CHAPTER 2

PROCESSING OF PROTECTION VISA APPLICATIONS

2.1 Much of the evidence received by the committee during the course of this inquiry related to issues to do with the processing of protection visa applications and that is the focus of this chapter (that is, the primary assessment of visa applications). The next chapter examines the processes available for visa applicants to appeal against an unfavourable decision (that is, the secondary assessment of visa applications).

2.2 The Migration Act (and the associated Migration Regulations) provides the statutory framework under which DIMA delivers the Government's migration and humanitarian programs.[1] The Migration Act regulates the travel to, entry and stay in Australia, of people who are not Australian citizens. It establishes a visa regime under which all persons who are not Australian citizens must hold a valid visa in order to come to and remain in Australia.

2.3 Appendix 5 provides general background on the operation of the Migration Act and the Migration Regulations, particularly in relation to the lodgement and assessment of protection visa applications, both offshore and onshore. Appendix 5 also looks at issues raised in other recent reviews of the Migration Act, and their findings and recommendations.

Issues raised during this inquiry

2.4 During the inquiry submitters and witnesses gave evidence to the committee in relation to a number of issues, including:

- inconsistent and arbitrary decision-making by DIMA;
- delays in processing applications or advising applicants of outcomes;
- failure to interview protection visa applicants;
- use of inadequate and inappropriate interpretation services;
- a lack of appropriate knowledge, information and training;
- questionable quality of information used in decision making;
- the existence of an adversarial and hostile culture within DIMA; and
- restrictions on applicants' access to legal advice and assistance.

2.5 These issues are discussed in detail below.

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1 DIMA, *Submission 205*, p. 5.

Inconsistent and arbitrary decision-making by DIMA

2.6 Several submissions criticised the quality of decision-making by DIMA. Instances were cited of inconsistent and arbitrary outcomes, a lack of transparency in decisions and the number of successful applications for review as evidence of poor decision-making.

2.7 The Catholic Migrant Centre (CMC) advised the committee that:

> We have serious concerns about the quality of decisions made by DIMA with respect to protection visa applications. In our experience DIMA rejects a very high proportion of applications; the reasoning provided in written decisions is often deficient; and a large proportion of DIMA's decisions are over-turned on review. [2]

2.8 A Just Australia (AJA) also pointed to the proportion of DIMA's decisions over-turned on review. It argued that the available data on the processing of claims 'suggests a systemic failure to properly identify refugees at the initial case assessment stage by DIMA'. That is:

> According to the [2003-2004] annual report of the Refugee Review Tribunal (RRT), the percentage of cases in which the original determination was set aside rose from 5.7% in 2002-03 to 12.7% in 2003-04. That is, one in eight asylum seekers appealing a primary determination was later determined to be a refugee by the Tribunal. Such a high number of incorrect primary decisions is of grave concern.[3]

2.9 AJA also focussed on the set-aside rates for decisions on protection visa applications from particular countries. In its view, these provided evidence that 'the present system is unable to adequately make primary determinations to grant protection to those who in need'. It noted, for example, that:

> … 89.8% of primary decisions regarding cases from Afghanistan were overturned on appeal to the RRT (up from the already high 32.2% in 2002-03). This is a staggering figure and must surely indicate a fundamental break down in the assessment of asylum seekers from Afghanistan.
>
> It is also notable that the RRT set aside rate for primary decisions on cases from reports Iran, Turkey, Egypt and Pakistan was over 50%, much higher than overturn rates for other countries.
>
> It is disturbing that the initial system of case assessment could produce such high error rates. It is also of concern that each of these countries, Afghanistan, Iran, Turkey, Egypt and Pakistan, are predominantly Muslim countries. This suggests that the Department's country advice in these cases was lacking at the time the cases were initially determined, and raises

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2 CMC *Submission 165*, p. 8. See also Project SafeCom , *Submission 8A*, pp 2-3; Falun Dafa Association of NSW, *Submission 143*, p. 4; CASE for Refugees, *Submission182*, p. 2.

3 AJA, *Submission 184*, pp 6-7.

> serious questions about the ability of the Department to properly assess the claims of those from the Muslim world.[4]

2.10 DIMA rejected suggestions that officials (and members of the Refugee Review Tribunal, RRT) have a predisposition to refuse applications by asylum seekers. DIMA referred to the approval rate of asylum seeker applications in Nauru where applications processed by both DIMA officers and UNHCR officers were 'broadly in alignment of each other.' Also cited was DIMA's approval rate at the primary decision-making stage for unauthorised boat arrivals that came between 1999 and 2001. DIMA noted that 85 per cent of the Afghani nationals and 89 per cent of the Iraqi nationals in this category were approved at the primary stage. As a representative from DIMA explained:

> I do not think you would have those kinds of rates of acceptance of people as refugees if there were some predisposition to be refusing cases, or some negative state of mind. Those rates are very high and, looking at those particular statistics, I do not know of any other country in the world that had, for those case loads, such a high positive determination rate at the primary stage. So I think that, if you look at the big picture indicators, and whilst there might be dispute and difference of view over cases that were not found to require protection, I think those approval rates—of 85 or 89 per cent for those particular nationalities, Afghans and Iraqis, at that stage— indicate that cases were being looked at in a positive way and with an open mind.[5]

2.11 DIMA also stressed that, when considering RRT set-aside rates, it had to be recognised that the RRT provides applicants with the opportunity to present new claims and takes into account any changes in country information that have occurred since DIMA's primary decision.[6]

2.12 The Asylum Seekers Resources Centre (ASRC) advised the committee that:

> 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.[7]

2.13 Similar concerns were raised by the Refugee Advocacy Service of South Australia (RASSA). It advised the committee that:

> This seems to have been one of the features of the whole detention regime from day one – the arbitrary nature of the decisions that are made and the

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4 AJA, *Submission 184*, pp 6-7.

5 *Committee Hansard*, 11 October 2005, p. 27.

6 DIMA, Answer to Question on Notice, 25 October 2005, p 3.

7 Mr Birrs, *Committee Hansard*, 26 September 2005, p. 71.

> lack of transparency of those decisions. Time and time again we have come across families where half of the family has been granted a visa and allowed out of detention and the other half has not. They are in identical circumstances. There just seems to be no rationale for that. We cannot explain it. There is no transparency and there is no right to review those decisions. We encountered that right from the early days at Woomera and it continues to be a feature of the current regime.[8]

2.14 These concerns were echoed by a representative of the Legal Aid Commission of NSW (LACNSW):

> My number one concern, and the concern of many applicants, is that decision making appears to be quite arbitrary and inconsistent. It is almost as if applicants feel that their case depends not on the quality of their application, but on who the decision maker is.[9]

2.15 The Albany Community for Afghan Refugees (ACAR) cited a particular instance involving a group of asylum seekers affected by the '7 day rule'.[10] The committee was advised that all, but one, successfully requested the Minister to waive the operation of the rule and were granted permanent protection visas. In this one case, the person's route to Australia was the same as the others and had been undertaken in similar circumstances, yet he was not offered the chance to appeal to the Minister.[11]

2.16 DIMA's response to criticism of arbitrary and inconsistent decision making was to note that visa applications are processed on a case-by-case basis on their individual merits in accordance with the provisions of the Migration Act and Migration Regulations. In assessing applications, decision-makers performed an 'inquisitorial' – as opposed to an adversarial – function in actively exploring and testing the applicants' claims. This, DIMA argued, could result in different outcomes in cases with similar circumstances. A person may appear to have the same protection claims as another person, for example, but their profile and risk of persecution may be quite different. DIMA noted that 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.[12]

2.17 DIMA also stressed that no quota for refusal or approval rates is imposed on protection visa decision-makers and that extensive processes are complied with to ensure that protection is provided in appropriate cases. It pointed to requirements to

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8 Mr Harbord, *Committee Hansard* , 26 September 2005, p. 16.

9 Ms Elizabeth Biok, *Committee Hansard*, 28 September 2005, p. 62. See also comments of Ms Dymphna Eszenyi, Law Society of South Australia, *Committee Hansard*, 28 September 2005, p. 3.

10 The '7 day rule' applies when an asylum seeker, enroute to Australia, spent more than 7 days in a country where they could have sought protection.

11 Albany Community for Afghan Refugees, *Submission 177*, p. 4.

12 DIMA, Answer to Question on Notice, 5 December 2005, p. 37.

consider all relevant information; to grant a protection visa where satisfied that statutory criteria are met; and to provide applicants with an opportunity to comment on any adverse information that is being considered by the decision-maker.

2.18 DIMA noted that Australia's protection visa approval rates compare favourably with those in many European countries. The set-aside rate for its decisions in the RRT also compared favourably to those for other Australian tribunals. DIMA argued that this demonstrated that its decision-makers will generally give the applicant the benefit of the doubt when it comes to establishing the applicant's identity, origin and claims, particularly where an applicant lacks any documentation.[13]

2.19 DIMA noted that apparently inconsistent outcomes could arise for many reasons including changing circumstances within, or information concerning, applicants' countries of origin. While primary decisions to refuse protection visas are based on an assessment of available country information and the assessment may be entirely appropriate at the time, changed country circumstances and new country information can lead to applications being reassessed and provide different outcomes at the secondary decision-making or ministerial discretion decision-making stages of the refugee determination process.[14]

Committee view

2.20 The committee notes DIMA's advice that Australia's protection visa approval rates compare favourably with those in many European countries and also to those for other Australian tribunals. Nonetheless, it notes with some disquiet the consistently high and increasing proportion of certain visa-related decisions being set-aside by the review tribunals.

2.21 The Migration Review Tribunal (MRT), for example, set-aside DIMA's non-protection visa decisions in 47% of all cases that are brought before it, with the set-aside rate for decisions relating to certain visa types being consistently above 50% over the last five years. The MRT's overall set-aside rate also appears to be rising.

2.22 There has also been a significant increase in the Refugee Review Tribunal's (RRT) overall set-aside rate in 2004-05, with the set-aside rate for Iraqi and Afghani related decisions in that year being approximately 90 per cent.

2.23 The committee acknowledges that both the MRT and the RRT have indicated that these set-aside rates are explicable in part by the availability of further evidence and information at the time of review.

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13 DIMA, Answer to Question on Notice, 5 December 2005, pp 44-45.

14 DIMA, Answer to Question on Notice, 5 December 2005, p. 14.

Delays in processing applications, advising decisions and issuing visas

2.24 Several submissions expressed concern at the time taken to process protection visa applications and that people were, as a result, being unnecessarily detained.[15] Most submissions on this issue acknowledged that a short period of migration detention for unlawful arrivals may be necessary to enable security and health checks to be carried out in relation to a protection visa application. However, submissions argued the period of migration detention should be finite and limited and that DIMA should bear the onus of proving that any ongoing detention is necessary.[16]

2.25 LACNSW advised the committee that 'onshore processing of protection visas can be marred by long delays, especially in the very early and then the later stages of the determination process.' It argued that these delays were the result of the time taken by DIMA to allocate case officers to new protection visa applications and in obtaining ASIO security checks.[17]

2.26 The Law Institute of Victoria (LIV) cited case studies of 'unjustifiable and unnecessary delays' at the primary application stage and at review.[18] The LIV also highlighted the point that delays were not restricted to applications lodged in Australia, but also arose in respect of applications lodged with certain of Australia's s overseas embassies. It referred to DIMA's *Manager's Guide to Visa Grant Times by Subclass (June 2005)* and argued that it:

> … indicates that while a Provisional Spouse (subclass) visa only takes 10 weeks to process at the London Post, the same visa class takes 51 weeks at the Ho Chi Minh Post in Vietnam. Likewise, a Prospective Marriage visa at the London Post takes 12 weeks, while at the Ho Chi Minh it takes 77 weeks.[19]

2.27 The Law Society of South Australia (LSSA) noted that 'processing times for protection visa applications are subject to excessive delay'. It suggested that this was due in part to the number of primary refusals by DIMA at the TPV and PPV application stage. It noted that:

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15 See for example Hopestreet Urban Compassion, *Submission 30*, p. 1; Catholic Migrant Centre, *Submission 165*, pp 2-3; Legal Aid New South Wales, *Submission 166*, pp 10-12; Albany Community for Afghan Refugees, *Submission 177*, p. 4; CASE for Refugees, *Submission 182*, p. 2; Law Institute of Victoria, *Submission 206*, p. 25; NSW Refugee Health Service, *Submission 209*, p. 5.

16 Hopestreet Urban Compassion, *Submission 30*, p. 1; Catholic Migrant Centre, *Submission 165*, pp 2-3; Law Institute of Victoria, *Submission 206*, p. 25.

17 Legal Aid NSW, *Submission 166*, pp 10-11.

18 LIV, *Submission 206*, p. 25. The two cases involved delays of over a year in cases which LIV suggested warranted priority decision-making.

19 LIV, *Submission 206*, p. 25.

> For TPV [temporary protection visas] applicants and holders, a majority of whom originate from Iraq and Afghanistan, around 90% of these primary refusals have been overturned by the Refugee Review Tribunal.[20]

2.28 The LSSA argued that the temporary protection visa (TPV) system was itself a cause of undue delay. In its view, the use of the TPV – which were valid only for 3 years after which applicants had to reapply for protection – had 'extended processing periods' and 'prolonged decision making process'. This was because:

> Each individual claim must be evaluated at least twice, possibly more if the decision is appealed, necessitating the inefficient allocation of resources.[21]

2.29 Compounding the problem, in the LSSA's view, was DIMA's policy that, when assessing a further protection visa application by a TPV holder, decision-makers had to form a fresh view on whether Australia has protection obligations to the applicant. The LSSA argued that this policy approach is both costly and flawed:

> The appropriate approach is to continue the prior recognition of refugee status unless there have been fundamental, stable and durable changes in the country of origin. Decision makers should be required to determine in the first instance whether such fundamental and durable changes have occurred, rather than requiring applicants to again prove themselves to be in need of protection.[22]

2.30 The time taken to obtain security or character clearances for protection visa applicants was cited in submissions as a reason for significant delay. The LSSA advised the committee that:

> DIMA itself admits that this can cause delays of up to a year in the processing of protection visa applications, adding to the uncertainty and distress for applicants.[23]

2.31 Submissions and witnesses acknowledged that many of these delays were beyond DIMA's control due to the need to rely on other agencies or foreign governments to provide the required information. The LIV, for example, advised the committee that:

> DIMA is practically powerless when it comes to expediting those enquiries. DIMA officers can and frequently do follow up these matters but because of the apparent lack of accountability on the part of ASIO those efforts are often not rewarded. We have been advised by Onshore Protection officers that clients can expect to wait nine months for security clearances to be completed.[24]

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20 LSSA, *Submission 110*, pp 4-5.

21 LSSA, *Submission 110*, pp 4-5.

22 LSSA, *Submission 110*, pp 4-5.

23 LSSA, *Submission 110*, p. 4.

24 LIV, *Submission 206*, p. 22.

2.32 Other witnesses argued that unreasonable delays occurred even after an applicant had been found to be a refugee and all necessary documentation and checks had been provided or undergone. The Catholic Migrant Centre (CMC) said it was their experience that DIMA often takes 'an unreasonably long time to issue a visa once an applicant has provided all necessary documentation including a police clearance and health checks.' It advised the committee that:

> It is not unusual for a client to wait over 4 months for a visa to be issued after providing all necessary documentation. Whilst this may not sound like a long time, given the clients' circumstances we submit the delay was unreasonable. Like some other asylum seekers in the community, they are forced to survive on charity, unable to work and unable to begin the process of reuniting with their families who are often also refugees in difficult circumstances.[25]

2.33 The Albany Community for Afghan Refugees (ACAR) referred to cases where long delays had occurred in issuing permanent protection visas. It cited one case in which a visa was not received until 19 April 2005 after it had been remitted to DIMA for reconsideration in late June 2004. It also claimed that an applicant in another case, who had appeared before the RRT in November 2003, did not receive a visa until February 2005.[26]

2.34 A key concern in evidence to the committee was the impact that such delays in processing or granting protection visa applications can have on asylum seekers. It was argued that such long delays can be devastating on applicants, especially those in immigration detention. Delays can lead to a sense of insecurity and anxiety which in turn impacts on mental health. The NSW Legal Aid Commission noted that aplicants often:

> … have been 'in limbo' for years. They often fear that the delay indicates rejection. The delay is especially stressful for those temporary protection visa holders who have been separated from their families for many years and who are unable to sponsor them until a permanent visa is granted.[27]

2.35 The LSSA echoed this concern:

> The effect of the combined delays is that protection visa applicants may remain in limbo for lengthy periods before becoming eligible for permanent protection. This can take anywhere from the minimum 30 months envisaged by legislation to as long as 7-8 years in some cases.[28]

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25 CMC, *Submission 165*, p. 9. Other submissions which referred to long delays in issuing visas following positive determinations by the RRT included Albany Community for Afghan Refugees, *Submission 177*, CASE for Refugees, *Submission 182*, p. 2 and Mrs Dallas Mazoori, *Submission 197*, p. 3.

26 ACAR, *Submission 177*, p. 4.

27 Legal Aid NSW, *Submission 166*, p. 11.

28 LSSA, *Submission 110*, pp 4-5.

2.36 Similarly, Ms Biok of the LACNSW said:

> We are also very concerned that there seem to be quite serious delays in processing. This occurs even after somebody has had one of the few interviews. It is not unusual for someone to go before the case officer and be interviewed, the interview to appear to be favourable and then everything to just seem 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.[29]

2.37 Concerns were expressed that the impact of such delays on applicants may be exacerbated by the restrictions imposed on them by their bridging visas. The committee received evidence that asylum seekers living in the community pending the processing of their applications are forced to rely on charity for their day-to-day needs due to the 'no-work' conditions imposed by their bridging visas.[30] Submissions argued that such restrictions not only cause hardship and further distress, but lead to 'depression and loss of self esteem because they are unable to participate in society through work'[31] and 'impedes any attempt to build a new life.'[32]

2.38 In this context, the policy and legislative changes announced by the Government in 2005 in respect to faster visa processing times were welcomed by many submitters. In September 2005, the Government introduced the Migration and Ombudsman Legislation Amendment Bill 2005 to, among other things, introduce 90 day processing time limits for the determination of protection visa applications and for the completion of reviews by the RRT.

2.39 However, the efficacy of these new measures is open to question. The Bills Digest noted that:

> In relation to the 90-day processing times, a decision is not rendered invalid even if it is made after 90 days. The question [therefore] arises whether the requirement to report to Parliament on 'late' decisions will provide enough of a sanction to compel adherence to this time limit.[33]

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29 *Committee Hansard* , 28 September 2005, pp 63-64.

30 See Chapter 8 for a discussion of bridging visas.

31 Catholic Migrant Centre, *Submission 165*, pp 5-6.

32 NSW Refugee Health Service, *Submission 209*, p. 5.

33 Parliamentary Library, Bills Digest No. 52 2005–06. Migration and Ombudsman Legislation Amendment Bill 2005, (Australian Parliament 2005).

2.40 Another issue is the time at which the 90 day period starts. The committee understands that the commencement of the 90 day period is to be prescribed by regulations under the new provisions. Draft regulations, which have been published, deal with the commencement dates for various categories of protection visas. For example, the 90 day period for certain visas types would only commence after 30 months has expired, unless the Minister has specified a shorter period at her discretion.[34]

2.41 One concern is that the imposition of time limits will not of itself address the underlying causes of delay. The LSSA noted:

> …they do not address the policy differences which contribute to the high percentage of cases overturned on appeal, and therefore do not address some of the most significant reasons for delays.[35]

2.42 DIMA's response to the above concerns was to advise the committee that:

> Australia is one of the few Western countries with no protection visa processing backlog. As noted in the DIMA 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.[36]

2.43 DIMA noted that the Government had acted in 2005 to introduce 'measures to ensure that immigration policy is administered with greater flexibility and fairness, and in a timely manner'.[37] These measures had greatly reduced the existing case load of protection visa applications:

- 550 initial protection visa applications with the Department remained to be finalised as at 18 November 2005. Of these, 115 applications were over 90 days old with finalisation of some being delayed by factors beyond the Department's control;

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34 Parliamentary Library, Bills Digest No. 52 2005–06. Migration and Ombudsman Legislation Amendment Bill 2005, p. 5.

35 Law Society of South Australia, *Submission 110*, pp 4-5.

36 DIMA, Answer to Question on Notice, 5 December 2005, p. 39.

37 On 17 June 2005, the Prime Minister made a commitment that all primary protection visa applications will be decided within three months of the receipt of the application. This has since been refected in legislation. 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. DIMA, Answer to Question on Notice, 5 December 2005, p. 40.

- 270 applications by TPV holders for further protection visas remained on hand as at 31 October 2005 because they were awaiting security assessments or required further information from external sources, meaning that a final decision was not possible.

2.44 DIMA also stressed that it is working closely with other agencies to minimise the time taken for external assessments and checks.[38]

Committee view

2.45 The committee shares the concerns of many submitters and witnesses to this inquiry at the impact of delay on visa applicants, particularly protection visa applicants and especially those being held in immigration detention. For that reason, it welcomes recent Government moves to introduce a 90 day limit during which the Minister or her delegate is required to decide applications for protection visas (and to require the RRT to decide applications for review of protection visa decisions within 90 days).

2.46 However, it is apparent that a failure to comply with this 90 day time limit does not attract any sanction other than the requirement to report to Parliament. The committee notes concerns that statements tabled in the Parliament by Immigration Ministers have often lacked sufficient detail to enable any meaningful scrutiny of departmental or ministerial decisions or actions.

2.47 It is too early to assess whether the introduction of a 90 day processing period is sufficient to address the concerns of undue delays in the processing of visa applications. The committee will monitor the impact of the new time limits with interest.

Recommendation 2

2.48 The committee recommends that the Minister ensure all statements tabled in Parliament that relate to protection visa applications and review applications that take longer than 90 days to decide contain sufficient information to ensure effective parliamentary scrutiny of the visa and review determination process.

Failure to interview protection visa applicants

2.49 The committee received evidence critical of the low number of interviews conducted by DIMA at the primary or initial determination stage. This practice, it was argued, has led to meritorious cases being refused visas on cursory evidence.

38 DIMA, Answer to Question on Notice, 5 December 2005, p. 40.

2.50 The committee understands that, following administrative reforms introduced by the department in 1996, most decisions are now made 'on the papers'.[39] This is permitted by the Migration Act which, while requiring DIMA decision-makers to consider information provided in an application, permits a decision to be made without 'giving the applicant an opportunity to make oral or written submissions'.[40]

2.51 The NSW Legal Aid Commission advised the committee that, in its experience, most offshore humanitarian applications and onshore protection visa applications are decided without the applicant being interviewed.[41] The Commission argued that:

> …the paper-based processing of protection visa applications represents a significant deviation from accepted standards of procedural fairness and natural justice. It breaches the spirit of justice and the determination criteria suggested in the *Handbook on Procedures and Criteria for Determining Refugee Status* published by the United Nations High Commissioner for Refugees.[42]

2.52 This view was shared by the Catholic Migrant Centre, which said:

> …a fair and ethical approach to determining protection visa applications also requires that each applicant is interviewed and given the opportunity to answer the decision makers concerns about their case. [43]

2.53 A particular concern was that paper based decision-making disadvantages those applicants who are from a non-English speaking background and who may not have received assistance with their applications. The NSW Legal Aid Commission noted that offshore or unrepresented applicants regularly provide cursory answers or fail to submit supporting statements. The Commission also pointed out that onshore applications may be refused even though the applicant has advised that key documents are being obtained and/or translated, or that a comprehensive statement is being completed. It argued that this, coupled with DIMA's failure to seek or await further information, meant:

> … offshore humanitarian visa applicants are often refused without interview or written request for further information. … Similarly, onshore applicants for protection visas are rarely interviewed or asked to comment on adverse information, and decisions can be made soon after application.[44]

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39 *Sanctuary under Review*, p. 114.

40 *Migration Act 1958* (Cth), subsection 54(3).

41 Legal Aid NSW , *Submission 166*, pp 5-6. The NSW Legal Aid Commission provides legal services to members of the community and to protection visa applicants at Villawood Detention Centre under the Government's 'Immigration Advice and Application Assistance Scheme.'

42 Legal Aid NSW*, Submission 166*, p. 7.

43 CMC, *Submission 165*, p. 7.

44 Legal Aid NSW, *Submission 166*, p. 5.

2.54 It was put to the committee that provision of more information (for example, on the relevant application forms) and an opportunity for applicants to put forward their case at an interview could improve the quality of decision-making:

> As there is no requirement to give reasons for refusals of offshore applications under *Migration Act* …, rejections regularly include only a photocopy of the visa criteria with a mark next to the supposedly unmet criteria. …. Many members of refugee communities in Australia are accustomed to receiving such rejection notifications for their relatives overseas. They respond by lodging repeat applications without being aware of how further information could advance their case. Given that offshore humanitarian visa classes attract a large volume of applicants, it would assist with fair and quick processing if application forms and procedures were more comprehensive and referred to the visa criteria. It would expedite the fair processing of offshore visas if applicants were asked to submit supporting information and were interviewed.[45]

2.55 The NSW Legal Aid Commission queried whether DIMA officials 'have been encouraged to give priority to meeting Departmental performance indicators for finalising applications, rather than affording justice to the applicants'. It stated:

> There is no doubt that this practice has enabled more expeditious primary decision making. However, it is our view that the drive to greater efficiency has been accompanied by a reduction in the quality of decision making. For example, *credibility* is often the basis of the rejection even when the applicant has not been given an opportunity to respond in an interview to any allegations of inconsistency or credibility.[46]

2.56 The consequences of paper based decision-making was also highlighted by the Catholic Migrant Centre, which advised the committee that:

> Almost all of our clients (with one exception) who were rejected by DIMA without interviews were later found to be genuine refugees.[47]

2.57 In light of the above, it was recommended that the policy of rarely interviewing applicants for initial protection visas be reconsidered. Doing so, it was argued, would assist in a proper and thorough consideration of an applicant's claims at the initial decision-making stage. It would also alleviate the pressure upon the RRT by reducing the prospect of appeals, especially those involving credibility findings based upon limited material.[48]

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45 Legal Aid NSW, *Submission 166*, p. 6.

46 Legal Aid NSW, *Submission 166*, p. 7.

47 CMC, *Submission 165*, pp 6-7. The Catholic Migrant Centre also advised that in a small number of cases, decisions had been made to refuse protection visas without all of the relevant evidence, including DIMA's failure to interview applicants.

48 Legal Aid NSW, *Submission 166*, pp 5-8.

2.58 The Catholic Migrant Centre recommended that, if mandatory interviews are not introduced, then:

> DIMA [should] be required to give the applicant at least 2 weeks notice of the intention to make a negative decision with respect to an application. In addition, DIMA provide a summary of its reasons for its intention to make a negative decision and the applicant be given the opportunity to respond.[49]

2.59 This committee made a similar recommendation in 2000.[50] It did so after receiving evidence similar to that outlined above. The Government's response to that recommendation was:

> An interview is only one of a number of assessment tools available to case officers and is not always necessary. Whether an interview takes place or not, applicants are always informed of adverse information, and decision records, including the reasons for the decision, are always provided.[51]

2.60 A similar sentiment was expressed by DIMA during this inquiry. It noted that there is no legislative requirement that protection visa applicants be interviewed. Rather decisions about whether to interview and what matters to cover at interview are left to the DIMA decision-maker. This reflects the view that an interview is just one avenue available to decision-makers to test claims, gather information or put adverse information to clients. DIMA also advised that it is possible in many cases to reach decisions without interview because of the nature of claims made, the country of nationality concerned and the country information relevant to these claims. It noted that this possibility is made clear to applicants on the relevant application forms.[52]

Committee view

2.61 The Committee considers that there is considerable benefit in interviewing protection visa applicants. An interview not only ensures applicants are given the best opportunity to put forward their case, but would also ensure that case officers fully appreciate the nature of the claims being made. It is also likely to lead to a reduction in the number of RRT applications if applicants believe they have been given every opportunity to put forward their case. On the other hand, the committee is aware of the significant number of offshore protection visa applications that must be managed by DIMA. It is also conscious of the need for flexibility in managing the onshore protection visa caseload.

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49 CMC, *Submission 165*, p. 7.

50 *Sanctuary under Review*, Recommendation 4.4. 'The Committee recommends that, where decision-makers are of the view that an applicant should not proceed to interview stage, the decision-maker must provide reasons for that decision to the applicant'. The committee made that recommendation after noting evidence that some 87 per cent of non-detention applications were rejected without interview and some 33 per cent of detention cases rejected without interview. *Sanctuary under Review*, p. 114.

51 Government response, 8 February 2001, p. 5.

52 DIMA, Answer to Question on Notice, 5 December 2005, pp 17, 37.

2.62 The committee sees considerable merit in applicants being given an opportunity to comment in cases where decision-makers consider their application should not proceed to interview stage. It also notes that the statutory requirement to provide applicants with an opportunity to comment on 'adverse information' is subject to certain exceptions.

Recommendation 3

2.63 The committee recommends that the Migration Act be amended to require that onshore protection visa applicants be given at least two weeks notice of the intention to make a negative decision with respect to an application. In addition, it is recommended that DIMA provide a summary of its reasons for its intention to make a negative decision and the applicant be given the opportunity to respond.

Recommendation 4

2.64 The committee recommends that DIMA conduct an interview with all onshore applicants unless they are to be approved on the papers.

Recommendation 5

2.65 The committee recommends that DIMA review the application forms and information sheets provided to offshore humanitarian visa applicants to ensure that they provide applicants with comprehensive and detailed information on the relevant visa criteria and assessment process.

Use of inadequate and inappropriate interpretation services

2.66 Several submissions were critical not only of the level and quality of interpreters provided by DIMA (and the RRT) to assist applicants[53] but also of the appropriateness of certain interpreters, because of their cultural and ethnic background.[54] As examples of inappropriate interpreters being engaged, it was pointed out that Hazara asylum seekers had been provided with Pashtun interpreters, even though these two ethnic groups are known to be hostile towards each other; while in the case of an Iranian Farsi applicant, the interpreter provided spoke Farsi as a second language with their mother tongue being Arabic.[55]

53 Ms Diane Gosden, *Submission 97*, pp 1-2.

54 See for example Ms Rosemary McKenry, *Submission 2*, p. 2; L V Nayano Taylor-Neumann, *Submission 135*, pp 5-6; Survivors of Torture and Trauma Assistance and Rehabilitation Service, *Submission 138*, p. 2; Albany Community for Afghan Refugees, *Submission 177*, p. 4; Ms Frederika Steen, *Submission 224*, pp 5-6.

55 Ms Rosalind Berry, *Submission 137*, pp 4-5.

2.67 It is clear that incorrect interpretation, whether intentional or otherwise, can be critical, if not fatal, to an applicant's claim and can lead to persons being detained unnecessarily. Evidence to the committee included claims from applicants that, because interpreters had incorrectly interpreted or misrepresented what they said, either at their unauthorised arrivals interview or their primary interview, this was used to discredit them in subsequent interviews and in RRT hearings when they have sought to correct the misinterpretation.[56]

2.68 Similar concerns were raised in relation to the use of interpreters by DIMA in the committee's inquiry in 2000. At that time, the committee considered that qualified interpreters' training should ensure they act professionally, and the committee refrained from making any recommendations.[57]

2.69 The committee notes that DIMA's latest annual report points to difficulties in recruiting accredited interpreters required for new and emerging languages in Australia (such as African languages) brought about by the changing nature of Australia's migrant and refugee intake. DIMA also reported on 'the continuing low demand for onsite interpreters associated with processing of applications for protection by asylum seekers' and a move towards more cost effective telephone interpretation services.[58]

2.70 Concerns over interpreters also arose during the recent inquiry by the Senate Foreign Affairs Defence and Trade Committee into the circumstances surrounding the removal, search for and discovery of Ms Vivian Solon.[59] That committee received evidence that DIMA relied on its employees to act as interpreters and that DIMA was unaware of whether the person concerned was an accredited interpreter. This was despite the relevant Migration Series Instruction (MSI) stipulating that, whenever the person has difficulty understanding and/or speaking English, DIMA officers were to seek the assistance of a qualified interpreter (such as from the Department's Telephone and Interpreting Service). The Senate Foreign Affairs Defence and Trade Committee considered that, to ensure objectivity, fairness and avoid any conflict of interest, independent and accredited interpreters must be used and DIMA employees should only be used in exceptional circumstances. It recommended that DIMA officers be reminded of this requirement.[60]

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56 L V Nayano Taylor-Neumann, *Submission 135*, pp 5-6.

57 Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, June 2000, pp 139-141.

58 DIMA, *2004-2005 Annual Report*, pp 190, 191-2.

59 Senate Foreign Affairs, Defence and Trade Committee, *The removal, search of and discovery of Ms Vivan Solon: Final Report*, 8 December 2005, Commonwealth of Australia, paragraph 2.21.

60 Senate Foreign Affairs, Defence and Trade Committee, *The removal, search of and discovery of Ms Vivan Solon*, Recommendation 2.

2.71 The committee is aware that DIMA through its Translating and Interpreting Service (TIS) provides an interpreting service to eligible individuals and organisations.[61]

Committee view

2.72 In light of the continuing problems with interpreters, it is the committee's view that every effort must be made to ensure that, whenever required, appropriately qualified and culturally acceptable interpreters are used to assist applicants in their visa applications. The committee also notes that shortages of interpreters in particular languages or regions are a continuing challenge for DIMA.

8.1 The committee endorses all the recommendations concerning interpretation services made by the Select Committee on Ministerial Discretion and, more recently, by the Senate Foreign Affairs and Trade Committee.

Recommendation 6

2.73 The committee recommends that the Government make training of interpreters a priority and establish a planned, comprehensive training programme to address the development and ongoing needs of interpreting services provided by or on behalf of DIMA.

Recommendation 7

2.74 The committee recommends that a quality assurance process be developed and implemented to monitor and to report to Parliament through the Department's Annual Report on the quality of interpreting services provided by or on behalf of DIMA (including the RRT and MRT).

Lack of appropriate knowledge, information and training

2.75 Evidence to this inquiry suggested that a lack of appropriate knowledge and training among DIMA officers may be a reason for the poor quality of decision making outlined above. This extended to an apparent lack of knowledge of the applicable law as well as a failure to appreciate and understand the cultures or the countries from which many applicants come.

2.76 Submissions pointed to a lack of cross-cultural training and knowledge of other mores and values of the cultures concerned and even current events within DIMA.[62] It was also put to the committee that a lack of adequate training of DIMA

61 DIMA, *2004-2005 Annual Report*, pp 190, 191.

62 Name withheld, *Submission 210*, p. 3.

staff may account for the cultural and attitudinal problems within DIMA that were identified in the Palmer report and highlighted in some submissions to this inquiry.[63]

2.77 Ms Marion Le, a migration agent, emphasised the lack of cultural training and awareness of many DIMA officers in her evidence to the committee:

> …many DIMA officers … 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.[64]

2.78 Her concern was echoed by Ms Claire 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.[65]

2.79 LSSA representatives pointed out that:

> 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.[66]

2.80 The Catholic Migrant Centre argued that the quality of DIMA decision making could be improved by:

> …providing officers with thorough and extensive training in Migration and Refugee Law; interviewing skills; the manner in which evidence (including country information) should be used in assessment of a claim; and cultural difference.[67]

2.81 Dr Margaret Kelly of Macquarie University's Division of Law pointed to the need for basic and ongoing training of DIMA officers in:

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63 See, for example, University of NSW Centre for Refugee Research and the Australian National Committee on Refugee Women*, Submission 170*, p.8.

64 *Committee Hansard*, Friday, 7 October 2005. p. 16

65 Ms Claire O'Connor, *Committee Hansard*, 26 September 2005, p. 30.

66 *Committee Hansard* , 26 September 2005, p. 6.

67 CMC, *Submission 165*, pp 8-9.

> …the constitutional and legislative bases of their powers, their legal responsibilities and obligations, and the approach of the federal courts to interpreting the provisions of the Act relevant to officers' areas of responsibility.[68]

2.82 Dr Kelly noted that the length, complexity, and multifaceted nature of the Migration Act poses particular problems for DIMA decision-makers and applicants alike:

> The Act and Regulations, together with the various Guidelines and Directions, are huge and complex – one doubts if any single person could ever be familiar with the Act, its interpretation, and its application as a whole. The Palmer Report noted the need for greater training of staff in their legal obligations (in that instance, with respect to compliance and detention powers) under the Act – the necessity for this is unsurprising given the frequent changes to the Act, the unremitting judicial interpretation of it, the changes in judicial interpretation, and the high volume of cases and detailed work involved in administering the Act.[69]

2.83 Other commentators noted that:

> … the Migration Act is bloated and legalistic, and even a well-educated lay person would find it difficult to wade through its Byzantine regulations. People with limited English or a disability are incapable of understanding their basic rights under it, let alone its arcane provisions and regulations. After the string of recent errors there should be greater review and increased access to legal advice, not less.[70]

2.84 Associate Professor Kneebone of Monash University's Faculty of Law advised the committee that the current state of the Migration Act posed grave problems for its administration and operation due to 'its lack of guidance on basic, principles, objectives and definitions'. She noted that :

> The Migration Act in its current form (more than 600 provisions and nearly 600 pages in printed length) arose from substantial amendments dating from the period 1989 onwards and numerous subsequent piecemeal amendments. It has not been subject to major overhaul or review since that time. It has been amended from time to time to insert provisions to deal with new crisis … it is time for major overhaul of its scope and focus.[71]

2.85 The Australian Catholic Bishops Conference expressed the view that the increasingly complexity of the Migration Act was a deterrent for potential migrants:

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68 Dr Margaret Kelly, *Submission 103*, p. 10.

69 Dr Margaret Kelly, *Submission 103*, p. 10.

70 George Newhouse, 'Immigration reform reaches a dead end', *Sydney Morning Herald*, 6 October 2005, p. 13.

71 Ass. Professor Kneebone, Castan Centre for Human Rights, Submission 71, pp 2, 11.

> Overall migration processing has become increasingly complex for staff, for agencies involved in assisting migrants such as the Church and, most importantly, for individuals seeking to migrate to Australia. A matter of strategic importance to Australia is whether the complexity of migration processing is having an adverse impact on the long term future of Australia. There is substantial anecdotal evidence that people, who could make a positive contribution to Australia, are often deterred by the complexity of the process and thus seek to migrate to other countries who also covet their skills. The underlying cause of many of the problems of complexity in the processing and assessment of visa applications appears to be similar to the cause of the problems in detention facilities. That is, ad hoc solutions to immediate problems or processes that accord with a particular political or philosophical approach, have been implemented without consideration of the long term or down stream consequences of such changes. The results have been increasing complexity of administration and adverse operational impacts on other parties.[72]

2.86 The LIV shared this concern, citing a range of problems with the process for applying for and assessment of business migration visas.[73]

2.87 DIMA acknowledged that the legislation was complex. It advised that this complexity reflected the multiplicity of goals and objectives that the Act must meet.[74]

2.88 It was suggested that, because of the legislation's increasing complexity, decision-makers now relied more on departmental policy documents and guidelines than the legislation itself to determine claims. As the LIV stated:

> It is the experience of LIV members practising in the area of migration law that migration policy, as set out in the Procedures Advice Manual (*PAM*), which can be narrower than the Migration Regulations, is applied more readily than the law by DIMA decision makers. The complexity of the migration scheme is such that many decision makers, at both the DIMA and Tribunal level, are now reading and applying policy in preference to the wording of the Migration Regulations.[75]

2.89 The LIV expressed the following concern with this practice:

> While it is accepted that policy is necessary to assist decision makers, it should not restrict them in their primary duty to make lawful decisions under the Migration Act. … There are [also] a number of examples where the policy provisions, as set out in PAM and the Migration Series Instruction (*MSI*), are in conflict or severely restrict the meaning of the

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72 Australian Catholic Bishops Conference, *Submission 73*, p. 5. See also sub LIV, *Submission 206*, p. 11.

73 LIV, *Submission 20*6, pp 10-12.

74 DIMA, *Submission 205*, p. 6.

75 LIV, *Submission 206*, pp 24-25.

> Migration Regulations. This means that many applications though lawful, are less likely to be successful. [76]

2.90 In light of such problems, the Catholic Migrant Centre recommended the introduction of:

> … a system whereby teams of case officers work under the supervision of a person with legal training / detailed knowledge of migration law / a lot of experience in assessing protection visa claims. That person would be available to assist case officers throughout the assessment process and should read and critique all decisions before they are finalised.[77]

2.91 The need for improved supervision was also raised by other submissions and witnesses. The Uniting Church, for example, suggested that improved systems of supervision, debriefing and training were required to reduce staff turn-over and improve staff morale within DIMA.[78] High staff turnover compounded the problems in ensuring adequate knowledge and understanding among case officers:

> Apart from high level positions, most DIMA staff are required to frequently change their roles within the Department. This is particularly so in the Compliance Unit, with some staff in the Unit as little as 3-6 months. It has been argued that the high turn-over is to ensure staff become skilled in various parts of the Department, however, we find that this approach lowers the quality of service and heightens the possibility of mistakes being made. This is made worse by the lack of training, inadequate handover and oversight as highlighted in the Palmer Report.[79]

2.92 Staff turnover within DIMA and the consequent need to ensure case officers understand both the applicable law and how to deal appropriately with specific groups of people was also raised by the NSW Legal Aid Commission:

> Dealing with protection visa applicants is quite different from dealing with student visa applicants, so they need special training. That used to occur in the past. People who were refugee advocates, people like us and people like the Refugee Advice and Casework Service, would go and give training sessions to new DIMA case officers as they went into the onshore protection strand. That has not happened for a long time.[80]

2.93 Similar concerns over the inadequacy of knowledge and training within DIMA were raised during the committee's inquiry in 2000. The committee at that time

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76 LIV, *Submission 206*, pp 24-25.

77 CMC, *Submission 165*, pp 8-9.

78 UJA & the Hotham Mission, *Submission 190*, p. 7.

79 UJA & the Hotham Mission, *Submission 190*, pp 7, 21. See also Ms Rost, *Submission 220*, p. 36. The high internal movement of staff within DIMA was acknowledged by DIMA and the ANAO in a recent audit. See Australian National Audit Office, *Workforce Planning,* Audit Report No. 55, 2004-2005, p. 79.

80 Ms Mary Biok, *Committee Hansard*, 28 September 2005, p.68.

recognised that it is crucial that decision-makers have the necessary skills, knowledge and ability and the necessary personal attributes to perform the decision-making function. The committee therefore recommended that primary decision-makers have additional specialist training, both before and during their tenure and that training be obtained from a cross-section of sources, including the legal profession, European judicial specialists and other government and non-government organisations.[81]

2.94 The Government's response to the above in 2001 provided the following assurance:

> Case officers receive all necessary training to properly carry out their decision-making function. This includes training by DIMA legal specialists, torture and trauma treatment service providers and community groups. Refresher courses on specific issues are conducted when necessary.[82]

2.95 DIMA provided a similar assurance to this inquiry. Its response to allegations that decision makers were onadequately trained or fully aware of the situations in applicants' country of origin or that there was a departmental bias towards rejection of applications was to stress the following:

- Departmental decision makers were effectively supported through the existence of detailed Manuals, the Legend system and to a comprehensive country information and research capability though the CIS;
- Protection visa decision making was undertaken by senior officers who had undertaken comprehensive induction training and regular refreshing training;[83]
- Australia's protection visa approval rates compared favourably with many European countries;[84]

81 *Sanctuary under Review*, p. 127.

82 Government response, 8 February 2001, p. 5.

83 It advised that 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 [Country Information Service] 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. DIMA, answer to question on notice, 5 December 2005.

- The set-aside rate for its primary decisions in the RRT was relatively low when compared to the set-aside rates of other Australian review tribunals.[85]

2.96 The ANAO also advised the committee that it considered the training provided to DIMA officers to be reasonably sound.[86] This advice was based on an ANAO audit in 2004 of onshore processing of protection visa applications. It concluded that:

> …the training needs of decision-makers processing PV's are addressed [by DIMA's] Training and Coordination Committee. In addition, an Onshore Protection Training Strategy has been developed that identifies training that has been undertaken, identifies the core competencies required by decision-makers, identifies stakeholders and provides a plan for the implementation of future training programs.[87]

2.97 The committee notes that an earlier ANAO audit report appeared much less sanguine about the adequacy of training within DIMA. An audit in 2002 of work force planning within DIMA had concluded that:

> DIMA is not able to monitor its learning and development programs to determine if they are working in practice, as well as contributing cost-effectively to desired outputs and outcomes. … The audit found that systematic learning is not widely promoted within the department despite the need for it, given the diversity of its portfolio interests, complex governing legislation, and the rate at which new and inexperienced staff are promoted into demanding roles and duties. The links between existing learning and development arrangements and the department's goals are not articulated. There are few reports generated to inform management of the success of training activities and initiatives. There is potential in the longer term, for the lack of attention in the area of learning and development to diminish the workforce's ability to perform effectively.[88]

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84 DIMA noted that, of the unauthorised boat arrivals between 1999 and 2001, DIMA approved 85 percent of applications from Afghan nationals and 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 71 percent, and for Afghan nationals 67 percent. That is, DIMA has been approving over two thirds of the applications, notwithstanding the significant changes that have taken place in country circumstances since many of these people were originally assessed. In comparison, 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 per cent. DIMA, Answer to Question on Notice, 25 October 2005, p. 32; DIMA, Answer to Question on Notice, 5 December 2005, pp 15, 26.

85 DIMA, Answer to Question on Notice, 25 October 2005, pp 2-3, 27-8.

86 *Committee Hansard*, 7 October 2005, p. 5.

87 Australian National Audit Office, *Management of the Processing of Asylum Seekers,* Audit Report No. 56, 2003-2004, p. 12.

88 Australian National Audit Office, *Workforce planning within the Department of Immigration and Multicultural and Indigenous Affairs,* Audit Report No. 56, 2001-2002, pp 18-19.

2.98 The same audit also highlighted the crucial need for training within DIMA given its rapidly changing workforce:

> In response to rising workloads, the department has increased the size of the workforce by about 10 per cent in each of the past two years, through external recruitment. The rate of external recruiting, internal promotion and transfer activity in DIMA has also increased over the last two years to the point where some 40 per cent of the workforce have been either recruited from outside the department, or promoted or transferred in or out of a position within the department in the last 12 months. This rate of activity has significant implications for the cost and effectiveness of training and for the quality of work outputs of significant numbers of people who are moving between, or are new to, their roles. In addition, staff recruited at the lowest levels have in many cases been promoted rapidly. This indicates that the work level standards are in need of review and recruitment has not taken place at an appropriate level.[89]

2.99 These concerns appear to have been borne out by the findings of the Palmer report and the Comrie report. Notwithstanding the findings of the ANAO in 2004 and DIMA's above-mentioned assurances, the Government has acknowledged that a strong theme in the Palmer report was the need for substantially enhanced training for staff undertaking operational roles and exercising powers under the Migration Act, and the need for a substantial investment in appropriate systems and other support for their activities.

2.100 To this end, measures announced by Government following the Palmer report's release include:

- Establishment of a national training branch within DIMA and the appointment of a National Training Manager.
- Reviews of departmental training and skills needs.
- Implementation of a National Training Strategy within DIMA.
- A national executive leadership programme, which commenced in September 2005, for all executive level staff in DIMA. Management training for APS staff and training in a range of departmental systems, records management, visa cancellation, and name searching to be rolled out by the end of 2005.
- A records management improvement plan, with strong training component (to be delivered to all staff undertaking case and client related activity).
- A review of DIMA State and Territory Office arrangements, with a particular emphasis on appropriate funding levels for operations, training and support.
- A review and reissue of DIMA's Migration Series Instructions (MSIs). The MSIs are an important part of the support provided to staff in the conduct of their responsibilities and a component of departmental training programmes.

89 Australian National Audit Office, *Workforce planning within the Department of Immigration and Multicultural and Indigenous Affairs,* Audit Report No. 56, 2001-2002, p. 18.

- Improved governance arrangements within DIMA, including a high level Values and Standards Committee with external representation to ensure that the actions and decisions of DIMA officials comply with community expectations and Australian Public Service values.
- Establishment of a College of Immigration Border Security and Compliance to deliver comprehensive, tailored operational training for DIMA officers, with an emphasis on quality assurance and decision making. All new compliance and detention staff will be required to complete a 15 week induction training programme at the College with five streams available: compliance, investigation, detention management, border management and immigration intelligence. Existing staff will be required to complete regular refresher training each year.[90]

2.101 On the issue of training, DIMA advised the committee that it has progressively been moving to a more structured approach to training since 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.[91] The above-mentioned measures will build on this approach. In particular, the new National Training Manager will head a team which will provide:

- strategic oversight of learning and development across DIMA including the development and implementation of a national training strategy;
- high-quality corporate training for the Department;
- enhanced coordination of training across DIMA;
- innovative development programs to build leadership and management capacity: these courses have already commenced and will continue on a regular basis so that all DIMA executive level staff will attend leadership training within the coming 18 months;
- a range of staff development programs; and
- regular evaluation and reporting on the outcomes of national training programs.[92]

2.102 The committee commends the Government and DIMA on taking this action. However, it notes the concern of some submitters and witnesses that the emphasis of its response appears to be more on training in the areas of compliance and detention. It

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90 See DIMA, *Report from the Secretary to Senator the Hon Amanda Vanstone Minister for Immigration and Multicultural and Indigenous Affairs: Implementation of the Recommendations of the Palmer report of the Inquiry into the circumstances of the immigration detention of Cornelia Rau* (September 2005), tabled in Parliament on 6 October 2005. Copy at Appendix 7.

91 DIMA, Answer to Question on Notice, 5 December 2005, pp 18-9.

92 DIMA, Answer to Question on Notice, 5 December 2005, p. 20.

was put to the committee that the above reforms provide an opportunity to ensure that a comprehensive and coordinated approach is also taken within DIMA for training in other areas of the department, particularly refugee status determination.[93] The above reforms were also seen as an opportunity for DIMA to work productively with external stakeholders. The Uniting Church, for example, recommended:

> The development and implementation of new training programs for compliance staff and management, *and other sections of the Department*, which include the opportunity for experienced agencies like the Victorian Foundation for the Survivors of Torture, Hotham Mission, and the Red Cross, to provide input and training on sensitive issues related to persons seeking protection. These include trauma, gender, culture, child protection, and mental, physical and welfare issues.[94] [emphasis added]

2.103 UNHCR advised the committee that it had:

> … been asked already to assist with training of DIMA staff. We have done that in the past and we will do it again, starting at the end of this month. We welcome this dialogue that we hope will lead to a detailed analysis of the existing guidelines to identify areas in which they might be improved.[95]

2.104 UNHCR also advised the committee that it had offered to assist DIMA with a rewrite or review of the relevant guidelines. In its view, a review of the guidelines available to DIMA decision-makers was crucial as:

> … the first instance determination is all-important if you want to avoid future embarrassment. The better the quality and information sharing that takes place during and after that first instance determination the better the system will function as a whole. So the guidelines that are provided to those members of the Australian authorities charged with undertaking that first instance determination, and the guidelines that are provided to assist them to make determinations further downstream, are extremely important in the effectiveness of the system. If the guidelines can be strengthened, … then they will indeed result in fewer situations of further suffering and fewer errors.[96]

Committee view

2.105 The committee appreciates that decision-making in this area is an inevitably difficult task, given the inherent problems in assessing the merits of applications for visas (especially protection visas) and the size and complexity of the Migration Act and its associated Regulations. The committee also commends the Government for its

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93 See, for example, Mr Patrick Gee, National Council of Churches in Australia, *Committee Hansard*, 27 September 2005, pp 62 -63.

94 UJA & the Hotham Mission, *Submission 190*, p. 6.

95 Mr Wright, *Committee Hansard* , 7 October 2005, p. 36.

96 Mr Wright, *Committee Hansard* , 7 October 2005, p. 35.

moves to improve the systems for training departmental staff, in the light of the Palmer and Comrie reports.

2.106 On the evidence presented to this and earlier reviews, it is clear that, despite efforts to improve the skills of decision makers, and the uniformity of their decisions, there is room for further improvement. In particular, the committee considers that the sheer complexity of the legal framework acts as a powerful impediment to best practice. While other legislation – perhaps most notably the Tax Acts – are similarly complex, the negative effects of this complexity are magnified by the more limited professional assistance available to applicants and the frequent difficulties associated with producing evidence.

2.107 For this reason, the committee believes that it is an appropriate time for a bottom-up review of the Migration Act, with the objective of producing a more concise and comprehensible legislative regime, recognising that these attributes contribute to a more easily administered and fairer system.

2.108 The committee further considers that recent reforms exhibit a skewed emphasis towards compliance and detention. Accordingly, the committee recommends an equal emphasis be given to improving systems and training aimed at improving the decision-making in visa application determinations.

Recommendation 8

2.109 The committee recommends that the Migration Act and Regulations be reviewed as a matter of priority, with a view to establishing an immigration regime that is fair, transparent and legally defensible as well as more concise and comprehensible.

Recommendation 9

2.110 The committee recommends that the review of the Migration Act and Regulations be undertaken by the Australian Law Reform Commission.

Recommendation 10

2.111 The committee recommends that the review of the Migration Series Instructions, announced as part of the Government's response to the Palmer report, ensure that the Instructions accurately and clearly reflect and comply with the Migration Act and Regulations.

Recommendation 11

2.112 The committee recommends that DIMA's approach to case management of protection visa applications be reviewed.

Recommendation 12

2.113 The committee recommends that, as part of its new National Training Strategy, DIMA review the training methods and approaches for officers responsible for the processing and assessment of protection visa applications,

with a view to establishing a planned and structured comprehensive training programme.

Recommendation 13

2.114 The committee recommends that the Government expand the responsibilities of its recently established College of Immigration Border Security and Compliance to include provision of training for officials responsible for the processing and assessment of protection visa applications.

Recommendation 14

2.115 The committee recommends that the ANAO commit to a series of rolling audits to provide assurance that humanitarian and non-humanitarian visa applications are being correctly processed and assessed.

Questionable quality of information used in decision making

2.116 The quality of decision making is naturally heavily dependent on the quality of the information used by the decision maker. Criticisms were directed at two aspects of the department's information: the quality of the country of origin information, and the assessment of the credibility of information.

The quality of country of origin information

2.117 The committee also received evidence critical of the country of origin information relied on by DIMA to determine protection visa applications (such as whether the circumstances in an applicant's country of origin meant that he or she had a well-founded fear of persecution for the purposes of the Refugee Convention).

2.118 A key resource for DIMA in this regard is its Country Information Service (CIS), which is a database containing information from a range of sources. The CIS was established in 1992 to assist DIMA decision-makers by providing information about political, social and human rights conditions in asylum seekers' countries of origin. The CIS contains a range of material from UNHCR, DFAT, other countries, newspapers, books, magazines, Internet web sites, information provided by community groups, protection visa applicants, academics and non-government organisations.[97] In the event that information is not immediately available to case

97 See DIMA, answer to Question on Notice, received 5 December 2005, p. 18. Approximately 80 per cent 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 per cent is sourced from United Nations agencies. Information sourced from non-government organisations, other government, academic and special interest groups make up the remaining 10 per cent. Information provided by DFAT comprises 0.5 per cent of holdings. DIMA, Answer to Question on Notice, 5 December 2005, p. 14. For background information on the CIS see *Sanctuary under Review*, pp 130-133.

managers, the CIS can be requested to conduct research. Some research requests may be referred to overseas posts and/or overseas organisations, such as the UNHCR.[98]

2.119 DIMA decision-makers need not rely on the CIS alone. They may also conduct their own inquiries and to consider information they assess to be relevant and reliable from any source, including from clients and advocates.[99] Advice from DIMA decision-makers to the ANAO in 2004 was that, at times, the information contained within the CIS did not provide them with an analysis of the current situation in a particular country at the level of detail that they required and that in these circumstances they were required to look to other sources of information, such as the internet.[100]

2.120 In the course of this inquiry, concerns were raised over the quality of the country of origin information relied on by DIMA and the skill of departmental staff in retrieving and using information. It was claimed, for example, that DIMA's information in relation to the matter of country of origin is not always adequate and is often at variance to that supplied by human rights groups.[101] Another claim was that out of date information was used and that, in at least one case, a DIMA official had cited a backpackers' tourist guide as his source.[102]

2.121 Concern was also expressed over the manner in which country information was selected and used by decision-makers. The NSW Legal Aid Commission advised the committee that:

> There is a lot of country information that immigration officers can use. There is also a lot of country information which applicants put before the case officers. Two things become very clear. Firstly, decision makers do not seem to use that country information to get background knowledge on the cultural, political and social norms in that country. It would seem with the amount of information that is available on, let us say, Burma that a case officer might get some understanding of the difficulties a person would face before they actually did an assessment of somebody's application. Too often, that does not seem to happen. There seems to be a real culture among onshore protection officers of looking for information which can be used to reject an application and forgetting about the rest. That is too often what we see.[103]

2.122 Similar concerns in 2000 promoted this committee to recommend that:

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98 DIMA, answer to Question on Notice, 5 December 2005, p. 19.

99 DIMA, answer to Question on Notice, 5 December 2005, p. 19.

100 Australian National Audit Office, *Management of the Processing of Asylum Seekers*, p. 45.

101 See, for example, Project SafeCam, *Submission 8A*, p. 2; Ms M E Flenley, *Submission 91*, p. 2; Ms Linda Anchell, *Submission 95*, p. 2; Ms Rosalind Berry, *Submission 137*, p. 4; and Ms Kerry Barry, *Submission 146*, p. 2.

102 Name withheld, *Submission 210*, p. 2.

103 Ms Mary Biok, *Committee Hansard* , 28 September 2005, p. 63.

> … accurate and up-to-date information from a broad cross-section of Government and non-government sources should be entered into CIS. Staff using CIS for visa determination decisions should be trained in rapid information retrieval, information analysis and methods of critical evaluation.[104]

2.123 The Government's response in 2001 was to merely note that 'this was current practice'.

2.124 The ANAO in 2004 also considered DIMA could mitigate the risks of dated or inaccurate information being relied on by conducting training that highlighted the risks involved. DIMA's advice to the ANAO at time was that it had implemented risk strategies including:

- the training of case managers in the appropriate use of country information and the assessment of information sources;
- management supervision and review of decision records as part of quality assurance process; and
- the requirement that all items referred to in decision records be placed on CISNET, which involves review and if appropriate suggestion of alternative sources, by experienced researchers.[105]

2.125 DIMA dismissed claims that the CIS contained outdated information or was selectively used by decision makers. It stressed that the CIS was constantly updated by an experienced and trained research team and that considerable training was provided on its use.[106] It also stressed that the system was predicated on decision makers being able to select and weigh the available country information in each case to reflect the particular situation and circumstances of the applicant.[107]

2.126 DIMA pointed to the quality assurance and accountability mechanisms, such as the requirement that all information used in protection visa decisions be included in CIS holdings for audit and reference purposes. It also noted the safeguard that any adverse information used by a decision-maker must be provided to the applicant for comment.[108]

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104 *Sanctuary under Review*, Recommendation 4.6.

105 Australian National Audit Office Audit Report No. 56, 2003-2004, *Management of the Processing of Asylum Seekers*, p. 45.

106 DIMA, Answer to Question on Notice, 25 October 2005, pp 28-30.

107 DIMA, Answer to Question on Notice, 25 October 2005, p 30. See also See DIMA, answer to question on notice, 5 December 2005, pp 14, 18-19.

108 DIMA, answer to question on notice, 5 December 2005, p. 19.

DIMA's approach to the credibility of information

2.127 Submissions also raised concerns over the approach taken by DIMA officials in assessing the credibility of protection visa applicants. It was argued that there was a need for DIMA to develop a consistent method for the assessment of credibility issues, one which gave applicants the 'benefit of the doubt'.

2.128 Assessment of credibility is clearly intrinsic to the determination of refugee status. For the reasons outlined earlier, most applicants will lack evidence (other than their own verbal or written evidence) to support their protection claims.[109] It is for this reason that the UNHCR Handbook, which has been accepted by the High Court as a guide to decision making, recommends that decision makers ensure that applicants present their case as fully as possible and with all available evidence, and in assessing the evidence, give the applicant the benefit of the doubt where necessary.[110]

2.129 The LSSA noted:

> DIMA purports to, and in many cases, does apply the 'benefit of the doubt' approach, but it appears that there is often a lack of consistency in its application, leading to significant disadvantage for some confused or traumatised applicants.[111]

2.130 Further, LSSA advised that:

> Credibility issues such as inconsistencies in information supplied by the applicant, 'late claims' and the results of linguistic analyses often form the basis of visa rejections by DIMA. There is a tendency for the applicant's whole account to be disbelieved because of a relatively minor fact or inconsistency in the evidence.[112]

2.131 It was suggested that the current system expected too much of refugee claimants, given their circumstances. There was a need to take account of the myriad reasons that may exist for minor inconsistencies in the information supplied by applicants or for delays in supplying information. This could include a lack of assistance in presenting claims or a limited opportunity to make such claims, particularly when applicants are overseas or in immigration detention. Moreover applicants can face an array of obstacles in presenting their case.

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109 See also Law Society of South Australia, *Submission 110*, p.3.

110 *See UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees,* Geneva, January 1992, p. 34. The Handbook was recognised as a non-binding guide by the High Court in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs 1989)* 169 CLR 379. Law Society of South Australia, *Submission 110*, pp 3-4.

111 Law Society of South Australia, *Submission 110*, pp 3-4. See also Mr Anthony Krohn, *Submission 131*, p. 2.

112 Law Society of South Australia, *Submission 110*, pp 3-4.

2.132 A particular concern was DIMA's reliance on often anonymous 'dob-in' information to determine credibility.[113] It was suggested that it should be incumbent on DIMA to check the veracity of any anonymous allegations before they are used in any decision.[114]

2.133 DIMA confirmed that dob-in information is sought and used, but stressed decision makers had regard to the veracity, credibility and relevance of such information.[115]

2.134 DIMA maintained that it was reasonable to retain records of information which might shed light on the identity or origin of the people arriving without authority. It explained that 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. DIMA also stressed that 'dob in' information is not automatically considered reliable. Rather, whether such information is given any weight remains a matter for the individual decision maker. DIMA also stressed that adverse information that is relevant to a visa decision is required to be disclosed to the applicant for comment and, in any event, applicants who disagree with visa decisions have both merits and judicial review available.[116]

2.135 Concerns were also raised over DIMA's reliance on linguistic analysis evidence to reject applications. The committee was advised by the LSSA that:

> This evidence has been controversial and subjected to sustained criticism by expert linguists. Excessive weight has been attached to linguistic analysis evidence, resulting in a significant number of applicants spending lengthy periods in immigration detention until finally being forced to apply for passports from their country of origin, only then being granted refugee status.[117]

2.136 DIMA's response to these concerns was threefold. It stressed that analysts employed by the specialised language analysis agencies it relies on to provide language or linguistic analysis possess a range of relevant qualifications and experience and are subject to screening and crosschecking by their employing agency to ensure confidence in the value of their work.[118] It also stressed the extensive

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113 See, for example, Project SafeCom, *Submission 8a*, pp 6-7.

114 Ms Rosalind Berry, *Submission 137*, p. 4.

115 DIMA, answer to question on notice, 5 December 2005, p. 50. See also Mr Douglas Walker, Assistant Secretary *Committee Hansard* , 11 October 2005, p. 26.

116 DIMA, Answer to Question on Notice, 25 October 2005, pp 4 -5; DIMA, Answer to Question on Notice, 5 December 2005, p. 50.

117 Law Society of South Australia, *Submission 110* , pp 3-4.

118 DIMA, Answer to Question on Notice, (11 October 2005), p. 16. DIMA advised the committee that it relies on the services of specialised language analysis agencies established in other countries.

training that its decision-makers received in considering applications for protection visas.[119] It also noted that, while language analysis is an important consideration, it was not regarded as conclusive. It is only one factor taken into account in the decision.

2.137 DIMA noted that language analysis could help substantiate applicants' claims of origin in the absence of any other tangible information, such as identity documents, travel documents or other documented personal history.

Committee view

2.138 The committee is unable to form any definitive views on the adequacy of the information used in the Country Information Service, in the absence of direct access to the database. Good decision-making requires that both the information used is accurate and that the decision-makers use that information appropriately. Criticisms of this area have been necessarily anecdotal, and the committee is unable to form any general conclusions on the information systems as a whole. However, the committee certainly endorses the process of reviewing information on CISNET carried out by DIMA researchers. The committee would further encourage consideration of random information audits carried out by external experts to ensure that information holdings are accurate.

2.139 The committee considers that information obtained by DIMA through its 'dob-in-line' must be treated with the upmost caution, particularly if the information is provided anonymously. All information should be checked, so far as is possible, for its veracity and, in the absence of conclusive verification, should not be used in any determination.

Recommendation 15

2.140 The committee recommends that the Migration Series Instructions include a requirement that case officers treat 'dob-in' information with the upmost caution, particularly if the information is provided anonymously, and ensure that such information is provided to applicants and their legal representatives.

The existence of an adversarial and hostile culture within DIMA

2.141 It was suggested to the Committee that a culture or attitude exists within DIMA, which results in a bias towards the rejection of applications.[120] The LIV, for example, advised the committee that:

> … there is a perceived culture of DIMA decision makers and compliance officers in administering the Migration Act as a 'negative' rather than a

119 DIMA, answer to question on notice, 5 December 2005, pp 44-45.

120 Catholic Migrant Centre, *Submission 165*, p. 8.

> 'positive' piece of legislation which has had the practical effect of DIMA seeing its primary role as a regulator rather than as a service provider … It is arguable that DIMA has become a Government department to be feared by those who must seek or rely on its services. [121]

2.142 The Refugee Advocacy Service of South Australia (RASSA) – a community legal service provider – advised the committee that:

> [e]ven when many of our clients have been granted protection visas … we are reluctant to identify them for fear of reprisal by DIMA.[122]

2.143 The Catholic Migrant Centre argued that, in order to improve the quality of its decision making, there was a need to promote within DIMA:

> … a culture of respect for Migration and Refugee law and asylum seekers (ie decision makers should be at least as eager to protect refugees from being refouled as they are to ensure that non-refugees are not granted asylum).[123]

2.144 Several submissions were very critical of an apparent attitude held by some DIMA officers towards applicants, particularly those seeking protection visas. They alleged these attitudes to be adversarial,[124] inquisitorial,[125] interrogational[126] and 'very intimidating and making vulnerable people very nervous, uncomfortable and treating them as less than human'.[127] Others referred to a lack of sensitivity by DIMA officers when conducting interviews to ascertain the circumstances which led the applicant to come to Australia seeking protection.[128] One example provided was the claim concerning an applicant who:

> ... told his case officer that his father had been tortured by the Taliban, specifically that they had cut off his hands and feet. He became hysterical when his case officer replied that it was his father then that should have come to Australia on a boat, not him. His father was of course dead. [129]

2.145 It was suggested that DIMA (and the RRT) is 'too ready to dismiss asylum seekers' claims on the ground of the applicant's purported lack of credibility' and that 'psychological evidence submitted by the applicant which tends to affirm the applicant's claims or explain why adverse inferences about credibility should not be

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121 LIV, *Submission 206*, p. 6.

122 RASSA, Answer to Question on Notice, 28 October 2005, p. 1.

123 CMC, *Submission 165*, pp 8-9.

124 A Just Australia, *Submission 184*, p. 11.

125 Name withheld, *Submission 84*, p. 2.

126 Albany Community for Afghan Refugees, *Submission 177*, p. 4.

127 Ms Euthymia Sephton, *Submission 25*, p. 1.

128 Albany Community for Afghan Refugees, *Submission 177*, p. 4.

129 Mrs Dallas Mazoori, *Submission 197*, p. 2.

hastily drawn, is given insufficient weight.'[130] In one case, for example, it was claimed that the interviewing officer had indicated that 'the detainee must be telling lies about his circumstance or actions, simply because the action taken by the detainee was something, '*I* (the interviewer) *wouldn't have done*.' [131]

2.146 The Palmer Report's recent and well publicised finding of 'deep seated cultural and attitudinal problems within DIMA' was cited as a reason for the above.[132] The Palmer Report's findings were concerned primarily with compliance and immigration detention cases.[133] However, the Palmer Report did note that:

> Although the Inquiry was not called on to examine the corporate culture of DIMA as a whole, the concern of some commentators is that the control motivated culture evident in compliance and detention might now be dominant. This would need to be carefully dealt with as an integral part of the proposed implementation strategy for the reforms that are essential to the initiatives that the Inquiry [that is, the Palmer Inquiry] proposes.[134]

2.147 A similar view was expressed by witnesses and submitters to this inquiry who advised the committee that, in their experience, the cultural and attitudinal problems in DIMA's compliance and detention areas that the Palmer Report had identified were endemic across that department.

2.148 The NSW Legal Aid Commission advised the committee that:

> As illustrated by events during 2005, within the Compliance sections of the department there is a culture that encourages officers to act in disregard of legal norms and acceptable standards of administrative procedure. It is our submission that the same culture exists in other sections of the Department, both in Australia and offshore, where delegates are responsible for determining applications for permanent residence.[135]

2.149 This view was shared by the President of the Law Society of South Australia, who advised the committee that:

> … the cultural problems that have been identified within the Department extend to the processing and assessment of offshore humanitarian visa applications.[136]

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130 Mr Guy Coffey, *Submission 81*, p. 4.

131 Name withheld, *Submission 210*, p. 3.

132 LIV, *Submission 206*, p. 6.

133 The Palmer Report did note that the problems it identified with respect to the compliance and detention areas 'might not be endemic to DIMA as a whole'. Palmer Report, p. 213.

134 Palmer Report, p. 213.

135 Legal Aid NSW, *Submission 166*, p. 4.

136 Ms Eszenyi, *Committee Hansard*, 26 September 2005, p. 5. See also; Mr Harbord, RASSA, *Committee Hansard*, 26 September 2005, p. 25; Ms Birss, RASSA, *Committee Hansard*, 26 September 2005, p. 25; Mrs Le, *Committee Hansard*, 7 October 2005, pp 16-17.

2.150 Ms Jockel, representing both the Law Council of Australia and the Law Institute of Victoria, also advised the committee:

> The Palmer report is only the tip of the iceberg of a system which has gone awry. Whilst that report focuses on DIMA'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. The Palmer report has indicated not only that there is a culture of imbalance, that there are rigid attitudes and processes and that there is a strong government policy with a lack of assertive leadership to ensure integrity of application but also that there is a lack of accountability and public confidence and that there is a desire to preserve the status quo.[137]

2.151 Associate Professor Kneebone argued the view that:

> … the 'deep seated culture and attitudes' [that is, those identified and criticised in the Palmer Report] are embedded in the Migration Act itself and reflected in many of its provisions and hence its administration and operation. … recent controversies surrounding the exercise of detention and deportation cases suggest that it is a time for a major overhaul of the scope and focus of the Migration Act.[138]

2.152 Allegations of an adversarial and hostile culture within DIMA are not new. Similar concerns were raised in the committee's inquiry in 2000. In its report on that inquiry, the committee noted, for example, the following evidence from a former member of the Refugee Review Tribunal:

> Primary decision-makers [in DIMA] … are often woefully ignorant of the law and of conditions in the country against which they assess the applicant. Anecdotal evidence is that they are often arrogant, hostile and even abusive towards applicants. In some cases, they reveal attitudes of prejudice, xenophobia and racism.[139]

2.153 The Federation of Ethnic Communities Councils of Australia (FECCA) advised the committee that:

> [t]here is a perception that if you come from certain countries you are more likely to end up in a detention centre than a jail. ... there is a strong perception that it is done using a selective, racist approach …. I am not sure if that is true or not, but that is a strong community perception. … .[There is] huge concern within the ethnic community in Australia about putting people in detention centres without identifying them or giving them a chance to justify their own identity. A common joke now in the ethnic

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137 Ms Jockel, Law Council of Australia, *Committee Hansard*, 27 September 2005, p. 76.

138 Associate Professor Kneebone, Castan Centre for Human Rights, Submission 71, p.2.

139 *Sanctuary under Review*, p. 123 (citing Dr Rory Hudson *Submission No. 16* to that inquiry at p. 77).

> media and among some people is that they need to carry their passport all the time. That is a very serious matter.[140]

2.154 Witnesses did acknowledge that action was being taken to address these issues in the aftermath of the Palmer and Comrie report. For example, the committee was advised that:

> The DIMA review of service quality, with the changes at the top echelon of DIMA, recognises that there is a need to undertake wholesale and significant change from the point of view of not only culture but also process and that, in terms of the fact that immigration is a vital part of Australia, there is a need to redress some of these imbalances.[141]

2.155 The Government, in responding to the findings of the Palmer and Comrie reports, has accepted the need for cultural change more generally across the Department and to 'ensure that the government's border security and immigration policies are administered more fairly and reasonably'.[142]

2.156 DIMA was asked to comment on the concerns outlined above. Its response acknowledged that there was a problem and to point to the projects now being implemented to address the recommendations and the broader issues relating to culture highlighted in the Palmer Report. DIMA advised that:

> … 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.[143]

2.157 DIMA referred the committee to recent changes to the structure and governance of the Department designed 'to focus on clients as individuals, to ensure quality decision making, and to communicate better with the wider community'. It advised that:

> 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.[144]

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140 Mr Malak, Chairperson, Federation of Ethnic Communities Councils of Australia, *Committee Hansard*, 29 September 2005, p. 16.

141 Ms Jockel Law Council of Australia, *Committee Hansard*, 27 September 2005, p. 76.

142 LIV, *Submission 206*, p. 6. See also Amanda Vanstone, 'Ministerial Statement to Senate Estimates Committee', Media Release, 25 May 2005. Amanda Vanstone, 'Palmer Implementation Plan and Comrie Report', Media Release, 6 October 2005**.**

143 DIMA, Answer to Question on Notice, 5 December 2005, p. 28.

144 DIMA, Answer to Question on Notice, 5 December 2005, p. 58.

Committee view

2.158 The committee is concerned that the focus of the Government's recently announced reforms appears to be on the compliance and detention areas of the department.[145] Evidence suggests that there is a need to address issues for the processing and assessment of onshore protection and humanitarian visa applications. As noted above, the committee has recommended that the proposed training and support measures be broadened to include these areas.

2.159 The committee notes that DIMA's protection visa decision-making remains subject to a qualitative performance measure that only measures the timeliness of visa processing. It also notes the ANAO finding that the latter does not provide a complete indicator of quality of decision-making and that better practice requires a broader set of indicators. To this end, the ANAO recommended that the quality indicators for DIMA's protection visa decision-making be expanded beyond timeliness. The committee notes that the performance indicators used to measure the RRT and MRT's performance include indicators other than timeliness (such as the levels and outcomes of appeals against their decisions; and the number of complaints received about their Members and services).[146]

Recommendation 16

2.160 The committee recommends that the quality indicators for DIMA's offshore humanitarian program and onshore protection visa processing be amended to include qualitative performance measures other than timeliness (such as the number and outcome of review applications and appeals).

Restrictions on applicants' access to legal advice and assistance

2.161 Given the complexity of the migration system, it is self-evident that equitable access to that system will frequently depend on access to specialist legal advisers, especially where applicants have little or poor English skills.

2.162 Two particular aspects of this issue emerged during the inquiry – the first relates to the adequacy of legal aid schemes; and the second relates to access to legal advice and assistance on entry to Australia.

Access to legal aid

2.163 The committee received evidence critical of the barriers faced by many visa applicants, particularly those in detention, in gaining appropriate legal advice and

145 DIMA, Answer to Question on Notice, 5 December 2005, pp 28-30.

146 See, for example, Migration Review Tribunal, *Annual Report 2004-2005*, p. 14.

representation.[147] The committee notes that similar concerns arose during its inquiry into the operation of Australia's Refugee and Humanitarian Program in 2000 and in the inquiry into Legal Aid and Access to Justice in 2004.[148]

2.164 A key concern was inadequate free legal assistance available to people in immigration detention and in the community.[149]

2.165 The Commonwealth provides assistance in relation to visa applications under two schemes: the Immigration Advice and Application Assistance Scheme (IAAAS) and the general Commonwealth Legal Aid Scheme.

2.166 The IAAAS is administered by DIMA through contracts with individual service providers. The IAAAS funds twenty-three contracted registered Migration Agents to provide application assistance to:

- protection visa applicants in immigration detention;
- disadvantaged protection visa applicants in greatest need (including TPV holders) in the community; and
- disadvantaged non-protection visa applicants in greatest need in the community.[150]

2.167 'Application assistance' is assistance to prepare, lodge and present visa applications. It also includes assistance to prepare the merits review application should the primary application be refused, and to explain the implications of visa decisions made by DIMA and the relevant merits review tribunal. IAAAS services are *not* provided where an applicant seeks the Minister's intervention under section 417 of the Migration Act or where an applicant appeals to the Federal Court.[151] Appeals to the Federal Court would presumably be a matter for the Commonwealth Legal Aid Scheme.

2.168 IAAAS also funds the provision of 'immigration advice' to disadvantaged members of the community in greatest need. Assistance is provided to help eligible

147 See, for example, Law Council of Australia, *Submission 233*, pp 11-12, Refugee Advocacy Service of South Australia, *Submission 51*, pp 2-3; Legal Aid Commission of New South Wales, *Submission 166*, pp 13-18; Immigration Advice and Rights Centre Inc., *Submission 194*, pp 3-4 and South Brisbane Immigration & Community Legal Service Inc. *Submission 200*, pp 6-7.

148 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Chapter 7.

149 See, for example, Legal Aid New South Wales, *Submission 166*, p. 13.

150 DIMA, Fact Sheet 63, *Immigration Advice and Application Assistance Scheme,* 20 November 2005.

151 DIMA, Fact Sheet 63, *Immigration Advice and Application Assistance Scheme,* 20 November 2005.

persons living in the community to prepare and lodge their visa applications; and to extend or to vary the conditions of their visas and sponsor applicants.[152]

2.169 IAAAS services in 2004-05 cost $1.9 million and provided 430 application assistance services to asylum seekers in detention, 418 asylum seekers in the community and 96 non-protection visa applicants. Over 5,000 persons were provided with immigration advice in that year. Assistance and advice through the IAAAS is provided at no cost to eligible persons. [153]

2.170 The level of funding and therefore assistance available under each scheme has been criticised. The committee in 2004 concluded that the funding of assistance through IAAAS and Commonwealth Legal Aid Scheme was inadequate to satisfy the demand for assistance both at the preliminary and review stages of migration matters, including challenges to visa decisions and deportation orders. The committee therefore recommended that Commonwealth guidelines be amended to provide for assistance in migration matters, subject to applicants satisfying means and merit tests, and that necessary funding be provided to meet the need for such services.[154]

2.171 It is apparent that little, if any, effective action has been taken since that recommendation was made.

2.172 Evidence to this inquiry indicated that the Legal Aid Scheme remains of limited assistance to many visa applicants. The NSW Legal Aid Commission advised that existing legal aid guidelines for immigration matters restrict legal aid to only those matters where there is a 'difference of judicial opinion' or where 'the proceedings seek to challenge the lawfulness of detention, not including a challenge to a decision about a visa or a deportation order.'[155] The Commission recommended that the requirement that there be 'differences of judicial opinion ' before legal aid can be granted for judicial review proceedings should be scrapped and replaced solely by the means and merits test.[156]

2.173 Witnesses and submissions highlighted the limitations of the IAAAS. The committee was advised that support is provided to 'only a small fraction of the visa applicants who need assistance' and that there is considerable unmet demand. It was argued that the need is particularly acute among temporary protection visa holders applying for further protection visas. Many are in a poor financial position and suffer

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152 DIMA, Fact Sheet 63, *Immigration Advice and Application Assistance Scheme,* 20 November 2005.

153 DIMA, Answer to Question on Notice, 5 December 2005, pp 54, 68.

154 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Recommendations 41 and 42, p.143.

155 Legal Aid NSW, *Submission 166*, p. 14.

156 Legal Aid New South Wales, *Submission 166,* pp 28-29.

poor physical and/or psychological health. Yet the legal issues involved in further protection visa applications are complex.[157]

2.174 The NSW Legal Aid Commission is a contractor for the provision of legal services to asylum seekers under the IAAAS scheme. It advised:

> It is our experience that many asylum seekers with strong claims are unable to obtain assistance because of the limitations of the scheme. We are obliged to turn away financially disadvantaged applicants with strong cases when funding is exhausted. Enquiries of other contractors show that they have similar difficulties. Many applicants do not speak English and have enormous difficulty preparing and lodging their own applications for protection visas. Failure to submit a well-written and comprehensive protection visa application usually leads to rapid rejection of the application. Unrepresented applicants are at grave disadvantage in this process.[158]

2.175 The committee was advised that another area of great unmet need is services to people, particularly protection visa holders, seeking to sponsor family members from overseas. The IAAAS limits assistance to the giving of advice and assistance in completion of forms. However, the committee was advised that more assistance is required due to factors such as— lack of birth and marriage certificates for applicants from countries like Afghanistan and Somalia; requirements for DNA testing; requirements to prove dependency of adult children separated from the parent in Australia for many years; lack of English language capacity of relatives overseas; and long periods of family separation as a result of the temporary protection visa regime.[159]

2.176 Another significant criticism of the IAAAS scheme was that it left detainees who do not have refugee claims with few options to seek advice or representation. The Law Council of Australia, for example, advised the committee that:

> … the provision of legal assistance to detainees is severely limited. DIMA funds legal representation in respect of detainees who apply for protection visas. The legal representation is provided to assist with the completion of the protection visa application. Asylum seekers who are unable to seek refugee status are unable to be provided with legal representation under the funding program.[160]

2.177 The NSW Legal Aid Commission also stressed that there is no free advice service to detainees:

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157 See, for example, Legal Aid New South Wales, *Submission 166,* p. 15.

158 Legal Aid New South Wales, *Submission 166,* p. 15.

159 Legal Aid New South Wales, *Submission 166,* p. 15.

160 Law Council of Australia, *Submission 232*, p.12.

> The advice component of the IAAAS applies only to disadvantaged members of the community; there is no funding of advice services in detention. It does provide all detainees who have an asylum claim with a free migration agent or lawyer to assist them with their protection visa application.[161]

2.178 The committee is aware of concerns that the Migration Act generally restricts the right to provide immigration advice to migration agents registered under that Act.[162] It has been claimed, for example, that:

> The cost and administrative burden of the migration agents licensing regime acts as a choke on legal centres and pro-bono lawyers and stops them from taking on migration cases. Vivian Alvarez Solon's inability to get help from a local legal aid centre because of immigration licensing restrictions is one of the most serious, but unknown, failings of the Migration Act and contributed to her wrongful deportation.[163]

2.179 It was put to the committee that the effective operation of the Migration Act depends on visa applicants being able to understand the law in order that they are able to make applications for appropriate visas and to present their case.[164] Witnesses and submissions stressed that ensuring applicants had appropriate access to legal advice, assistance and representation at the outset of the visa determination process would provide significant benefits for applicants and government alike. That is, it could improve the assessment process, lead to fewer applications for review to the RRT and appeals to the courts and, thereby, be cost effective.[165]

2.180 The Immigration Advice and Rights Centre (IARC) saw the following advantages for applicants of early access to legal advice and assistance:

- Potential applicants would be in a position to make informed decisions as to whether or not to lodge an onshore visa application, and will be informed of relevant exclusion periods should they not have any onshore visa options;

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161 Mr Bill Gerogiannis, *Committee Hansard*, 28 September 2005, p. 66.

162 Anyone who uses knowledge of migration procedures to offer advice or assistance to a person wishing to obtain a visa to enter or remain in Australia, or to a person nominating or sponsoring a visa applicant, for a fee or reward must register as an agent with the MARA. This includes lawyers and people who work for voluntary organisations. There are penalties ranging up to 10 years imprisonment for people who practise in Australia as unregistered agents. Exemptions to the registration requirement apply to some groups of people including close family members, sponsors and nominators who can provide immigration assistance as long as they don't receive a fee or reward. DIMA, Fact Sheet 100 *Migration Agents Registration Authority* 5 August 2005. See also http://www.mrt.gov.au/operations.html. Migration Review Tribunal, *Annual Report 2004-2005*, p. 11.

163 George Newhouse, 'Immigration Reform reaches a deadend', *Sydney Morning Herald*, 6 October 2005, p. 13. Mr Newhouse is a lawyer who worked on Ms Solon's legal team.

164 Law Council of Australia, *Submission 232*, p. 12.

165 See, for example, Ms Maria Jockel, Law Council of Australia *Committee Hansard*, 27 September 2005, p. 76.

- The most appropriate visa class would be applied for (which may or may not be a protection visa);
- The strict time-frames prescribed under the Migration Act would be complied with;
- Protection visas would only be applied for where a protection visa is the appropriate visa to apply for;
- DIMA would receive appropriate and adequately prepared applications, which would minimize processing times and the costs involved in processing incomplete or inappropriate visa applications, and will maximise processing efficiency.[166]

2.181 The Law Council of Australia (LCA) outlined additional benefits of expanding legal assistance to detainees:

> a. Legal advice may inform the detainees of the likelihood of success and avenues of review and appeal and the difficulties and obstacles faced, and the usual experiences of others in similar circumstances.
>
> b. Where the likelihood of a successful application to obtain a visa is remote, the person may be encouraged at some stage of the detention to return to his or her country.
>
> c. The provision of legal assistance and the information provided under lawyer-client confidentiality may expose cases in which Australian citizens are wrongfully detained.[167]

2.182 The South Brisbane Immigration & Community Legal Service (SBICLS) highlighted the advantages of access to legal advice and assistance for detainees:

> People detained under immigration law as suspected non-citizens, without competent and timely legal assistance, may not get an opportunity to have their immigration case considered properly, meet tight and inflexible time limits prescribed by immigration law, or to obtain their release. The consequences are extremely serious – a person may continue to be detained, or be deported, face bans from ever returning to Australia, lose right to permanent residence and be torn away from their families. In protection visa cases, they may face persecution and death on return to their home country. [168]

2.183 The SBICLS argued that the procedural requirements imposed under the Migration Act made a duty lawyer scheme essential:

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166 *Submission 194*, p. 4. Similar advantages were also expressed in other submissions. See, for example, Refugee Advocacy Service of South Australia, *Submission 51*; Legal Aid Commission of New South Wales, *Submission 166*, and South Brisbane Immigration & Community Legal Service, *Submission 200*.

167 LCA, *Submission 233*, p. 12.

168 SBICLS, *Submission 200*, p. 6. See also Immigration Advice and Rights Centre, *Submission 194*, p. 3.

> A duty lawyer system is particularly needed given the effect of timelines. For example, S195 MA allows a detainee 2 (+5) working days to apply for a visa. After this a detainee may only apply for a Bridging or Protection visa. Without access to timely and sound advice the time limits in s195 may encourage protection visa applications because other visa options have not been explored within the strict limits prescribed. People who have had their options explained by an independent advocate are more likely to accept their situation and be clear on their options. Independent adequately resourced legal aid style of a duty lawyer would not encourage protection visas as there is no financial incentive to do so.[169]

2.184 The LACNSW noted that, in the past, a lawyer from Legal Aid NSW would attend at Villawood detention centre once a week to provide general immigration advice to detainees. It argued that the above-mentioned benefits required that funding be provided for a regular face to face legal service at detention centres:

> Funding such a service would allow detainees to obtain advice on a range of issues including wrongful detention, bridging visas, options for visa applications, criminal deportation and judicial review.[170]

2.185 The IARC also considered the current level of immigration advice and assistance to be inadequate and needed to be expanded to include assistance to all detainees, not just those seeking protection visas. It therefore suggested that all detention cases should be:

> … referred to an IAAAS service provider for advice on relevant onshore visa applications as soon as practicable at or after a detainee's section 194 interview (and not later than 12 hours after that interview), allowing the potential applicant to lodge (or make an informed decision not to lodge) within the strict time limits prescribed under section 195.[171]

2.186 In light of the above, much was made of the fact that section 256 of the Migration Act currently provides detainees with a right to a lawyer only when and if expressly requested by the detainee.[172]

2.187 The Law Council of Australia advised the committee that:

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169 SBICLS, *Submission 200*, p. 6. See also Immigration Advice and Rights Centre, *Submission 194*, p. 3.

170 Legal Aid New South Wales, *Submission 166,* p. 17.

171 IARC, *Submission 194*, p. 4. The IARC also noted that additional funding would be required to meet the increase in demand for assistance by people released into the community on bridging visas following the recent amendment to section 195A of the Migration Act.

172 Section 256 provides that 'where a person is in immigration detention under this Act, the person responsible for his or her immigration detention shall, at the request of the person in immigration detention, give to him or her application forms for a visa or afford to him or her all reasonable facilities for making a statutory declaration for the purposes of this Act or for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention'. *Migration Act 1958*, section 256.

> The Migration Act provides that legal assistance may be made available to an immigration detainee if a request in writing for such assistance is made. The law does not mandate the giving of such assistance if people do not know how to ask for it. The Act is also clear that there is no obligation on officers to offer advice to detainees about their position. The Law Council maintains its long held view that these arrangements are grossly inadequate.[173]

2.188 The SBCIL shared these concerns. It also pointed out that:

> There is no duty under law (only in procedures) to advise a person they can seek legal assistance. Officers are required only to advise of timelines that exist for lodging visas (s194-196) but do not have to advise that the detained person can get a lawyer, nor provide access to that lawyer [ie, unless requested by the detainee].[174]

2.189 Witnesses and submissions highlighted the consequences for detainees of a lack of a statutory guarantee of legal advice and representation. The Refugee Advocacy Service of South Australia (RASSA), for example, advised the committee that according to detainees, DIMA does not advise asylum seekers of their right to obtain legal advice:

> This effectively means that detainees only learn that legal assistance is available to them by word of mouth through other detainees or community people who visit the detention centre to provide support to asylum seekers. The result of this is that detainees who are not aware of their right to obtain legal advice because of cultural or language barriers, lack of education or mental illness, are left to fend for themselves unless they learn that they are required to *ask* for legal assistance before DIMA will allow it. [175]

2.190 RASSA representatives argued that, given the reliance on word of mouth among detainees, the changing detainee population meant that some will not obtain the legal support they require:

> It used to be that the majority of detainees at these centres would relate to each other. They were from a similar background. They shared languages, so they could spread the word that there were lawyers available to assist them. Now there are detainees from a wide variety of cultures and languages. They are not communicating with one another, so I have no doubt that there are currently people in Baxter in need of a lawyer who do not know we exist, and we are unable to offer our services to them. That is still a problem.[176]

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173 LCA*, Submission 232*, p. 11.

174 SBCILS, *Submission 200*, p. 6.

175 RASSA, *Submission 51*, pp 2-3.

176 Ms Birss, RASSA, *Committee Hansard*, 26 September 2005, p. 15.

2.191 Nor, according to RASSA, will DIMA assist legal representatives to contact detainees in the absence of any request from detainees:

> RASSA is unable to be pro-active in advertising their legal services to detainees in Baxter, because DIMA refuses to provide details to us of the people who are detained. We can therefore only assist asylum seekers, when we become aware, through community people or other detainees, that they are in need of help. We rely solely on the information provided by other asylum seekers and observant visitors to Baxter to identify detainees in need of our legal services. Those detainees who are isolated from the rest of the inmates, either because of racial, religious or health reasons or because they are held in isolation (in the "Management Unit" or Red 1 Compound, for example), may never come to the attention of lawyers.
>
> Once we are aware of a detainee's existence, we can telephone them and invite them to sign an authority, but we are unable to visit them or provide legal assistance until they sign an authority for us to act for them. If they are unable to sign an authority, due for instance to their mental illness, then such detainees may never get assistance. We regard this as yet another unreasonable barrier which is placed between the asylum seekers and their access to legal rights.[177]

2.192 Other barriers to appropriate legal advice and assistance cited in evidence to the committee included the remote location and isolation of some detention centres, such as Baxter and on Christmas Island.[178] Another cited difficulty was the lack of appropriate facilities – such as adequate interview rooms and access to telephones, faxes and photocopiers – at some detention centres:

> 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. … Another feature of the whole regime has been that at times we do not know if it is DIMA, ACM or GSL who are providing the obstruction. There is a lot of duckshoving that goes on and hiding behind the cloak of who might be responsible for certain facilities within the detention centre.[179]

177 RASSA, *Submission 51*, pp 2-3.

178 See for example, Ms Birss and Mr Harbord*, Committee Hansard*, 26 September 2005, pp 20-21.

179 Mr Harbord, RASSA, *Committee Hansard*, 26 September 2005, p. 20. See also, for example, NSW Legal Aid Commission, *Submission 166*, pp 25-26.

2.193 The committee was advised that detainees have had to rely on the 'merit points' system used in detention centres to meet the upfront fax and photocopying charges imposed by the detention centre contractor.[180] It was alleged that had been used to deny detainees access to legal representation:

> Detainees were required to pay upfront and even if faxes were urgent or addressed to lawyers they would not be sent if a detainee had insufficient points. In 2005 a complaint was brought to the managers of DIMA and GSL at Baxter about a detainee being unable to send a fax to his lawyer because he had insufficient points and they confirmed GSL's position that he was not permitted to send the fax.[181]

2.194 Of significant concern to the committee were claims that officials and government contractors deliberately obstructed detainees' access to legal advice and representation. RASSA described its story as one of fighting to get access to its clients in immigration detention:

> 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.[182]

2.195 RASSA cited the following as examples:

> RASSA is required to write letters to DIMA seeking access for a visit on each separate occasion, several days in advance. At times permission has been granted and then cancelled abruptly when lawyers were just about to set off for their journeys to Woomera or Baxter. On occasions detainees were suddenly sent away to other detention centres without any notice or reasons being given to their lawyer.
>
> Upon visiting a detention centre lawyers are generally only allowed to see those persons who they have requested to see in advance. If a detainee hears about their visit whilst lawyers are actually there, that person is usually refused access to the lawyers despite his or her request.
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> In addition lawyers are not allowed entry into the actual compounds where detainees reside. This means that RASSA is not able to access those detainees who may be ill, for instance, or to review conditions in notorious areas, such as the Management Units or Red Compound 1. [183]

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180 The merit points system is described and discussed in Chapter 6 of this report.

181 RASSA, Answer to Question on Notice, 28 October 2005, p. 2.

182 Mr Harbord, RASSA, *Committee Hansard*, 26 September 2005, p. 19. See also Ms Birss, RASSA, *Committee Hansard*, 26 September 2005, p. 15.

183 RASSA, *Submission 51*, pp 2-3.

2.196 Similar concerns and claims were raised by other witnesses, such as the representatives of the Woomera Lawyers Group who advised the committee of their difficulties in accessing clients in detention centres.[184]

2.197 In view of the above, RASSA submitted that 'lawyers should be allowed full and unrestricted access to asylum seekers in detention centres' and that 'section 256 of the *Migration Act* should be amended by deleting the phrase *"at the request of the person in immigration detention"* from this provision.'[185] They also submitted that lawyers should be permitted to represent applicants throughout the interview process conducted by DIMA which is presently not allowed under existing procedures. [186]

2.198 DIMA disputed many aspects of this evidence.

2.199 DIMA maintained that it always facilitates access to legal advisers and advice and, moreover, provides detainees with all reasonable facilities for obtaining legal advice or taking legal proceedings in relation to their immigration detention.[187]

2.200 The department advised that all detainees are informed upon arrival at an immigration detention facility 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.

2.201 DIMA highlighted the obligation imposed on the Department by section 256 of the Migration Act to provide such assistance at the detainee's request. It also advised that:

> [i]n 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.[188]

2.202 The committee notes that one could reasonably argue unauthorised arrivals and character cancellation cases constitute a significant omission from such a requirement given their number and their need for advice.

2.203 DIMA also pointed to the publicly funded Migration Agent assistance provided through the IAAAS to protection visa applicants in immigration detention

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184 See, Mr Paul Boylan, Ms Jane Moore and Mr Jeremy Moore, *Committee Hansard*, 26 September 2005, pp 49-61. See also Woomera Lawyers Group, *Submission 187* and Mr Paul Boylan, *Submission 112*.

185 RASSA, *Submission 51*, p. 3.

186 RASSA, *Submission 51*, pp 3-4.

187 DIMA, Answer to Question on Notice, 5 December 2005, pp 20, 54, 57-58, 68.

188 DIMA, Answer to Question on Notice, 5 December 2005, p 57.

and to disadvantaged visa applicants living in the community. It also noted that applicants are free to choose privately funded representation.[189]

2.204 DIMA also explained that, 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. Departmental protocols require detainees' legal representatives to produce evidence of their qualifications prior to their initial access to a detention facility. They must also establish their identity and provide written evidence that a detainee has retained them to act on his or her behalf. Permission is required to bring mobile telephones and lap-top computers into an immigration detention facility.

2.205 DIMA noted that visits by lawyers for non-migration matters are facilitated subject to operational requirements. 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).[190]

2.206 In response to concerns about detainees being unable to communicate with their legal advisers, DIMA stressed that detainees have a right to contact their legal representatives by phone and to receive and send material to them via fax or post. It explained that the Detention Service Provider (DSP) or Departmental officers will generally facilitate access to phone, faxes and postage for detainees unable to pay for these themselves. However, in the case of the DSP, it is for the Operations Manager to determine the circumstances and extent of this service. Size limits also apply to faxes, with lengthy documents having to be sent by mail. In contrast, the DSP facilitates free and unlimited facsimile, telephone and postage access to the Commonwealth Ombudsman and the Human Rights and Equal Opportunity Commission (HREOC).[191]

Lack of legal advice and assistance on entry

2.207 Some witnesses and submissions were particularly concerned that unauthorised arrivals are not provided with any legal assistance when they initially entered or sought to enter Australia. The LIV, for example, advised that:

> Currently, immigration officials have the ability to return a person to their country of origin, before they enter the 'migration zone', if they deem that a claim for protection has not been validly made. In many cases this may be due to communication difficulties because the person making the claim

189 DIMA, Answer to Question on Notice, 5 December 2005, pp 58.

190 DIMA, Answer to Question on Notice, 5 December 2005, pp 56-58.

191 DIMA, Answer to Question on Notice, 5 December 2005, p. 58.

> does not speak English and does not know how to make a valid application.[192]

2.208 This, it was argued, meant people could be turned around without sufficient consideration having been given to their situation. As an example, the LIV cited:

> …[the] occasions when the Minister has arranged for boats carrying suspected asylum seekers to be intercepted and effectively turned away from Australia after claiming that the passengers on board the boat were not seeking protection, were not within the 'migration zone' or did not make a valid claim for protection. In returning people before properly assessing if they have a protection claim it is highly possible that Australia is breaching its non-*refoulement* obligations under the Refugee Convention.[193]

2.209 The SBCIL also argued that there is little transparency and harsh time limits apply in immigration clearance. It cited Migration Regulation 2.46 which it explained:

> … gives a person 5 minutes to say why their visa should not be cancelled. This is insufficient time to properly respond.[194]

2.210 Other witnesses noted that similar problems could arise in relation to persons who had been detained as opposed to turned away. The Woomera Lawyers Group, for example, advised that:

> We found out at Woomera that a lot of people had been screened out of the process because they had not said the right words. They had not said, 'I claim the protection of Australia.' They had said things like, 'I have come here so my family can be better'—things like that. It was at our pushing, once we found out that there was a whole group of them out there in November compound who were in this predicament, that DIMA then changed its mind and they were all allowed to make another application.[195]

2.211 In light of the above, the LIV recommended that:

> … asylum seekers, who make an oral claim for protection upon arrival at an Australian airport or sea port, … be given the right to access an independent migration agent/lawyer, an opportunity to fully explain their claims before being returned to their country of origin and to make a valid application for a Protection visa.[196]

2.212 The same concerns arose during the committee's 2000 inquiry into Australia's onshore refugee determination system. DIMA stressed to the committee at that time

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192 LIV, *Submission 206*, p.17. It is noted that 1632 people were refused immigration clearance at Australian airports in 2004-2005, with 97.5% being removed within 72 hours, in most cases on the next available flight. DIMA, Annual Report 2004-2005, p. 109.

193 LIV, *Submission 206*, p.18.

194 SBICLS, *Submission 200*, p. 9.

195 Mr Paul Boylan, *Committee Hansard*, 26 Sept 2005, p. 55.

196 LIV, *Submission 206*, p.18.

that great care is taken when interviewing unauthorised arrivals to ensure that a person is not required to leave Australia and return to an unsafe place. The department also indicated that it was under an obligation to determine whether unauthorised arrivals were *prima facie* likely to engage Australia's protection obligations and, therefore, appropriate procedures had been put in place.[197]

2.213 The committee at that time refrained from making a recommendation on this specific issue. However, it noted that:

> One of the main problems that has been identified in respect of the capacity to make an application for a Protection Visa is the fact that there is no obligation on departmental officers to provide detainees with information about the process or to advise that legal or other assistance is available. Neither s 193 nor s 256 [of the Migration Act] place any obligation on an officer unless the asylum seeker makes a request.[198]

2.214 DIMA's response to concerns about the level of assistance provided at arrival or entry to Australia was to reiterate that persons assessed as *prima facie* engaging Australia's protection obligations following an entry interview at the border will be provided with assistance in preparing and lodging a protection visa application under the IAAAS. It also noted that persons refused immigration clearance at the border and placed in immigration detention can also 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.[199] It referred the committee to statutory obligations under the Migration Act which require immigration officers to provide application forms for a visa upon request and to provide reasonable facilities for the person to access legal advice should they ask for this. [200]

Committee view

2.215 The committee acknowledges that there is considerable provision within the migration system for access to legal advice and assistance, including via the legal aid programs. The capacity to expand such assistance programs is almost limitless and the committee does not necessarily accept the view that increasing legal aid would inevitably lead to fewer appeals. However, it is logical to suggest that legal assistance

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197 Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, pp 115-120. DIMA advised, for example, that results of interviews conducted at airports were referred to and considered by senior departmental officers to assess whether Australia's international protection obligations were likely to be engaged.

198 Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, p. 119.

199 DIMA, Answer to Question on Notice, 5 December 2005, p. 69.

200 DIMA, Answer to Question on Notice, 11 October 2005, p. 11. DIMA advised that of the 1632 persons refused immigration clearance at Australian airports in 2004-05, there were 40 persons who raised claims or information which prima facie may have engaged Australia's protection obligations. In 2002-03 and 2003-04 there were 21 and 23 out of 937 and 1632 respectively.

to applicants at an early stage would improve the quality of applications and could be expected to improve processing at other stages of the process.

2.216 Therefore the committee maintains its view that, for the refugee determination process to work effectively and efficiently, access to appropriate information, advice and assistance (including legal advice and interpretation services) at the outset of the process is critical.

2.217 The committee is also struck by the divergence of evidence between DIMA's formal policies on access to lawyers and the experience of those lawyers in their day to day practice. Whatever the theory, the committee cannot escape the suspicion that the rules are interpreted as restrictively as possible by DIMA officers at the operational level, in a way that seems designed to limit effective access. This suggests that at least some in DIMA view lawyers as a problem rather than an asset to the system.

2.218 The committee stresses that every effort must be made to ensure that asylum seekers understand the rules relating to entry; their rights and obligations; and the basis on which their claims for asylum will be accepted. To this end, the committee endorses the recommendations concerning the provision of legal advice and assistance made in its 2000 report into the onshore refugee determination process, the recommendations of the 2004 Select Committee on Ministerial Discretion, as well as the migration related recommendations of the Legal Aid and Access to Justice Inquiry in 2004. In addition the committee makes the following specific recommendations:

Recommendation 17

2.219 The committee recommends that visa applicants' legal representatives be accorded the right to participate in primary interviews conducted by DIMA.

Recommendation 18

2.220 The committee recommends that the Government institute and fund a duty solicitor scheme for all persons held in immigration detention (not solely protection visa applicants).

Recommendation 19

2.221 The committee recommends that DIMA cease its practice of interpreting section 256 of the Migration Act narrowly which, in practice, limits access to lawyers. Detainees should be advised of their right to access lawyers, and lawyers should have ready access to detainees with the minimum possible restrictions.