DISSENTING REPORT BY GOVERNMENT SENATORS

General comments

1. It is the view of the Government Senators that the majority report on the operation of the Migration Act is substantially flawed by a biased and highly selective use of the evidence presented during the inquiry.

2. Four matters stand out in this regard.

3. First, the report consistently fails to see DIMA in its wider context: DIMA makes in excess of four million decisions every year and administers large and complex migration and refugee programs. As Mr Andrew Metcalfe, departmental secretary, told the Committee during Additional Estimates hearings:

> To give you a sense of scale, in addition to the 43 per cent of Australians who are either born overseas or have at least one parent born overseas, Australia is host to very large numbers of temporary entrants. In December 2005, for example, there were around three-quarters of a million people in the country on a temporary basis. In the 10 minutes or so that I have been speaking, the department has considered and granted around 90 visas and around 550 people have entered and left our country – that is almost one every second.[1]

4. These decisions occur across all areas of the department's wide portfolio responsibilities which include migration and settlement, multiculturalism, community harmony and citizenship objectives.

5. Government Senators also note that DIMA, in carrying out it's wide portfolio responsibilities also incurs litigation costs. In evidence to the Inquiry, Mr John Eyers, Assistant Secretary, Parliamentary and Legal Division stated:

> … the costs of litigation to the Commonwealth in the immigration sphere are quite significant and have been significant for a number of years, and that is largely due to the number of cases which are undertaken in any year. We currently have a litigation caseload of around 3½ thousand active cases before the courts and the AAT. We receive approximately 5,000 new cases each year – we have for the last couple of years – and we resolve just in excess of 5,000 each year. The numbers are fairly large. For the last financial year, 2004-05, our spend on litigation external to the department was in the order of $36.8 million and the internal cost of managing that litigation is somewhere in the order of $5½ million.

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1 Mr Metcalfe, Additional Estimates Hansard, 13 February 2006, p . 7.

> As far as our success rate in litigation is concerned, in recent times that has been very high. We certainly take great care to seek to defend only those cases where we have reasonable grounds for success and I think that is reflected by our success rates. In the financial year 2002-03, we were successful in 92.5 per cent of cases that were defended before the courts; in 2003-04, that improved to 94 per cent; and for the last complete financial year, 2004-05, it was 95 per cent.

6. Inevitably, in managing such a large number of matters, any agency will make a certain number of mistakes. While it is quite proper to examine these mistakes, and take measures to address them, this report makes no attempt to see the department's decision making in this wider context. Instead, it arrives at general conclusions based on isolated specific examples.

7. Second, the gaze of the report seems resolutely fixed on the past. Large tracts of text are devoted to a detailed rehashing of information and allegations contained in previous inquiries, blind to the quite extensive changes announced by the Minister of Immigration and Multicultural Affairs as a result of, among other things, the recent Palmer and Comrie inquiries. Consequently, many of the issues and criticisms presented in the report are out of date and irrelevant.

8. Third, the report is characterised by biased and uncritical approach to the evidence. In particular, many allegations are passed off as evidence of fact without any attempt to test the accuracy of the claims being made or the motives of the individuals making them. As noted above, these allegations are then used to justify sweeping generalisations and recommendations.

9. Fourth, since the report seems largely concerned with the management of asylum seekers and immigration detention to the exclusion of the wider operation of the Migration Act, it seems reasonable to point out that the system of mandatory detention was introduced in 1992 by a Labor Government. In this context, Government Senators also note with concern that the majority report fails to mention, much less objectively examine, detention statistics prior to 1996. The period 1992-1996 is conveniently left absent from discussion in the majority report.[2]

10. In addition, Government Senators note:

- selective quoting with unreasonable weight given to comments made by avowed critics, not only of the policy of mandatory detention, but of the Howard Government in general;
- selective quoting of statistics;

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2 Government Senators note that the Department of Immigration and Ethnic Affairs' 1992-1993 Annual Report acknowledged that, reflecting increases in compliance activity, there was an increase in the number of people passing through immigration detention centres in that period, as compared with the previous financial year (p. 77).

- an unbalanced presentation of material with chapters containing evidence that is overwhelmingly critical of DIMA which fails to include material provided by DIMA in response. During the course of the inquiry, DIMA produced a lot of material in response to questions on notice, and little of that material has been included in the Chair's report;
- an accusatory and negative tone which uses 'over the top' language rather than an unembellished account of the facts;
- failure to give proper weight to the reasons why people stay in detention – often for lengthy periods – due to, for example, litigation commenced by them or delays due to applicants seeking adjournments;
- given migration agents play an important role, the report should have included information about problems with unscrupulous agents and their impact on cases, as well as the exorbitant fees they charge;

11. Because the majority report seems disinclined to, Government Senators consider it is important to reiterate key elements of the government's reform program announced since the Palmer and Comrie reports.

12. An important starting point in this process has been the referral by the Minister to the Commonwealth Ombudsman, all cases of detention that might be in any way doubtful, in the light of the Rau and Alvarez cases.

13. Supported by a commitment of $231 million, the department has implemented a roadmap for change which includes: the creation of an open and accountable organisation with obligations to government and community; fair and reasonable dealings with clients; and well-trained and supported staff.

14. The national office has been restructured, to achieve improved and stronger governance arrangements, including a new values and standards committee. This has a membership of three external members including the Deputy Ombudsman and the Deputy Public Service Commissioner. The Audit and Evaluation Committee has also been expanded to have an external chairperson.

15. In addition to the staff training initiatives mentioned in the majority report, substantial improvements have been initiated for the immigration detention centres, which go well beyond the recommendations made in the Palmer report, and a new active case management framework and community care pilot is also being developed for clients with exceptional circumstances. All detainees are now screened for mental health problems and mental health plans are developed, where appropriate. Vast physical improvements have also been made at Baxter and other immigration detention centres.

16. Independent reviews of the department's information technology systems have been implemented, examining business information needs, governance, and records management. To these should be added the wider groundbreaking work that by the

department in developing computerised systems for visa applications that are accessed by the internet and processed almost instantly.[3]

17. The department has also expressed an ongoing commitment to building on all its reforms, progressing projects; continuing to engage, listen and respond to community concerns; and, of course, transparent and accountable reporting through the Minister to Parliament.

18. In combination, these amount to a substantial and systematic response by the government to the flaws identified in the department's administration. The failure by the majority report to properly consider these changes casts doubt on the accuracy and relevance of the majority report's recommendations.

19. Government Senators consider the majority report ignores the wider context of the essential work that the department does in controlling Australia's borders. This task is essential to the security of Australia against criminal and terrorist elements that may seek entry, as well as fundamental to the integrity of Australia's system of governance, which would be undermined without the basic ability to control who enters the country and under what conditions. Allied to this is the reluctance to recognise the inherent complexity and difficulty of performing this task.

20. Government Senators are unable to agree with either the analysis or the findings of the majority report.

21. Further specific comments in relation to each of the chapters in the Majority Report are discussed below.

Chapter 1: Ministerial responsibility

22. The discussion contained in Chapter 1 is flawed by a number of inaccuracies that must be corrected.

23. In relation to references to DIMA's 'systemic' and 'catastrophic' failings in paragraphs 1.3 and 1.4 of the Chair's report, Mr Comrie's report stated that the handling of the case in question was 'catastrophic'. This was a comment on the consequences for the individual concerned, not a statement specifically referring to 'the leadership, management, actions, systems and processes of DIMA' more generally. The reference is to the management of one particular case and it should not be pluralised and stretched to systems and matters that were not the subject of Mr Comrie's inquiry.

3 DIMA, answers to questions on notice, 7 February 2006 – provide details of the degree to which the use of the internet is used to facilitate visa application processing, including the integrity of such usage and various initiatives to assist employers with the complexities of visas and work permits.

24. Paragraph 1.9 sets out what purports to be a list of the significant improvements to be carried out with the $230 million approved by the Federal Government, flowing from the Palmer Report. This list does not refer to IT systems, to which a large part of the funds mentioned will be allocated. It should be noted that the current systems played a significant role in the failure to identify Vivian Alvarez.

25. Paragraph 1.12 quotes Senator Evans' reference to the Palmer Report and comments on the ability of the authors of 'failed practices, poor decisions etc...' to implement changes. Senator Evans says that this disqualifies Minister Vanstone from implementing change. Government Senators consider that, as a basic principle, if the Chair's report is to quote the Palmer Report, it should do so directly and not via politically biased paraphrases. Further, if this is a reference to Finding 20 on page xi of the Palmer Report, it is misleading. Mr Palmer's comment was in relation to 'the current immigration compliance and detention executive management team'. Stretching this to be a reference to the Minister is dishonest.

26. In reference to the 'allegations against' the Minister and former Minister in paragraph 1.17, no specific allegations are made but simply the claim of 'failure' to properly exercise discretionary powers and the failure to rectify problems before they were apparent.

27. In paragraph 1.25, it is asserted that the culture of DIMA developed as a direct result of 'the government's tougher immigration policy'. No evidence at all is adduced in support of this assertion.

28. The words 'the framework within which DIMA has been required to operate' quoted in paragraph 1.26 are taken to be a reference to Federal Government policy. This is not warranted. Page 171 of the Palmer Report amplifies these matters and it is clear that this is a reference to longstanding organisational practices within parts of DIMA and the culture to which it gave rise. The principles that are enunciated on page 1 of the Palmer Report make clear that the policy imperatives are also longstanding, going back to 1992 and were implemented by the Keating Labor Government. The current inquiry did not call this policy into question.

29. Government Senators also note the inaccuracy of the reference in paragraph 1.27, footnote 23 which cites page 166 of the Palmer Report. Page 166 of the Palmer Report does not have any reference to the Minister or her advisers, nor to contact with them by DIMA.

Chapter 2: Processing of protection visa applications

30. The Chair's report's reference to high set-aside rates by tribunals implies that this is an adverse reflection on DIMA. The report acknowledges that the MRT and the RRT have indicated that these rates are explicable in part because of 'further evidence and information' available at the time of review. However, without further evidence, the slur on DIMA officers is completely inappropriate.

31. The majority report fails to acknowledge the department's achievements in meeting the Prime Minsiter's commitment to process one hundred percent of initial protection visa applications within 90 days.

32. Paragraph 2.87 refers to claims that decision-makers rely more on policy documents and guidelines rather than the legislation itself. It is not clear whether the Chair's report is questioning the training and support given to decision makers or the fact that the contents of policy documents may have the force of law.

33. Paragraphs 2.115-2.139 contain criticism of the quality of country of origin information which should be reconciled with the levels of successful asylum claims in Australia by comparison with other countries. The Chair's report earlier acknowledges information from DIMA that these levels are high. If the country of origin information is so bad, why are the approval rates for asylum claims so high? The rates for other comparator countries should have been quoted in the report. It would also have been helpful to include international comparisons in relation to access to legal assistance for asylum claimants.

34. Chapter 2 of the Chair's report discusses generally the role of migration agents, but contravention of the MARA legislation is not specifically addressed. This is an important omission given the role that migration agents play in the overall system, and the effects of any malpractice on that system.

35. The Government and the Migration Agents Registration Authority (MARA) are taking strong action against unscrupulous agents who lodge large number of applications with no chance of success:

> The *Migration Agents Integrity Measures Act 2004* was developed following an analysis of the activity of migration agents who lodge Protection visa applications, which showed that 95 agents appeared to be engaging in 'vexatious activity'. Between them, these agents had 3,470 Protection visa applications refused over an eight month period from 1 November 2001 to 30 June 2002. A total of 9,238 Protection Visa applications were lodged during 2001-02 financial year.
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> These statistics were used to help develop a list of agents of concern for the Migration Agents Task Force (MATF), which was set up in June 2003 to investigate particular registered and unregistered agents allegedly involved in breaches of the Migration Act 1958 and other Commonwealth legislation.[4]

36. The effects of the Migration Agents Integrity Measures Act, increased sanction actions by the MARA and the disruption activities of MATF, has resulted in a significant number of these 95 agents of concern being removed or forced out of the industry. Since the legislation came into effect on 1 July 2004, only seven agents have been identified as coming within the scope of the vexatious activity sanction scheme:

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4 DIMA, answers to questions on notice, 7 February 2006.

> Every Protection visa application lodged by these seven agents has been identified. All the relevant case files are being collated to enable comprehensive analysis of each agent's activities. One of these agents has already had their registration cancelled by the MARA under its discretionary sanction powers. Three agents have already been formally asked to explain their actions, as a precursor to being considered for referral to the MARA for possible sanction under the sanction regime introduced in the Migration Agents Integrity Measures Act, pending judicial review of some of their cases. 'Show cause' letters are being prepared to send to two more of these agents.

37. The deterrent effect of these measures is evident from the fact that since 1 July 2004, no agents have been identified as within the scope for the vexatious activity sanction scheme in terms of their lodgement of other types of visa applications. However, the MARA continues to take strong action against agents of concern, although at a lower level than in 2003-04, with:

- 37 sanction decisions made during 2004-05 (compared to 42 in 2003-04); and
- 28 agents refused registration (a drop from 44 in 2003-04).

38. The department is continuing to take a pro-active approach in relation to other agents of concern, including through the creation of profiles of agents with high refusal rates and those who have lodged a number of applications with fraudulent supporting documentation. Warning letters are also being sent to registered migration agents who:

- are involved in at least five cases where fraudulent supporting documentation has been identified;
- repeatedly lodge incomplete applications;
- act in cases where a conflict of interest may arise; or
- appear to lack sound knowledge of migration law and procedure.

39. Better researched and more substantive complaints about migration agents are referred to the MARA for further investigation, and the department advised that 31 such complaints have been referred to the MARA since 1 July 2005.

40. The department also provided information on actions taken to address complaints over high fees by migration agents.

> As many consumers only seek migration advice once, the level of community knowledge about what may be an appropriate fee for a certain visa has always been low. Further, information about quality and price has not been readily available, making comparisons difficult.
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> The Migration Agents Registration Authority (MARA) published information about the average fees charged by migration agents in November 2005, as recommended by the most recent industry review. Fee information has been provided for most of the permanent visas, as well as for student and other temporary visas.

41. This information will improve consumer protection through building community expectations about appropriate fees and changes.[5]

Chapter 3: Secondary assessment of visa applications

42. Government Senators acknowledge the validity of criticisms that the RRT and MRT have often taken too long to make decisions in the past. However, the Majority report does not mention the important changes which have been introduced by the Migration and Ombudsman Legislation Amendment Act to increase accountability of the time taken to make decisions via Parliament. This is a significant development which has been dismissed.

43. It should be emphasised that this piece of legislation passed unopposed by non-government parties. The parliamentary debate on the Bill provides good background information about this legislation.

44. As pointed out above, the majority report focuses heavily on the past as if this is still the current practice. The Chair's report basically regurgitates the findings of previous, and now out-of-date, inquiries. The Committee should have taken the effort to come up with fresh perspectives rather than duplicate findings that are now no longer current.

45. Many of the quotations in the Chair's report are comments submitted previously in other contexts. Many are the perspectives of agencies which and advocates who in the past have been vocal in speaking out about mandatory detention. These groups are ideologically opposed to mandatory detention including some who would advocate diluting our strong and effective border protection measures. Overall, Government Senators are of the view that there has been no attempt in the Chair's report to obtain a balanced view amongst the commentators.

46. Further, and in relation to membership of the RRT, and qualifications of its Members, which is discussed at paragraphs 3.31 and 3.32, Government Senators note that evidence was provided by Mr Burnside QC at the Melbourne hearing that:

> Some commentators have rather uncharitably pointed out that the principal qualification in recent years seems to be a failed candidacy for a Liberal seat.

47. DIMA was asked to give a breakdown of the qualification of the membership of the RRT. DIMA's response of 7 February 2006 gives a breakdown of the immense variety of backgrounds of Members but none of these details have been included in the Chair's report. DIMA provided information showing that Members of the RRT come from a broad cross-section of the community in a host of different areas. Specifically, DIMA advised that of the 71 Members currently appointed to the RRT:

- 6 have Doctors of Philosophy;

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5 DIMA, answers to questions on notice, 7 February 2006.

- 2 have Doctors of Judicial Studies;
- 11 have a Masters of Law;
- 44 have a Bachelor of Laws;
- 20 have Masters Degrees in disciplines other than law;
- 55 have one or more Bachelor degrees in disciplines other than law;
- 25 have additional Diploma qualifications; and
- 12 have other tertiary qualifications.[6]

48. That is, 98.5% of RRT Members hold a tertiary qualification and 79% have more than one tertiary qualification. The 1.5% of Members who do not have tertiary qualifications had extensive experience in refugee matters prior to their appointment.[7]

49. Further, DIMA advised that appointments to the RRT are made under the Migration Act by the Governor-General based on recommendations made and approved by the Federal Government. Generally:

> … appointments are made following a nationally advertised recruitment campaign. A Selection Advisory Committee appointed by the Minister measures applicants against published selection criteria designed to identify people with the following skills:
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> - a sound understanding of the relevant law;
> - the ability to apply relevant law to make quality decisions in a manner that is fair, just, economical, informal and quick (as required by the Act);
> - analysis and research skills; and
> - interpersonal skills (including sensitivity to cross-cultural issues).[8]

50. DIMA also emphasised the independence of the RRT:

> RRT Members are statutory office holders independent of the Minister and the Department of Immigration and Multicultural Affairs. Whilst the Act permits the Minister and Principal Member of the Tribunals to provide general Directions to Members concerning their method of performance or exercise of general powers or functions under the Act, that power does not allow a member to be directed as to how to exercise his or her powers in specific cases.[9]

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6 DIMA, answers to questions on notice, 7 February 2006.

7 DIMA, answers to questions on notice, 7 February 2006.

8 DIMA, answers to questions on notice, 7 February 2006.

9 DIMA, answers to questions on notice, 7 February 2006.

51. In paragraphs 3.39-3.95 there is no mention of the fact that sometimes a decision is held up due to factors outside the control of the tribunals – such as information coming from a third agency. However, under the new legislation, the reasons for delays have to be tabled in Parliament so that some assessment can be made as to whether or not the MRT or RRT is causing the delay, or whether there is some other explanation.

52. There is criticism that time limits should be more flexible and that Members should have the discretion to extend them. This criticism is consistent with the recommendation in the Chair's report to replace the entire merits review process with a judicial process. It is the view of Government Senators that it is legally and practically undesirable to eliminate or downplay the administrative review role played by the Tribunals.

53. Extending time limits as recommended by the majority Report, will prove counter-productive to the Tribunals' aim to provide timely decisions. Time limits have served as a means of enforcing some discipline on the lodging of applications. If these are to be removed then cases will drag on indefinitely and the flow-on effect will be that cases will take longer to finalise and the Tribunals will experience blockages (as the courts do now). In the end, justice will not be served.

Freedom of information

54. Government Senators note the criticisms relating to the length of time it takes to process FOI requests. The wide-ranging changes in DIMA as a result of the Palmer inquiry will ensure that administrative processes will be more transparent and that time frames will be more closely adhered to.

55. In terms of what can be provided publicly and non-disclosure due to public interest claims, it is essential that matters of privacy, or matters that go to the heart of national security or other operational matters, be kept out of the public arena. The application of the public interest test could be reviewed to see if there are ways to ensure it is not being applied indiscriminately.

56. It should be noted that the concerns regarding FOI are not being expressed in the Chair's report after a thorough examination of empirical evidence by the committee in order to reach its conclusions. The Chair's report simply quotes the Law Institute of Victoria but there is no data or actual analysis of the cases where there has been a delay and where people have been unreasonably denied access to documents.

Legal representation

57. In relation to paragraph 3.109, Government Senators are mindful of concerns with limitations on legal representation (for example, not more than one person; representation by a qualified lawyer or registered migration agent). However, this is to avoid hearings descending into an adversarial process where perspectives other than the applicant's are interpreted. While an applicant's command of English may not be

entirely satisfactory, the Member is entitled to have a direct relationship with the applicant so that the applicant can best put forward his or her case.

58. The Tribunals are not a court where applicants will be required to face large costs to obtain legal representation in order to ensure a positive outcome. The advantage of tribunals is that they are informal and are meant to deal with the applicant directly rather than with other intermediaries – the process is empowering to the applicant. It is not meant to be intimidating.

Rules of evidence

59. In paragraph 3.110, the Chair's report calls for the application of the rules of evidence in Tribunal hearings. Again this would mean expensive drawn out litigation-type experiences for applicants. The report laments the lack of cross-examination by witnesses when the aim of the system is to ensure that the formality of the court process does not inhibit the applicant.

60. On the one hand, the Chair's report appears to be favouring the tribunals taking on a more judicial role but, on the other hand, it argues that the Federal Courts should be able to review the merits of cases. It is important that people be given a forum other than a court, with all its formality and complexities, to present their case.

Tribunal members

61. Chapter 3 of the majority report contains a litany of assertions which is critical about the conduct and attitudes of Tribunal Members and makes some unfounded allegations which paint all Tribunal Members as having a 'confrontational' attitude which undermines decision-making. Criticism of performance management and the independence of Tribunal members is unjustified. Government Senators maintain that one only has to look at the information provided in Annual Reports to see that Members come from a rich and diverse range of backgrounds and that they contribute to the community on a wide level. If there are examples of Members behaving inappropriately this should be drawn to the attention of the Principal Member immediately, but to tarnish all Members in the way the Chair's report does is unfair.

62. The Chair's report seems to favour a multi-Member panel approach to decisions. Such an approach would be resource-intensive and there is no evidence to suggest that a better outcome will be achieved. The suggestion that a multi-panel approach would prevent the Minister from interfering in the outcome of decisions is nonsense – the entire process is independent of the Minister.

Non-meritorious cases

63. There is some mention of success rates in judicial review of MRT and RRT decisions in the Chair's report, along with a brief reference to the costs of litigation to the Commonwealth for defending cases (see, for example, Chapter 3, footnote 144). The Chair's report also describes the appeal process. However, the significant issue of non-meritorious cases is not addressed.

64. On 11 October 2005 questions were directed to an analysis of the many non-meritorious cases and how they find their through the appeal process, and the costs associated with that. DIMA provided an answer on 25 October 2005 but no reference is made to it in the majority report.

65. DIMA provided the following pertinent information to the committee in respect of non-meritorious cases:

> Appeal through the various layers of judicial review has become common place and considered, by many applicants, to be part of the process. This has resulted in significant numbers of matters being pursued all the way to the High Court. In 2001-02 financial year 5% of all applications for judicial review of migration decisions were applications for special leave to appeal to the High Court. The 2004-05 financial year has seen a fourfold increase in such appeals, with 20% of applications received being High Court special leave applications.
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> On 1 January 2005 the new High Court rules commenced which gave the court the power to dismiss applications for Special Leave on the papers where an unrepresented applicant has either no reasonable cause of action or has not filed the required documentation. This change to the rules, largely a response to the Court's increasing workload of migration matters, has had a dramatic effect on the number of matters which proceed to hearing in the High Court. Between 1 January 2005 and 21 October 2005 there have been 508 applications for special leave determined in the High Court, of which 8 resulted in favourable outcomes for applicants. Of these 508 resolutions in excess of 80% have been dismissed on the papers.
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> In addition to applicants pursuing matters through the various stages of judicial review, there is a trend towards re-filing and commencing the process again. For example in the period 1 July 2005 to 30 September 2005, 91 out of 713 applications for judicial review filed in the Federal Magistrates Court or Federal Court at first instance were filed by applicants who had had previous judicial review of the same refusal decision.[10]

66. DIMA provided the committee with multiple examples of recent cases where judges and magistrates have been highly critical of applicants who pursue non-meritorious claims. In one such case, *VWZG v MIMIA*[11], Justice Weinberg stated that:

> In my view the current proceedings amount to an abuse of process because: the repeated bringing of applications for judicial review of the same tribunal decision is unjustifiable, vexatious and brings the administration of justice into disrepute; there is an underlying public interest in the finality of litigation; the current application for judicial review is devoid of particulars, and fails to disclose any arguable basis; and in all, the applicant has brought seven proceedings in relation to the same RRT decision, three of which he has chosen to discontinue. Having regard to his history of instituting

10 DIMA, answers to questions on notice, 25 October 2005.

11 [2005] FCA 1018 (21/7/05).

> proceedings, only to subsequently abandon them, I am prepared to infer that he has brought this application for the collateral purpose of extending the period of his stay in this country.[12]

67. There are many other cases where judges and magistrates have made similar comments. DIMA's response to questions on notice sets out some recent examples where judges and magistrates have commented on non-meritorious cases.[13]

Chapter 5: Mandatory detention in policy

68. Government Senators are concerned at the selective quoting of statistics in this chapter. Table 5.1 reflects a recurring theme in the Chair's report. Notwithstanding the fact that mandatory detention was introduced by the Keating Labor government with bipartisan support in 1992, the report is skewed towards looking only at events and statistics from 1996-97, following the election of the first Howard Government.

69. The following table sets out the number of people in mandatory detention since 1992:

Table 5.1: Number of vessels and number of unauthorised arrivals

Year	No. of vessels	No. of unauthorised arrivals
1991-92	3	78
1992-93	4	194
1993-94	Figure not available	209
1994-95	20	1,071
1995-96	14	589
1996-97	13	365
1997-98	13	157
1998-99	42	926
1999-2000	75	4,175
2000-01	54	4,137
2001-02	23	3,649

12 DIMA, answers to questions on notice, 25 October 2005.

13 DIMA, answers to questions on notice, 25 October 2005.

2002-03	nil	nil
2003-04	3	82
2004-05	nil	nil
1 July 2005 – 20 January 2006	2	50

Source: DIMIA, Managing the Border, 2004-05 edition, p. 29; and figures provided to the committee by DIMIA on 20 January 2006.

70. In paragraphs 5.11-5.19, there is a clear failure to recognise the Federal Government's reform agenda. The reforms flowing from the Palmer and Comrie inquiries represent real and significant changes to the administration of the policy of mandatory detention. The ALP introduced this policy but never provided alternatives to mandatory detention, particularly for women and children. The Chair's report glosses over this. Paragraph 5.77 provides another example where the Chair's report clearly ignores the reforms implemented by the Federal Government.

71. Paragraph 5.20 contains selective quoting. The report focuses on critical responses to the Federal Government's reforms. Many commentators and advocates have welcomed the new measures but their views are not presented.

72. Paragraph 5.38 contains numerous of dubious and simplistic reasoning. The Chair's report quotes selectively in attempting to prove that global asylum flows, not government policy, are responsible for the decline in the numbers of people seeking asylum in Australia. This is simply not true. There are significant lead-times involved in reducing the size of refugee 'pipelines'. The reality is that tougher policies were introduced in October 2001 and, by December 2001, the boats had effectively stopped. If global trends were the reason, this effect would have taken much longer to register. Furthermore, resolution of conflicts in Afghanistan and elsewhere only reduced refugee pipelines from certain areas, in certain countries, and amongst certain people. Significant economic push factors remain throughout the world today.

73. Paragraph 5.48 refers to remarks on the indeterminate nature of mandatory detention. The Chair's report fails to appreciate that, for many, continuing detention is a choice for those who, however weak their claims, persist in seeking a permanent migration outcome. If people repeatedly seek to challenge the fact that they have consistently been found not to need protection, there comes a point where they must take some responsibility for their choices. Australia does not operate a visa system to that regulates the entry and stay of non-citizens, merely to provide open-ended access to benefits and work rights for people who do not qualify for a visa under that system.

74. Again in paragraphs 5.48-5.58, the Chair's draft suffers from selective quoting. Not just in these passages, but throughout the entire report, unreasonable weight is given to comments made by avowed critics, not only of the policy of mandatory detention, but of the Howard Government in general. Simply footnoting

these remarks does not make the work more academically rigorous or credible than any other piece of openly partisan commentary.

75. There are many instances of partisan amnesia in the Chair's report – paragraph 5.59 is an example. The report says that witnesses argue that many of the problems associated with immigration detention are embedded in the law itself. That may or may not be but, again, this a law that the ALP introduced.

76. Paragraph 5.72 contains an obvious deviation from the inquiry's Terms of Reference. The report rightly acknowledges that looking at the merits of a bill of rights is outside the scope of the present inquiry but then proceeds to make a subjective comment on the question. Either it is outside the inquiry's scope or it is not.

77. Flimsy conclusions are provided in paragraph 5.82. The report says that there is a 'persuasive argument that the deterrent effect of [mandatory detention] is not…efficacious'. This argument is not persuasive at all. Government Senators are of the view that it is bald assertion backed up by selective quoting of statistics and biased secondary sources.

Chapter 6: Mandatory detention in practice

78. As a general comment, this entire chapter uses the subjective and untested experiences of a handful of detainees as a basis to make sweeping generalisations and recommendations about the administration of detention centres. Further, there is a complete absence of academic rigour. The chapter makes no attempt to corroborate claims made by detainees and various other criticisms levelled by lawyers and advocates.

79. Government Senators believe that Recommendations 35 and 36 are vexatious. The Chair's report says that management units should be closed, but then says that in the alternative they should be limited to use for short periods only in an emergency. Which is it?

80. Paragraph 6.37 contains serious allegations about bashings in an immigration detention centre which are presented as fact. It does not appear that the committee has at any stage attempted to test the veracity of these claims by asking DIMA or GSL to comment specifically on these allegations. The experiences of one visitor to an immigration detention centre are used to imply a culture of impunity within immigration detention centres in general. Completely meaningless and unempirical talk of 'feelings' that staff at immigration detention centres have a mandate to do as they please have no place in any serious work.

81. Paragraph 6.65 contains further untested allegations. Serious allegations are made here but it does not appear that these have been referred to DIMA either for comment or investigation.

82. Paragraph 6.85 reveals yet another example of partisan myopia. It would be worth noting here that there are currently no children in mainland immigration

detention centres, only in alternative forms of detention such as residential housing centres.

83. Although this chapter contains some consideration of the issue of payment of debts as a result of detention, Government Senators would have preferred the inclusion of greater details in relation to the cost of overstayers and the value of their unrecovered debts that accrue to the Commonwealth. DIMA provided the committee with information that, for the 2004-05 financial year, 3,813 visa overstayers were held in immigration detention. During this time, these overstayers accrued a total debt to the Commonwealth for immigration detention costs of $11,615,874. On average, DIMA recovers only about 4% of immigration detention debts. Based on these figures, during the 2004-05 financial year it is estimated that $11,151,239 in detention debts incurred by overstayers will not be recovered. This is a debt which the taxpayers of Australia are required to bear.[14]

Chapter 7: Outsourcing of management of immigration detention centres

84. Government Senators are of the view that, to a large extent, this chapter of the Chair's report pre-empts a forthcoming ANAO report into the negotiations of DIMA's contract with GSL. Government Senators believe that it is inappropriate to comment further on the issues raised in this chapter until DIMA has had an opportunity to respond to the findings and recommendations of the ANAO's report.

85. By way of background, DIMA provided the following historical information about detention centre contracting.

86. On 22 December 1997 the department entered into a contract with Australasian Correctional Services Pty Ltd to provide a broad range of specified services that were appropriate for the detention conditions envisaged at the time. The contract with ACS was signed on 27 February 1998. Their role was as prime contractor provide guarding, interpreter and translation services, catering, cleaning, education, welfare, health services, escort or transport services and any other services as required. The Contract introduced various components including detention standards and a sanctions regime.

87. On 27 August 2003 the department entered into a Detention Services Contract with a new provider, Global Solutions Limited. This contract was an improvement on the previous contract and contained additional standards and measures of performance.

88. This is in contrast with the more ad hoc arrangements which appear to have been in place from the introduction of mandatory detention by the Keating Labor government. Prior to 1997, detention services were managed by the department using a range of government and non-government agencies to provide specific services ie:

14 DIMA, answers to questions on notice, 25 October 2005.

- Security services were provided by the APS;
- Catering was provided under contract by a private catering company;
- Medical services were sourced from the local area medical service on as and when required basis;
- Repairs and maintenance was carried out on an ad hoc basis.

89. The question of the outsourcing of management of immigration detention centres has been comprehensively dealt with by the ANAO. DIMA has cooperated fully with the ANAO in this regard.

Chapter 8: Temporary protection visas, bridging visas, and cost shifting

90. Government Senators are of the view that, in relation to paragraphs 8.73-8.84, further details from DIMA's answers to questions on notice received by the committee on 7 February 2006 would have provided useful background information in relation to alleged cost-shifting by the Commonwealth under Australia's Humanitarian Program.[15]

91. Australia's Humanitarian Program comprises an offshore resettlement component, which provides resettlement to persons overseas who are in the greatest need of this durable solution, and an onshore protection component which provides protection to persons who arrive in Australia and are in need of that protection. Refugees are permitted to stay in Australia under both the offshore and onshore components.

92. The offshore component of Australia's Humanitarian Program is guided by the priorities of the United Nations High Commissioner for Refugees (UNHCR) and comprises a Refugee category and a Special Humanitarian Program (SHP). The resettlement component of the program goes beyond any international obligations and reflects Australia's desire to assist persons around the world in greatest need of resettlement.

93. The Refugee category assists persons who are subject to persecution in their home country and living outside their home country. Most applicants under this category have been identified and referred by the UNHCR. Appendix 5 to the majority report includes the UN Refugee Convention definition of a refugee.

94. The SHP assists persons who are subject to substantial discrimination amounting to gross violation of human rights in their home country and who are living outside their home country. People who wish to be considered for a SHP visa must be proposed for entry by an Australian citizen, permanent resident, eligible New Zealand citizen or an organisation operating in Australia.

15 DIMA, answers to questions on notice, 7 February 2006

95. Australia is one of just ten countries operating a well established and successful resettlement program and consistently ranks within the top three countries in terms of the number of persons resettled alongside the US and Canada.

96. The Humanitarian Program is planned on an annual basis. The government increased the size of the program in 2004-05 to 13,000 places and within it the Refugee category to 6,000 places, up from 4,000 places. This is the largest offshore Refugee category for 20 years.

97. Places under the Humanitarian Program are used for the offshore resettlement component as well as for the onshore protection component. The flexibility in the program means that places can be moved between the SHP category of the offshore component and the onshore protection component. Where places are required for protection visas to meet our obligations under the Refugees Convention, a place is deducted from the available offshore SHP places. The 6,000 places for the offshore Refugee category are for use for that purpose only.

98. In 2005-06, the allocation of 13,000 comprises:

- 6,000 Refugee category places for use offshore; and
- 6,400 SHP for use offshore; and
- 600 places retained for use onshore.

99. In line with UNHCR’s recommended regional priorities the focus of the offshore program in 2005-06 will be on Africa, followed by the Middle East and South West Asia.

100. In short, the Government does provide wide-ranging programs to assist newly arrived entrants under the humanitarian program.

Chapter 9: Removal and deportation

101. The Chair's report expresses concern that there is no requirement for independent review of removal actions themselves. Already the immigration system is slow and bogged down with litigation. Government Senators are of the view that the including an additional requirement for review of removal actions would seriously undermine the integrity of Australia's border control policies.

102. Government Senators note that, in commenting on removals in relation to its report on Ms Vivian Alvarez, the Senate Foreign Affairs, Defence and Trade (FADT) Committee commented that clear and comprehensive records of arrangements should be kept in relation to removals. This is a reasonable expectation and DIMA is now focussing on maintaining accurate records on removals.

103. The FADT Committee also went on to say, however, that there is 'lack of clarity over when DIMA’s responsibility for a detainee formally ends'. Government Senators agree that clearly there have to be some protocols to ensure that a person has some resources when they reach another country after removal. Beyond that, DIMA

cannot have indefinite responsibility for a non citizen living overseas. Some practical codes have to be established by ensuring that overseas authorities provide a person with information and as many resources as possible to assist them, but it is unreasonable to tie legal or moral responsibility to DIMA for the way a person's life in the country of removal. Responsibility clearly lies with the authorities of other countries to look after its nationals.

104. In paragraph 9.12, the Chair's report irresponsibly quotes from the Asylum Seekers Resource Centre that:

> Numerous reports internationally have highlighted instances where severe injury or death by asphyxiation have resulted from the excessive use of force and inappropriate means of restraint.

105. If the word 'internationally' had not been included, such comments could be taken as applying to Australia. Government Senators are not aware of any case where a detainee has died due to unreasonable force being used and believe that use of this quote in the Chair's report is irresponsible, defamatory and casts a slur on public servants.

106. In relation to issues involving section 501 of the Migration Act and its apparent misuse – Government Senators assert that it is critical that the Minister maintain the discretion to be able to cancel a visa without rights to review. This would be done in extreme circumstances where Australian's national security is at stake, for example, or where there is a real threat to the Australian community. A review has been undertaken by DIMA and it will also consider the Ombudsman's report. In relation to Nystrom and the effects of that decision, DIMA has acted lawfully to ensure that nobody who might be affected by that decision is held in detention or removed.

Chapter 10: Student visas

107. While noting that the activities of overseas-based migration agents are discussed in paragraphs 10.14-10.20 of the Chair's report in the context of students, DIMA's answer to a question on notice relating to contravention by these agents could also have been usefully included in this chapter.

Senator Concetta Fierravanti-Wells
Liberal Party

Senator Barnaby Joyce
The Nationals