Legal requirements of administrative decision making;
- Policy and procedures; and
- Selection and use of country information.

In addition, the CIS organises country information seminars for decision-makers, often drawing on visiting international experts or local commentators and academics.

In total, between 280 and 300 hours of training courses are provided for protection visa decision-makers each year. This training is additional to corporate, systems, staff management and personal development training provided to all DIMIA employees. It is noted that advocates representing protection visa applicants are also required to undertake training for their continuing professional development. For example, lawyers are required to undertake 10 hours of continuing legal education per annum.

Over recent years DIMIA has progressively been moving to a more structured approach to training its staff. A National Training Summit in 2003 identified five national training priorities - induction, client contact, lawful decision-making, supervision/leadership, and contract management. Training packages have been developed and delivered across each of these priority areas.

Induction training is compulsory and the aim is for all new DIMIA employees to attend induction training within one month of commencement. Client contact training is primarily targeted to contact centre and counter staff (including locally engaged employees overseas). The aim is for staff in client service roles to undertake this training before starting to engage with clients. The target group for lawful decision-making is new decision-makers at APS3-6 levels. Programs have typically been run quarterly in most offices. In addition to these corporate priorities, program-specific training has been delivered across the Department. Examples of this include specialised programs for officers performing in compliance related roles, and detailed decision-making training for onshore protection decision-makers.

Legal training is provided within the overall Quality Decision Making (QDM) Spectrum. QDM courses are developed in accordance with a framework that includes specific principles and are run by operational areas. The legal area reviews proposed QDM courses to determine whether the contents are legally correct. Within the QDM spectrum the courses provided in the "Decision Integrity" and "Financial Integrity" frameworks include instruction on relevant provisions of the Act and Regulations. The courses are designed to enhance the competencies of DIMIA decision-makers in relation to key decision-making skills and abilities and the legal framework within which decisions are made.

DIMIA is building on this approach and has recently appointed a National Training Manager who will be commencing shortly. The National Training Manager will head a team which will provide:

- strategic oversight of learning and development across DIMIA including the development and implementation of a national training strategy
- high-quality corporate training for the Department;
- enhanced coordination of training across DIMIA;
- innovative development programs to build leadership and management capacity:
  - these courses have already commenced and will continue on a regular basis so that all DIMIA executive level staff will attend leadership training within the coming 18 months;
- a range of staff development programs including for graduates and Indigenous staff; and
- regular evaluation and reporting on the outcomes of national training programs.

Legal Representation for protection visa applicants
Under the *Migration Act 1958*, protection visa applicants in immigration detention must be provided with all reasonable facilities on request to access legal advice, in addition to any arrangements the detainee may make to retain legal advisers. All protection visa applicants in immigration detention are offered publicly funded Migration Agent assistance with their visa application through the Immigration Advice and Assistance Scheme (IAAAS). Disadvantaged protection visa applicants and non- protection visa applicants in the community may also be eligible for IAAAS assistance provided they are assessed as being in financial hardship and satisfy other eligibility criteria.

4. Litigation

(i) Ms Everson and Ms Gauthier raised concerns about a particular case:

Ms Gauthier – One in particular also relates to 417 and addresses a number of issues. A woman and her family were refused by the RRT. All claims were accepted that she would fear persecution, that she would probably be killed, but it was not within conventional grounds, or they believed so at the time. It was in fact later overturned. I am not sure whether anyone is aware of the issues with women and domestic violence, but it was decided in a case in the High Court called Khawar. The RRT recommended in relation to this case that the minister consider granting a visa under section 417, which I understand is fairly unusual. They do not often do that, and they did in this case. It was apparently totally ignored. It was not until two years later, when she found a way to appeal the decision, even though it was out of time, that they finally backed down. On the day of the hearing it took about five months until it was finally going to court. Since the decision in the High Court it was quite clear that the RRT's decision was wrong on the matter of refugee law. But it did take, until the day of the hearing, five months later—and after about 3½ years in detention—for them to say, 'Whoops, yes, we're going to give you a visa.'

Ms Everson—They were clearly refugees. On the day of the hearing—in fact I think it was on the court steps—the government solicitors spoke to their counsel and told them she was getting a 417.

Ms Gauthier—She was also a very vulnerable single mother of three children, one of whom had cerebral palsy. This child remained in detention with cerebral palsy and with no adequate medical health care for an additional 2½ years because the government did not act in time. The government knew that this woman was a refugee and that her children should have been granted status, and they withdrew their case against her in court on the day of the hearing.

Ms Everson—Further to that, it is also quite clear from their withdrawing that it was because of the precedent that the case would set. It was a very strong case. It was stronger than the case which has been decided in the High Court in relation to women being able to be considered as a social group in a country—whereas the Khawar case had only decided that in relation to women suffering domestic violence. This was a case which seemed as though it would establish a broader precedent than had been previously established.

Ms Everson – The woman had also made, I think, between seven and nine written requests to the minister to exercise 417. The minister was fully aware and there had been submissions from the disability advocacy counsel in Sydney. I am sure they were fairly well on notice about this family. The Department for Community Development—the equivalent of DOCS, in Western Australia—had also recommended the release, some two years earlier, of the mother and the children.

Response:

In the absence of specific identifying information provided by Ms Gauthier and Ms Everson, the Department has been unable to conclusively identify this case.

However, a case has been identified matching the broad elements of the description provided. This case concerns a female applicant with children, in detention, who claimed to be the subject of domestic violence in her country of origin, Iran.

This person had her claims for protection assessed against the Convention criteria and relevant legislation by an officer of the Department and was found not to engage Australia's protection obligations. This person then sought merits review by the Refugee Review Tribunal , which affirmed the primary decision. The then Minister subsequently used his intervention powers to grant permanent visas to this person and her children on public interest grounds, notwithstanding that the family was pursuing further litigation over the Tribunal's decision. In this case the applicant withdrew from litigation following receipt of a visa. The RRT decision in this case stands and the Minister did not withdraw from the litigation. At no stage was there any finding by the Department, the Refugee Review Tribunal or the courts that this person was a refugee.

(ii) Ms Clark, Mr McNally and Ms Gauthier raised concerns about DIMIA's conduct in litigation proceedings:

Ms Clark – …in our experience there have been plenty of examples of people who have been represented by lawyers in South Australia and been successful, only to have the Commonwealth continually appeal those successful decisions. I guess some people start to get a little bit frustrated when they feel that the lawyers are being accused of starting unmeritorious litigation when in fact the Commonwealth itself has not been a model litigant when it comes to this type of litigation.

Mr McNally – One thing that really should be explored is early resolution of the matter. That does not seem to happen. Cases seem to settle a couple of days out from a hearing that took 18 months to get to despite the fact that nothing has changed since the original document was filed. As a model litigant, serious consideration of early resolution should be given.

Ms Gauthier – In relation to judicial review and the Department's litigation section, I am aware of a number of cases where the Department have waited until the last moment in cases where the application made by the asylum seeker was fairly well substantiated and likely to succeed, I guess. They have waited until the day of the hearing to withdraw and sign consent orders.

Response:

The Legal Services Directions issued by the Attorney-General under the Judiciary Act require the Commonwealth and its agencies to behave as a model litigant in the conduct of litigation.

The Directions set out a number of requirements that need to be met in order that the Commonwealth acts fairly and honestly in handling claims and litigation brought by or against the Commonwealth. These requirements include matters such as:

- dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation;
- acting consistently in the handling of claims and litigation;
- endeavouring to avoid litigation, wherever possible;

- where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:
    - not requiring the other party to prove a matter which the Commonwealth or the agency knows to be true; and
    - not contesting liability if the Commonwealth or the agency knows that the dispute is really about quantum.
- not taking advantage of a claimant who lacks the resources to litigate a legitimate claim;
- not relying on technical defences; and
- not undertaking and pursuing appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest.

The obligation does not prevent the Commonwealth and its agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and its agencies and testing or defending claims against them. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interests of the Commonwealth or an agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable.

The Department takes its obligations as a model litigant very seriously. We, and our panel firms (who are required by the terms of their contracts with the Department to act in accordance with the Attorney-General's Legal Services Directions) actively seek to abide by the letter and spirit of the obligations imposed.

The Department has a very busy and large litigation caseload. Currently almost 3500 active cases are before the courts and the AAT. The caseload has been of that order for some years. With such a large caseload the Committee may be surprised to learn that there are currently only 17 cases in which the Minister is the appellant.

For each of the last three completed financial years the Department has received approximately 5000 new court/AAT applications. For the last three years the number of applications/appeals initiated on behalf of the Minister has been:

02/03	30
03/03	27
04/05	36

We also take care to avoid defending those cases where we do not have reasonable grounds of success. Our positive actions in this regard are demonstrated by our success rates in defended court cases for the past several years:

02/03	92.5%
03/04	94%
04/05	95%

5. FOI

(i) Mrs Le, Mr Harbord and Ms Birss expressed concerns about lengthy delays in responding to FOI requests.

Mrs Le – …the cooperation even now at some levels of the Department is still marked—and will be for many months to come, I suspect—by the same culture of suspicion and secrecy. We have difficulty getting files under FOI. We find ambassadors overseas being refused access or being told, 'We could give you more information but it is classified information.' How classified is it when you give an ambassador briefings overseas, expecting him to make some representations on behalf of the government and people of Australia, yet some lower Departmental officer says, 'We can't give you that information; it's classified'?…We have had problems where, two years later, we still have not received [FOI] files.

Mr Harbord – For period of time, we were suffering huge delays in response to FOI requests and the feedback we were getting from DIMIA was that they do not have the resources to conduct the FOI requests. More recently, we started threatening legal action if the requests were not complied with. As a result of that, we have been getting a far more rapid response, which leads us to infer that DIMIA did in fact have the resources all along. This is symptomatic of what we have had to do throughout the existence of RASSA and even before we were set up. We have experienced continual obstruction and delays by DIMIA in relation to the most simple of requests. It is only when we have threatened legal action or have taken legal action that we get a reasonable response.

Ms Birss – It does help to file an appeal to the AAT, and suddenly the documents turn up when they are supposed to. I have a classic example of the obstructionist attitude of the Department. I did file an appeal to the AAT on a delay in the provision of urgent FOI documents. I received a letter in the post, an FOI determination, saying that I was refused access to the documents on the grounds that they could not find any. Subsequently, they have found documents relating to my client but, instead of producing them, they are fighting me in the AAT about whether I am entitled to those documents under section 37 of the AAT Act. They have requested that I send a fresh FOI request with a further 30-day time limit and a further opportunity to appeal to the AAT if they do not comply with that time limit in order to obtain these urgent documents. In the meantime, I am unable to put a submission forward for my client and hopefully prevent him from being forcibly returned to a position where he feels that he is in danger.

Response:

In recent years, the Department of Immigration and Multicultural and Indigenous Affairs has experienced a significant increase in the number, and complexity, of requests for documents made under the *Freedom of Information Act 1982* (FOI Act). From 2002 to 2004, the number of FOI requests increased by 46% to 15,446. In the last financial year (2004/05), the Department received over 11,600 requests. The Department receives more FOI requests than any other agency.

The Department endeavours to process and finalise each FOI request within the statutory timeframes set out under the FOI legislation. Where possible, the Department's clients are consulted in an effort to negotiate an extension of the timeframe. When a client requests the urgent finalisation of their FOI request for documents, the Department processes the requests as a matter of priority.

Similarly, where an appeal is filed with the Administrative Appeals Tribunal (AAT) in relation to an outstanding FOI request, the Department seeks to prioritise the request in order to avoid unnecessary financial costs associated with the litigation.

The Department is implementing a range of strategies to address delays in FOI processing including structural changes, recruitment of additional staff and investigating alternative ways to meet the increasing demands.

As part of this strategy, DIMIA is exploring ways in which the Agent's Gateway and other technological enhancements can assist with streamlining the process of responding to FOI requests from Migration Agents. To this end we have already commenced consultation and education processes both internally and with members of the Migration Agents Registration Authority.

6. Cultural issues

(i) Mrs Le said:

The interaction between the Department of Immigration and the Department of Foreign Affairs from the Department of Immigration's point of view is abysmal. There is a culture of lies, coverup and deliberate misinformation to the Department of Foreign Affairs.

Response:

DIMIA regards this allegation as extremely serious. The Department invites Mrs Le to provide further details to support this allegation, so that these may be seriously considered and investigated. The Department strongly states that it does not condone "lies, cover-up and deliberate misinformation to the Department of Foreign Affairs and Trade" (DFAT).

DIMIA and DFAT have endeavoured to work very closely regarding the Country Information Service (CIS) to provide the most accurate and current information possible. Information relating to the CIS is provided above at pages 14, 18 and 19.

On a broader level, DIMIA maintains a close working relationship with DFAT. Officials work collegially on a range of day to day matters at overseas posts and in Canberra, including through regular meetings at both Senior Executive Service and officer levels.

This is further supported by working together in crisis situations. For example, following the aftermath of the Boxing Day Tsunamis, officers from both departments worked together for several weeks, both in Australia and in Thailand and Indonesia to help hundreds of distressed Australians and assist with their return to Australia.

DIMIA remains strongly committed to working collegially with DFAT.

(ii) Mrs Le said:

From the time Philip Ruddock started accusing people of doing all these kinds of things, inside the Department there developed the culture of us being expected to reject; us being expected to provide the minister with a reason to reject.

Response:

Australia's protection visa approval rates compare favourably with those in many European countries. For example, as mentioned above at page 15, for the unauthorised boat arrivals between 1999 and 2001, DIMIA approved some 85 percent of applications from Afghan nationals and some 89 percent from Iraqi nationals in the first instance. The Department's approval rate in relation to applications for further protection for Iraqi nationals was some 71 percent, and for Afghan nationals some 67 percent. Approval rates in comparable European countries in 2004 for these nationalities ranged from less than 1 percent to some 66 per cent, with approval rates in many countries being below 20 percent.

Historical and current Refugee Review Tribunal set aside rates compare favourably with merits review tribunal rates in other jurisdictions. It needs to be recognised that the RRT is making a *de novo* decision, providing applicants with the opportunity to present new claims and taking into account any changes in the home country that have occurred since the Department's decision.

Even with these factors, in the period from 2001-2004, the RRT set aside rate has been between 6 and 13 percent. Set aside rates for other tribunals, such as the Migration Review Tribunal, the Social Security Appeals Tribunal and the Veterans Review Board over the same period have been between 28 and 50 percent.

(iii) Mrs Le, Mr Malak, Ms Eszenyi, Ms Birss, Mr Harbord, Ms O'Connor, Sister Leavey and Ms Jockel raised concerns about the culture in DIMIA:

Mrs Le – I think there has always been, in a sense, a culture of otherness, a culture that is adversarial rather than cooperative. Inside the Department there are some very wonderful people who over the last few years have been almost destroyed by some of the work they have had to do and some of the things they have seen going on. They are applauding the fact that the Solon and Rau cases are in the limelight—in the media—because people who have voiced concerns have been silenced, and that has been a problem.

Mr Malak – There is a perception that if you come from certain countries you are more likely to end up in a detention centre than a jail. It is not useful, it is not effective and there is a strong perception that it is done using a selective, racist approach and that if you come from a different background you will not go through that…As you know, most people who are not citizens are not from an English speaking background. My understanding is that a lower number of English-speaking people go to the detention centres. I am not sure if that is true or not, but that is a strong community perception.

Ms Eszenyi – It is our view that these specific procedures surrounding the removal of detainees from Australia, which are identified in our written submission, are part of the broader cultural problems within the Department. The Department is perceived by many to view both the detainees and those who may wish to assist them with scant regard.

…we wish to note our opinion that the cultural problems that have been identified within the Department extend to the processing and assessment of offshore humanitarian visa applications.

Ms Birss – I have met good eggs and bad eggs in the Department. The problem to me seems to be that there is a lack of accountability—so the bad eggs can get away with malicious behaviour.
Senator LUDWIG – So you are finding that it is a culture of concealment and cover-up?
Ms Birss – Yes, I would agree with that.

Mr Harbord – …my experience has been that there is an ongoing attitude of: 'We will only do something if we are really forced to or if there is a threat hanging over us.'…Our experience has been that from the very start, when detention centres were set up in the outback away from any legal access, there has been a culture of concealment, obstruction and prevention of due process and proper legal representation.

Ms O'Connor – I think on the ground that culture has not changed. Unless you employ all new staff and management, I do not know how you could change that culture…How can you systemically change it? You have the same company operating the service and the same people providing the mental health and physical health services. The same manager is still operating Baxter. That manager did not lose her employment, was not made accountable or criticised at all, not only for what happened to Ms Rau…but in relation to all those other cases where the court was critical that they had not received appropriate treatment. She is still there. She still manages the place.

Sister Leavey – The very punitive culture that exists in the Department, in the immigration detention centres…

Ms Jockel – …there is no doubt that there has been a culture of imbalance within the Department of immigration. It has become a regulator at the expense of being a public servant. Whilst that report focuses on DIMIA's detention and compliance activities and makes very adverse conclusions about those, that culture is prevalent throughout the system…systemic difficulties within the system percolate right through to the lowest level case officer.

Response:

The Inquiry into the Immigration Detention of Cornelia Rau by Mr Mick Palmer AO APM was highly critical about a number of failures in the Department including culture. Mr Palmer described the Department as being 'process rich and outcomes poor'.

A number of projects are being implemented to address the recommendations and the broader issues relating to culture which were highlighted in the Palmer Report. In order to meet the expectations of the Government, the Parliament and the wider community, the Department must:
- become a more open and accountable organisation;
- deal more fairly and reasonably with client; and
- have staff that are well trained and supported.

Open and Accountable Organisation
The broad objectives against this theme are to improve the structure and governance of the Department to focus on clients as individuals, to ensure quality decision-making, and to communicate better with the wider community.

A new Departmental structure has been developed and will be implemented by the end of December 2005. The capacity of the Senior Executive Service to both lead and embed the change process has been enhanced. Over 40 promotions, transfers and appointments have recently been made to DIMIA's Senior Executive Service ranks.

Three new Deputy Secretaries provide clearer lines of responsibility and accountability for the Department's activities. Improved governance arrangements have been implemented – in particular a high level Values and Standards Committee with external representation (including from the Commonwealth Ombudsman's Office and the Australian Public Service Commission) to ensure the organisation is meeting community expectations and the Australian Public Service Values.

Fair and Reasonable Dealings with our Clients
The Department has a very broad client base and receives multiple contacts from individuals in a range of ways, for example, face to face, by telephone, by e-mail and through electronic and traditional means of lodging applications.

It is vital that the Department have strategies in place to ensure quality commonsense decision-making with fair and reasonable outcomes and effective case management so that no-one gets lost in the system or falls between the gaps. A structure which enables us to be responsive, particularly where circumstances are difficult, is also vital.

Improving immigration compliance and detention case management and coordination, including the pilot of a community care model, is underway. A national case management framework will be developed in the new Compliance Policy and Case Coordination Division. In keeping with the objective to drastically improve governance and accountability arrangements, this new division will have better organisational arrangements, better systems support and a more clearly defined role for the non-government sector. The framework will be developed by the end of 2005 for implementation during 2006. The community care pilot study will run in Melbourne and Sydney for 12 months, commencing early next year.

Well Trained and Supported Staff
It is a basic requirement in any organisation that staff members are well-equipped to deal with what is asked of them. To ensure that staff are well trained and supported to carry out their tasks there will be a priority on developing leadership skills, appropriate training and ensuring they have systems that support their work.

Communication will be fundamental to the change process. To facilitate open dialogue in the Department the Secretary, Mr Andrew Metcalfe writes to all staff each Monday and Friday to let people know about a current issue. In return Mr Metcalfe has asked staff to contribute their ideas, their energy and their commitment to rebuilding DIMIA and its reputation. Mr Metcalfe has presented three keynote addresses to all staff to outline to them the thrust of the criticisms in the Palmer and Comrie Reports and to set the vision and tone for the responses to these reports and the broader change agenda.

To ensure that staff have the skills they need to make fair and reasonable decisions a College of Immigration Border Security and Compliance will be established in 2006. This will not be a bricks and mortar site. A partnership with training providers and educational institutions will be introduced to ensure that the Department can provide all new compliance and detention staff with a comprehensive induction program across five streams:
- compliance;
- investigations;
- detention management;
- border management; and
- immigration intelligence.

Existing staff in these operational areas will complete regular refresher training each year. Importantly, the funding arrangements are based on increasing staffing capacity so that staff on initial training can be back-filled, meaning that there will be no reduction of operational capacity while that training is being delivered. In the interim, enhanced training will be provided focusing on the application of 'reasonable suspicion', emerging legal issues, identity investigations, search warrant training and capacity to search and interrogate all DIMIA systems.

7. Compliance

(i) Mr Malak, Rev. Poulos, Mr Thornton, Ms Jockel and Ms Rost raised concerns about compliance operations.

Mr Malak – A real issue of concern for the community is that people will be picked up in the street and put on planes, without any transparency.

Rev Poulos – We have … identified very serious problems with compliance practices and procedures including the structure and staffing of compliance units, oversight and decision-making structures and communication both within compliance itself and between compliance and clients.

Mr Thornton – …We see a lot of excesses in the compliance area. We see cases where compliance officers effectively just turn up on someone's doorstep and demand entry to their house. They go through the house looking at people's bedrooms and private situations. … they often reach the wrong conclusions and do not give people a fair chance to explain things.

Ms Jockel – My view is that there is an excess of zeal and not enough counterbalance of responsibility, accountability and transparency – and, really, leadership at the top to say. 'If I'm going to deprive you of your liberty, what right have I got to do that and how should I be brought to account if I exercise that power in an irresponsible way?

Ms Rost – …The real problem is the cowboys attitude of many DIMIA officers, who have a "Deport, deport" mentality, rather than trying to understand the student's point of view. It is exacerbated by the mandatory cancellation provisions and by the lack of proper accountability.

Response:

Compliance officers are required to comply with legislative and policy requirements when carrying out operations, and in their general dealings with the public. They are also bound by the Department's Code of Conduct. Allegations of misconduct by officers are taken seriously by the Department and investigated.

The Department has comprehensive guidelines for compliance officers. These also cover the powers available and how they are to be exercised, as well as the procedures that are to be followed when persons are detained.

Departmental policy requires that entry to property should be made with the execution of a search warrant. The Migration Act provides that a search warrant may be issued to an officer to enter and search any premises, vessel, vehicle or place. The officer must have reasonable cause to believe that there may be found:

- an unlawful non-citizen;
- removee or deportee;
- a visa holder in breach of a visa condition;
- documents relating to the entry and exit of a person who would have become, or is, an unlawful non-citizen, removee or deportee.

Operations are conducted in a manner which aims to minimise any disruption to persons, especially children, and with due consideration and respect to those who may be affected.

Persons who feel aggrieved by the conduct of, or a decision by, Departmental officers can complain to the Department or the Ombudsman. The Department has a complaints system in place, where issues of concern can be dealt with by Client Services or the Values and Conduct Section. Persons may also be entitled to seek redress before a tribunal or the courts.

As a result of the Palmer report, the Department is establishing a training college and reviewing its procedures, and all aspects of compliance training. More detail about this college is provided above at pages 29 to 30. Work is also being undertaken to make the Department more open and accountable, and to improve service to clients. The Department has been restructured to provide clear lines of responsibility and better governance arrangements.

In respect of students, the mandatory cancellation provisions relating to breaches of attendance and/or academic performance were amended in the Migration Regulations, which came into effect on 8 October 2005. They now allow for exceptional circumstances beyond the student's control to be considered when determining if a breach has occurred.

(ii) Ms Domicelj raised concerns about six officers conducting a late-evening visits:

> …the style of questioning was … extremely intimidating. In both cases, there were small children who were extremely distressed. … they stayed there for upwards of 45 minutes. In both cases, the questions related to how that family was surviving in the community. I suppose there was an implicit threat that, if they were in any way breaching their bridging visa, which did not permit them to work, they would be detained. On both occasions, the matter was fairly swiftly resolved, In one case there was a DIMIA error. In the other case, there was a mix-up about a particular reporting date, which was the fault of the person's lawyer, but it was easily resolved. … In neither case were they interested in hearing a great deal about the level of trauma associated with that experience.

Response:

In executing a warrant, officers may question those present to ensure that they are not the people to whom the warrant relates. Operations are conducted in a manner which aims to minimise any disruption to persons, especially children, and with consideration and respect to those who may be affected.

The safety and wellbeing of officers, persons of interest and the community are paramount in the planing and execution of an operation. Departmental guidelines suggest that where possible, operations should only take place between the hours of 7 in the morning and 9 at night. Sometimes it is necessary for operations to occur outside of business hours, for example, in the hospitality industry.

However, the Department has recognised there are deficiencies in the level and amount of training provided to its operational staff.

As outlined above and at pages 29 to 30, the Department is establishing a College of Immigration Border Security and Compliance to ensure that all staff exercising powers under the Migration Act have the skills and knowledge they need to make fair and reasonable decisions. The College will be established by mid-2006. Work on the model for the College and its curriculum is underway. In the interim, enhanced training is being provided to compliance staff, focusing on the application of 'reasonable suspicion', emerging legal issues, identity investigations and search warrant training. Procedures and all aspects of compliance training are being reviewed. Work is also being undertaken to make the Department more open and accountable, and to improve service to clients. The Department has been restructured to provide clear lines of responsibility and better governance arrangements.

(iii) Mr McNally said:

I have a case where an Australian citizen and his three-year old citizen child were detained over a weekend because at a residence they suspected that he was not who he said he was. He was detained on a Friday, despite showing drivers licence identification that showed who he was. There may well have been reasonable grounds to suspect at the scene that he was not who he said he was and therefore might be unlawful, but there was no follow-up inquiry done following the detention to further explore that. We intervened and provided his citizenship documents ... and proved that he was a citizen. They were released three days later …the guidelines really ought to incorporate a duty on the part of the detaining officers to follow up and explore their suspicion rather than just getting to the point of detention and then leaving it up to the detainee to prove otherwise.

Response:

This case is one of the group being investigated by the Ombudsman. As this matter is also currently before the court, it is not appropriate to make comment on the particular circumstances of this case.

By way of general comment, immigration officers can only detain someone they know or reasonably suspect is an unlawful non-citizen. That reasonable suspicion may be formed in a number of ways including through responses to questions, how the person fits prior intelligence, information provided by other authorities or people. Also important is any information provided by the person as to their identity, particularly if that information cannot be verified or is inconsistent with departmental records or other documentation they are carrying.

Where compliance officers encounter citizens and residents during their operations, in the overwhelming number of cases, identity is quickly resolved and most people are willing to assist. In some cases, people seek to disguise their identity or provide false information which can result in the suspicion being confirmed.

It is paramount that the Department needs to resolve any such identity issues as quickly as possible and a new Identity Verification and Advice unit has been established to assist officers in that regard.

(iv) Mr Hitchcock said:

So the Department held a view that, because another person fraudulently used it (passport), the passport holder is therefore in the wrong, that they lent it or gave it to the individual rather than that they did accidentally loses it. There should be an opportunity to argue the case that the person who lost the passport acted innocently.

Response:

We have been unable to identify this case.

By way of general comment, in a case involving the fraudulent use of a passport, compliance officers would normally attempt to establish how a passport came into the possession of the person responsible for its fraudulent use. This could involve officers conferring with the person to whom the passport was issued, seeking an explanation from him or her on the loss or otherwise of the passport. Investigation or compliance action would follow if fraud is identified.

(v) Ms Jockel said:

Mandatory detention does not just apply to asylum seekers and boat people. It can happen to … a student. There was a recent case of a Mr Alam. The compliance officers went to a house, … and immediately dragged him off to DIMIA. They would not even allow him to put on a T shirt. He supposedly worked more than 20 hours per week.

Response:

This case concerned an appeal by the Minister to the Full Court of the Federal Court resulting from a decision by a Federal Magistrate. The main issue was the definition of a "week", because it was alleged that Mr Alam had breached a condition of his visa by working in excess of the permitted 20 hours per week. The Full Court dismissed the Minister's appeal.

Whilst not relevant to any substantive legal issues in the appeal (which, as stated above, was the definition of "a week"), the Full Federal Court was highly critical of alleged conduct by departmental officers in the lead up to the cancellation of Mr Alam's student visa. The allegations, although untested in the Court, are taken seriously by the Department.

Issues raised about the operation of the student work rights provisions are being considered by DIMIA to ensure that these provisions operate fairly while remaining effective in deterring abuse of student visas.

In regard to criticisms about compliance actions, the government has agreed to fund a very significant boost in training border security and compliance staff. As detailed above at pages 29, 30 and 32, $50.3 million will be provided for the establishment in 2006 of a college of immigration border security and compliance. This college will provide new compliance and detention staff with a 15 week induction program and existing staff in border security and compliance areas will complete regular refresher training each year.

There will also be enhanced training for compliance and detention staff in the period leading up to the establishment of the college, focusing on the application of "reasonable suspicion", emerging legal issues, identity investigations, search warrant training and the capacity to search and interrogate DIMIA systems. DIMIA is also reviewing its procedures and policy to enhance openness and accountability, and improve its service to clients. The Department has been restructured to provide clear lines of responsibility and better governance arrangements.

Further information considering other aspects of this case are provided below at page 99.

8. Processing

(i) Mr Hitchock said:

In an effort to try to streamline processing they have contracted out to commercial organisations the lodgement of applications…There is an active encouragement that you must lodge with that commercial organisation. You are actively discouraged from having access to the Australian high commission. I do not see anywhere in the act that power to make a commercial arrangement about something that is a fairly fundamental process of lodging an application. I certainly cannot see it in section 45, which is the most relevant section…There is also the worry that no person, in particular an Australian citizen or an Australian permanent resident, should be discouraged from dealing directly with an Australian mission overseas. Finally, it increases the risk that somebody in a commercial organisation might do something wrong—may disclose the private information of an applicant.

Response:

DIMIA has agreements with a number of third parties overseas to deliver visa lodgement services. The third parties are known as Service Delivery Partners and the arrangements are managed by the relevant DIMIA offices overseas. The agreements are entered into following a competitive tender process based on value for money. SDPs distribute application forms and checklists, accept and forward completed application forms and visa application charges to the relevant DIMIA office and return passports to clients. SDPs do not vet applications, provide advice on visa matters or decide applications.

SDPs are one of the ways by which we can continue to provide quality client service in the current security environment, where unregulated visits by clients to collect forms or to lodge applications create possible risks to overseas missions. SDPs provide alternate access points for clients and are often located at a number of sites, positioned close to transport links and open to the public for longer hours. Clients are still able to access information and/or lodge applications directly with an Australian mission. This is generally by mail, courier or in person in some locations by appointment.

Our overseas posts have been reminded that there is no lawful basis to refuse to accept a valid application lodged directly with an overseas mission. In addition, arrangements are in place for SDPs to identify sensitive and time critical applications and escalate these to DIMIA staff. Constructive engagement with stakeholders and the ongoing training and support of SDP staff are fundamental to the delivery of quality service through this client service initiative.

We are working with overseas missions and SDPs to ensure that our web content clearly explains the role of SDPs and the choices clients can make in relation to accessing DIMIA services.

Each SDP agreement includes service standards that address privacy and is subject to a rigorous monitoring and evaluation process.

DIMIA recently released a draft Client Service Charter and a draft Client Service Strategy for Visa and Citizenship Services for public consultation. The documents were widely distributed to interested parties and were made available on the DIMIA website. The period for public consultation has now closed and the documents are being finalised, incorporating the outcomes of the consultation process, for release in early 2006. The documents set out very clearly DIMIA's commitment to quality client service. This project is supported by a range of other initiatives to improve client service across the Department. Improved systems for handling general enquiry emails made to the Department will ensure queries and feedback are handled more effectively by the Department. The Department is also improving call handling arrangements for client enquiries made overseas through the expansion of contact centre coverage in Europe, South America and the Asia Pacific region.

(ii) Ms Biok said:

> It is our experience that most asylum seekers are not interviewed before they get their decision from the Department of Immigration and Multicultural and Indigenous Affairs. That means that most of them are refused without an interview.

Response:

As discussed above at page 17, migration legislation does not require that an applicant for a protection visa be interviewed. Decisions about whether to interview and what matters to cover at interview are matters for the decision-maker.

An interview is just one avenue available to decision-makers to test claims, gather information or put adverse information to clients.

It is made clear to applicants for a protection visa in the application form that a decision may be made on the basis of the application and information they have provided. Further, it is stated that the applicant will be requested to attend an interview “only if the case manager decides it is necessary”.

Because of the nature of claims made, the country of nationality concerned and the country information relevant to these claims, it is possible in many cases to reach decisions without interview. In other circumstances an extensive interview may be necessary.

(iii) Ms Biok said:

> We also have concerns with offshore processing and what appears to be quite random decision making there, especially in relation to spouse visas and humanitarian offshore visas.

Response:

The provision of resettlement, such as provided by Australia’s offshore Humanitarian Program goes beyond any international obligations and is provided by countries as a matter of choice. Australia’s program consistently ranks in the top three programs in the world along with the USA and Canada. The program and supporting decision making framework needs to be able to respond to wider and evolving circumstances across the globe as well as balancing the interests of the Australian community.

The formulation of the offshore humanitarian program is informed by an extensive program of consultations involving the Australian community, peak Australian refugee and humanitarian bodies, government agencies and the United Nations High Commission for Refugees (UNHCR).

Significantly higher numbers of persons apply for resettlement to Australia each year than the number of places allocated by Government. In 2004-05, the Humanitarian Program was set at 13,000 places. More than 90,000 persons applied for resettlement to Australia. Every effort is made to assist those in greatest relative need of resettlement. However, many applicants will not be successful in obtaining a visa. Among other things, decision-makers must be satisfied that applicants have compelling reasons for giving special consideration for the grant of a visa. This includes an assessment balancing the elements of the applicant's degree of persecution or discrimination, their connection with Australia, whether there is any other country which can provide for their protection and the capacity of the Australian community to provide for their permanent settlement.

The decision-maker must also be satisfied that the grant of a visa would be consistent with the regional and global priorities of the Commonwealth in relation to the permanent settlement of persons in Australia on humanitarian grounds. All applications for a humanitarian visa are assessed individually on their merits against legal requirements set out in the Migration Act and Migration Regulations, supplemented by policy advice contained in the Department's Procedures Advice Manual.

The regulatory criteria for decision-makers are broad in order to enable them to deal flexibly with vast differences in claims and circumstances of applicants in different regions such as immediate threat to an individual's life, torture and trauma, other serious human rights abuse, connection to Australia and durable solution need – the UNHCR promotes three durable solutions for the resolution of refugee situations: voluntary repatriation to the home country in conditions of safety and dignity, local integration in the country of first asylum, and resettlement in a third country, if the first two solutions are not possible or suitable.

As cases are assessed on individual circumstances and against the backdrop of evolving humanitarian situations, information and resettlement priorities, individual applicant's outcomes will vary, including amongst persons with similar backgrounds.

(iv) Ms Lowes and Ms Moore raised concerns about the length of time of decision-making.

Ms Lowes—We are still aware of people who have been waiting in excess of a year for a decision after their interviews, despite the time frame that has been set. Certainly there have been improvements but they have not gone far enough.

Ms Moore – The processing of refugee applications needs to be speeded up. Another concern is that sometimes asylum seekers go through the process and are then judged to be refugees and it is only at that point that health and security checks are then done, which only prolongs their detention even further. There seems to be no reason why that could not be done beforehand.

Response:

Australia is one of the few Western countries with no protection visa processing backlog. As noted in the DIMIA Annual Report 2004-05, 79 percent of protection visa applications from applicants not in detention were finalised within 90 days of lodgement, and 83 percent of protection visa applications from applicants in detention were finalised within 42 days of lodgement. Australia also compares very favourably with the processing times in other countries with asylum seeker caseloads. For example, in New Zealand processing took an average of six months in 2004-05. In Canada the average processing time was 14.2 months in 2003-04.

On 17 June 2005, the Prime Minister announced the implementation of various measures to ensure that immigration policy is administered with greater flexibility and fairness, and in a timely manner. The Prime Minister made a commitment that all primary protection visa applications will be decided within three months of the receipt of the application. The Prime Minister also set a deadline of 31 October 2005 for the Department to complete all primary assessments of applications for permanent protection visas from the existing caseload of temporary protection visa holders.

As at 18 November 2005, there were only some 550 initial protection visa applications with the Department remaining to be finalised. Some 115 applications were over 90 days old and an examination of a sample of these cases indicates that finalisation of these cases is being delayed by factors beyond the Department's control.

As at 31 October, the Department had decided some 3100 applications for further protection visas, virtually all approvals with permanent visas. Some 270 applications remained on hand because they were awaiting security assessments. Some 30 applications were in other processes or needed critical information from external sources, meaning that a final decision was not possible.

Legislation has just been passed by Parliament to establish 90 day time limits for the making of protection visa decisions by the Minister and for review of those decisions by the Refugee Review Tribunal. These provisions will commence on Royal Assent, which is currently expected to occur on 17 December 2005.

(v) Ms Biok said:

We are also very concerned that there seem to be quite serious delays in processing…everything to just seem (sic) to slip into a black hole. When you ring the case officer and say, 'It has now been three or four months since the interview—what has happened,' they say, 'That application has gone to Canberra.' What does that mean? Does it mean that somebody in Canberra is overlooking the case? Does it mean that it has gone for a security check? We understand the need for security checks, but when this delay goes on, in some cases for a year or longer, this creates concern amongst the applicants. It is very difficult to explain to people why some people are getting approved quickly and others are not. It is all leading to this culture of randomness that makes applicants feel very vulnerable and uncertain…We also have concerns with offshore processing and what appears to be quite random decision making there, especially in relation to spouse visas and humanitarian offshore visas.

Response:

Since 1999, processes have been continually reviewed and streamlined with external assessments and checks being commissioned as early as possible to minimise delay.

In small numbers of cases, advice is sought from DIMIA National office, for example on complex issues of law or possible character and Convention exclusion issues. DIMIA is working closely to minimise the time taken for such consultation and advice processes, and with external agencies to lessen any delays occurring when requests for security checks are made. Specific funding and priority setting arrangements have been established for ASIO to undertake these checks. Where possible, external agency checks are commissioned as early as possible in order to minimise the impact any delay may have on the processing of an application. DIMIA continues to liaise at senior levels with the agencies to promote speedy resolution of security checks.

As at 18 November 2005, some 10,450 temporary protection visas and temporary humanitarian visas have been granted, from which some 9930 applications for further protection have been lodged. Of these some 6520 protection visas have been granted at primary stage and some further 1440 protection visas have been granted following remittal by the Refugee Review Tribunal. The vast majority of overall grants have been permanent protection visas.

As at 18 November 2005, around 1240 protection visa applications were awaiting finalisation by the Department (some 490 of which were remittals awaiting a decision). A significant proportion of these have not yet reached their 30/54 month point and, therefore, a decision cannot currently be made on their application for a further protection visa.

9. Poor/inconsistent/hostile/tardy decision making

(i) Ms Biok said:

There are real concerns that, when people get their decisions from the offshore posts, the decision is cursory.

In order to explain why they cannot come, it is not enough that they just get a photocopied sheet with a tick. They should be given some real reasons why these people do not meet the set criteria. Our concern would be that decision making, both onshore and offshore, is about performance indicators. It is about getting a decision made. It is not about finding whether these claims are valid and it is not about giving people procedural fairness.

Response:

Applications for an offshore Refugee and Humanitarian (class XB) visa are assessed against the criteria for all seven visa subclasses within the class taking into account information available to the decision-maker, including information on country situations.

Under the Migration Act, the Department is required to advise applicants which criterion in the Migration Regulations they do not meet.

Often applicants do not succeed because the decision-maker is not satisfied that there are 'compelling reasons' for giving special consideration to the grant of a visa. This criterion is common to all visa subclasses under the offshore Refugee and Humanitarian (class XB) visa. A short version of the decision record is used to advise the outcome to applicants whose applications have been refused on the basis of failing to meet this criterion. This is used in the majority of refusal decisions. The "compelling circumstances" test involves an assessment that balances the elements of the applicant's degree of persecution or discrimination, their connection with Australia, whether there is any other country which can provide for their protection and the capacity of the Australian community to provide for their permanent settlement.

Where an application has not been approved because the applicant has not met criteria other than the above mentioned 'compelling reasons' criterion, for example, requirements relating to persecution or substantial discrimination amounting to gross violation of human rights, health and character criteria, a longer version of the decision record is used. This document has all the visa criteria listed with a 'tick box' against each so that the decision-maker could indicate which of the criteria have not been met. This version is only used in a relatively small number of cases.
Given the large volume of applications received and the significant proportion that are not approved, the decision record has been simplified to indicate which of the visa criteria the applicant has not met. In addition, the decision-maker's findings, on which the decision is based, are recorded in the case notes that are available on IRIS/ICSE and case files.

(ii) Mr Clutterbuck said:

The process, as we have said in our opening statements and in our submissions, has sometimes been somewhat arbitrary. There are a lot of cases where people are receiving different outcomes within the Department because different decision-makers decide cases in different ways. We referred to a case where we acted for a sister and two brothers, in which the sister and one brother got their visas at the Department stage but the second brother did not, even though they had exactly the same case. There is a big gap between the approval rates at the Department stage and the Refugee Review Tribunal stage. The whole process has been quite confusing for claimants from beginning to end. It would be easy to throw up your hands and say that it is all coming to an end now for the great majority of those people—they are all getting their permanent visas now—but, of course, it continues to apply to people who are arriving every day in an unauthorised way and applying for asylum anyway. So there are ongoing issues as well.

Response:

Applications for a protection visa are processed on a case-by-case basis on their individual merits in accordance with the provisions of the Migration Act 1958 and Migration Regulations 1994. A person may appear to have the same claims as another person, but their profile and risk of persecution may be quite different. This can be true of close adult relatives and can also be the case where family members claim protection at different times, especially where there have been intervening changes in the situation in their home country. The Department has not been able to identify the cases mentioned by Mr Clutterbuck on the information provided. The Department invites Mr Clutterbuck to provide further details so that these cases may be investigated.

As discussed above at pages 15 and 26, Australia's protection visa approval rates compare favourably with those in many European countries. For example, for the unauthorised boat arrivals between 1999 and 2001, DIMIA approved some 85 percent of applications from Afghan nationals and some 89 percent from Iraqi nationals in the first instance. The Department's approval rate in relation to applications for further protection for Iraqi nationals was some 71 percent, and for Afghan nationals some 67 percent. Approval rates in comparable European countries in 2004 for these nationalities for initial protection claims ranged from less than 1 percent to some 66 per cent, with approval rates in many countries being below 20 percent.

As explained above at page 27, Refugee Review Tribunal set aside rates compare favourably with merits review tribunal rates in other jurisdictions. It needs to be recognised that the RRT is making a *de novo* decision, providing applicants with the opportunity to present new claims and taking into account any changes in the home country that have occurred since the Department's decision.

Even with these factors, in the period from 2001-2004, the RRT set aside rate has been between 6 and 13 percent. Set aside rates for other tribunals, such as the Migration Review Tribunal, the Social Security Appeals Tribunal and the Veterans Review Board over the same period have been between 28 and 50 percent.

(iii) Dr Newman said:

But the fundamental issues for many people that I have seen in the community are about the need for permanency of protection or at least decision making in one way or another. Again, we are facing issues of the inordinate period of time in that decision making process, which further increases people's stress and contributes to their mental health problems. Unfortunately we have seen some very unusual decisions made, particularly affecting families and the separation of families. There have been situations—I am sure people can provide details of them if you require—where parents are threatened with deportation but children are to remain. I have dealt with one family of two children with a single father but without a mother. The father was deported and the children were to remain here and be placed in care. They have no other family members.

Response:

There are different reasons why children remain in Australia when a parent is removed or deported. The child may be an Australian citizen, permanent resident or have an outstanding application to remain in Australia and the parent being deported or removed decides it is in the best interest of the child to remain in Australia. Alternatively, the child may be the subject of a Family Court order directing that the child not depart Australia. In some cases the parent being removed is not the custodial parent.

When considering removal arrangements that may impact on a child, the Department will consult, where appropriate, with State child welfare authorities to obtain advice on appropriate care and management of the child.

(iv) Mr Moore said:

We would have someone getting off a boat holding onto three kids, kids vomiting on the beach, and the woman would be interviewed for five minutes. 'What is the reason you came here?' It would all be written down, it would be recorded and then it would be used against her down the track. We were into catching them out because they are all liars and cheats. If you come from that basis, then anything goes.

Response:

As previously mentioned (see pages 15, 16 and 42), for the unauthorised boat arrivals between 1999 and 2001, DIMIA approved some 85 percent of applications from Afghan nationals and some 89 percent from Iraqi nationals in the first instance. All unauthorised arrivals are interviewed by an officer authorised by DIMIA, whether they entered Australia by airport or seaport, to establish the person's identity and citizenship and the purpose of their travel to Australia. If a person states that they fear returning to their country of citizenship or usual residence, a full entry interview of the person is conducted to ascertain the reasons for the person's arrival in Australia, including the nature of any claims the person may make. It is not an assessment of the merits of their claims for protection. For boat arrivals, these interviews are generally conducted several days after arrival and after a settling-in period at the relevant Immigration Reception Centre.

Where a person subsequently applies for a protection visa, the decision-maker is required to consider all relevant information. Statements made in the entry interview may constitute relevant information that the decision-maker must consider. Protection visa decision-makers are under a statutory obligation to grant a protection visa where they are satisfied that the criteria for the visa provided in the migration legislation are met. They are also under an obligation to provide the applicant with an opportunity to comment on any adverse information that is being considered by the decision-maker. The UNHCR handbook provides that although in most cases an applicant may not be able to support his or her statements by documentary or other proof, allowance for such possible lack of evidence does not mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant. The Handbook further provides that an applicant has a certain level of responsibility to tell the truth and assist the decision-maker in establishing the facts of the case, and provide any available evidence or information to support his or her statements.

As demonstrated by the approval rates described above, DIMIA decision-makers will generally give the applicant the benefit of the doubt when it comes to establishing the applicant's identity, origin and claims. This is applied particularly where the applicant lacks any documentation.

Where a protection visa application is refused, the applicant is provided with a comprehensive written statement of reasons for that decision and is given written advice about their options for seeking review of the decision. Merits review by the Refugee Review Tribunal provides another avenue for the applicant to have his or her application heard and the opportunity to present any further evidence or information relevant to their application.

Given this scheme, the Department does not agree that its approach is intent on "catching them out" (boat arrivals). Rather, extensive and considered processes are complied with to ensure that protection is provided in appropriate cases.

(v) Ms Eszenyi said:

> The administrative processes around protection visa applications are often characterised by excessive delays, including with respect to freedom of information applications and the 'character checks' carried out by ASIO. Although there are some capable and skilled decision-makers within DIMIA, in our experience there is considerable inconsistency among delegates. This includes factors such as the assessment of credibility issues and the weight attached to linguistic analysis evidence.

Response:

Freedom of Information (FOI) requests are not related to the processing of protection visa applications (please see pages 24 and 25 for details on handling of FOI requests). The Migration Act sets down the process for the disclosure of information required in relation to visa decision making.

While language analysis is an important consideration it has not been regarded as conclusive. This is simply one of the factors to be taken into account in the decision.

It is important to note that for the unauthorised boat arrivals between 1999 and 2001, DIMIA approved some 85 percent of applications from Afghan nationals and some 89 percent from Iraqi nationals in the first instance. In the overwhelming majority of cases language analysis helped to substantiate the applicant's claims of origin in the absence of any other tangible information, such as identity documents, travel documents or other documented personal history.

Decision-makers have received extensive training in considering applications for protection visas. Assessments of claims under the Refugees Convention provisions in accordance with the Migration Act are made on a case by case basis on their individual facts, and do not depend on broad generalisations that particular countries are "safe" or "not safe" for their own or other nationals. Being of a particular nationality, ethnicity or religion is not conclusive – claimants must have a well founded fear of persecution on Convention grounds. General issues of safety or security of a particular county may be relevant to timing of return but are not relevant to the engagement of protection obligations under the Refugees Convention.

(vi) Ms Gauthier said:

> [The decision-making process] is adversarial. We are not talking about an independent inquisitorial process…I understand a decision-maker who spoke on ABC television…did say that there was a quota system. Decision-makers were expected to accept and reject a certain number of people and decide a number of cases in a certain time or they did not stay in that position.

Response:

The protection visa decision-making process is not intended to be adversarial. As outlined at page 17, DIMIA case officers need to inquire into facts and circumstances in the course of their role as decision-makers. They are genuinely motivated to attempt to settle the facts of any matter.

The Australian process requires case-by-case assessment of individual refugee claims against the Refugees Convention definition, rather than the application of general assumptions regarding particular groups or profiles of applicants. This approach is consistent with the Refugees Convention, and is supported by UNHCR. It is the approach adopted widely in other countries conducting refugee status determinations.

As part of this process, decision-makers and the RRT perform an "inquisitorial" function in actively exploring and testing the applicant's claims. The UNHCR handbook provides that although in most cases an applicant may not be able to support his or her statements by documentary or other proof, allowance for such possible lack of evidence does not mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.

There is no quota system for refusal or approval rates for protection visa decision-makers. Each case is assessed on its individual merits on a case-by-case basis. As discussed above (for example, see pages 15 and 26), Australia's protection visa approval rates compare favourably with those in many European countries.

For the unauthorised boat arrivals between 1999 and 2001, DIMIA approved some 85 percent of applications from Afghan nationals and some 89 percent from Iraqi nationals in the first instance. The Department's approval rate in relation to applications for further protection for Iraqi nationals was around 71 percent, and for Afghan nationals 67 percent. Approval rates in comparable European countries in 2004 for these nationalities ranged from less than 1 percent to some 66 per cent, with approval rates in many countries being below 20 percent.

(vii) Ms Biok said:

In order to explain why they cannot come, it is not enough that they just get a photocopied sheet with a tick. They should be given some real reasons why these people do not meet the set criteria. Our concern would be that decision making, both onshore and offshore, is about performance indicators. It is about getting a decision made. It is not about finding whether these claims are valid and it is not about giving people procedural fairness.

Response:

Protection visa decision-makers are under a statutory obligation to grant a protection visa where they are satisfied that the criteria for the visa provided in the Migration legislation are met. They are also under an obligation to provide the applicant with a opportunity to comment on any adverse information that is being considered by the decision-maker. Where a protection visa is refused, the applicant is provided with a comprehensive written statement of reasons for that decision and is given written advice about their options for seeking review of the decision. Please also see page 41 for more detail about the format of the reasons provided.

(viii) Mrs Le raised concerns in relation to a particular case of an Iraqi national on Nauru:

This is a kid who was born in 1984… This was the first interview with the kid when he first arrived...What I find most offensive about this interview is that the applicant, still legally a child, was repeating again and again that he did not want to join a group that might force him to kill innocent people, and the interviewer was totally unsympathetic to his situation. I am particularly concerned about comments like, 'What's the problem? Why is that a problem?' when the applicant was saying he believed he would be asked to kill innocent people. The boy said, 'People didn't do anything. Why should I want to kill them?' I also consider the following two comments totally inappropriate statements to make to any unaccompanied minor, let alone a young asylum seeker: 'Why insult the party when you know you will be executed?' and 'The law of your country permits execution for your offence, so you are escaping from the law.' This is a boy, a kid, saying, 'If I had joined that particular party in Iraq, I would have been expected to kill innocent people,' and the interviewer says, 'Well, that's your law. Why didn't you do it?' The boy tried to say that the group he did not want to join was a group of boys who are trained to do things like, believe it or not, bite off the heads of live chooks. That is one of the things they are trained to do. And the woman is saying, 'If that's what the training is, why don't you just go ahead and do the training? It's just like Boy Scouts. Here in Australia, people join the Boy Scouts.' Believe me, that is what this interviewer was saying. We went in and found that in fact what that boy was saying at 17 was absolutely correct. Saddam's kids army trained to play dirty. A source said:

> After the 1991 Persian Gulf War, Saddam's security police began forcing boys as young as 6 from their families and into intensive boot camps. There, they are beaten, forced to kill animals and indoctrinated with Baath Party propaganda.

A 17-year-old kid said, ‘I don’t want to do that,’ and the interviewer—ignorant, stupid, nasty, cruel—said, ‘Why not? That’s the law of your country.’ We got that from Immigration files which we had to fight to get for over 2½ years.
Response:

The two young Iraqi men at the Nauru Offshore Processing Centre (OPC) have been identified to the Department. One arrived on Nauru as an unaccompanied minor and was assessed and found not to be a refugee by UNHCR. The other arrived on Nauru and was assessed and found not to be a refugee by the Department. The UNHCR and the Department respectively affirmed the decisions at review in 2002.

In evidence to the Committee, Ms Le raised concerns over the processing of the claims of the unaccompanied minor. DIMIA can confirm that he was interviewed and assessed for refugee status by the UNHCR as part of its caseload. Ms Le’s concerns about the interview conducted by the UNHCR have been referred to the UNHCR for consideration.

As a result of continuing monitoring by Australia of the caseload on Nauru, the two persons have been identified by Australia as now being refugees on the basis of the current country situation. This outcome is subject to security checks, which are currently underway. The process of monitoring of refused cases to identify instances where a different outcome may be needed is a general DIMIA practice both onshore and in Nauru. It reflects the Department’s work to ensure that people who become refugees receive protection irrespective of past decisions on their cases.

Regarding the Nauru caseload, 25 people were brought to Australia on 1 November 2005. 13 people arrived as refugees as a result of further Australian assessments of their cases taking into account developments in the country of origin. Most of them hold three to five year temporary humanitarian visas.

There are 12 people who are not refugees and who fall into two groups: those who meet all clearance requirements; and those awaiting security clearance at the time of transfer to Australia.

Those who have been security cleared entered Australia on safe haven visas and, on 3 November 2005, were given temporary humanitarian visas valid for up to two years, pending their possible return home or other resolution of their status. These visas provide work rights, Medicare cover and access to Centrelink benefits.

Three non-refugees without security clearance were brought to Australia voluntarily and placed in community detention until they received security clearance. On 25 November 2005 they were granted temporary humanitarian visas for up to two years’ stay. These visas provide work rights, Medicare cover and access to Centrelink benefits. These people will now live in the community until their long term situation is resolved.

2 Iraqi nationals remain on Nauru because they have received adverse security assessments. The Australian Government is working to resolve their situations from Nauru and will ensure that they are appropriately cared for until such resolution.

10. Lack of accountability/oversight

(i) Mr Jeremy Moore said:

The Immigration Detention Advisory Group is there to assist and advise the government. The first time I met them was when a great group of us had gone up to Woomera. We used to take up a large number of people, and on this day we may have had 20 people with us. We had travelled up on a Saturday. It was hot, and I was anxious to get to the detention centre because I knew that there were some really serious problems there. People were swallowing shampoo and, if they were not trying to commit suicide, they were certainly trying to self-harm.

When we got to the gates, people were being carried out of their rooms on stretchers and other people were being taken down to the medical centre. I saw all this happening, and then a car came through the gate and I realised that it was carrying IDAG people. I had been to the detention centre on a number of occasions and seen their photos up on the wall. These were the government's representatives who, we could all be reassured, were looking after people by making sure that this place was run in a proper and reasonable way.

Seeing these people in front of me, I knew it was an opportunity for me to speak with them about what was going on. At that stage we had the confidence of most of the people who were in the detention centre; we had been acting for them in a number of different ways. When I saw the people from IDAG, I said: 'We really want to talk to you. It is important. We have not had an opportunity to meet with you and we would like to talk to you.' Begrudgingly, Harry Minas said: 'We're busy. We've had a big day and we want to go.' Paris Aristotle was there and he said: 'All right. I'll talk to you, but only for half an hour.' At that stage we had the Woomera Lawyers Group house. Paris Aristotle and Professor Harry Minas and a man who was an interpreter, I think, and also part of IDAG came to the house.

We wanted to talk to them about the serious issues that were facing these people at Woomera. There was a hunger strike on the go, I think, at this time. I will never forget talking to these people and saying to them, 'I think I can help and maybe I just might be able to stop what's happening.' Harry Minas said, 'I bloody well hope not.' That conversation went on for a little bit longer. We left and they then engaged in a process of negotiating the end of the hunger strike by foul means. They were the agents of government and they certainly, in my view, did not provide an independent view. In my time, I did not see any changes come about because of their efforts and certainly I think it is not a proper safeguard for people like this.

Response:

Between 21 January and 8 February 2002, the Immigration Detention Advisory Group (IDAG) visited the Woomera Immigration Reception and Processing Centre (IRPC) on four separate occasions to: listen to the detainees' concerns; advise the Minister on the situation at the centre, including possible circuit breakers; and where possible, assist in resolving hunger strike protest action.

IDAG members discussed the situation at the Woomera IRPC with Departmental staff, ACM staff, individual detainees and the detainees' delegates. IDAG members also sought the views of the Woomera Legal Group (WLG) on a number of occasions in an attempt to establish productive discussions on how all detainee stakeholders could safely negotiate an end to the protest action. Initially the meetings with WLG went well but subsequently became less constructive.

IDAG members, Mr Paris Aristotle and Associate Professor Harry Minas, have considerable professional experience in asylum seeker mental health and human rights issues. Mr Aristotle and Mr Minas and other members of IDAG assessed the situation at the Woomera IRPC as one which may have serious consequences for those detainees involved in the protest action. For IDAG the safety of the detainees involved in the protest action was of paramount importance. IDAG noted at the time that this did not appear to be the primary concern for WLG.

IDAG members agreed to raise the detainees' concerns directly with the Minister and negotiated an agreement with detainee delegates that led to a safe end to the protest action on 30 January 2002. IDAG met with the Minister on 22 February 2002 to discuss its activities at the Woomera IRPC and its recommendations to the Minister. The Minister was very supportive of the IDAG recommendations and a number were subsequently implemented.

IDAG was publicly commended for the intense efforts of members to resolve the protest action safely. The welfare of the detainees was, at all times, the principal driver in the negotiations.

The Department has been advised that IDAG will provide a separate response to the Committee in relation to the specific comments made in respect of Mr Paris Aristotle and Associate Professor Harry Minas.

11. ‘Dob-ins’

(i) Ms Lowes, Senator Nettle and Mrs Le raised concerns about the reliance placed on ‘dob-in’ information, particularly from anonymous sources:

Ms Lowes—I am aware of situations where delegates have relied on information provided by other applicants in their own application to cast doubt on the credibility of another applicant’s claims. There is really no assessment of how much reliance can be placed on that sort of information. I am talking about things like the procedure that might take place in a particular country which then casts doubt on another applicant’s account of that same procedure. Reliance on that sort of information as opposed to independent country information does not seem to have any valid basis, and it does occur in my experience.

Senator NETTLE—You have talked a bit about the effect of dob-ins. Do you have an idea of how widespread they are? The examples that you have given us so far are of the Department taking dob-ins as fact. Is that a standard or regular procedure—dob-ins being taken as fact?
Mrs Le—Unfortunately, they are often totally taken as fact.

Response:

It is reasonable for DIMIA to retain records of information which might shed light on the identity or origin of people arriving without authority. This does not mean that such information is considered reliable enough for use for visa decision making purposes. Whether ‘dob-ins’ are given any weight in any DIMIA visa decision will be a matter for the individual decision-maker. Standard visa decision making arrangements involve the disclosure of such information to the applicant for comment if it is adverse to the applicant and the decision-maker is considering giving weight to the information in the visa decision.

Decision-makers are able to conduct their own inquiries and to consider information they assess to be relevant and reliable from any source, including from clients and advocates. All of the general country information used in protection visa decisions is required to be included in the Country Information Service (CIS) holdings for audit and reference purposes (see pages 14, 18 and 19 for further information on the CIS). Should an applicant disagree with a visa decision, avenues of both merits and judicial review are available.

(ii) Mrs Le raised concerns about information gathered regarding the Bakhtiyari family:

Mrs Le—All Informant 1 said about Rakiya Bakhtiyari: Afghan. Husband is a Pakistani who came on an earlier boat and has a visa—travelling with brother-in-law. That level of information from intel says from day one that she is Afghan but that her husband is Pakistani and that she, by implication, is travelling with her brother-in-law. From that, someone decided that another person on that boat called Mohib Suwari, must be the brother-in-law because he looked a little bit like Ali Bakhtiyari. As a result of that, Mohib Suwari was arrested and with his children was taken from Tasmania and thrown into Baxter detention centre. In order for him to prove that he was not Ali Bakhtiyari’s brother, I had to go all the way to Afghanistan. What was the real information here? A family was picked up and it cost $30,000 to fly them in a highly traumatising air lift from Tasmania to Baxter on the basis of this information. Do you know what it was? It was a blatant mistake.

Firstly, if we just take the factual mistake, Rakiya was actually travelling with her brother. She was travelling with the brother-in-law of Ali Bakhtiyari; not with her brother-in-law. That is a mistake there. The other thing was that right from the beginning, the informant, whoever that person was, said she was Afghani and that Ali was Pakistani…it went from that tiny little 'dob in' on day one to affect another family and sent me to Afghanistan…

Response:

Ms Le refers to information from DIMIA, including that informants state that Mrs Bakhitaryi is Afghan and that her husband is Pakistani and that she is travelling with her brother-in-law. Ms Le states that "that level of information from intel says from day one that she is Afghan but that her husband is Pakistani and that she, by implication, is travelling with her brother-in-law. From that, someone decided that another person on that boat called Mohib Suwari, must be the brother-in-law because he looked a little bit like Ali Bakhtiyari….."

The unauthorised boat arrivals caseload at the time were arriving with little or no identifying documentation and the Department was receiving persistent claims from various sources, including the Afghan community, that the caseload contained Pakistani nationals presenting themselves as Afghans. As explained above at page 50, it is reasonable for DIMIA to retain records of information which might shed light on the identity or origin of the people arriving without authority. This does not mean that such information is considered reliable enough for use for visa decision making purposes. Whether 'dob-ins' are given any weight in any DIMIA visa decision will be a matter for the individual decision-maker. Standard visa decision making arrangements involve the disclosure of such information to the applicant for comment if it is adverse to the applicant and the decision-maker is considering giving weight to the information in the visa decision.

In this case, Mrs Bakhtiyari was found by the Government of Pakistan to be a citizen of Pakistan and the Government of Pakistan issued her with a Pakistani travel document. The Bakhtiaryi family was removed to Pakistan holding Pakistani travel documents in accordance with the Department's obligations under the Migration Act.

(iii) Mrs Le raised concerns about information gathered regarding the Bitani family:

Mrs Le—I think I quoted in my submission the case of the Bitanis. It defies belief. This family has never been to Sydney, someone walks into an office in Sydney, gives a mobile phone number—which did not work—refuses to give his name and defames them. He defames a young woman by saying that she is defrauding the government, saying she is living with a person who is really her mother…If it were me, I would be saying, 'Investigate it straight away…But do the Department treat her like? No, they do not. They say, 'Okay, here's a dob-in. We'll leave it on the file and when we come to do a ministerial intervention we will put that dob-in unchanged in the ministerial and away it will go to the minister.' It says: 'Back there in'— whenever it was—'2000 we got this dob-in and therefore, Minister, this is the reason why you should reject these people for your intervention.'

Later on when we who have been fighting for five years to find out what the dob-in is get it we produce statutory declarations we say, 'Yes, she'll have a DNA'. The other woman is beside herself, because she is actually a very well known world famous psychiatrist and she says, 'Everyone knows who I am. Search me on the internet.' Do the Department acknowledge that? Do they apologise? No, they do not.

They then decide that Majlinda and Alban Bitani are someone else. They decide to do some more things because ‘We can’t have got that dob-in wrong; they must be hiding something,’ so they are now wasting taxpayers’ money. They say, ‘We will throw him into detention.’ They say—I have just been reading it again today—‘We threw Mr Bitani into detention a few months ago. Do you know why? Because we did an interview with him and he gave inconsistent answers.’ The Department went out in November 2004 and searched the Bitani home, because we had managed to prove that the dob-in was wrong. So in 2004 they searched his house and during that time they took away a few documents; they took away three photographs.

They decided to interview Mr Bitani in April 2005, and the allegations of a false identity were put to him. In response, Mr Bitani denied changing his identity. However, he provided no plausible explanation for the inconsistency between the Departmental evidence and his claims. I want you to listen to this: as a result of this interview in which he could not provide proper responses to what they were putting to him, Mr Bitani was detained on 5 April 2005 by Adelaide compliance…Mr Bitani is still in community detention. The Department of Immigration and Multicultural and Indigenous Affairs—as a result of an interview they had with him where he could not explain certain things—put him in detention.

Let me tell you what that was. They took away two photographs. The one that they found the most worrying was a photograph of little Gracy Bitani, four years of age, blowing out the candles on a birthday cake. Alongside her in that photograph were her mother, Valbona Kola and another woman. It did not have anything on the back except that it said this is a birthday party and Gracy is blowing out the candles. There were 25 candles. So they said, ‘Obviously this was her mother’s birthday, but information received by the Department is that Mrs Bitani is not 25; she is 31.’ I am serious about this. They then asked Mr Bitani, ‘Do you know when this occasion occurred?’ He said, ‘I have no idea. Obviously it was some lunch party or something with my wife. I don’t know anything about it.’ They said, ‘Obviously you are lying, because the person who your wife is supposed to be—Eliona—would have been 25, so therefore you are lying to the
Department.’ His visa was cancelled and he was put into detention.

It took us six weeks before we finally managed to get a copy of that photograph. I asked him, ‘What is this photograph that they talked about?’ He said, ‘I don’t know. It was ...’ and he named people at a party. So I asked Majlinda, ‘Whose party would it be?’ She said, ‘I have no idea unless I see the photo.’ When we got the photograph, she said, ‘Oh, that is so and so’s party.’ I rang up the girl whose party it was and she produced a statutory declaration within a day that said, ‘That is my birthday party.’ I then rang up the other girl in the photograph—the one I have not identified—and asked, ‘Do you remember this?’ She said, ‘I have photos from being at that party myself. I will send you copies.’ They threw a man in detention on that kind of flimsy evidence. He is now out; he is in community detention here in Canberra, but that is the level we are talking about.

Response:

In March 2000, the Bitanis’ protection visa applications were refused by the Department. They were found not to be owed refugee protection on the basis of the identities and claimed origin they provided in their application.

On 25 July 2000, a member of the Australian community, providing only a given name and a mobile phone number, and who wished to remain anonymous, informed DIMIA that he wished to advise the Department that a number of Albanian individuals had applied for protection visas using false names, and were presenting themselves as Kosavar refugees. This included the Bitanis. He also claimed that Mrs Bitani's mother-in-law resided in Adelaide and that is why the clients moved there.

In August 2000 the Refugee Review Tribunal (RRT) affirmed the Department's refusal of the protection visa applications. The RRT's decision accepted the applicant's stated identities and origins. The RRT's decision did not refer to 'dob-in' information. The Tribunal's decision has been upheld by the Federal Court and the Full Federal Court.

Ministerial Intervention schedules were sent to the Minister in December 2002 and May 2003, setting out a range of supporting and countervailing considerations for possible Ministerial intervention in the case. They included a reference to the anonymous 'dob-in' of July 2000. This information was included because the Ministerial Intervention Guidelines issued by the Minister to the Department state that 'information regarding any offence or fraud involving migration legislation is relevant and should be specifically brought to my [the Minister's] attention'. There is no information available to the Department to suggest that this 'dob-in' was given any weight in the outcome of that intervention decision.

The Department received anonymous information about the identities of Mr and Ms Bitani from a member of the Australian community, and conducted further investigation into their identities. That investigation produced documentary evidence that called into question the claims of Mr and Mrs Bitani. The Department continues to investigate the issue of their identities.

Any adverse information that is relevant to a visa decision is required to be disclosed to the applicant for comment. Should an applicant disagree with a visa decision, avenues of both merits and judicial review are generally available.

12. Detention – facilities, access, rights, conditions

(i) Mr Harbord said:

Which legal firm and which lawyers are going to be able to access Christmas Island? Do we try and set up a house on Christmas Island? One can only assume that a key reason for doing that is to prevent access by lawyers. It seems as if in the past South Australia and Western Australia in particular have been used as somewhat of a dumping ground for refugees, nuclear waste or whatever because we have such a large outback. But Christmas Island and the distances there are going to make it even more problematic for those people to get proper access to both legal advice and other services, such as health services.

Response:

The Department always facilitates contact with a client's legal adviser(s). When operational, a detainee's legal adviser(s) will be welcome to make appropriate arrangements to visit CIIRPC. Further, detainees and their legal adviser(s) will be able to contact each other by telephone, mail or fax.

Pursuant to section 256 of the Migration Act, where a person is in immigration detention, the person responsible for his or her immigration detention shall, at the request of the person in immigration detention, afford him or her all reasonable facilities for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention.

The Immigration Advice and Application Assistance Scheme (IAAAS) provides legal assistance to eligible Protection Visa (PV) applicants in immigration detention and in the community. The IAAAS funds 23 contracted registered Migration Agents to provide application assistance and immigration advice. Application assistance is available to all PV applicants in detention; and disadvantaged PV and non-PV applicants in greatest need in the community. Assistance and advice through the IAAAS is provided at no cost to eligible persons.

Under the current IAAAS contracts (valid until 30 June 2006) ten of the 23 agents can provide services to Christmas Island.

In relation to health services, there is an obligation upon the detention services provider to ensure that adequate health services including mental health services are available to all detainees. In the event that health service providers on Christmas Island are unable to treat a detainee on the island, the detainee will be transferred to the mainland to receive treatment there.

(ii) Mr Gerogiannis said:

Just last week, in stage 1, where there is only one proper interview room, a colleague of ours started an interview with an asylum seeker and was told that she had to vacate the room because DIMIA required it. She had to vacate the room...In a centre with that many detainees, to have two dedicated rooms in stage 2 for stages 2 and 3 and one proper interviewing room in stage 1 seems to us to be totally inadequate.

Response:

Mr Gerogiannis raised concerns about the lack of interview facilities at Villawood Immigration Detention Centre (IDC), referring in particular to a case where a colleague had to vacate an interview room for DIMIA use. Unfortunately, without further particulars, the Department is unable to identify this case and is not in a position to respond to that particular criticism.

However, there are nine interview rooms at Villawood IDC. Stages 2 and 3 both have four interview rooms each and Stage 1 has one furnished interview room. In addition, Stage 1 also has two other rooms which may be used for interviews and which DIMIA plans to refurbish for specific use as interview rooms. Another large area containing six non-contact booths may also be used as interview cubicles in future.

Generally speaking, DIMIA staff require the use of these rooms on a daily basis at different times throughout the day. The DIMIA workload is solely based on the number of new arrivals at the Centre, including follow up interviews which are conducted on days one, three and eight of a persons' detention. For this reason, DIMIA has dedicated two rooms in Stage 2 for its own use, as it is imperative that post-location and follow up interviews are conducted as required in order to obtain detainee details, travel documentation, applications, and other relevant information.

Any external visitors who wish to use the rooms are asked to book rooms in advance to ensure that rooms are available and so that they can be advised if there is no availability. Any legal representatives who wish to interview clients are asked to send a fax through to the Detention Services Provider requesting a room booking at least 24 hours in advance.

(iii) Senator Ludwig and Mr Harbord raised concerns about communication facilities within detention centres:

Senator Ludwig—It seems anecdotal, but I am wondering if you can confirm that it costs $4 to send a fax from, say, a client in one of the detention centres to their solicitor, with relevant information that might be needed. Faxes can sometimes run to 20 or 30 pages and, of course, not all clients are going to be able to foot the bill and will pass the bill on.
Mr Harbord—That has varied. In the past we have not had access to any such facilities. Certainly we were not able to take phones in, and problems with access to phones, faxes and photocopiers in detention has been a problem in the past. At times it seems to be somewhat arbitrary as to what facilities we might have access to. Again, this is compounded by the fact that it is not as if we are just down the road; it takes us at least four hours to get to Baxter and in the past it took seven hours for a trip up to Woomera. We just did not have the facilities there, so that again produced delays and obstruction in being able to provide proper advice to our clients.

Response:

The Department provides detainees with all reasonable facilities for obtaining legal advice or taking legal proceedings in relation to their immigration detention. Section 256 of the Migration Act obliges the Department to provide such assistance at the detainee's request. Visits by lawyers for non-migration matters are facilitated wherever operationally possible.

All detainees in immigration detention facilities have a right to contact their legal representatives by phone and to receive and send material to them via fax or post.

The Detention Service Provider (DSP) facilitates a detainee's access to the telephone and postage when the detainee has no resources to pay for it themselves. The Operations Manager will determine the circumstances and extent of this service.

When a detainee wishes to send a personal fax, they will be required to pay for the cost of the fax. If the detainee is unable to pay for the cost of the fax (and where the fax is no more than two pages long) the cost will be covered by the DSP. Where the fax is greater than two pages long and the detainee is unable to pay for the cost of the fax, the DSP will request that the detainee mail the correspondence.

Where the fax relates to a detainee's application being determined by the Department or forms part of an appeal before a court or tribunal, the document is sent by the Departmental officers at the immigration detention facility, if the request is reasonable. A reasonable request amounts to a document up to ten pages. Larger documents should be sent via post but may be sent by facsimile where required urgently.

The DSP facilitates free and unlimited facsimile, telephone and postage access to the Commonwealth Ombudsman and the Human Rights and Equal Opportunity Commission.

Prior to meeting with clients, legal representatives can make a request to the Department, seeking permission to bring mobile telephones and lap-top computers into an immigration detention facility.

(iv) Ms Birss, Mr Burnside, Ms O'Connor, Mr Moore and Mr Boylan raised concerns about access to detention centres.

Ms Birss – RASSA's story is really a story of fighting to get access to our clients. I think that fight continues. We have had better access in getting psychiatrists in to assess the clients we are concerned have mental health problems, but there are still obstructions, particularly with people who we do not know are in Baxter detention centre.

Mr Burnside – Yes. I think particular problems arise from the fact that social workers, migration agents, lawyers and doctors are not allowed…to go there just in case someone needs their help. They can only go there if someone asks for their help. But, by the nature of things, the people who most need their help are probably least able to ask for it. Cornelia Rau is a startling example of exactly that.

Ms O'Connor – I do not understand for the life of me why I as a lawyer cannot go into Baxter without an appointment by the client, a letter from the client saying the area of law that is going to be covered and that they want to instruct me. That was the problem with Cornelia Rau. There were a number of people who were trying to get me to go and see her, because I had a bit of a reputation for dealing with people with mental illness. Lots of detainees thought she was ill. Certainly, people in the community who had contact with her thought she was ill. But I could not get in there without a request from her. She is ill—how is she going to make a request that she needs to see a lawyer? If I want to go to Yatala tomorrow and see someone who has been charged with the Snowtown murders…I can just go and see them.

Mr Moore – The government, through the way it sets things up, had a system where migration agents were allocated to particular refugees. People would want to come and see us and they were told by DIMIA officers: ‘You already have a lawyer. If you persist in wanting to see that other lawyer, who cannot help you by the way—here is a press cutting to show what sort of idiot, nuisance and troublemaker he is—we will cancel that one.’ They say that even though they know that the first lawyer is not a migration agent and cannot help with a migration application.

Mr Boylan – I point to the matter where my vehicle was stopped on the road outside Port Augusta. There was a current Federal Court order saying that that was not to happen, but it did happen. Those sorts of things continue to happen. For no good reason at all, we cannot see our clients; we cannot get access to them

Response:

Access issues
The Department’s policies are designed to facilitate detainees’ access to legal representation wherever possible. However, in order to protect the privacy of detainees and to ensure equal access to resources, there are certain requirements which must be met by lawyers visiting immigration detention facilities.

As stated above, the Department provides detainees with all reasonable facilities for obtaining legal advice or taking legal proceedings in relation to their immigration detention. Section 256 of the Migration Act obliges the Department to provide such assistance at the detainee’s request.

In addition *Migration Series Instruction 234: General Detention Procedures*, requires that detainees be informed as soon as practicable of their entitlement to seek legal advice, with the exception of certain detainees referred to in s 193(1) of the Act, such as unauthorised arrivals and certain character cancellation cases.

Upon arrival at an immigration detention facility all detainees are informed, as part of the induction process, of their right to receive visits from their legal representatives, contact them by phone and to receive and send material to them via fax or post. This information is also provided in the *Detainee Information Booklet*, a copy of which is provided to every detainee.

In order to protect the privacy of detainees, the Departmental protocol, *Access to Detention Centres for the Provision of Legal Advice to Detainees*, requires lawyers to produce evidence of their qualifications prior to receiving their initial access to a detention facility. They are also required to establish their identity and provide written evidence to the Detention Services Provider (DSP) that a detainee has requested legal advice from them. Visits by lawyers for non-migration matters are facilitated wherever operationally possible.

Detainees may have more than one legal representative. However, to ensure equal access to resources, each lawyer must be able to show that the detainee has in fact retained them to act on their behalf.

Separate interview rooms are made available, where possible, for lawyers to meet with their clients. The protocol also specifies that lawyers may provide advice to detainees by telephone or videoconferencing (where and when this facility is available).

As explained above at page 54, people in detention who seek a protection visa or a review by a merits review tribunal of a protection visa decision are offered publicly funded professional assistance with those processes through the Immigration Advice and Application Assistance Scheme (IAAAS). IAAAS assistance must be provided either by a Registered Migration Agent (RMA) or, in the case of Legal Aid Commission IAAAS providers, a person who is an "official" within the meaning of Section 275 of the Migration Act 1958. Individuals are not obliged to take up the offer of IAAAS assistance. They may choose privately funded alternatives and can change their privately funded representation.

Generally

A number of witnesses before the Committee raised concerns about particular incidents, detainees and the circumstances surrounding their time in immigration detention. Unfortunately, without further particulars, the Department is unable to identify these cases and is therefore not in a position to respond to the specific criticisms.

The Department has accepted the broad recommendations of the Palmer Report and, in an effort to focus on the future and the way forward, is implementing a wide range of initiatives designed to enhance its client focus and the effectiveness of its decision making and operational roles. These changes include better training and support for staff, improved governance and accountability measures, a stronger emphasis on case management and client service and broader cultural change within the Department.

On 6 October 2005, the Secretary announced a number of proposed changes to the management of immigration detention facilities in response to the Palmer Report. These initiatives include a review of the detention function, detention operations and the detention services contract by an external consultant, and are scheduled to be delivered by the end of December 2005.

In the past ten months, the Department has implemented a range of new initiatives affecting immigration detention. Recent improvements include infrastructure and amenities upgrades, ensuring improved access to health and legal services at facilities, improved monitoring of centre management by the Detention Services Provider (DSP) and enhanced client focus.

While mistakes have been made in the past, it is also important to dispel some of the myths about immigration detention facilities, as Mr Palmer has done in his report. The quote below comes from pages 57 and 58 of his report in respect to the Baxter Immigration Detention Facility:

“Many of the stories about Baxter that circulate and have become folklore are just that. The following are examples:

Descriptions of hell and razor wire have been aired on television file footage. There is no razor wire at Baxter; the stories relate to Woomera, which was closed in April 2003;

Reference has been made to cells and bars. At Baxter there are rooms with doors;

The management unit is represented as a punishment cell where no light enters and where people are incarcerated 24 hours a day. There are 10 single rooms, each with a door, a window, toilet and shower facilities and a mattress. Detainees are permitted limited periods in outside courtyards;

It has been claimed that lights in 'cells' are left on all night to intimidate detainees. There is a light switch in every room.

Although they (detainees) were critical about a number of aspects of Baxter life, the detainees interviewed by the Inquiry did not complain of poor or malicious treatment. They also said they had never witnessed mistreatment of Anna and rejected many of the popular claims made about her behaviour …"

13. Health/medication issues in detention

(i) Ms O'Connor said:

I then lodged another three and they were not transferred to Glenside. We went to court. By the time we were at our second hearing, one of them had been transferred. At the third hearing, two had been transferred. On the first day I appeared, the Commonwealth told the court that they were foreshadowing an application against me personally for costs for taking these sorts of cases. All I am doing is making applications for people who I genuinely believe need hospital treatment so as to get them treatment before someone gets more seriously damaged.

Response:

Ms O'Connor's statement relates to applications made on behalf of three detainees for injunctions restraining DIMIA from detaining or otherwise preventing the applicants from being presented for an immediate assessment for the purposes of admission to a psychiatric unit under the *SA Mental Health Act.* Interlocutory relief expressed in the same terms was also sought. Attached to the applications were medical reports suggesting that psychiatric intervention was required. The applications were filed on 21 June 2005 and the matters were listed for interlocutory hearing at 4pm on 23 June 2005.

On the morning of 23 June 2005, the Australian Government Solicitor, on instructions from DIMIA, sent a letter to Ms O'Connor advising her that DIMIA was not opposing the orders sought, that steps had been taken to ensure that the applicants were to be seen by a psychiatrist on 4 July 2005 and that as a result there was no utility in the applications to the court.

Notwithstanding DIMIA's response, Ms O'Connor advised that she intended to pursue the interlocutory hearing and counsel was briefed to appear at the hearing. At the hearing the interlocutory orders changed to orders seeking medical advice as soon as possible as to whether the applicants should be presented for assessment for in-patient psychiatric care. Given that our medical professionals had not had a chance to review the medical reports, together with the response contained in the letter sent to Ms O'Connor, Justice Mansfield refused the application for interlocutory relief and listed the matters for further directions at a date after the applicants were to have been reviewed by the psychiatrist.

When the issue of costs was raised, counsel foreshadowed a possible application for costs against Ms O'Connor on the following basis:

- the relief sought in the original application was not the relief sought at the hearing;
- there was no utility in the application as DIMIA had already advised Ms O'Connor that we did not oppose the orders sought and that steps were being taken to have the applicants assessed the following week.

Justice Mansfield noted the possible costs application, however it was not formally pursued as the matters were resolved without progressing to final hearing.

(ii) Mrs Highfield said:

…without the extraordinary professional help, courage and personal kindness of Zachary Steel, Dr Michael Dudley, Dr Louise Newman, Dr Bijou Blick, Dr John Jureidini and Dr Sarah Mares, we would have dead children. That is not hyperbole. We would have dead children in detention. I went to the locked ward of Glenside Psychiatric Hospital last year and saw a mother who was broken down to the point where she was mute and could no longer walk, and I saw her damaged, frightened little children. A psychologist was employed by the Department of immigration to, I believe, discredit the work of Dr Louise Newman and Zachary Steel. He was paid $30,000 plus GST, and he has no track record of…publishing papers on detention or the damage caused by detention; I believe his background is in insurance. All that money was paid to him to discredit two people who have international reputations and extraordinary reputations in this country for their work. I would like that put on the record. I was disgusted, because Zachary Steel saved the life of one boy I know.

Response:

In 2004, at the request of the Minister's office, the Department commissioned a literature review to evaluate the strengths and weaknesses of research methodology in existing literature into the relationship between mental illness and detention. There is no evidence to substantiate the claim that the Department commissioned this analysis to discredit researchers in the field. The Department has not published the report.

(iii) Mr Burnside, Dr Newman, Ms O'Connor said:

Mr Burnside – …the use of solitary confinement without any regulation is an additional problem of very grave proportions. I see that the latest MSI looks as though it is addressing the way in which solitary confinement will be used, but, so far as I am aware, there are still no regulations that dictate and restrict the way in which solitary confinement can be used.

Dr Newman – We have been particularly concerned about the misuse, in our opinion, of so called behavioural principles, largely because those principles and practices have in some cases been used in a punitive way—merely for the purpose of maintaining behavioural control, with the fundamental problem of a lack of understanding of the reasons behind disturbed behaviour…The fundamental problem, particularly in the behaviour management unit Red 1 in Baxter, is the way that simplistic psychological models are applied to really complex and very disturbed people which, in effect, means that those people are potentially made worse by the treatment they receive.

Ms O'Connor – …conditions of punishment, lack of access to proper services in environments that were harsh, mean, controlling and uncaring… They may be allowed out of that room for one hour a day, which has now been increased to four hours a day. People in the management unit can get access outside the unit for up to four hours a day. They have nothing to do…You realise the impact of locking someone up with nothing to do for hours on end. If you do that to someone with a mental illness, you are going to harm them even further.

Response:

Solitary confinement is not used in Immigration Detention Facilities (IDFs). Sometimes it is necessary to transfer detainees to places of more restrictive detention in order to ensure the good order and security of the facility and the safety of those within it, including the detainee being transferred.

Under no circumstances is there to be any element of punishment in a decision to transfer a detainee to a place of more restrictive detention. Strict requirements apply to ensure that the health and mental health of detainees is not compromised while accommodated in a place of more restrictive detention, and daily reviews are conducted to ensure that no other, more appropriate, alternative exists.

The operational procedures (OPs) governing use of places of more restrictive detention, such as Management Support Units and the Red One compound at Baxter IDF, require the implementation of a support network for each detainee while in the place of more restrictive detention and upon their return to mainstream detention. Unless specific reasons exist, no restrictions are imposed on the detainee's freedom of movement within the compound, on their use of telephones or association with other detainees within the same compound, on their access to organised external visits within the visit centre, or on their access to daily exercise in the open air and other appropriate recreational activities.

In cases where transfer is being considered due to behavioural concerns, detainees are notified, except in emergencies, of the reasons why they are being considered for transfer and given the opportunity to avoid such a transfer. Where transfer occurs, a care plan agreement may be formulated between the detainee and the Placement Review Team (PRT). The goal of these agreements is to address the behaviour or circumstances that led to the transfer and what steps may facilitate the detainee's return to general accommodation as quickly as possible. Restrictions are not imposed, and return to general accommodation is not delayed, simply because a detainee declines to participate in such programs or agreements. Rather, the PRT conducts a daily assessment to ensure that no other, more appropriate, alternative placement exists.

Health and mental health assessments are, unless there is an emergency situation, conducted by suitably qualified professionals prior to the transfer. In an emergency situation, the assessments must be made as soon as possible and no later than 24 hours after transfer. The detainee must be seen daily by a health professional and receives a daily mental health examination. A daily report on the detainee's health and mental health is provided to the PRT, and a health professional must be present at each meeting of the PRT. The OPs require that specific attention is given to ensuring that mental health issues are dealt with as a matter of priority.

The OPs for Management Support Units and the Red One compound at Baxter were developed in consultation with the Ombudsman's Office.

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

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

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

Third Party Medical Opinions
The Department routinely seeks additional third party medical advice whenever it receives conflicting medical opinions from sources other than the medical professionals subcontracted by GSL. A detailed protocol in relation to third party medical opinions is currently being developed.

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

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

Enhancements to Mental Health Services
The government has accepted the recommendations contained within the Palmer and Comrie Reports and is implementing a range of health strategies to address these. These enhancements can be grouped as follows:

1. Environmental Change

Environmental Change Program (ECP) is being implemented at Baxter IDF focusing on increased activities for detainees within and outside of the Centre.

Enhancements include new sports facilities such as a floodlit oval with soccer and hockey pitches, a basketball hard court and volleyball turf court. Detainees will have the opportunity to participate in additional outside activities such as local outings for fishing expeditions, attending sporting games and shopping. A new entrance and improved visitor's centre has also been planned.

This was announced on 19th September 2005, by the Minister of Immigration and Multicultural and Indigenous Affairs, as the "Baxter Plan".

Arising from the comments of Mr Palmer, wide-ranging changes to buildings infrastructure at Baxter IDF and other detention facilities are being pursued. Architectural advice is currently being sought on these changes and other changes recommended by Palmer in relation to programs and facility policies.

2. Mental Health Screening and Assessment

All detainees, in all facilities who are received into immigration detention are assessed for mental health concerns. This involves a suicide and self harm assessment, which is undertaken on arrival by the receiving Detention Services Officer, an 'at risk' assessment by the nurse undertaking the general health assessment, and follow up by the psychologist for anyone exhibiting risk.

Baxter Immigration Detention Facility
Increased mental health resources have been added to the health services at Baxter IDF including two psychiatric nurse positions providing 24 hour, 7 days a week availability (including on-call). Visits by a psychiatrist now occur on a fortnightly basis as opposed to once every six weeks.

Initial screening at Baxter IDF also includes a clinician rated Health of the Nation Outcomes Scale (HoNOS), and a Mental State Examination (MSE).

A client rated Kessler 10 (K 10) screen (voluntary) will be introduced in Baxter by the end of the year. The HoNOS, K 10 and the MSE are widely used in mainstream mental health services.

All detainees who screen positive on these instruments will be referred to a multidisciplinary mental health team for diagnosis, the development of a specific mental health management plan and ongoing mental health care. A team leader coordinates this care and management process in consultation with other team members which include mental health nurses, a psychologist, senior counsellor, general practitioner and psychiatrist.

If the management plan requires inpatient mental health treatment this will be arranged through clinical pathways developed with identified public and private sector health providers.

All detainees who screen negative can be reassessed at their own request, or at the request of GSL, IHMS, PSS and/or DIMIA staff. If not re-screened earlier, all detainees will be re-screened at 90 days to ensure no person has developed an undetected mental disorder.

Other Immigration Detention Facilities
DIMIA has received a costed proposal from the Detention Services Provider to enhance mental health services at other immigration detention facilities in line with the current and planned process at Baxter IDF.

The enhanced mental health capacity at Baxter is being rolled out as a ‘pilot’ and will be adapted to fit the population characteristics of other IDFs.

DIMIA has established a Health Services Delivery group, involving GSL and its subcontractors, together with input from IDAG, to oversee this process.

3. Referral Process for Detainees leaving Immigration Detention

Where a person in immigration detention has been granted a visa or has been given a court ordered release, the Detention Services Provider’s health subcontractors are required to ensure that the detainee has the appropriate medication for their immediate and short term needs and that they have any necessary repeat prescriptions.

The Detention Service Provider’s health subcontractors are also required to provide those leaving immigration detention with the appropriate referrals/letters of introduction to physicians or other clinicians who will be providing health care in the community.

When a person leaves immigration detention under these circumstances, the medical records will be archived by the Department.

14. Settlement/release issues

(i) Ms Domicelj said:

An issue which we have been raising consistently without any outcome over some time is that people are often released without a single contact number, without money to make a phone call, often on a Friday afternoon and sometimes in the rain. We had a man who came to our centre after he had been sleeping out for over two weeks at Central Station, without a word of English, after having spent over two years in detention. He made his way to us eventually. He actually managed to find himself a migration agent who made the referral. What we have been asking for some time is that people upon release at least be provided with a list of names and numbers of charitable organisations that they can approach for help. I am at a loss to understand why, in the six months of asking, that has not been possible. It has been raised with me that it is not necessarily DIMIA's role to suggest that people approach particular agencies. My point has been that it is information that is on the public record. It is a shorthand version of the *White Pages* directory.

Response:

Details of Non Government Organisations who may assist people once released from an immigration detention facility are regularly provided to people released from detention, where necessary.

People released from detention often possess funds which they had prior to entering immigration detention, which are returned upon release. Alternatively, they may 'cash out' merit points earned during their time at the immigration detention facility or, if destitute, may be provided with funds for their initial needs.

People's ongoing travel and accommodation plans may be discussed with the Department to determine whether further assistance may be necessary. Phone calls are also facilitated to allow detainees to contact friends or family to advise them of their release date.

People released from immigration detention facilities in remote locations are provided with assistance to reach a major metropolitan centre.

The availability of services for people released from immigration detention is dependent on the visa issued or reason for their release. For example, settlement services are provided for Protection Visa recipients. Bridging Visa E grants have conditions attached that require appropriate community care and resources to be in place, as do Residence Determination and Removal Pending Bridging Visa grants.

Furthermore, as discussed above at page 29, DIMIA is currently developing a new Case Management Framework. This framework is to provide a nationally consistent service delivery approach for holistically managing clients, particularly those who are vulnerable or have complex circumstances. The national case management framework will be augmented by a 12 month community care pilot in Sydney and Melbourne. The community care pilot is being designed to provide a range of services based on individual need which may include housing, assistance with living needs, counselling, medical and mental health interventions.

The case management framework is expected to be rolled out across DIMIA's service delivery network commencing from end January 2006. The community care pilot is also timed to commence from end January 2006. Whilst details of the new arrangements are still being determined, the expectation is that case management would include managing the transition to settlement or removal.

15. Legal assistance/migration advice

(i) Mr Kerhyasharian said:

…some community centres funded by DIMIA, such as the migrant resource centres, provide some pro bono advice on migration issues. My understanding is that the immigration Department will discontinue that kind of funding, which will have the effect of forcing people into using paid migration agents. We think that there is a need to maintain some sort of pro bono service.

Response:

Under the new Settlement Grants Program (SGP) community organisations, including Migrant Resource Centres, will be funded to provide migration advice for humanitarian entrants, who arrived in the last five years, who are seeking to propose family members.

Under the SGP, migration advice must be provided by a registered migration agent as part of the casework they perform, rather than as a stand-alone service. The decision to include migration advice as a valid service type under the SGP was made after extensive community consultations, and was a reflection of the concerns raised by community members.

The SGP will allow the provision of migration advice to humanitarian entrants, because they are likely to have serious concerns about family members still in dangerous situations overseas, and are generally not in a position to pay a migration agent.

Beyond the SGP, organisations can arrange for registered migration agents to provide migration assistance from the service location either *pro bono*, on a fee basis or under other funding programs such as the Immigration Advice and Application Assistance Scheme (IAAAS).

Protection Visa (PV) and review processes are non adversarial and have been designed to obviate the need for professional assistance for asylum seekers. PV decision-makers have a statutory obligation to consider visa applications and to grant the visas where they are satisfied that the criteria for grant are met. As mentioned above at pages 54 and 58, the IAAAS funds 23 contracted registered Migration Agents to provide application assistance and immigration advice. Application assistance is available to all PV applicants in detention; and disadvantaged PV and non-PV applicants in greatest need in the community. Immigration advice is also available to eligible disadvantaged members of the community in greatest need to prepare and lodge their visa applications, to seek to vary the conditions of their visas and with sponsoring applicants. Assistance and advice through the IAAAS is provided at no cost to eligible persons. IAAAS services in 2004-05 cost $1.881m providing 430 application assistance services to asylum seekers in detention, 418 asylum seekers in the community and 96 non-PV applicants. Over 5,000 persons were provided with immigration advice.

(ii) Ms Eszenyi (and Senator Bartlett) said:

Ms Eszenyi—That delegates are unaware of regulations which ought to be taken into account in decision making throws into stark relief the need for the applicants to have representatives with them who understand the intricacy of the regulations.
Senator BARTLETT—…in a public policy sense would it be fair to say that, if there had been more resources at the start in providing people assistance in putting forward a proper claim, that would have saved everybody a lot of time, effort and—more to the point—money with the court processes. Of course, if the claim is successful, it ends up going back to the start anyway.
Ms Eszenyi—The answer to that question is yes.

Response:

As previously explained, under the Migration Act, protection visa applicants in immigration detention must be provided with all reasonable facilities on request to access legal advice, in addition to any arrangements the detainee may make to retain legal advisers. All protection visa applicants in immigration detention are offered publicly funded Migration Agent assistance with their visa application through the Immigration Advice and Assistance Scheme (IAAAS). Disadvantaged protection visa applicants and non- protection visa applicants in the community may also be eligible for IAAAS assistance provided they are assessed as being in financial hardship and satisfy other eligibility criteria.

(iii) Mr Burnside said:

The problems that are inherent in the system would be reduced if the rights were made available to them in a practical sense, rather than just being theoretically available. Can I give you an example of this, and it was quite funny in a grim way. You may remember Aladdin Sisalem, the last guy who was on Manus Island, who actually got into a non-excised bit of Australia but was taken across to Manus Island after having asked for asylum, told his story and said he was seeking protection. They removed him to Manus Island anyway and it ultimately transpired that the reason they had done that was that he could only apply for protection in Australia by filling out form 866—or whatever it is—and he had not asked them for form 866 so they had not given it to him. So, because he did not know what form to ask for, they removed him to Manus Island.

Response:

This specific matter was the subject of litigation that was eventually settled in Mr Sisalem's favour.

Section 256 of the Migration Act provides, amongst other things, that a person in immigration detention may request, and shall be provided with, an application form for a visa.

Current procedures provide that if an unlawful non-citizen is detected at an Australian airport or seaport, an entry interview of the person is conducted to ascertain the reasons for the person's arrival in Australia, including the nature of any claims the person may make. It is not an assessment of the merits of their claims for protection.

After the entry interview has been conducted, the report is examined by a senior Departmental officer representing Refugee, Humanitarian and International Division. This officer assesses whether the person raises claims or information that prima facie may engage Australia's protection obligations under the Refugees Convention. The relevant considerations for the assessing officer are:

- whether the person raised issues that might amount to persecution; and
- whether the reasons indicated for such persecution may be regarded as Refugee Convention reasons.

If the person is considered by the assessing officer to prima facie engage Australia's protection obligations, the person will be provided with assistance in preparing and lodging a protection visa application under the government funded Immigration Advice and Application Assistance Scheme.

If the person does not provide information or make claims that the assessing officer considers prima facie engage Australia's protection obligations, the Department is not required to invite them to apply for a protection visa. A person, however, can access the protection visa process at any time after the entry interview while they remain in immigration detention in Australia, if new information or claims are made.

16. Ministerial intervention

(i) Senator Kirk and Mrs Le said:

Senator Kirk — I notice from your submission that you have some serious concerns about the information being passed to the minister in this process, and whether the minister is in fact even making the decisions about the matters that she considers. You seem to suggest that the officers determine not only what information is put before the minister but also whether the request should even go to the minister. Would you outline for us more detail on that. It seems to me to be quite a serious matter if the minister is meant to be exercising her discretion yet some of the matters are not even being brought to her attention…
Mrs Le—…I do not think it is just this minister; it is also the procedures by which the cases go to the ministerial intervention unit. Often before they get that far, they go back to the original case officer first. I did comment on that at an earlier inquiry and gave some case-specific examples of where information was wrongly given or not looked at. The case officer who rejected it in the first place looks at it again and then says, 'No, it should not go for ministerial intervention.'

Response:

Requests for section 417 ministerial intervention are not passed to the original Departmental decision-maker in the case for review and comment. These requests are handled in separate Ministerial Intervention Units in Sydney, Melbourne and Perth offices, and in the National Office for persons in detention.

Refugee Review Tribunal (RRT) decisions are automatically referred to the Onshore Protection area and, preferably, to the original Departmental decision-maker for analysis. This enables protection visa decision-makers in the Department to obtain the benefit of any feedback from the Tribunal in reviewing their decisions. It also enables officers to analyse these RRT cases against the Minister's guidelines, and refer any case which they assess meets the Minister's guidelines for referral to the relevant Ministerial Intervention Unit. This process of analysing RRT cases against the Minister's guidelines occurs in addition to, and completely separate from, the process of handling (personal) requests for intervention made by individuals or their supporters.

Where a request is assessed as meeting those guidelines, it is referred to the Minster in a submission, taking into account any information provided with the request. Where it is assessed that the case does not meet the Ministerial guidelines, the case will be provided to the Minister on a schedule which gives a summary of the case. Whether or not the case is referred to the Minister in a submission or a schedule, the Minister may request further information to enable her to consider whether or not to exercise her public interest power under section 417.

(ii) Dr Thom said:

You may tick off every box on those guidelines and you get a letter back saying that you have not met the guidelines. You do not understand. The inability to challenge the decision is increasingly frustrating for practitioners, let alone for asylum seekers.

Response:

The section 417 power is a personal non-compellable power of the Minister to act where she considers this to be in the public interest. The guidelines are issued to the Department for the Department's use in identifying the circumstances and form in which potential intervention cases are to be referred to her attention. They should not be taken to create an expectation that intervention will occur in any particular case.

(iii) Ms Eszenyi said:

> By its very nature, the exercise of ministerial discretion lacks transparency and accountability. It may result in inconsistent outcomes because of the vagueness of the criteria which must be established in order for the minister to intervene. It is open to allegations of actual or apprehended bias and corruption. People seeking our protection, and citizens too, expect that in a country such as Australia, where the rule of law and natural justice are respected, administrative decisions will be made fairly, efficiently and consistently.

Response:

The section 417 intervention power enables the Minister to act in exceptional circumstances to grant a visa, in the public interest, to a person who does not meet the normal legislative requirements for a visa grant, including after testing the initial decision at review. Migration legislation sets out the requirements for the Minister to report to Parliament on the use of her power.

(iv) Mr Domicelj said:

> We have several clients at the moment who have lodged a section 417 and been waiting for over two years—in some cases, close to three years—without word. During that time, they are living in complete limbo. They have absolutely no way of knowing whether their claims are even going to be considered.

Response:

Without information enabling the Department to identify and assess the handling of the cases of concern to Ms Domicelj, no reliable conclusion can be drawn as to whether these cases were handled improperly.

The section 417 power is a personal and non-compellable power of the Minister to act in the public interest in exceptional cases.

The migration legislation sets out the formal criteria and processes for persons to qualify for visas. Where people have been found to have no basis to obtain a visa through these processes, including having the initial decision affirmed by an independent review body, it is not reasonable to expect that the Minister will necessarily use her intervention power in their case.

(v) Ms Birss said:

In particular, the Minister's policy of refusing to consider exercising her discretion while court proceeds are on foot is causing unnecessary delay. It is causing a waste of legal and administrative resources, and it is causing our clients to suffer terrible mental health problems. Even when a decision is made it is not reviewable, despite these being life or death decisions, and often those decisions are not even made by the minister but, rather, by staff of the ministerial intervention unit, who screen our communications to the minister.

Response:

The Minister has issued publicly available guidelines for referral of cases where she may wish to consider exercising her public interest power under section 417. The guidelines state that when litigation is proceeding, it is not appropriate to consider a case until that litigation is concluded.

As explained above at page 71, where a request is assessed as meeting those guidelines, it is referred to the Minster in a submission, taking into account any information provided with the request. Where it is assessed that the case does not meet the Ministerial guidelines, the case will be provided to the Minister on a schedule which gives a summary of the case. Whether or not the case is referred to the Minister in a submission or a schedule, the Minister may request further information to enable her to consider whether or not to exercise her public interest power under section 417.

The section 417 power is a personal non-compellable power of the Minister to substitute a more favourable decision where she considers this to be in the public interest.

17. Protection issues

(i) Rev. Poulos and Mr Wright said:

Rev. Poulos – The response I have had from UNHCR field officers so far indicates very strongly that they do not even bother to refer refugees with disabilities or with HIV-AIDS to Australia because they know that they will never get in.

Mr Wright – My understanding of the law here is that the law allows refugees with HIV-AIDS and other disabilities to enter Australia. But the practice tends to prevent them, because there is a financial ceiling set. If the estimate is that the cost of providing them with medical support after they arrive in Australia exceeds that financial ceiling then they are not allowed to enter.

Response:

All permanent visa applicants are required to meet public interest health criteria, as specified in Australia's migration legislation: the Migration Act and the Migration Regulations. The health requirement is designed to minimise the public health and safety risk to the Australian community, to contain public expenditure on health care and services and to maintain the access of Australian residents to those services. No disease, condition or disability, with the sole exception of tuberculosis, is specifically identified in the Migration Regulations as necessarily leading to refusal of a visa.

The health requirement and associated screening process that the Department of Immigration and Multicultural and Indigenous Affairs has adopted is based on advice from the Department of Health and Ageing.

Applicants diagnosed with HIV are not automatically considered to have failed the health assessment. Decision-makers take into account factors such as the estimated significance of treatment costs and reduced access of Australians to health and support services.

There is opportunity, under the Migration Regulations, for cases that have significant cost implications on health grounds to have the health requirement waived in some visa categories, including under the Humanitarian Program. These waiver considerations focus on the compassionate and compelling circumstances, and whether, as a result of these compassionate circumstances, the estimated costs are therefore not considered "undue".

UNHCR is aware of Australia's health criteria. Criteria for resettlement vary between resettlement countries as do the relative size of resettlement programs. UNHCR may refer resettlement cases to countries where they believe there is the greatest prospect of success.

(ii) Mr Bitel said:

He made a claim in the early 1990s for protection and was refused, the general approach being that Filipinos cannot be refugees. He went back to the Philippines and was executed within three months, together with his three-year-old son, by the very people that he said he feared. He was a COMELEC officer—COMELEC is the equivalent of the Australian Electoral Commission in the Philippines—who had exposed some corrupt conduct by some local politicians, and he was executed by them.

Response:

This appears to be a reference to a case raised by Mr Bitel on 21 October 2003 during the course of giving evidence to the Senate Select Committee on Ministerial Discretion in Migration matters. On the limited information provided at that time, the Department conducted a search of shared drives, files and RRT decisions of 1993 involving Filipinos, but did not identify a person matching the profile articulated by Mr Bitel. In the absence of case identifying information, the Department is unable to explore Mr Bitel's assertion further.

(iii) Ms Gauthier said:

There is overwhelming evidence that the processing of refugee related visas is so fatally flawed as to be entirely untrustworthy. There is evidence that the Department has taken an adversarial stance against asylum seekers and applied the Migration Act in view of that negative stance instead of fairly and without prejudice. No case shows this quite as clearly as the case of the seven-year-old girl who was deported away from her father—an act that had no basis in international law and involved no application to the Family Court of Australia.

Response:

The Department does not agree that the processing of protection visas is fundamentally flawed. Rather, available evidence indicates that Australia has a world class and highly reliable refugee determination system. In this regard, the Department would like to reiterate its approval rates and processing times.

Australia's protection visa approval rates compare favourably with those in many European countries. For example, for the unauthorised boat arrivals between 1999 and 2001, DIMIA approved some 85 percent of applications from Afghan nationals and some 89 percent from Iraqi nationals in the first instance. The Department's approval rate in relation to applications for further protection for Iraqi nationals was some 71 percent, and for Afghan nationals some 67 percent. Approval rates in comparable European countries in 2004 for these nationalities ranged from less than 1 percent to some 66 per cent, with approval rates in many countries being below 20 percent.

With 79 percent of applications from applicants not in detention finalised within 90 days of lodgement, and 83 percent of applications from applicants in detention finalised within 42 days of lodgement, Australia compares very favourably with the processing times in other countries with asylum seeker caseloads. For example, in New Zealand this took an average of six months in 2004-05. In Canada the average processing time was 14.2 months in 2003-04.

The 2003-04 Australian National Audit Office (ANAO) audit on the management of the processing of asylum seekers published in June 2004 concluded (at paragraph 18):

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

UNHCR has also expressed its satisfaction with Australia's refugee status determination processes.

From the information provided, the case example cited by Ms Gauthier does not support the view that the refugee assessment process is flawed. Removal of the child in question was unrelated to the assessment of protection visa claims, which were tested at primary, merits review and judicial review and found to be unfounded.

The return of the child was at the behest of the custodial parent, her mother in Iran. The Iranian authorities determined that the child could be issued with a travel document on the basis of the custodial parent's authorisation.

The Department contacted the Family and Youth Services (FAYS) of the South Australian Department of Human Services and sought its support for the removal on the basis that it was in best interests of the child. FAYS, who were familiar with the case, agreed with the Department's decision.

Please see pages 88 and 89 below for further information related to this particular case.

(iv) Ms Gauthier said:

When they went through the refugee determination process they were found not to be from Afghanistan. However, when it came time to deport those people the government spent $100,000 setting up the ID checking unit. It found that some of these people did indeed come from Afghanistan, verified their stories and then put into play the process of deporting them. It did not occur to anybody to halt proceedings and say: 'Hang on— they were telling the truth the whole way along. They are from Afghanistan.' It took the deportees' lawyers to halt the deportation proceedings in court. Those people have since been granted refugee status, but had it not been for the quick-acting lawyers, we would have deported them back to Afghanistan.

Response:

While it is unclear which specific cases are referred to, the cases of Afghan individuals in detention have been reviewed a number of times. A small number of claimed Afghans remained in detention where DIMIA and the RRT were not satisfied that they were Afghan nationals.

Following negotiations with the Afghan Government after the fall of the Taliban (before which this was not possible), Australia provided funds to support the establishment by the Afghan Government of an Identity Checking Unit (IDCU) to assist in verifying nationality claims. Where individuals in detention availed themselves of the IDCU opportunity and the IDCU subsequently recognised these individuals as Afghans, processes were initiated quickly by DIMIA to have their cases raised with the Minister under section 417, or under section 48B to consider lifting the application bar to enable a further protection visa application to be made. This process did not rely on advances by advocates or representatives.

(v) Ms Lowes said:

DIMIA continues to require people to prove their refugee status—again—three years, or around that time frame, after they were granted a temporary protection visa. When we wrote the submission, our view was that the onus should be on the minister to prove that the circumstances which led to the recognition of refugee status have ended, as opposed to the onus being on the applicant to prove their refugee status again, taking changes in country circumstances into account. A case was handed down about two days before the closing date for submissions ended, which was QAAH and the minister which now supports that position. We are saying that DIMIA policy should be amended to reflect that.

Response:

The Migration Act and Regulations require DIMIA to assess, on a case-by-case basis, whether individuals meet criteria for the grant of a protection visa. No applicant is required to prove their refugee status.

Before *QAAH of 2004 v MIMIA* [2005] (QAAH) was decided, Departmental advice to decision-makers reflected the law as affirmed in a series of Federal Court decisions. Following the handing down of the QAAH decision, modified advice on assessing further protection visa applications in light of the decision in QAAH has been provided to all cases officers.

The Minister has sought special leave to appeal QAAH in the High Court.

(vi) Mr Clutterbuck said:

…there is a flaw in the Migration Act in its failure to allow women to separate from their husbands' protection visa applications in situations of family violence and marriage breakdown and in its failure to have these claims considered independently of the husbands' claims. Currently women in these situations must seek ministerial intervention under section 48B of the act to allow them to apply for protection for a second time. Under section 48B women must firstly overcome the threshold of proving that they have credible new information which strengthens their refugee claims. Only then, if the minister allows them to, can they go through the fairly lengthy process of applying for protection again.

Response:

All protection visa applicants are primary applicants in their own right. All applicants are able to make specific claims at any time during the processing of that application.

Where a person is a current protection visa applicant, their application can either be administratively linked with, or de-linked from another person's application for processing purposes.

Where a person's application for a protection visa (PV) has been refused, they are barred by s48A from making another PV application unless the Minister lifts the bar under s48B. This provision is a safety net to ensure that Australia meets its obligations under the Refugees Convention.

(vii) Mr Bitel and Mr Clutterbuck raised further concerns about gender issues in the context of protection visas.

Mr Bitel – I think there is a failure to adequately consider the Department's gender guidelines when many assessments are made. It was interesting to read reports of the new justice to the High Court.—and I do not remember the case reference—where she expressed concerns and set aside a decision of the Refugee Review Tribunal which had misapplied the law in relation to persecution where a woman had been raped.

Mr Clutterbuck – The difficulty for women in this process is the Department's inconsistent approach when considering these claims. Often women must rely on their domestic violence experiences as a basis for a new protection visa claim. We have seen in our practice and our dealings with the Department the unwillingness of the Department to recognise domestic violence as grounds for applying for a protection visa. This leads to a broader issue in relation to gender based claims. We consider that the Department has failed in applying gender as a social group and it has failed to recognise violence perpetrated by non-state actors as falling within the refugee convention. I can cite any number of instances where gender based claims have been rejected by the Department without the applicant being granted even an initial interview…The Department's process for processing claims made by women on the basis of gender lacks transparency. It has been demonstrated that the Department does not seem to have any concrete policies or procedures in place to deal with these sorts of cases. In that context, I note that gender guidelines were introduced by the Department in 1996. Due to the lack of transparency in the Department's decision-making process, we cannot be assured that these guidelines are being applied appropriately or followed.

Response:

Australia's procedures for the determination of refugee status and the broader regime have been the subject of extensive external scrutiny, including by Parliament, which has reviewed the process on a number of occasions. The Australian National Audit Office (ANAO) completed a performance audit, titled "Management of the Processing of Asylum Seekers" on 23 June 2004. As detailed above at page 76, the ANAO concluded that the onshore processing of asylum seekers is managed well and uses experienced officers supported by appropriate training and guidelines.

The Department's process of refugee status determination is transparent and accountable to the applicant and their representative, and others who have an entitlement to the information concerning an applicant. In particular, Migration Agents, such as Mr Clutterbuck, receive comprehensive written statements of reasons whenever a client is not granted a protection visa. The written decision record documents all information assessed and conclusions made relevant to the decision.

The *1951 Convention Relating to the Status of Refugees* is the principal international law governing refugees and forms the basis of Australia's legislation, policies and programmes for refugees. Gender-based persecution is not recognised as a separate ground for refugee status under the Refugees Convention.

Australia and most other countries use the Convention and its Protocol in the determination of refugee claims. Australia agrees with UNHCR that the refugee definition properly interpreted can accommodate gender-related persecution and that there is no need to add gender *per se* to the five grounds currently enumerated in the Convention.

In Australia, gender is not considered as a separate ground in its own right, however, 'women' or a subset of 'women' can constitute a particular social group for the purposes of the Refugees Convention and it is also recognised that gender can influence or dictate the type of persecution or harm suffered and the reasons for this treatment.

Australia is one of a number of States that have supported the incorporation of gender perspectives into asylum policies, practices and training, including through the issue of Guidelines on Gender Issues for Decision-makers (1996). Australia developed these gender guidelines to assist decision-makers to recognise and properly assess gender related persecution.

Australian courts have accepted that a particular social group may be categorised on the basis of gender. However, the Federal Court noted in *Applicant S469 of 2002 v MIMIA* that the question of whether a particular group could constitute a particular social group for the purposes of the Convention is a matter of fact based on the evidence before the decision-maker. This illustrates the importance of looking at the individual facts of a case and the particular circumstances of the society in question to assess whether a cognisable group exists at the relevant time.

18. Women – trafficking, domestic violence

(i) The Chair (Senator Crossin) and Mr Von Doussa said:

Chair – We heard in Sydney that there are two women who have been caught up in that horrible saga and have actually assisted the police—the Australian Federal Police—but for actually going to the Australian Federal Police their thanks has been that they are now in detention. Do you get involved in those sorts of cases of people facing deportation and whatever horror awaits them when they are returned?
Mr Von Doussa **-** It is that sort of case which lies behind the concern we are expressing here. From what one reads in the papers, not all these people that do help the police get visas at the end of the day. It is only a very few that do. The others are, as you say, kept in detention for a period of time, then deported. They are facing, one understands, a pretty uncertain future—a very frightening one— when they get home and it is only this sort of general discretion, non compellable and non reviewable, of the minister at the moment that might save those people from that fate.

Response:

Under the whole-of-government approach to people trafficking, DIMIA has an obligation, where there is any indication of suspected people trafficking, to immediately refer the matter to the Australian Federal Police (AFP) for investigation. The threshold for referral is low.

The AFP is the primary investigatory body in determining the veracity of claims made by suspected victims of people trafficking.

A comprehensive visa regime is in place that enables persons who are assisting, or who have assisted, with an investigation or prosecution of people trafficking offenders to remain lawfully in Australia.

The visa regime is underpinned by a victim support program that is administered by the Office for Women in the Department of Family and Community Services. The support program provides a comprehensive range of support services for suspected victims of people trafficking who remain in Australia to assist trafficking investigations and associated criminal justice processes. Suspected victims of trafficking have individual case-managed support and access to accommodation, income support, medicare, legal services, vocational training, counselling services and social support.

The visa regime comprises the Bridging F visa, Criminal Justice visas and Witness Protection (Trafficking) visas.

The Bridging F visa (BVF) enables unlawful non-citizens who hold information in relation to a people trafficking matter to remain in Australia for up to 30 days. The 30 day period also allows time for the person to reflect on whether they wish to further assist the AFP, State or Territory police.

If, on the expiry of the BVF, a person chooses to continue to assist the police in the investigation or prosecution of a people trafficking matter, and the police require the person to remain in Australia, the police may seek the issue of a Criminal Justice Stay Certificate. This is a criterion for the grant of a Criminal Justice Stay visa. A Criminal Justice Stay visa allows the person to remain in Australia for as long as they are required for law enforcement purposes.

Holders of a Criminal Justice Stay visa who have significantly contributed to, and cooperated closely with law enforcement agencies in, a prosecution, or an investigation that does not result in a prosecution, and who would be in danger if they returned to their home country may be granted a temporary Witness Protection (Trafficking) visa. A temporary Witness Protection (Trafficking) visa can lead to a permanent Witness Protection (Trafficking) visa.

In the period 1 January 2004 to 29 November 2005, 43 persons have been granted Bridging F visas, 26 persons have been granted Criminal Justice Stay visas and 5 persons have been granted Criminal Justice Entry visas. No Witness Protection (Trafficking) visas have been granted to-date – a small number are in the process of being assessed.

It is not reasonable to expect that every person who claims to be trafficked will be allowed to stay in Australia. As an investigation progresses it may turn out that a person is in fact not trafficked, or that the alleged offence occurred prior to the enactment of the trafficking legislation, or that the information provided is unable to be corroborated by police. In other cases suspected victims choose not to assist law enforcement authorities and wish to return home.

The Chair raises the cases of two women who have assisted the Australian Federal Police. Without specific details it is difficult to conclusively identify the people. However, it is believed that one of the people is the person referred to in the media as "Julie", and the other person is a person located at the same time as "Julie". While it is inappropriate to provide details of individual cases for privacy reasons it can be confirmed that these people remain lawfully in the Australian community.

Where a person's evidence is insufficient to assist a trafficking investigation or prosecution they will not be eligible for the grant of a Witness Protection (Trafficking) visa. The person may however, be eligible for another visa that would enable them to remain lawfully in Australia, or be assisted to return to their home country.

(ii) Mr Rodan and Ms Jockel raised concerns about new domestic violence legislation and the new role of Centrelink officers in determining whether domestic violence has occurred:

Mr Rodan **-** Since 1 July domestic violence issues have been decided by an immigration officer and a Centrelink officer, and in many cases that happens. However, we think that these new regulations are a mess. Who do you appeal to against a Centrelink decision? How can an immigration officer make an objective decision in that regard, because it is a very emotional issue?

Ms Jockel—if, indeed, Centrelink is the final arbiter, what if Centrelink has got it wrong? Also, if you look at the fine print of the legislative provisions, it actually provides that consent intervention orders would not be accepted. In other words, they had to be fully judicially determined and imposed by a court. My view, again, is that if you have a court order, you have a court order—regardless of whether it is by consent or otherwise. It is a court order and it is not for DIMIA to second-guess a court…We do not have domestic violence unless we have got umpteen measures of evidence, and only then will we be satisfied. If there is any doubt, we will offload it to Centrelink and Centrelink shall be the final arbiter. We think that these are just excessive and unnecessary provisions, and they do not help.

Response:

The recent changes to the domestic violence provisions in migration legislation improve the integrity of the migration program while continuing DIMIA's commitment to providing an efficient and responsive pathway to permanent residence for victims of domestic violence.

The domestic violence provisions were introduced in 1991 in response to community concerns that, under two stage partner arrangements, some visa holders might feel compelled to remain in abusive relationships rather than end the relationship and leave Australia. The provisions allow the holders of certain temporary visas to have their application for a permanent visa decided even though the partner relationship that was the basis of their eligibility for a visa has ceased. Furthermore, partner visa applicants are not required to wait the usual two years, but rather have their permanent partner visa application decided immediately.

Until 1 July 2005, the legislation stipulated that, for an applicant to be granted a spouse visa under the domestic violence provisions, they needed only to provide a statutory declaration which set out the allegation of domestic violence and statutory declarations from two "competent persons" which stated that, in their opinion, domestic violence had occurred. "Competent persons" include doctors, nurses, social workers and women's refuge managers. Before 1 July 2005, these statutory declarations were legally regarded as conclusive proof that domestic violence had occurred. This was the case even where DIMIA had information that contained evidence to the contrary.

There was evidence of some improper use of the provisions, including by a disproportionate percentage of males who alleged they suffered domestic violence and by people who entered Australia on the basis of what subsequently appeared to be non-genuine relationships. In 2004-05 there were some 500 applications on domestic violence grounds, approximately 17 per cent of which were from males.
In September 2002, the Family Section of DIMIA National Office initiated a review of domestic violence claims for the 2001–2002 program year. The review was primarily aimed at answering community concerns about the length of processing times and the profiles of the sponsors and applicants, and their relationships. It was also seen as a potential resource for policy development for the provisions and a way of identifying any other issues of concern. The review was also an opportunity to investigate concerns that the Domestic Violence Provisions (DVP) had become a target for immigration fraud.

The review examined 43 per cent (150 of the 351) of cases finalised during 2001–02. These cases were randomly selected and were representative of all state offices.

Key findings indicated that:

- 70 per cent of the cases under DVP showed strong indication that they were genuine, 20 per cent were doubtful, and 10 per cent were not genuine.
- In almost half of the applications by males the sponsor claimed the applicant was the perpetrator of domestic violence.
- Non-judicial evidence was the main form of evidence submitted, ie a statutory declaration signed by the applicant and two statutory declarations by "competent persons".

The claims found to be doubtful included combinations of a number of common elements:

- applicants were young males;
- there was contradictory evidence on file;
- there had been little or no contact or cohabitation either before or after migration;
- claims were based on generalised accusations of psychological or emotional abuse; and
- statutory declarations were the only means of evidence submitted, and the statements made by competent persons appeared simply to repeat the applicants' assertions.

While the survey found that the majority of domestic violence claims were genuine, the evidence indicated a need to improve the integrity of assessment procedures, particularly in respect of non-judicial evidence.

DIMIA undertook extensive consultations with state and territory representatives on the Partnerships Against Domestic Violence Task Force and the Office for Women (formerly the Office of the Status of Women). In February 2005, Minister McGauran agreed to a proposal to enable decision-makers to refer doubtful claims of domestic violence that had not been tested in a court to an independent expert for a binding opinion. Regulations have now been enacted which will reduce the potential for improper use whilst enabling faster decision-making on cases of genuine domestic violence. The amended Regulations commenced on 1 July 2005.

As part of the 2005-06 Migration Program, the Australian Government committed two million dollars over four years to fund integrity improvements to the domestic violence provisions, mostly covering the cost of the referral service. The referral process is outlined in Departmental and Ministerial Fact sheets.

The 1 July 2005 changes
On 1 July 2005 legislation commenced allowing referral of non-judicially determined claims of domestic violence to an independent expert where the visa decision-maker is not satisfied on the evidence available that domestic violence has occurred. Once an independent expert has made an opinion on whether domestic violence has occurred, the visa decision-maker must take that opinion to be correct and process the application on that basis.

The term "independent expert" is defined in the Regulations to mean a suitably qualified person employed by an organisation gazetted by the Minister for the purpose of assessing domestic violence claims. Centrelink has been gazetted as the independent expert; however, the gazettal mechanism provides the Government with the flexibility to source other providers in the future.

Centrelink is well placed to offer a nationwide domestic violence assessment service for clients from diverse backgrounds. While other national organisations exist that deal professionally with domestic violence, such as Relationships Australia or Centacare, these organisations primarily act in a counselling and support role. This does not involve an assessment of the genuineness of a claim of domestic violence, or whether the alleged behaviour meets the definition of domestic violence in migration legislation. Centrelink social workers have professional expertise in dealing sensitively with clients who claim domestic violence as well as the experience necessary to critically assess such claims within a regulatory framework where a benefit may result. Equally important is the ability of Centrelink to provide assessment services throughout Australia, including regional centres.

Referral to a Centrelink social worker is only considered in cases where an applicant relies on non-judicially determined evidence – such as statutory declarations – and there are reasonable grounds to doubt the claim. The large majority of domestic violence claimants will continue to have their claims accepted without being referred.

In accordance with the policy intention that the referral mechanism be used judiciously, since it commenced on 1 July 2005 only six referrals have been sent to Centrelink by DIMIA officers for an assessment. Three of these referrals involve male claimants. As a proportion of the total number of domestic claims normally received over a 5-month period, this represents approximately 3 per cent of the domestic violence caseload. The Migration Review Tribunal (MRT) has also made a small number of referrals.

The regulations do not require multiple forms of evidence. For example, a single court order would suffice, and would not be subject to referral. The regulations set out a variety of acceptable forms of evidence, giving applicants a number of options depending on their circumstances. All DIMIA State and Territory Offices have at least one domestic violence contact officer whose role includes explaining to applicants what types of evidence are acceptable under the provisions.

Judicially tested evidence of domestic violence is taken as conclusive evidence of domestic violence and therefore cannot be referred to the independent expert. This includes court orders issued following an opportunity for comment from the alleged perpetrator. This acknowledges the fact that the claim has been tested and determined in court.

Consent orders are acceptable as evidence of domestic violence. Depending on the relevant State or Territory law, these orders may not result from any judicial scrutiny of the claim. Where that is the case, they are placed in the same evidentiary category as statutory declarations, but would not be referred except in unusual circumstances.

Where the relevant State or Territory law requires a judicial finding, consent orders are taken as conclusive evidence of domestic violence and therefore cannot be referred to the independent expert.

When an application has been referred to an independent expert, the DIMIA decision-maker must accept as correct the expert opinion on whether or not domestic violence has occurred. This appropriately recognises the expertise of the independent assessor. In the event that the independent expert finds that domestic violence did not occur, and the visa application is subsequently refused, applicants can seek review of the decision with the Migration Review Tribunal (MRT), which will review the application and can request a fresh assessment from another Centrelink social worker. The MRT can also make referrals in doubtful cases where domestic violence is first raised at review. The MRT is also obliged under legislation to accept the independent expert's opinion as conclusive.

It is important to note that in establishing the referral system, the Government was not seeking to cast aspersions on the vast majority of "competent persons" who were providing statutory declarations for domestic violence claims. It is difficult to envisage that statutory declarations demonstrating a level of quality consistent with in-depth and professional contact between the alleged victim and the competent person would give rise to the kind of doubts that would lead to a referral. However, it became apparent that not all competent persons have that level of contact with the alleged victim. A benefit of the recent changes is that a professional standard of assessment of claims is available for those cases where either there is reason to doubt the version of events given in the statutory declaration, or there is relevant information known to the Department which was not known to the competent person when they made their statutory declaration.

The introduction of the referral provisions was accompanied by training to relevant DIMIA staff around Australia and new written policy advice making plain how the provisions operate and under what circumstances referral should be considered. It is DIMIA's strong policy intention that these provisions be used sparingly, and only where the circumstances of the claim give rise to significant and cogent doubts in the mind of the DIMIA decision-maker. To ensure that this is how the policy is used in practice, all DIMIA referrals are authorised by a senior officer in the originating State or Territory office and all referrals are monitored by the relevant policy area in DIMIA National Office.

19. Removal/deportation

(i) Senator Nettle and Ms Biok raised concerns about different aspects of a particular removal case:

Senator Nettle – You mentioned the case of an asylum seeker who was returned to Australia from Dubai at a time when there was a United Nations Human Rights Committee interim order on his deportation. I have asked the Department and I am awaiting a response from them— whether or not this is the first instance of the Australian government not complying with an interim order from the Human Rights Committee. The reason I ask that question is that some United Nations conventions are consistently ignored by the Government.

Ms Biok – Somebody I saw quite recently at the Villawood Detention Centre, after spending five years in detention, was told that he was to be released and was asked to sign a form. He was not fully aware of what the form was and signed it. He realised later that it was for his deportation. He was put on a plane from Baxter to Sydney, held at the airport in Sydney and then put on another plane, thinking, 'Well, I'm going to face certain death when I get off eventually in my country of nationality.' While waiting at the airport, in transit to his country of nationality, he was approached by the Australian Consul General, who said: 'You're lucky. The lawyers who have been lobbying for you have written to the United Nations High Commissioner for Human Rights and have some information to support you. Do you want to go back to Australia and try again?' He was then brought back to Australia and I saw him within 24 hours of his return here. He did not know where he was or why he was back here. He just knew that he had been saved from what he thought was his definite death on return— and it was a return to a very nasty country. That, to me, is real mental torture.

Response:

The Department provided an answer to a similar question on notice at the Senate Foreign Affairs and Trade Reference Hearing on 6 September, as follows:

"Requests made by the United Nations Human Rights Committee (via an Interim Measures Request) that complainants not be removed while the Committee considers the matter are not binding on the recipient states.

The Australian Government decided in 2001 to make decisions on a case-by-case basis as to whether Interim Measures Requests by the Committee are warranted or not. Australia has robust arrangements for considering these requests. In this case, the Interim Measures Request for the person was considered to be unwarranted [based on information that had been provided by the United Nations Human Rights Committee].

This was the first case since 2001 where a person was removed from Australia while an Interim Measures Request was in place."

This person was removed from Australia on 31 August 2005 after a thorough assessment of his claims for protection was completed. Prior to his removal he was informed that he was being removed from Australia and was asked to sign the Notice of Removal. He refused to sign the Notice.

His claims for protection had been finally determined by the Refugee Review Tribunal and judicial review had upheld that decision. He had been found not to be owed protection by Australia and was being returned to the country in which he has right of entry and residence.

After his departure, the United Nations High Commissioner for Refugees raised significant new information which raised a real question about whether this person may now be in need to protection. Accordingly, this person was returned to Australia so that he may have his claims considered afresh in light of new information.

The decision to return this person did not relate to the existence of his complaint to the United Nations Human Rights Committee or to any approach from the Committee or lawyers lobbying in relation to this case.

(ii) Ms Sister Leavey said:

Sister Leavey **-** But we also have the example of the simple denial that chemical injections have taken place….They have actually happened in Australia. It happened with an ex-ACM guard. On page 49 of our report, Deported to danger, there is a quite horrifying description of a chemical injection. The head of the Department denied that this was true and said that, because this was not true, he doubted the credibility of the whole report. Yet it was obvious in the 2000 inquiry, A sanctuary under review, that the question had been raised about chemical injection and the reply is recorded in Hansard that the Department is looking into this question. In fact, we have five recorded instances of people being chemically injected and yet the Department, through a man who I could name, said that this did not happen.

Response:

The Department addressed this allegation in a supplementary question on notice asked by Senator Nettle at the Senate Inquiry into the Administration and Operation of the Migration Act 1958 on 11 October 2005. For ease of reading, the substance of that response is reproduced here.

The Department believes it has identified the detainee referred to in the incident described in pages 49-50 of the *Deported to Danger Report*. In 1999 a medical practitioner instructed an ACM nurse to administer Valium orally and intramuscularly to this person. This instruction was deemed necessary because the first attempt to remove the detainee had been cancelled because of his violent behaviour. The detainee had also threatened to severely disrupt any further attempt to remove him. The medical practitioner's opinion was that the medication administered was not excessive.

Since that time the Department has introduced a clear policy that medication (including sedatives) must not be used for the purpose of restraint.

(iii) Ms Everson said:

The girl had been in the custody of her father since the time she arrived in Australia, which was something over three years prior to when she was removed. Apparently, the mother did gain a court order in Iran. This came up. Apparently there was a copy of it in Federal Court proceedings subsequently—after her removal in relation to duty of care. The court order had apparently, according to counsel in that case, expired three weeks prior to when they removed the child. I do not know whether that was their justification for her removal. I cannot see how, under Australian law or international law, an order from an Iranian court that the other parent have custody where the parent who had custody of the child at the time had had custody since she was two—and custody in Australia—could apply. It clearly circumvented all processes.

The major question for us, apart from the inhumanity of tearing a child away without telling the father, is where did they have the power to do it? The Department do not have power to make decisions about which parent should be granted custody, which is essentially what they did. The father clearly had custody of the child. If he had been asked he could have provided evidence of a court order, which we later got a copy of, from when the child was two when he was granted custody. They gave him no notice. They made every attempt to conceal, and were effective in concealing, from him the fact they were going to remove this seven-year-old child from him. It was quite extraordinary. There are two questions. Why on earth would they favour one parent against another and where on earth did they think they got the power from? It is a clear indication of the arbitrary and absolute power they think they have.

Response:

The child was removed from Australia on 23 July 2003.

The Department became aware of an allegation of child abduction when a person who claimed to be the mother of the child visited the Australian Embassy in Tehran on 23 October 2001 for the second time seeking information and contact with her daughter. The mother presented her Iranian identity card and that of the child. These documents confirmed that the person was the child's mother. The child's father was named. The mother also presented a divorce certificate stating that her marriage to the father ended on 18 April 1999 and that she was given custody of the child until the child reached the age of seven. She later advised the Department that she had ongoing custody of the child now that the child had reached the age of seven. All documents that were presented by the mother were original documents and certified translations were provided.

The child's mother also advised that she had lodged a complaint with the Shiraz Family court about her daughter's removal from Iran. On 13 October 2001, the court handed down an order requiring the father to return the child to her mother. The original court order was sighted and a translation was provided.

As explained above at page 76, the return of the child was at the behest of the custodial parent, her mother in Iran. The Iranian authorities determined that the child could be issued with a travel document on the basis of the custodial parent's authorisation.

The Department contacted the Family and Youth Services (FAYS) of the South Australian Department of Human Services and sought its support for the removal on the basis that it was in the best interests of the child. FAYS, who were familiar with the case, agreed with the Department's decision.

The father was not informed in advance that his daughter was being returned to her mother, the custodial parent. A security assessment was undertaken and, due to his potential for disruptive behaviour, it was decided not to inform him until after the child departed.

The Department now has a policy that at least 48 hours written notice of removal is to be provided to the person being removed, unless there are exceptional circumstances that would warrant providing less notice. Clearance must be obtained from senior management before less than 48 hours notice can be given.

(iv) The Chair (Senator Crossin) and Sister Leavey said:

CHAIR - Are you suggesting there that documents issued under the Australian authority were in fact false?
Sister Leavey - Yes.
CHAIR - I am assuming DIMIA is the Australian authority you are referring to.
Sister Leavey - It is either DIMIA itself or the agent. For instance, P&I certainly issued the Angolan man, whose name we can now use—Matuse Calado, who was deported by P&I—with papers to the Congo, though he does not speak French and his family is not there. Amnesty International could not say whether or not they were issued directly by DIMIA or whether DIMIA handed him over to P&I. That is certainly an example. There are other examples of a false passport, and there are photos of this in the book. There are a number of false papers
CHAIR - So there are a number of instances where the Australian government, or agents on its behalf, deport people with documents that are false, of little relevance or of little benefit to the deportee?
Sister Leavey - That is right. If you look at the end of page 28, you will see that it is particularly true of the deportation of the stateless Bedoons, who were sent to Damascus. Their nationality was often given as Kuwaiti, but that, in fact, is not true. On page 29 are tickets to Kuwait purchased by the Department of immigration in Canberra, and then there is a certificate which is valid only for one-way travel.

Response:

Mr Calado arrived in Australia without authorisation and his removal was the responsibility of the carrier that brought him to Australia. He claimed to be a national of Angola and arrangements for his return there were made through the South African company P&I that had been engaged by the carrier to assist with his removal. However, before he was removed from Australia the Angolan Embassy in Pretoria refused to accept Mr Calado as their national and refused to issue him with a travel document.

Based upon the information provided by Mr Calado, the Department (and P&I) conducted an investigation to ascertain his place of origin. The investigation revealed that Mr Calado was a national of the Democratic Republic of Congo (DRC). The DRC Embassy in Pretoria confirmed this and issued Mr Calado with a travel document.

Arrangements were then made to return Mr Calado to the DRC via South Africa. Mr Calado denied that he was a DRC national and insisted that he was Angolan. He was advised that he would have the opportunity to discuss his Angolan nationality with the Angolan Embassy in South Africa.

On arrival in South Africa Mr Calado was interviewed by the Angolan Embassy officials. Following this interview the Angolan Embassy provided Mr Calado with a travel document and the right to return to Angola. Given this development, and the desire by Mr Calado to reside in Angola instead of the DRC, he was removed to Angola in keeping with his wishes.

This issue is not uncommon. Persons in a similar position to Mr Calado may well belong to two countries in the sense that their home territory spans a border. Record-keeping in these countries may be very limited and it may take a country some time to ascertain where the person resides.

In relation to the removal of persons who claimed to be Bedoons, it is not the Australian government's practice to encourage, condone or require the use of false passports. From time to time it is suggested to us by detainees that they could obtain false passports for the purpose of travelling from Australia. Such suggestions are strenuously rejected and always have been.

Allegations in the ERC report that DIMIA and Australasian Correctional Management (ACM) officers encouraged detainees to obtain false passports and pay bribes to travel to third countries are not true and have been categorically denied by the Department. These claims were investigated by the Department and the Australian Federal police (AFP). The AFP has advised that its investigation found no evidence that staff of either the Department or ACM had committed any offences. The AFP investigation found that the documentary evidence did not support the claims being made to the ERC by returned asylum seekers.

When another government issues a person with a travel document, on the basis that a person has a right of residence in that country, the Department does not question that country's decision. If a person provides their own travel document and if there is doubt about the document, the Department contacts relevant authorities for comment on the document's authenticity.

It is important to note that the allegations made in relation to Bedoons all involve cases where the person voluntarily departed Australia. Persons who have travelled to Syria have obtained their own visas and have travelled by choice, either on a passport or a certificate of identity.

The Department's role is to assist people with no lawful basis for remaining in Australia to travel to a country where they hold a valid visa for entry.

(v) Sister Leavey raised concerns about Australia having removed people to dangerous situations:

Australia has deported people to danger, it has increased the dangers to asylum seekers by sending incriminating evidence and it or its agencies have become involved with false papers and corruption. The evidence in the report for the answers to the first question is from page 26 onwards…Our evidence shows that the Australian government or its agencies—such as ACM, GSL, IOM and especially P&I—have sent or attempted to send people to dangerous places…One was a Zimbabwean man whose father had founded, with others, the Movement for Democratic Change, and he had seen his father murdered. Yet, after two years in this country—at five o'clock at the end of two years—he received notice from Canberra that they had a fortnight to leave country and to return to Zimbabwe.

Response:

The evidence provided to the Committee by the Edmund Rice Centre (ERC) is based on its earlier published report "Deported to Danger". This evidence makes a number of assertions which are not substantiated. The report seeks to identify what it considers to be returns from Australia to dangerous or unsafe situations, but does not clearly acknowledge that the broad concepts of danger or safety it uses do not correlate with international obligations to provide protection. Nor does it indicate why the authors believe that general disadvantage or hardship experienced by a person after return to their homeland, which are broadly similar to those experienced by many people in these countries, are Australia's responsibility.

People in many countries can face generalised dangers, hardships and uncertainty. This does not mean that Australia has obligations to them under the specific terms of the Refugees Convention or other international instruments. Generalised considerations of danger, hardships and uncertainty do not equate to the criteria for grant of a protection visa which are set out in legislation and which must be applied by departmental and Tribunal decision-makers. The fact that an individual may experience some hardship on return does not automatically establish any entitlement to obtain residence in any country of choice.

The ERC report does not appear to test the assertions in the report. It relies heavily on the self assessment by individuals themselves to indicate the existence of danger without assessment of whether subjective views have any objectively legitimate basis. Importantly, the report does not disclose the identity of the persons cited as case studies and the ERC has not separately passed this information to the Department. This seriously limits any prospect of exploring the claims in the report and accordingly substantially diminishes any value the report might have as a resource to the Department for identifying any aspects of processing which might be improved. To the extent that there is sufficient information in the report to enable some exploration, the Department has found nothing to substantiate assertions that such people have been removed in breach of any international obligations owed by Australia.

Australia does not return anybody who is found to be a refugee and asylum seekers are not returned if they have a real chance of facing persecution.

Australia does not monitor those returned on the basis that monitoring, by its very nature, would be intrusive and could draw unwelcome attention to the individuals concerned and to those with whom they associate. These concerns are not unique to Australia. It is not general international practice for countries returning failed asylum seekers to their country of origin to monitor those individuals.

A thorough internal investigation of two cases that the Department could identify has also not revealed any misconduct or criminal behaviour by Departmental staff. The Department has been looking at the ERC's final document which was released in November 2004. DIMIA officers met with the ERC on Monday, 23 May 2005 and again on Thursday 8 September 2005 to seek further information, which might enable the investigation of any residual matters not covered in the first investigation.

The Department is waiting for information promised by the ERC of contact details of further witnesses.

20. Cancellation

(i) Mr McNally and Senator Nettle raised concerns that visa cancellation following a criminal conviction amounts to double jeopardy:

Mr McNally—Someone has done their time and yet they are further penalised as a result of the immigration implications once they are released. That is one of the public interest considerations that should be taken into account in the discretion not to cancel.

Senator Nettle—I have a view that once you have done that there should not be further punishment, but I am certainly aware of cases where people have spent less than 12 months in prison and then, as a result of the law, find themselves in detention for three to four years.

Response:

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

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

A decision to cancel a visa under s501 is not taken lightly, and all relevant information is taken into account.

In its 1998 report on the Deportation of Non-Citizen Criminals, the Joint Standing Committee on Migration accepted the view that removal of non-citizens following the commission of a criminal offence is not a second punishment. Submissions received from the Human Rights Commissioner in the context of this report also supported the Government's view in this regard.

(ii) Professor McMillan, Dr Nicholls and Mr Burnside raised concerns about the application of section 501 to long-term residents (and reliance placed on this provision as compared with s 201):

Prof. McMillan **-** ...we had received a number of complaints from people who were in detention. The general picture is that these are people who were Australian residents. Some of them came to Australia many years ago, while some came as young people. Some were even unaware that they were not Australian citizens, because they had simply grown up in Australia. Then a decision was made by the minister under section 501 of the Migration Act that, after conviction of an offence, a person failed the good character test in that section and should be removed from Australia.

The complaints to our office have, again, illustrated the complexity and sensitivity of the different issues that arise. As I have indicated, sometimes these are people who really have grown up in Australia. Most of them are people who have completed the term of imprisonment for the offence committed in Australia and their removal to another country raises distinct issues. Often they are people with close family and other connections. Sometimes the country to which their citizenship belongs are countries that no longer exist or they may be a country that the person has never visited and in which they are not proficient in the language or culture.

Dr Nicholls **-** In my submission I echo concerns expressed in July this year by two judges of the Federal Court at the use by the minister and the Department of section 501 of the Migration Act to cancel visas rather than the deportation power in section 201 of the act. The use of the different sections is important, because section 201 contains a limit whereby someone cannot be deported if they have lived lawfully in Australia for more than 10 years. This limit does not exist under section 501, and use of this section is therefore a way of overriding the limit in section 201. In the two cases I cite in my submission the individuals arrived in Australia at 27 days and at six months old, respectively, and had lived their whole lives here. I believe that people who have migrated here as children have lived essentially their whole lives here and to serve their sentence should not be deported to a country they barely remember.

Mr Burnside—There are other problems with 501. One is that some people have come here, not as refugees, to take up permanent residency but do not bother to apply for citizenship, and there are many illustrations of this problem. But the general shape of it is that people come here, sometimes as infants. They live here without becoming Australian citizens and get into trouble in their 20s or 30s. They are then deported to the streets of Croatia or goodness knows where, without any support, any of the language of the country they are sent to and without any real prospect of surviving, except at the lowest imaginable level.

Response:

Part 2, Division 9 of the Act authorises the deportation of certain non-citizens, including (pursuant to sections 200 and 201) non-citizens who have been convicted in Australia of a criminal offence that:

- was committed within 10 years of them becoming a permanent resident; and
- resulted in a sentence of imprisonment of one year or more.

Section 501 authorises the cancellation of a visa if its holder is found not to pass the character test in that section.

Section 501 achieved its current form in 1999, when Parliament approved amendments to strengthen the provisions relating to character and conduct. In his Second Reading Speech, the then Minister indicated that the amendments were designed "to ensure that persons who are found to be of character concern can be removed". Therefore, unlike the deportation power, the exercise of the character power is not subject to restrictions based on a non-citizen's length of residence in Australia, and the section does not specify any period of residence after which a non-citizen falls outside its scope.

The deportation provisions are not now used as the Department's view is that they were effectively superseded in 1999 by the strengthened character provisions.

As above, section 501 applies to all non-citizens, including those who are permanent residents of Australia. It does not specify any period of residence after which a non-citizen falls outside its scope. Thus, a resident's visa may be cancelled if it is found that they fail the character test. However, a decision to cancel a visa is not made lightly and is only made following a detailed assessment against the considerations set out in the Ministerial Direction.

The Ministerial Direction requires delegates to consider issues that relate to the non-citizen's length of residence in Australia, including:

- the extent of disruption to family, business or other ties to Australia that visa cancellation would cause;
- whether a genuine marriage (including de facto or interdependent relationship) with an Australian citizen exists;
- the degree of hardship that would be caused to immediate family members lawfully resident in Australia; and
- the purpose and intended duration of the non-citizen's stay in Australia (including any relevant compassionate circumstances).

Links with the probable receiving country, including the non-citizen's proficiency in their language and culture, are not factors referred to in the current Ministerial Direction. However, language and cultural barriers are factors to be considered in respect of any children, in the context of the best interests of the child, which is a primary consideration.

Where a visa has been cancelled under s 501, non-citizens who are onshore have rights of appeal: to the AAT (in cases of Delegate's decisions) or the Federal Court (for both Ministerial and Delegate's decisions).

(iii) Senator Nettle and Professor McMillan raised concerns about the resulting length of detention in some cases, following a s 501 cancellation decision:

Senator Nettle - …I am certainly aware of cases where people have spent less than 12 months in prison and then, as a result of the law, find themselves in detention for three to four years. This is three or four times the period for which they have been sentenced for a traffic offence or whatever it might be.

Professor McMillan - Sometimes [an issue to resolve]…results in the person being in detention for quite a long period in Australia while these issues are addressed, reviewed and so on. Indeed, some of the people within this group come within our two-year detention review.

Response:

People in detention who have had their visa cancelled under section 501 may pursue appeals through the Australian courts. In some cases this can lead to the period of immigration detention being extended. There are a number of additional factors that can contribute to extended detention periods. These include difficulty with establishing identity, difficulty in obtaining travel documentation and non-cooperation with plans for removal.

(iv) Mr Burnside and Senator Bartlett raised concerns about the lack of transparency in visa cancellation decisions made on national security grounds and the resulting detention of such persons:

Mr Burnside—The real problem of unaccountability is that ASIO will not tell anyone what it is that Mr Parkin is supposed to have said or done that justified an adverse security report. That does concern me. It seems that ASIO may have told a journalist from *The Australian* the reason for their thinking but they will not tell the lawyers.

Senator Bartlett – The broader issue there is the concern, for anybody on any sort of permanent visa or anything, about the potential for that visa to be cancelled at the click of a finger without being told why. You can then be detained, be charged for being detained and the longer you resist the more your bill goes up—all of those sorts of things.

Response:

Decisions made to cancel a visa are judicially reviewable, including decisions relating to national security.

Relevant sensitive, criminal or security intelligence might not be disclosed to the applicant (because it is protected under section 503A of the Act). However, if the decision is reviewed, the courts will have the capacity to inspect such information and decide whether it warrants such protection.

If the visa cancellation occurs because ASIO issues an adverse security assessment in relation to a non-citizen, the *ASIO Act* will provide for whether the non-citizen can seek review of the underlying basis for the visa cancellation (i.e. review of the relevant security assessment).

Once a visa is cancelled, a non-citizen becomes an unlawful non-citizen and must be detained (s189) and removed from Australia as soon as reasonably practical (s198). Section 209 stipulates that non-citizens who are detained are liable for the costs of their detention.

Every person who spends time in immigration detention incurs a debt to the Australian Government based on a daily maintenance amount multiplied by the number of days in detention. The daily maintenance amount is never more than the actual cost of detention incurred by the Commonwealth. As a matter of general policy, asylum seekers who are successful in their applications for protection visas are not pursued for the costs of their detention.

Section 210 stipulates that a non-citizen who is removed or deported (other than a non-citizen who came to Australia on a Criminal Justice Visa) is liable to pay the Commonwealth the costs of their removal or deportation.

This is to ensure all adult unlawful non-citizens bear primary responsibility for the costs associated with their detention, deportation or removal and to assist in minimising costs to the Australian community.

(v) Mr Burnside raised concerns about the removal of persons whose visas are cancelled under s 501 and the possible lack of support for them in their country of removal:

> I know of one case where a guy is living on the streets of Zagreb, I think. He speaks nothing but Australian, he has no contacts, none of the support agencies is able to help him and he is living from hand to mouth on the streets. We sent him back because he committed a low-level offence in Australia, after living here for 25 years. His wife and children are still here. It is not something we can be proud of.

Response:

Departmental policy requires that, before returning a person to another country, officers are to consider if the person has special needs which require support upon their arrival. For example, if a person has special medical needs, the Department may arrange for the person to be met by medical staff or referred to a medical facility upon their arrival. If a person is destitute then the Department may provide them with a small allowance that will allow the person to obtain accommodation, purchase food and arrange travel back to their preferred destination within the country.

Many people who are removed from Australia arrange to be met by family or friends in the country to which they are being returned. Where a person is to be returned to a country where they have not resided for a long time, they will usually be encouraged to contact any family or friends in that country. They will also often be encouraged to discuss their return with their consulate.

There have been instances where intended support arrangements are not properly effected or break down following the person's return.

As previously mentioned at page 29, DIMIA is currently developing a new Case Management Framework to provide a nationally consistent service delivery approach for holistically managing clients, particularly those who are vulnerable or have complex circumstances. Arrangements under this framework will extend to Departmental case managers working hand-in-hand with community and other service providers, as well as with our overseas missions, to ensure that, as far as practicable, clients with identified special needs are appropriately supported upon removal from Australia.

(vi) Mr Boylan raised concerns about a particular case involving the acquisition of a penal certificate:

> …on 11 September 2001, a bloke called Mohammed Haliji received the decision of the RRT that he was indeed a refugee. He was then held in Woomera pending the character and police checks. A check that the Department wanted was that he had committed no crimes while living in Seoul prior to going to Iran, where he was subsequently imprisoned and from whence he came to Australia. It was quite clearly stated by the police authorities in Seoul that they would not bother giving that sort of information out, yet we had to take an application for habeas corpus before our Federal Court. I think the documents were filed in April and the first hearing was in May. You will see on the transcript that, when the Commonwealth minister was seeking an adjournment because her counsel did not have information the court required at her fingertips, she sought an adjournment for, I think, three weeks. Mr Justice Mansfield replied that he thought three hours would be more appropriate.

The matter was adjourned for two weeks and Mr Haliji was released about seven days later. There was no explanation or reason whatsoever. The Seoul check had not come. Those sorts of things occur time and time again.

Response:

Penal clearances, which are part of the character checking assessment, are required for visa applicants aged 16 years and over for each country in which they have resided for 12 months or more in the past 10 years. The only exception is that refugee applicants are not required to obtain a penal clearance from the country from which they are seeking protection.

According to Departmental advice police clearance certificates for Korea are not generally difficult to obtain, with processing taking around three weeks and certificates mailed directly to the applicant. For those applicants seeking a penal clearance from Korea, applications are made by the client at either the Korean government offices in Sydney or Canberra or are arranged through the Australian Embassy in Seoul.

Should a certificate be deemed impossible to obtain (as is stated in Mr Haliji's case) a penal waiver could be requested with the support of the DIMIA post responsible for the country for which the waiver is sought.

The penal clearance requirement is not readily waived as it is important that every effort possible is made to ascertain whether someone seeking to live in the Australian community is of criminal concern.

21. Students

(i) Ms Rost said:

This was the student whose house was raided to find his housemate. At the same time, the officials decided to search his property, they found the payslip where he had worked 22½ hours and took him to the DIMIA centre in Sydney. He was required to pay a $10,000 bond on the spot or be detained, so he was detained for three weeks. He made subsequent legal applications and—this is really important—had the right lawyer.

Response:

Mr Alam was placed into s192 Questioning Detention when he was located at the address on 18 December 2002. At this time no decision had been made to cancel Mr Alam's visa so there was no need to request a bond. Mr Alam was taken to Lee Street Office where he was interviewed in relation to his alleged visa breach. A decision was made to cancel Mr Alam's visa and he was detained under s189 of the Migration Act.

The operating practice at that time was to advise clients that he or she can apply for a Bridging Visa, which could have conditions attached to it. One of the conditions may be the request for a bond to be paid in situations where this is deemed necessary. In determining whether a bond is required to be paid, a case officer considers the immigration history of the client. The monetary amount that is set on any bond will depend on whether the person is considered to be a high flight risk and whether he or she is likely to abide by the conditions of the Bridging Visa. Principally, a bond is imposed to ensure that the client maintains contact with the Department whilst they pursue substantive visa outcomes. The bond money is returned if a person abides by the conditions imposed, departs Australia or obtains a migration outcome.

In Mr Alam's case, the Department has no record that he was advised that he could apply for a Bridging Visa while he was at Lee Street Office, but an application for a Bridging Visa was not made following the visa cancellation. As such, Mr Alam became an unlawful non-citizen and was detained.

On 24 December 2002, Mr Alam lodged an application with the Migration Review Tribunal seeking a review of the decision to cancel his student visa. He applied for a Bridging Visa E on 2 January 2003 and was subsequently released on a Bridging Visa on 6 January 2003. One of the conditions of the Bridging Visa was payment of an $8,000 bond.

As explained above at page 34, issues raised about the operation of the student work rights provisions are being considered by DIMIA to ensure that these provisions operate fairly while remaining effective in deterring abuse of student visas.

In regard to criticisms about compliance actions, the government has agreed to fund a very significant boost in training border security and compliance staff. $50.3 million will be provided for the establishment in 2006 of a college of immigration border security and compliance.

This college will provide new compliance and detention staff with a 15 week induction program and existing staff in border security and compliance areas will complete regular refresher training each year.

There will also be enhanced training for compliance and detention staff in the period leading up to the establishment of the college, focusing on the application of "reasonable suspicion", emerging legal issues, identity investigations, search warrant training and the capacity to search and interrogate DIMIA system. DIMIA is also reviewing its procedures and policy to enhance openness and accountability, and improve its service to clients.

(ii) Ms Jockel said:

For example, in the student visa regime, if you do not get a new visa application in within 28 days you are statute barred. You have no legal redress, save and except going through the Migration Review Tribunal to the Minister. If you have been late in lodging your application because of some other delay in some other part of the Department that has been processing some other application of yours, which was subsequently refused, you have lost the opportunity to lodge a new student visa and therefore you are in a sort of no-man's-land.

Response:

International students are expected to hold a valid visa at all times while in Australia. Where a student intends to undertake further study beyond the life of their current substantive visa, they are expected to lodge their next visa application before their current visa ceases.

Students who do not lodge a further visa application before their visa ceases generally remain eligible to lodge after that date; however, failure to lodge within 28 days of visa expiry is grounds for refusal.

Where a student's last substantive visa was cancelled, and the Migration Review Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation, the student may lodge a further student visa application within 28 days of:

- the day when that last substantive visa ceased to be in effect; and
- the day when the applicant is taken to have been notified of the Tribunal's decision (under sections 368C, 368D and 379C of the *Migration Act 1958*);

whichever is later.

In certain circumstances a person in Australia who does not hold a substantive visa can validly apply only for certain visas (as set out in S.48 of the *Migration Act 1958* and prescribed in regulation 2.12 of the *Migration Regulations 1994*), namely if they:

- have been refused a visa, other than a bridging visa, for which they applied on or after 1 September 1994 and since last entering Australia; or
- were refused an entry permit and became an illegal entrant before 1 September 1994 and has not subsequently left Australia and returned; or
- held a visa that was cancelled under certain provisions on or after 1 September 1994.

These provisions are fundamental to the integrity of the migration structure that exists under the Act. They are intended to:

- encourage non-citizens who have a legitimate basis for remaining in Australia to apply for a further visa before their current substantive visa expires;
- discourage non-citizens from remaining in Australia beyond the period of effect of their substantive visa; and
- prevent non-citizens from benefiting by remaining in Australia unlawfully – that is, by acquiring migration eligibility while remaining in Australia without permission.

(iii) Ms Rost said:

> Yesterday I spoke to a student mentioned in the submission as Mr Q. He has since had his visa cancelled. He got very depressed in his second semester. He had medical certificates and he met a counsellor—an Australian gentlemen working for an Indian organisation here. So he had a lot of documented material. When he went to the interview that material was not considered at all. His medical certificates were considered to be 'inappropriate'. Then the DIMIA compliance officer consulted with a trainee and came back and decided his visa was cancelled. He was given seven days to either show a ticket to leave the country or to apply for MRT. A person can make the decision totally by themselves at that point.

Response:

There are insufficient details for us to identify the case concerned. In relation to the circumstances in which DIMIA can take account of personal circumstances that explain the reasons for a visa breach, it is important to note that the law at that time provided little ability for the Department to take exceptional circumstances into account. However, from 8 October 2005, Migration Regulation 2.43(2)(b) was amended to allow for exceptional circumstances beyond the student's control to be taken into consideration prior to cancelling a student visa for a breach of condition 8202.

Serious illness, hospitalisation, bereavement of close family members (of either the visa holder or their spouse) or major political upheaval or natural disaster in the home country requiring a student's emergency travel may be considered by a delegate in determining whether or not to cancel a student visa for a breach of a student's visa conditions. All claims must be supported by documentary evidence and the onus is on the applicant to satisfy the delegate that the circumstance was beyond their control.

In the case of medical certificates, the certificate should be signed by a qualified medical professional and clearly show the link between the medical condition and the applicant's inability or otherwise to meet their course obligations. It is not the intention that 'exceptional circumstances beyond control' encompasses such things as difficulties in adjusting to living in Australia or academic life, relationship problems, financial difficulties or generally feeling "depressed" about circumstances ie. where the depression is not clinically diagnosed by a qualified professional.

DIMIA has a range of measures in place to ensure that international students are aware of the requirements of their student visa, and that they understand the implications of not meeting these requirements.

All overseas international students who are granted a student visa are provided with an approval letter, usually sent to them by mail or e-mail. This letter provides students with information about their visa, such as its type and duration. The letter also sets out the conditions that have been imposed on the visa, and the meaning and effect of each condition.

DIMIA's State and Territory offices undertake regular outreach activities at the local level, visiting universities and other institutions during student orientation periods and conducting information sessions for international students. Visa conditions, particularly those relating to study and work, are a central focus of these sessions. Migration officers based in Australian missions overseas also provide training locally to education agents, to assist them in advising their clients about student visa requirements when considering Australia as a destination for study.

In addition, information about visa conditions is made publicly available on the Department's website.

(iv) The Chair (Senator Crossin) and Ms Rost said:

Chair – Are you suggesting that, as you mentioned in your submission, under condition 8202, which relates to academic results and attendance, if somebody is sick, either physically or mentally, and cannot attend classes and they get documented evidence to prove that, it is not considered adequate by DIMIA?
Ms Rost – In the example of the student Mr Q, who is mentioned on page 38 of our submission, this was the case. This is not just one case. It seems to be a blanket response of applying the act without discretion. It seems that the compliance officers are not allowed to apply any discretion, and the MRT is also not permitted to make any discretionary decisions.

Response:

On 8 October 2005, Migration Regulation 2.43(2)(b) was amended to allow for exceptional circumstances to be taken into consideration prior to cancelling a student visa for a breach of condition 8202. This amendment ensured that students who comply with the law and attend a DIMIA office within 28 days from the date of a section 20 notice will receive similar treatment to students who apply for revocation under section 137L after their visa has been cancelled under section 137J of the Act.

Consequently, exceptional circumstances such as serious illness, hospitalisation, bereavement of close family members (of either the visa holder or their spouse) or major political upheaval or natural disaster in the home country requiring the students emergency travel may be considered by delegate in determining whether or not to cancel a student visa for a breach of student visa conditions. All claims must be supported by documentary evidence and the onus is on the applicant to satisfy the delegate that the circumstance was beyond their control.

(v) Ms Rost said:

What is more, in that college there seems to be some unscrupulousness happening. The students were actively discouraged from changing providers. The students felt that, if they did change educational provider, they would be punished. The student who suicided attended this college, according to Mrs Sudhasaini, who is a lecturer in it.

She said the attitude of the management was unfriendly. She said quite a few students at the college ended up in Maribyrnong detention centre. So, what can happen is that the students can be immediately put into detention. I am still trying to find out what situations they can be put immediately into detention for.

Response:

The first visa granted to all international students is subject to condition 8206, except where the student is sponsored by AusAID or Defence. Condition 8206 generally precludes students from transferring from the education provider of initial enrolment to another provider during the first 12 months of their course. This condition was introduced to offer some protection to the investment of education providers against poaching of students on arrival in Australia, where considerable expense may have been outlaid on marketing initiatives.

Where a student is undertaking more than one course, the condition limits their ability to change education providers for the duration of all preliminary courses as well as the first 12 months of their principal course. Students who wish to change education providers within the first 12 months may lodge a visa application to seek permission to do so. These students are required to show exceptional circumstances justifying their change in enrolment.

Where a student is found to have breached condition 8206 by changing providers without being granted permission to do so, their visa may be subject to cancellation.

This requirement is currently under review as a result of the 2004 *Evaluation of the ESOS Act* on the basis that decisions on changing providers are more appropriately addressed as education matters under *ESOS* legislation.

(vi) Ms Rost and Senator Parry said:

Ms Rost – ... DIMIA also states that no students have suicided in detention, yet an Indian student, tragically, killed himself in Maribyrnong in 2001…detained students, as well as those removed due to visa breaches or DIMIA errors, have been treated disgracefully and denied natural justice.
Senator Parry – Moving back to the issue you raised in your opening submission that no students had committed suicide in detention, you then indicated an Indian student had committed suicide but not in detention. I am just clarifying that it was not in detention.
Ms Rost – Yes, it was in detention. This is according to the former lecturer at St George Institute for Professionals. She can verify that. Also, I have been told by some Indian consular officials that students have committed suicide. This is a question that Senator Carr asked. DIMIA replied—that is in their supplementary information, 220a—that a student had died at Villawood and there was a coronial inquiry and no suspicious circumstances were found. However, this former lecturer maintains that a student from this particular college did suicide in detention. Again, some things might be said that a particular officer may have found out, but it is just not properly collated. The information is simply not collated. There are no proper statistics in DIMIA about the length of stay in detention.

Response:

Departmental records indicate that no Indian national has committed suicide while in immigration detention.

Available records indicate that there have been fourteen deaths in immigration detention between April 1998 and October 2005. Of these deaths, the Coroner found that one was as a result of suicide. The Coroner delivered an open finding on two other deaths as to whether they were accidental or intentional. Of the remaining deaths, in those cases where coronial inquiries have been completed, the causes of death identified included terminal illness, ongoing drug and alcohol-related illnesses, and complications during surgery.

The one case where there was a finding of suicide occurred at Villawood Immigration Detention Centre in July 2001 and involved a person who was detained after the cancellation of their tourist visa.

The Department keeps records of the number of people detained and the length of time spent in immigration detention. According to Departmental records, between September 2002 and 21 October 2005, 1375 people were detained as a direct result of overstaying their student visa or having their student visa cancelled.

Of these 1375 people, 17 remain in immigration detention as at 21 October 2005.

The table below shows the length of detention for these 1375 people.

Period of detention	Number of clients
Less than a day	34
1 to 7 days	596
1 to 4 weeks	514
1 – 3 months	168
3-6 months	32
6-12 months	24
1 year or more	7
TOTAL	1375

(vii) Ms Rost said:

If their student visa has rightly or wrongly been subject to mandatory cancellation, they become unlawful citizens and may be detained before being required to leave the country. If they then decide to contest the alternative of deportation but cannot afford a bond of up to $10,000 for the granting of a bridging visa, some overseas students have continued a nightmarish journey in detention rather than returning home to face disgrace for their family, huge education debts incurred, a totally ruined reputation and great mental stress. It is extremely difficult to get a cancelled student visa reinstated. Only about five to 10 per cent of students succeed in the migration review tribunal. An experienced migration agent in Melbourne describes this as disgraceful and onshore counselling, which the *ESOS* Act obliges universities to provide, as a joke. Another immigration agent believes: ‘the real problem is the cowboy attitude of many DIMIA officers, who have a “deport, deport!” mentality, rather than trying to understand the student’s point of view. It is exacerbated by the mandatory cancellation provisions and by the lack of proper accountability of DIMIA.

Response:

The Tribunal may set aside a decision to cancel a student visa (or a decision not to revoke the cancellation of a student visa) on the basis that the student visa should not have been cancelled. Most persons who have had a student visa cancelled are granted a bridging visa pending the outcome of the MRT's review.

In 2004-05, the Tribunal set aside the decision to cancel a student visa in 33% of the cases decided. That is, in 352 of the 1,069 cases decided.

In 2004-05, the set aside rate was 45% for those cases where the applicant was in immigration detention. That is, in 17 of the 38 detention cases decided.

(viii) Ms Rost said:

> With the MRT waiting lists it takes six months for an MRT hearing to happen. If a student chooses the MRT option—which, as I said, only has about a five to 10 per cent chance of having the visa reinstated, according to migration agencies…

Response:

The allocation of cases to Members is determined by the Tribunal's caseload and allocation policy. All student visa cancellation cases are allocated Priority 1 (highest priority) status, and the Tribunal aims to finalise student visa cancellation cases within 90 calendar days.

In individual cases, there may be requests from applicants for hearings to be rescheduled or for applicants to be given more time to present submissions or further evidence.

In 2004-05, the average processing time for all student visa cancellation cases was 152 calendar days. For applicants in detention, the average processing time was 91 calendar days.

(ix) Ms Rost said:

> A student applied for the minister's discretional opinion under section 351 to have his condition reviewed while he was in detention. The minister did not even get all the letters that I wrote initially because the senior officials were not forwarding them to the minister. They were saying that there was no new information attached, yet there was new information attached. In the supplementary confidential information there is a letter to the Territory director, Ms Nelly Siegmund, and a letter to the minister as an example of some of the many letters I have written to the minister, the Attorney-General and the minister for education.

Response:

The Minister's discretion under section 351 is operative only following a decision by the MRT. The Minister has issued guidelines to the Department indicating the types of cases where she may wish to consider whether to intervene if she believes it is in the public interest to do so. Whether it is in the public interest to intervene is a matter for the Minister to determine personally.

Repeat requests for the Minister to intervene would be brought to her attention where the new information that is provided is relevant to the circumstances described in the Minister's guidelines.

(x) Ms Rost said:

> It is the *ESOS* Act, unscrupulous providers and lack of information given to the students overseas. For example, last night, when I asked, ‘Did you know about condition 8202 or condition 8105 before you arrived here?’ Mr Q said no, he did not know. I said, ‘Do you mean to say that no immigration authorities explained that to you in India?’ He said he only found out about those conditions—the 80 per cent attendance—when he arrived here.

Response:

As explained above at page 101, DIMIA has a range of measures in place to ensure that international students are aware of the requirements of their student visa, and that they understand the implications of not meeting these requirements.

All overseas international students who are granted a student visa are provided with an approval letter, usually sent to them by mail or e-mail. This letter provides students with information about their visa, such as its type and duration. The letter also sets out the conditions that have been imposed on the visa, and the meaning and effect of each condition.

DIMIA's State and Territory offices undertake regular outreach activities at the local level, visiting universities and other institutions during student orientation periods and conducting information sessions for international students. Visa conditions, particularly those relating to study and work, are a central focus of these sessions. Migration officers based in Australian missions overseas also provide training locally to education agents, to assist them in advising their clients about student visa requirements when considering Australia as a destination for study.

In addition, information about visa conditions is made publicly available on the Department’s website.

(xi) Ms Rost said:

> In the case of students who breach the other condition of not working more than 20 hours, that is draconian as well. A student can have worked two hours more and then have the entire visa cancelled and be sent back, even if they are one subject off a master’s degree. There was another situation with Mr B, who Sister Baker and I met. His father had been sick; he went to India, got worried, met him, came back and failed the subject. In order to repeat the subject, he had to get a migration agent to get the visa extension—which all cost money—and then pay $5,000 for an extra term’s fee. He was caught working extra and was immediately detained. He could not afford the $10,000 bond that goes with the bridging visa. So he was one of the three students that remained for 12 months in Maribyrnong. He ended up giving up and going.
>
> The conditions of the visa are just totally unrealistic for the needs of students because a lot of them need to work here to pay for living costs. They should be allowed to work for longer. There should not be blanket cancellation of the visa and then possible detention.

The Act is much too harsh for the students' needs here. They do have to work. For example, if the students sitting in Mr A's college, at the St George Institute for Professionals, were required to stay eight hours a day in the college, they were too exhausted to even go home and work or to find some other work. Students are working night shifts. They are working at petrol bowsers, in 7-Elevens or as taxi drivers. Anecdotal evidence lately is that DIMIA has been targeting student taxi drivers. Recently, I have been told that about 60 of them had their visas cancelled straightaway and were deported. When they work too much and breach condition 8105, they have absolutely no hope of any discretionary hearing. It is extreme.

Response:

To be eligible for a student visa, applicants are required to demonstrate that they have access to funds sufficient to cover tuition costs and to support themselves while studying full-time.

International students are eligible to seek permission to work while in Australia, and may use this work entitlement as an opportunity to gain experience in their chosen field of employment or to explore the Australian culture and way of life.
While income from this work may supplement funds previously shown for visa grant, it is not intended that students should seek employment in order to pay tuition fees or meet living expenses.

International students who have been granted permission to work are able to work up to 20 hours per week while their course is in session. During vacation periods, there is no limitation on the number of hours they may work per week. The 20 hour limitation does not apply to work that was specified as a requirement of the course when the course particulars were entered in the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS).

A student in Australia whose student visa has been cancelled is eligible to seek review of this decision.

(xii) Ms Rost said:

In the case of Mr A, he saw a compliance officer. He might be eligible to be one of the 8,000 students that have recently been absolved of their visa breach because the Department now claims that the wrong form was given to the education providers. It claims that they were not given the option to go to any DIMIA office rather than the central office. They were supposedly directed to a particular office, although they could in fact have gone to any office. There are a few other issues around that. But suddenly 8,000 students are now being notified that their visas were incorrectly cancelled. One migration agent says there is actually probably about 20,000 others. These are supposedly the ones that did not attend the interview, but there are many who did. Again, that is to be investigated.

Response:

In *Uddin v Minister for Immigration and Multicultural and Indigenous Affairs*, the Federal Magistrates Court found that the notice given by an education provider to a student did not meet mandatory legal requirements and, therefore, did not have the effect of cancelling the student visa.

The notice set out how and where a student may report to DIMIA where he or she fails to comply with the attendance or academic requirements attaching to their student visa. In this case, the notice stated that the student had to appear before a 'compliance officer,' not simply an officer, when attending an immigration office. The Court held that this misdescription of 'officer' meant that the notice did not strictly comply with the legal requirements of section 20 of the *Education Services for Overseas Students Act 2000*. Thus, the notice did not have the effect of notifying the student of the visa cancellation, nor of setting in train the automatic cancellation process. As a result, if the student visa had not expired or ceased as a result of some other ceasing action, it will continue to run its course.

After this decision, DIMIA identified the students who had received these notices and, on the evening of Tuesday 16 August 2005, performed a system reversal of 8,450 automatic cancellations that flowed from the section 20 notices. The defective section 20 notice was revised in July 2005.

DIMIA has implemented a comprehensive public information strategy to contact students who may have been affected by the court case. This strategy included press advertisements, letters where we have addresses and working with education providers. The letters encourage students to make contact with the Department so that they may clarify impact of the decision in their case.

As each case comes to notice it is handled on an individual basis in an open, fair and reasonable way. Of the students who now hold a valid student visa as a result of the *Uddin* decision, those who are currently enrolled in a registered course are able to continue their study. No compliance action will be taken unless a further breach occurs. Those students who are not currently enrolled will be given the opportunity to obtain enrolment in a registered course or apply for another type of visa before any compliance action is taken. Students who do not intend to enrol in a registered course or apply for another visa will be given the opportunity to depart voluntarily before any action is taken to cancel their visa.

22. Removal Pending/Residence Determinations

(i) Ms Domicelj said:

One of the issues has also been that we have been calling for consistent standards across Australia on how residence determination operates and the entitlements that people have. I and others have noted in meetings with DIMIA recently that it would be tremendous if those same consistent approaches could be applied to BVE releases. What we tend to hear via word of mouth, through chatting with counterparts in other states, is that there appears to be no consistency whatsoever.

Response:

The *Migration Act 1958* has been amended to provide the Minister for Immigration and Multicultural Affairs with a personal, non compellable power to specify alternative detention arrangements for a person's detention and conditions to apply to that person should it be in the public interest to do so.

The Department works with Non-Government Organisations (NGOs) to make sure that when clients are placed in residence determination arrangements in the community, they are properly supported. The NGOs are funded by the Department to source housing for the families and allow payment of their bills and other living expenses. The NGOs also provide case officers to assist people living in the community under residence determinations and to ensure they have access to the relevant services and social support networks. These arrangements are tailored to meet the individual immigration detainee's specific needs and as such may vary from person to person. Conditions attached to the placement of a person in residence determination arrangements are also set to meet individual circumstances and legislative requirements.

In other circumstances, a Bridging E Visa (BVE) may be issued to a non-citizen permitting the person to remain in Australia. BVEs are granted to non-citizens who are not entitled to any other visa, allowing them to remain in the community for a specified period or until a specified event. Such events include: preparing or awaiting the determination of an application for a substantive visa; allowing the person to make arrangements to depart Australia; or preparing or awaiting the outcome of a hearing to review the refusal of a substantive visa application or the cancellation of a visa.

Delegates of the Minister grant BVEs in accordance with the Migration Regulations and Departmental policy. These determine what conditions, if any, are attached to an individual's BVE and decisions are made on a case-by-case basis.

(ii) Ms Domicelj said:

The core issues relate to the lack of a time frame for the visa to evolve into some kind of permanent resolution. The removal pending bridging visa essentially replicates the limbo that people may have been experiencing in their indefinite detention situation on the outside, with Medicare and work entitlements. It is still a limbo.

Response:

The Removal Pending Bridging Visa (RPBV) was introduced specifically for use where the person's substantive status could not be resolved in the short term, particularly where removal is considered appropriate but is not reasonably practicable at that time even if the person cooperates with removal efforts. The alternative in those circumstances would be continuing immigration detention.

The RPBV provides a mechanism for them to be released from detention and provided with benefits such as work rights, Centrelink benefits and Medicare. Efforts to substantively resolve the person's status continue while they hold an RPBV.

(iii) Mr Clutterbuck said:

We do have a client who is on a residence determination at the moment. We referred to her case within the submission as well. It all happened at once for her, in some ways. She was offered different sorts of visas. She was offered a removal pending bridging visa and she was offered a residence determination visa, and there was also a bridging visa which came up. We were in a position where we had to advise her about the best option. She also had a daughter in detention who was fairly severely disabled. She was wheelchair bound, basically, so of course we wanted to get her out as soon as possible. So she was released under a residence determination in the end.

Our point of view is that the conditions are fairly reasonable. She seems to be doing quite well. It was certainly a great relief when the Red Cross became involved. From a case management point of view, it suddenly became much more normal and options started to arise for her. Arrangements were made for her accommodation and the daughter's accommodation in an appropriate house. I think an occupational therapist was even organised to look at the daughter's particular needs. We found that quite ironic, seeing as no consideration had been given to that for the nine months or so that she was in detention.

The one black spot remaining is the lack of an identity document for her. She is still in the community in Melbourne at the moment and she has no identity documentation to prove who she is or that she is legally within the community. We have certainly talked with her about the ironies of that. If she were stopped by the police and she had no identity documentation, the police would say, 'Maybe we will have to detain you as unlawful,' and she would say, 'I'm already in detention here in the community.' That highlights in some ways the absurdity of the residence determinations. We do, of course, agree that they are better than nothing. One suggestion we have made in the submission is a half-way step, whereby when someone has been on a residence determination for a period of time they would then become eligible to be considered for a bridging visa. They would move out of the situation where they are technically in detention while wandering around in the community and move onto a normal bridging visa.

Response:

Circumstances of the particular case
Alternatives to an immigration detention facility for this family were under active consideration for some time prior to the introduction of the legislation which enabled the Minister to use her personal non-compellable power to place a person in the community under residence determinations arrangements.

Indeed, bridging visa options were open to the clients but they chose to pursue a residence determination because of the level of support they would receive.

Following liaison with an NGO and the development of suitable support and care arrangements to meet the very specific needs of this family, they were placed in the community under residence determination arrangements.

It should also be noted that a high level of care was provided while the clients were in detention. The daughter had surgery while in immigration detention for a hip problem that occurred prior to her detention. As a result of this surgery and in accordance with medical advice she was using a wheelchair. This was to be followed by a few weeks on crutches and ongoing physiotherapy.

Identity document issues

When a person is placed in the community under residence determination arrangements they are provided with a letter that explains that the person is subject to residence determination arrangements, the conditions which the person must abide by, and relevant contact details of both a Departmental liaison officer and the NGO's Community Care Liaison person. The person is instructed to carry this letter (or a copy of it) with them at all times.

It is contemplated that if such a person was to be located by the Police, they could produce this letter and the Police are then able to contact the Department to verify the person's status, arrangements and conditions associated with their residence determination.

Liability/duty of care issue

This is a complex legal issue which the Department has considered in detail. Legal advice obtained by the Department indicates that the Commonwealth's duty of care is dependent on a number of factors, including the Commonwealth's prior knowledge of circumstances, the conditions placed on the person in residence determination arrangements and the foreseeability of any incident.