The Senate

Legal and Constitutional References Committee

Administration and operation of the *Migration Act 1958*

March 2006

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ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ACM	Australasian Correctional Management
ACS	Australasian Correctional Services
ANAO	Australian National Audit Office
APMN	Australian Political Ministry Network Ltd
ASPHM	Asylum Seekers Project Hotham Mission
ASRC	Asylum Seekers Resource Centre
Baxter IDC	Baxter Immigration Detention Centre
Bishops Committee	Bishops Committee for Migrants and Refugees (on behalf of the Australian Catholic Bishops Conference)
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCHRL	Castan Centre for Human Rights Law
CIS	Country Information Service
CLRINSW	The Conference of Leaders of Religious Institutes in New South Wales
COR	Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees
CPOAS	Coalition for the Protection of Asylum Seekers
Comrie Report	Neil Comrie, *Inquiry into the Circumstances of the Vivian Alvarez Matter*, September 2005
CRC	Convention on the Rights of the Child
DEST	Department of Education, Science and Training
DFAT	Department of Foreign Affairs and Trade
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs

Edmund Rice Centre	Edmund Rice Centre for Justice and Community Education
Edmund Rice Centre's study	Edmund Rice Centre for Justice and Community Education, *Deported to Danger*, *A Study of Australia's Treatment of 40 Rejected Asylum Seekers*, September 2004.
ESOS Act	*Education Services for Overseas Students Act 2000*
ESOS Evaluation Report	PhillipsKPA and LifeLong Learning Associates, *Evaluation of the Education Services for Overseas Students Act 2000*, June 2005
FADTC	Senate Foreign Affairs, Defence and Trade Committee
FECCA	Federation of Ethnic Communities' Councils of Australia
Federal Court	Federal Court of Australia
Federal Magistrates Court	Federal Magistrates Court of Australia
GEO	GEO Australia Pty Ltd
GSL	Global Solutions Limited (Australia) Pty Ltd
High Court	High Court of Australia
IAAAS	Immigration Advice and Application Assistance Scheme
IARC	Immigration Advice and Rights Centre Inc.
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists (Australian Section)
IDS	Immigration Detention Standards
JSCM	Joint Standing Committee on Migration
LACNSW	Legal Aid Commission of New South Wales
LIV	Law Institute of Victoria
LSSA	Law Society of South Australia
MIA	Migration Institute of Australia
Migration Act	*Migration Act 1958*

MRT	Migration Review Tribunal
National Code	*National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students*
NCCA	National Council of Churches in Australia
Palmer Report	Inquiry into the Circumstances of Immigration Detention of Cornelia Rau by Mick Palmer AO APM, July 2005
PIP	Palmer Implementation Plan
the Minister	Minister for Immigration and Multicultural and Indigenous Affairs
Law Council	Law Council of Australia
PPV	Permanent Protection Visa
RANZCP	Royal Australia and New Zealand College of Psychiatrists
RASSA	Refugee Advocacy Service of South Australia
Refugee Convention	UN Convention and Protocol Relating to the Status of Refugees
RCOA	Refugee Council of Australia
RRT	Refugee Review Tribunal
A Sanctuary under Review	Senate Legal and Constitutional References Committee, *A Sanctuary under Review, An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000
SBICLS	South Brisbane Immigration & Community Legal Service
STTARS	Survivors of Torture and Trauma Assistance and Rehabilitation Service
the Act	*Migration Act 1958*
THV	Temporary Humanitarian Visa
TPV	Temporary Protection Visa

UJA	Uniting Justice Australia
UJA and ASPHM	Uniting Justice Australia and Asylum Seekers Project Hotham Mission
UNHCR Guidelines	UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers
WRM	Women and Reform of Migration

RECOMMENDATIONS

Recommendation 1

1.37 The committee recommends that the terms of reference for any future independent inquiries into the administration of the Migration Act provide the authority for the investigation to include both the Minister and the Minister's office.

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.

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.

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).

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.

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.

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).

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.

Recommendation 20

3.198 The committee recommends that DIMIA and the Department of Finance and Administration review the RRT and MRT current funding levels and systems in light of the current and expected workloads of both Tribunals.

Recommendation 21

3.12 The committee recommends that the Migration Act be amended to provide that the MRT and RRT can, in appropriate circumstances, grant an extension of time in which to lodge applications for review.

Recommendation 22

3.1 The committee recommends that the *Migration Act 1958* be amended to provide an entitlement to legal representation at Tribunal hearings for applicants and an entitlement to call and examine witnesses at hearings.

Recommendation 23

3.200 The committee recommends that the Commonwealth legal aid guidelines be amended to provide for assistance in migration matters, both at the preliminary and review stages, subject to applicants satisfying means and merit tests, and that necessary funding be provided to meet the need for such services.

Recommendation 24

3.201 The committee recommends that applicants have a right to be provided with copies of documents the contents of which Tribunal members propose to rely upon to affirm the decision that is under review.

Recommendation 25

3.202 The committee recommends that RRT incorporate into its Practice Directions specific guidelines on its approach to credibility.

Recommendation 26

3.203 The committee recommends that the MRT and the RRT be included in the training and development initiatives and strategies being developed by DIMIA as part of the response to the Palmer report.

Recommendation 27

3.204 The committee recommends that the RRT incorporate into its Practice Directions specific guidelines on the weight to be given to expert medical reports, especially those detailing a claimant's history of persecution with a clinical assessment of their current psychological condition.

Recommendation 28

3.205 The committee recommends that the RRT be able to sit as a single member body and as a panel of up to three members as appropriately determined by a Senior, or the Principal Member. Members would be drawn from people with appropriate backgrounds for considering refugee and humanitarian applications.

Recommendation 29

4.122 The committee recommends that coverage of the Immigration Application Advice and Assistance (IAAAS) scheme be extended to enable applicants for Ministerial intervention to obtain an appropriate level of professional legal assistance.

Recommendation 30

4.123 The committee recommends that each applicant for Ministerial intervention be shown a draft of any submission to be placed before the Minister to enable the applicant to comment on the information contained in the submission. This consultative process should be carried out within a tight but reasonable time frame to avoid any unnecessary delay.

Recommendation 31

4.124 The committee recommends that all applicants for the exercise of Ministerial discretion should be eligible for visas that attract work rights, up to the time of the outcome of their first application. Children who are seeking asylum should have access to social security and health care throughout the processing period of any applications for Ministerial discretion and all asylum seekers should have access to health care at least until the outcome of a first application for Ministerial discretion.

Recommendation 32

4.125 The committee recommends that the Minister ensure all statements tabled in Parliament under sections 351 and 417 (which grant the Minister the discretionary power to substitute more favourable decisions from that of the Tribunals) provide sufficient information to allow Parliament to scrutinise the use of the powers. This should include the Minister's reasons for believing intervention in a given case to be in the public interest as required by the legislation. Statements should also include an indication of how the case was

brought to the Minister's attention by an approach from the visa applicant, by a representative on behalf of the visa applicant, on the suggestion of a tribunal, at the initiative of an officer of the department or in some other way.

Recommendation 33

4.126 The committee recommends that the Migration Act be amended to introduce a system of 'complementary protection' for future asylum seekers who do not meet the definition of refugee under the Refugee Convention but otherwise need protection for humanitarian reasons and cannot be returned. Consideration of claims under the Refugee Convention and Australia's other international human rights obligations should take place at the same time. A separate humanitarian stream should be established to process applicants whose claims are in this category, including a review process.

Recommendation 34

6.15 The committee recommends that the use of detainee labour should be subject to independent investigation by the Ombudsman or HREOC and re-examined as part of the review of the immigration detention services contract.

Recommendation 35

6.34 The committee recommends that the use of behavioural management techniques and restrictive detention be re-examined as part of the government's proposed review of the immigration detention contract. The committee further recommends that HREOC and the Royal Australia and New Zealand College of Psychiatrists and other stakeholders be consulted during the process.

Recommendation 36

6.35 The committee recommends that the 'management units' be closed. In the alternative, their use should be limited for short periods not exceeding twenty-four hours in cases of emergency.

Recommendation 37

6.36 The committee recommends that all measures which constitute a further deprivation of liberty within a detention centre be established by law, the grounds and procedural guidelines should be specified and procedural safeguards enforceable in the general courts.

Recommendation 38

6.44 The committee recommends that the forthcoming review of the detention services contract include specific examination of internal complaint processes including, among other things, mechanisms for confidential complaints and protection from victimisation.

Recommendation 39

6.45 The committee recommends that the Migration Act be amended to provide HREOC with an express statutory right of access to all places of immigration detention;

Recommendation 40

6.46 The committee recommends that a system of regular official visits by an independent complaints body be instituted and this function be performed cooperatively by HREOC and the Commonwealth Ombudsman.

Recommendation 41

6.58 The committee recommends that the review of the immigration detention services contract include a review of the Immigration Detention Standards, Migration Series Instructions and Operational Procedures and ensure that rules relating to access to detainees are consistent with international standards.

Recommendation 42

6.59 The committee recommends that the Migration Act be amended to give effective recognition to the right of detainees to have access to lawyers and other visitors, including medical and religious visitors.

Recommendation 43

6.60 The committee recommends that restrictions on access to lawyers and other visitors imposed for disciplinary or behavioural management purposes should be expressly prohibited.

Recommendation 44

6.134 The committee recommends that there be a presumption against the imposition of a liability to pay the Commonwealth for the cost of detention, subject to an administrative discretion to impose the debt in instances of abuse of process or where applicants have acted in bad faith.

Recommendation 45

6.145 The committee recommends that the Migration Act be amended to permit the mandatory detention of unlawful non-citizens for the purpose of initial screening, identity, security and health checks and that the initial period of detention be limited to up to ninety days.

Recommendation 46

6.146 The committee recommends the continuation of detention for a specified limited period should be subject to a formal process, such as the approval of a Federal Magistrate, on specified grounds and limited to situations where: there is suspicion that an individual is likely to disappear into the community to avoid immigration processes; or otherwise poses a danger to the community.

Recommendation 47

6.147 The committee recommends release into the community on a bridging visa with a level of dignity that allows access to basic services, such as health, welfare, housing and income support or work rights.

Recommendation 48

7.132 The committee recommends that, as a fundamental overarching principle, direct responsibility for the management and provision of services at immigration detention centres in Australia should revert to the Commonwealth.

Recommendation 49

7.133 The committee recommends that the detention services contract between DIMIA and GSL be redrafted immediately to incorporate all relevant suggestions and recommendations from the Palmer Report, the Hamburger Report and recent ANAO performance audit reports, particularly in relation to performance measures, outcomes, service quality and risk management.

Recommendation 50

7.134 The Committee recommends that a statement of detainees' rights and conditions be established within the Migration Regulations, including clear provisions for the making of complaints to a third party, and third party powers to make rectification orders.

Recommendation 51

7.135 The committee recommends that an independent body be established with ongoing responsibility for monitoring the operation and management of immigration detention centres and the detention services contract.

Recommendation 52

8.34 The committee recommends that the Temporary Protection Visa regime be reviewed. Specifically, the review should consider the possible abolition of the '7 day rule', and that all TPV holders be given the opportunity to apply for permanent protection visa after a specified period.

Recommendation 53

8.68 The committee recommends that all holders of Bridging Visas Class E should be given work rights.

Recommendation 54

8.70 The committee recommends that if the Commonwealth Government rejects the proposal that all Bridging Visa holders have work rights, the Committee recommends that the current '45 day rule' be doubled to 90 days to give people more time to apply for a protection visa.

Recommendation 55

8.115 The committee recommends that, in the light of increasing numbers of refugees from Africa, DIMIA should reassess its resettlement programs to ensure that services are relevant, and that sufficient budget appropriation is made to cover all the costs of implementing those programs.

Recommendation 56

9.28 The committee recommends that the Migration Act be amended to require a comprehensive pre-removal risk assessment to ensure no 'refoulement', humanitarian or welfare concerns exist.

Recommendation 57

9.29 The committee recommends that the Migration Act be amended to require that all prospective removees be provided with reasonable notice.

Recommendation 58

9.85 That the committee further review the operation of section 501 and the report of the Commonwealth Ombudsman investigation into the administration of the cancellation of visas on character grounds. Further, the committee recommends that, as per the Ombudsman's recommendations, the use of Section 501 to cancel permanent residency should not be applied to people who arrived as minors and have stayed for more than ten years.

Recommendation 59

9.119 The committee recommends that, in order to comply with its 'non-refoulement' obligations and to ensure the welfare of persons removed or deported from Australia, the Commonwealth continue to enhance the scope of its informal representations to foreign governments, encourage monitoring by Australian overseas missions, and continue to develop strong relationships with local and overseas-based human rights organisations.

Recommendation 60

9.120 The committee recommends that the Commonwealth Government review and clarify its removal and deportation processes to ensure that formal and proper procedures for welfare protection are in place for the reception of persons being removed or deported from Australia.

Recommendation 61

10.72 The committee recommends that the Migration Act and Regulations be amended to allow for greater flexibility and discretion in dealing with breaches of the conditions of student visas.

Recommendation 62

10.75 The committee recommends that the recommendations of the *Evaluation of the Education Services for Overseas Students Act 2000* continue to be implemented as a high priority.

INTRODUCTION

Referral of the Inquiry

On 21 June 2005, the Senate referred to the Legal and Constitutional References Committee an inquiry into the administration and operation of the *Migration Act 1958*. The inquiry was to report by 8 November 2005.

On 6 October 2005 the Senate agreed to extend the reporting date to 1 December 2005, The Senate subsequently agreed to further extend the reporting date to 21 December 2005. The committee subsequently resolved to table its report on the first sitting day in 2006.

These extensions arose for a number of reasons: the considerable amount of material to presented to the committee; the significant public interest in this inquiry; and the committee's need to thoroughly consider the evidence it has received; as well as the committee's heavy workload and several administrative and procedural matters which diverted the committee's time and attention.

The committee's terms of reference were to inquire into:

> (a) the administration and operation of the *Migration Act 1958*, its regulations and guidelines by the Minister for Immigration and Multicultural and Indigenous Affairs and the Department of Immigration and Multicultural and Indigenous Affairs, with particular reference to the processing and assessment of visa applications, migration detention and the deportation of people from Australia;
>
> (b) the activities and involvement of the Department of Foreign Affairs and Trade and any other government agencies in processes surrounding the deportation of people from Australia;
>
> (c) the adequacy of healthcare, including mental healthcare, and other services and assistance provided to people in immigration detention;
>
> (d) the outsourcing of management and service provision at immigration detention centres; and
>
> (e) any related matters.

Background to the inquiry

The decision to instigate the inquiry arose in particular from the handling by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) of two cases: the wrongful detention of an Australian resident, Ms Cornelia Rau, and the improper deportation of an Australian citizen, Ms Vivian Solon. As is explored in greater detail in Chapter 1, these instances of maladministration reflected widespread public concern at many aspects of DIMIA's operations with respect to, among other things, detainees and asylum seekers.

This report also reflects the latest instance of a long running public and parliamentary scrutiny of Australia's immigration system. The report is written in the light of the earlier evidence and findings of this committee's June 2000 report *A Sanctuary under Review: An examination of Australia's Refugee and Humanitarian Determination Processes*, and the 2004 report of the Senate Select Committee on Ministerial Discretion in Migration Matters.

Readers are also referred to the reports of the Senate Legal and Constitutional Legislation Committee which explore in detail a number of the legislative changes to the *Migration Act 1958* over time, and which form something of a legislative history of the Act.

Scope of the inquiry

Emphasis

Evidence received by the inquiry was primarily concerned with the effectiveness, efficiency and equity of the existing onshore refugee program and so-called 'humanitarian program', and of detention and removal of persons without a visa. Therefore, there is little focus non-humanitarian aspects of the Act although some of the recommendations do relate to those areas.

Individual cases

The committee received submissions and heard evidence from individuals affected by departmental or Refugee Review Tribunal (RRT) decisions, and Federal and High Court decisions, many of whom had made requests to the Minister under section 417 of the Migration Act. Although the committee found many of these individual cases raised questions about access to appropriate services, it had resolved that it would be inappropriate for a Parliamentary Committee to intervene in or pursue claims concerning any individual case. Instead, where matters raised were within the terms of reference, they were taken into account in formulating our conclusions and recommendations.

Evidence concerning the Department of Foreign Affairs and Trade

The committee's terms of reference included an examination of the activities and involvement of the Department of Foreign Affairs and Trade and other government agencies in processes surrounding the deportation of people from Australia. The committee received little evidence on this issue. This was due in part to the inquiry by the Senate Foreign Affairs and Trade Committee into asylum and protection visas for consular officials and the deportation, search for and discovery of Vivian Solon. A particular focus for that inquiry – which was conducted in parallel with this inquiry – was DFAT's involvement in the deportation, search and discovery of Ms Solon. This committee did not see the need to cover the same ground, especially in light of the focus of that inquiry and the evidence presented to it concerning DFAT's involvement in the deportation process. The committee endorses the findings and recommendations

of the Senate Foreign Affairs and Trade Committee (which are set out in Appendix 8 to this report).

Conduct of the inquiry

Submissions

The Committee advertised the inquiry in major national and state/territory newspapers on 29 June 2005, as well as writing directly to a large number of individuals and groups including non-government organisations, law associations, academic and specialist lawyers, community legal groups, and groups with a special interest in refugee matters. The committee received 234 submissions,[1] and a number of exhibits.

Hearings

The committee held public hearings in Adelaide on 26 September 2005, Melbourne on 27 September 2005, Sydney on 28 and 29 September 2005, and Canberra on 7 and 11 October and 8 November 2005[2] amounting to 478 pages of transcript.

A significant number of questions asked by Senators at these hearings were placed or taken on notice by witnesses, particularly government witnesses. Answers were still being received in January 2006, with responses from GSL finally received on 18 January 2006.

The committee wishes to thank all those who provided written and oral evidence, and who have provided additional information and supplementary submissions. The committee also notes its appreciation of the assistance provided by DIMIA officers preparing submissions, giving evidence before the committee on several occasions, and responding to numerous questions on notice and requests for additional information.

The committee had the benefit of making visits to the Villawood Immigration Detention Centre in Sydney. The Committee thanks DIMIA and the contractor, GSL Pty Ltd for facilitating these visits. Although the Committee did not have the opportunity to visit other Immigration Detention Centres, some Committee members had visited other facilities, including during the course of this inquiry.

As well as the public hearings, the committee also held one *in camera* hearing, which assisted it considerably in its understanding of general and specific issues. The issue of privacy and security of individuals was uppermost in committee consideration during this inquiry, and the use of *in camera* hearings enabled free discussion on a number of matters.

1 A list of submissions is at Appendix 1

2 A list of hearings and witnesses is at Appendix 2

Issues relating to confidentiality and restricted documentation

Departments, individuals and their representatives provided the committee with substantial amounts of material, much of which was classified as confidential, or it was requested that publication be restricted.

As noted above, in inquiries of this type, the committee is particularly aware of the need to protect personal information and therefore decided to omit or treat as confidential any such personal information, especially concerning asylum seekers, provided in submissions.

Structure of the report

The terms of reference of the report could have been dealt with in several ways. However, a format was decided whereby certain of the terms of reference are discussed across several chapters (as, for instance, the issue of international obligations), and others are dealt with primarily in a single chapter – for example, the issues of deportation and removal.

Chapter 1 considers what is, in the committee's view, a fundamental question in the administration of the Migration Act—that of the nature of the Minister's responsibility for the actions and administrative 'culture' of their department.

Chapters 2, 3 and 4 then assess the migration process in roughly the order in which an applicant will encounter them: initial application, secondary review procedures, and the exercise of ministerial discretionary powers.

The remaining chapters then deal with particular aspects of the process: Chapters 5 and 6 look at the policy of mandatory detention in policy and practice; Chapter 7 examines the outsourcing of the management of immigration detention centres; Chapter 8 examines temporary protection visas and bridging visas; Chapter 9, the administration of removal and deportation; and Chapter 10, student visas.

All references to submission page numbers are to the page numbers as they appear in printed volumes of submissions. References to *Hansard* transcripts of evidence are generally to the final versions of transcripts.

Some references have been made in footnotes to *in camera* evidence or to documents provided by departments or from other sources, which are considered confidential. The references have been made to note for the record the location of the source. However, this evidence is not publicly available.

Senator Trish Crossin

COMMITTEE CHAIR

March 2006

CHAPTER 1

MINISTERIAL RESPONSIBILITY

1.1 This chapter will consider:

- the mistakes and failings recently identified in relation to the Government's immigration arrangements;
- the Government's response to those failings to date; and
- the extent to which the relevant Minister(s) should be held responsible for these failings.

Cultural problems within DIMIA

1.2 The present inquiry was established following serious allegations of significant failings in relation to the Government's immigration arrangements. These failings subsequently came to wider public attention through two high profile cases which highlighted fundamental problems within the Government's immigration systems — the wrongful detention of an Australian resident, Ms Cornelia Rau, and the improper deportation of an Australian citizen, Ms Vivian Alvarez Solon.

1.3 The circumstances surrounding these cases are well documented in two recent reports to Government – the Palmer Report,[1] which details the Rau affair, and the Comrie Report,[2] which details the Alvarez affair. The findings, recommendations and implementation of these reports are considered in more detail where relevant in other chapters of this report. However, it is worth noting that both reports are highly critical of the leadership, management, actions, systems and processes of DIMIA. They detail the department's 'systemic' and 'catastrophic' failings in relation to these matters.[3] In particular, the findings of the Palmer Report point to the need for broader cultural change within DIMIA. Indeed, the Palmer Report concluded that there is a 'serious cultural problem within DIMIA's immigration compliance and detention areas' and that 'urgent reform is necessary'. The report went on to say:

> The combination of pressure in these areas and the framework within which DIMIA has been required to operate has given rise to a culture that is overly

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1 Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, July 2005 (Palmer Report), available at: http://www.minister.immi.gov.au/media_releases/media05/palmer-report.pdf . See also Appendix 3 of this report.

2 Neil Comrie, *Inquiry into the Circumstances of the Vivian Alvarez Matter*, September 2005 (Comrie Report), available at: http://www.ombudsman.gov.au/publications_information/Special_Reports/2005/alvarez_report03.pdf See also Appendix 4 of this report.

3 See Comrie Report, pp. xv – xvi.

> self-protective and defensive, a culture largely unwilling to challenge organisational norms or to engage in genuine self-criticism or analysis.[4]

1.4 The Comrie Report supported the findings and recommendations made in the Palmer Report, and indeed, concluded that 'many of the systemic problems identified by both investigations had been present in DIMIA for some years'.[5]

Government response

1.5 At the committee's hearing on 11 October 2005, a representative of DIMIA told the committee that a range of legislative and other changes had been implemented in recent months. Subsequent chapters of this report discuss many of these changes in greater detail. However, it is worth noting here that these changes involved amendments to the Migration Act relating to detention arrangements, as announced by the Prime Minister on 17 June 2005. This included, for example, amendments to allow the Commonwealth Ombudsman to review the cases of long-term detainees; and to widen the Minister's discretionary powers — for example, so that the Minister is now able to specify alternative arrangements for a person's detention and to grant a visa to a person in detention.[6]

1.6 Further organisational and administrative changes have been, or are being, made within DIMIA. In particular, to facilitate a change of culture within DIMIA the senior administration within DIMIA has largely been replaced. A new Departmental Secretary, Mr Andrew Metcalfe, has been appointed. A range of other senior managers have also been appointed, including three new Deputy Secretaries, as well as over 40 promotions, transfers and appointments to DIMIA's Senior Executive ranks to date.[7]

1.7 The committee was told that the new Departmental Secretary has focussed on cultural change within DIMIA, emphasising to all staff that, in order to respond appropriately to the Palmer and Comrie Reports, and to meet the expectations of the Government, the Parliament and the wider community:

> …the culture of the department must be focussed on the three main goals: a more open and accountable organisation, fair and reasonable dealings with clients, and well trained and supported staff.[8]

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4 Palmer Report, p. ix.

5 Comrie Report, p. xvi.

6 *Migration Amendment (Detention Arrangements) Act 2005*; see further, Prime Minister the Hon John Howard MP, *Immigration Detention*, Media Release, 17 June 2005, at: http://www.pm.gov.au/news/media_releases/media_Release1427.html

7 DIMIA, *Estimates Hansard*, 1 November 2005, p. 15.

8 *Committee Hansard*, 11 October 2005, p. 5; see also Mr Andrew Metcalfe, 'Implications of the Palmer Report Future Changes', *IPPA Seminar*, 25 November 2005, available at: http://www.immi.gov.au/media_releases/media05/ippa_speech.pdf (accessed 9 December 2005).

1.8 The new Secretary, who commenced with DIMIA on 18 July, has established a Change Management Task Force, which has developed an implementation plan to improve the structure and workings of DIMIA.[9]

1.9 The committee was told that the Government has committed $230 million to achieving change within DIMIA. According to a representative of DIMIA, funding has been provided to implement a range of measures, including to:

- establish a College of Immigration Border Security and Compliance to deliver comprehensive, tailored operational training for DIMIA officers, with an emphasis on quality assurance and decision making;
- continue improving the delivery of immigration detention health services, including through the development of a long-term detention health service delivery strategy;
- improve case management and coordination, including a 12-month pilot program to develop a community care model in partnership with community organisations;
- improve immigration detention facilities;
- improve client services and feedback response management;
- improve quality assurance, internal audit and decision-making review, and records management.[10]

1.10 Finally, the committee notes that both the Prime Minister and the Minister for Immigration have acknowledged that mistakes were made, and have apologised to both Ms Rau and Ms Alvarez.[11]

Ministerial responsibility

1.11 While DIMIA itself has undergone a number of changes, and apologies have been made, the question must be asked to what extent the relevant Minister(s) should be held responsible for the 'systemic' and 'catastrophic' failings identified by the Palmer and Comrie Reports. Unfortunately, due to the restricted terms of reference

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9 *Committee Hansard*, 11 October 2005, p. 5; see also DIMIA, answers to questions on notice, 11 October 2005, Attachments 1, 2 and 3 for further information in relation to the departmental restructure.

10 *Committee Hansard*, 11 October 2005, p. 4.

11 Transcript of the Prime Minister the Hon John Howard MP, Joint Press Conference with Senator the Hon Amanda Vanstone, Minister for Immigration, Parliament House, Canberra, 14 July 2005, www.pm.gov.au/news/interviews/Interview1460.html (accessed 9 December 2005); see also DIMIA, *Committee Hansard*, 11 October 2005, p. 4. The government has also provided an assistance package designed to help re-establish Ms Solon in Australia: see Senator the Hon Kay Patterson, Minister for Family and Community Services, 'Government Welcomes Vivian Solon's Return', Media release, 18 November 2005, http://www.facs.gov.au/internet/minister1.nsf/content/vivian_solon_package.htm (accessed 14 December 2005).

imposed on these inquiries by the Government, neither report focussed on the questions of whether, and to what extent, the Minister responsible for DIMIA should be held responsible for these failings.[12]

1.12 However, following the release of these reports, the Opposition questioned whether the Immigration Minister should be held responsible for DIMIA's failings. For example, Leader of the Opposition in the Senate, Senator Chris Evans stated:

> Mr Comrie has done an excellent job in providing his report. It is the latest revelation of incompetence and mismanagement in Senator Vanstone's department. It reinforces, unfortunately, many of the damning findings of the Palmer report into the case of Ms Rau. Mr Palmer commented that it was difficult to see how the people responsible for such failed practices, poor decisions and regrettable outcomes could have the credibility and objectivity to bring about the fundamental change of mindset that is necessary. But Senator Vanstone ignored that finding and recommendation by Mr Palmer. Mr Howard, the Prime Minister, also ignored that recommendation. Senator Vanstone remains responsible for the department, although she accepts no responsibility for what it does.[13]

1.13 The doctrine of individual ministerial responsibility is central to the Westminster parliamentary system. In general terms, the doctrine states that ministers are individually responsible to the Parliament for actions taken under their authority. In particular, this relates to the actions taken by the portfolio department and agencies for which they are responsible. In the event of departmental error, the principle requires that the minister accepts responsibility for the mistake and if possible corrects it. If the departmental failure is sufficiently serious, the minister should resign.

1.14 However, the committee notes that the doctrine has evolved, and continues to evolve over time. Over the past 30 years, as government departments have grown larger, more complex and diverse, new accountability mechanisms have been introduced to provide a necessary counterbalance to the growth of bureaucratic decision-making and its impact on the lives of ordinary people and businesses. Examples of accountability mechanisms which now apply to government departments include the Freedom of Information legislation, the Commonwealth Ombudsman, judicial review of decisions, and the Senate Estimates process.

1.15 As a result of the growth in public sector administration and accountability, the doctrine has been eroded. Ministers are accepting less direct responsibility for actions taken under their authority. Given the extremely broad range of issues that modern government departments deal with, it would be unreasonable for ministers to be expected to take responsibility for all of the actions of those under their authority. The principle in its contemporary form therefore does not cover situations beyond a

12 See for example, Palmer Report, Appendix A, pp 196-197.

13 Senator Chris Evans, *Senate Hansard*, 10 October 2005, pp 50–51.

Minister's knowledge, in which case the Departmental Secretary or some other senior official must take responsibility.

1.16 The Prime Minister has also released guidelines on ministerial responsibilities entitled *A Guide on Key Elements of Ministerial Responsibility*. According to these guidelines:

> Ministers do … have overall responsibility for the administration of their portfolios and for carriage in the Parliament of their accountability obligations arising from that responsibility. They would properly be held to account for *matters for which they were personally responsible*, or where they were *aware of problems but had not acted to rectify them*.[14] [emphasis added]

1.17 These two circumstances conveniently cover the two situations that the committee considers to be at the heart of the allegations against the Minister for Immigration, Senator the Hon. Amanda Vanstone and the former minister, the Hon. Mr Philip Ruddock MP. That is:

- the apparent failure of the former Minister to properly exercise his discretionary powers under sections 351, 417 and 501 of the *Migration Act 1958*; and
- the failure of the former and current Ministers for Immigration to act to rectify the 'systemic' and 'catastrophic' problems within the culture of the Department of Immigration and Multicultural and Indigenous Affairs prior to the public outcry over the fate of Cornelia Rau and Vivan Solon.

Personal responsibility

1.18 From time to time, legislation grants ministers special discretionary powers regarding particular issues. The use of these special powers may have implications, which at times can be far-reaching, on the individual rights of real people. Under these circumstances, it is reasonable to expect that certain safeguards will be put in place to counterbalance the use of discretionary power. As a general rule, the greater the powers granted, the higher the degree of ministerial responsibility which must be demanded.

1.19 In relation to immigration policy, successive governments have acknowledged the need for greater safeguards when individual liberties are at risk:

> Protection of individual liberty is at the heart of Australian democracy. When there exist powers that have the capacity to interfere with individual liberty, they should be accompanied by checks and balances sufficient to

14 Prime Minister the Hon. John Howard MP, *A Guide on Key Elements of Ministerial Responsibility*, 1998, p. 13, www.pmc.gov.au/guidelines/docs/ministerial_responsibility.rtf (accessed 8 December 2005).

> engender public confidence that those powers are being exercised with integrity.[15]

1.20 The Migration Act grants the Minister for Immigration a wide range of discretionary powers. In general, these powers allow the Minister to intervene in various circumstances where the Minister thinks that it is in the public interest to do so. For example, the Minister is able to intervene personally in visa applications after the Migration Review Tribunal or the Refugee Review Tribunal hands down a decision, where the Minister thinks that it serves the public interest.[16]

1.21 In March 2004, a Senate Select Committee prepared a report on Ministerial Discretion in Migration Matters. The report noted that the ministerial discretion powers relating to visa applications were inserted into the *Migration Act* to 'provide an outlet to deal with difficult cases that did not fit statutory visa criteria'[17]. The report found that the information provided by DIMIA on the use of ministerial discretionary powers in some cases seems 'to raise more questions than they answer, creating room for speculation about [Minister Ruddock's] use of his powers'.[18]

1.22 According to the report, in cases where the discretionary power is used to grant a visa, the sole accountability mechanism is a requirement that the minister table in parliament his or her reasons for thinking intervention is in the public interest. This was often seen to be lacking. Other than this requirement, the powers are non-compellable, non-reviewable and non-delegable. The report found that 'the lack of transparency and accountability of the minister's decision making process is a serious deficiency in need of urgent attention'.[19]

1.23 In the committee's view, there can be no doubt that Ministers must be personally accountable where they personally exercise power.

Were Ministers aware of DIMIA's cultural problems?

1.24 Soon after the Palmer Report was made public, the Prime Minister was asked whether, in light of the report's findings, he had considered replacing the Minister. The Prime Minister responded:

> No ... because I don't think the circumstances supported such a decision. I indicated last weekend that Ministers should go if they are directly

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15 Quoted by Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, July 2005, p. i.

16 Sections 351 and 417, *Migration Act 1958.*

17 Senate Select Committee on Ministerial Discretion in Migration Matters, *Report*, March 2004, p. xi.

18 Senate Select Committee on Ministerial Discretion in Migration Matters, *Report*, March 2004, p. xiii.

19 Senate Select Committee on Ministerial Discretion in Migration Matters, *Report*, March 2004, p. xiii.

> responsible for significant failings, or mistakes or if their continued presence in the Government is damaging to the Government. I have full confidence in Senator Vanstone. I don't think for a moment in the circumstances of this case either of those conditions arose.[20]

1.25 However, in the committee's view, the 'defensive and self-protective' culture[21] that has developed in the department has been a direct result of the government's tougher immigration policy, led and implemented by Ministers Ruddock and Vanstone. The committee believes that senior officials within the department have been captured by the government's own culture. Further, the committee considers that it is inappropriate for Ministers to hide behind a departmental 'culture' which, in the committee's view, has developed in response to the needs and demands of Ministers Ruddock and Vanstone.

1.26 As noted earlier in this chapter, the Palmer Report concluded that there is a serious cultural problem within DIMIA and that 'urgent reform is necessary'. The report identified one of the reasons behind this cultural problem was 'the framework within which DIMIA has been required to operate'.[22] This clearly demonstrates that the government's immigration detention policy, which has undergone drastic modification and strengthening over the past five years, has contributed to the cultural problems within DIMIA. The committee is of the view that it is the responsibility of the relevant department to implement government policy. It must fall upon the department to set up effective management and administrative processes to carry out government policy. However, the committee considers that the Minister must ensure that government policy is being effectively, fairly and humanely implemented, particularly in circumstances where there are such wide-ranging and fundamental policy shifts as have been experienced in immigration policy over the past five years. The committee is concerned that this did not happen, and that Ministers appear to be seeking to avoid responsibility which is rightly theirs.

1.27 The committee also notes that many of the serious and systemic cultural problems stem from the upper echelons of DIMIA's compliance and detention management area[23] — that is, senior officials that on occasions would be in daily contact with the Minister and his or her advisers. The Palmer Report notes that the established DIMIA organisational structure and arrangements 'fail to deliver the outcomes required by the government in a way that is firm but fair and respects human dignity'.[24]

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20 Transcript of the Prime Minister the Hon. Mr John Howard MP, Joint Press Conference with Senator the Hon Amanda Vanstone, Minister for Immigration, Parliament House, Canberra, 14 July 2005, available from www.pm.gov.au/news/interviews/Interview1460.html (accessed 9 December 2005).

21 Palmer Report, p. ix.

22 Palmer Report, p. ix.

23 Palmer Report, p. 166.

24 Palmer Report, p. x.

1.28 The findings of serious cultural problems within DIMIA which were raised by the Palmer Report were also supported by the Comrie Report:

> It is reasonable to conclude that the problems discussed in the Palmer report were entrenched in DIMIA back in 2001, when the events associated with Vivian began.[25]

1.29 The Comrie Report further stated that:

> Since the circumstances of the Alvarez matter first arose in 2001 and the Palmer report focused on matters that occurred in 2004, this Inquiry … concludes that many of the systemic problems identified by both investigations had been present in DIMIA for some years.[26]

1.30 The committee believes this begs the question: why then did the government, and in particular the Minister, not act earlier to insist that DIMIA change its management approach in order to effectively and fairly deliver the government's immigration detention policy?

1.31 As one journalist noted after the release of the Palmer Report:

> The ministers set the tone, the parameters and the mindset. The officials, senior and otherwise, were merely mechanics trying to read and to respond to what ministers wanted. Nothing would have changed if the Rau and Alvarez cases had not been exposed.[27]

1.32 The committee endorses the view of Professor Richard Mulgan, Director of the Policy and Governance Program in the Asia Pacific School of Economics and Government at the Australian National University:

> Responsibility for a departmental culture of harshness must lie, in part, with the minister herself, as well as with her predecessor, Philip Ruddock, and the Prime Minister, John Howard, who public backed a hard-line asylum and refugee policy.[28]

1.33 As the Minister for Citizenship and Multicultural Affairs himself recently acknowledged to Parliament, DIMIA has, since 2001, merely done what the Government has instructed it to do.[29]

1.34 A final matter that arises in relation to ministerial responsibility is the role of the minister's office and the minister's advisers. As became apparent in the Comrie

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25 Comrie Report, p. 31.

26 Comrie Report, p. xvi.

27 Geoffrey Barker, 'Blame belongs at the top', *Australian Financial Review*, 18 July 2005, p. 54.

28 'DIMIA: the buck stops where?', *Public Sector Informant*, July 2005, p. 8. Note also the comments of Mr Comrie, *Committee Hansard*, 8 November 2005, p. 35

29 The Hon John Cobb MP, Minister for Citizenship and Multicultural Affairs, *House of Representatives Hansard*, 11 October 2005, p. 10.

inquiry, the Minister's staff play a vital role in many aspects of the department's day-to-day administration. As questioning during the Committee's hearings demonstrated, in the case of the removal of Vivian Alvarez, emails relating to Ms Alvarez were sent to the Minister's office on 4 April 2005, yet were not responded to until 21 April 2005 – seventeen days later.[30] However, notwithstanding the clear involvement of the Minister's office in the affair, the terms of reference for the Comrie inquiry clearly excluded the Minister and her staff from any investigation.[31]

Committee view

1.35 The roles, powers and corresponding accountabilities of ministers vis-a-vis their departments have been changing considerably over the past decade. As this chapter has examined in the context of the Migration Act, there has been a simultaneous growth in the extent of ministerial discretion and decline in the traditional doctrine of ministerial responsibility for the actions and administration of their department. Much of this is necessary and justified given the complexity of public administration and the wide ranging scope of departmental decision making.

1.36 Nevertheless, the committee considers it important that accountability measures keep pace with these developments. In particular, the creation of terms of reference for inquiries that exclude the Minister and the office is simply not acceptable. This is particularly the case given the wider context in which Senate Committees are unable to question either Ministers or their staff.[32] As such, scrutiny is therefore non-existent in the most important area of public administration.

Recommendation 1

1.37 The committee recommends that the terms of reference for any future independent inquiries into the administration of the Migration Act provide the authority for the investigation to include both the Minister and the Minister's office.

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30 Mr Comrie, *Committee Hansard*, 8 November 2005, p. 31

31 Mr Comrie, *Committee Hansard*, 8 November 2005, p. 30

32 On this point, the committee notes the report of the Senate Finance and Public Administration References Committee examination of employment, management and accountability of staff under the *Members of Parliament (Staff) Act 1984* (the MOPS Act), October 2003.

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.
>
> 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.

CHAPTER 3

SECONDARY ASSESSMENT OF VISA APPLICATIONS

3.1 This chapter examines the second stage of Australia's two tiered system for processing visa applications; that is: where tribunals undertake merits review of visa and visa related decisions made by DIMIA officials. It outlines the statutory framework and review processes and canvasses the concerns raised in respect of that process to date.

The Migration Review Tribunal

3.2 The Migration Review Tribunal (MRT) is a statutory body which provides a final independent merits review of visa and visa-related decisions (other than those refusing or cancelling protection visas) made by the Minister or DIMIA officers acting as the Minister's delegate. Applications seeking a review of adverse decisions in respect of protection visas are dealt with by the Refugee Review Tribunal (RRT).

Jurisdiction, membership and powers

3.3 The MRT has been in existence since 1 June 1999. The Migration Act states that the MRT is to provide a review mechanism that is fair, just, economical, informal and quick. The Act and the Migration Regulations set out its jurisdiction, powers and procedures.[1] As mentioned above, the MRT has a very broad jurisdiction in relation to non-humanitarian visa decisions made within and outside Australia. There is a large potential caseload as DIMIA deals with more than 100,000 partner and family visa applications and more than 3 million visitor visa applications in a year.[2]

3.4 The MRT comprises members appointed for fixed terms under the Migration Act. At 30 June 2005, the MRT had 67 Members. The MRT is usually constituted by

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1 See *Migration Act 1958*, Part 6.

2 The MRT is authorised to review decisions relating to a wide range of visas: bridging, visitor, student, temporary business entry, permanent business entry; skilled; partner visas; and family visas. The type of decisions involved can include decisions: to refuse to grant visas, to cancel visas, not to revoke automatic cancellation of student visas; to refuse to approve or renew approvals of business sponsors; to refuse to approve a nominated position or nomination of a business activity; in relation to status as an approved professional development sponsor; to impose a security for compliance with visa conditions and to assess a score in relation to the points test in skilled visa applications. The MRT only has jurisdiction over 'offshore' visa refusal decisions in relation to visas where there is a requirement for an Australian sponsor or close relative (who is the applicant for review). Migration Review Tribunal, *Annual Report 2004 -2005*, pp 9, 16-17.

a single Member when dealing with a case. The MRT cost $21.1 million to operate in 2004-05.[3]

3.5 The Act and Regulations empower the MRT to undertake merits review of the cases brought before it. Merits review is an administrative reconsideration of the case, to ensure that the decision taken is the 'correct or preferable' one. As the MRT explains in its annual report:

> Correct in the sense that the decision made is consistent with law and policy, and preferable in the sense that, if there is an area of discretion in making a correct decision, the decision made is the most appropriate in the circumstances. A merits review system should also improve the general quality and consistency of decision-making, and enhance openness and accountability.[4]

3.6 To these ends, the MRT is authorised to exercise all of the powers and discretions conferred on the primary decision-maker in addition to its own specific powers. The MRT can affirm or set aside a decision under review. If the decision is set aside, the MRT can substitute another decision, or remit the matter to DIMIA to be reconsidered subject to any directions made by the MRT. The MRT's findings are binding on DIMIA.

3.7 The Act provides that, in reviewing a decision, the MRT is not bound by technicalities, legal forms or rules of evidence, and that it must act according to substantive justice and the merits of the case.[5] However, the MRT must make its decision within the same legislative and policy framework as the primary decision-maker. In deciding a review, the MRT must apply the correct law, have due regard to policy and is bound by relevant court decisions. It cannot make a decision that is not authorised by the Act or Regulations. It is also bound by any directions issued by the Minister under section 499 of the Act.[6]

3.8 The Act and Regulations prescribe the procedure for review by the MRT. For example:

- The MRT cannot accept applications for review lodged by persons who do not have standing to apply for review. In some cases, only the visa applicant or former visa holder themselves can apply.

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3 Migration Review Tribunal, *Annual Report 2004-2005*, pp 8-9, 14, 33.

4 Migration Review Tribunal, *Annual Report 2004 -2005*, p.8.

5 *Migration Act 1958*, section 353.

6 Section 499 states that 'the Minister may give written directions to a person or body having functions or powers under this Act if the directions are about: the performance of those functions; or the exercise of those powers'. *Migration Act 1958*, section 499.

- The MRT cannot accept and consider an application lodged outside the relevant time limit prescribed under the Act. The time limits vary according to the type of visa or decision involved.[7]
- An application fee of $1400 is payable.[8] The fee may be waived or refunded if Tribunal officials are satisfied that payment has caused, or is likely to cause, severe financial hardship. The fee is also refunded if the MRT sets aside the primary decision or remits a matter to DIMIA for reconsideration.

3.9 The following paragraphs summarise the sequence of events in the MRT review process.[9]

3.10 On lodgement of a valid application, a case officer will write to the review applicant confirming its acceptance, allocating a case number and asking the applicant if they wish to provide any additional information.

3.11 The MRT will obtain the relevant case file from DIMIA. The MRT Member will examine the documents provided by DIMIA and by the applicants. If after reviewing the papers, the MRT considers a mistake has been made by the DIMIA decision-maker, it may set aside or remit the department's decisions without holding a hearing.

3.12 If the MRT is unable to make a decision favourable to the applicant on the papers, the applicant has the right to appear before the Tribunal to give evidence and argue their case. The applicant will be notified of the time and date of the hearing and asked if he or she wants any particular persons called as a witness or written information obtained. The Tribunal is not bound by an applicant's request that a witnesss be called or written information obtained.

3.13 Hearings are usually open to the public. The MRT can hold closed hearings if satisfied this would be in the public interest.

3.14 The MRT may hand down its decision at the end of a hearing or (as is more often the case) after the hearing. All MRT decisions are written and contain a statement of reasons for the decision. If the review application is upheld, the file is returned to DIMIA to impliment the decision. Further processing by DIMIA may be required, such as health and character checks or approval of assurances of support.

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7 The time limits vary from two working days for some immigration detention cases, through to seven working days for cancellation decisions and other immigration detention cases, 21 calendar days for other cases where the visa applicant is in Australia and 70 calendar days where the applicant is outside Australia. Migration Review Tribunal, *Annual Report 2004-2005*, p. 10.

8 The exception is where the application relates to a decision to refuse to grant or to cancel a bridging visa, as a result of which the applicant is in immigration detention

9 The summary is drawn from Burns, *The Immigration Kit*, pp 747-763.

3.15 According to the MRT's latest annual report:

> The MRT's procedures are designed to ensure that outcomes are reached that are consistent with the Tribunal's objective to provide a mechanism of review that is 'fair, just, economical, informal and quick'. The Act sets out procedural steps designed to ensure that an applicant can fully put his or her case to the MRT, including the opportunity to appear before the MRT.[10]

3.16 The MRT's procedures provide that:

- an applicant is entitled to have access to, or a copy of, the material before the Tribunal;
- the Tribunal must inform the applicant of information that might lead to an adverse outcome, and give the applicant an opportunity to comment upon the information;
- the Tribunal must invite the applicant to appear before the Tribunal to give oral evidence and present arguments, and to give the applicant an opportunity to ask the Tribunal to take oral evidence from other persons or to obtain other documentary evidence;
- an applicant is entitled to be represented other than during an appearance before the Tribunal;
- an applicant is entitled to be accompanied by an assistant when appearing before the Tribunal;
- an applicant can make written submissions or provide documentary evidence at any stage of the review;
- a qualified interpreter is provided if the applicant or a witness is not sufficiently proficient in English; and
- the Tribunal must produce a written record of its decision and reasons.[11]

Representation

3.17 Appoximately 30% of the MRT annual case load involves unrepresented applicants.[12]

3.18 The MRT's procedures provide that applicants may be assisted by representatives, who may forward written submissions and evidence to the MRT, contact the MRT on the applicant's behalf and accompany the applicant to any meeting or hearing arranged by the MRT. However, as noted above, a representative cannot present oral arguments or speak on the applicant's behalf when the applicant

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10 Migration Review Tribunal, *Annual Report 2004-2005*, p. 10.

11 See http://www.mrt.gov.au/operations.html.

12 About 30% of the 8308 cases finalised by the MRT in 2004-2005 involved applicants who were unrepresented. Migration Review Tribunal, *Annual Report 2004-2005*, p. 11. See also Migration Review Tribunal, *Annual Report 2003-2004*, p. 13.

appears before the MRT unless the Tribunal considers that exceptional circumstances exist.[13]

3.19 An applicant's representative must be a registered migration agent. The Act generally makes it an offence for a person to provide immigration assistance (as defined by the Act) unless he or she is registered as a migration agent under that Act.[14]

3.20 The Minister or DIMIA are not represented in MRT proceedings. As such, the Tribunal members take an active role in questioining applicants and witnesses and in exploring issues. DIMIA may make written submissions to the MRT, but reportedly does so infrequently.[15]

Caseload

3.21 The MRT finalised 8,308 cases during 2004-05. It also received 7,827 new cases in that year and had 4,685 ongoing cases as at 30 June 2005. 7061 hearings were held in 2004-05, with hearings being held in 69 per cent of all cases finalised. Interpreters were required in 55 per cent of cases where a hearing was held.[16]

13 See http://www.mrt.gov.au/operations.html.

14 See Chapter 2.

15 Migration Review Tribunal, *Annual Report 2004-2005*, p. 11.

16 Migration Review Tribunal, *Annual Report 2004-2005*, p. 15.

3.22 Table 3.1 provides a breakdown of the cases finalised by the MRT in the last five years, according to the type and category of decision and visa involved.

Table 3.1: Cases finalised by the Migration Review Tribunal, last 5 years

Finalisations - type and category	2004-05	2003-04	2002-03	2001-02	2000-01
Visa refusal - Bridging	799	739	807	733	476
Visa refusal - Visitor	379	467	562	532	591
Visa refusal - Student	517	748	583	1055	1219
Visa refusal – Temporary Business	413	794	1207	998	694
Visa refusal – Permanent Business	270	251	277	162	143
Visa refusal – Skilled	355	424	633	713	328
Visa Refusal – Partner	2840	2916	2333	1636	1273
Visa Refusal – Family	614	1129	1162	1366	794
Cancellation – Student	1069	1237	861	510	313
Temporary Business sponsorship	220	438	448	265	211
Other	832	879	841	613	537
TOTAL	**8308**	**10022**	**9714**	**8583**	**6579**

Source: Migration Review Tribunal, *Annual Report 2004-2005*, p. 20, Table 3.6. Migration Review Tribunal, *Annual Report 2003-2004*, p. 23, Table 3.6; Migration Review Tribunal, *Annual Report 2002-2003*, p. 22, Table 3.7.

Outcomes

3.23 Table 3.2 provides a breakdown of the cases set aside by the MRT in 2004-05, according to type and category of decision and visa involved.

3.24 The MRT set aside DIMIA's primary decision in 3905 cases or 47% of all cases finalised. The set-aside rate varied between case categories. Relevant factors include the applicable criteria for the visa and the extent to which further evidence may be available. As the MRT noted in respect of partner visa refusals:

> Partner refusals were the decision most often set aside. These also constitute the largest single group of cases before the MRT. In many partner visa cases that come to the MRT, the relationship had only existed for a brief period at the time of the visa application, and at the time of the decision of the delegate. The relationship may have become more settled by the time of the MRT's decision, and the MRT is often presented with greater evidence of co-habitation, of joint financial relationships, of regular contact or visits between spouses living in different countries, and of the

support of relatives and friends. Such evidence is tested by the taking of oral evidence by the MRT, with hearings held in more than 80% of cases.[17]

3.25 The overall set-aside rates for 'offshore' cases was 62%, compared to 39% for 'onshore' cases. The MRT attributed the generally lower set-aside rate in cases involving a person already in Australia to 'a greater interest in persons on temporary visas in Australia to exercise review rights, sometimes irrespective of the merits of their case.'[18]

Table 3.2: Set-aside rates for cases reviewed by the Migration Review Tribunal, last 5 years

Set-aside rates	**2004-05**	**2003-04**	**2002-03**	**2001-02**	**2000-01**
Visa refusal - Bridging	22%	27%	30%	35%	22%
Visa refusal - Visitor	58%	63%	64%	61%	59%
Visa refusal - Student	45%	50%	48%	55%	57%
Visa refusal – Temporary Business	28%	33%	26%	25%	21%
Visa refusal – Permanent Business	31%	38%	33%	34%	34%
Visa refusal – Skilled	63%	59%	58%	53%	43%
Visa Refusal – Partner	65%	61%	63%	62%	59%
Visa Refusal – Family	44%	40%	35%	29%	29%
Cancellation – Student	33%	40%	31%	46%	47%
Temporary Business sponsorship	22%	27%	21%	25%	22%
Other	39%	35%	33%	38%	38%
All cases	**47%**	**46%**	**43%**	**44%**	**43%**

Source: Migration Review Tribunal, *Annual Report 2004-2005*, p. 22, Table 3.8. Migration Review Tribunal, *Annual Report 2003-2004*, p. 25, Table 3.8; Migration Review Tribunal, *Annual Report 2002-2003*, p. 17, Table 3.3.

17 Migration Review Tribunal, *Annual Report 2004-2005*, p. 21.

18 Migration Review Tribunal, *Annual Report 2004-2005*, p. 21.

Time taken to determine review applications

3.26 It is apparent that timeliness is an important performance indicator for the MRT.[19] The MRT's funding is based on the number of cases to be finalised in each year. According to its latest annual report, the MRT also 'operates within a legislative framework which requires a speedy resolution of matters'. Case targets are set for the MRT Members each year and each Member is expected to undertake a mix of cases (for example, from a variety of countries). Notwithstanding the importance of meeting case targets, the MRT has stressed that there is a continuing commitment to making quality decisions.[20]

3.27 The average time taken by the MRT in 2004-2005 to process a case (ie, from lodgement to finalisation) was 39 weeks or 271 days. The MRT explained that:

> … the length of a review can vary. This may depend on the type of case, the investigations or third party assessments that may be required, the overall workload of the MRT, the priority given to the case, and the extent to which the applicant request further time to make submissions or to obtain and present further evidence.[21]

3.28 The MRT must by law give priority to cases involving persons being held in immigration detention, all visa cancellation cases and cases involving visits to attend significant family events.[22] For example, the MRT's average processing time in 2004-05 for review of DIMIA decisions to refuse bridging visas was 15 days, with 70% of all reviews of bridging visa decisions involving persons held in immigration detention being finalised within the prescribed period of seven working days.[23] Priority is also given to cases which are remitted or returned from a court for the MRT to reconsider (see below).

Judicial review of MRT decisions

3.29 An application for judicial review was filed in 440 cases of the 8,308 cases finalised by the MRT during 2004-05 (ie, 5.3%).[24] The vast majority of such

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19 Timelines is one performance indicator used by the MRT to measure its performance in undertaking the task required of it by Government. The other performance indicators are: the number of cases finalised; the levels and outcomes of appeals against MRT decisions; and the number of complaints received by the MRT about its Members and services. Migration Review Tribunal, *Annual Report 2004-2005*, p. 14.

20 The MRT's funding agreement with the Department of Finance and Administration is based on the number of cases to be finalised in a year and an assessment of fixed and variable costs. Migration Review Tribunal, *Annual Report 2004-2005*, pp 14, 22-24.

21 Migration Review Tribunal, *Annual Report 2004-2005*, p. 11.

22 See http://www.mrt.gov.au/faqs.html.

23 Migration Review Tribunal, *Annual Report 2004-2005*, p. 23. The MRT noted in its annual report that, in most cases not finalised within the prescribed seven working days, the applicant had requested an extension of time.

24 Migration Review Tribunal, *Annual Report 2004-2005*, p. 24.

applications are withdrawn by the applicant or dismissed by the courts. Table 3.3 summarises the outcomes of applications for judicial review of MRT decisions in recent years.

Table 3.3: Outcomes of judicial review of MRT decisions, last 5 years

Judicial Review outcomes	2004-05	2003-04	2002-03	2001-02	2000-01
Applicant withdrawal	201	171	142	110	94
Dismissed by the court	247	176	108	125	72
Remitted by consent for reconsideration	65	38	17	50	62
Remitted by court for reconsideration	27	25	12	14	12
TOTAL	**540**	**410**	**279**	**299**	**240**

Source: Migration Review Tribunal, *Annual Report 2004-2005*, p. 24, Table 3.10. Migration Review Tribunal, *Annual Report 2003-2004*, p. 28, Table 3.10; Migration Review Tribunal, *Annual Report 2002-2003*, p.18, Table 3.4.

The Refugee Review Tribunal

99.1 The Refugee Review Tribunal (RRT) is a statutory body whose main function is to provide a final independent merits review of decisions made by DIMIA or its Minister to refuse or cancel protection visas to non-citizens in Australia.

Jurisdiction, membership and powers

3.30 The RRT was established in 1993 and its jurisdiction, powers and procedures are set out in the Act and Regulations.[25] As mentioned above, the RRT deals only with applications from 'onshore' asylum seekers, that is, persons who are present in Australia and who have been refused a protection visa or had such a visa cancelled.

3.31 The RRT is comprised of members appointed for fixed terms under to the Migration Act. As at 30 June 2005, the RRT had a Membership of 74, comprising the Principal Member, Deputy Principal Member, 4 Senior Members, 10 full-time

25 The Tribunal was established under Part 7 of the *Migration Act 1958*. It replaced the Refugee Status Review Committee (RSRC), which unlike the RRT, lacked a statutory basis and could only make nonbinding recommendations to the then Minister for Immigration and Ethnic Affairs. The RSRC comprised representatives from the then Department of Immigration, Local Government and Ethnic Affairs, the Attorney-General's Department, the Department of Foreign Affairs and Trade and the community. Refugee Review Tribunal Fact Sheet R8, *The Refugee Review Tribunal – An Overview*, 7 April 2005.

Members and 56 part-time Members. The RRT is usually constituted by a single Member when dealing with a particular case.[26]

3.32 According to the RRT, its Members:

> … come from a broad range of professions and are employed for the high level skills which they bring to the decision making process. Members have a wide range of tertiary qualifications and more than 50% have a legal background. Many Members come to the Tribunal with extensive experience at senior levels in the private and/or public sectors in a variety of organisations, including other Tribunals. Some Members have experience in the refugee field, refugee advocacy groups or the UNHCR. A number of Members have undertaken temporary assignments with the UNHCR … to assist in the establishment of human rights structures and to make refugee determinations in those countries.[27]

3.33 The RRT cost $21.08 million to operate in 2004-05.[28]

3.34 The RRT undertakes a full merits review. It can affirm DIMIA's primary decision, vary that decision, set the decision aside and substitute a new decision, or remit (return) the matter to DIMIA for reconsideration with directions.

3.35 In making its decision, the Tribunal is restricted to consideration of whether the 'inclusion' criteria for refugee protection as set out at Article 1A of the 1951 UN Convention Relating to the Status of Refugees (the Refugee Convention) are met.[29] It has no jurisdiction to consider whether the individual is excluded from Convention coverage and, therefore, is not owed protection on character related grounds set out in the Refugee Convention.[30]

3.36 The RRT has described its conduct of review applications as follows:

> In conducting a review of a decision to refuse to grant a protection visa, the RRT looks at the issues and evidence afresh. It considers the material relating to the protection visa application, including DIMIA's file, any further submissions from the applicant and information from other sources available to the RRT. It decides whether the applicant is a person to whom Australia has protection obligations, which includes consideration of whether he or she is a 'refugee' within the meaning of the Refugees Convention.[31]

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26 Refugee Review Tribunal, *Annual Report 2004-2005*, pp 8, 31.

27 See Refugee Review Tribunal Fact Sheet R9, *The Members of the Refugee Review Tribunal*, available at http://www.rrt.gov.au/factsheets/R9.pdf.

28 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 43.

29 The convention was amended by the 1967 UN Protocol Relating to the Status of Refugees.

30 DIMIA, *Submission 205*, p. 27.

31 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 8.

3.37 A major objective of the Tribunal – in common with the MRT – is to provide a review system that is 'fair, just, informal, economical and quick'. As the RRT explains:

> The proceedings before the RRT are informal (non-adversarial). Applicants may attend the RRT to present oral arguments and to give oral evidence, but DIMIA is not usually represented at RRT hearings. The RRT is inquisitorial in nature and can obtain whatever information it considers necessary to conduct the review. It is not bound by technicalities, legal forms or the rules of evidence but must act according to substantial justice and the merits of the case. It cannot, however, make a decision outside what is permitted by the legislation.[32]

3.38 The Migration Act and its Regulations specify how an application for review by the RRT must be made and when and by whom. The following paragraphs summarise the current sequence of events in the RRT review process. Commentators have noted that procedures and practice are constantly evolving and changing, with legislative changes to the RRT's structure and processes and changes in its mode of operation on a policy and practice level.[33]

3.39 At present, applications must be made on the prescribed form. The completed form must lodged within a specified time which commences on the date that a person is notified or deemed to be notified of a primary decision.[34] The RRT does not have the power to extend the time limit. The time limits are:

- 7 working days for persons in immigration detention, and
- 28 calendar days for all other cases.

3.40 There is no upfront application fee. However, a charge of $1,400 is payable if the application for review is unsuccessful.

3.41 On receipt of a valid application, the RRT sends a letter of confirmation and invites the applicant to send any documents, information or any other evidence that they want the Tribunal to consider.

3.42 Once the RRT has received the application, it conducts a 'review of the papers'. The RRT will review the DIMIA case file and any statement made by DIMIA in relation to the case, material provided with the application and any statutory declarations made by the applicant in relation to the matter under review, and any additional information sought by the RRT. At this point, the RRT may make a decision favourable to the applicant based on a 'review of the papers'.

3.43 The RRT may invite the applicant or any other person to provide additional information relevant to the review. If the RRT considers that it has information before

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32 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 8.

33 Germov and Motta, *Refugee Law in Australia*, p. 75.

34 See http://www.rrt.gov.au/applyrev.htm#process.

it which would give it a reason to affirm the orginal decision (ie, adverse information), the RRT must provide the particulars of that information to the applicant and invite the applicant to comment on it. The RRT is only obliged to provide the applicant with adverse information specific to the applicant or some other person (as opposed to information concerning a class of persons).[35]

3.44 The RRT may request additional information at any stage of the review. A detainee invited to provide additional information to the RRT, other than for the purposes of an interview, has seven days notification of the invitation to provide the information if information is to be provided from a place in Australia, or 28 days after the date of notification if information is to be provided from a place outside of Australia.[36] An applicant who is not in detention has 14 days to provide additional information, other than for an interview, after notification (if information is to be provided from a place in Australia) or 28 days after notification (if information is to be provided from a place outside Australia).

3.45 The RRT may extend the period within which the applicant must provide additional information or comment on information, to 28 days for information to be provided from within Australia and to 70 days for information to be provided from outside Australia, from the date of notification.

3.46 All written material submitted by an applicant in a language other than English must be accompanied by a translation into English by an accredited translator. The RRT will meet the cost of translation in limited cases where the document is material to the applicant's case and no other alternative can be found within a reasonable timeframe.[37]

3.47 If an applicant declines to provide additional information or to comment on information provided by the RRT to the applicant pursuant to section 424 of the Migration Act, the RRT may make a decision on the review without taking further action to obtain the applicant's view on the information or to obtain additional information from the applicant.

3.48 If the RRT's decision would not be a favourable one for the applicant based on a 'review of the papers', the applicant must be invited to appear before the RRT, unless the applicant consents to the RRT deciding the review without the applicant appearing.

3.49 A detainee who is invited to appear before the RRT is given seven days notice, and an applicant, who is not a detainee, is given 14 days notice to appear before the RRT. The applicant must also be advised that, within seven days of

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35 Burns and Sudrishti, *The Immigration Kit*, p. 767. See pp 766 to 769 for an overview of the RRT merits review process.

36 *Migration Regulations* 1994, Regs 4.35-4.35B *pursuant to s. 424B(2),*

37 Germov and Motta, *Refugee Law in Australia*, p. 76.

notification of the invitation to appear before the RRT, he or she may request in writing that the RRT take oral evidence from a person or persons.[38] However, the RRT is not required to obtain evidence from the named person(s).

3.50 If the applicant declines an invitation to appear before the RRT pursuant to section 425 of the Migration Act, the RRT may make a decision on the review without taking further action to enable the applicant to appear before it. However, the RRT may reschedule the interview date to enable the applicant to appear before it.

3.51 The RRT will engage a qualified interpreter if satisfied that the applicant needs an interpreter for a hearing. Where possible, the RRT will use interpreters who have been accredited by the National Accreditation Authority for Translators and Interpreters (NAATI).

3.52 The RRT may request the applicant to provide additional information or comment on information at an interview. A detainee must provide the information or make comments within 14 days of notification. An applicant who is not a detainee must provide the information or make comments within 28 days of notification.

3.53 The RRT may extend the period within which the applicant must provide additional information or comment on information at an interview to 28 days of the applicant receiving notification of the extension.

3.54 The RRT's hearings are private and confidential. In view of the nature and subject matter of asylum claims, the Tribunal is required by the Migration Act to conduct its hearings in private and to restrict the release of personal information. The Committee notes that breach of these requirements by Tribunal Members and officials is a criminal offence punishable by a term of imprisonment.[39]

3.55 The RRT's hearing are also informal.[40] Commentators have noted that the general procedure and method of conducting a hearing can vary greatly depending on the presiding Member.[41] The RRT may take oral evidence from an applicant in person, by telephone, closed-circuit television or any other means of communication.[42] Hearings are tape-recorded and the tape-recording is the official record of the proceedings. An audio-cassette tape of the proceedings will be made available to the applicant upon request.

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38 *Migration Act 1958*, section 426.

39 *Migration Act 1958*, sections 429 and 439. See DIMIA, Answer to Question on Notice, 25 October 2005, p. 34.

40 *Migration Act 1958*, section 429. The rationale for closing the RRT's proceedings to the public is the nature of protection visa claims. Refugee Review Tribunal, *Annual Report 2004-2005,* p. 9.

41 See, for example, Germov, *Refugee Law in Australia*, p. 79.

42 *Migration Act 1958*, s.429A

3.56 The RRT has the power to summon a person to appear before it to give evidence or to produce documents to it.

3.57 A person appearing before the RRT to give evidence is not entitled to be represented by any other person or to cross examine any other person giving evidence unless the Tribunal gives them leave to do so. However, an applicant is entitled to give evidence and present arguments in support of their claims.[43]

3.58 The RRT is required to prepare a written statement of its decision on the review including the reasons for the decision, findings on any material questions of fact, and references to the evidence or other information on which the findings of fact were based.[44] A copy is provided to the applicant and to DIMIA.

3.59 The RRT must also publish decisions considered to be of particular interest, excluding information capable of identifying the applicant or his or her dependents or relatives. Approximately 10% of RRT decisions are published.[45]

Representation

3.60 Approximately 31 per cent of the 3,033 cases finalised by the RRT in 2004-05 involved unrepresented applicants.[46]

3.61 The RRT's procedures provide that applicants may appoint a representative, who can forward written submissions and evidence to the RRT, contact the RRT on the applicant's behalf and accompany the applicant to any meeting or hearing arranged by the RRT. The Tribunal is not required to allow the representative to argue the case for the applicant. The applicant must appear at any hearing in person or via teleconference or videoconference facilities. The RRT may invite the applicant's representative or adviser to give make oral submissions at the conclusion of the hearing or in writing after the hearing.[47]

3.62 With very limited exceptions, an applicant's representative must be a registered migration agent.

3.63 DIMIA is not represented before the RRT, but may make written submissions to the RRT in individual cases or in relation to a particular caseload.[48]

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43 Germov, *Refugee Law in Australia*, p. 80.

44 *Migration Act 1958*, s430

45 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 9.

46 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 10. This compares to 23% of the 5810 cases finalised by the RRT in 2003-2004 and 20% of the 5077 cases finalised in 2002-2003. See Refugee Review Tribunal, *Annual Report 2003-2004*, p. 12 and Refugee Review Tribunal, *Annual Report 2002-2003*, p. 18.

47 See http://www.rrt.gov.au/applyrev.htm#process.

48 Refugee Review Tribunal, *Annual Report 2004-2005*, p 15.

Caseload

3.64 The RRT finalised 3,033 cases in 2004-05 and had 1,115 cases on hand as at 30 June 2005.

3.65 Applicants appointed a representative in 69 per cent of cases finalised in 2004-05. Applicants were invited to a hearing in 95 per cent of the finalised cases. Hearings were held in 73 per cent of finalised cases and interpreters were used in 89 per cent of cases involving a hearing.[49]

3.66 The RRT received 2,911 new applications for review in 2004-05. The number of applications lodged has declined over the past four years (that is, from 4,929 in 2001-02). The RRT explained:

> Over this period, the volume of lodgements has been affected not only by changes in primary lodgements and primary decision and primary grant rates (affected by circumstances overseas, departmental processing priorities and border control policies). It has also been affected by the processing of applications for further protection visas from persons who have previously been granted a temporary protection visa, and changes in the volume of court remittals. … Border control policies have largely stopped the flow of applications for protection visa applications lodged by persons who did not enter Australia lawfully. Detention cases peaked at 16% of lodgements in 2000-01, but only comprised 7% of lodgements in 2004-05. Most lodgements (93% in 2004-2005) are community cases, where the protection visa application was made after lawful arrival on another kind of visa, and the applicant holds a bridging or other visa providing lawful status during the course of the review.[50]

3.67 The RRT received 196 applications during 2004-05 from persons being held in immigration detention. It finalised 166 of these cases in that year, with 53 being undecided as at 30 June 2005.[51]

3.68 The composition of the RRT's caseload also changed during 2004-05. There was a marked rise in the number of Iraqi cases. The RRT explained that almost all of these involved TPV holders seeking a further protection visa. This rise was offset by a significant decline in applications received from other source countries such as Afghanistan, India, Malaysia and Indonesia.[52]

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49 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 15.

50 Refugee Review Tribunal, *Annual Report 2004-2005*, pp. 16-17.

51 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 15.

52 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 17.

3.69 Table 3.4 shows the composition of cases lodged, by source country, which shows the changing nature of the RRT's caseload.

Table 3.4: Cases lodged with the Refugee Review Tribunal, by source country

Cases lodged by source country	2004-05	2003-04	2002-03
Afghanistan	299	747	25
Bangladesh	137	105	154
China (PRC)	753	649	909
India	128	404	523
Indonesia	68	143	411
Iraq	540	6	18
Lebanon	50	48	111
Malaysia	88	142	163
Philippines	58	48	41
Sri Lanka	72	90	145
Other	718	962	2377
All cases	**2911**	**3344**	**4877**

Source: Refugee Review Tribunal, *Annual Report 2004-2005*, p.17, Table 3.4

Outcomes

3.70 The RRT set aside DIMIA's decision in 1,009 cases or 33 per cent of all cases finalised in 2004-05. The RRT explained:

> Typically a decision under review is set aside if a Member if satisfied that the applicant is a person to whom Australia has protection obligations under the Refugee Convention. The application for the visa is at this point usually remitted (returned) to DIMIA for further processing and final decision. The RRT's finding that an applicant is owed protection is binding on DIMIA.[53]

3.71 The set-aside rate in 2004-05 for applications lodged by persons held in immigration detention was 31 per cent – that is, 52 of the 166 detention applications

53 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 15.

finalised by RRT were upheld. The set aside rate for detention cases in the two previous years was approximately 20 per cent.[54]

3.72 There was a significant increase in the RRT's overall set aside rate in 2004-05. As mentioned above, the RRT's set aside rate in 2004-2005 was 33 per cent. The set aside rate for previous years varied between 10 per cent and 13 per cent. This increase in the number of DIMIA decisions being overturned was explained by the RRT as follows:

> This reflected a significantly increased proportion of cases from Afghanistan and Iraq in the caseload. Most of these cases involved persons who had previously been granted a temporary protection visa and who were seeking a further protection visa. In the majority of these cases, the Tribunal found that at the time of the review the circumstances in Afghanistan and Iraq were such that a further protection visa should be granted.[55]

3.73 Table 3.5 provides a summary of the outcomes of RRT review applications.

Table 3.5: Outcome of review applications to the Refugee Review Tribunal

Outcomes of reviews	**2004-05**	**2003-04**	**2002-03**	**2001-02**	**2000-01**
Primary decision affirmed	1899 (22%)	4685 (81%)	5388 (86%)	4647 (79%)	4858 (81%)
Primary decision set aside	1009 (33%)	739 (13%)	359 (13%)	710 (12%)	620 (10%)
Application withdrawn	72 (2%)	299 (5%)	426 (7%)	377 (7%)	310 (5%)
Otherwise resolved #	53 (2%)	87 (1%)	78 (1%)	131 (2%)	177 (3%)
Total finalised	**3033**	**5810**	**6251**	**5865**	**5965**

Source: Refugee Review Tribunal, *Annual Report 2004-2005*, p. 19, Table 3.7; Refugee Review Tribunal, *Annual Report 2003-2004*, p. 22, Table 3.7; Refugee Review Tribunal, *Annual Report 2002-2003*, p. 18, Table 3.2.

(includes applications lodged outside of the required time limit)

54 See http://www.rrt.gov.au/stats/lodgements%20and%20finalisations.pdf and the table entitled *RRT: Lodgements and finalisations since 1993.*.

55 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 19.

3.74 Table 3.6 provides the RRT set-aside rate according to source country.

Table 3.6: RRT set-aside rates by source country

Set aside rates by source country	2004-05	2003-04	2002-03	2001-02	2000-01
Afghanistan	89.2%	89.8%	32.2%	61.6%	61.9%
Bangladesh	14.9%	14.4%	1.5%	1.9%	-
China (PRC)	10.4%	4.7%	3.4%	6.4%	-
India	1.5%	0.4%	0.5%	0.7%	-
Indonesia	5.4%	3.7%	0.9%	2.6%	-
Iraq	91.5%	20%	52%	-	87.1%
Lebanon	18.6%	9.9%	10.6%	-	-
Malaysia	1.0%	0.6%	0.7%	1.8%	-
Philippines	1.9%	0%	0.2%	-	-
Sri Lanka	15.5%	5.9%	4.2%	15.4%	-
Other	11.6%	5.5%	4.8%	-	-
All cases	**33.3%**	**12.7%**	**5.7%**	**12.1%**	**13.0%**

Source: *Statistics for all countries listed in the Table were not readily available for 2001-02 and 2000-01. Refugee Review Tribunal,* Annual Report 2004-2005*, p. 20, Table 3.8; Refugee Review Tribunal,* Annual Report 2003-2004*, p. 23, Table 3.8; Refugee Review Tribunal,* Annual Report 2002-2003*, p. 19, Table 3.3; Refugee Review Tribunal,* Annual Report 2001-2002*, p. 3.*

Time taken to determine review applications

3.75 Timeliness is also an important performance indicator for the RRT.[56] Like the MRT, the RRT's funding is based on the number of cases to be finalised in each year. According to its latest annual report, the RRT also 'operates within a legislative framework which requires a speedy resolution of matters'. Case targets are also set for the RRT Members each year and each Member is expected to undertake a mix of cases (for example, from a variety of countries). The RRT has stressed that,

56 Timeliness is one performance indicator used by the RRT to measure its performance in meeting the outcome required of it by Government, namely, 'the independent merits review of decisions concerning applicants for refugee status'. The RRT's other performance indicators are: the number of cases finalised; the levels and outcomes of appeals against RRT decisions; and the number of complaints received by the RRT about its Members and services. Refugee Review Tribunal, *Annual Report 2004-2005*, p. 14.

notwithstanding the importance of meeting case targets, there is a continuing commitment to making quality decisions.[57]

3.76 *The Migration and Ombudsman Legislation Amendment Act 2005* requires the RRT to finalise reviews within 90 days. The RRT has advised that measures have been developed or mooted to achieve this outcome since the proposed amendments were first announced by the Prime Minister on 17 June 2005.[58]

3.77 The average time taken by the RRT in 2004-05 to process a review application from lodgement to finalisation was 22 weeks (154 days). This is the lowest average processing time since the RRT was established in 1993. The average time taken to finalise applications from persons held in immigration detention was 11 weeks.[59]

Judicial review – appeals to the Federal Court

3.78 During 2004-05, 1,978 applications for judicial review of RRT decisions were made. These related to 1,932 RRT decisions. This compares to 2,824 initiating applications for judicial review filed in the previous year, relating to 2,791 RRT decisions.[60]

3.79 An application for judicial review was filed in 39.9 per cent of all cases finalised by the RRT in 2004-05. This compares to 38.1 per cent of cases finalised in the previous year.[61]

3.80 The number of RRT decisions remitted or overturned by the courts rose from 163 cases in 2003-04 to 245 cases in 2004-05.

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57 Refugee Review Tribunal, *Annual Report 2004-2005*, pp 14, 21-22. The RRT's funding agreement with the Department of Finance and Administration is based on the number of cases to be finalised in a year and an assessment of fixed and variable costs.

58 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 2. These measures have included the transfer of Member and staff resources to the RRT caseload as well as the introduction of a new Principal Member Direction (3/2005 – Efficient Conduct of RRT reviews) which provides for a framework for processing cases within 90 days by promoting greater use of electronic communication, early lodgement of submissions setting out applicants' claims together with any available evidence, early consideration of cases by Members, and by seeking collaboration from migration agents. DIMIA, Answer to Question on Notice, 25 October 2005, p. 44.

59 Refugee Review Tribunal, *Annual Report 2004-2005*, pp 2, 15.

60 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 22.

61 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 22.

3.81 Table 3.7 provides a summary of the outcomes of applications for judicial review of RRT decisions in the last five years.

Table 3.7: Outcomes of applications for judicial review of RRT decisions

Judicial Review outcomes	2004-05	2003-04	2002-03	2001-02	2000-01
Applicant withdrawn	675	519	288	194	341
Dismissed by the court	1288	1539	444	365	342
Remitted by consent for reconsideration	165	80	34	76	105
Remitted by court for reconsideration	80	83	31	53	47
TOTAL	**2208**	**2221**	**797**	**686**	**835**

Source: Refugee Review Tribunal, *Annual Report 2004-2005*, p. 22, Table 3.10. Refugee Review Tribunal, *Annual Report 2003-2004*, p. 25, Table 3.10; Refugee Review Tribunal, *Annual Report 2002-2003*, p. 20, Table 3.4.

3.82 The judicial review process is discussed below.

The Administrative Appeals Tribunal

3.83 The Administrative Appeals Tribunal (AAT) is an independent statutory body established to undertake merits review of a broad range of administrative decisions made by Commonwealth Government Ministers and officials.

Jurisdiction

3.84 The Administrative Appeals Tribunal has jurisdiction to review the following departmental decisions on their merits:

- refusal to grant a protection visa or to cancel a protection visa relying on Articles 1F, 32 or 33 of the Refugee Convention; [62]
- cancellation of a business visa;
- an order for the deportation of a non-citizen convicted of certain crimes;
- registration, or refusal to register, a person as a migration agent;
- deregistration, or refusal to deregister, a person as a migration agent;

62 Article 1F of the Refugees Convention concerns the commission of international (crimes such as war crimes), serious non-political crimes and acts contrary to the purposes and principles of the United Nations. Article 32 concerns the expulsion of refugees on the ground of national security or public order. Article 33(2) concerns refugees considered to be a danger to security or the community. ANAO, *Report No. 56, 2003-2004, Management of the Processing of Asylum Seekers*, pp 25-26.

- cancellation or suspension of a person's registration as a migration agent;
- refusal to grant, or to cancel, a visa on the basis that the non-citizen does not satisfy the delegate of the Minister that the person passes the character test;
- access to information (that is, decisions made under the *Freedom of Information Act 1982* (Cth)); and
- review of certain decisions made under the *Australian Citizenship Act 1948* (Cth).[63]

The Migration Act also provides for the referral of certain RRT and MRT decisions to the AAT for review. In each case, the decision may be referred by the Principal Member of the Tribunal, and must involve an important principle or an issue of general application.

Caseload

3.85 Applications to the AAT have generally increased over the past 10 years. There were 72 matters resolved in the AAT in 1993-94. There were 399 in 2004-05.[64]

3.86 Immigration related applications for review lodged with the AAT during 2004-05 included:

- Business Visa cancellations – 123 applications lodged;
- expedited review of section 501 visa cancellations / refusals – 98 applications lodged;
- protection visa cancellations / refusals – 5 applications lodged; and
- section 501 visa cancellations / refusals – 70 applications lodged.[65]

Outcomes

3.87 The following table summarises the outcomes of migration related applications in recent years.

63 DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005.

64 DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005.

65 Administrative Appeals Tribunal, *Annual Report 2004-2005*, p.128.

Table 3.8: Outcomes of migration-related applications

Year	Applicant Withdrawal	Minister Withdrawal	Decision under Review Set Aside	Decision under Review Affirmed	Total
2000-01	77	31	66	146	320
2001-02	98	80	78	95	351
2002-03	97	46	86	170	399
2003-04	164	89	124	197	574
2004-05	118	97	71	175	461

Source: The table is drawn from DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005.

Criticism of secondary assessment procedures

3.88 The Committee received evidence critical of the review process following DIMIA's rejection of visa applications, particularly in respect of protection visa applications. Much of this criticism mirrored the criticism levelled at the primary assessment stage of visa applications (which is described in Chapter 2). Concerns raised in submissions included:

- the need to comply with strict time limits when seeking a review;
- the time taken to process applications;
- the imposition of application and transcript fees;
- restriction on legal representation at hearings;
- the quality of interpreters used;
- the attitude of tribunal members towards applicants;
- the quality of decision making; and
- scepticism about the impartiality and independence of tribunal members.

Concerns raised in earlier inquiries

3.89 Similar concerns were raised with this committee in its 2000 inquiry into Australia's Refugee and Humanitarian Program.[66] That report summarised the concerns raised about the RRT at that time as including:

66 See, generally, Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, June 2000, Chapter 5.

> …the structure and operation of the Refugee Review Tribunal including the adequacy of the inquisitorial approach of the RRT; the training and qualifications of Members; the manner in which interviews are conducted, including the use of credibility issues by the RRT members to challenge applications; the manner in which country information is used by Members; the alleged bias of some RRT Members; and the use of single-member panels.[67]

3.90 The committee at that time considered that these concerns could best be addressed by improving decision-making at the primary stage, providing better advice, assistance and information to protective visa applicants as well as clarity about the RRT's methodology, and enabling the RRT to hear some cases with a larger panel of members.[68] The committee's response to concerns or perceptions about the independence of the RRT and the qualifications and training of its Members was to recommend that:

- the Principal Member of the RRT be a person with judicial experience;
- officers from DFAT, DIMIA and the Attorney-Generals Department not be appointed as RRT members;
- members of the RRT be drawn from a broad cross-section of the Australian community, including the legal profession, with experience in refugee and humanitarian issues;
- further training be provided for RRT members in the use of inquistitorial methods; and
- the RRT be able to sit as a multimember panel in appropriate cases.[69]

3.91 In response to concerns that the measures used to assess the RRT's performance were inadequate, the committee recommended that DIMIA and DOFA acknowledge the RRT's changing caseload and the differing complexity of its cases and use this information 'to assess appropriate funding levels and/or systems'.[70]

3.92 The Government responded to these recommendations in 2001 by either dismissing them or stating that they were already reflected in current practice. The Government also advised that multimember panels were not permitted under the Migration Act at that time.[71]

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67 Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, June 2000, Chapter 5, p. 146.

68 Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, June 2000, pp 168-9.

69 Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, June 2000, pp 151, 172-3, 174.

70 Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, June 2000, p. 174.

71 See Appendix 6.

Concerns raised in this inquiry

Arbitrary and inflexible time limits

3.93 There are strict time limits for lodging applications for review to both the MRT and the RRT. Neither tribunal has the power to extend the time limits. In relation to the MRT the time limits vary from two working days for some immigration detention cases, through to seven working days for cancellation decisions and other immigration detention cases, 21 calendar days for other cases where the visa applicant is in Australia, and 70 calendar days for cases where the visa applicant is outside Australia.[72]

3.94 As mentioned above, the time limits for the RRT are 7 working days for persons in immigration detention, and 28 calendar days for all other cases.[73]

3.95 Submitters criticised the inflexibility of these time limits for preventing access to merits review regardless of the reasons for failing to lodge within time or the consequences for the applicant.[74] The Law Society of South Australia (LSSA), for example, pointed to the consequences of such a failure for applicants. It argued that a failure to lodge within the prescribed time:

> …flows on to affect applications made directly to the Minister. Under the *Migration Act*, the Minister only has the power to exercise her discretion to substitute a more favourable decision after the RRT or MRT has made a decision. If applicants fail to lodge an application for merits review within time, they also lose the right to appeal to the Minister. … there are many reasons an applicant may not receive notice and/or lodge an appeal within time. These include lack of access to legal advice, failure to understand the requirement to provide a current address (particularly for applicants with limited English language skills, education and/or understanding of the Australian legal system), or error on the part of the appointed agent. If DIMIA is in error, the onus is on the applicant to prove the error in order for the notification to be re-issued, which can be very difficult.
>
> Precluding such applicants from applying for an extension of time for appeal is unreasonably harsh. The MRT, RRT and federal courts should be granted the discretion to allow extensions of time in appropriate circumstances.[75]

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72 *Migration Regulations 1994*, reg. 4.10.

73 *Migration Regulations 1994*, reg. 4.31.

74 See, for example, Law Society of South Australia*, Submission 110*, p. 5, and South Brisbane Immigration & Community Legal Service, *Submission 200*, p. 9.

75 *Submission 110*, pp 5-6. Commentators have noted that, if notification was not received due to an error by DIMIA, then an applicant may be able to argue that it was not a valid notification and the time limit has not commenced. Burns and Sudritshti, *The Immigration Kit* pp 764-765.

3.96 It was argued that tribunals should have a discretion to grant an extension of time to lodge an application for review in appropriate circumstances similar to that provided to the courts via the *Migration Litigation Reform Act 2005 (Cth)*. The latter provides a discretion to grant a possible extension of a further 56 days after the 28 day period from actual notification.[76]

DIMIA's delays in processing FOI applications

3.97 It was put to the committee that the impact of inflexible Tribunal time limits was compounded by the time taken by DIMIA to process related Freedom of Information (FOI) applications.

3.98 The Law Institute of Victoria (LIV) suggested that extensive delays are not uncommon in FOI applications for DIMIA files:

> Such delays in processing and reviewing FOI requests is unworkable when migration law and visa applications require responses within prescribed periods (ie usually within 28 days) without access to extensions of time. Obtaining access to a client's DIMIA file is imperative for a migration agent to provide correct immigration assistance to their client. This is particularly relevant in matters involving an applicant who does not speak English and does not understand what has occurred in their case.[77]

3.99 The LSSA also raised this issue with the committee:

> The *Freedom of Information Act 1982 (Cth)* requires that DIMIA or the Minister must take all reasonable steps to enable the applicant to be notified of a decision on a request within 30 days. However, applications for access to documents held by DIMIA typically take many months to process. Current applications commonly take from 6 months to a year before a decision is made. This in turn impedes the application for and processing of visa applications. It prevents lawyers and migration agents from giving speedy advice, and in some cases, from assisting with an application at all, until the documents are made available. DIMIA should direct appropriate resources to ensuring that such unreasonable delays do not occur.[78]

3.100 A related concern was DIMIA's claimed reliance on exceptions under FOI legislation to deny access to information. As the LIV explained:

> The release of documents under FOI is usually made with exceptions, for example, on public interest grounds. For example, an offshore application such as a spouse visa may be refused due to local community information, an anonymous allegation received or negative information provided by an

76 SBICLS, *Submission 200*, p. 9. See footnote 135 below.

77 LIV, *Submission 206*, p. 24. See also Mrs Le, *Committee Hansard*, 7 October 2005, p. 22; Mr Harbord, RASSA, *Committee Hansard*, 26 September 2005, p. 19 and Ms Birss, RASSA, *Committee Hansard*, 26 September 2005, p. 19.

78 Law Society of South Australia, *Submission 110*, p. 5.

> unknown source or obtained independently by DIMIA. Similarly in visa cancellation cases, an FOI request will not always reveal all information on a DIMIA file and why a visa has been refused. Such information, unless disclosed to the applicant, can make it difficult, if not impossible, for the applicant to respond to and or correct. The principles of natural justice mean that a person who is the subject of an allegation and whose interests are affected by a decision must be accorded procedural fairness in the investigation of public interest disclosures and given the opportunity to be heard.[79]

3.101 The LIV claimed that, in cases where DIMIA invoked exceptions under the FOI legislation, the matter is practically closed as the means of challenging such decisions generally involves further lengthy delays.[80]

3.102 The committee notes that a key finding of the Palmer Inquiry into the Cornelia Rau matter was the unduly restrictive interpretation of privacy laws by DIMIA.[81]

3.103 DIMIA explained to the Committee that the number and complexity of FOI requests had increased significantly in recent years, with DIMIA now receiving more FOI requests than any other agency. It stressed that, notwithstanding the latter, it endeavours to process and finalise each FOI request within the statutory timeframes and that is implementing a range of strategies to address delays in FOI processing including structural changes, recruitment of additional staff and investigating alternative ways to meet the increasing demands.[82]

Time taken by trubunals to process review applications

3.104 Concerns were raised over delays being experienced at the review stage. The LIV, for example, suggested that:

> [while] resources, caseload and the individual circumstances of some cases may cause delay in a visa application decision, … DIMIA, MRT and RRT should be required to comply with strict visa decision making time periods unless certain exceptions apply.[83]

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

80 If DIMIA refuses to release a file or part of a file, there is a right of internal review through the Department. If the information is not released on internal review, there is the possibility of further review by applying to the Administrative Appeals Tribunal.

81 The Inquiry found that 'DIMIA's attitude to the Commonwealth Privacy Act 1988 is unduly cautious and has operated to limit the range and effectiveness of inquiries …'. M. Palmer, *Inquiry into the Cornelia Rau Matter*, Main Finding 34, p. xiv.

82 DIMIA, Answer to Question on Notice, 5 December 2005, pp 24-25. From 2002 to 2004, the number of FOI requests increased by 46% to 15,446. DIMIA received over 11,600 requests in 2004-05. DIMIA, Answer to Question on Notice, 11 October 2005, p. 4

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

Tribunal application and transcript fees

3.105 As noted above, a person whose protection visa application has been refused is advised that they can seek a review of the decision by the RRT. At the same time they are advised that an application fee of $1400 is payable if their application is unsuccessful.

3.106 It was put to the committee that:

> …'the use of application fees and charges is used by DIMIA and other related agencies to deter asylum seekers making a review application. Such fees limit an asylum seeker's access to justice and right to seek review of a decision by DIMIA to refuse their Protection visa application.[84]

3.107 The LIV considered payment of these fees, or the prospect of having to pay these fees if unsuccessful, placed an unnecessary burden upon asylum seekers and their supporters. It referred the Committee to the failure by DIMIA and the RRT to make clear to recent East Timorese asylum seekers, who had filed RRT applications and who were later granted humanitarian visas by the Minister exercising her discretion, that they were entitled to seek a refund of the review application fee. The payment of the fee, it was claimed, had not only caused many families financial hardship but also forced a number to borrow money to pay the fee.[85] The LIV recommended that the review application fee should be either reduced or abolished.

3.108 Similar concerns were raised in respect of transcription fees. For example, the Refugee Advocacy Service of South Australia noted that, when advising asylum seekers on potential appeals of RRT decisions, the fees charged for Tribunal transcripts forced the Service to rely on tapes of the Tribunal hearings and the services of volunteers to transcribe those tapes. However, it noted that, in non-immigration matters, transcript fees are usually waived in relation to legal aid matters. They submitted that 'transcript fees should be waived and copies of transcripts of RRT hearings provided free of charge to those making applications or lodging appeals.'[86]

Restrictions on legal representation

3.109 As with the primary assessment of protection visa applications, criticism was levelled at the restrictions on legal representation at hearings, particularly RRT hearings.

3.110 As explained above, there is no automatic right to representation and no right to call witnesses or to cross-examine witnesses at tribunal hearings. Effective legal representation at a hearing depends on the discretion of the tribunal. A migration agent or lawyer can only speak or make submissions on an applicant's behalf if and when

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

85 LIV, *Submission 206*, pp 18-19.

86 RASSA, *Submission 51*, p. 5.

the tribunal member considers it appropriate to do so. It was put to the committee that such a lack of legal support increases the vulnerability of persons who often speak little English, may have mental problems as a result of being held in detention and have no understanding of the legal system in Australia.[87]

3.111 As the International Commission of Jurists (ICJ) noted

> Refugee law in Australia has become an extraordinarily complicated area of specialised legal skill, as the Courts have construed the migration legislation and international law through many appeals of tribunal and departmental decisions. The complexity of refugee law, which many lawyers find difficult to grasp, let alone asylum seekers, renders even more unsatisfactory the provisions of the Migration Act that prohibit legal representation in the review tribunals.[88]

3.112 The difficulties faced by unrepresented applicants were a particular concern. As noted above, approximately 30 per cent of RRT and MRT cases involve an unrepresented applicant. The LSSA advised the committee that it has:

> … concerns about evidence that is put before the RRT as well in that often the applicant is not represented and they will be presented with certain evidence by the tribunal member which, it is put to them, is contrary to their claim, and asked to respond to it pretty much on the spot. Often you have a scenario where it is one piece of evidence versus another. We say that it is actually quite unfair for that unrepresented applicant to have to try to deal with information when they may be completely unaware of where it has come from. How is an unrepresented, untrained applicant who probably does not even speak English very well supposed to put their case forward in a way that they are actually able to test the information that is being put against them? That is probably one of the really serious problems that comes with having people unrepresented before the RRT.[89]

3.113 As noted above, this committee in its June 2004 Report on *Legal aid and access to justice,* recommended the Commonwealth legal aid guidelines be amended to provide for assistance in migration matters, both at the preliminary and review stages, subject to applicants satisfying means and merit tests, and that necessary funding be provided to meet the need for such services.[90] It is apparent that neither recommendation has been implemented.

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87 RASSA, *Submission 51*, p. 4.

88 ICJ, *Submission 115*, pp 4-5.

89 *Committee Hansard*, 26 September 2005, p. 12.

90 *Legal aid and access to justice* Senate Legal and Constitutional References Committee Report, June 2004, p. xxix

Quality and appropriateness of interpreters

3.114 Both the MRT and the RRT will arrange for an interpreter to assist an applicant at a hearing, if required. However, as previously noted, criticism has been levelled at the quality of interpreters used as well as the appropriateness of certain interpreters, because of their cultural and ethnic background. Similar claims and concerns to those were raised in respect of the use of interpreters during the primary assessment of applications were levelled at the use of interpreters by the Tribunals. The RASSA, for example, referred to the following in relation to the RRT:

> … [p]roblems with interpreters which are often apparent once tapes of the hearing are listened to and the transcript reviewed. These occur where interpreters do not have adequate fluency in the English language or in pronunciation. At times there may be ethnic conflicts between the interpreter and the applicant.[91]

Conduct and attitudes of Tribunal Members

3.115 It was claimed that a lack of procedural protections for applicants coupled with a confrontational attitude by some members, particularly on issues of credibility, had undermined tribunal decision-making.

3.116 The discretionary nature of RRT hearings was highlighted by submitters such as A Just Australia:

> Evidentiary practices and procedures at the RRT have been observed to be 'operating at such a routinely low standard that they contribute to decisions that are manifestly unfair and potentially wrong in law.' The conduct of hearings is entirely discretionary, meaning:
>
> - there *may* be pre-hearing contact between the Member and the applicant, but there usually is not;
> - the applicant *may* be able to bring a friend along for emotional support (an issue that is particularly relevant for traumatised people with a negative experience of the authorities in their country of origin);
> - the Member *may* lead the applicant through their story chronologically or may instead focus only on one or two issues arising from their DIMIA file; and
> - the Member *may* (selectively) use whichever country information they believe is relevant in assessing whether or not an applicant's story is credible – information which the applicant does not have access to, and which is of varying quality.[92]

91 RASSA, *Submission 51*, p. 4.

92 AJA, *Submission 184*, pp 7-8.

3.117 As noted above, there is also no automatic right to representation before the Tribunals and no right to call witnesses or to cross-examine witnesses at hearings, with legal representation at a hearing depending on the discretion of the Tribunal.

3.118 The committee's attention was drawn to the following judicial summary of the nature of the review provided by the RRT.

> [H]earings before the Tribunal are virtually unique in Australian procedures and in the common law system generally. … The Tribunal is both judge and interrogator, is at liberty to conduct the interview in any way it wishes, without order, predictability, or consistency of subject matter, and may use any outside material it wishes without giving the person being interrogated the opportunity of reading and understanding the material before being questioning about it … These methods contravene every basic safeguard established by our inherited system of law for 400 years.[93]

3.119 It was argued that the lack of procedural safeguards was being compounded by the attitude and approach taken by some Tribunal Members. The RASSA, for example, cited the following conduct as evidence of poor decision making by the RRT:

- Very leading, directed or selective questioning by the RRT member which appears not designed to elicit the applicant's story but rather to find a reason for rejecting their claim.
- RRT members not addressing their mind to the key question as to whether this person is a refugee but spending an inordinate amount of time in trying 'to catch them out'.
- Applicants being placed under stressful questioning and required to respond on the spot without any opportunity to consider issues raised and provide further submissions.
- Applicants not being given a proper opportunity to simply tell their story.
- The RRT member often places great emphasis on so-called 'inconsistencies' in submissions. Sometimes assumptions as to credibility are made on the basis of inconsistencies without taking into account the fact that applicants may be under stress and may be being questioned about issues that took place several years ago where they may not have a good memory recall.
- RRT members often making assumptions or putting words in the mouth of an applicant, making erroneous conclusions and not necessarily asking for clarification of conclusions.
- RRT members 'brushing off' issues raised by the applicant, or saying they will come back to those issues and then not doing so.

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93 Justices Einfeld and North in *Sellian v MIMA*[1999] FCA 615, [3]-[4], cited in A Just Australia *Submission 184*, p. 8

- RRT members raising spurious reasons as to why an applicant should leave Australia and return to their former country. Examples include questions such as – if the applicant had bribed their way out of their home country, then why couldn't they bribe people to live there safely, or asking why they simply couldn't keep a low profile in their own country. Each of these questions of course implies that the RRT member accepts that the person cannot live freely and safely in their own country, and yet often the applicant is still rejected.
- Obvious failures of the RRT to acknowledge the genuine refugee claims of certain groups of people, eg. Sabain Mandaeans, Arab Iranians and Christian converts, who more recently have been recognised as persecuted groups.[94]

3.120 Similar comments were expressed by other submitters and witnesses.[95] The International Commission of Jurists (ICJ), for example, raised particular concerns in respect of the use of adverse information, including information from unidentified sources. It advised the Committee that:

> One gets a distinct sense, in the RRT in particular, that the entire proceeding really takes the form of cross-examination of the asylum seeker. … There are no real rules of admissibility of evidence. If the tribunal regards it as relevant to its inquiry, it is admissible. Certainly it is open to the tribunal to determine what weight to give to certain evidence, but often an applicant who has given their evidence under oath in person before the tribunal is confronted with information from unidentified sources which would seem to contradict an aspect of the person's evidence. Yet the witness who provides either information or an opinion is often not identified. Their expertise or their qualifications to express an opinion are not disclosed.[96]

3.121 ICJ representatives also argued that applicants may be unable to rebut or examine adverse information in any meaningful way:

> If there is information before the tribunal that the tribunal regards as a reason or part of a reason to affirm the department's refusal then they are required [by section 424A of the Migration Act] to issue a letter under that section to the applicant disclosing the information, explaining why it is relevant and inviting them to respond. But what happens … is that you are not given the actual documents. You are not given the exchange of correspondence that may have given rise to this information. You are not given full texts of documents. As a lawyer in a court, if someone seizes upon a paragraph of a document to defeat my case, I would ordinarily look at the document as a whole to ascertain the proper context and see if there

94 RASSA, *Submission 51*, pp 4-5.

95 See, for example, ASRC, *Submission 214*, pp 16-19, and Mr Guy Coffey, *Submission 81*, p. 4.

96 Mr McNally *Committee Hansard* , 28 September 2005, p. 40.

> was anything else in the remainder of the document which may rebut or perhaps qualify to some extent the interpretation that has been given to the extract. That in my view is proper natural justice – the proper right to reply to adverse information. But the tribunal is … not obliged to give you that document or that evidence. It can just paraphrase it in a letter or provide it to you under section 424A, saying, 'We have information that suggests X', where that conclusion may not even be what is in the piece of information. So you do not have an opportunity to examine the reasoning process that led to the statement that that information means that conclusion.[97]

3.122 The import of the above is that such information can be used to reject an applicant's claim on the basis of a lack of credibility:

> It is often used as a basis on which to conclude, as a finding of fact, that its weight outweighs the sworn testimony of the person and that their credibility is doubtful. Therefore their whole claims fails and that is it. Credibility is a finding of fact in relation to which there is no access to judicial review, so that is particularly problematic.[98]

Approach to assessment of credibility

3.123 The issue of the RRT's assessment of an applicant's credibility continued to be a vexed one for many submitters and witnesses. As explained in Chapter 2, assessment of credibility is intrinsic to the determination of refugee status.

3.124 The ICJ argued that the RRT and MRT have developed a fixation on the question of credibility of visa applicants, and many cases are now rejected on the basis of adverse findings of fact in this regard. It stressed that these findings are usually made after vigorous cross-examination of applicants:

> Standard cross-examination techniques are employed by Members at the hearings in relation to visa applicants, and much like in court proceedings, witnesses can become confused or upset when faced with co-ordinated, strategised and direct challenges to various aspects of their case, including their credibility. Usually, this all takes place in a language other than their own, and through the use of interpreters of mixed competence.[99]

3.125 The outcome – according to the ICJ – was that:

> In many cases, adverse credibility findings are made as a result of relatively minor inconsistencies in an applicant's evidence. It is hardly surprising that in many cases (if not most of them), there will be some inconsistencies or lack of precision in some of the evidence before the tribunals. This is particularly so in refugee matters where many applicants have limited

97 Mr McNally *Committee Hansard* , 28 September 2005, p. 44.

98 Mr McNally, *Committee Hansard* , 28 September 2005, p. 40.

99 ICJ, *Submission 115*, p. 3.

> education and for whom presenting a complicated refugee case would be a formidable task, even if it were in their own language.[100]

3.126 It was argued that the lack of an effective right to representation before the Tribunals only compounded the problem:

> Due to the very nature of the RRT and the MRT, and the lack of the right to representation, the hearings before the RRT and MRT often take the form of cross-examination by the Member of the witnesses (including the visa applicant), and very little more. There is no right for the visa applicant to have a lawyer or other representative undertake re-examination, and if the Tribunal identifies other witnesses and sources of information, there is no entitlement to test that adverse evidence through the applicant's cross-examination of those other witnesses. Their hearsay statements, often only in writing, are admitted without any real challenge or testing, and they are often preferred to the applicant's own evidence.[101]

3.127 The Asylum Seekers Resource Centre (ASRC) echoed the ICJ's concerns. It advised the Committee that:

> … it is our view that RRT members regularly question applicants in an inappropriate manner and often draw unfair and unjustified conclusions on matters of credibility.[102]

3.128 The ASRC pointed to the significant number of submissions to the 2000 inquiry and to the many suggestions made to the RRT over the years concerning the RRT's inappropriate approaches to credibility. It argued that, despite the latter, the RRT's approach to credibility remained just as problematic:

> With the exception of the mantra of 'ongoing training for RRT members' we are not aware of any substantive attempts to deal with the issue.[103]

3.129 A particular concern was the RRT's approach to and treatment of applicants who had suffered torture or trauma:

> Assessment of psychological reports from torture/trauma counselling services in relation to an applicant's history of past persecution presents apparent difficulties for the RRT. Little weight is generally given to such reports by RRT members. However members are often limited in their expertise and their ability to fairly and accurately make findings on the credibility of persons who are victims of torture/trauma.[104]

3.130 The ASRC made the following suggestions for change:

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100 ICJ, *Submission 115*, p. 3

101 ICJ, *Submission 115*, p. 3.

102 See ASRC, *Submission 214*, pp 16-18.

103 ASRC, *Submission 214*, pp 16-18.

104 ASRC, *Submission 214* , pp. 16-18

- The RRT incorporate into its Practice Direction Specific guidelines on its approach to credibility (as is the case in Canada).
- The use of use multi-member panels.
- Further training for RRT members on making decisions in a way which minimises the need to rely on credibility.
- The RRT give greater weight to expert medical reports such as those from doctors, psychologists, psychiatrists or specialist torture/trauma counsellors detailing a claimant's history of persecution with a clinical assessment of their current psychological condition.
- A summit be held specifically on the issue of credibility in the refugee determination process, with the aim of identifying recommendations for change.[105]

Performance management

3.131 Concerns were raised that the measures used to assess the performance of the Tribunals compromised their independence and decision-making.

3.132 It was put to the Committee, for example, that a government focus on the cost of the determination system rather than its effectiveness had fostered poor decision-making by the RRT. A Just Australia argued that:

> … the focus on performance indicators, a set number of cases members are expected to finalise per year, as a away of measuring the performance of Tribunal members also contributes to this [poor decision-making]. 'Efficiency' becomes an end in itself rather than an aid to effective and fair decision-making. The RRT's credibility would be greatly enhanced, and its decisions greatly improved, if it had … a greater focus on the quality, rather than the quantity, of decisions made by members.[106]

3.133 Performance measurement was also an issue that arose in this committee's inquiry in 2000, with witnesses in that inquiry also arguing that the RRT Members' decision quotas affected the quality of decision-making. Such concerns prompted the committee to recommend that the workload of RRT Members be re-assessed.[107]

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105 Recommended summit participants include DIMIA case officers, Tribunal members, practitioners in the area, Federal Court judges, academics, medical experts, psychologists, counsellors from torture/trauma counselling services, asylum seekers and refugees, and international experts in refugee law. ASRC, *Submission 214*, pp 16-18.

106 A Just Australia*, Submission 184*, p. 9.

107 Senate Legal and Constitutional References Committee*, Sanctuary under Review*, p. 174.

3.134 The Committee understands that annual case targets in 2004-05 for full time RRT Members were 115 or 120 cases or at least 2.2 cases per week. Members averaged 94 per cent of their case targets in that year.[108]

3.135 Commentators have suggested that the Tribunal Member's task is a challenging one and can result in pressure to cut corners:

> Review of protection visa applications involves reading the DIMIA file and documents provided by the applicant for the review as well as research into the applicant's home country and particular issues raised by their claims, The Member will have to decide whether they need to obtain further information or extend an invitation to comment on adverse information, Once that process is complete, the Member must decide whether a favourable decision can be made 'on the papers'. In most cases, it cannot and a hearing invitation must be extended. The Member must prepare questions for the hearing, conduct the hearing – almost invariably through an interpreter – and then write up their decision. The Tribunal is assisted by country and legal research sections, both of which have a considerable database of information at their disposal. Tribunal Members are required to type up their own decisions and the ability to use a word processor is one of the selection criteria for appointment. The Member's task is a formidable one and it is not surprising that the SLCLC [the Senate Legal and Constitutional Legislation Committee] recommended that the workload of RRT Members be reassessed. It is also not surprising that the pressure of this workload may cause Members to cut corners or fail to cover all the issues in the reasons for their decisions.[109]

3.136 As noted above, both the MRT and RRT also rely on the level and outcomes of appeals against their decisions as measure of their performance. A Just Australia pointed to an 'exponential' increase in the number of court appeals lodged against RRT decisions in recent years as evidence of poor Tribunal decision making:

> Despite repeated attempts by the Federal Government to prevent appeals to the courts from the RRT, the number of applications for judicial review of RRT decisions has risen consistently since the Tribunal commenced operations, climbing from 52 in the 1993-1994 financial year to 914 in 2000-2001, and 2824 in 2003-2004. This climb does not simply reflect an increase in asylum seekers. Rather applications for judicial review as a *percentage* of Tribunal decisions have risen. Applications were lodged for judicial review of 3% of RRT decisions in 1993-1994 … [whereas] in 2003-2004, applications for judicial review were made in respect of 35% of all RRT decisions.[110]

3.137 A Just Australia maintained that this increase:

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108 Refugee Review Tribunal, *Annual Report 2004-2005*, p. 22.

109 Germov & Motta, *Refugee Law in Australia*, p. 812.

110 A Just Australia, *Submission 184*, p. 7. Applications for judicial review were lodged in respect of 39.9% of RRT cases finalised in 2004-2005 (see table 3.5 above).

> … cannot simply be explained away by asserting that those appealing decisions are acting in bad faith. The increase in appeals has corresponded with multiple attempts by the government to prevent any such appeals by progressively tightening the provisions of the *Migration Act*. Repeated amendment of the Act, combined with intense government pressure on Tribunal members to privilege efficiency over fairness has created a situation where the legislation is so complex, and the Tribunal system under so much strain, that users of the system widely believe it to be incapable of making consistent decisions.[111]

Independence

3.1 Several submissions expressed doubts about the independence of the Tribunals, with some calling for their abolition.[112]

3.138 The joint submission from the Human Rights Council of Australia and A Just Australia, suggested that the Minister:

> ….exerts an unhealthy influence over what was meant to be an independent review mechanism. This influence rests partly in the combination of her powers of appointment to the RRT, the short tenure of these appointments, and the fact that single-member panels mean it is possible for the Minister to more easily identify or pressure individuals whose decisions go consistently against the department. … In addition, the failure of key selection criteria for members to include legal or human rights expertise raises doubts about the emphasis these issues are given in the making of life and death decisions for asylum seekers.[113]

3.139 These concerns were shared by the ICJ:

> A number of tribunal Members are employed on maximum term contracts, but are eligible for re-appointment at the Minister's discretion. It is not satisfactory in terms of the independence of the review tribunals that the Minister who determines appointment and re-appointment of tribunal Members, is also the Minister responsible for administering DIMIA, whose decisions are under review by the tribunal. It is a classic example of a structure whereby the purportedly independent tribunals could be subjected to powerful political pressure from the Minister whose departmental delegates are being called into question in the review cases. It is reasonable to fear that review tribunal Members may feel indirect, if not direct, pressure to provide decisions that please the Minister, and which could not be seen to be contrary to government policy. … Further, concerns about the

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111 AJA, *Submission 184*, pp 7-8.

112 Refugee Advocacy Service of South Australia Inc., *Submission 51*, p. 4; Ms M E Flenley, *Submission 91*, p. 2; Human Rights Council of Australia and Australians for Just Refugee Programs Inc., *Submission 185*, p. 5. See also comments of Mr McNally of the ICJ at *Committee Hansard* , 28 September 2005, p. 40.

113 Joint submission by the Human Rights Council of Australia and A Just Australia, *Submission 185*, p. 5.

> independence of the review tribunals are reinforced when one notes that many tribunal Members are ex-DIMIA officers, promoted by the Minister through the ranks of the public service. Further, if a visa applicant takes the tribunal and the Minster to court over a tribunal decision, the tribunals engage the same lawyer as the Minister to represent both parties in the proceedings.[114]

3.140 This concern was echoed by A Just Australia, which argued:

> …as the RRT has the same Minister as DIMIA (whose decisions it reviews), it is extraordinarily vulnerable to political pressures in decision-making. This is particularly so given the political prominence of asylum issues, and the extremely vocal championing of the Department's decisions by both Philip Ruddock and Amanda Vanstone.[115]

3.141 Mr Julian Burnside QC was also critical of the RRT. He advised the committee that:

> …there is a real problem with the nature, structure and operation of the RRT,…They are not independent of government – although notionally they are, in reality they are not because they are on short-term contracts and they are given a very clear message about what outcomes the government wants. … A more workable system might be one where, first of all, the members of the RRT are given some sort of independence. They should not be on short-term contracts; they should be given the sort of independence that is commensurate with the importance of the decisions they are making.[116]

3.142 RASSA noted that there have been reports suggesting that 'Tribunal members those members whose decisions please the Government have a greater chance of being reappointed'.[117]

An over reliance on ministerial discretion

3.143 It was put to the Committee that the lack of confidence in decision making at the primary and secondary assessment stage had led to an over reliance on the use ministerial discretions. A Just Australia noted that:

> … the frequency with which the Minister is required to intervene to overturn decisions of the RRT is also of concern. The Department's figures reveal that of the 2049 visas granted as part of the onshore humanitarian program, 1259 (over 60%) were the result of decisions by the Minister (DIMIA 2005). … Obviously, 60% of total onshore humanitarian program

114 ICJ, Submission 115, p. 2.

115 AJA, *Submission 184*, p. 8.

116 *Committee Hansard* , 27 September 2005, pp 47 and 52.

117 RASSA, *Submission 51*, p. 4.

> extends well beyond anomalous cases and might suggest that at the stage of the RRT, … genuine asylum claims are not being recognised.[118]

3.144 The UJA and ASPHM also suggested that a lack of confidence in decision-making by DIMIA and the RRT:

> … has resulted in ministerial discretion being over-emphasised by asylum seekers and their supporters in the determination process. Though substitution of a more favourable decision by the Minister does not imply a wrong decision by the RRT, nor that the person granted a visa is considered to be a Convention refugee, many protection claimants and their supporters equate ministerial intervention under section 417 with a grant of refugee status to the person, and with an implied failing of the RRT to make the right decision. Increasingly, public perception is that the power is used to grant visas to refugees where Australia's onshore protection program has failed them.[119]

3.145 As Chapter 4 explains, the current system of ministerial discretions is not without criticism.

Alternative approaches

3.146 Witnesses and submitters offered a range of alternatives which, in their view, would improve the independence and integrity of Tribunal decision making processes.

3.147 RASSA, for example, argued that the RRT Members:

> … should be lawyers. They should have tenure or in the alternative be restricted to one fixed term of appointment with no right of renewal. In other words, there should be no perception that Tribunal members are relying on the Government's favour for continuing employment.[120]

3.148 Some have argued for longer terms of appointment, transparent selection processes and the imposition of a presumption of reappointment unless the relevant selection panel can provide cogent reasons for non-appointment.[121]

3.149 Others, such as the ICJ, called for the abolition or substantial modification of the Tribunals. The ICJ advised the Committee that its position was:

> … that the MRT and the RRT should either be abolished (with the case load and jurisdiction being transferred to the AAT) or they should be modified such that their structure and procedures, and access to judicial review, are the same as is presently applicable to cases in the AAT. Members of the

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118 AJA, *Submission 184*, p. 9.

119 UJA and Hotham Mission, *Submission 190*, p. 9. See also the Law Society of South Australia, *Submission 110*, p 112.

120 RASSA, *Submission 51*, p. 5.

121 Germov, *Refugee Law in Australia*, p. 810.

> tribunals should only be appointed by the Attorney-General, and there should be no temporary appointments following which there is any eligibility for re-appointment as a Member.[122]

3.150 The ICJ maintained that the tribunals' current structure and procedures meant that one cannot have confidence in their ability to impartially, independently and effectively determine the facts of a case:

> Only through a right to representation, the right to question witnesses against them, and through judicial officers who are not potentially subjected to Ministerial political pressure, can any confidence in the outcome of these tribunals be had. Given the gravity of the decisions being made by these tribunals, which very often have life-changing implications for the applicant (and in refugee cases, potentially life-threatening implication) the present structure and procedures are inadequate and inappropriate.[123]

3.151 Others recommended the use of multi-member RRT panels as a way of improving the decision making of the RRT and reducing the perception of government influence.[124] According to the NSW Legal Aid Commission, reasons for considering use of multi-member tribunals included:

> … the sheer complexity of refugee law, the difficult experiences that applicants invariably bring before the tribunal and the inevitable sense of pressure that the members feel in terms of deciding, in many cases, somebody's future – their life. We feel that multimember tribunals, two-member or three-member tribunals, sometimes may spread that pressure around and allow for a fairer and more comprehensive assessment of a person's claim.[125]

3.152 The Committee notes that the earlier finding that a panel approach to RRT hearings 'would … help ensure the continual dissemination of information and reasons behind decisions within the RRT itself' and that it 'would expect the panel structure to contribute to a continuous improvement in the quality of decision-making by the RRT.'[126] As mentioned above, the latter prompted the Committee's recommendation in 2000 that 'the RRT be able to sit as a single member body and as a panel of two and up to three members as appropriately determined by a Senior, or the Principal Member.'[127]

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122 Mr McNally, *Committee Hansard*, 28 September 2005, p. 40.

123 ICJ, *Submission 115*, p. 4.

124 Human Rights Council of Australia and Australians for Just Refugee Programs Inc., *Submission 185*, p. 5; Asylum Seekers Resource Centre, *Submission 214*, pp 16-19. See also comments of Mr Burnside QC in *Committee Hansard* , 27 September 2005, p. 53.

125 Mr Gerogiannis, *Committee Hansard* , 28 September 2005, p. 69.

126 Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, June 2000, p. 169.

127 Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, June 2000, Recommendation 5.4, pp 139-141.

The RRT's response

3.153 The Committee put the above concerns to the RRT and DIMIA.

3.154 Their advice was that a broad range of quality control mechanisms exists to ensure that merits review decision making quality in the portfolio remains at a high level. These include:

- Tribunal Members being recruited for high level of skills and experience through a competitive and extensive nation-wide recruitment process;[128]
- Priority being given to the training and professional development of Tribunal Members, with a formal training program involving induction and follow up training of Members as well as leadership, guidance and advice by mentors, legal advisers and Senior Members.
- Reliance on specialist legal and country research staff and ready access to a very wide range of legal and relevant country information.
- Procedural requirements to ensure fairness and justice.
- The existence of a Member Code of Conduct and a requirement to act according to the Australian Public Service (APS) Values and APS Code of Conduct.
- Active performance management of Members.
- The availability of a formal complaints mechanism (although only a small number of complaints are received).
- Appropriate professional development and training are also conducted at the National Members Conference.[129]

3.155 In response to concerns over consistency in decision making, the RRT stressed that each cases before the Tribunal is decided on its merits and involves consideration of the individual circumstances presented by each applicant. It was argued that the variation in individuals' circumstances mean that it is seldom possible to compare individual cases.[130]

3.156 In response to concerns over a lack of legal representation at hearings, the RRT noted that, while the conduct of the hearing is at the discretion of the Tribunal Member, the hearing must be a genuine opportunity to present evidence and arguments. In practice, representatives are invited to provide submissions and comments after the applicant has given their evidence, but when and how they do so

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128 In response to concerns over Member's lack of legal qualifications, the RRT noted that analysis of Court remittals to the RRT did not suggest that legal error occur noticeably more or less on the part of Members with legal qualifications than those without such qualifications.

129 See generally DIMIA, Answer to Question on Notice, 25 October 2005, pp 36-50.

130 DIMIA, Answer to Question on Notice, 25 October 2005, p. 41.

remains at the discretion of the Member. The RRT also noted that procedural fairness may require that an applicant before the tribunal be represented in hearings.[131]

3.157 The RRT also advised it's contract for the provision of interpretative services stipulates that the interpreters provided by the Contractor must be generally accredited to NAATI Interpreter Level or above, where such accreditation is provided in the language. Where accreditation is not available, or where the Contractor is unable to provide an interpreter at the NAATI level or above, the Contractor must seek approval from the Tribunals. Interpreters are also required to comply with the standards and requirements set out in the RRT's Interpreter Handbook and the code of ethics devised by the Australian Institute for Interpreters and Translators. They are also generally required to advise the Tribunal of any possible conflicts of interest.[132]

3.158 The RRT did advise that on occasion difficulties were experienced in obtaining appropriately qualified interpreters in high demand language (such as Vietnamese) and also obtaining accredited interpreters in emerging languages (such as African languages).[133]

3.159 In response to concerns over the time being taken to decide cases, the RRT noted that the Tribunal now had the lowest average processing times since the RRT was established in 1993.[134]

3.160 The Committee also observes that recent amendments to the Migration Act noted above will require the RRT to finalise reviews within 90 days. However, as explained, failure to comply with this deadline will not render an RRT decision invalid. As also explained above, a range of measures have been or are being developed to achieve this deadline, including transfer of MRT members to the RRT to assist with the RRT caseload.

Further avenues for review

3.161 There are two potential further avenues for review following a decision of a review tribunal.

- A written request to the Minister to exercise his or her personal discretion to grant a visa
- An appeal to the courts for a review of the Tribunal decision.

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131 See *Appellant WABZ* v *MIMA* (2004) 204 ALR 687

132 DIMIA, Answer to Question on Notice, 25 October 2005, p 43.

133 DIMIA, Answer to Question on Notice, 25 October 2005, p 44.

134 The percentage of cases over 9 months old since lodgement has been dramatically reduced from 35% of cases at the end of 2002-03 to 1% of cases at the end of 2004-05. The percentage of cases over 12 months old has been reduced from 16% in 2002-03 to less than 1% in 2004-05 DIMIA, Answer to Question on Notice, 25 October 2005, p 44.

Ministerial discretionary power to substitute a more favourable decision

3.162 An applicant may apply to the Minister to exercise his or her discretionary powers under sections 351 and 417 of the Migration Act to substitute a more favourable decision. These powers are discussed in Chapter 4.

Judicial review of visa related decisions

3.163 As mentioned above, a person who wishes to challenge a decision of the MRT, the RRT or the AAT can seek to have that decision reviewed by the Federal Magistrates Court, the Federal Court or the High Court.

Jurisdiction

3.164 The jurisdiction of the Federal Magistrates Court and the Federal Court to review decisions is largely conferred by, and subject to the Migration Act.[135] If a person is unsuccessful in the Federal Court, they may appeal in the first instance to the full bench of the Federal Court, and then to the High Court under section 73 of the Constitution. Primary decisions (ie, decisions by DIMIA officials) for which there is a right to merits review by the MRT, the RRT, or the AAT, are not reviewable. Only decisions of the MRT, the RRT and the AAT are reviewable by the Federal Court or the Federal Magistrates Court.[136]

3.165 An applicant may also appeal *directly* to the High Court (ie, without going through the Federal Court or Federal Magistrates Court) for interlocutory relief from a decision of a primary decision maker or a Tribunal under the original powers of the High Court, contained in section 75(v) of the Constitution.[137]

3.166 The courts cannot review the merits of the case. An appeal may on be lodged on the basis that *an error of law* has been committed in the making of the decision. Part 8 of the Migration Act applies a 'privative clause' that applies to most decisions made under the Migration Act, including decisions of the RRT, MRT and AAT, to narrow the scope for judicial review of those decisions. In February 2003, the High Court upheld the constitutional validity of the privative clause but found that it did not

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135 The Federal Magistrates Court has concurrent jurisdiction with the Federal Court. The choice of forum is left to the person making the application. The key difference between the two courts is that the Federal Magistrates Court is intended to be a relatively informal forum dealing with more routine migration matters more quickly. See DIMIA, *Judicial Review*, 11 March 2004, at http://www.immi.gov.au/legislation/judicial_review.htm.

136 *Sanctuary under Review*, pp 181-202; Germov, *Refugee Law in Australia*, p. 573; DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005; DIMIA , *Judicial Review*, 11 March 2004.

137 Migration Act, Parts 8, 8A and 8B. See also *Sanctuary under Review*, pp 181-202; Germov, *Refugee Law in Australia*, p. 573; DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005; DIMIA , *Judicial Review*, 11 March 2004.

apply to decisions tainted by 'jurisdictional error'. Jurisdictional error covers most legal errors.[138]

3.167 DIMIA has stated that, in practice, this means that the Federal Court, the Federal Magistrates Court or the High Court cannot overturn the visa-related decision unless:

- the decision-maker was not acting in good faith in making the decision; or
- the decision is not reasonably capable of reference to the decision-making power given to the decision-maker; or
- the decision does not relate to the subject matter of the legislation; or
- the decision exceeded the limits set out in the Constitution.[139]

3.168 The Migration Act also prevents class, representative or otherwise grouped court actions in migration proceedings.[140]

3.169 If a court finds a jurisdictional error in a decision under review, it cannot substitute its own decision. The courts must return the decision to the decision maker to be reconsidered, subject to any directions issued by the court. The High Court has the power to quash decisions under review and to issue a writ of *mandamus*, compelling the Minister to consider the decisions and remit the matter back to a differently constituted Tribunal.[141]

Time limits

3.170 Applications must be made to the Federal Court Registry within 28 days of the person concerned being deemed to have been notified of the decision. The same time limit applies to applications to the Federal Magistrates Court. Applications made directly to the High Court under section 75 of the Commonwealth Constitution must currently be made within 35 days of actual notification of the decision.[142]

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138 DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005.

139 DIMIA , *Judicial Review*, 11 March 2004.

140 There are some exceptions to this prohibition, including consolidation of proceedings by a court in certain circumstances. See DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005.

141 DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005.

142 Provisions of the *Migration Litigation Reform Act 2005* (Cth) will, on commencement, impose uniform time limits on applications for judicial review of migration decisions in the Federal Magistrates Court, the Federal Court and the High Court. These are found in the proposed new sections 477, 477A and 486A of the Act respectively. The time limits will be 28 days from actual (as opposed to deemed) notification of a decision. The courts will have a discretion to extend this time limit by 56 days to a maximum of 84 days provided the application is made within the 84 days and the court is satisfied that it is in the interests of the administration of justice to extend the 28 day period.

Caseload

3.171 2,714 applications for judicial review of migration decisions were filed in 2004-05. Of these 73 percent were reviewing RRT decisions, 17 percent challenged MRT decisions, with the remaining 10 per cent for review of other decisions.

3.172 Applications to the Federal Magistrates Court and the Federal Court at first instance for judicial review of portfolio decisions have increased over the past ten years. In 1993-94 there were 381 applications to the Federal Magistrates Court and the Federal Court, compared with 3,748 in 2003-04.[143]

Outcomes

3.173 As DIMIA explains, a case is resolved when: either the applicant or the Minister withdraws before hearing, or the court remits the decision to the decision-maker for reconsideration (that is, the applicant wins), or the court dismisses the application (that is, the Minister wins). In 2004-05, the Federal Magistrates Court and the Federal Court at first instance dismissed 2,099 applications after hearing and another 896 before hearing when applicants discontinued, and upheld 112 applications after hearing and remitted the decisions for reconsideration. The Minister also withdrew from 264 matters prior to hearing.

3.174 Table 3.9 below sets out the outcomes of matters before the Federal Court in the first instance.

143 DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005.

Table 3.9: Outcome of matters before the Federal Court.

Year	Applicant Withdrawal	Minister Withdrawal	Applicant Win	Minister Win	Total
2000-01	396	205	71	611	**1283**
2001-02	410	131	75	811	**1427**
2002-03	526	53	48	879	**1506**
2003-04	890	136	102	2451	**3579**
2004-05	896	264	112	2099	**3371**

Source: DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005

Concerns raised in previous inquiries

3.175 The significant growth in the number of applications for judicial review and the costs and the time taken to determine these appeals have been the concern of government over a number of years.[144] These concerns have prompted successive governments to seek to amend the Migration Act to restrict judicial review of visa related decision making.[145] These measures have in turned prompted a number of parliamentary inquiries which have canvassed the arguments for and against restricting access to judicial review.

3.176 In 1999-2000, this Committee inquired into whether, among other things, there was sufficient oversight by the judiciary of Australia's onshore refugee determination process to ensure that Australia's international obligations were met. That Committee concluded :

> The weight of evidence and submissions presented to the Inquiry argued in favour of the need to maintain a judicial review system for refugee determination that has the power to pass judgement on refugee matters under the rule of law, while respecting and maintaining the ideal of the separation of powers. Some submissions also argued that judicial oversight promotes the development of jurisprudence in the migration area and encourages consistency in decision-making. Australia's international legal obligations to provide access to courts and tribunals and judicial oversight of the refugee determination, must also be met. However, according to DIMA, judicial oversight involving litigation in the courts is a

144 For the year ending 30 June 1996, the litigation expenditure for DIMIA was less than $6.5 million. By 2004-2005, the cost had risen to in excess of $42 million. DIMIA Fact Sheet 9, *Litigation Involving Migration Decisions*, 25 October 2005.

145 See, for example, Bills Digest No. 118 2003-2004, Migration Amendment (Judicial Review) Bill 2004 (Cth), Parliamentary Library, 6 May 2004.

> resource-intensive review process. All parties in the review process of refugee determination are concerned about the costs of either operating or engaging in the system of review presently in place.[146]

3.177 The committee at that time refrained from recommending major reforms of the judicial review of refugee determination process. Instead the Committee recommended that a feasibility study be undertaken on the benefits of modifying the current on-shore refugee determination process. The study would assess, among other matters, the feasibility of moving to a wholly judicial determination process, including the costs of any such process. An objective would be to assess if such a process could be more open and transparent than the current multi-tiered system, which the majority of the committee considered had been highly criticised.[147]

3.178 The Government did not accept this recommendation. It argued that it had mechanisms in place to monitor the performance and effectiveness of the onshore refugee determination process and, moreover, efforts are continually made to maintain its integrity and improve its efficiency.[148]

Concerns raised during this inquiry

3.179 The issue of the Act's restrictions on judicial review of the refugee determination process arose during this inquiry principally in the context of perceived shortcomings and inadequacies of the MRT and RRT as review bodies.

3.180 In light of the concerns over the Tribunals' capacity to decide matters appropriately, much was made of the fact that the courts, in undertaking judicial review of Tribunal decisions were generally bound by the Tribunals' finding of fact in the case. The ICJ, for example, expressed alarm over the fact that:

> …[t]here is no right of appeal to a court if the review tribunal clearly makes errors of fact. The tribunals are the final arbiters of fact; there is no access to merits review of a decision of the MRT or RRT. … Except for the limited ground of 'jurisdictional error of law', decisions of the MRT and RRT are immune from judicial review or oversight under ordinary administrative law principles.[149]

3.181 Similar concerns was raised by Mr Julian Burnside QC:

> One of the problems is that there is some pretty bad decision making in the RRT. People then try to go to court, but the court's hands are tied largely because they cannot review the merits of the case; they can only look at

146 *Sanctuary under Review*, p. 200.

147 Other committee recommendations were for comparative databases and studies on how other countries had incorporated into their domestic law international legal obligations requiring access to courts and tribunals, and judicial oversight of the refugee determination process.

148 See Appendix 6.

149 ICJ, *Submission 115*, pp 3 - 4.

> whether there has been a jurisdictional error. That is a pretty difficult concept and there have been some quite horrifying decisions that have nevertheless survived judicial review.

3.182 Church organisations and representatives also expressed alarm over government moves to restrict judicial scrutiny. In a joint submission, for example, Uniting Justice Australia and Asylum Seekers Project Hotham Mission pointed to widespread community dissatisfaction with Australia's system for assessing refugee claims, with a widely held view that the system is unjust:

> The minimalist interpretation of the definition of a refugee under the Refugee Convention and Protocol combined with the failure of the RRT to act as an independent and reliable body that both does, and is perceived to, conduct fair and proper merits review of departmental decisions, has resulted in widespread community dissatisfaction with the system for assessing refugee claims. The system is not widely perceived to be just. This perceived lack of justice is exacerbated by the emphasis, in the broader program, on deterring people from accessing the onshore protection system. In this policy environment, reform of application processing and review rarely considers human rights and our obligations to asylum seekers, but rather focuses on the resources that asylum seekers use in having their protection claim assessed. These failings, combined with efforts to limit judicial scrutiny, have resulted in a widespread view that an appeal to the RRT does little to guarantee the applicant a fair, thorough, and independent examination of the claim.[150]

3.183 Witnesses and submitters called for reform. It was argued that widening the scope for judicial review and oversight would improve the quality of decision-making in the review tribunals:

> Only through full judicial oversight of review tribunal decisions can one have real confidence in the outcomes of the tribunals. … the only way to achieve this is to reinstate merits review in the federal courts. Otherwise, potential miscarriages of justice that flow from the structure and procedures in the tribunals will inevitably continue to occur.
>
> As a less satisfactory alternative to full merits review in the courts, policy makers should at least permits judicial review on the basis of ordinary error of law and in particular, under accepted principles of administrative law, and under the *Administrative Decisions (Judicial Review) Act 1977*. This is the situation in the AAT.[151]

3.184 Mr Burnside QC also recommended reform:

> I think also that a system would be workable if it allowed for an appeal to the courts—not a judicial review, but an appeal – so that you get a merits review in court, but subject to a filter at the front end. The last thing any of

150 UJA and ASPHM, *Submission 190*, p. 9.

151 ICJ, *Submission 115*, p. 4.

> us wants, especially those of us in the profession, is to see the courts flooded with merits reviews.
>
> If you had a front-end filter, something like the special leave requirements in the High Court, a judge would have a look at the application, see whether he or she thought that something had gone wrong in the tribunal and, if so, then you would have a merits appeal in court. If he or she did not think something had gone wrong, then all you would have would be the residual judicial review so that, if something had gone wrong in jurisdictional terms, that would still be open to correction. Having that sort of pressure release valve of merits review in the court would save some very serious problems. I think it would give refugee appellants a sense that they have had some sort of justice, because frankly a lot of them come away from the RRT thinking that they have not had justice, and you would have to agree with them in a lot of cases.[152]

Committee view

3.185 The committee notes and acknowledges the concern of many witnesses and submitters with respect to judicial review of tribunal decisions. It is frustrating that the substantive issues put to this committee's inquiry are little changed from those put to various other inquiries over a number of years, and have not been addressed.

3.186 Managing an appeals process is always complex and there will always be those who exploit any available appeals process as a way to draw out the length of proceedings and so extend their stay in the country. However, the committee cannot help but conclude that DIMIA administers the review system with two underlying – but unarticulated – assumptions that all appeals are essentially vexatious, and that anyone who does not get the result they want will appeal. This cynicism risks blinding DIMIA to real instances of injustice.

3.187 In spite of departmental assurances that 'procedures are in place' to ensure impartiality, due process and fairness, it is striking that virtually everyone else, without exception, disagrees. In many cases, as this chapter has shown, these critics are both experienced in the law generally, and in the operation of DIMIA's tribunals. As such, their criticisms are well informed and cannot be lightly dismissed.

3.188 The fact remains that DIMIA's tribunals are considered to be partisan, to not adequately apply natural justice procedures, and therefore not able to consistently deliver just outcomes.

3.189 Several matters stand out. The first of these is impartiality.

3.190 The credibility of a tribunal depends largely on public confidence in the competence and impartiality of its members. However, evidence to this inquiry and other inquiries is that there is a widely held perception that the RRT's integrity and

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152 *Committee Hansard* , 27 September 2005, pp 47 and 52.

independence is seriously compromised by its current arrangements. As the ARC stated in a 1996 report, it is crucial that members of the community feel confident that tribunal members are of the highest standard of competence and integrity and that they perform their duties free from undue government or other influence. It is crucial that there is no perception (let alone reality) that tribunals are in any way influenced either in reaching decisions in particular cases or more generally.[153] To this end, the committee reiterates the recommendation made in 2000 that the Migration Act be amended to allow for multi-member panels.

3.191 For the tribunals to have credibility, the appointment process of members must also be amended. The Minister should have no place in appointing quasi-judicial officials who will be making assessments of her department's decision making. Appointments should be made by a transparent, merit based process and made by either an independent panel or at the least, the Attorney General or Minister for Justice. Adjustments should also be made to the rules of tenure to remove any perception that members are subject to undue ministerial or departmental influence.

3.192 A second matter relates to procedure. Again, the committee notes the department's easy assurance that procedural rules are in place. However, they are apparently not the right ones. As this chapter shows, current provisions allow basic flaws in natural justice, relating to capacity to respond to adverse evidence, to be properly represented, and to call and challenge witnesses. Leaving these matters solely to the arbitrary discretion of Members is not adequate.

3.193 Third, as explained in Chapter 2, the committee endorses the Government's move to introduce a 90 day time period or target by which the RRT should finalise reviews involving protective visa applications. However, the committee is concerned that, in responding to this expectation, there is a need to ensure that both the MRT and RRT (which share an increasingly common Membership) are adequately resourced and funded for the task at hand. The committee notes proposals for MRT members to transfer across to the RRT to assist with the RRT caseload in peak times. There is a need to ensure that this does not adversely affect the MRT's ability to progress its caseload. It is noted that the average time taken by the MRT in 2004-05 to process a case (ie, from lodgement to finalisation) was 39 weeks.

3.194 The committee notes that the ANAO is undertaking a performance audit of the RRT and the MRT as part of the ANAO audit work program issued in July 2004. The audit commenced in April 2005 and is focussed on productivity issues, quality of service and trends in review outcomes and the relationship between DIMIA, the RRT and the MRT.[154] The specific objective of the audit is to assess whether the MRT and the RRT:

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153 The Administrative Review Council: *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Canberra 1995, p. 70.

154 Refugee Review Tribunal, *Annual Report 2004-2005*, p 26.

- have established appropriate arrangements for the governance, business planning and performance management of tribunal operations;
- have achieved intended operational efficiencies from the introduction of common facilities, services and resourcing;
- provide appropriate training and development and information support services to promote quality decision-making;
- make case decisions within applicable tribunal time and productivity standards;
- provide applicants with services and conduct tribunal reviews in accordance with statutory requirements and tribunal service standards; and
- appropriately communicate and consult with DIMIA and other Tribunal stakeholders.

3.195 The audit report is expected to be tabled in the Autumn 2006 Parliamentary Sittings.[155]

3.196 The committee acknowledges that many failed asylum seekers are unlikely to have the finances to meet the application fee that is imposed following an unsuccessful review application and therefore must either borrow the money, which in most cases would be impossible, or rely on community support. However, as the fee is only imposed following an unsuccessful review application, the committee does not consider that the fee acts as a disincentive to people wishing to seek a review. As to the level of the fee, the committee makes no comment. In relation to the provision of transcripts of RRT immigration hearings to unsuccessful applicants, the committee considers that these should be provided on the same basis as applies to non-immigration matters.

3.197 The committee shares the concern of many witnesses and submitters over the potential costs and injustice incurred as a result of the inflexible time limits for lodgement of applications for review in the MRT and the RRT. All fact finding tribunals and courts, whilst working to time limits, should have the discretion to vary time limits in particular cases before them in the interests of justice.

Recommendation 20

3.198 The committee recommends that DIMIA and the Department of Finance and Administration review the RRT and MRT current funding levels and systems in light of the current and expected workloads of both Tribunals.

155 *ANAO, 'Work Program", 2005-2006,* Canberra, July 2005, pp. 73-78.

Recommendation 21

3.199 The committee recommends that the Migration Act be amended to provide that the MRT and RRT can, in appropriate circumstances, grant an extension of time in which to lodge applications for review.

Recommendation 22

3.1 The committee recommends that the *Migration Act 1958* be amended to provide an entitlement to legal representation at Tribunal hearings for applicants and an entitlement to call and examine witnesses at hearings.

Recommendation 23

3.200 The committee recommends that the Commonwealth legal aid guidelines be amended to provide for assistance in migration matters, both at the preliminary and review stages, subject to applicants satisfying means and merit tests, and that necessary funding be provided to meet the need for such services.

Recommendation 24

3.201 The committee recommends that applicants have a right to be provided with copies of documents the contents of which Tribunal members propose to rely upon to affirm the decision that is under review.

Recommendation 25

3.202 The committee recommends that RRT incorporate into its Practice Directions specific guidelines on its approach to credibility.

Recommendation 26

3.203 The committee recommends that the MRT and the RRT be included in the training and development initiatives and strategies being developed by DIMIA as part of the response to the Palmer report.

Recommendation 27

3.204 The committee recommends that the RRT incorporate into its Practice Directions specific guidelines on the weight to be given to expert medical reports, especially those detailing a claimant's history of persecution with a clinical assessment of their current psychological condition.

Recommendation 28

3.205 The committee recommends that the RRT be able to sit as a single member body and as a panel of up to three members as appropriately determined by a Senior, or the Principal Member. Members would be drawn from people with appropriate backgrounds for considering refugee and humanitarian applications.

CHAPTER 4

MINISTERIAL DISCRETION

4.1 This chapter explores the concept of ministerial discretion and its implementation, the nature of a non-compellable and non-reviewable decision and forced *refoulement*, when an applicant is unable to gain refugee status under the Refugee Convention. It outlines the statutory framework and application processes and canvasses the concerns raised in respect of that process to date.

Statutory framework

4.2 The Migration Act provides the Minister with various discretionary powers, including substitution powers and powers to vary processes, order release from detention and cancel visas on character grounds.

4.3 Key provisions include sections 351, 417 and 501J of the Migration Act which generally authorise the Minister to substitute a decision of the Migration Review Tribunal (MRT) the Refugee Review Tribunal (RRT) or the Administrative Appeals Tribunal (AAT) respectively with a decision that is more favourable to the applicant, where the Minister believes it is in the public interest to do so. Although the Act does not specify that the 'more favourable decision' must result in the grant of a visa to the applicant, it is understood that the discretionary power is most commonly used in that way.[1]

4.4 Another key provision is section 48B of the Migration Act which confers a personal non-compellable power on the Minister to allow a person refused a protection visa to lodge a valid fresh protection visa application.[2]

4.5 In June 2005, as part of a reform package to secure 'greater flexibility, fairness and timeliness' in immigration matters, the Government moved to amend the Migration Act to confer the following discretionary 'public interest' powers on the Minister:

- Section 195A empowers the Minister to grant a visa to a person in immigration detention (whether or not the person has applied for the visa) if the Minister thinks that it is in the public interest to do so. In exercising the power, the Minister is not bound by the usual requirements that apply to the grant of visas. The Minister may grant any visa that the Minister considers is appropriate to that individual’s circumstances.

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1 The following summary of the Minister's discretionary powers under the Migration Act is drawn from DIMIA, Submission 205, pp. 13-15. See also the report of the Select Committee on Ministerial Discretion, Chapter 2.

2 *The Migration Act 1958* prevents a person refused a protection visa from lodging a valid fresh protection visa application unless the Minister uses a personal non-compellable power to allow this in the public interest under section 48B of the Act.

- Section 197AB empowers the Minister to make 'a residence determination' if the Minister considers this is in the public interest. A residence determination provides that a person in immigration detention may reside other than in an immigration detention centre or secured arrangements (that is, the detainees would be free to move about in the community without being accompanied or restrained by an officer), subject to any conditions specified in that determination. The stated purpose of the power is to enable the detention of families with children to take place in the community under conditions that can meet their individual circumstances.
- Section 197A provides that the Minister may at any time revoke or vary a residence determination in any respect if the Minister thinks that it is in the public interest to do so.[3]

4.6 Much of the evidence to this (and earlier) parliamentary inquiries has concerned the discretionary powers under sections 351 and 417 of the Act, which are therefore the focus for this chapter. Section 351 powers may be exercised following a decision of the MRT which considers all cases except protection visa cases, whereas section 417 powers may be exercised following a decision of the RRT which considers only protection visa cases.

4.7 The discretionary powers under sections 351 and 417 have the following features:

- They may only be used to intervene in a matter where the Minister believes it is in the public interest to do so.
- They may only be exercised in circumstances where a visa application has been assessed both at primary and merits review stages as failing to meet the criteria for grant of a visa – for example, at the MRT under section 351 and at the RRT under section 417.
- They are non-compellable and non-reviewable. That is, the Minister does not have a duty to exercise the discretionary power, and a court cannot order the Minister to use the discretionary power to consider an applicant's case.
- They may only be exercised personally by the Minister and cannot be delegated.
- When exercising them to grant a visa, the Minister is generally not restricted by the type of substantive visa that can be granted, and does not have to be satisfied that criteria specified in the Migration Regulations have been met.
- Having exercised these powers, the Minister must table a statement in both Houses of Parliament setting out the decision of the relevant tribunal, the

3 See Parliamentary Library, Bills Digest no. 190, 2004-05, *Migration Amendment (Detention Arrangements) Bill 2005*, (Australian Parliament 2005); See also The Hon John Howard MP, Prime Minister, Media Release, *Immigration Detention*, (17 June 2005).

decision substituted by the Minister, and the reasons for substituting a more favourable decision.

How the powers are exercised

4.8 Matters that may require the exercise of the above powers are brought to the Minister's attention in one of two ways:

- Requests for Ministerial intervention, whereby an applicant or their representative may write to the Minister seeking her intervention through the exercise of her discretionary powers. The Committee understands that such requests are treated as Ministerial correspondence.
- Assessment of cases returned from review authorities. An automatic assessment is undertaken where a review authority – such as the RRT or the AAT – rejects an application for review and affirms DIMIA's decision on a protection visa application. This occurs irrespective of whether or not a request for ministerial intervention has been made. A review authority or the court may also identify circumstances that may warrant the Minister's intervention and refer the case back to DIMIA.[4]

Reliance on Ministerial Guidelines

4.9 Processing of requests and returned cases is undertaken by DIMIA officials in accordance with Ministerial Guidelines. The Minister has issued a set of Guidelines on the identification of 'unique or exceptional' circumstances where the Minister may consider it appropriate to use the discretionary powers. The Guidelines provide that unique or exceptional circumstances may be shown by:

- Circumstances that evidence a significant threat to a person's safety, human rights or human dignity on return to their country of origin;
- Circumstances that may bring Australia's obligations under the Convention Against Torture (CAT) into consideration; namely where there are substantial grounds for believing that the person would be in danger of being subjected to torture in the State to which they would be returned;
- Circumstances that may bring Australia's obligations under the Convention on the Rights of the Child (CROC) into consideration, particularly the obligation that the best interests of the child be given primary consideration;
- Circumstances that in which Australia has obligations under the International Covenant on Civil and Political Rights (ICCPR). For example, where a person would face a real risk that their human rights would be violated through torture, cruel, inhuman or degrading treatment of punishment if they were removed from Australia;

4 See Migration Series Instruction 387, paragraph 5.2.1

- Circumstances that the legislation could not have anticipated or where the application of the legislation leads to unfair or unreasonable results;
- Strong compassionate grounds relating to harm or hardship to an Australian family;
- Circumstances where exceptional economic, scientific cultural or other benefit to Australia would result if the person was permitted to retain in Australia;
- The length of time the person has been present in Australia;
- Compassionate circumstances such as the age, health, psychological state of the person.[5]

4.10 The Guidelines and associated instructions also specifically list cases which would be 'inappropriate for the Minister to consider'. These include cases in which:

- migration related litigation has not yet been finalised;
- the applicant has made another visa application that has yet to be determined;
- where there is an ongoing request to the Minister to exercise another power; or
- where the case has been remitted or set aside by a review body.[6]

4.11 The Guidelines are intended to provide guidance to DIMIA officials involved in processing requests and returned cases. They are not criteria for intervention nor intended to be exhaustive. Nor are they binding on the Minister. Each case is to be considered in isolation and on its merits. Previous decisions of the Minister have no impact on the assessment of each case against the Guidelines.[7]

Processing and assessment by DIMIA

4.12 Requests for Ministerial intervention are allocated to one of four Ministerial Intervention Units (MIU) located in Sydney, Melbourne, Perth and Canberra for processing. Requests concerning persons in immigration detention are referred to DIMIA's national offices.

4.13 Requests for Ministerial intervention are not passed to the original departmental decision maker or case officer for review and comment. However, it is understood that the referred or return review authority decisions are usually sent back to the original DIMIA decision maker for analysis. This is to provide feedback to the decision-maker. The officers are tasked to automatically refer any case which they assess meets the Minister's guidelines for referral to the relevant MIU.[8]

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5 Migration Series Instruction 387, paragraph 5.2.1; Burns, *The Immigration Kit*, pp 782 -3; DIMIA Submission 205, pp 13-14.

6 Burns, *The Immigration Kit*, pp 782-3. Migration Series Instruction 387, paragraph 5.5.6.

7 Migration Series Instruction 387, paragraphs 3.3.4 and 3.3.5

8 DIMIA, Answer to Questions on Notice, 11 November 2005, p. 1; DIMIA, Answer to Question on Notice, 5 December 2005, p. 71.

4.14 The role of the MIU includes conducting a check on whether the Minister is able to exercise his public interest powers. As mentioned above, the Minister's public interest power is not available unless a review authority decision has been made. It is also not available if there is no longer a review authority decision in existence for which the Minister can substitute a more favourable decision.[9] That is, where:

- the review authority has made a decision to remit the matter to DIMIA and a departmental decision-maker has made a subsequent decision on the case; or
- the decision set aside by a court and the case is remitted to the review authority. [10]

4.15 If the request is within power and that does not fall within the 'inappropriate to consider' category, the MIU is then required to make an assessment against the Guidelines.[11]

4.16 In the event that a request or case is assessed as falling within the Guidelines, DIMIA will prepare a submission to the Minister to enable her to decide whether she wishes to consider the case. The submission will outline the reasons why DIMIA considers the matter falls within the Guidelines and provide a statement of the matter, its background and any relevant issues. It is understood that DIMIA refrains from making a recommendation in the submission to the Minister on whether or not the discretionary powers should be exercised. However, submissions may also set out a range of visa options available in the event that the Minister decides to use his or her discretionary power to grant a visa.

4.17 Requests for Ministerial intervention assessed by DIMIA as not falling within the Guidelines are sent to the Minister in the form of a schedule summarising each matter.[12] It remains for the Minister to decide whether or not to consider each matter.

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9 The prerequisite of a review authority decision means that the Minister also does not have the power to substitute a more favourable decision in respect of a 'no jurisdiction' decision (such as a finding that the Department's decision is not 'MRT-reviewable') or an 'invalid application' decision (for example, where an application is not made to the review authority within the required timeframe).

10 Migration Series Instruction 387, paragraphs 3.1.1 and 3.1.2. The Minister's power to substitute a more favourable decision for that of a review authority is also only available if the relevant review authority's decision was made under the appropriate section of the Act. For example, a decision under section 349 (which provides the MRT the power to make decisions) is necessary to trigger the power in section 351 of the Migration Act.

11 Migration Series Instruction 387, paragraphs 5.5.9, 5.5.1.

12 The schedule must contain the following types of information: a summary of the request and the reasons for the request being made; the relevant history the subject of the request has with the Department; details on who made the representation; views of review authority members or the courts; and an assessment against the Guidelines (including international obligations). Migration Series Instruction 387, paragraphs, 5.6.1.

4.18 The Committee understands that cases returned or referred from review authorities or the courts and assessed by DIMIA as not falling within the Guidelines are not referred to the Minister. Rather, a file note to that effect signed and dated by the assessing officer, is placed on file and no further action is taken.

4.19 There is no limit on the number of times a person may request intervention by the Minister. However, once a request has been considered by the Minister, subsequent requests by the same applicant are not usually brought to the Minister's attention unless they are assessed by DIMIA as meeting the Guidelines for referral. This could occur, for example, where a subsequent request provides significant new information on the case, or where the department becomes aware of such significant new information through its own research or other avenues.[13]

4.20 It is understood that no automatic assessment of *non-protection* visa decisions by review bodies is undertaken by DIMIA. That is, the relevant instructions only provide that an assessment under the Guidelines *may* be undertaken by DIMIA if a review authority – such as the MRT – affirms a non-protection visa decision.[14]

Impact on removal of unlawful non-citizens

4.21 A request for Ministerial intervention of itself will have no effect on the removal provisions of the Migration Act. Section 198 of that Act requires the removal of unlawful non-citizens (whether or not they are also detainees) who are not either holding or applying for a visa. A request for the Minister to exercise one of the public interest powers such as section 351 or 417 is not regarded as an application for a visa and unless the request leads to the grant of a visa, such a request has no effect on the removal provisions.[15]

4.22 The Migration Regulations provide that the making of a request for the Minister to exercise his public interest powers under sections 351 and 417, among others, is a ground for the grant of a bridging visa. An applicant must meet the specified criteria for the grant of such a visa.[16]

Time taken to assess cases and requests

4.23 DIMIA advised that the automatic assessment by DIMIA of returned or referred review authority decisions is generally completed within 28 days of the case files being returned to the department.[17] However, the time taken to resolve requests for intervention made by individuals:

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13 Migration Series Instruction 387, paragraph 6.5.

14 Migration Series Instruction 387, paragraph 5.1.1.

15 Migration Series Instruction 387, paragraph 9.3.

16 Migration Series Instruction 387, paragraph 81.

17 DIMIA, Answer to Question on Notice, 11 November 2005, p. 2.

> … can vary significantly depending on the complexity of the issues raised, the completeness of the information and argument provided in support of the intervention, and the number and spacing of submissions and correspondence being provided in support of the case. Where a case has been referred to the Minister, the issue of possible Ministerial intervention remains open until such time as the Minister considers whether or not to use her power in a particular case.[18]

4.24 The Committee notes that, during 2004-05, DIMIA acted to streamline the Ministerial intervention support arrangements and establish stronger management and coordination arrangements for community and detention caseloads. Management of the detention caseload was centralised in Canberra to strengthen liaison with detention management areas and the Minister's office.[19]

Caseload

4.25 The following tables provide an indication of the case load for the requests for Ministerial intervention.

Table 4.1: Use of Ministerial Discretion 1999 to 2005

Year	**1999-00**	**2000-01**	**2001-02**	**2002-03**	**2003-04**	**2004-05**
Humanitarian*						
Requests	3709	3370	4472	4489	4138	2802
Interventions	179	289	203	213	655	142
Percent	4.8	8.6	4.5	4.7	15.8	5.1
Non-humanitarian**						
Requests	888	850	1178	1471	1297	995
Interventions	86	109	159	270	277	97
Percent	9.7	12.8	13.5	18.4	21.3	9.7
Totals						
Requests	4597	4220	5650	5969	5435	3797
Interventions	265	398	362	483	932	239
Percent	5.8	9.4	6.4	8.1	17.2	6.3

*Interventions under s417, s454 and s501J, described as ‘Humanitarian’ by DIMIA
**Interventions under s345, s351 and s391, Described as 'Non-humanitarian’ by DIMIA

18 DIMIA, Answer to Question on Notice, 11 November 2005, p. 6.

19 DIMIA, *Annual Report 2004-2005*, p. 95.

Table 4.2: Ministerial Interventions on RRT and MRT Decisions

Year	1999-00	2000-01	2001-02	2002-03	2003-04	2004-05
Humanitarian						
RRT	5417	4858	4647	5391	5810	3033
Interventions	179	289	203	213	655	142
Percentage	3.3	6.0	4.4	4.0	11.3	4.7
Non-humanitarian						
IRT/MRT	1625	2498	3360	4087	3925	3284
Interventions	86	109	159	270	277	97
Percentage	5.3	4.4	4.7	6.6	7.0	2.9
Totals						
All Tribunals	7042	7356	8007	8946	9735	6317
Interventions	265	398	362	483	932	239
Percentage	3.8	5.4	4.5	5.4	9.6	3.8

*Decisions affirmed by IRT

**Decisions affirmed by IRT and MRT

Source: Tables provided to the Committee by the Department of Immigration and Multicultural and Indigenous Affairs on 12 January 2006.

Concerns raised in earlier inquiries

4.26 The Minister's discretionary powers in migration matters were considered in two inquiries in recent years—in 2000 by a predecessor of this committee (see *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000), and in 2004 by the *Select Committee on Ministerial Discretion in Migration Matters,* a specially-constituted Senate Select Committee which tabled its report in March 2004.[20]

The Senate Legal and Constitutional References Committee 2000 inquiry

4.27 This committee's report of 2000, *A Sanctuary under Review*, examined, among other things, the concept of Ministerial discretion, its implementation and administrative procedures, and the nature of a non-compellable and non-reviewable decision and forced *refoulement* when an applicant is unable to gain refugee status under the Refugee Convention.

4.28 The committee's report concluded that the Ministerial discretions, such as that provided under section 417 of the Migration Act, were valuable and should be

20 *Select Committee on Ministerial Discretion in Migration Matters* (March 2004).

retained.[21] However, in light of the evidence received during its inquiry, the committee recommended a number of procedural and administrative improvements to the way the discretionary powers are exercised. Issues covered by these recommendations included that:

- the Minister should consult with stakeholders to ensure the Ministerial guidelines are contemporary and address the specific purposes of Australia's obligations under the CAT, CROC and ICCPR;
- the RRT should continue its current practice whereby members informally advise the Minister of cases where there may be humanitarian grounds for protection under international conventions;
- an information sheet should be made available in appropriate languages to explain the provisions of section 417 and the Ministerial guidelines, as well as information about section 48B;
- section 417 processes should be completed quickly and the outcome advised to the relevant person;
- the subject of the request should not be removed from Australia before the initial or first section 417 process is finalised; and
- appropriately trained DIMA staff should consider all section 417 requests and referrals against CAT, CROC, and ICCPR.[22]

4.29 The Government's response to the above was to maintain that existing administrative procedures and arrangements were adequate.[23]

The Select Committee's 2004 inquiry

4.30 As mentioned above, a Select Committee was established in June 2003 to inquire into the use and appropriateness of the Minister's discretionary powers under sections 351 and 417 of the Migration Act. It tabled its report in March 2004.[24]

4.31 The Select Committee found almost unanimous support for having some capacity for Ministerial discretion in the migration legislation. However, while the committee concluded that the Ministerial intervention powers should be retained as the ultimate safety net in the migration system, evidence to that inquiry highlighted a pressing need for reform of their operation.

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21 Senate Legal and Constitutional References Committee, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (June 2000), p. 267.

22 Senate Legal and Constitutional Committee, *A Sanctuary under Review*, Recommendations 8.1 to 8.4 and 8.6.

23 Government response, 8 February 2001, pp 12-13.

24 The report can be found at http://www.aph.gov.au/Senate/committee/minmig_ctte/report/index.htm

4.32 The Select Committee's findings are summarised below. The full listing of its 21 recommendations is shown at Appendix 7.

Lack of transparency and accountability

4.33 The Select Committee found that a lack of transparency and accountability of the Minister's decision making process was a serious deficiency in need of urgent attention. The sole accountability mechanism in cases where the discretionary power is used to grant a visa is a requirement that the Minister table statements in parliament on a six-monthly basis. According to the legislation, these statements must set out the Minister's reasons for thinking intervention is in the public interest. However, in recent years, tabling statements had outlined only in the broadest terms cases where the Minister has intervened. The Select Committee noted its concern that:

> … vesting a non-delegable, non-reviewable and non-compellable discretion with the immigration minister without an adequate accountability mechanism creates both the possibility and perception of corruption. At a minimum, the Committee wants to see external scrutiny of decision making made an integral part of the ministerial discretion system. This should bring a greater degree of transparency into the decision making process and reduce the scope for corruption of the system.[25]

4.34 The Select Committee made several recommendations to address the perceived shortcomings in the accountability of the Minister's discretionary powers. To ensure parliamentary scrutiny of the use of discretionary powers, the Select Committee recommended that the Minister's tabling statements provide reasons why a decision to intervene is in the public interest and indicate how the case was brought to the Minister's attention – by an approach from the visa applicant, by a representative on behalf of the visa applicant, on the suggestion of a tribunal, at the initiative of an officer of the department or in some other way. [26]

4.35 It was also recommended that the Government establish an independent committee as part of the Ministerial intervention process to improve the equity and transparency of the process and restore public confidence in the system. The purpose of the committee would be to review DIMIA's submissions and schedules and recommend to the Minister cases which it believes warranted Ministerial intervention.[27]

4.36 The Select Committee was concerned by evidence that the Minister's discretionary powers were being used on average several hundred times each year instead of for the few exceptional cases they were originally designed to deal with.[28]

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25 *Report of the Senate Select Committee on Migration Matters*, March 2004, p.xix

26 *Report of the Senate Select Committee on Migration Matters,* p.xiv

27 *Report of the Senate Select Committee on Migration Matters,* p.xix

28 *Report of the Senate Select Committee on Migration Matters,* p.119

4.37 DIMIA had advised that there were three main reasons for the increase in the use of Ministerial discretion since 1996-97. First, the Government has chosen to deal with onshore applications for visas on a case-by-case basis rather than by establishing special visa categories. Second, there have been more requests as the workload and decisions made by the tribunals have increased significantly. Third, there is greater public awareness of the existence and the processes of the exercise of discretion. DIMIA also suggested that judicial review has influenced the number and timing of requests.

4.38 The Select Committee was unable to test these claims, as it could not draw firm conclusions about the use of Ministerial discretion from the available data, which it described as being limited in respect of its reliability and detail. It therefore recommended that DIMIA establish procedures for collecting and publishing statistical data on the operation and use of the Ministerial discretion powers to improve the accountability of the system.[29]

DIMIA involvement in vetting applications

4.39 The Select Committee noted that the Minister's capacity to formulate an independent view on a particular case depended almost entirely on the information provided by DIMIA. The processing and decision making process within DIMIA, especially whether to prepare for the Minister a submission or a schedule, was critical to the success or otherwise of individual cases. However, evidence to that inquiry – including evidence from the Commonwealth Ombudsman – revealed 'serious and fundamental administrative' weaknesses in DIMIA's decision making processes.

4.40 The Select Committee therefore recommended that:

- DIMIA establish a procedure of routine auditing of its internal submission process;
- the Commonwealth Ombudsman carry out an annual audit of the consistency of DIMIA's application of the Ministerial and administrative guidelines on the operation of the Minister's discretionary powers. The audit should include a sample of cases to determine whether the criteria set out in the guidelines are being applied, and to identify any inconsistency in the approach of different case officers.[30]

4.41 The Select Committee also recommended that the role of the RRT and MRT in the Ministerial discretion process be reconsidered.[31] The Committee accepted that the Tribunals' core task is the review of DIMIA decisions to refuse or cancel protection

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29 *Report of the Senate Select Committee on Migration Matters,* p.xii

30 *Report of the Senate Select Committee on Migration Matters,* p.62

31 As noted above, cases may be brought to DIMIA's attention by a referral from the RRT and the MRT. Members of the review tribunals may indicate in their decisions that a particular case raises humanitarian issues.

and other visas. However, the Tribunals were seen as being well placed to assess the entirety of an applicant's circumstances, especially when new information is presented that was not previously available to the department. The Select Committee recommended that the MRT and the RRT:

- standardise their procedures for identifying and notifying DIMIA of cases raising humanitarian and compassionate considerations; and
- keep statistical records of cases referred to DIMIA, the grounds for referral and the outcome of such referrals.[32]

Limited advice, assistance and information for applicants

4.42 The Select Committee found a lack of available information for applicants about Ministerial discretion and its processes. To address these deficiencies, the Select Committee recommended that:

- DIMIA create an information sheet and application form in appropriate languages that explains the Ministerial guidelines and application process; [33]
- a consultative process be established between DIMIA and applicants for Ministerial intervention where applicants are shown and can comment upon information that is central to the outcome of their case – for example, the draft submission to be placed before the Minister;[34] and
- the Minister provide a statement of reasons for an unfavourable decision on a first request for Ministerial intervention.[35]

4.43 The Select Committee considered that provision of a statement of reasons would ensure fairness and allow applicants to identify in any subsequent request matters that may have been overlooked. It would also enable Parliament and the community to ascertain how the powers were being used.[36]

4.44 The Committee also recommended that the Immigration Application Advice and Assistance Scheme (IAAAS) be extended to enable applicants for Ministerial intervention to obtain an appropriate level of professional legal assistance.[37]

The need for a tribunal decision as a prerequisite for intervention

4.45 The Select Committee recommended that DIMIA consider legislative changes to enable Ministerial intervention to be available in certain circumstances where there

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32 *Report of the Senate Select Committee on Migration Matters,* p.67

33 *Report of the Senate Select Committee on Migration Matters,* p.71

34 This was originally recommended by the Commonwealth Ombudsman.

35 *Report of the Senate Select Committee on Migration Matters,* pp 73-74

36 *Report of the Senate Select Committee on Migration Matters,* p.73

37 *Report of the Senate Select Committee on Migration Matters,* p.185

is a compelling reason why a merits review tribunal decision was not obtained. Witnesses and submitters to that inquiry – including the Commonwealth Ombudsman – pointed to the problems of denying access to Ministerial intervention in cases in which applicants, through no fault of their own, were not able to appeal to a tribunal (ie, because an invalid application for review had been lodged). The need to appeal to a tribunal in cases where there is no chance of success before the tribunal, but where there is a reasonable chance that the Minister might intervene, was also queried.[38]

Financial hardship and delays in obtaining bridging visas

4.46 The Select Committee identified a range of difficulties being experienced by applicants. A particular concern was the evidence that many applicants for Ministerial intervention faced considerable financial hardship due to the constraints of bridging visas, particularly restrictions on work rights (and therefore access to Medicare).

4.47 The committee recommended that all applicants for the exercise of Ministerial discretion should be eligible for visas that attract work rights, up to the time of the outcome of their first application. Children who are seeking asylum should have access to social security and health care throughout the processing period of *any* applications for Ministerial discretion and all asylum seekers should have access to health care at least until the outcome of a first application for Ministerial discretion.[39]

4.48 The committee noted that applicants for Ministerial intervention become eligible for a bridging visa while their request is being considered. It therefore recommended that DIMIA formalise the application process for Ministerial intervention to overcome delays and other problems in the process for granting bridging visas, namely:

- processing times that can take up to several weeks;
- applicants not knowing when they should apply for a bridging visa; and
- applicants being ineligible for a bridging visa because an unsolicited letter or inadequate case was presented to the Minister, often without the applicant's knowledge.[40]

4.49 This committee understands that the Government has yet to respond to the Select Committee's report and recommendations.

The need for 'complementary protection'

4.50 An issue that arose in both of the above inquiries was whether the Migration Act should be amended to provide expressly for complementary protection.

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38 *Report of the Senate Select Committee on Migration Matters,* p.186

39 *Report of the Senate Select Committee on Migration Matters,* p.80

40 *Report of the Senate Select Committee on Migration Matters,* p.186

4.51 The term 'complementary protection' refers to a widening of the categories of persons who may be granted temporary or permanent residence beyond only those who are owed refugee protection. The Refugees Convention does not provide for protection of people who do not meet the Convention definition of a refugee. However, a range of other international instruments impose obligations not to return (or *refoul*) persons who do not satisfy the Refugee Convention's definition of a 'refugee', but who face a risk of a violation of their fundamental human rights. Examples include the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; and the International Covenant on Civil and Political Rights.

4.52 It is understood that there is no consistent international approach on this issue, with the nature and application of complementary protection provided under domestic law differing between countries. The protection offered by countries can include permanent or temporary residence on various grounds based on humanitarian concerns, obligations under international human rights treaties, or judgement by a State as to whether it is unsafe, inappropriate or not practicable to return to the country of origin. International practice also varies markedly on the rights to be afforded under complementary protections, ranging from nothing more than protection against *refoulement* to enjoyment of all rights normally afforded to persons found to be a 'refugee'. Differences also exist in the procedures followed to accord complementary protection.[41]

4.53 The committee notes that there are moves to harmonise the various approaches to complementary protection, particularly within the European Union.[42]

4.54 Australia's practice has been to rely on the Ministerial discretionary powers to grant a visa to meet the needs of those people in Australia whose circumstances do not fit the criteria of the Refugees Convention. Another mechanism has been the occasional creation of special categories of visas to provide temporary haven for

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41 DIMIA answers to Questions on Notice, 11 November 2005, pp. 53-54. See also Erka Fellor Director of International Protection, UNHCR, *The responsibility to protect – closing the gaps in the international protection regime and the new EXCOM Conclusion on Complementary Forms of Protection*, Statement to the 'Moving On: Forced Migration and Human Rights Conference, Sydney, 22 November 2005.

42 A European Commission Directive adopted in 2004 established a framework for an international protection regime based on existing international refugee and human rights instruments obligations, which emphasises the primacy of refugee status. It set minimum standards, with some flexibility for States to give lesser benefits to holders of complementary or subsidiary protection. Member States must implement national legislation by October 2006. Discussion is also underway within UNHCR on the general principles on which complementary protection should be based. UNCHR's Executive Committee, which is comprised of over 50 member states including Australia, recently adopted the *Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection*, which, among other things, calls on States to implement procedures to care for those in need of protection, but who fall outside the Refugee Convention. See Refugee Council of Australia, Answer to Question on Notice, 27 October 2005.

certain prescribed groups or to allow people in Australia illegally to regularise their status.[43]

4.55 This practice was examined in both the above-mentioned inquiries.

Concerns raised with the Committee in 2000

4.56 A key issue in the committee's 2000 inquiry was the fact that Australia's treaty commitments – such as those under the CAT and the ICCPR – had not been incorporated into Australian domestic law. Rather, as noted above these obligations were met through the provision of the non-reviewable and non-compellable Ministerial discretion in section 417 of the Migration Act**.** This led to committee consideration of whether Australia was complying with its obligation of non-refoulement under the CAT and the ICCPR, and whether it was appropriate to rely on Ministerial discretion to give effect to international obligations.

4.57 The report identified four specific areas of concern regarding the use of Ministerial discretion powers to fulfil non-refoulement obligations:

- The absence of a formal mechanism for the referral of cases to the Minister;
- Reliance on a non reviewable and non-compellable discretion is an unacceptable means for determining the fate of persons claiming protection under Australia's international obligation;
- The circumstances in which the Minister is able to exercise the discretionary power is too narrow;[44] and
- It takes too long to access the Ministerial discretion.

4.58 A person seeking protection on humanitarian grounds must make an application to the department for 'refugee status' based on the criteria of the Refugee Convention, have that rejected and then seek to have that negative decision reviewed

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43 Examples include the Temporary Safe Haven visas used in 1999 to provide temporary residence to some 4000 Kosovars brought to Australia for temporary protection. An equivalent 'Safe Haven Visa' was used to provide temporary protection to some 1 900 East Timorese evacuated by Australia from Dili in 1999. Similarly, the offshore humanitarian visa classes provide protection to persons on grounds broader than those set out under the Refugees Convention. There have also been occasions where persons unlawfully in Australia and in humanitarian need were granted visas under new visa categories. See UNHCR, *Complementary Protection*, Discussion Paper No. 2, 2005. See also DIMIA, Answer to Question on Notice, 11 November 2005, Attachment.

44 The Minister is only able to substitute a more favourable decision of the RRT once the RRT has reviewed a claim for consideration of refugee status under the Refugee Convention. That means that the Minister is unable to use the power until the relevant review authority has made a decision in a particular case. Similarly, where a decision is quashed or set aside by a Court and the matter is remitted to the decision maker to be decided again, the Minister is unable to use the public interest power as there is no longer a review decision in respect of which he can substitute a decision.

by the RRT. This is required even though the applicant and their advisor may consider such a claim for refugee status on Convention grounds to be without merit. It is only after the Tribunal had affirmed the department's decision that the applicant may apply to the Minister.[45]

4.59 The above, it was argued, had a number of unintended adverse consequences:

- it had added significantly to the number of apparently 'unsuccessful' applications;
- it fostered professional disrepute by forcing practitioners to utilise the refugee determination process for the purpose of seeking Ministerial discretion;
- it wasted public monies by requiring the assessment of humanitarian cases in the first instance against refugee criteria – which will, by their very definition, fail;
- it causes delays for alleged refugees who may be emotionally vulnerable; and
- applicants in immigration detention may be detained for lengthy periods while waiting to access the Ministerial discretion.[46]

4.60 Notwithstanding the above, the committee's report concluded that discretionary Ministerial powers – such as those provided by section 417 of the Act – were an appropriate means through which Australia can meet its international obligations under the CAT, CROC and the ICCPR.[47]

4.61 However, it is clear that the Select Committee also considered that discretionary Ministerial powers alone were an insufficient safety net to ensure compliance with the above international obligations.[48] Further, the 2000 report noted that:

> A revision of the process whereby a person seeking asylum on humanitarian grounds is required to be processed through an administrative decision-making system focussing on refugee related grounds would remove the sometimes lengthy delays incurred in a number of genuine cases. It should also lead to what would be considerable saving in time and resources associated with unsuccessful RRT processing.[49]

4.62 Concerns that reliance on Ministerial discretions and guidelines meant that applicants lacked enforceable rights and obligations led the committee to recommend

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45 *A Sanctuary Under Review*, pp. 61-64.

46 *A Sanctuary Under Review*, p 63.

47 *A Sanctuary Under Review*, p. 64.

48 Select Committee on Ministerial Discretion, p. 137.

49 *A Sanctuary Under Review*, p. 257.

that the Government examine incorporation of the non-refoulement obligations of the CAT and ICCPR into domestic law.[50]

4.63 This recommendation was generally rejected by the Government.[51]

Concerns raised with the Select Committee

4.64 The same arguments and concerns arose during the Select Committee's 2004 inquiry. The Select Committee received evidence expressing the view that protection from refoulement should not be left solely to Ministerial discretion powers which are non-compellable, non-reviewable and non-delegable because:

- Australia's non-refoulement obligations under the CAT, CROC and ICCPR are not discretionary and subject to few, if any, exceptions;[52]
- CAT, CROC and ICCPR asylum seekers have no such right of review and little protection in the way administrative decisions are scrutinised; [53]and
- reliance on the discretionary powers places considerable burden on Australia's migration system and results in non-Convention asylum seekers being detained for extended periods in order to request the Minister's intervention at the end of a determination process which is not relevant to them. [54]

4.65 In light of the above, it was put to the Select Committee that providing alternative administrative arrangements to enable Australia to fulfil its non-refoulement would ease the burden on the current (over) use of Ministerial discretion. Introduction of complementary protection under the Migration Act, it was suggested, had the potential to enable Australia's migration and humanitarian programs to be delivered with certainty and transparency, and to assist non-Refugee Convention asylum seekers who are in genuine need of humanitarian protection.[55]

4.66 The Select Committee – in its majority report – accepted these arguments. It was concerned that Australia is one of the few countries in the developed world that does not have a system of complementary protection. The Select Committee was in no doubt that the current Australian practice of relying solely on Ministerial discretion places it at odds with emerging international trends. In its view, the concept has not received the attention from Government it now clearly deserves.[56]

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50 *A Sanctuary Under Review*, Recommendation 2.2.

51 See Appendix 3.

52 *Select Committee on Ministerial Discretion*, p.134

53 *Select Committee on Ministerial Discretion,* p.135

54 *Select Committee on Ministerial Discretion*, p.147

55 *Select Committee on Ministerial Discretion,* p.148

56 *Select Committee on Ministerial Discretion*, p.145

4.67 However, as complementary protection was at that time a relatively undeveloped concept in Australian domestic law, the Committee considered that further examination of how complementary protection might work in the Australia context was warranted. It therefore recommended that the Government consider adoption of a system of complementary protection to ensure that Australia no longer relies solely on the Minister's discretionary powers to meet its non-refoulement obligations under the CAT, CROC and ICCPR.[57]

4.68 In making this recommendation, the Select Committee dismissed concerns raised by DIMIA that introduction of complementary protection would encourage litigation and create the potential for misuse of the process by those wishing to prolong their stay and frustrate their removal from Australia.

4.69 The Government has yet to respond formally to the Select Committee's report. However, it is apparent from the evidence given to this inquiry that it does not accept the Select Committee's findings and maintains that the existing arrangements are appropriate.

Concerns raised during this inquiry

4.70 The same concerns and criticisms that were levelled at the operation of the discretionary Ministerial powers and at the lack of a system of complementary protection were put to the Committee during this inquiry.

4.71 Most submissions and witnesses agreed that there is a need for Ministerial discretion in relation to migration matters, as a 'catch-all' or a final 'safety net'. However, several expressed concern in the manner it which it operates. These concerns included:

- the non-compellable, non-delegable and non-reviewable nature of the power;
- the lack of accountability and transparency in decision making;
- the delay in obtaining a decision can prolong a person's detention; and
- reliance on such a power is at odds with Australia's international commitments under international treaties.

4.72 Submissions and witnesses also argued that, rather than relying on Ministerial discretion to cover cases where an asylum seeker does not fall within the definition of refugee in the Refugee Convention, but may be eligible for protection under other conventions such as CAT, ICCPR and CROC, a fairer and more efficient process

57 *Select Committee on Ministerial Discretion*, p.148

would be to consider such claims under some form of complementary protection, such as a humanitarian visa.[58]

4.73 These concerns and criticisms are examined below.

The non-compellable, non-delegable and non-reviewable nature of the power

4.74 Most submissions and witnesses did not agree with the Committee's finding in 2000 that the continued reliance on the current system of Ministerial discretion was appropriate.[59]

4.75 The Law Society of South Australia (LSSA), for example, considered the present reliance on Ministerial discretion is 'inherently unsuitable' in dealing with Australia's obligation on non-refoulement, which 'is not discretionary'. It pointed to:

> … an inherent conflict in attempting to meet the non-refoulement obligation through reliance on a non-compellable, non-reviewable, non-delegable decision made on the sole basis of intervention where it is "in the public interest". There should be a clear legislative structure to guide the decision-making process to ensure factors relevant to Australia's obligations under the ICCPR, CROC and CAT are considered and that outcomes are fair and consistent. The current system does not provide an 'effective remedy' sufficient to satisfy the requirements of international law.[60]

4.76 The LSSA also argued that with any administrative decision there is a risk of errors occurring**,** whether it is as a result of 'incorrect information, a lack of relevant information, or a misinterpretation of the facts or the law.'[61] It stressed that:

> This risk is heightened where applications are made to the Minister without legal advice as to what information is in fact relevant, where there is no opportunity to respond to adverse material which may be before the Minister, where applications are made on the basis of documentary evidence alone and/or where the Minister is burdened by such a large volume of applications that insufficient time is available to consider each individual application thoroughly.[62]

4.77 Yet, notwithstanding these risks, the LSSA noted that:

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58 LSSA, *Submission 110*, pp. 11-15; NCCA, *Submission 179*, pp. 4-15; Franciscan Missionaries of Mary, *Submission 180*, p. 3; UJA and ASPHM, *Submission 190*, pp. 10-11; LIV, *Submission 206*, p. 20. Witnesses and submitters advised that it is too early to assess whether the additional intervention powers granted to the Minister by the June 2005 changes to the Migration Act were capable of being used to remedy this situation. See, for example, Refugee Council of Australia, *Submission 148*, p. 3.

59 *A Sanctuary under Review,* p. 267

60 LSSA, *Submission 110*, p. 12.

61 LSSA, *Submission 110*, p. 11.

62 LSSA, *Submission 110*, pp. 12-13.

> … the decision as to whether or not to exercise Ministerial discretion …[which is] in effect a primary decision where an applicant is seeking complementary protection … is not subject to any form of review and provides no safeguard against potential harm flowing from an error in the decision.[63]

4.78 The National Council of Churches Australia (NCCA) shared this concern. It argued that:

> There is no reason in principle why a person applying under ICCPR/CRC/CAT grounds should be entitled to a lesser form of support (income support, work rights and Medicare coverage) than an asylum seeker applying under the Refugee Convention. Each invokes Australia's obligations under the various treaties and Australia's non-refoulement obligations under the ICCPR, CRC and CAT are no less important than those under the Refugees' Convention. The potential harm resulting from a flawed decision is equally severe, if not fatal.[64]

Lack of transparency and accountability in decision making

4.79 Witnesses and submitters pointed to a lack of accountability and transparency in how the Ministerial discretion was being exercised.

4.80 Representatives of the LSSA commented that:

> By its very nature, the exercise of Ministerial discretion lacks transparency and accountability. It may result in inconsistent outcomes because of the vagueness of the criteria which must be established in order for the Minister to intervene. It is open to allegations of actual or apprehended bias and corruption.[65]

4.81 Amnesty International echoed the Law Society's concerns. Its representative, Dr Graham Thom, advised the Committee that:

> There are issues regarding transparency and guidelines. For those people who have to try to navigate the guidelines in terms of getting 417 applications or 48B applications to the Minister, at times it just does not seem to make sense. You may tick off every box on those guidelines and you get a letter back saying that you have not met the guidelines. You do not understand. The inability to challenge the decision is increasingly frustrating for practitioners, let alone for asylum seekers.[66]

4.82 The LSSA suggested that such shortcomings could be overcome if reasons for decisions were tabled in Parliament (as they were previously) and if written reasons

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63 LSSA, *Submission 110*, pp. 12-13.

64 NCCA, *Submission 179*, p. 9.

65 *Committee Hansard*, 26 September 2005, p. 4.

66 *Committee Hansard*, 29 September 2005, p. 27.

were provided to the applicant where the Minister declines to exercise his or her discretion.[67] As noted above, earlier Senate inquiries have made a similar recommendation.

4.83 Uniting Justice Australia (UJA) and Asylum Seeker Project Hotham Mission (ASPHM) also stressed the importance of ensuring that asylum seekers understand why their application has been refused :

> … It is important that asylum seekers have all the information as to why they have been refused. Allowing asylum seekers to feel that their entire case has been heard and that a definitive decision looking at all our obligations has been made will assist and facilitate a more humane process of return. All persons requesting or referred for Ministerial intervention on their visa application should receive notice, in writing, of the decision made by the Minister and the reason for the decision.[68]

4.84 Reverend Poulos of Uniting Justice Australia advised the Committee that 'we never know why people are accepted or refused'. She also highlighted the problems facing those trying to advise applicants:

> Without any understanding of how 417 decisions are made, it leaves people with absolutely no grounds to assess things and think: 'Of the conditions surrounding this particular case, what is the most relevant? What is the Minister going to consider in particular? What would be helpful for the Minister in this case? What is irrelevant?' It is a bit of lottery for people.[69]

4.85 Ms Lucy Bowring of the ASPHM expressed the same concern over the lack of transparency:

> We cannot say why decisions are being made or not being made. It is very hard to determine if a certain issue is being picked up on. I know there have been a few occasions when we have had two very similar cases before the Minister and one family received the visa and the other did not. It is very difficult to determine why that might be when you do not know what has actually been looked at and considered.[70]

4.86 When asked how they dealt with such a situation and what avenues are open to them to resolve such a situation, Ms Bowring responded:

> We do not have an avenue, apart from trying to talk to the department about putting up the case again, stressing our original concerns and perhaps our concerns around other cases that received a positive decision in a similar situation. With that level of advocacy, sometimes the case will get up again and the Minister will decide to consider it. Whether the Minister ends up

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67 LSSA, *Submission 110*, p. 14.

68 UJA and ASPHM, *Submission 190*, p. 12.

69 *Committee Hansard*, 29 September 2005, p. 32.

70 *Committee Hansard*, 29 September 2005, p. 33.

> making a decision or not is unclear, but that is pretty much the role that we take. It is very arbitrary and it is very unclear.[71]

4.87 The Migration Institute of Australia (MIA) advised the Committee that, despite the 'recent and comprehensive Senate inquiry in 2004', the use of the Minister's discretionary powers 'remained a process shrouded in mystery and controversy':

> Recent decisions relating to Ministerial Discretion (in particular decisions which have separated parents from their natural children), have left MIA perplexed, given the public interest foundations behind these powers. It appears to MIA members that they can no longer rely on MSI guidelines written under the provisions of these sections of the Act as reliable for properly and professionally advising and acting for applicants in these circumstances.[72]

4.88 The MIA agreed that Ministerial discretion in migration matters should be retained as a necessary and basic Ministerial power. However, it also considered that:

> … the very seriousness of the situation facing the majority of people seeking the Minister's intervention to grant visas in the public interest …, requires absolute trust in the government of the day that such a power is at the very least not politicised or even suggested as so.[73]

4.89 In light of the above, the MIA queried why the above-mentioned recommendations made by the Select Committee had not been decided on or acted upon by the Government. The MIA also recommended that the Migration Act be amended to allow the power to be delegated by the Minister to decision makers at State Director level, as is the case with other powers under the Act. In its view, this would go some way in de-politicising the intervention powers and providing more consistency overall.[74]

Delays prolong detention and hardship

4.90 A major concern raised in evidence to the Committee was the length of time involved in seeking the exercise of Ministerial discretion. Submissions pointed out that applications for Ministerial intervention are lodged late in the assessment process, after an applicant has already gone through and had to await the outcome of the initial assessment by DIMIA and then review by the RRT. The Asylum Seekers Centre advised that, while the Centre had been given the opportunity through the Ministerial unit in DIMIA to request that a particular case be expedited on the basis of mental health concerns, they had:

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71 *Committee Hansard*, 29 September 2005, p. 33

72 Migration Institute of Australia, *Submission 144*, p. 6.

73 Migration Institute of Australia, *Submission 144*, p. 6.

74 Migration Institute of Australia, *Submission 144*, p. 6.

> … several clients at the moment who have lodged a section 417 (application) and been waiting for over two years – in some cases, close to three years – without word. During that time, they are living in complete limbo. They have absolutely no way of knowing whether their claims are even going to be considered.[75]

4.91 Criticism was directed at the Migration Act's failure to provide for requests for protection on humanitarian grounds to be undertaken at the primary stage of application. As NCCA representatives noted:

> … protection visa applicants with grounds for complementary protection must apply as a refugee to DIMIA and appeal to the RRT and receive negative decisions from both before they can appeal to the Minister on complementary protection grounds. In the case of protection visa applicants in detention, this effectively prolongs the detention as they must first be considered under irrelevant criteria by DIMIA and the RRT before being able appeal under relevant criteria to the Minister.[76]

4.92 Witnesses also pointed to the impact on applicants living in the community. Applicants for protection on humanitarian grounds living in the community may face financial and other hardships pending Ministerial consideration of their application. Different levels of support are available apply depending on the basis of their release (such as release into the community under a temporary protection visa, a bridging visa E, removal pending bridging visa, or under community detention arrangements). This has prompted church representatives to describe the plight of some applicants in the following terms:

> The absence of complementary protection also affects asylum seekers living in the community. These are people who entered Australia with a visa and then claimed asylum so they are not detained. Some have work rights and income support and others have neither and are totally dependent on charities. Again, they have to wait and get knocked back by both the Department of Immigration and the Refugee Review Tribunal before they can apply to the Minister under the appropriate grounds. For those who are not permitted to work or receive income support, this obviously greatly extends the period in which they are impoverished, idle and forced to depend on charity. For those with income support who are forced to apply as a refugee to the Department of Immigration, get knocked back, and appeal to the Refugee Review Tribunal, and get knocked back, it is a waste of government-funded income support and processing costs, as they're not being assessed under the right criteria until they apply to the Minister. And when they do apply to the Minister under the right criteria, their income support is cut off and often their work rights, leaving them without income, work or Medicare. [77]

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75 *Committee Hansard*, 28 September 2005, p. 28.

76 NCCA, *Submission 179*, p. 9.

77 James Thompson, National Council of Churches In Australia, *Why Australia needs a complementary protection visa*, Perspective, ABC Radio National, 3 September 2004.

4.93 The committee also notes evidence cited in Chapter 8 of this report of the adverse impacts that prolonged uncertainty can have on the mental and emotional well being of some applicants.

4.94 The Regugee Advocacy Service of South Australia (RASSA) provided the Committee with an example of the delay and hardship caused by the Minister's policy of not considering section 417 requests while court proceedings are current. As mentioned above, the Guidelines provide that such cases are 'inappropriate for consideration'. The example concerned a group of Sabean Mandeans who had claimed protection from persecution in Iran and Iraq:

> On 20 June 2004, all Sabean Mandeans that we know of were granted protection visas except for those who had court proceedings on foot. … The remaining Sabean Mandeans were required to put their lives on hold while they waited for years for the court process to be completed, despite the logical outcome being a guaranteed visa. These asylum seekers were faced with the cruel choice of giving up their only available legal fight for asylum to rely on a non-compellable, discretionary decision from a Ministry that is known for being inconsistent or waiting out a lengthy court process in order to obtain the asylum that we all knew they deserved. It is now two years since the RRT clearly acknowledged that Sabean Mandeans are persecuted in Iran and Iraq and we know of one Sabean Mandean who still has not received a protection visa due to court proceedings continuing well into 2005. This is not only an appalling way to treat genuine asylum seekers but also an extraordinary waste of administrative and judicial resources. DIMIA cannot dismiss this criticism merely by pretending to defer to the authority of the courts because the Minister has intervened with the granting of a section 417 visa or a section 48B opportunity while court proceedings were on foot; just not at RASSA's request.[78]

4.95 RASSA argued that, rather than delaying matters, the Minister and her Department should take action to grant a visa as soon as they are satisfied that an asylum seeker is deserving of protection.

International humanitarian obligations – Complementary Protection

4.96 Most submissions and witnesses did not agree with the committee's finding in 2000 that Australia is able to meet its international obligations under CAT, ICCPR and CROC by relying on discretionary Ministerial powers. They considered that these obligations could only be met appropriately by the creation of a complementary protection visa to cover the particular circumstances of asylum seekers whose claim for protection is based on these conventions.

4.97 Some highlighted the lack of accountability and transparency in the current system to argue that it was an unacceptable mechanism for determining the fate of

78 RASSA answer to Questions on Notice received 28 October 2005, p. 2.

persons claiming protection under international obligations. The UJA and ASPHM, for example, advised:

> For those seeking Ministerial intervention for humanitarian reasons, there is no formal decision made on a person's humanitarian status. The question of whether claims with humanitarian merit are adequately assessed is crucial. The current process does not give any assurance that this occurs, in part due to the non-compellable nature of the power, combined with a lack of binding criteria in relation to international obligations against which Ministerial decisions can be measured and held accountable. If Ministerial intervention continues to be used to assess cases that may invoke our obligations under international treaties, there is a need for mechanisms to ensure a consistent application of the guidelines, and the guidelines themselves must be expanded to clearly and adequately detail Australia's humanitarian, protection, and non-refoulement obligations under these treaties. Applicants also need to be enabled to explicitly outline their case for humanitarian protection against these guidelines as the claim made against criteria for refugee protection may not be adequate and can not be assumed to contain sufficient relevant information to assess a non-refugee convention claim.[79]

4.98 Others pointed to the inefficiencies inherent in the current system, which requires asylum seekers to first seek protection under the Refugee Convention and then exhaust all avenues of appeal.[80] The LSSA, for example, considered the existing procedures involved in requesting the exercise of Ministerial discretion to be an illogical and inefficient use of resources. It said:

> The burden of the large number of applications to the Minister in recent years is unacceptable and unsustainable, yet the discretionary power will continue to be relied upon whilst there remains no effective structure provided for in the Migration Act for the consideration of applications for complementary protection. As applicants must have exhausted all avenues of appeal before seeking the Minister's intervention, frivolous applications for review by the RRT and Federal Court are implicitly encouraged. This is a ridiculous and costly waste of time and resources.[81]

4.99 The LSSA stressed that:

> [t]he current system is flawed as … neither the primary decision maker within DIMIA nor any of the review bodies are entitled to consider factors relevant to complementary protection due to the legislative constraints of the Migration Act. [82]

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79 UJA and ASPHM*, Submission 190*, p. 12.

80 LSSA, *Submission 110*, pp 11-13; NCCA, *Submission 179*, pp 4-15; UJA and ASPHM, *Submission 190*, p. 13; LIV, *Submission 206*, p. 20.

81 LSSA, *Submission 110*, p. 13.

82 LSSA, *Submission 110*, pp 12-13.

4.100 Others emphasised the impact on those who seek Australia's protection on humanitarian grounds. Amnesty International's representatives, for example, advised the Committee that:

> … we have seen a number of cases where we believe individuals should have been picked up much earlier in the system. In some cases those individuals have had to go through years of very traumatic circumstances in trying to prove who they are and that they would suffer persecution. …. where there are issues of human rights, there needs to be a system that operates before it gets to the Minister. Again, this is where we raise the issue of complementary protection, because if assessments are able to be made before they get to the Minister then you will cut back on a great deal of suffering.[83]

4.101 The Refugee Council of Australia recently summed up the situation as follows:

> By leaving any consideration of non-Convention [that is, Refugee Convention] related protection claims to the very end of the process and by consigning the decision to Ministerial discretion, it can be argued that Australia's current practice is inefficient, unnecessarily expensive, places an unrealistic burden on the Minister for Immigration, lacks transparency and accountability, does not contain sufficient safeguards and is detrimental to both Convention refugees (by clogging up the system) and to those with non-Convention needs.[84]

Calls for reform

4.102 In order to address the deficiencies identified above and to ensure that Australian practice is consistent with both Australia's international obligations and with international best practice, witness and submitters argued that changes had to be made to the manner in which Australia considers protection applications.

4.103 Most argued for a system of complementary protection based on a single administrative procedure in which consideration of both Refugee Convention and non-Convention related protection claims was undertaken by primary decision-makers.

4.104 The committee notes in particular the model of complementary protection detailed in the paper prepared by the Refugee Council, Amnesty International and the National Council of Churches in Australia entitled *Complementary Protection: The Way Ahead*. The aim of the model – which has also been endorsed by most Australian churches, the ICJ and other legal organisations as well as refugee organisations – is to ensure that Australian practice is 'fair, transparent, timely, efficient and legally defensible'.[85]

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83 *Committee Hansard*, 29 September 2005, p. 27.

84 Refugee Council of Australia, *Complementary Protection – A New Model for Australia*, in UNHCR, *Complementary Protection*, Discussion Paper No. 2, 2005, p. 9.

85 Refugee Council of Australia, *Submission 148*, Attachment A, p. 12.

4.105 The proposed model would allow 'an applicant's eligibility for complementary protection to be assessed at each stage of the determination process, thereby ensuring that those entitled to protection receive it at the earliest possible time. Complementary protection would be offered to people who would face 'a substantial violation of their human rights if returned to their country of origin'. This could include people who:

- have no nationality or right of residence elsewhere;
- would face torture if returned to their country of origin;
- come from countries where their lives, safety or freedom is likely to be threatened by the indiscriminate effects of generalised violence, foreign aggression or internal conflict;
- come from countries where there is significant and systemic violation of human rights and/or a breakdown in the rule of law; and
- would face serious human rights violations if compelled to return.[86]

4.106 The introduction of this model would require an amendment to paragraph 36(2)(b) of the Migration Act to include a new section which would set out the criteria for the grant of a visa, introduce a new visa subclass, set out any necessary limitations, and stipulate that nothing in this section removes or otherwise affects the exercise of the Minister's discretion. It would also require a new regulation to set out the framework for the grant of a visa on the grounds of the need for complementary protection and the rights and entitlements afforded to successful applicants.[87]

4.107 It was argued that adoption of this model would have the following benefits:

- bring Australia into line with international best practice;[88]
- ensure compliance with Australia's international obligations and commitments;
- result in consistency between Australian policy with respect to onshore and offshore refugees;[89]
- result in significant cost savings for determination bodies and also reduce welfare payments to asylum seekers as well as detention costs;[90]

86 Refugee Council of Australia, *Submission 148*, Attachment A, p. 17.

87 Refugee Council of Australia, *Submission 148*, Attachment A, pp 19-20.

88 It is understood that, for example, Canada, the United States and all the countries in the European Union have introduced complementary protection measures whereby claims may be brought on non-Refugee Convention grounds.

89 Australia's Offshore Humanitarian Program provides for the grant of 'refugee' visas and special 'humanitarian' visas.

- enhance the efficiency and productivity of DIMIA and the RRT;
- make it easier for applicants to present their claims by reducing the perceived need for tenuous links between their fear of return and Refugee Convention grounds;
- ensure necessary transparency, accountability and consistency in decision-making;
- reduce the burden on the Minister for Immigration and enable the Minister's discretionary powers to used for the exceptional cases for which they were intended;
- ensure that those entitled to Australia's protection receive it in a timely fashion and thereby enhance their ability to become productive members of the Australian community;
- enable detained asylum seekers to have all relevant claims considered simultaneously and thereby reduce the duration and trauma of detention;
- benefit Convention refugees by feeing up the determination processes;
- benefit TPV holders by enabling a more thorough examination of the implications of changed country circumstances when applications for a further TPV are being considered; and
- reduce the incentive for people to abuse the protection application process to extend their stay in the country as decisions will be made faster.[91]

4.108 This view was shared by other witness and submitters, such as the LSSA. It considered that such:

> … reform would have numerous benefits including ensuring Australia meets the full extent of its human rights obligations, reducing the burden on the Minister, DIMIA and review bodies through the use of a more efficient determination process, reducing the length of time asylum seekers spend in

90 The Refugee Council of Australia referred to a case study of a family with six members granted a protection visa after Ministerial intervention. They had been in detention for four years. The cost of detention for the family for four years would have been in the order of $1.2million (based on $140 per person per day). Had it been possible to make a decision on their need for protection at the primary determination stage, they may have been released within six months of arriving. Detention for 6 months would have cost about $150,000, a saving to the taxpayer of over $1million. This does not include additional savings in determination and health costs. Refugee Council of Australia, *Submission 148*, Attachment A, p. 13.

91 Refugee Council of Australia, *Submission 148*, Attachment A, pp 18-19. See also Refugee Council for Australia, *Complementary Protection – A New Model for Australia*, pp 11-12.

> detention, and affording applicants a more acceptable level of due process and the safety net of a reviewable decision.[92]

3.1 The committee was advised that the Uniting Church also supported the move to a system of complementary protection:

> … which would cover the assessment of cases which might trigger our obligations to protect under international treaties other than the refugee convention. These are predictable claims, not obscure and exceptional claims as would be appropriate for consideration under the powers of Ministerial discretion.[93]

4.109 The LSSA recommended the retention of Ministerial discretion 'as a mechanism for use in exceptional cases'. However, the LSSA considered that, unlike the present process which requires all avenues of appeal be completed before a request can be made, a request for Ministerial discretion should be permitted at any time during the assessment and determination process.[94]

4.110 It was put to the Committee that adoption of the above-mentioned complementary protection model would not prompt a flood of applications as it is merely a transfer of existing decision making power from the Minister to officials. Moreover, vexatious or frivolous applications can be prevented by codification of the relevant criteria and by incorporating appropriate safeguards.[95]

4.111 The committee notes that successive Governments have not supported the introduction of a system of complementary protection. DIMIA, maintains that current Australian arrangements are adequate. It said:

> … provide a range of mechanisms to provide continued lawful stay in Australia on general humanitarian grounds with considerable flexibility to respond appropriately to individual circumstances. It is not possible to anticipate and codify all human circumstances. Accordingly, the Ministerial intervention power plays a significant additional role in providing the capacity to flexibly and compassionately respond to other exceptional individual circumstances where there are public interest grounds in providing some form of continued stay in Australia. At the same time the migration framework allows the Government to develop regulations as

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92 LSSA, *Submission 110*, p. 14. See also comments of Ms Eszenyi of the LSSA, *Committee Hansard,* 26 September 2005, p. 4. Ms Thea Birss of the RASSA advised the Committee that they supported the recommendation of the LSSA for the creation of a complementary protection visa: *Committee Hansard,* 26 September 2005, p. 14.

93 Reverend Poulos, *Committee Hansard,* 29 September 2005, p. 31.

94 LSSA, *Submission 110*, p.15.

95 Refugee Council of Australia, *Submission 148*, Attachment A, p. 13.

> necessary tailored to the particular circumstances of new groups as the need arises.[96]

4.112 DIMIA also highlighted the potential cost of moving towards a complementary protection regime:

> It is not clear why it is expected that the introduction of some form of complementary protection in Australia would deliver cost savings. A parallel visa system for complementary protection with full merits and judicial review available and with broad eligibility criteria, is likely to attract a wider class of applicant and therefore larger numbers of applicants, most of whom may not be eligible, with corresponding increased costs.[97]

4.113 DIMIA advised that it has not conducted any studies into the feasibility of introducing a system of complementary protection. Nor has it done any assessment of whether the introduction of a complementary protection process would reduce the amount of immigration litigation that DIMIA was involved in.[98]

4.114 The lack of evidence that there are significant numbers of persons entitled to CAT, ICCPR or CROC protection who do not also meet the Refugee Convention definition of a refugee has also been cited as reason for maintaining the status quo.[99]

4.115 DIMIA's response to concerns over the nature of the Ministerial powers and the lack of accountability and transparency was to note the exceptional nature of the powers:

> The section 417 intervention power enables the Minister to act in exceptional circumstances to grant a visa, in the public interest, to a person who does not meet the normal legislative requirements for a visa grant, including after testing the initial decision at review. Migration legislation sets out the requirements for the Minister to report to Parliament on the use of her power.[100]

4.116 In response to concerns over the delays and uncertainties experienced by applicants, DIMIA maintained that, given the exceptional nature of the power, it was unreasonable for applicants to expect that the Minister will necessarily use her intervention power in their case.[101]

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96 DIMIA, 'Complementary Protection and Australian Practice', in UNHCR, *Complementary Protection*, Discussion Paper No. 2, 2005, p. 8.

97 DIMIA answer to Questions on Notice, 11 November 2005, p. 54.

98 DIMIA answer to Questions on Notice, 11 November 2005, p. 54.

99 DIMIA, 'Complementary Protection and Australian Practice', in UNHCR, *Complementary Protection*, Discussion Paper No. 2, 2005, p. 8.

100 DIMIA answer to Questions on Notice, 5 December 2005, p. 72.

101 DIMIA answer to Questions on Notice, 5 December 2005, p. 72.

Committee view

4.117 The committee notes that the issues in relation to the Minister's discretion have been identified in a number of inquiries as deserving of serious review. The most comprehensive of these inquiries was conducted by the Senate Select Committee on Ministerial Discretion in Migration Matters, which tabled its report in March 2004. The committee generally supports the recommendations made in that report.[102]

4.118 However, to date the Government has chosen to ignore the recommendations made by these inquiries.

4.119 If at the end of the day the Government intends to honour Australia's obligations under international treaties and conventions such as CAT, CROC, and ICCPR, then it would make sense to provide for it upfront, rather than giving that responsibility to the Minister involved. Having said that, the committee understands that a minimum level of ministerial discretion is necessary to give the system a required degree of flexibility.

4.120 The committee considers that in a system based on the rule of law, in general, it is inappropriate that rights are discretionary, although it acknowledges that a sensible balance is required. In recent years that balance has swung too far towards Ministerial discretion. It believes that the recommendations made below will go a long way to achieving that better balance.

4.121 The Committee makes the following five specific recommendations:[103]

Recommendation 29

4.122 The committee recommends that coverage of the Immigration Application Advice and Assistance (IAAAS) scheme be extended to enable applicants for Ministerial intervention to obtain an appropriate level of professional legal assistance.

Recommendation 30

4.123 The committee recommends that each applicant for Ministerial intervention be shown a draft of any submission to be placed before the Minister to enable the applicant to comment on the information contained in the submission. This consultative process should be carried out within a tight but reasonable time frame to avoid any unnecessary delay.

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102 The recommendations are listed in Appendix 4, while the full report can be found at http://www.aph.gov.au/Senate/committee/minmig_ctte/report/index.htm

103 These recommendations are the same as those made on these issues by the Senate Select Committee on Ministerial Discretion in Migration Matters report of March 2004, pp. xxi - xxv.

Recommendation 31

4.124 The committee recommends that all applicants for the exercise of Ministerial discretion should be eligible for visas that attract work rights, up to the time of the outcome of their first application. Children who are seeking asylum should have access to social security and health care throughout the processing period of any applications for Ministerial discretion and all asylum seekers should have access to health care at least until the outcome of a first application for Ministerial discretion.

Recommendation 32

4.125 The committee recommends that the Minister ensure all statements tabled in Parliament under sections 351 and 417 (which grant the Minister the discretionary power to substitute more favourable decisions from that of the Tribunals) provide sufficient information to allow Parliament to scrutinise the use of the powers. This should include the Minister's reasons for believing intervention in a given case to be in the public interest as required by the legislation. Statements should also include an indication of how the case was brought to the Minister's attention by an approach from the visa applicant, by a representative on behalf of the visa applicant, on the suggestion of a tribunal, at the initiative of an officer of the department or in some other way.

Recommendation 33

4.126 The committee recommends that the Migration Act be amended to introduce a system of 'complementary protection' for future asylum seekers who do not meet the definition of refugee under the Refugee Convention but otherwise need protection for humanitarian reasons and cannot be returned. Consideration of claims under the Refugee Convention and Australia's other international human rights obligations should take place at the same time. A separate humanitarian stream should be established to process applicants whose claims are in this category, including a review process.

CHAPTER 5

MANDATORY DETENTION POLICY

Introduction

5.1 This chapter discusses the background to Australia's mandatory detention policy and whether it can continue to be justified as a proportionate and rational measure necessary to ensure the integrity of Australia's immigration program. The implementation of mandatory detention and options for reform are discussed more fully in Chapter 6.

History of the policy of mandatory detention

5.2 Australia's policy of mandatory immigration detention was introduced with bi-partisan support in 1992. Under sections 189, 196 and 198 of the Migration Act, all non-citizens unlawfully in Australia must be detained,[1] and kept in immigration detention until granted a visa or removed from Australia.[2] An unlawful non-citizen is any person who does not hold a valid visa.

5.3 In theory, the policy of mandatory immigration detention applies to everyone who arrives without a valid visa, including asylum seekers claiming protection; lawful entrants who have overstayed their visa; and people who have had their visa cancelled on various grounds and are liable to deportation. However, many witnesses argued that mandatory detention is aimed primarily at deterring unauthorised boat arrivals.[3]

5.4 Prior to 1992, the Migration Act made a distinction between unauthorised border arrivals and illegal entrants and deportees. Unauthorised boat arrivals were deemed to have not entered Australia, they were detained in open areas of migration centres but not permitted to leave the centre and had to report daily to the Australian Protective Service.[4] By contrast, 'illegal entrants' included those who entered Australia by deception or fraud, or had entered lawfully and subsequently overstayed their visa or breached visa conditions. This group were liable to be deported but could only be detained for 48 hours and then for periods of seven days with the permission of a magistrate.

5.5 In 1992, the *Migration Amendment Act 1992* introduced the policy of mandatory detention of 'designated' persons, which applied to people who arrived by

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1 Migration Act 1958, s. 189.

2 Migration Act 1958, s. 196, s.198 or s.199.

3 For example, Assoc. Professor Susan Kneebone, Castan Centre for Human Rights Law, *Submission* 71, p.2.

4 Millbank A., *The Detention of Boat People,* Current Issues Brief No.8 2000-01, Department of Parliamentary Library, 27 February 2001, p.2.

boat between 19 November 1989 to 1 September 1994, without authority to enter or remain in Australia.[5] The discretion to detain illegal entrants and deportees continued. The policy was expressed to be an 'interim measure' for a 'specific class of persons' to 'address only the pressing requirements of the current situation'.[6] It was generated by concern about the possibility of a large number of unauthorised boat arrivals and the need to maintain tighter control over the migration program.[7]

5.6 It was community concern about the length of detention endured by unauthorised boat arrivals that acted as a catalyst for the Joint Standing Committee on Migration inquiry into asylum, border control and detention (JSCM inquiry) in 1994.[8] During that inquiry many witnesses opposed mandatory detention on the grounds that it was intended to deter asylum seekers fleeing persecution arriving by sea and was likely to institutionalise lengthy periods of detention.[9] The then Department of Immigration and Ethnic Affairs (DIEA) argued that the upgrading of security arrangements in Australian migration centres was necessary to prevent escape and ensure that people without a lawful basis to remain in Australia were available to be removed.[10] The JSCM gave bi-partisan support for the principle of mandatory immigration detention but recommended that there should be capacity to consider release where the period exceeded six months.[11]

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5 Migration Act 1958, s. 177; the classification also applied to all non-citizen children born in Australia whose mother was a 'designated person'.

6 The Hon Gerry Hand, MP, Migration Amendment Bill 1992, Second Reading Speech, *House of Representatives Hansard,* 5 May 1992, p.2370.

7 Petro Georgiou MP, Second Reading Speech, Migration Amendment (Detention Arrangements) Bill 2005, *House of Representatives Hansard*, 21 June, 2005, p.63.

8 See JSCM, *Asylum, Border Control and Detention*, February 1994, p.32; Evidence to that inquiry indicated that as at 27 January 1994 of the 216 unauthorised boat arrivals held in detention 84 persons had been detained for less that 6 months; 1 for 8 months; 31 for 12 to 18 months; 6 for 18 to 24 months; 26 for 30 to 36 months, 2 for 36 to 42 months and 63 for 42 to 48 months.

9 JSCM *Asylum, Border Control and Detention*, February 1994, p.13.

10 DIEA evidence at that time revealed that 57 persons who had arrived by boat had escaped from detention between 1991 and October 1993. 25 unauthorised boat arrivals escaped in 1991 (7 of whom later returned voluntarily); 22 escaped in 1992 (6 were captured within a few hours of escape and nine returned voluntarily); 10 escaped in 1993 (three returned voluntarily). Of the individuals who were allowed to reside in the community while their refugee status applications were being determined, out of a group of 8,000 individuals who had been refused refugee status, some 2,171 persons (27%) remained unlawfully on Australian territory; see JSCM *Asylum, Border Control and Detention*, February 1994, p.31.

11 JSCM *Asylum, Border Control and Detention*, February 1994, p.xiv.

Migration Reform Act 1992

5.7 During the JSCM inquiry, major changes to the migration system were introduced by the *Migration Reform Act 1992*.[12] The various classifications of border arrivals, illegal entrants and deportees were replaced with a simple distinction between lawful and unlawful non-citizens.[13] Using the *Migration Amendment Act 1992* model, the amendments introduced by this Act required mandatory detention of all boat people, illegal entrants and deportees.[14] Consequently, mandatory detention, initially envisaged as a temporary and exceptional measure for a specific group of boat people, was extended to become the norm. Judicial supervision of the power of arrest and detention was removed. Although on its face the law applies uniformly to everyone without lawful authority to enter or remain in Australia, it has been argued that the primary target remained 'boat people'.[15]

5.8 Successive governments have maintained Australia's mandatory detention policy to ensure that:

- unauthorised arrivals do not enter the Australian community until their identity and status have been properly assessed and they have been granted a visa;
- unauthorised arrivals are available during processing of any visa applications and, if applications are unsuccessful, that they are available for removal from Australia; and
- unauthorised arrivals are immediately available for health checks, which are a requirement for the grant of a visa.[16]

Continuing rationale for mandatory detention

5.9 The number of unauthorised arrivals has fluctuated over time, but increased significantly toward the end of the 1990s. In September 2001, following the 'Tampa

12 The *Migration Reform Act 1992* commenced operation on 1 September 1994 under then Immigration Minister, Senator the Hon. Nick Bolkus.

13 See JSCM, *Asylum, Border Control and Detention*, February 1994, p.86 for detailed discussion of the *Migration Reform Act 1992.*

14 The relevant provisions, sections 189 and 196 commenced on 1 September 1994; see Hancock N., *Refugee Law – Recent Legislative Developments*, Current Issues Brief No.5 2001-02, 18 September 2001 p.6.

15 Millbank A. and Phillips J., *The detention and removal of asylum seekers*, E-Brief, Department of Parliamentary Library, 5 July 2005, p.2.

16 See for example, http://www.immi.gov.au/facts/82detention.htm

Crisis',[17] the policy of excision and offshore processing was introduced to combat the involvement of organised people smuggling networks in the transit of asylum seekers to Australia by boat.[18] Under the 'Pacific Solution' unauthorised boat arrivals arriving on excised places are diverted to processing centres on Nauru, Manus Province and Papua New Guinea (PNG) (declared third safe country). Over the last four years the number of unauthorised arrivals has declined significantly since its peak in 2001. See Table 5.1 below.

5.10 In September 2004, the Government recommitted itself to 'tough and well-resourced' border protection arrangements including 'retaining the policies of excision, offshore processing and mandatory detention that act as a powerful deterrent to unauthorised arrivals'.[19]

5.11 Table 5.1 shows the number of unauthorised arrivals in the last eight years.

17 In August 2001, the MV Tampa, a Norwegian container ship carrying 433 Afghan asylum seekers rescued from an Indonesian fishing vessel was refused permission to enter Australian waters or land the asylum seekers on Australian soil. See Chapter 1 – Border protection: A new regime, *Report of the Senate Select Committee on Certain Maritime Incident*, 23 October 2002, p.p.1-8, available at http://www.aph.gov.au/senate/committee/maritime_incident_ctee/report/c01.htm.

18 Since 2001 unauthorised arrivals on Christmas Island, Ashmore and Cartier Islands, the Cocos (Keeling) Islands and other prescribed places have been prevented from making a valid visa application unless the Minister determines that it is in the public interest to do so.

19 Joint Press Release, Attorney General The Hon Philip Ruddock and Minister for Justice and Customs, Senator The Hon Christopher Ellison, *Strengthening our Borders,* E 140/04, 27 September 2004.

Table 5.1: Number of vessels and number of unauthorised arrivals

Year	No. of vessels	No. of unauthorised arrivals
1997-98	13	157
1998-99	42	926
1999-2000	75	4,175
2000-01	54	4,137
2001-02	23	3,649
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.

The Palmer and Comrie inquiries

5.12 During 2005 the discovery of the mistaken detention of a permanent resident Ms Cornelia Rau, who has lived in Australia since she was 18 months old, focused attention on the Commonwealth Government's policy of mandatory immigration detention.[20] The *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* was established in February 2005 (the Palmer Report). The subsequent discovery of the unlawful detention and deportation of Australian citizen Vivian Alvarez Solon in 2001 resulted in an extension of the Palmer inquiry and a referral to the Commonwealth Ombudsman.

5.13 The Palmer Report criticised the handling of immigration detention cases, which it said suffers from serious problems stemming from deep seated cultural and attitudinal problems within DIMIA.[21] The report of the *Inquiry into the Circumstances*

20 See Prince P., *The detention of Cornelia Rau: legal issues*, Research Brief, Department of Parliamentary Services, 31 March 2005, no.14, 2005-05.

21 Mr M. Palmer, *Report on the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, 6 July 2005,p. xi.

*of the Vivian Alvarez Matter, report No. 3 of 2005 (*the Comrie Report*),* reached broadly similar conclusions.

5.14 The Palmer and Comrie reports provided the impetus for a re-examination of the mandatory detention policy. While the focus of these inquiries was the illegal detention of a permanent resident and an Australian citizen, it revealed serious and persistent problems in the treatment of vulnerable persons. In particular, public concern was voiced about the mental health effects of indeterminate detention of asylum seekers and the indefinite detention of people who cannot be removed.[22]

Recent changes to mandatory detention policy

5.15 On March 2005, in response to calls for the release of long term detainees, the Minister for Immigration, Multicultural and Indigenous Affairs, announced 'new measures to manage the cases of long term immigration detainees' who are not found to be refugees and where 'the Minister believes it is not reasonably practicable to achieve removal in the short term and where the detainee undertakes to co-operate fully with removal from Australia once that becomes practicable.'[23]

5.16 These measures created a new class of bridging visa, known as the Removal Pending Bridging Visa, which are said to allow for greater flexibility in managing the cases of long term detainees who are awaiting removal but cannot be removed for various reasons. Regulations creating the new visa were introduced on 11 May 2005.[24]

5.17 The new bridging visa is not available to detainees with current visa applications, or who are challenging a decision, either through review or courts. And a detainee cannot apply for a Removal Pending Bridging Visa unless they are first invited to do so by the Minister. Detainees receiving the Removal Pending Bridging Visa are released into the community and have access to the same limited social support benefits as Temporary Protection Visa holders, i.e. work rights, access to Medicare benefits and various welfare payments. The new bridging visa does not allow family reunion and does not provide re-entry rights if the holder leaves Australia. A Removal Pending Bridging Visa can be ceased when removal can be arranged and the holder is required to report regularly to DIMIA. Access to the visa is not merits reviewable.

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22 The Member for Kooyong, Mr Petro Georgiou's, undertook in May 2005 to introduce private members Bills, which would have effectively ended indefinite detention of asylum seekers; limited detention to 90 days for new asylum seekers, with access to judicial review; families with children would not have been detained; and all long term detainees of 12 months or longer would have been released into the community. The Migration Amendment (Act of Compassion) Bill 2005, and Migration Amendment (Mandatory Detention) Bill 2005 were introduced into the Senate on 16 June 2005 by Greens Senator Kerry Nettle: See Millbank A. and Phillips J., *The detention and removal of asylum seekers*, E-Brief, Department of Parliamentary Library, 5 July 2005, p.1.

23 http://www.minister.immi.gov.au/media_releases/media05/v05046.htm.

24 Migration Amendment Regulations 2005 (No.2) (SLI No. 76 of 2005).

5.18 Further calls for a review of the mandatory detention policy and an easing of conditions in detention followed the Palmer Inquiry. On 17 June 2005 the Prime Minister announced changes that were said to preserve the broad framework and principle of mandatory detention but 'with a softer edge'. The *Migration Amendment (Detention Arrangements) Bill 2005* was introduced by the Minister for Citizenship and Multicultural Affairs, the Hon, Mr Peter McGauran MP. In summary, the amendments provide for:

- Parliament's affirmation as a matter of principle that a minor shall only be detained as a measure of last resort;
- an additional non-compellable power for the minister to specify alternative arrangements for a person's detention and conditions to apply to that person. This is intended to allow families with children to be placed in community detention arrangements with conditions being set to meet their individual circumstances;
- extending the ministers non-compellable discretionary powers to allow release from immigration detention, through the grant of a visa where the Minister believes this is appropriate, including a removal pending bridging visa; and
- require DIMIA to report to the Commonwealth Ombudsman when a person has been detained for 2 years, and every 6 months thereafter that the person is in detention. The Ombudsman's assessment and recommendation are to be tabled in Parliament.[25]

5.19 During the second reading speech, Mr McGauran said:

> The broad framework of the government's approach is unaltered. It is essential that we continue to have an orderly and well managed migration and visa system. The government remains committed to its existing policy of mandatory detention, its strong position on border protection, including excision, the maintenance of offshore processing and in the unlikely event of it being needed in the future – the policy of turning boats around. These changes also represent the responsiveness of this government in taking opportunities to see that out existing detention policy is administered with greater flexibility.

5.20 In addition, all primary protection visa applications must be decided by DIMIA within three months of receipt of the application and review by the RRT must also occur within three months. Periodic reports of cases where these time limits have not been met must be made to the Minister, who will table the reports in the Parliament.[26]

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25 Second Reading Speech, House of Representatives Hansard, 21 June 2005, p.2; see also Millbank A. and Phillips J., *The detention and removal of asylum seekers*, E-Brief, Department of Parliamentary Library, 5 July 2005, p.1.

26 Second Reading Speech, House of Representatives Hansard, 21 June 2005, p.3.

Initial responses to recent reforms

5.21 HREOC acknowledged the amendments are a positive move in addressing some of its concerns but believed that the measures do not go far enough. They said:

> …in contrast to the recommendations made in *Those who've come across the seas* and *A last resort?*, the amendments do not create enforceable rights and depend entirely upon an exercise of Ministerial discretion. The Commission considers that, as a consequence, Australia is not meeting its obligations to provide 'effective remedies' for violations of human rights. The Commission considers that those obligations are best met by providing that the ongoing appropriateness of detention be periodically reviewed by a Court empowered to order release on the grounds discussed …in *A last resort?*[27]

5.22 HREOC went on to say that the amendments do nothing to alter the power of the Commonwealth to subject a person, who cannot be removed from Australia, to 'indefinite detention' under the Migration Act. And that like the Residential Housing Projects and the home-based detention arrangements, 'the use of the power to specify 'alternative arrangements' still involves a form of detention, the conditions of which will be specified by the Minister.'[28] In other words, 'alternative arrangements' is an alternative *form* of detention not an alternative to detention.

5.23 HREOC also pointed to the possible inconsistency between the statutory obligation to only detain children as a measure of last resort in the recently inserted subsection 4 AA (1) of the Migration Act which is qualified by subsection 4 AA(2), which states that:

> For the purposes of subsection (1), the reference to a minor being detained does not include a reference to a minor residing at a place in accordance with a residence determination.

5.24 HREOC argued:

> That approach is inconsistent with the broad meaning of detention accepted in international law.[29]

Review of detention of two years or more by Commonwealth Ombudsman

5.25 Under the new section 486L of the Migration Act, as amended, where a person has been in detention for two years or more, DIMIA is required to report that case to the Commonwealth Ombudsman and provide a report on that person every six months. The Ombudsman will review the facts and provide an assessment and recommendation to the Minister, who must table the assessment in Parliament.

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27 HREOC, *Submission 199*, p. 4.

28 HREOC, *Submission 199*, p. 5.

29 See e.g. *Amuur v France* (1992) 22 EHRR 533 referred to in HREOC *Submission 199*, p.5.

5.26 The committee welcomes the statutory requirement for regular independent monitoring and the tabling of the Ombudsman's report in Parliament. This new mechanism will increase transparency and accountability in relation to people in long term immigration detention and should promote a greater internal discipline in DIMIA's case management. The Ombudsman has significant powers to obtain information and enter departmental premises.

5.27 However, a number of concerns were raised that should be taken into account when assessing whether review of this nature is sufficient as an ongoing safeguard against arbitrary or inhumane detention. For example, Amnesty International argued that the duty to report does not commence until a person has been held for a period of 2 years, which:

> …is excessively long considering that the initial detention of a person is not subject to review or investigations, and the mounting evidence that detainees who are in prolonged or indefinite detention have a high risk of mental illness.[30]

5.28 It was also noted that the recommendations of the Ombudsman are advisory only. Subsection 486O (4) provides that:

> The Minister is not bound by any recommendations the Commonwealth Ombudsman makes.

5.29 This is consistent with the advisory role of the Ombudsman but highlights what some witnesses regard as the limits of administrative rather than judicial supervision of individual cases.

5.30 In a recent information bulletin the Ombudsman reported that:

- 17 reports and statements for tabling had been provided to the Minister;
- 93 current and former detainees have been interviewed by Ombudsman staff:
- assessments of 40 people who have been in detention for two years or more at 29 June 2005, and who remain in detention, are being prioritised for completion.[31]

5.31 The Ombudsman has reported that the Minister has tabled the first 2 reports with her response.

> In response to the first person, he voluntarily returned to his home country due to family problems and in respect of the second person, the

30 Amnesty International Australia, *Submission 191* p.5

31 Commonwealth Ombudsman, Information Bulletin 6, 14 December 2005; section 486O of the *Migration Act 1958* requires the Commonwealth Ombudsman, upon receipt of a report from the DIMIA, to provide the Minister with an assessment of the appropriateness of the arrangements for the detention of a person who has been in detention for two years or more.

> Ombudsman suggested a permanent visa but before the Ombudsman report was provided to the Minister, a temporary protection visa was granted[32].

5.32 The Ombudsman also reported that many people who are subject to an assessment have been granted various visas and released from detention before their assessment are completed. This is encouraging. However, the Committee is concerned about the implications for the workload of the Ombudsman's office as assessments involve a substantial amount of work – researching the detainee's circumstances; seeking further information, explanations and obtaining files from DIMIA; consulting detainee's representatives and discussing potential recommendations.[33]

5.33 The Ombudsman also reported that a significant number of draft assessments provided to the Ombudsman required substantial re-working because of changes to the detainee's circumstances, which in turn changes the priority for completing assessments.

5.34 The effective implementation of new section 486L relies on DIMIA providing prompt up to date information to enable assessments to be conducted efficiently. Timely and accurate information on changes or likely changes to a detainee's circumstance is critical to the effective discharge of the Ombudsman new role.

5.35 Moreover, although the role of the Ombudsman under section 486L is narrowly circumscribed, the potential caseload is substantial and likely to grow significantly over the next two years based on current figures (see above). The Ombudsman reported that:

> As at 29 June 2005, when this function commenced, there were 149 people who had been in detention for more than two years on whom reports were to be prepared by DIMIA for the Ombudsman no later than 29 December 2005. During the first six months as many as 50 other people in detention will become subject to this reporting obligations.[34]

5.36 The committee notes a potential further 67 assessments for people, detained between 12 to 18 months at the time of the inquiry, will become subject to the reporting obligation in the first half of 2006. The requirement for 6 monthly reports to the Ombudsman on each person who remains in detention beyond the 2 year period will also add to the assessment workload.

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32 Commonwealth Ombudsman, Information Bulletin 6, 14 December 2005.

33 Commonwealth Ombudsman, Information Bulletin 6, 14 December 2005, p.2.

34 *Covering Statement by the Commonwealth Ombudsman to the Minister for Immigration and Multicultural and Indigenous Affairs Concerning Reports under s.486O of the Migration Act 1958*, 12 October 2005 in the Commonwealth Ombudsman, *Information Bulletin 6*, 14 December 2005

Criticisms of the policy

5.37 In looking back over the thirteen years since mandatory detention was introduced, it is evident that it has been and remains, one of Australia's most controversial policies. Strong and sustained debate over the policy has led, as outlined above, to ongoing evolution of its application. Over this time, three key criticisms consistently emerge:

- The effectiveness of the mandatory detention
- The legality of the mandatory detention
- The indeterminate nature of mandatory detention.

Effectiveness of mandatory detention

5.38 As described above, the central rationale for mandatory detention has been the preservation of Australia's border control measures and the creation of a deterrent against unauthorised arrivals. The use of temporary detention of arrives during the determination of health and security checks has generally been only a secondary consideration.

5.39 However, the extent to which the decrease in unauthorised boat arrivals can be attributed to mandatory detention is open to debate. For example, Professor Maley disputes the claim that mandatory detention is a deterrent. He states:

> …there is simply not a shred of credible evidence that Australia's polices have actually deterred… The key marker of this is to be found in DIMIA's own data on boat arrivals. The current system of mandatory detention was introduced in 1992 by the ALP (with the complicity of the Coalition). In 1991-1992, three boats arrived, with 78 people. In the following year, the number of people who arrived by boat more than doubled, and by 1994-95, the number had reached 1071… The message should be obvious: it is overwhelmingly the situation in refugees' country of origin (push factors), and the situation en route to Australia (transit factors) that determine the flow of refuges to Australia. These factors account for the cessation of refugee flows since late 2001.[35]

5.40 It is notable that Australia's experience is consistent with the downward global and regional trends in asylum requests.[36] Recent UNHCR analysis indicates a significant fall in asylum applications in Europe and other non-European industrialised countries since its peak in 2001. In 2004, in 50 industrialised countries, the number of asylum requests fell by 22 per cent and since 2001 have dropped by 40

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35 Professor William Maley, Director Asia-Pacific College of Diplomacy, ANU, *Detention: Government's policy has been built on a myth*, Australian Policy Online, 15 June 2005, p.2 available at http://www.apo.org.au.

36 *Asylum Levels and Trends in Industrialised Countries, 2004: Overview of Asylum Applications Lodged in Europe and Non-European Industrialised Countries in 2004*, Population Data Unit, UNHCR, Geneva, 1 March 2005.

per cent.[37] The largest fall in asylum requests since 2001 was reported by non-European industrialised countries – Canada and the USA received 48 per cent fewer requests in 2004 than 2002, while asylum levels in Australia and New Zealand fell by 74 per cent. The report also notes that:

> The number of asylum seekers from Afghanistan and Iraq continued to drop sharply in 2004. Afghan asylum applications have fallen by 83 per cent since 2001, while Iraqi asylum requests have dropped by 80 per cent since 2002.[38]

5.41 This evidence suggests that factors other than mandatory detention are likely to have been the biggest influence on boat arrivals to Australia over the past five years.

5.42 Some witnesses also argued that the largest number of onshore asylum applications are lodged by people who arrive on short term visas and subsequently seek asylum. It was therefore suggested that the rationale for detention – to prevent escape and disappearance into the community and availability for removal – is difficult to sustain in the face of this evidence.

5.43 Information provided by DIMIA confirms that the largest proportion of asylum claims are initiated by people who arrive with a visa. The number of initial applications for protection from people held in immigration detention centres was less than half of the total onshore claims in 1999-2001, when the number of asylum requests was at its peak. Protection requests from immigration detainees have declined as a proportion of total onshore claims as the number of unauthorised arrivals has continued to decline. By contrast the proportion of visitor visa holders applying for protection visas after they arrive in Australia has remained relatively stable.[39]

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37 The EU recorded 19 per cent fewer applications; North America 26 per cent fewer and Australia and New Zealand registered 28 per cent fewer asylum requests in 2004 than 2003.

38 *Asylum Levels and Trends in Industrialised Countries, 2004: Overview of Asylum Applications Lodged in Europe and Non-European Industrialised Countries in 2004*, Population Data Unit, UNHCR, Geneva, 1 March 2005, p.3.

39 The Department's 2004-05 annual report records a small decline from 0.07 per cent in 2003-4 to 0.06 per cent in 2005-05.

Table 5.2: Protection Visa Applications 1999-00 to 2004-05 as at 30 June 2005

Program Year of Lodgement	All Applications	All Detainees
1999-00	11,653	5,033
2000-01	12,540	5,122
2001-02	9,235	3,166
2002-03	5,023	612
2003-04	3,567	322
2004-05	3,105	88

Source: Outcomes Reporting Section Report ID 376 ICSE Extract 30 June 2005

5.44 Obtaining information about the number of long term detainees is not always straight forward.[40] During the inquiry DIMIA provided the following breakdown of the number of detainees and periods of detention current at that time:

- 422 people less than three months (43 per cent)
- 99 people three to six months (13 per cent)
- 119 people six to 12 months (16 per cent)
- 67 people 12 to 18 months (9 per cent)
- 49 people 18 months to 2 years (7 per cent)
- 92 people more than 2 years (12 per cent).

5.45 The Commonwealth Ombudsman reported that DIMIA has advised that at least three people had been held for more than three years, including two people for longer than five years.[41] The committee was unable to test the accuracy of that figure.

5.46 A recent Ministerial press statement indicates that the profile of detainees in Australian immigration detention centres has changed significantly over the past five years. As at 21 December 2005, the number of people in detention is the lowest since 1999 (except illegal foreign fishers). The decline in the arrival of unauthorised arrivals is the major contributing factor to the overall reduction in detention figures.

5.47 On 26 December 2005, the Minister reported that of 535 people in immigration detention, only 16 were unauthorised boat arrivals and a further 76

40 In June 2005 it was reported to the Parliament that 300 people, including children, had been in immigration detention for over one year and about 80 of them had been in detention for four years or more; Mr Georgiou MP, Migration Amendment (Detention Arrangements) Bill 2005, Second Reading Speech, *House Hansard*, p.63.

41 Response to question on notice 7 October 2005

detainees are living in the community under residence determinations (community detention), including 40 children.[42]

> Less than 30 per cent of detainees are actually seeking asylum. At this time only 26 people had primary protection visa applications before the department. Most asylum seekers arrive in Australia with a valid visa and live in the community while they pursue their claims.[43]

5.48 The Committee is encouraged by the overall reduction in the number of people in immigration detention centres[44] but remains concerned about the prolonged detention of detainees, especially in relation to people:

- claiming asylum and awaiting the outcome of reviews and appeals;
- those who have been unsuccessful in their claim for refugee status and await an exercise of ministerial discretion to grant a visa on humanitarian grounds; and
- those who await deportation but cannot be removed for various reasons.

Indeterminate nature of mandatory detention

5.49 The often lengthy and indeterminate nature of immigration detention, especially of unauthorised boat arrivals, emerged as a central theme of the inquiry. Some witnesses argued that prolonged loss of liberty could rarely be justified on the basis of, for example, the risk of flight.[45]

5.50 It was also said that the immigration detention had taken on an increasingly punitive character, exacerbating the adverse effects of detention. Some of the legislative changes that reflect a hardening of the detention policy include:

- the removal of the statutory right of HREOC and the Commonwealth Ombudsman to initiate confidential contact with people held in immigration detention;[46]

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42 *Few Detainees Prove Immigration Policies Working Well,* Media Release, Senator Amanda Vanstone, Minister for Immigration and Multicultural and Indigenous Affairs, 26 December 2005, available at http://www.minister.immi.giv.au/media_releases/media-5/v05160.htm.

43 *Few Detainees Prove Immigration Policies Working Well,* Media Release, Senator Amanda Vanstone, Minister for Immigration and Multicultural and Indigenous Affairs, 26 December 2005, available at http://www.minister.immi.giv.au/media_releases/media-5/v05160.htm.

44 Senator Amanda Vanstone, Minister for Immigration and Multicultural and Indigenous Affairs *Few Detainees Prove Immigration Policies Working Well,* Media Release, 26 December 2005, available at http://www.minister.immi.giv.au/media_releases/media-5/v05160.htm.

45 See for example, Mr Wall de Gallo, *Submission 6*, p.1; Mr D. Bennett, *Submission 7*, p.1; Ms L. Nasir, *Submission 9*, p.1.

46 The committee notes that amendments to the *Migration 1958* on 30 November 2005 now enable the Ombudsman to contact an immigration detainee where that person has not made a complaint to the Ombudsman.

- clarification that officers of the Department are under no duty to give visa applications to unauthorised boat arrivals unless a request is made by the detainee;
- increases in the penalty for escaping from immigration detention introduction of and new offences manufacturing or possessing weapons have been introduced;[47]
- introduction of a regime for strip searching immigration detainees and security monitoring provisions governing visitors to detention centres;[48]
- preventing court orders for release.[49]

5.51 Many witnesses equated immigration detention to imprisonment, but lacking the minimum standards applicable to criminal detainees.[50] The emphasis on security, the use of high fences, uniformed guards, handcuffs and behaviour management techniques were regarded as more appropriate to correctional facilities than administrative detention, especially of asylum seekers. The committee notes that the Palmer Report described Baxter as a 'correctional style facility':

> It is surrounded by a strong, high steel picket fence inside which is a perimeter fence topped with electrified wires. It looks like a prison. In many ways, the activities that occur in Baxter are similar to those in any Australian correctional institution; the untrained observer could not tell the difference. Baxter is effective in its purpose of containment.[51]

5.52 DIMIA has made efforts to improve immigration detention – the closure of Woomera in April 2003 is one example. In response to ongoing public concern about the effects of the detention on children, other changes to detention policy have been implemented.[52] The Woomera Residential Housing Project was established in August 2001 to enable eligible women and children to live in family style accommodation at Woomera, while remaining in immigration detention. In 2003 the Woomera RHP closed and residents were accommodated at the new Port Augusta RHP. A new RHP in Port Hedland also opened on 18 September 2003.

5.53 Nevertheless, the adverse mental health effects of indeterminate and lengthy detention remains a serious and persistent issue of public concern and raises important

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47 *Migration Legislation Amendment (Immigration Detainees) Act 2001*.

48 *Migration Legislation Amendment (Immigration Detainees) Bill (No. 2) 2001*.

49 *Migration Amendment (Duration of Detention) Act 2003; see also* Millbank A. and Phillips J., *The detention and removal of asylum seekers*, E-Brief, Department of Parliamentary Library, 5 July 2005, p.2.

50 See Chapter 6 for discussion on prison like conditions and practices.

51 Mr M. Palmer, *Report on the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, 6 July 2005, p. xi.

52 Phillips J., Lormier C., *Children in Detention*, E Brief, Department of Parliamentary Library, 23 November 2005, p.4.

questions about Australia's legal and moral obligations toward non-nationals. The Palmer Report confirmed that for detainees in Baxter:

> … the worst punishment was seen to be the open-ended nature of their detention and the fact of detention itself. Everything was done for them and they felt useless. As one detainee put is, 'It is like dying from the inside'.[53]

5.54 During the inquiry Mr Burnside QC said:

> The mistreatment that is associated with indefinite mandatory detention is not really difficult to identify. For people who have not committed an offence, to be locked up indefinitely for months or years, and in particular without knowing how long the detention will continue, is a torment the consequences of which have been thoroughly documented by the medical profession. That is the largest problem – the fact that they do not know when, if ever, they are going to be released.
>
> …the fact that the act allows lifetime detention of an innocent human being is pretty disturbing and, I would say, represents world's worst practice, and the fact that it can only be brought to an end by the uncompellable, unreviewable discretion of an individual is also disturbing.[54]

5.55 It is in this context that many witnesses challenged the ethics of mandatory detention. The concerns of many witnesses were reflected by Ms McKerney, a founding member of Rural Australians for Refugees:

> The Australian government says that this [migration detention] is used as a deterrent to stop other asylum seekers coming here and that this policy has succeeded in greatly reducing numbers. But it is morally wrong to use the destruction of innocent people's lives as a deterrent to others. There are ways to protect Australian borders other than locking asylum seekers up for long periods.

5.56 Mr Burnside QC also questioned the morality of using detention as a deterrent. He commented:

> My concern in the matter, from first to last, is a moral concern, which is simply this: in my view – and I think it is not a difficult view to hold – it is morally reprehensible to mistreat innocent people as an instrument of government policy in order to deter other people from behaving in particular ways. The system of mandatory detention, as it is designed and as it has been implemented, does precisely that. It involves the mistreatment of innocent people in order to deter other people from behaving in particular ways. Innocent people are simply being used and mistreated as instruments of policy.[55]

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53 Mr M. Palmer, *Report on the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, 6 July 2005, p. 58.

54 *Committee Hansard*, 27 September 2005, p. 44.

55 *Committee Hansard*, 27 September 2005, p. 44.

5.57 The detrimental effects of the isolation imposed by the use of remote locations, especially on young people was said to compound the problem.[56] For example, the Woomera Lawyers Group argued that:

> the location of our detention centres in remote outback areas is part of a policy of deterrence … I cannot see any reason for people to be detained so far away from centres where there are facilities available to deal with some of the issues that arise.'[57]

5.58 Like many witnesses, Mr J. Peter advocated that mandatory detention should be re-examined:

> for it's impact on detainees, the prison staff and the civil society of Australia – and it's 'cost effectiveness' should be looked at, in comparison to less draconian methods.[58]

5.59 Throughout the inquiry critics of the policy maintained that prolonged detention for an indeterminate period is inhumane and the lack of legal safeguards is antithetical to the rule of law in a democratic society.

The legality of mandatory detention

5.60 Some witnesses argued that many of the problems associated with immigration detention are embedded in the law itself and that the prolonged and indeterminate detention is inconsistent with international law and practice.[59]

5.61 It is accepted as a fundamental legal principle of Australian law and international law, that as an incidence of national sovereignty, the State may determine which non-citizens can gain entry to Australia, the conditions under which those non-citizens are admitted or permitted to remain, and the conditions under which they may be deported or removed.[60] That said, there is no legal impediment to the exercise of national sovereignty consistent with international obligations or minimum standards necessary to preserve human dignity. The movement of people across national borders fleeing persecution, civil war or for economic reasons is a global phenomena. Australia shares, with other nation states, binding obligations under international customary and treaty law in relation to refugees and the treatment of non-citizens generally.

5.62 At the domestic level *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (the Lim case), is leading authority for the principle

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56 See for example, Mr R. Monson, *Submission 14*, p.1

57 *Committee Hansard*, 26 September 2005, p. 50.

58 Mr. J. Peter, *Submission 3*, p.1

59 See for example, Castan Centre for Human Rights Law, Submission 71, p.2.

60 *Robtelmes v Brenan* (1906) 4 CLR 395; JSCM, *Asylum, Border Control and Detention*, February 1994, p.11.

that sovereignty confers on the Executive the authority to detain a non-citizen for the purposes of expulsion or deportation, to receive, investigate and determine an application for an entry permit, and, after that determination, to admit or deport that non-citizen.[61] Provided the detention is 'reasonably necessary' to achieve this purpose the detention is within power. Since the decision in the Lim case it has been accepted that the constitutional basis or source of power for the Act, is the naturalisation and aliens' head of power (s.51 (xxvii)).

5.63 However, Associate Professor Kneebone argued that the 'citizen – alien dichotomy' has led to a belief that different standards can be applied to someone who cannot establish that they are a citizen. Consequently, the Migration Act is framed entirely in terms of the control of aliens and reflects an ingrained sense of a lack of State responsibility for the treatment of 'non-citizens'.[62]

5.64 In 2004 the High Court declared that failed asylum seekers who cannot be returned to their country of origin or another country and who pose no danger to the community, can be kept in immigration detention indefinitely. In *Al Kateb v Godwin*[63] and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji*, the majority of the High Court said that provided the Immigration Minister retained the intention to eventually deport such people, the detention would be valid even if it was potentially indefinite.[64]

5.65 The 2004 decisions were criticised by some witnesses, especially in light of evidence of the detrimental effects of long term detention on health and wellbeing.[65] For example, Mr J Peter said that the 2004 decisions have 'highlighted the need for legislation that will make it unlawful to detain asylum seeks indefinitely and to hold children in mandatory detention'.[66] HREOC also argued that a law which authorises indefinite detention should not remain on the statute books.[67]

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61 Reported JSCM, *Asylum, Border Control and Detention*, February 1994, p.11.

62 See also Mr. N. Hitchcock, Fellow and former President, Migration Institute of Australia, *Committee Hansard* 28 September 2005, p.73.

63 (2004) 78 ALJR 1099, Gleeson CJ, McHugh, Hayne, Callinan and Heydon JJ, Gummow and Kirby JJ dissenting; [2004] HCA 38.

64 Prince P., *The High Court and indefinite detention: towards a national bill of rights?,* Research Brief, Department of Parliamentary Services, 16 November 2004, p.1.

65 See, for example, Ms R McKenry, *Submission* 2, p.3; *Submission* 71, p.4.

66 Mr. J. Peter, *Submission 3*, p.1.

67 HREOC, *Submission 199*, p. 5. See also Ms Rosemary McKenry, *Submission 2*, p. 3; Mr J. Peter, *Submission 3*, p. 1 and NSW Young Lawyers Human Rights Committee, *Submission 198*, p. 3.

United Nations guidelines on detention of asylum seekers

5.66 Australia has assumed responsibility to extend protection to asylum seekers and refugees through its accession on 22 January 1954 to the 1951 *Convention relating to the Status of Refugees* and the *1967 UN Protocol Relating to the Status of Refugees* (the Refugee Convention). The committee notes that the Executive Committee of the UNHCR provides guidance on accepted international practice, and although not binding under international law, reflects an international consensus of acceptable practice that has an important normative effect. UNHCR ExCom Conclusion 44 states that the circumstances in which it may be necessary to detain such persons include:

- To verify identify;
- To determine elements of a claim;
- To deal with cases where such persons have destroyed vital documents;
- To protect national security or public order.

5.67 Similarly, the *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (February 1999*)* (UNHCR Guidelines) state that 'As a general principle asylum-seekers should not be detained' (guideline 2) unless there are 'exceptional grounds for detention' (guideline 3) as outlined above.

5.68 Several submissions argued Australia's immigration detention policy and practice is also inconsistent with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT), International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on the Rights of the Child (CRC). The UN High Commissioner for Refugees said that:

> Australia's policy of mandatory detention of all asylum seekers arriving undocumented is not consistent with applicable international standards. While UNHCR recognises that mandatory detention was introduced as a mechanism seeking to address Australia's particular concerns related to illegal entry, using detention in this way requires the exercise of great caution to ensure that it does not serve to undermine the fundamental principles upon which the regime of international protection is based. Legitimate State security concerns must be addressed in a way that balances them with the rights of individuals, consistent with human rights instruments, including the Refugee Convention. In the particular case of refugees, their human suffering in fleeing persecution should not be exacerbated by their treatment upon arrival in the country of asylum.[68]

68 UNHCHR, *Submission 74,* p.3; For a more detailed statement of UNHCR's position in relation to detention see UNCHR's submission to the HREOC National Inquiry into Children in Immigration Detention, available at http://www.unhcr.org.au/pdfs/subinqchildimmi.pdf.

A v Australia

5.69 In 1993 a case concerning the prolonged detention of a Cambodian national was lodged under the first Optional Protocol to the ICCPR for consideration by the UN Human Rights Committee – a body of independent experts nominated by State parties to monitor the implementation of the ICCPR.[69]

5.70 In *A v Australia* it was argued, among other things, that A's detention between 25 November 1989 and 20 June 1993 (three years and 204 days)[70], although lawful under the *Migration Act 1958* was arbitrary and in violation of article 9.1 of the ICCPR. The UN HRC found that, while mandatory detention is not *per se* a breach of international law, the continued detention of A could not be justified in the circumstances of his case and found that Australia had breached its treaty obligation:

> It is established international legal principle that 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness, injustice and lack of predictability: Furthermore, remand in custody could be consider arbitrary if it is not necessary in all the circumstance of the case, for example, to prevent flight or interference with evidence; the element of proportionality becomes relevant in this context. The State party however, seeks to justify the author's detention by the fact that the entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left in liberty.[71]

5.71 The HRC observed that every decision to keep a person in detention should be open to periodic review so that the grounds justifying detention can be assessed:

> In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.[72]

5.72 The HRC also formed the view the provisions of the Migration Act, which prevents a court from releasing a person from detention, violates the right to a real and effective review of the lawfulness of detention by an independent court. The primary issue in dispute is the scope of judicial review. The inability of Australian courts to look beyond narrow legal questions and provide supervision of the merit of detention decisions was found to be inconsistent with the right of effective review enshrined in

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69 The HRC is the treaty monitoring body constituted under the ICCPR and responsible for overseeing the implementation of the ICCPR by State parties to the treaty.

70 Mr A was released from detention on 27 January 1994.

71 See also *Van Alphen v the Netherlands*: Views adopted on 23 July 1990, para.5.8.

72 *A v Australia* Communication No.560/1993 CCPR/C/59/D/560/1993. 9.3 available at http://www.bayefsky.com/docs.php/area/jurisprudence/treaty/ccpr/opt/0/state/9/node/5/type/finalview.

article 9.4 of the ICCPR. The HRC has reached the same conclusion in subsequent cases involving Australia.[73]

Reconciling Australian law and practice with universal minimum standards

5.73 The disparity between international and domestic law led some witnesses to advocate the introduction of a constitutional or statutory bill of rights.[74] An inquiry into the merits of a bill of rights is outside the scope of the present inquiry. However, the committee notes that unlike comparable jurisdictions such as the UK and Canada, Australian judges do not have a coherent set of minimum standards against which to assess the compatibility of Australian law or the conduct of public authorities.

5.74 Associate Professor Kneebone said:

> As numerous reports and decisions of international committees have now pointed out the effect of section 189 and 196 read together is to create a mandatory, non-reviewable system of detention which arguably breaches the right to freedom from arbitrary detention (ICCPR Article 9). This consequence of the reading of sections 189 and 196 together is also confirmed by decisions in which it has been held that the harsh conditions of detention *(Behrooz v Secretary, Department of Immigration* (2004) 79 CLD 176), or the fact that the children are detained in contravention of international human rights standards (Re Woolley) does not affect the (domestic) legality of the detention regime.

5.75 In her submission she said: the 'deep seated culture and attitudes' are embedded in the Migration Act itself and '…reflected in many of its provisions and hence in its administration and operation'.[75] This view was widely shared.

5.76 Associate Professor Kneebone also contrasted the Migration Act with the Canadian *Immigration and Refugee Protection Act 2002* (IRPA), which is drafted as 'framework legislation' with fixed principles in each part of the Act. She says that:

> It articulates key principles for the immigration and refugee protection programmes, including fundamental rights and freedoms. For example, it clarifies that persons can be arrested and detained for three principal reasons: identify, flight risk or danger to the public. It also set out the human rights framework for refugee protection and incorporates it into the legislation.[76]

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73 See for example, *Bakhtiyari v Australia*, Communication No. 1069/2002 UN Doc. CCPR/C/79/D/1069/2002 para.9.3; *C v Australia* Communication No. 900/1999 UN Doc. CCPR/C/76/D/900/1999 para.8.2; see also *Madafferi v Australia,* Communication 1011/2002 UN Doc. CCPR/C/81/D/1011/2001.

74 For example, Mr. J Peter, *Submission 3*, p.1.

75 Castan Centre for Human Rights Law, *Submission* 71, p.2.

76 Castan Centre for Human Rights Law, *Submission* 71, p.3.

5.77 The committee agrees with the general consensus that existing Migration Act provisions lack adequate safeguards to prevent detention for a period longer than justified by the facts of individual cases or that conditions of detention meet acceptable standards.

Alternatives to mandatory detention

5.78 There was a general consensus among organisations and individuals that mandatory detention may be necessary when an asylum seeker first arrives in Australia for the purpose of carrying out identity, health, character and security checks but that the time spent in detention should be strictly limited.[77] However, it was suggested that if mandatory detention is to continue then procedures need to be put in place to have detention decisions independently reviewed. The Commonwealth Ombudsman observed that there is a need for legislative clarification and amendment in relation to detention provisions, and that the attempts to limit the impact of judicial and tribunal review had led to a tightening of provisions.[78]

5.79 The South Brisbane Immigration & Community Legal Service Inc. suggested that continuing immigration detention should be subject to 'regular judicial or other independent scrutiny, initially within a month and then on a quarterly basis.'[79] The Catholic Migrant Centre recommended that:

> Migration detention of unauthorised arrivals who seek asylum be limited to a specific period of days (we suggest 45), after which a detainee should have the right to have their ongoing detention reviewed by a judicial body. The onus of proof should be on DIMIA to demonstrate that the ongoing detention of an asylum seeker is necessary in all the circumstances with due weight being given to the fact that the right to liberty is one of the most fundamental of all human rights.[80]

5.80 Mr Colin James Apelt said:

> There should be a presumption against detention of asylum-seekers who arrive without authorisation. Detention of an asylum-seeker should only be resorted to if it is necessary to verify their identity and/or to determine the basis for the claim for refugee status or asylum and/or to protect national security and public order and/or where the asylum-seeker has deliberately sought to mislead the authorities.

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77 Ballarat Refugee Support Network, *Submission 52*, pp. 1-2; Ms Rosalind Berry, *Submission 137*, p. 5; FECCA, *Submission 101*, p. 3; Great Lakes Rural Australians for Refugees, *Submission 150*, p. 2; Social Issues Executive Anglican Diocese Sydney, *Submission 155*, p. 1; NCCA, *Submission 179*, p. 18; HREOC, *Submission 199*, p. 3.

78 *Committee Hansard* 7 October 2005, p.71.

79 South Brisbane Immigration & Community Legal Service, *Submission 200*, p. 5.

80 Catholic Migrant Centre, *Submission 165*, p. 3.

> The Migration Act must be amended to specify a statutory maximum duration for detention that is reasonable. Once this period has expired the individual concerned should be released.[81]

5.81 FECCA said that full protection must be afforded to:

> …the most vulnerable in reception centres, namely women and children. We argue that family units and unaccompanied women and children should be allowed into receptive communities as soon as the required identity, health and security checks have been completed. All unaccompanied minors should be delivered into appropriate community care within 48 hours.[82]

5.82 HREOC referred the committee to recommendations made in its most recent reports relating to detention of asylum seekers.[83] These recommendations include:

- detention for immigration purposes should not exceed 28 days in the absence of exceptional circumstances;
- in relation to the detention of children for immigration purposes, there should be a presumption against detention;
- a court or tribunal should assess whether there is a need to detain children for immigration purposes within 72 hours of initial detention; and
- the continuing detention of children for immigration purposes should be subject of prompt and periodic review by a court.[84]

Committee view

5.83 The committee agrees with the general consensus that it is now appropriate to reconsider Australia's policy of mandatory detention for the duration of status determination process.

5.84 The factors which influenced the adoption of mandatory detention in 1992 are to a large extent now longer present. There is also persuasive argument that the deterrent effect is not as efficacious as once thought and that, while the original policy envisaged the possibility of long term determination, the Parliament did not intend to pass a law for the indefinite detention of non-nationals.

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81 Mr Colin James Apelt, *Submission 89*, p. 1.

82 FECCA, *Submission 101*, p. 3.

83 *Commission's Report of an inquiry into complaints by immigration detainees concerning their detention at the Curtin Immigration Reception and Processing Centre* (HREOC Report No. 28), http://www.humanrights.gov.au/human_rights/human_rights_reports/hrc_report_28.htm; *Those who've come across the seas*, http://www.humanrights.gov.au/human_rights/asylum_seekers/index.html#seas; *last resort?,* http://www.humanrights.gov.au/human_rights/children_detention_report/index.html

84 HREOC, *Submission 199*, pp. 3-4.

5.85 While recent changes create scope to ameliorate the harshness of the policy, it is the committee's view that amendment of section 189 is necessary to better reflect Australia's changed attitude, especially toward asylum seekers and those who for various reasons cannot be safely returned to their country of origin. It is the role of the law to provide procedural safeguard against over zealous use of executive power and reflect the community's values of humanitarian concern and fairness; as well as to ensure effective implementation and protection of the Australian migration program.

5.86 The committee considers the evidence in relation to the practice of immigration detention in chapter 6. Options for reform are considered in more detail in that chapter and recommendations appear at the end of that chapter.

CHAPTER 6

MANDATORY DETENTION IN PRACTICE

6.1 Following the previous chapter's consideration of the background and evolution of the policy of mandatory detention, this chapter focuses on the conditions of detention and treatment of detainees in Australian immigration detention centres. Under domestic law the Commonwealth and private contractors involved in the delivery of detention services owe a duty of care to detainees. As noted in Chapter 5, international standards also apply to the detainees, including non nationals in immigration detention.[1]

6.2 Evidence to this inquiry raised concerns in relation to eight matters, which are listed below:

- The use of detainee labour
- Penal approach to immigration detention
- Allegations of mistreatment
- Access to detainees by lawyers, health professionals and other visitors
- Health standards and medical care of detainees
- Mental health care
- Poor food
- Detention costs

6.3 The chapter concludes with a discussion of proposals for alternative approaches to mandatory detention.

The use of detainee labour

6.4 The use of detainees to perform tasks that would normally be undertaken by employees of GSL or its subcontractors is relevant to the concerns expressed by the Social Justice Committee of the Conference of Leaders of Religious Institutes (NSW). The Committee was informed that detainees may voluntarily undertake work which is related to the normal functioning of the centre. Detainees are awarded the equivalent of $1 per hour of value under a merit point system, which may be spent in the cafeteria on confectionary, tobacco or phone cards or other personal items.[2]

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1 See for example, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN GA Resolution 43/173, 9 December 1988.

2 *Committee Hansard* 8 November, 2005, pp 11-14.

6.5 The committee notes that during a visit to Villawood there were only two paid workers and 17 detainees working in the kitchen.[3] DIMA and GSL were questioned on the prevalence of this practice. The Committee also sought information on:

- how many detainees are engaged in work within detention centres; and
- whether there are explicit obligations contained in the contract, which require a minimum level of staffing to be provided by GSL.

6.6 DIMA advised that

> The provision of the 'merits point' system is required under the contract between DIMA and GSL. It is administered by GSL and operates within a framework agreed by the Department. This includes an operational procedure which addresses the practical implementation of the merits point system.[4]

6.7 The committee is aware that GSL is prohibited from employing detainees but must provide 'meaningful activity'. Nevertheless, the committee is concerned that work normally performed by paid employees is being carried out by detainees for minimal reward. In this context the practice offers an obvious financial benefit to the contractor and subcontractors.

6.8 Media reports indicate that an asylum seeker, at the Villawood IDF, has initiated proceedings in the Federal Court, seeking an injunction to stop DIMA, GSL and Delaware North Companies Australia Pty Ltd from employing detainees under the merit system claiming that it has no legitimate basis in law.[5] The argument in that case is that work is not undertaken on a voluntary basis because detainees have:

> … no choice but to work, because visitors could not bring them more than $10 a visit, there was no ATM within the detention centre to withdraw their own money and the federal Government charged detainees about $130 a day to stay there.[6]

6.9 The committee also received further evidence from Thea Birss, Principal Solicitor for Refugee Advocacy Service of South Australia (RASSA) concerning the use of the merit point system at Baxter IDF:

> We referred Senator Ludwig's query to DIMA staff at the Baxter IDF but have received no response to date. We are advised by a former detainee recently released that GSL received the money detainees paid to send faxes. Faxes, like photocopying cost around $1 per page. This money was paid on a points system as cash is not allowed in Baxter IDF.

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3 *Committee Hansard* 8 November 2005, p. 12.

4 Response to Question on Notice given 11 October, 2005.

5 Natasha Robinson, Detainee arguing 'slave labour' case, *Australian*, 6 December 2005, p. 3.

6 Natasha Robinson, Detainee arguing 'slave labour' case, *Australian*, 6 December 2005, p. 3.

> Detainees were required to pay upfront and even if faxes were urgent or addressed to lawyers they would not be sent if a detainee has 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.[7]

6.10 Detainee labour raises an important public issue. In the context of detention, where detainees are dependent on centre management and have little or no access to cash, the merit point system is open to abuse. The committee is concerned that exploitative practices have been allowed to develop.

6.11 Among the issues that need to be addressed is the number of hours worked; the level of remuneration and the health and safety of detainees when performing such labour. During hearings DIMA agreed that there was no specific limit to the number of hours of work that could be performed and no specific standards relating to detainee labour but general standards relating to the dignity of the person would apply.[8] DIMA subsequently advised that:

> the Meaningful Activities program at each detention centre is managed by GSL. Like all other activities there is a regular audit. Audits cover areas such as:
>
> - suitability of the activities made available through the program;
> - detainee access to the program;
> - the allocation and redemption of 'merit points' by detainees; and
> - training and OHS issues arising from detainees participating in the program.
>
> Any issues arising from these audits are raised directly with GSL to ensure that they are addressed.
>
> DIMA would also use the complaints process in a positive way to identify any potential concerns in this area. This could include complaints to the Office of the Ombudsman, Members of Parliament and the Office of the Human Rights Commissioner.[9]

6.12 In light of the systemic problems in the oversight of the contract and the Immigration Detention Standards, the committee finds no comfort in DIMA's response. While involvement in meaningful activity is crucially important to the health and wellbeing of detainees, work related activity is not a substitute for a structured activity program

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7 RASSA, Response to Question on Notice given 26 September, 2005, p. 2.

8 *Committee Hansard* 8 November 2005, p. 14.

9 Response to Question on Notice given on 11 October 2005.

6.13 The committee is also extremely concerned about the level of voluntariness of those participating in work related activity. Forced labour is prohibited under international law. In the prison context exemptions which apply to criminal detainees, expressly prohibit compulsory labour for the benefit of private individuals, companies even where a public authority has legal oversight.[10] The use of detainee labour in private prisons for activities related to running the facility remains prohibited and is a controversial in the international arena. Immigration detainees are equally vulnerable to exploitation and warrant no less protection.

6.14 In addition, access to the outside world, particularly to lawyers and therefore to the court, is a fundamental human right. Impeding access to the outside world is likely to place Australia in breach of its international human rights obligations and warrants independent investigation.

Recommendation 34

6.15 The committee recommends that the use of detainee labour should be subject to independent investigation by the Ombudsman or HREOC and re-examined as part of the review of the immigration detention services contract.

Penal approach to immigration detention

6.16 Some witnesses opposed the use of a company whose core business is security and prison management and, what they regard, as a penal approach to immigration detention.

6.17 It was claimed that staff at detention centres are often ex-prison officers and are not trained appropriately to deal with immigration detainees, in particular detained asylum seekers. It was also argued that personnel frequently lack the necessary understanding of the trauma many detainees have suffered, the psychological impact of these experiences and the effects of detention. This has often unnecessarily led to detainees becoming frustrated, agitated and on some occasions aggressive.[11] The Torture and Trauma Assistance and Rehabilitation Service (STTARS) told the Committee that:

> Detention centre staff have little experience of, or training in, recognising or working with mental disorders and can be unsympathetic and unskilled in their management strategies. When disorders manifest the custodial response is to manage the behaviour by placing the individual in isolation under surveillance which in turn often exacerbates the problem.[12]

10 ILO Convention 29, Article 4(1).

11 Ms Margaret McGregor, *Submission 20*, p. 1; FECCA, *Submission 101*, pp. 5-6; Ms Rosalind Berry, *Submission 137*, pp 6-7.

12 STTARS, *Submission 138,* pp 3-4.

6.18 Frustration and conflict was also attributed to the lack of understanding of cultural difference by detention staff. In relation to Baxter, the Palmer Inquiry found many instances of poor communication and cultural approaches to communication being misinterpreted, creating unnecessary misunderstanding.[13] The Federation of Ethnic Communities' Council of Australia (FECCA) considered the lack of cultural understanding a particular problem. They said that:

> It is vitally important that there be clear guidelines and protocols for management of detention centres that ensures that human rights are upheld, that people be treated with compassion and concern for their physical, emotional, spiritual and psychological welfare.[14]

6.19 The committee was told that the emphasis on security means the environment of detention centres is very similar to a correctional facility and practices often reflected those used in prisons and detainees were often seen as trouble-makers.[15] Certain practices were regarded as inappropriate and unnecessary and often the source of considerable distress to detainees. Some of the practices referred to include detainees being required to sleep with lights on, waking detainees at night to check on them and failure to take into account cultural issues, particularly in relation to women.[16]

6.20 The committee was concerned by evidence about the use of behaviour management techniques. Dr Newman told the Committee:

> We have been particularly concerned about the misuse, in our opinion, of so called behavioural principles, largely because those principles and practice have in some cases been used in a punitive way – merely for the purpose of maintaining behavioural control, with the fundamental problem of a lack of understanding of the reasons behind disturbed behaviour… The fundamental problem, particularly in the behaviour management unit Red 1 in Baxter, is the way that simplistic psychological models are applied to really complex and very disturbed people which, in effect, means that those people are potentially made worse by the treatment they receive.[17]

6.21 In a similar vein Dr Jureidini said:

> The fact that they are labelled as behaviour management strategies gives them some kind of credence. It is an extremely punitive program. The program talks specifically about rewards; there are no rewards. People have

13 Mr M. Palmer, *Report on the Inquiry into the Circumstances of the Immigration Detention of Cornelia Raur*, 6 July 2005, p. 7.

14 FECCA, *Submission 101*, p. 6.

15 Mr Bert and Mrs Christine Fabel, *Submission 54*, p.1; Ms Gwen Gorman, *Submission 136*, p. 1.

16 FECCA, *Submission 101*, p. 6; Brotherhood of St Laurence, *Submission 175*, p. 4.

17 *Committee Hansard* , 27 September 2005, p. 21.

> absolutely everything taken away from them and then gradually get some of it given back. It is at times almost a sadistic mentality.[18]

6.22 The RASSA said that 'management units' are in effect isolation cells which have been used to punish detainees and should be abolished. They described the Management Unit at Baxter in the following terms:

> The Management Unit is about 3 metres square, contains a mattress and no other furniture. Fixed upon the wall is a closed circuit TV camera which observes and records the inmate's movements at all times. The cell is always lit. There is no view of anything outside the room. There is a small frosted window up high which lets in some light. In the past detainees have been confined to their cell for more than 23 hours in each day. [19]

6.23 The Palmer Report describes the Management Unit as being comprised '10 single rooms, each with a door, a window, toilet and shower facilities and a mattress. Detainees are permitted limited periods in outside courtyards.'[20]

6.24 The committee notes that the processes, procedures and practices of Red One behaviour management compound and the Management Unit at Baxter Immigration Detention Facility are listed as an area of concern previously raised by the Commonwealth Ombudsman with DIMA.[21] DIMA advised that the operational procedures were developed in consultation with the Ombudsman Office. Nevertheless, evidence given by Dr Newman suggests grounds for continuing concern about the use of restrictive detention, particularly its appropriateness where a person may be suffering mental disorder. The fact that the majority of detainees do not experience Red One does not lessen the importance of those concerns.

6.25 A Just Australia complained that 'behaviour modification' is unregulated:

> This regime is a prime example of the unregulated nature of conditions within the overall migration detention regime. It is hard to find any lawful basis for allowing detention officers employed by a private company the power to arbitrarily impose the punishments of separation and isolation on people who have never been charged nor found guilty of any offence. The use of isolation and separation, its legal and welfare ramifications, needs to be investigated by an independent judicial body.[22]

6.26 Mr Burnside QC also criticised the lack of a clear legal basis for the use of a further deprivation of liberty:

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18 *Committee Hansard*, 26 September 2005, p. 40.

19 RASSA, *Submission 51*, pp 6-7.

20 Mr M. Palmer, *Report on the Inquiry into the Circumstances of the Immigration Detention of Cornelia Raur*, 6 July 2005, p. 59.

21 Commonwealth Ombudsman, *Submission* 196, p. 2.

22 A Just Australia, *Submission 184*, p. 13.

> … That is the largest problem – the fact that they do not know when, if ever, they are going to be released. Within that context, the use of solitary confinement without any regulation is an additional problem of very grave proportions. I see that the latest MSI looks as though it is addressing the way in which solitary confinement will be used, but, so far as I am aware, there are still no regulations that dictate and restrict the way in which solitary confinement can be used.
>
> That stands in marked contrast to the prison system, where even the worst convicted criminal cannot be put in solitary confinement without a very clearly defined process which is subject to judicial review if misused. It is very hard to see why a private operator of a detention centre should be allowed to put people in solitary confinement without any preconditions at all and, for practical purposes, without any judicial oversight.[23]

6.27 In response to these criticisms DIMA refuted the claim that 'solitary confinement' is used in IDFs but conceded that 'restrictive detention' is and that:

> Unless specific reasons exist, no restrictions are imposed on the detainee's freedom of movement within the compound, on their use of telephone or association with other detainees within the same compound … .
>
> In cases where transfer is being considered due to behavioural concerns, detainees are notified, except in emergencies, of the reasons why they are being considered for transfer and given the opportunity to avoid such a transfer. Where transfer occurs, a care plan agreement may be formulated between the detainee and the Placement Review Team (PRT). The goal of these agreements is to facilitate the detainee's return to general accommodation as quickly as possible. Restrictions are not imposed, and return to general accommodation is not delayed, simply because a detainee declines to participate in such programs or agreements. Rather, the PRT conducts a daily assessment to ensure that no other, more appropriate, alternative placement exists.[24]

6.28 *MSI 403: transfer of detainees within immigration detention facilities* sets out the basic policy and procedure to be used when moving a detainee to 'restrictive detention' or a 'management unit' within a centre. 'Restrictive detention' is described as one aspect of a behaviour management strategy 'which aims to achieve constructive participation by detainees in the daily life of the IDF' and is part of a ' multifaceted approach…which is incentive and progress based'. The strategies listed include:

- behaviour management agreements,
- curfews,
- restrictions of movement to specific areas within the compounds,
- restriction of movement to individual rooms; and

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23 *Committee Hansard*, 27 September 2005, pp 44-45.

24 Response to a Question on Notice, 5 December 2005.

- restriction on the periods of access to specific areas of the IDF.

6.29 If the detainee is placed in restrictive detention the requirement for contact by the DSP case manager is weekly, as opposed to transfers to a management support unit or self harm unit which require daily contact.[25]

6.30 The committee also notes that MSI 403 envisages that limitations on a person's communication with other detainees and the outside world may occur in certain circumstances. Paragraph 3.4.40 states that a behaviour management agreement should be specific to the individual and include, among other things, 'access to amenities and visitors'.[26]

Committee view

6.31 The core issue is whether the use of 'behavioural management techniques' is appropriate in a non-punitive administrative detention environment and requires further investigation. The use of these practices without clear legal authority is also a matter of concern. There is wide discretion left to centre management as to the reasons, duration and conditions of restrictive detention and minimum standards and procedural rights are not directly enforceable. Nor is there any regular independent administrative or judicial oversight built into the system as a protection from abuse of power.

6.32 The committee considers that the unregulated use of segregation and restrictive detention for disciplinary purposes has no place in a non-punitive administrative detention environment. Strict regulation of the use of separation detention is essential and should only be permitted where it is necessary to protect the life of the detainee or is strictly necessary to protect the safety of others. In these circumstances, the minimum level of segregation necessary to achieve that objective and for the shortest possible time should the guiding principle.

6.33 The mental health needs of detainees and the use of behaviour management techniques is discussed further below.

Recommendation 35

6.34 The committee recommends that the use of behavioural management techniques and restrictive detention be re-examined as part of the government's proposed review of the immigration detention contract. The committee further recommends that HREOC and the Royal Australia and New Zealand College of Psychiatrists and other stakeholders be consulted during the process.

25 *MSI 403 Transfer of detainees within immigration detention facilities,* para. 3.4.34.

26 *MSI 403 Transfer of detainees within immigration detention facilities.*

Recommendation 36

6.35 The committee recommends that the 'management units' be closed. In the alternative, their use should be limited for short periods not exceeding twenty-four hours in cases of emergency.

Recommendation 37

6.36 The committee recommends that all measures which constitute a further deprivation of liberty within a detention centre be established by law, the grounds and procedural guidelines should be specified and procedural safeguards enforceable in the general courts.

Allegations of mistreatment

6.37 The committee is particularly concerned by allegations that detainees have been abused by detention staff.

6.38 Mrs D Lascaris, a visitor to Baxter Detention Centre for nearly two years, referred to two examples. The first concerned an alleged assault by '8 guards' which resulted in the detainee being hospitalised for two days in Port Augusta hospital. The alleged assault had not been reported as the detainee not only feared reprisal from detention centre staff but also feared that it could adversely affect his appeals which were still pending. The second case involved an allegation that a nurse from Glenside hospital had reported that the detainees had felt intimidated by the 'GSL guards' stationed outside the ward, who they claimed had previously 'bashed them with batons'.[27]

6.39 Several witnesses attested to a culture of impunity within detention centres. For example, Mr Jamal A Daoud described the atmosphere based on his experience of visiting detainees:

> … there is a deep feeling among detention authorities, officials and workers that they have an absolute mandate to do whatever they wish, with no real prospect of losing anything, been [sic] disciplined or ending up in courts for any reason or acts they may commit. During my regular visits to Villawood, this was very clear. On many occasions I (or other Australian citizen visitors) threatened to take actions against security, officials or manager, and we were confronted with the simple answer: do whatever you want… .
>
> The workers in these detention centres feel that they are immune from any accountability … There were many reports about security guards accused of mistreating detainees, for whom the government facilitated departure from Australia – presumably to avoid their prosecution here. Some of them went

27 Ms D. Lascaris, *Submission 70*, p. 2.

> to New Zealand, and some of them were even transferred to work in the Nauru detention centre, away from any accountability.[28]

6.40 The committee also notes recent media reporting of an alleged assault by two officers during the reception of a man into Villawood IDF. It was reported that the man sustained a fractured wrist and, although the officers were reported to the police, the men were suspended for three months but the matter was 'dropped' after the detainee was deported. The article suggested that no further disciplinary action was taken because GSL had failed to train the staff – in breach of the contractual obligation to do so.[29]

6.41 A Just Australia also expressed concern about:

> … the number of allegations of serious abuse, assault and breaches of duty of care made by people within the detention environment. Yet in the face of these numerous serious allegations, not one major complaint has been upheld. Conversely, many detained people have been found guilty of major and minor behavioural infractions, resulting in penalties from isolation and segregation within the migration detention centres, up to prison terms. It is difficult to accept that every single allegation made by detainees is unfounded. This therefore makes it difficult to accept that the Department is the proper oversight body for conditions in migration detention centres.[30]

Committee view

6.42 The committee is concerned about the reluctance to use existing complaint mechanisms, which suggests a systemic weakness in accountability arrangements. Cases of alleged corruption, intimidation and abuse of power raise significant issues concerning the supervision and accountability of detention centre staff. It is the responsibility of centre management to ensure that staff are properly trained and supervised and disciplinary procedures are implemented. It is a matter of particular concern if conduct that is likely to constitute a criminal offence has not been reported to police authorities for investigation**.** The forthcoming review of the detention services contract should examine and recommend concrete steps to combat criminal activity and the culture of impunity. The internal complaint processes should be reviewed and the adequacy of mechanisms for confidential complaints and protection from victimisation examined.

6.43 The committee also notes that amendments to the *Migration Act 1958* on 30 November 2005 now enable the Ombudsman to contact an immigration detainee where that person has not made a complaint to the Ombudsman. However, no comparable provision was made to permit HREOC a similar role, although HREOC is

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28 Jamal A Daoud, *Submission 85*, p. 3.

29 Elizabeth Wynhausen, 'At the mercy of private guards', *Weekend Australian*, 11 June 2005, p. 22.

30 A Just Australia, *Submission 184*, p. 13.

the Commonwealth body with a specific human rights jurisdiction. A system of regular official visits by an independent complaints body should be instituted. The committee considers that this function is best shared and performed cooperatively by HREOC and the Commonwealth Ombudsman.

Recommendation 38

6.44 The committee recommends that the forthcoming review of the detention services contract include specific examination of internal complaint processes including, among other things, mechanisms for confidential complaints and protection from victimisation.

Recommendation 39

6.45 The committee recommends that the Migration Act be amended to provide HREOC with an express statutory right of access to all places of immigration detention;

Recommendation 40

6.46 The committee recommends that a system of regular official visits by an independent complaints body be instituted and this function be performed cooperatively by HREOC and the Commonwealth Ombudsman.

Access to detainees by lawyers, health professionals and other visitors

6.47 Access to lawyers, health professional and other visitor was a particular area of complaint. The remote location of some IDFs was cited as a significant impediment to access to services. FECCA[31] and the Catholic Migrant Centre[32] advocated the importance of locating IDFs, in or close to, capital cities to ensure asylum seekers have reasonable access to local service providers, community groups, faith representatives and independent legal and migration advice.

6.48 Mr Burnside QC also saw the problem as a systemic one arising from the fact that:

> social worker, migration agents, lawyers and doctors are not allowed … to go there just in case someone needs their help. They can only go there if someone asks for their help. But, by the nature of things, the people who most need their help are probably least able to ask for it. Cornelia Rau is a startling example of exactly that.[33]

31 FECCA, *Submission 101*, p. 3.

32 Catholic Migrant Centre, *Submission 165*, p. 3.

33 *Committee Hansard*,, 27 September, 2005, p. 44.

6.49 The rules on access to a lawyer were criticised as more restrictive than that imposed in prisons. Ms O'Connor, referring to the Cornelia Rau case to illustrate the point, said:

> I do not understand for the life of me why I as a lawyer cannot go into Baxter without an appointment made by the client, a letter from the client saying the area of law that is going to be covered and that they want to instruct me. That was the problem with Cornelia Rau. There were a number of people who were trying to get me to go and see her … I could not get in there without a request from her. She is ill - how is she going to make a request that she needs to see a lawyer? If I want to go to Yatala tomorrow to see someone who has been charged with the Snowtown murders … I can just go and see them. They will not ask me whether that person has asked to see me. They will not ask me what area of law is being covered … This is for someone who has committed the most horrific crimes in South Australia. If I want to go to Baxter, I cannot do that.[34]

6.50 In response, DIMA said that its policies are designed to facilitate access to legal representation wherever possible:

> However, in order to protect privacy of detainee and ensure equal access to resource, there are certain requirements which must be met by lawyers visiting immigration detention facilities.
>
> … the Departmental Protocol requires lawyers to produce evidence of their qualifications prior to receiving their initial access to a detention facility. They are also required to establish their identity and provide written evidence to the Detention Service Provider (DSP) that a detainee has requested legal advice from them. Visits by lawyers for non-migration matters are facilitated wherever operationally possible.
>
> Prior to meeting with clients, legal representatives can make a request to the Department, seeking permission to bring mobile telephones and lap-top computers into an immigration detention facility.[35]

6.51 Several organisations and individuals who visit detainees also expressed concerns at the attitude of detention centre management and staff towards them. They considered that obstacles had been put in place to either restrict or deny their access to detainees. It was claimed that rules on visits were continually being changed and a lack of communication between detention centre staff often impacts on visitors being able to see detainees.[36] For example, it was reported that following a written request being made as required by the detention centre, permission to visit was cancelled without any explanation.[37] And that restrictions on detainees having access to mobile

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34 *Committee Hansard* , 26 September, 2005, p. 28

35 Response to question on notice, 5 December 2005.

36 Dr Joan Beckwith, *Submission 142*, p. 2.

37 RASSA, *Submission 51*, p. 2.

phones and the limited number of land phone lines available in detention centres, means that access to detainees can be severely curtailed.[38]

6.52 The Hopestreet Urban Compassion also complained about inconsistency and arbitrariness in visiting arrangements:

> On one occasion children were denied access where we had earlier been advised that they would be allowed in. On another occasion visiting hours were different when we arrived to what we were advised over the phone. Similarly different officers had different rules about what could be taken in and varied in their attitudes to visitors. On one occasion a gift for a detainee was held at the security desk for checking. The gift never reached the detainee …[39]

6.53 The committee was particularly concerned about access to patients. When questioned on about access to patients at Baxter IDF, Dr Jon Jureidini told the Committee he had:

> … given up trying to get there in person, having encountered some difficulties nine or 12 months ago. All the work I have done in recent times has been by telelink. I do not know what would happen if I attempted to go and see somebody there again now. I have not tried for some time. The only way I have ever had any access to any detainees over the last year or so is when it has been arranged by a lawyer.
>
> At the last meeting that I was in Baxter for, the operations manager from GSL behaved in a very intimidating and demeaning manner towards me and my team of staff who were there. I have been told on occasions that I could not go and see a particular person, that they did not need expert child psychiatric input, and that they had services in there readily available. After getting knocked back for a while and refused, if there is a way that you can do it that works a bit better, you give up trying to gain access.[40]

6.54 Limitations placed on chaplaincy and other pastoral services in detention centres was another area of concern raised by several witnesses. Despite DIMA having agreed in December 2004 to discuss the issue of pastoral care in detention centres with a committee of the Catholic Church and the National Council of Churches, they have continually declined to meet with the committee despite numerous requests.[41] However, Mr John Ball, Manager, of the National Program on Refugees and Displaced People, Christian Service, National Council of Churches in Australia advised the Committee that 'a number of church and other religious group representatives are meeting with members of the immigration department to look at

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38 Ms Emma Corcoran, *Submission 53*, p. 2; Ms Helen Lewers, *Submission 77*, p. 15.

39 Hopestreet Urban Compassion, *Submission 30*, p. 2; Strathalbyn Circle of Friends 22, *Submission 69*, p. 4.

40 *Committee Hansard*, 26 September 2005, p. 43.

41 Catholic Bishops Committee for Migrants and Refugees, *Submission 73*, p. 8.

the issue of a protocol for religious visitors to detention centres.'[42] The meeting had been arranged for 28 September 2005.

6.55 The committee observes that principles 18 and 19 of the UN Body of Principles for the Protection of All Person under Any Form of Detention apply to immigration detainees:

- Principle 18 requires that a detained person shall be entitled to communicate and consult with his legal counsel; that adequate time and facilities must be allowed and access to counsel must not be delayed, suspended or restricted 'save in exceptional circumstances' that are 'indispensable' to maintain security and good order'.
- Principle 19 requires that a detained person must have the right and shall be given adequate opportunity to communicate with the outside world, subject only to reasonable conditions and restrictions as specified in law or lawful regulations.

6.56 Based on the foregoing evidence the committee considers that practices in Australian IDFs appear to impose unreasonable restrictions on access to lawyers and other visitors, and fall short of acceptable standards. Immigration detention is administrative detention. It is intended to be non-punitive but is designed solely to prevent a person residing unlawfully in Australia and to facilitate removal. Restrictions on access that go beyond those which are unavoidable and inherent to the operation of a centre are not justifiable.

6.57 On this basis, it is unclear why these highly restrictive measures are necessary. DIMA's procedural rules do in fact permit the minimum of access to lawyers, visitors, communications etc, but are the very minimum of the acceptable range. In the Committee's view, DIMA's explanations, pointing to such matters as the protection of detainees' privacy, do not seem very convincing. They seem in fact to be punitive in nature and open to considerable abuse.

Recommendation 41

6.58 The committee recommends that the review of the immigration detention services contract include a review of the Immigration Detention Standards, Migration Series Instructions and Operational Procedures and ensure that rules relating to access to detainees are consistent with international standards.

Recommendation 42

6.59 The committee recommends that the Migration Act be amended to give effective recognition to the right of detainees to have access to lawyers and other visitors, including medical and religious visitors.

42 *Committee Hansard*, 27 September 2005, p. 61.

Recommendation 43

6.60 The committee recommends that restrictions on access to lawyers and other visitors imposed for disciplinary or behavioural management purposes should be expressly prohibited.

Health standards and medical care of detainees

6.61 The health care of detainees, and in particular the mental health of detainees was a major area of concern for a large number of witnesses. The Committee notes that Schedule 2 clause 7.1.1. of the immigration detention contract states:

> The Department expects that detainees should be able to access either in a facility or externally, a level and standard and timeliness of health services, including optical and dental services, broadly consistent with that available in the Australia community, taking into account the special needs of the detainee population.[43]

6.62 The Palmer Inquiry found in that, in relation to Baxter, the operational standards did not discharge the duty of care and, in relation to health care, clause 7.1.1. is fundamentally flawed because 'it does not recognise that the detainee population has specific needs that differentiate it from the broader Australian community. This is particularly the case in relation to mental health care.'[44]

6.63 The NSW Refugee Health Service is funded by the NSW Department of Health to protect and promote the health of refugees. They described the particular health needs of asylum seekers:

> Key health issues for asylum seekers are often similar to those of refugees arriving through the offshore refugee program, and include: psychological distress; dental disease; under-managed chronic conditions (e.g. diabetes, heart disease); exposure to TB and parasites; nutritional problems; and injuries from war and/or torture. Health care needs may therefore be high. Several studies in Australia have demonstrated asylum seekers to be a highly traumatised population with a high prevalence of depression, anxiety and post-traumatic stress disorder, and that such problems are likely to be worsened by their experiences here.[45]

6.64 The evidence in relation to health related matters falls into five main areas of concern:

- medical services are inadequate;

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43 Mr M. Palmer, *Report on the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, 6 July 2005,p. 68

44 Mr M. Palmer, *Report on the Inquiry into the Circumstances of the Immigration Detention of Cornelia Raur*, 6 July 2005, p. 68.

45 Sydney South West Area Health Service, *Submission 209*, p. 3.

- medical staff are poorly trained to deal with the needs of detainees with disabilities and mental health issues;[46]
- essential medical treatment has been delayed;[47]
- recommended treatment has not been followed;[48] and
- requests for independent medical advice has been refused.[49]

6.65 Many witnesses questioned the quality and appropriateness of health care generally. It was said that the type of medical treatment is often left to nursing staff instead of a doctor which resulted in delays in access to proper medical treatment.[50] Examples provided by witnesses included:

- A Just Australia referred to a case where it was alleged that a detainee who had broken his leg and who had x-rays taken the next day was not taken to hospital for treatment until 3 weeks later.[51]
- Following a minor operation at the Pt Augusta hospital a detainee's wound had become infected for which he was initially offered Panadol. A doctor prescribed antibiotics but these were not provided until two days later after a friend had rung to inquire about his condition.[52]
- The daughter of a detainee, who was wheelchair bound, was not referred to an occupational therapist for treatment during the 9 months that she was held in detention. It was not until she was released from detention with her mother that treatment was arranged through the Red Cross.[53]

6.66 It was argued that even in cases where independent medical advice has been obtained this advice has not always been followed. It was claimed that ex-detainees had advised that 'even if they were successful in gaining a medical check-up by a specialist outside detention, the prescribed medications would not be [bought.']'[54]

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46 Brotherhood of St Laurence, *Submission 175*, p. 4.

47 Mr Ian Knowles, *Submission 118*, p. 8; A Just Australia, *Submission 184*, p. 18.

48 RASSA, *Submission 51*, Appendix B; Ms Kerrie Barry, *Submission 146*, p. 1.

49 RASSA, *Submission 51*, p. 6; STTARS, *Submission 138*, p. 4.

50 Strathalbyn Circle of Friends 22, *Submission 69*, p. 6; St Vincent de Paul Society, *Submission 147*, p. 2.

51 A Just Australia, *Submission 184*, p. 18.

52 Ms Rosalind Berry, *Submission 137*, p. 8.

53 Mr Martin Clutterbuck, Asylum Seekers Resource Centre, *Committee Hansard*, 27 September 2005, p. 69.

54 Mr Jamal A Daoud, *Submission 85*, pp 4-5.

6.67 It was alleged that it is extremely difficult for detainees to obtain proper dental treatment.[55] One witness claimed that detainees have to wait weeks to see a dentist and that it appears the only treatment offered is teeth extraction rather than restorative treatment.[56] The committee was told of an instance where a detainee who suffers from diabetes lost most of his teeth, allegedly as a result of lack of dental care.[57]

6.68 Ms Ruth Graham, who has visited and corresponded with detainees in the Baxter IDF for the past 2 years, advised that detainees are not being referred for dental treatment even though services are available. She said that she had contacted the South Australian Dental Service in Port Augusta to try to expedite treatment for a detainee who had been having on-going pain. The Service had in turn contacted the dentist who she understood provided dental services to detainees under contract. He advised that there were plenty of appointments available but detainees were not being brought to his surgery.[58]

6.69 The NSW Refugee Health Service identified a number of issues based on their experience providing health care services at Villawood IDF and to ex-detainees following their release into the community. These issues include:

- the cost considerations in providing health services to detainees could impact on the level of health care provided;
- confidentiality of medical records do not appear to be assured, with non-health staff having potential access to the records: it was alleged that custodial and management staff had requested details on the pregnancy and HIV status of detainees;
- health staff working in the centre are seen as part of the system, exacerbated by nurses having to wear uniforms similar to that of custodial staff;
- the inability of doctors to act as advocates for their patients which raises a ethical challenge;
- the degree to which informed consent is sought for testing or medical care among a detained population where many individuals have limited English skills is unclear;
- where detainees are hospitalised, the hospital is deemed an 'alternative place of detention' which means guards accompanying the patient at all times and may, and indeed have, forbidden access to visitors and have even been said to monitor access by health staff;

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55 Strathalbyn Circle of Friends 22, *Submission 69*, p. 6; Mr Brian Davies, *Submission 113*, p. 2; Mr Ian Knowles, *Submission 118*, p. 8; St Vincent de Paul Society, *Submission 147*, p. 2.

56 Mrs Jean Jordan, *Submission 18*, p. 4.

57 Ms Rosalind Berry, *Submission 137*, p. 8.

58 Ms Ruth Graham, *Submission 122*, p. 2.

- medical follow up for those released into the community has been poor with no written summaries of the health care provided while in detention and without arrangements being made for follow-up care. This is of particular concern where people have been released on a Bridging Visa as they are not entitled to access Medicare; and
- once released information on a person's whereabouts cannot be obtained due to privacy laws.[59]

6.70 Companion House also commented that there did not appear to be any policy in place about providing detainees with their medical records on their release into the community. Whether medical records are provided appeared to be a matter solely at the discretion of the attending health worker.[60]

Mental health care

6.71 The Committee received a large body of evidence which argued that:

- immigration detention contributes to high levels of mental illness;
- the provision of mental health care is inadequate; and
- the effective treatment of mental disorder cannot take place within the detention environment.[61]

6.72 The consensus view was that 'prolonged, indefinite detention causes psychological harm in an already vulnerable population'.[62] Royal Australia and New Zealand College of Psychiatrists (RANZCP) said that:

> High levels of mental illness will continue to occur as long as immigration policy is implemented in this way. The RANZCP recommends that prolonged detention is replaced with an alternative system, such as community placements, with detention centres used only for brief initial processing.[63]

6.73 It was also stressed that a detention centre is not a mental health facility and that the treatment of mental disorder in a detention centre is therefore inherently flawed, especially where the cause of ill health is attributable in part or in whole to the conditions of detention. Dr Jon Jureidini considered the environment of immigration detention to be 'so toxic that meaningful treatment cannot occur' within a detention centre.[64]

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59 Sydney South West Area Health Service, *Submission 209*, pp 10-11.

60 Companion House, *Submission 141*, p. 5.

61 See for example, Dr Jon Jureidini, *Submission 31*, p. 1; RANZCP, *Submission 108* p. 2

62 Ms Lizz Hutchinson, *Submission 108*, p. 4.

63 Ms Lizz Hutchinson, *Submission 108*, p. 4.

64 Dr Jon Jereidini, *Submission 31*, p. 1.

6.74 A summary of independent research and evidence of the detrimental effects of immigration detention on the mental health of detainees was provided by RANZCP which showed that rates of mental illness including post-traumatic stress disorder, depression, anxiety are very particularly high among people in immigration detention:

> Detention contributes to feelings of anxiety, hopelessness and depression. Sultan and O'Sullivan (2001) report a pattern of psychological reactions among those held in detention for long periods. After an initial period of shock, detainees typically exhibit symptoms of major depressive disorder which worsen over time, and may eventually develop psychotic symptoms such as delusions and hallucinations. These authors surveyed 33 detainees at the Villawood Detention Centre in Sydney, who had been in detention for more than nine months. All but one of these people displayed symptoms of psychological distress at some stage of their detention. 85% had chronic depressive symptoms and around half of the respondents had very severe depression. Seven respondents showed signs of psychosis, including persecutory delusions, ideas of reference, and auditory hallucinations. 65% of respondents had pronounced suicidal ideation. A survey of Tamil asylum seekers found significantly higher levels of mental illness – depression, post-traumatic stress disorder, anxiety, panic and physical symptoms – in those detained at the Maribynong Detention Centre compared with those living in the community (Thompson et al., 1998). In another study describing the psychiatric status of families in an unnamed Australian detention centre (average length of time in detention two years and four months; Steel et al., 2004), all the adult detainees were diagnosed with a major depressive disorder, and a majority with post-traumatic stress disorder. Two adults showed psychotic symptoms, and met criteria for a severe major depressive disorder with psychotic features. Almost all the adults assessed had experienced persistent thoughts of suicide, though none had had suicidal thoughts prior to detention; a third of the adults had harmed themselves.
>
> Many detainees – in particular, those seeking asylum in Australia – have suffered human rights abuses, including torture, in their countries of origin; family members may have disappeared or been murdered, and many are separated from their loved ones as well as their homes and countries. The traumatic histories of this group makes them particularly vulnerable to the effects of further psychological distress. Overall, prolonged detention exacerbates existing psychological distress and precipitates further mental illness.[65]

6.75 STTARS also advised that a survey undertaken over the past 3 years of 264 people released from detention centres on Bridging or Temporary Protection Visas, found that 162 had been assessed as suffering psychological problems which severely interfered with their every day functioning.[66]

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65 RANZCP, *Submission 108*, p. 2.

66 STTARS, *Submission 138*, p. 1.

6.76 A literature survey commissioned by the Senate Select Committee on Mental Health indicates that the deterioration of mental health is attributable to a number of factors in the detention environment – the exposure to violence and traumatic events; racist comments; being handcuffed during transport and denial of food; lack of faith in asylum claim system; indeterminate lengths of stay, seclusion, lack of access to medical care, treatment by detention centre staff and the centre environment.[67] Inadequate mental health care was cited as a significant factor in some studies.[68] The severity of depression was linked to the length of time in detention and, in one study, half the group:

> … had reached what was described as the severe tertiary depressive stage which included psychotic symptoms such as delusions and hallucinations.[69]

6.77 The particular vulnerability of refugees and asylum seekers has long been accepted by the Commonwealth. The National Mental Health Plan 2003-2008, recognises that refugees and asylum seekers are one of the groups at greatest risk of mental illness.[70] The National Mental Health Strategy, which incorporates a number of pre-existing mental health plans, was adopted by the Australian Health Ministers in 2003. The underlying principles of the Strategy include a recognition of the principle of non-discrimination:

> All people in need of mental health care should have access to timely and effective services, irrespective of where they live.[71]

6.78 The National Mental Health Plan in Multicultural Australia also emphasises the importance of access to health care, which entails:

> The ability to reasonably and equitably provide services based on need irrespective of geography, social standing, ethnicity, age, race, level of income or sex.[72]

6.79 Standard 7 of the National Standards for Mental Health Services developed in 1996, based on UN standards designed to protect the rights of people with mental illness, requires the non-discriminatory treatment of people with mental illness and the

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67 See discussion of Steel et al (2004) and Sultan and O'Sullivan (2001) in Lisa A Hornsby, *The illness of Detention: Access to mental health care for refugees residing in immigration detention*, Report prepared for the Senate Select Committee on Mental Health, October, 2005, p. 18.

68 Mares and Jureidini 2004, Sultan and O'Sullivan 2001, Steel et al 2004 and Mares et al 2002 referred to in Lisa A Hornsby, *The illness of Detention,* 2005, ibid, p. 19.

69 Mares and Jureidini 2004; Steel et al 2004; Mares et al 2002 and Zwi et al 2003; Sultan and O'Sullivan 2001 cited in Lisa A Hornsby, *The illness of Detention,* 2005, ibid, p. 19.

70 Lisa A Hornsby, *The illness of Detention,* 2005, ibid, p. 7.

71 Lisa A Hornsby, *The illness of Detention*, 2005, Lisa A Hornsby, *The illness of Detention,* 2005, ibid, p. 7.

72 Commonwealth of Australia, 2004, p.46 quoted in Lisa A Hornsby, *The illness of Detention,* 2005, ibid, p. 11.

delivery of mental health services that are sensitive to the social and cultural values of the consumer.[73]

6.80 It is against this background of empirical evidence and the national policy framework that the committee considered evidence about the adequacy of mental health care in Australian immigration detention centres. RANZCP summed up the situation when it said:

> The current provision of mental health services to people in detention is clearly inadequate. Existing systems do not understand, recognise or respond adequately or appropriately to mental disorder. The recent case of the prolonged detention of Cornelia Rau clearly illustrates this.[74]

6.81 In a recent Federal Court case concerning mental health care of two detainees, Finn J affirmed the Commonwealth's duty to ensure that reasonable care is provided:

> That duty required the Commonwealth to ensure that a level of medical care was made available to them which was reasonably designed to meet their health care needs including psychiatric care. They did not have to settle for a lesser standard of mental health care because they were in immigration detention.
>
> Given the known mental conditions of the applicants, the Commonwealth permitted its contractor to provide an inadequate and, on the evidence, poorly functioning mental health care service to them.[75]

6.82 The committee is also aware that in at least two international cases Australia was found to have acted in violation of articles 7 and 10 of the ICCPR, by continuing detention after the deterioration of mental health was known to the Department.[76] Article 7 prohibits the use of cruel, inhuman or degrading treatment and article 10 imposes a positive obligation to ensure that all detainees are treatment humanely and with respect for the inherent dignity of the person.

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73 Commonwealth of Australian, 2004, p.46 quoted in Lisa A Hornsby, *The illness of Detention,* 2005, ibid, p.12. See also, for example, UN General Assembly Resolution 46/119 *The Protection of persons with mental illness and the improvement of mental health care,* 46th Session, 17 December 1991.

74 RANZCP, *Submission 108*, p. 3.

75 *S v Secretary Department of Immigration and Multicultural and Indigenous Affairs* [2005] FCA 549.

76 *C v Australia* Communication No. 900/1999 UN Doc. CCPR/C/76/D/900/1999 para. 8.4; see also *Madafferi v Australia,* Communication 1011/2002 UN Doc. CCPR/C/81/D/1011/2001, paras. 9.2 and 9.3.

Mental health and children

6.83 Particular concerns were expressed at the effect of detention on the physical, emotional and mental health of children.[77] HREOC referred to the Committee its report *A last resort*, in which it concluded that the Commonwealth was in breach of the Convention on the Rights of the Child (CRC) in that it had, *inter alia*:

- failed to take appropriate measures to protect the safety of children;
- failed to take all appropriate measures to protect their physical health; and
- failed to take all appropriate measures to protect and promote their mental health.[78]

6.84 RANZCP summarised the evidence relating to the particular vulnerability of children to the effects of prolonged detention:

> Parenting capacity and child protection are significantly compromised in the detention environment and rates of depression and post-traumatic stress disorder (PTSD) are high. Children are adversely affected by institutionalisation, witnessing adult distress, parental depression and emotional withdrawal, limited educational and recreational opportunities and isolation (Mares et al., 2002). Children not uncommonly self-harm, a pattern that is not noted in the general community. Studies of children in prolonged detention (more than two years) found that all children were diagnosed with at least one psychiatric disorder and 80% were diagnosed with multiple disorders. There was a 10-fold increase in total number of diagnoses found during the period of detention compared to pre-existing rates (Mares and Jureidini, 2004; Steel et al., 2004). The holding of children in detention centres raises issues of child protection, as children are also at risk of harm due to their enforced proximity to potentially dangerous adults.[79]

6.85 HREOC concluded that the only effective way to address the mental health problems caused or exacerbated by detention is to remove the children from that environment.[80]

Systemic factors that contribute to poor mental health care

6.86 There were a range of systemic factors that submitters and witnesses referred to, based on their direct experience of working in detention centre or with detainees. It

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77 Ms Nina Boddenberg, *Submission 32*, p. 1; Strathalbyn Circle of Friends 22, *Submission 69*, p. 5; Ms Annette Shears and Ms Peta Anne Molloy, *Submission 105*, p. 1; HREOC, *Submission 199*, pp 7-8.

78 HREOC Report, *A last resort* (April 2004), pp 12-16.

79 RANZCP, *Submission 108*, p. 2.

80 HREOC Report, *A last resort* (April 2004), quoted in *Submission 199*, pp 7-8.

was argued that detention itself separates detainees from mainstream services and the outsourcing of immigration detention exacerbates the problem:

> The RANZCP believes that the subcontracting of detention, which produces a separation of the mental healthcare of detainees from the mainstream mental health system, is a key factor in the deficient treatment of mental illness in detention centres. At present, there is no formalised arrangement between the detention centres and state mental health services. It can be very difficult to find appropriate treatment for mentally ill detainees, particularly in area mental health services already stretched to capacity.[81]

6.87 Dr Newman said the lack of clear arrangements between the Commonwealth and State mental health service:

> has contributed … to what we would consider on clinical grounds to be an inordinate delay in getting people to an appropriate mental health facility for the treatment that they need.[82]

6.88 SSTAR told the Committee that requests to provide an independent psychiatric examination:

> are frequently met with the assertion that internal services are adequate and there is no need for independent assessment or intervention. Visiting professionals are treated with suspicion instead of as a valuable resource integral to the overall care and support of detainees.[83]

And that treatment recommended by independent mental health professionals are not always implemented. For example, Dr Louise Newman, commented that she had been:

> …particularly concerned on recent visits about the persistent lack of recognition of the seriousness of people's mental distress and mental disorder. There was the case of a man I assessed as having a psychotic depression, who has also been assessed by other psychiatrists. We were of the opinion that this man needed to be transferred to a psychiatric hospital, and that had not been acted on. He remained in a very distressed state and was being treated with medication with very inadequate psychiatric review.[84]

6.89 Mr Guy Coffey, a clinical psychologist who conducts psychological assessment of detainees at the Maribyrnong Immigration Detention Centre said there are a number of reasons for not implementing recommendations, including:

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81 RANZCP*, Submission 108*, p. 3.

82 *Committee Hansard* 27 September, p. 24

83 STTARS, *Submission 138*, p. 4. Similar findings were made by Companion House in relation to the mental health of refugees who had been released from detention and whom they had assisted. Companion House, *Submission 141*, pp 1-3.

84 *Committee Hansard*, 27 September 2005, p. 21.

- the facility may not have the expertise to implement the recommendation or the detention environment may make certain treatments unimplementable;
- psychological and psychosocial treatments are difficult to implement in detention because, even if the expertise is available (and often it is not), the environment is often an insuperable barrier to the provision of such treatment;
- recommendations with regard to pharmacological treatments are more readily implemented.[85]

6.90 The committee was especially alarmed to hear those suffering from serious mental illness are the least likely to be released from detention:

> Recommendations least often followed in my experience related to opinions that the detained person can not be treated in the detention environment, and that therefore considerations should be given to releasing the individual on a bridging visa (under s 2.20(9) of the migration regulations). The grounds whereby this refusal to act on such an opinion are opaque. The practical operation of this provision requires urgent examination.
>
> Seriously mentally ill individuals have in my experience been left to deteriorate over months and years in disregard of expert opinion regarding the damaging effect that ongoing detention is having.[86]

6.91 The Asylum Seekers Resource Centre alleged that the Department had not disclosed and had actually hidden independent medical reports, which recommended the release of asylum seekers on the ground that they cannot be cared for in detention, in order to prevent the granting of a bridging visa and their release. They claimed the Department had consistently ignored reports they had submitted from independent, respected psychiatrists and psychologists expressing grave concerns for the mental health of asylum seekers.[87] The committee is unable to test these particular claims. However, the evidence is consistent with the systemic problems identified by Mr Palmer in the case of Cornelia Rau.

6.92 It also points to the importance of the development in Australia of statutory obligations for reasons in administrative decision making. This is particularly so in the immigration detention context where, by reason of their incarceration, detainees are particularly vulnerable to the influence of irrelevant considerations and unreasonable decision making. The committee considers that this is area in which unfettered executive discretion is a significant legislative gap. The exercise of ministerial discretion and the implementation of bridging visas are discussed in Chapters 4 and 8.

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

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

87 ASRC, *Submission 214*, p. 30.

Use of behavioural management techniques

6.93 The use of behavioural management techniques was raised repeatedly during the inquiry. This model was criticised as inconsistent with best medical practice and harmful, especially to detainees with emotional and psychological problems. The RANZCP said:

> The use of inappropriate behavioural management techniques, including solitary confinement, is of great concern to the RANZCP. These techniques are not considered to be standard treatment of behavioural disturbance resulting from mental illness, and are not acceptable to international psychiatric bodies. Brief uses of low stimulus environments are only used as part of overall comprehensive treatment of mental illness. The use of antipsychotic medications for behavioural control is inappropriate. We are also concerned that the environment of the detention centre creates a culture which perceives disturbed behaviour as deliberately disruptive, rather than a symptom of illness.[88]

6.94 Dr Jureidini argued that the 'behaviour management' is demeaning and an affront to human dignity. He gave an example of a man, who had permission to get married in the visitors centre, being deprived of the right to have guests and music at his wedding.

> What was particularly demeaning was that it was still a number of weeks between then and the time that the man was to get married and he was told that, if he was a good boy, he could earn back guests to his wedding at the rate of two or five a week, or something like that. An environment in which that level of capricious – I think sadistic – demeaning of somebody … can never be described as a therapeutic environment.[89]

6.95 When asked about the effect of the recent upgrade in visitor and recreational facilities at Baxter would have on the mental health of detainees, Dr Jureidini said:

> It is self-evidently completely useless to somebody who has already been badly damaged by what has happened. Having a different visitors facility when you are not capable of engaging with any other human being is not going to do you much good. Having sports facilities when you cannot rouse yourself from your room more than once a day to limp off to get something to eat is not going to be of any benefit to you.[90]

Use of medication for behaviour control

6.96 The Committee also heard reports of the use of sedating medication for behavioural control. During a committee hearing Dr Newman said:

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88 *Committee Hansard* , 27 September, 2005, p. 21.

89 *Committee Hansard*, 26 September 2005, p. 40.

90 *Committee Hansard*, 26 September 2005, p. 42.

> Our group has made submissions to the Health Care Complaints Commission in New South Wales regarding the inappropriate use of medication in Villawood. Similar concerns have been raised about the use of psychotropic medications in other detention environments. There are several issues. There is no doubt that some of the people do need medication and are being appropriately treated. However, the issue is more about the use of sedating medications, or antipsychotic medications being used inappropriately for the purpose of behavioural control, and about some individuals being threatened with the use of extremely sedating medication when they have been involved in any form of protest or conflict with the management of the centres, which we believe is inappropriate.

6.97 Recent media reports of the case of Virgina Leong, a Malaysian woman detained in Villawood for three years with her child, illustrates the problem about the forced use of medication. In June 2005, the Australian reported that videotape evidence depicts Ms Leong being forcibly removed from the roof of Villawood, where she was staging a protest against her detention, and removed to a management unit:

> Leong, a slight built woman hardly larger than a child, was dragged along with her head held down by two large detention centre officers. When they reached the management unit Leong was pushed face down on the floor and a male officer about twice her size sat astride her, tightly holding her hands behind her back as a nurse instructed Leong, who was crying, to take Valium … The video shows a distressed Leong calling out: 'I don't want the Valium'.[91]

6.98 The committee is not aware whether this incident was reported to DIMA under the requirements of the contract. However, cases like the Leong matter raise serious issues about training of detention centre staff, assault and breach of medical ethics. The use of force and sedation for behaviour control requires further independent investigation.

Reform of mental health care in Australian immigration detention centres

6.99 DIMA advised the Committee that it was currently implementing changes in mental health care in response to the Palmer Inquiry report. These changes include:

- fortnightly visits by a psychiatrist to the Baxter IDC;
- the establishment of two new psychiatric nursing positions at the Baxter IDC to achieve 7 day coverage and on-call arrangements at night;
- routinely seeking additional third party medical advice whenever it receives conflicting medical opinions from sources other than the medical professionals subcontracted by GSL, rather than on a case-by-case basis as was previously the case; and

91 Elisabeth Wynhausen, *At the mercy of private guards,* Weekend Australian, 11 June 2005, p 22.

- improved access to health care outside detention centres and reviewing monitoring and oversight arrangements for health care services. DIMA is accessing further specialist medical expertise to assist it in these processes.[92]

6.100 The Committee was further advised that since January 2005, all immigration detainees are screened for physical and mental health issues when they are received at an IDF. This involves a suicide and self-harm assessment undertaken by a Detention Service Officer and an 'at risk' assessment by the nurse.[93]

6.101 In relation to Baxter, the Department advised that:

> A voluntary client-rated Kessler 10 screening is undertaken, a clinician-rated health of the nation outcomes scale is undertaken and a mental state examination is undertaken. These last three examinations are widely used in mainstream mental health services.[94]

6.102 DIMA told the committee that if a detainee screens positive on a 'HoNOS, K10 or MSE instrument' he or she will be referred to a multidisciplinary mental health team for diagnosis, a mental health management plan and ongoing mental health care.[95] If the management plan requires inpatient treatment this will be arranged through 'clinical pathways developed with identified public and private sector health providers' and the all detainees will be re-screened at 90 days.[96]

6.103 DIMA also advised that the Department has received a costed proposal from GSL to 'enhance mental health services at all other immigration detention facilities in line with the current and planned process at Baxter IDF.'[97]

6.104 In relation independent medical opinions, DIMA informed the committee that it was developing a detailed protocol and that interim procedural arrangements applied to GSL and its subcontractors are in place (see Annexure X).

6.105 The reforms currently being implemented by DIMA were acknowledged by many witnesses. But overall access to independent medical opinion and services and independent oversight of health care was advocated if mandatory detention is to remain in place.

6.106 The RANZCP argued that psychiatrists employed by detention centre management have a conflict of interest and that patients may perceive them as being aligned with the detaining authorities which could impact on their effective treatment.

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92 DIMA, *Submission 205*, p. 48.

93 Response to Question on Notice given 11 October 2005.

94 *Committee Hansard*, 11 October 2005, p. 30.

95 Response to Question on Notice given 11 October 2005.

96 Response to Question on Notice given 11 October 2005.

97 Response to Question on Notice given 11 October 2005.

The RANZCP recommended that the mental health care of detainees be provided by mainstream mental services, independent of DIMA and detention centre management.[98] The LIV also argued that responsibility for mental health should be devolved to State mental health authorities:

> DIMA is not the appropriate government agency to have ultimate responsibility for the health care needs of mentally ill or incapacitated immigration detainees. The shocking circumstances of Ms Rau's ten-month period of immigration detention clearly demonstrate this point.[99]

6.107 RANZCP recommended that standards of care applying to mental health services generally must apply in immigration detention:

> Systems must be set in place to ensure that detainees suffering psychiatric symptoms are adequately assessed and treated for the inevitable mental health problems that will arise. At a minimum, independent review panels of clinicians must be established to assess detainees for mental illness, and assessments must be conducted regularly. Responsibility for such panels should be assigned to state mental health services to ensure their independence. If a person is found to be mentally ill, he or she must be removed from detention to an appropriate place of treatment. [100]

6.108 Similarly, RASSA argued that 'detainees should have full and unrestricted access to independent mental health professionals and accorded proper medical treatment.'[101]

> Detention centres are an unsuitable location for treatment. Psychiatric illness requires an appropriate treatment environment, trained nursing and mental health staff, and a comprehensive biopsychosocial treatment approach. The immigration detention centre does not have adequate mental health staff, appropriately-trained supervisory staff, or adequate capacity to review and monitor biological treatments.

6.109 The NSW Refugee Health Service suggested that national guidelines on the health care needs of refugees are necessary. They suggested that a National Refugee Health Committee comprised of 'health professionals with expertise in the health of humanitarian entrants and with knowledge of the public health systems in Australian states and territories' could develop the guidelines in consultation with DIMA and Commonwealth and State health services.[102]

6.110 A Just Australia also argued that health standards 'should be monitored by an oversight body independent of the Department, with the power to impose penalties for

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98 RANZCP, *Submission 108*, pp 3-4.

99 LIV, *Submission 206*, pp 26-27.

100 RANZCP, *Submission 108*, p. 3.

101 RASSA, *Submission 51*, p. 6.

102 South Sydney West Area Health Service, *Submission 209*, p. 7.

breaches.'[103] RANZCP said it was disappointed with the Palmer Inquiry recommendation to establish another ministerially appointed committee of medical representatives:

> We had previously made recommendations about having an independent clinician run group to overview health standards and to look at issues about quality assurance within the detention environment, possibly now incorporating people in various forms of community detention. Our original proposal was made some time ago now. I believe it was to Minister Ruddock at the time. There was an agreement across the medical colleges and the AMA that representatives from those clinical groups who needed to be represented - psychiatrists, paediatricians, physicians, public health and so on - could form such a committee. It would be very happy to work with the Commonwealth on the issues and to report to the minister but should fundamentally be appointed by the medical colleges.[104]

6.111 DIMA argued that immigration centres are subject to regular scrutiny from external agencies, such as Parliamentary Committees, HREOC, the Commonwealth Ombudsman, the Australian National Audit Office, the United Nations High Commissioner for Refugees and the Immigration Detention Advisory Group, to ensure that immigration detainees are treated humanely, decently and fairly.[105]

6.112 However, the Committee notes that none of these bodies has the power to make binding decisions in relation to particular cases or a specific mandate to oversee the provision of mental health care. During the hearings it was also pointed out that State authorities with responsibility for mental health do not have a statutory right of access to detainees under the Migration Act.

> …. neither the Public Advocate nor mental health agencies in each State had a right to access detainees held under the Migration Act regardless of the fact that the provision of mental health services and guardianship law fall under the jurisdiction of State governments.[106]

6.113 The opening of immigration detention centres to State authorities and the involvement of mainstream and specialist mental health services would ensure independent delivery of services.

Committee view

6.114 The committee was impressed by the depth and breadth of experience and expertise evident among witnesses and the quality of evidence they submitted to the inquiry. The issue of the mental health effects of prolonged and indeterminate immigration detention emerged as the most critical aspect of Australia's mandatory

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103 A Just Australia, *Submission 184*, pp 13-14.

104 *Committee Hansard*, 27 September 2005, p. 29.

105 DIMA, *Submission 205*, p. 49.

106 LIV, *Submission 206*, p. 26.

detention policy. There is a significant and credible body of evidence that prolonged and indeterminate immigration detention results in an unacceptable rate of psychological harm in the detainee population. Evidence also demonstrated that asylum seekers and those seeking protection on humanitarian grounds, including children, are most at risk. The committee therefore concludes that prolonged and indeterminate immigration detention is inherently harmful to psychological wellbeing and its abolition should be a priority.

6.115 The systemic problems associated with the delivery of health care, in particular mental health care, in an immigration detention centre environment may be alleviated by introducing reforms to improve access to high quality health care under independent supervision. However, the fundamental issue is the length of detention and the nature of the immigration detention environment.

6.116 There is a significant body of evidence from a wide range of well qualified witnesses that the provision of mental health care within immigration detention centres is systemically flawed and below acceptable community standards. While the reforms proposed and attested to by DIMA demonstrate a willingness to improve the quality of mental health care, it does not address the fundamental issue. The committee considers that addressing the fundamental cause – prolonged and indefinite detention – will help to address many of the most intractable problems.

6.117 Expert witnesses advocated the unimpeded access by external qualified medical practitioners to immigration detainees; the provision of mental health care by established mainstream mental health services; and the development of specific standards of care and oversight of those standards by the profession. If mandatory detention involving prolonged periods of detention remains, that such substantial reform will be required to guarantee a detainees right of access to appropriate, good quality health services.

Poor food

6.118 Several concerns were expressed about the food provided to detainees. It was claimed that not only has the food been of poor quality but in some instances, unfit for consumption.[107] It was also claimed that the food provided did not take account of detainees' religious and cultural backgrounds. On some occasions the quality of the food had provoked demonstrations by detainees resulting in some detainees being placed in one of the 'punishment units'.[108]

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107 Ms Margaret McGregor, *Submission 20*, p. 1; Mr Jamal A Daoud, *Submission 85*, p. 5; Ms Margaret Tonkin, *Submission 96*, p. 1; Great Lakes Rural Australians for Refugees, *Submission 150*, p. 3; Ms Joan Nield, *Submission 152*, p. 4.

108 Sister Jane Keogh, *Submission 34*, pp. 2-6; Ms Rosalind Berry, *Submission 137*, pp 6-7.

6.119 It was claimed that two pregnant detainees had found it difficult to obtain the food they needed during their pregnancy.[109]

6.120 Often people visiting detainees bring food items for them which supplements that provided by GSL. Ms Joan Nield stated that when she started visiting detainees at Baxter Immigration Detention Centre, bringing of food into the Centre was prohibited. This restriction has been lifted and visitors are allowed to bring full meals to detainees.[110]

6.121 On 12 September 2005 the Minister issued a media release on the findings of an independent review into food at the Baxter Immigration Detention Centre.[111] The review was commissioned by DIMA in response to ongoing complaints by detainees about the food at Baxter.

6.122 Under its contract with DIMA, GSL is required to provide detainees with good quality, nutritional food that is interesting, appealing and culturally appropriate. The Minister expressed disappointment that the review had found that 'not all of the required food standards at Baxter have been met.'

6.123 The Minister stated that the review had made a number of recommendations, many of which have already been implemented. These include greater menu choice, some self-catering, including regular barbeques, and increased opportunities for detainees to have a say on food. The Minister went on to say that she recognised that 'Food has a substantial impact on the morale of detainees and as such I have instructed my department to quickly assess and introduce changes that go above and beyond the recommendations made.' She also said that she had instructed her department to work with GSL to make all of the necessary changes.

6.124 The Minister said the Palmer Report had also made recommendations to improve food services at Baxter, particularly to allow greater independence and variety in food. As part of the general review of the contract between DIMA and GSL recommended in the Palmer report, DIMA is to consider whether any amendments are needed to the descriptions and standards for food services in the contract.

Committee view

6.125 The committee acknowledges the efforts being made to improve the food services for detainees at the Baxter Immigration Detention Centre. However, these improvements must not be restricted to Baxter but must apply to all immigration detention centres. In addition, there needs to be considerable improvement in the monitoring of and reporting on these services to ensure that the standards are being met as this has clearly not been the case in the past.

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109 Ms Margaret McGregor, *Submission 20*, p. 1.

110 Ms Joan Nield, *Submission 152*, p. 4.

111 http://www.minister.immi.gov.au/media_releases/media05/v05111.htm

Detention costs

6.126 Section 209 of the Migration Act provides that a non-citizen who is detained is liable to pay the Commonwealth the costs of his or her detention. Criticism was levelled at the imposition of costs particularly in relation to an asylum seeker's detention.[112] It was said that not only are asylum seekers unlikely to have access to funds to meet these costs but until the debt is paid various restrictions are imposed, including the prevention of that person returning to Australia.

6.127 The LIV said that:

> The Australian Government's mandatory detention policy comes at a high financial cost to persons detained in immigration detention, particularly, those persons within a family unit or detained for a significant period of time. Detention costs, if not repaid to the Government, may effectively prevent a person from returning to Australia, even in situations where they may have close family ties in Australia. The LIV also notes that a number of former detainees, who were eventually granted a temporary or permanent visa, have been forced to repay their detention costs. In some cases, this has meant a debt of more than $50,000, which is a major hurdle for a person seeking to rebuild their life in the Australian community. We suggest that it is not appropriate for an Australian permanent resident to be forced to pay such costs.
>
> The LIV recommends that immigration detainees should not be charged the costs of detention. Alternatively, detainees who are subsequently granted a temporary or permanent visa should not be liable for the costs of their detention.

6.128 The St Vincent de Paul Society commented that:

> The policy of charging detainees for the cost of detention needs to be managed very carefully with due regard for the individual circumstances of each case. If an individual has been detained without cause, or has become illegal due to circumstances beyond their control (such as the visa being cancelled en-route) the Society does not feel it is appropriate to charge the individual for the cost of their detention.

6.129 Accordingly they recommended that 'individuals in these circumstances not be charged the costs of their own detention and that a cap or limit be placed on the amount of debt that individuals can incur while in detention, as some bills are so large as to be beyond any reasonable capacity for individuals to pay.

6.130 Ballarat Refugee Support Network said that while they:

> are aware of an administrative decision that, for those on TPVs, detention debts are to be waived … there are other asylum seekers who have achieved release from detention in other ways eg. a permanent visa as a refugee, and

112 Ballarat Refugee Support Network, *Submission 52*, p. 5; Ms Meryl McLeod, *Submission 56*, p. 3; St Vincent de Paul Society, *Submission 147*, p. 3; LIV, *Submission 206*, p. 18.

> who have been presented with a bill for the accommodation costs of their years in detention. An Iranian asylum seeker known to us, spent 41/2 years in detention and finally was released on a spouse visa. He has a bill for over $220,000. He must begin to pay this account if he seeks permanent residency in this country. It is a serious injustice to charge for accommodation in Australian detention centres.[113]

6.131 In relation to a question from the Committee on detention debts, Ms Lyn O'Connell, First Assistant Secretary, Detention Services Division in DIMA advised that:

> The amount billed during the 2004-05 financial year for detention debts was just over $30 million – $30,860,000. In terms of the number of people that it applied to, approximately 4,600 people were billed with respect to that debt. In terms of the payments received during that period, they amounted to just over $1 million – $1,197,000 – during that financial year in relation to those detention debts.[114]

6.132 Perhaps unsurprisingly the success rate in relation to long term debts, 'The success rate after the person has left the country is very remote.'[115]

Committee view

6.133 The evidence clearly indicates that the imposition of detention costs is an extremely harsh policy and one that is likely to cause significant hardship to a large number of people. The imposition of a blanket policy without regard to individual circumstances is inherently unreasonable and may be so punitive in some cases as to effectively amount to a fine. The committee agrees that it is a serious injustice to charge people for the cost of detention. This is particularly so in the case of unauthorised arrivals, many of whom have spent months and years in detention. The fact that this policy has been implemented in the context of a mandatory detention policy makes it all the more egregious. It is unclear exactly what pressing social need the policy addresses or how it can rationally be sustained and the committee therefore recommends that it be abolished and all existing debts be waived.

Recommendation 44

6.134 The committee recommends that there be a presumption against the imposition of a liability to pay the Commonwealth for the cost of detention, subject to an administrative discretion to impose the debt in instances of abuse of process or where applicants have acted in bad faith.

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113 Ballarat Refugee Support Service, *Submission 52*, p. 5.

114 *Committee Hansard*, 11 October 2005, p. 18.

115 *Committee Hansard*, 11 October 2005, p. 18.

Alternative approaches to mandatory detention

6.135 In chapter 5 the committee expresses its view that it is now timely to consider alternative options to the mandatory detention of unlawful non-citizens, especially asylum seekers. During the course of the inquiry a number of alternative models were presented to illustrate how one might comprehensively address the question of how asylum seekers can be better catered for, while maintaining the integrity of the migration program.

6.136 For example, the National Council of Churches in Australia (NCCA) recommended 'The adoption of a community release scheme, open to all asylum seekers (unless there are strong, justifiable reasons to continue detention), based on adequate case management and proper entitlements, namely work rights, Medicare and supplementary income support, if required.'[116]

6.137 Amnesty International took a similar approach and recommended that the government should:

> **establish** a formal independent review process to assess on a case by case basis the necessity and proportionality of detention of all asylum-seekers and rejected asylum-seekers who are currently detained in Australia, including Christmas Island, and on Nauru.
>
> **ensure** that in future, asylum-seekers who arrive in Australia without adequate documentation are detained only when their detention is consistent with international human rights standards. Such legislation should be based on a general presumption against detention.
>
> **specify** in national law a statutory maximum duration for detention which should be reasonable in its length. Once this period has expired the individual concerned should automatically be released.
>
> **ensure** that detained asylum-seekers have regular and automatic access to courts empowered to review the necessity of detention and to order release if continued detention is found to be unreasonable or disproportionate to the objectives to be achieved.
>
> **establish** a new class of bridging visa for any future arrivals that allows for asylum-seekers to remain in the community with rights and entitlements as outlined above.
>
> **implement** a *complementary protection* model to provide for future asylum seekers who do not meet the full and inclusive interpretation of the definition of refugee under the Refugee Convention but nonetheless are in need of international protection.

6.138 Justice for Asylum Seekers (JAS) and the Brotherhood of St Laurence advocated the Reception and Transitional Processing System (RTP), as a viable alternative. Some of key features of the proposal include:

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116 National Council of Churches, *Submission 179*, p. 19.

1. Detention should only be used for a limited time, in most cases for Identity, Health and Security (IHS) checks upon arrival; prior to a person being returned to their country of origin or another country, or if a claim is unsuccessful and if supervision in the community is inadequate to the high risk of the person absconding.

2. Introduction of a monitored release regime based on a revised risk assessment – made into community hostels/cluster accommodation.

3. Those deemed high security risk to remain in detention, but with set periods of judicial or administrative review.

4. Ensuring children and their primary carers are released from detention as soon as possible.

5. Reception of all unaccompanied minors, families, single women, vulnerable people into community care with Government support and compliance requirements.

6. Reception of all people assessed to be psychologically vulnerable into community care by specialized services with Government support and compliance requirements.

7. Creation of a case worker system whereby an independent service provider (e.g. Australian Red Cross) provides information, referral and welfare support services to people claiming asylum, from the time of their arrival to the point of repatriation or settlement in the community.

8. Creation of a Representative Assessment Panel to oversee conditions of detention and community management. The Panel would make decisions on risk assessments, security compliance and periodically review length of detention. The Panel would act as an independent body ensuring transparency and accountability of service providers entrusted with the humane manner of treating people.

9. The introduction of a specialist service provider such as International Organisation of Migration to manage return of persons whose claim has been unsuccessful.

10. The creation of a special visa class for long term detainees who can't be returned to their country of origin, which would allow them to live in the community until such time as they can be returned.[117]

6.139 It was argued that adoption of the RTP system, or a similar approach, would not adversely effect the integrity of Australia's refugee determination system. A trial conducted by the Hotham Mission found that 85 per cent of those not found to be refugees returned voluntarily to their home country, while of the other fifteen per cent, some had returned to detention in order to have their air fare paid so that they could leave Australia.[118]

117 Justice for Asylum Seekers. *Submission* 163, Attachment A, p. 47.

118 *Committee Hansard*, 27 September 2005, p. 33.

Committee view

6.140 The committee has received a substantial body of expert testimony about the psychological harm of prolonged and indeterminate detention and the systemic problems in the management of immigration detention centres. Having considered the evidence the committee believes that the prolonged and indeterminate nature of Australia's mandatory detention policy is the key problem which must be addressed. The weight of evidence before the committee demonstrates that the consequences of mandatory detention demonstrate that immigration detention, in its present form, is unable to meet the twin of objectives of preserving the integrity of the migration program while ensuring the humane treatment of non-nationals in detention.

6.141 Against this background there must be strong reasons for continuing the policy and the practice in its present form. The committee agrees with the many witnesses who argued that comprehensive reform of Australia's mandatory policy is now essential. The government's recent commitment to reduce the number of long term detainees and, in particular, alternative detention arrangements for children and families are welcome and signify an important shift in position. However, the mandatory requirement that an 'unlawful non-national' be detained indefinitely until provided with a visa or removed from Australia remains Australian law. Release from an IDF to an alternative place of detention or under a residence determination is still a form of detention and the person remains subject to the conditions which are at the discretion of the minister.

6.142 A number of features are common to the proposals for reform:

- retention of mandatory detention for initial screening, identity, security and health checks;
- statutory time limit to periods of detention;
- effective access to independent judicial supervision of legality and merit of detention which continues beyond the initial period; and
- release into the community on a bridging visa with access to basic services and subject to reasonable reporting conditions.

6.143 Prior to the introduction of mandatory detention in 1992, judicial supervision of detention was the norm for the majority of 'unlawful non-citizens' and most people were permitted to live in the community. During the past ten years Australia has continued to permit those who arrive on short term visas and subsequently claim asylum to remain in the community – they represent the largest proportion of asylum applicants. The reforms proposed in this report are a fundamental change to the existing principle of mandatory detention, but are in fact measures which either previously or currently exist and will bring clarity and simplicity into a complex system. These reforms are directed at unauthorised arrivals.

6.144 The committee also considers that the system of complementary protection for future asylum seekers who do not meet the definition of refugee under the Refugee Convention but otherwise need protection for humanitarian reasons and cannot be

returned should be introduced. Consideration of claims under both Refugee Convention and Australia's other international human rights treaty should take place at the same time. This will significantly reduce the time spent in detention and allow existing decision making processes, including merit and judicial review to be applied simultaneously. The committee believes this is a more efficient, effective and comprehensive approach and one that is common in other jurisdictions.

Recommendation 45

6.145 The committee recommends that the Migration Act be amended to permit the mandatory detention of unlawful non-citizens for the purpose of initial screening, identity, security and health checks and that the initial period of detention be limited to up to ninety days.

Recommendation 46

6.146 The committee recommends the continuation of detention for a specified limited period should be subject to a formal process, such as the approval of a Federal Magistrate, on specified grounds and limited to situations where: there is suspicion that an individual is likely to disappear into the community to avoid immigration processes; or otherwise poses a danger to the community.

Recommendation 47

6.147 The committee recommends release into the community on a bridging visa with a level of dignity that allows access to basic services, such as health, welfare, housing and income support or work rights.

CHAPTER 7

OUTSOURCING OF MANAGEMENT OF IMMIGRATION DETENTION CENTRES

7.1 This chapter considers the issues raised in submissions and evidence in relation to the outsourcing of management and service provision at immigration detention centres.

7.2 During the inquiry many witnesses opposed the use of private contractors and attributed many of the difficulties in the management of immigration detention to outsourcing. The views expressed by the Social Justice Committee (SJC) of the Conference of Leaders of Religious Institutes (NSW) exemplified these concerns:

> The outsourcing of detention can service to compromise fundamental human rights of detainees. Privatisation and outsourcing are often justified on the grounds that they facilitate higher efficiency and less expense in the provision of services. However, outsourcing… also serves to lower standards, and to limit the accountability of detention centre operators… CLRI asserts that as deprivation of liberty constitutes a serious restriction of a fundamental human right itself, the conditions under which detention centres operate must be open to scrutiny. We are concerned that a private company, with an obligation to its shareholders to make a profit, may place more emphasis on financial efficiency and profitability than on optimum conditions for detention.[1]

7.3 The evidence to this inquiry indicates that the removal of direct ministerial control and the reliance of generalised immigration detention standards has increased the risk of inhumane treatment. This may be attributed to a number of specific factors. However, the core issue is whether it is sound public policy to outsource a public function as inherently complex as immigration detention, which involves a highly diverse, complex and vulnerable population.

Background

7.4 The provision of detention services at immigration detention facilities in Australia has been outsourced to private organisations since November 1997. Between November 1997 and February 2004 detention services were provided at all mainland immigration detention centres by Australasian Correctional Services (ACS). ACS provided these services through its operational arm, Australasian Correctional Management (ACM). ACS/ACM is now known as GEO Australia Pty Ltd (GEO).[2]

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1 SJC, *Submission 171*, p.2

2 ANAO, *Management of Detention Centre Contracts – Part B*, Audit Report No. 1 2005-2006, p. 11.

7.5 A new detention services contract (parts of which are commercial-in-confidence) was signed between the Commonwealth of Australia and Group 4 Falck Pty Ltd on 27 August 2003. Group 4 Falck subsequently changed its name to Global Solutions Limited (Australia) Pty Ltd. Global Solutions Limited (Australia) Pty Ltd (GSL) is the wholly-owned Australian subsidiary of Global Solutions Limited of the UK.[3] Between 1 December 2003 and 29 February 2004, the provision of detention services at Australia's immigration detention centres was progressively transitioned from GEO to GSL.[4]

7.6 The term of the detention services contract is four years (until August 2007), with an option for the Commonwealth to extend for a further period of up to three years. The annual cost of providing immigration detention services through the contract is approximately $90 million, not including the cost of overheads and contract administration.[5]

7.7 The contract requires that GSL provide a custodial service for people held in immigration detention and take responsibility for the security, custody, health and welfare of detainees delivered into its custody by DIMIA. GSL has no role in, or responsibility for, establishing identity or providing any service or function that relates to the application of the Migration Act.[6]

7.8 The service provider must exercise a duty of care, but ultimate responsibility for immigration detainees remains with the Commonwealth and DIMIA is responsible under the Migration Act for administering immigration detention.[7] Schedule 2, clause 4.1.2, of the detention service contract recognises that the duty to detain unlawful non-citizens:

> … imposes particular responsibilities on the Commonwealth with regard to duty of care for each and every person in immigration detention and, beyond the individual, to ensuring the safety and welfare of all detainees in a detention facility. The Commonwealth exercises this duty of care through the Department.

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3 The Global Solutions Limited website accessed on 19 January 2006 reports that GSL was purchased in July 2004 by two private equity investors, Englefield Capital and Electra Partners Europe. See http://www.gslglobal.com/press_centre/introduction.asp

4 ANAO, *Management of Detention Centre Contracts – Part B*, Audit Report No. 1 2005-2006, p. 11.

5 ANAO, *Management of Detention Centre Contracts – Part B*, Audit Report No. 1 2005-2006, p. 11.

6 Palmer Report, p. 60.

7 *Submission 205*, p. 45. Schedule 2, clause 4.1.2 Detention Services Contract reported in Mr M. Palmer, *Report on the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, 6 July 2005,p. 67; See also DIMIA evidence to Joint Standing Committee on Migration, *Detention Centre Contracts: Review of Audit report No.1 2005-2006, Management of the Detention Centre Contracts – Part B*, November 2005,Canberra, p.25.

7.9 GSL has the capacity to subcontract key services and has engaged four major subcontractors to assist in the following areas: provision of facilities management (Tempo Facilities Management); catering (Delaware North Australia); healthcare (IHMS, a subsidiary of International-SOS); and psychological counselling services (PSS, a subsidiary of Davidson Trahaire).[8]

7.10 Detention services are provided in accordance with the Immigration Detention Standards (the IDS), which were developed by DIMIA in consultation with the Commonwealth Ombudsman's Office and the Human Rights and Equal Opportunity Commission (HREOC). The IDS form the basis of the contract between DIMIA and GSL. The IDS relate to the standard of care and quality of life expected in immigration detention facilities in Australia.[9]

7.11 Under the contract, GSL are prevented from discussing publicly their policies and procedures. However, its website contains the following information:

> It is a sensitive and complex contract, and GSL must comply at all times with the Immigration Detention Standards in performing its obligations …The company is rigorously monitored. Extensive training prior to starting their employment and then throughout their careers ensures that management and staff fully understand their responsibilities under the contract and the unique nature of administrative detention.[10]

7.12 Representatives from GSL appeared before the committee at one of its public hearings for the current inquiry. Mr Peter Olszak, Managing Director of GSL, told the committee that GSL 'continually strive[s] to meet [its] contractual requirements, and part of this process is a regular review of [its] operational procedures'.[11]

7.13 Mr Olszak noted the complexity of the detention services contract:

> This is a complex and sensitive contract in which parliament and the community rightly show great interest. We are working in a difficult environment, but I believe that by any balanced measure GSL has performed to, and in some cases exceeded, its tendered offerings in seeking to meet the needs of detainees and DIMIA.[12]

7.14 Mr Olszak also provided the committee with some information regarding the practical workings of the detention services contract. In relation to the reporting of breaches of the contract, Mr Olszak advised that, in the last 12 months, GSL has 'been

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8 www.gslpl.com.au/gsl/contracts/contracts.asp (accessed 28 September 2005).

9 http://www.immi.gov.au/detention/standards_index.htm (accessed 4 October 2005).

10 www.gslpl.com.au/gsl/contracts/contracts.asp (accessed 28 September 2005).

11 *Committee Hansard*, 8 November 2005, p. 2.

12 *Committee Hansard*, 8 November 2005, p. 3.

sanctioned for not performing to the particular standards'[13] under the contract. A representative from DIMIA elaborated on the sanctions process:

> It is assessed on a quarterly basis. The incidents and activities are assessed each quarter and anything that, in our view, has led to a breach of one of the Immigration Detention Standards, which are a schedule to the contract, may lead to a sanction.[14]

7.15 Mr Olszak outlined the reporting mechanism related to 'breaches' of the contract:

> There is a pretty involved reporting structure around the reporting of incidents. Different incidents have a reporting time frame. For major incidents it is within the hour. For minor incidents it can be within an extended period of time. That is the first thing. On a day-to-day basis, we report through to DIMIA any particular incidents that may or may not reflect any possible failure by GSL. If there is a whole raft of incidents we are duty bound to report those. With regard to the quarterly reports, by going through our reports and the DIMIA centre managers reports, DIMIA will then determine if there are to be any sanctions applied.[15]

7.16 A representative from DIMIA confirmed that a monetary value is usually attached to any sanctions and that this is 'deducted from the percentage of the payments which are at risk'.[16]

Recent reports relating to outsourcing arrangements

7.17 A series of recent reports, including reports by the ANAO and the Palmer Report, have been highly critical of both the operations of immigration detention centres and the contracts that underpin those operations. Many submissions and witnesses to this inquiry suggested that the ANAO reports and the Palmer Report provide a damning critique of the commercial relationship between DIMIA and its service provider, GSL.[17] Some of the main findings and recommendations from these reports are discussed briefly below.

The Palmer and Comrie Reports

7.18 The Palmer Report identified serious systemic weaknesses in DIMIA and made 49 recommendations for the improvement of DIMIA's culture, processes and

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13 *Committee Hansard*, 8 November 2005, p. 6.

14 *Committee Hansard*, 8 November 2005, p. 6.

15 *Committee Hansard*, 8 November 2005, p. 7.

16 *Committee Hansard*, 8 November 2005, p. 7.

17 For example, see Law Institute of Victoria, *Submission 206*, p. 27; Women and Reform of Migration, *Submission 189*, p. 23.

operations. Recommendations in the Comrie Report reinforce a number of the Palmer Report's recommendations.[18]

7.19 One of the main findings in the Palmer Report was that the current detention services contract with GSL is 'fundamentally flawed and does not permit delivery of the immigration detention policy outcomes expected by the Government, detainees and the Australian people'.[19] Indeed, the 'unduly rigid, contract-driven approach has placed impediments in the way of achieving many of the required outcomes'.[20] Since the performance management regime between DIMIA and GSL 'does not manage performance or service quality or risks in any meaningful way', the entire system is 'ill-conceived' and could 'never deliver to the Commonwealth the information on performance, service quality and risk management' that DIMIA had hoped it would.[21]

7.20 Despite acknowledging that '(m)any of the ingredients seem to be there', the Palmer Report found that:

> …the arrangements fall short in delivering an immigration detention environment that is required by the policy and described in the contract. It is too simple to just blame GSL or DIMIA: the situation is both complex and demanding.[22]

7.21 Moreover:

> DIMIA does not seem to recognise that the nature of the contract determines behaviour. It is not enough to demand in the contract that the service provider act in partnership: there must be a basis for a real partnership that respects the rights and responsibilities of both parties.[23]

7.22 The Palmer Report concluded that there is a need to revisit the contractual parameters within which immigration detention services are delivered. One of its main recommended changes included renegotiating the Detention Services Contract so that the outcomes required by the Federal Government's immigration detention policy can be achieved; and the risks to the Commonwealth and GSL, as well as to detainees, are properly managed and protected.[24]

7.23 Other key recommendations of relevance included:

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18 Commonwealth Ombudsman, Media Release, 6 October 2005 at http://www.comb.gov.au/news_current_issues/media_releases/media_release_Alvarez_061005.pdf (accessed 7 December 2005).

19 Palmer Report, p. xiii.

20 Palmer Report, p. 61.

21 Palmer Report, p. 70.

22 Palmer Report, p. 64.

23 Palmer Report, p. 81.

24 Palmer Report, p. 70.

> …that DIMIA seek from the Australian National Audit Office a detailed briefing on the findings of the ANAO report on the detention services contract with GSL, to obtain the ANAO's guidance on reviewing the Commonwealth's current detention services contract with GSL and identify where and how changes can and should be made. [Recommendation 7.5][25]
>
> …that the Minister establish a Detention Contract Management Group made up of external experts to provide direction and guidance to DIMIA in relation to management of the detention services contract and report quarterly to the Minister… [Recommendation 7.6][26]
>
> …that, as a priority task, the Detention Contract Management Group review the current contract for detention services and advise DIMIA, in consultation with GSL, in order to identify and agree changes in arrangements that would [amongst other things]:
>
> - facilitate delivery of the detention services outcomes required by the Government
>
> …
>
> - develop, in consultation with GSL, a new regime of performance measures and arrangements for their continued monitoring and management that are meaningful and add value to the delivery of high-quality services and outcomes
>
> …
>
> - foster a shared partnership interest in achieving effective policy outcomes to ensure that the Government's objectives and the high standards of behaviour expected by the Government are met. [Recommendation 7.7][27]

ANAO's performance audits

7.24 The ANAO's audit into DIMIA's management of the detention centre contracts has been conducted in three stages. A number of findings in the Palmer and Comrie Reports relate directly to issues raised by the ANAO in its performance audit.

7.25 In 2003-04, the ANAO undertook the first stage (Part A) of a performance audit on the management of detention centre contracts. The report of the Part A audit, Audit Report No. 54, 2003-2004, *Management of the Detention Centre Contracts – Part A* (the Part A Report), was released on 18 June 2004. It focused on DIMIA's management of the detention centre contracts with GEO.[28]

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25 Palmer Report, p. 180.

26 Palmer Report, p. 180.

27 Palmer Report, pp 181-182.

28 ANAO, *Management of Detention Centre Contracts – Part A*, Audit Report No. 54, 2003-2004.

7.26 In 2005-06, the second part of the performance audit (Part B) was conducted. The Part B audit report, Audit Report No. 1, 2005-2006, *Management of the Detention Centre Contracts – Part B* (the Part B Report), was released on 7 July 2005. The objective of this second audit was 'to assess DIMIA's management of detention services through the contract, including the transition period and the implementation of lessons learned from the previous contract'.[29]

7.27 The Part B audit conducted by ANAO did not separately examine the outcomes of the detention program itself, nor the inherent quality of the services provided. This audit examined DIMIA's management of the contractual arrangements for the delivery of detention services and related performance measures.

7.28 It was initially intended that the Part B audit include an examination of the tender process, however the ANAO subsequently determined that such examination should be undertaken separately. Accordingly, the ANAO is currently undertaking an audit of DIMIA's tender, evaluation and contract negotiation processes and is expected to report in relation to these aspects in the first quarter of 2006.[30]

Key findings

7.29 The ANAO concluded in both the Part A Report and the Part B Report that DIMIA had been unable to articulate its requirements clearly for the provision of detention services under the contracts with its service providers. While acknowledging that a crucial issue in contractual arrangements is striking an appropriate balance between the degree of purchaser oversight of service delivery and the operational flexibility afforded to contracted parties, both reports highlighted serious deficiencies with this approach and emphasised that it is contingent upon the purchaser being able to clearly specify outputs, including appropriate service quality measures.[31]

7.30 For example, the ANAO found serious flaws with the IDS, the related performance measures and contract monitoring conducted by DIMIA. The ANAO also found that DIMIA had not sufficiently articulated the roles and responsibilities of third parties in the delivery of detention services; nor had it clearly specified mechanisms for the ongoing monitoring of third party arrangements for compliance with intended outcomes.[32]

7.31 In the Part A Report, the ANAO found that DIMIA's management of the detention arrangements 'suffered from a lack of clearly identified and articulated

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29 ANAO, *Management of Detention Centre Contracts – Part B*, Audit Report No. 1 2005-2006, p. 12.

30 ANAO, *Management of Detention Centre Contracts – Part B*, Audit Report No. 1 2005-2006, p. 12; DIMIA, 2004-05 Annual Report, p. 393. ANAO advise that publication of this latest report has been delayed until about February 2006.

31 Australian National Audit Office, *Submission 99*, p. 20.

32 Australian National Audit Office, *Submission 99*, pp 10-12 & p. 49.

requirements'.[33] The ANAO also found that DIMIA's management of the program, together with the delivery of services under the contract and the prioritisation of tasks, 'focused on risks that materialised, rather than systematic risk analysis, evaluation, treatment and monitoring'.[34]

7.32 Despite acknowledging that the current contract with GSL is better structured than previous detention arrangements,[35] the Part B Report found that the detention services contract does not adequately specify key responsibilities and expectations for the level and quality of services, either by DIMIA or GSL'.[36] In particular, 'clear and consistent definitions are not provided for health standards that are central to detainee welfare'.[37] Further, 'mechanisms to protect the Commonwealth's interests are not clear' and 'there is insufficient information about the quality of services being delivered and their costs to allow a value-for-money calculation'.[38]

7.33 Rather than DIMIA actively enforcing the performance of GSL, the monitoring of GSL's compliance with its contractual obligations is carried out by an 'exceptions-based' approach. The focus of this approach is the reporting of 'incidents'; DIMIA assumes that detention services are being delivered satisfactorily at each immigration detention centre unless the reporting of an 'incident' (or repeated 'incidents') reveals a problem.[39]

7.34 At one of the committee's hearings, Mr Steven Lack from the ANAO emphasised this point:

> There are issues around risk management – not documenting and treating risks – and contract management… [I]t remains an outcomes focused contract, which we do not have any inherent difficulties with. It is just that, because of the way they have structured that, they cannot measure against those outcome standards. The monitoring remains exception based and is reliant upon identifying incidents. The definition of an 'incident' is unclear.[40]

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33 Australian National Audit Office*, Submission 99*, p. 10.

34 Australian National Audit Office, *Submission 99*, p. 10.

35 ANAO, *Management of Detention Centre Contracts – Part B*, Audit Report No. 1 2005-2006, p. 48.

36 ANAO, *Management of Detention Centre Contracts – Part B*, Audit Report No. 1 2005-2006, pp 14 & 18.

37 ANAO, *Management of Detention Centre Contracts – Part B*, Audit Report No. 1 2005-2006, p. 49.

38 ANAO, *Management of Detention Centre Contracts – Part B*, Audit Report No. 1 2005-2006, pp 18-19.

39 ANAO, *Management of Detention Centre Contracts – Part B*, Audit Report No. 1 2005-2006, p. 16.

40 *Committee Hansard*, 7 October 2005, p. 12.

7.35 While acknowledging that assessment by exception allows DIMIA to identify extremely poor quality service delivery, the ANAO was critical of this approach and identified two main weaknesses with it:

> First, at a number of points in the monitoring and reporting process, DIMIA officials exercise considerable discretion as to what is reported. Secondly, the lack of clarity in the performance standards and measures in the contract itself means that it is not possible for DIMIA's staff to assess the ongoing performance of the Services Provider objectively, based on the performance reporting.[41]

7.36 Across both audit reports, the ANAO made a total of 10 recommendations aimed at improving key aspects of the contract. The ANAO has advised that DIMIA agreed with all its recommendations but the ANAO has not examined, and is therefore unable to comment on, DIMIA's progress in implementing them.[42]

7.37 In the Part B Report, four key areas for improvement were specifically identified:

- the insurance, liability and indemnity regime in the contract;
- the planning, performance information and monitoring arrangements, to provide a basis for systematic and objective monitoring and management of the detention function;
- the financial reporting of the detention function; and
- the management of Commonwealth equipment and assets at each detention facility, specifically the development of a comprehensive asset register.[43]

7.38 In its Annual Report for 2004-05, DIMIA summarised its response to ANAO's Part B Report:

> … the department advised the ANAO that the report did not fully reflect or take account of the complexity of the detention environment. In particular, the services and standards required in immigration detention must meet the needs of persons with a diverse range of backgrounds, and cannot be simply or inflexibly stated.[44]

7.39 The Annual Report noted that DIMIA had accepted the ANAO's four recommendations in its Part B report in full in relation to insurance, liability and indemnities; performance information and contract monitoring; financial reporting;

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41 ANAO, *Management of Detention Centre Contracts – Part B*, Audit Report No. 1 2005-2006, p. 16.

42 ANAO, *Submission 99*, p. 12.

43 ANAO, *Management of Detention Centre Contracts – Part B*, Audit Report No. 1 2005-2006, p. 23.

44 DIMIA, 2004-05 Annual Report, p. 392.

and asset management.[45] The Annual Report also stated that 'action' in many of these areas had been 'identified and work progressed'.[46]

The Palmer Implementation Plan

7.40 On 6 October 2005, the Minister for Immigration and Multicultural and Indigenous Affairs, Senator the Hon Amanda Vanstone, tabled in the Senate the report from the Secretary of DIMIA on the Implementation of the Recommendations of the Palmer Report of the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau (the Palmer Implementation Plan).[47]

7.41 The Palmer Implementation Plan (PIP) sets out the action the Federal Government has already taken, and action that is planned, to address the Palmer Report recommendations, the Comrie Report recommendations,[48] and the need for broader cultural change within DIMIA.

7.42 The PIP also includes DIMIA's proposed action to address the ANAO's recommendations in the Part B Report. DIMIA has also established the Palmer Programme Office to monitor the progress of, and expenditure against, PIP initiatives.[49]

7.43 A progress report on the PIP is due to be released in September 2006 and is expected to be tabled in Parliament on its release.[50]

Report by Joint Standing Committee on Migration

7.44 On 5 December 2005, the Joint Standing Committee on Migration (JSCM) tabled its report in relation to the review of the ANAO's Part B Report.[51] Several key issues raised in the Part B Report attracted comment from the JSCM and are relevant to this committee's inquiry. These issues are discussed briefly below.

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45 DIMIA, 2004-05 Annual Report, p. 392.

46 DIMIA, 2004-05 Annual Report, p. 392.

47 DIMIA, *Implementation of the Recommendations of the Palmer Report of the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, September 2005.

48 The PIP initiatives are consistent with the Palmer Report recommendations and those contained in the draft Comrie Report provided to DIMIA prior to its finalisation: see DIMIA, *Implementation of the Recommendations of the Palmer Report of the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, September 2005, p. 3.

49 Joint Standing Committee on Migration, *Detention Centre Contracts, Review of Audit Report No. 1, 2005-2006, Management of the Detention Centre Contracts – Part B*, December 2005, p. 7.

50 DIMIA, *Implementation of the Recommendations of the Palmer Report of the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, September 2005, p. 3.

51 Joint Standing Committee on Migration, *Detention Centre Contracts, Review of Audit Report No. 1, 2005-2006, Management of the Detention Centre Contracts – Part B*, December 2005.

7.45 In general terms, the JSCM stated that it:

> …is hopeful that action to date and the range of initiatives planned will address many of the problematic aspects of the management of the detention centre contracts, including DIMIA's ability to put in place performance information and monitoring systems to ensure that detainee needs and agency responsibilities are met. The Committee will continue to monitor developments in this area.[52]

7.46 The JSCM acknowledged the cooperative relationship between the ANAO and DIMIA in reviewing current detention arrangements. A representative from DIMIA told the JSCM that:

> As announced by the minister last Thursday, Mr Mick Roche, a former Deputy CEO of the Australian Customs Service, Deputy Secretary in the Department of Health and head of the Defence Materiel Organisation, has been engaged to review the functions and operations of detention and compliance activities within the department. Mr Roche will also conduct a review of the detention services contract, and the Australian National Audit Office has already been approached by the department to brief relevant officers about the findings and issues identified through the part B audit.[53]

7.47 Mr Roche has been engaged as a consultant for a three-month period and is expected to provide a formal report with suggested changes in relation to all aspects of the detention services contract at the end of the review period.[54] However, the JSCM commented that 'the three-month period allocated for the review may be too short a time for the significant task that Mr Roche is undertaking'.[55]

7.48 The JSCM also noted the involvement of the ANAO in the review being undertaken by Mr Roche.[56] The JSCM expressed its hope that:

> …consultation with the ANAO, which focuses on addressing the issues identified in [the Part B Report], will ensure that DIMIA is fully aware of the issues of concern and the options and approaches available to address the problems in the current arrangements.[57]

7.49 In relation to the ANAO's findings about shortcomings in the insurance, liability and indemnity arrangements between the Commonwealth and GSL, the

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52 Joint Standing Committee on Migration, ibid, foreword.

53 Joint Standing Committee on Migration, *Committee Hansard*, 10 October 2005, p. 13.

54 Joint Standing Committee on Migration, *Committee Hansard*, 10 October 2005, pp 14-15; Joint Standing Committee on Migration, *Detention Centre Contracts, Review of Audit Report No. 1, 2005-2006, Management of the Detention Centre Contracts – Part B*, December 2005, p. 9.

55 Joint Standing Committee on Migration, *Detention Centre Contracts, Review of Audit Report No. 1, 2005-2006, Management of the Detention Centre Contracts – Part B*, December 2005, p. 32.

56 Joint Standing Committee on Migration, ibid, p.10.

57 Joint Standing Committee on Migration, ibid, pp 10-11.

JSCM's inquiry heard that DIMIA had not yet taken action to follow up this recommendation. However, DIMIA indicated that this issue would be considered as part of the review of the current detention services contract being undertaken by Mr Roche.[58]

7.50 The JSCM encouraged DIMIA to ensure that the consideration of the insurance, liability and indemnity regime, occurring as part of Mr Roche's review of the contract, addresses the issues identified by the ANAO. It recommended:

> …that DIMIA act promptly to develop and implement the changes required to improve the insurance, liability and indemnity regime associated with its detention function. [Recommendation 1][59]

7.51 In relation to the ANAO's criticism of the lack of clarity and consistency for monitoring GSL's performance under the detention services contract, the JSCM noted that developing such measures for the delivery of services in a complex environment is not unique. It expressed the hope that DIMIA 'will explore and build upon the range of suggestions made by the ANAO for improving the clarity and consistency of standards and performance measures'.[60]

7.52 The JSCM's view on DIMIA's 'exception-based' approach to monitoring GSL's performance was that:

> …the nature and complexity of the detention services environment warrants a more proactive approach to performance monitoring, to ensure that detainees' needs are met and that there is some degree of quality assurance in the delivery of detention services. The Committee is hopeful that the host of reforms outlined in the PIP will facilitate a more proactive management and monitoring role by DIMIA.[61]

7.53 The JSCM stated that it would request a briefing from DIMIA to hear, amongst other things, specific examples of DIMIA's 'proactive and systematic' approach to performance monitoring.[62]

7.54 Finally, the JSCM recommended that:

> … the Minister for Immigration and Multicultural and Indigenous Affairs refer the progress report on the Palmer Implementation Plan to the Joint Standing Committee on Migration for examination when released. [Recommendation 2][63]

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58 Joint Standing Committee on Migration, ibid, p.16.

59 Joint Standing Committee on Migration, ibid, p. 16.

60 Joint Standing Committee on Migration, ibid, p. 21.

61 Joint Standing Committee on Migration, ibid, p. 24.

62 Joint Standing Committee on Migration, ibid, p. 24.

63 Joint Standing Committee on Migration, ibid, p. 33.

Government response to recent reports on outsourcing arrangements

7.55 As outlined previously, the Commonwealth Government has recently announced several administrative and structural changes to take place within DIMIA. Many of these changes reflect the findings and recommendations in the Palmer Report, the Comrie Report and the ANAO's performance audit reports.

7.56 DIMIA provided the committee with information regarding its implementation of recommendations contained in the ANAO's performance audit reports. It advised the committee that it has accepted the ANAO's recommendations in full.[64]

7.57 Specifically, DIMIA informed the committee of progress towards implementing the four recommendations contained in the ANAO's Part B Report as follows:

> *Recommendation 1 - Insurance, Liability and Indemnity*
>
> The current insurance, liability and indemnity regime in the contract will be independently reviewed as part of the detention services contract review process in response to Palmer. The ANAO has been invited to assist the Department in the context of the contract review.
>
> *Recommendation 2 - Planning, Performance and Monitoring*
>
> The Department is reviewing components of its broad governance framework, including examining options for improved business planning and performance information frameworks.
>
> As well as the independent review, an internal review of the risk management and monitoring plan commenced in October 2005, based on a comprehensive analysis of relevant data from the previous year.
>
> A new business plan for the detention function will be developed in coming weeks to articulate the objectives of the restructured detention services division, and the ANAO's comments will be incorporated into this process.
>
> The Department's internal auditor is currently conducting an audit of risk management processes in the division (and across the Department), and the recommendations arising from that report will also be incorporated into future planning processes.
>
> *Recommendation 3 - Financial Reporting*
>
> The current detention services contract defines service delivery in a particular environment. If changes are made to the environment, the Department will obviously need to renegotiate costings with the services provider to accommodate these changes. The Department is continuing to pursue value for money outcomes within this context.

64 DIMIA answers to Questions on Notice, 5 December 2005, p. 11. See http://www.aph.gov.au/senate/committee/legcon_ctte/migration/qon/05dec-dimia2.pdf

> The Department agrees with the ANAO's recommendations, and further progress will be made towards implementing these suggestions once the new detention environment is defined. In this way costings can be measured in an appropriate, long-term environment.
>
> Costing schedules under the current detention services contract will be independently reviewed as part of the contract review process.
>
> *Recommendation 4 - Management of Commonwealth equipment and assets at each detention facility*
>
> Joint onsite stocktakes with GSL have been successfully completed for every operational centre, with some outstanding issues being resolved at Baxter IDF.
>
> Common agreement has been reached regarding ownership of assets, including a volume of items in great detail not normally recorded in departmental stocktakes.[65]

7.58 DIMIA also advised that:

> More broadly, the Department is responding to criticism of its record-keeping practices raised in both the Palmer and Comrie Reports. A Records Management Improvement Plan (RMIP) is being developed and implemented by the Department in partnership with the National Archives of Australia. Improved records management practices, training, guidelines and systems support will all be addressed through the RMIP.[66]

7.59 At the JSCM's public hearing in relation to its review of the ANAO's Part B Report, a representative from DIMIA informed that committee that:

> …[a] governance coordination unit has been established within the detention services division and is contributing in this area. I suggest that one of the biggest things we need to advance, hand-in-hand with the review of the services contract, is an overall contract management framework for getting performance management right with the contracted organisations. We need to have very clearly defined authority and responsibility levels and skill levels with local contract management staff who are in day-to-day contact with GSL managers at local detention services centres. At the same time there needs to be a national account management role to work closely with the CEO level of the contracted organisation but with the right decision-making powers at the appropriate levels so that local issues can be solved quickly and readily on the ground and do not need high-level escalation to get them fixed quickly.[67]

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65 DIMIA answers to Questions on Notice, 5 December 2005, pp 11-12. See http://www.aph.gov.au/senate/committee/legcon_ctte/migration/qon/05dec-dimia2.pdf

66 DIMIA answers to Questions on Notice, 5 December 2005, p. 12. See http://www.aph.gov.au/senate/committee/legcon_ctte/migration/qon/05dec-dimia2.pdf

67 Joint Standing Committee on Migration, *Committee Hansard*, 10 October 2005, p. 20.

7.60 At the JSCM's public hearing, representatives from DIMIA also provided the following information on DIMIA's responses to recommendations in the Part B Report and in the Palmer Report:

> Given the significance of the Palmer report, the department's efforts have been focused towards addressing these recommendations, many of which involve complex and significant projects. The ANAO's recommendations from the part B report, which were accepted in full by the department, have been incorporated into the follow-up process from the Palmer report. The major component of the department's response to the Palmer report has been the acceptance of Palmer recommendations 7.6 and 7.7 regarding a comprehensive review of the detention services contract. The department acknowledges that there is room for improvement in the management of a function as complex as the immigration detention environment and the current contract forms a key part in maximising performance to clients in detention.[68]

7.61 In response to Recommendation 7.6 of the Palmer Report, DIMIA committed to establishing, by the end of 2005, a Detention Contract Management Group of external experts to provide direction and guidance to DIMIA and the Minister on the management of the detention services contract.[69]

7.62 The JSCM noted that:

> …DIMIA recognises that 'there is room for improvement in the management of a function as complex as the immigration detention environment' and that the Department is undertaking a number of initiatives, including departmental restructure and the PIP, that will address the issues identified by the ANAO in [the Part B Report].[70]

7.63 Further, it expressed the view that it:

> …is hopeful that these initiatives will result in more proactive management of the detention centre contracts by the Department. The Committee considers effective management of the detention centre contracts crucial to ensuring that detention services meet the needs of detainees and are provided in an efficient and cost-effective manner. The Committee will continue to monitor DIMIA's performance in this area.[71]

7.64 In an answer to a question on notice from this committee, DIMIA advised that:

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68 Joint Standing Committee on Migration, *Committee Hansard*, 10 October 2005, p. 13.

69 Joint Standing Committee on Migration, *Detention Centre Contracts, Review of Audit Report No. 1, 2005-2006, Management of the Detention Centre Contracts – Part B*, December 2005, p. 9.

70 Joint Standing Committee on Migration, ibid, p. 32.

71 Joint Standing Committee on Migration, ibid, p. 33.

> [Mr Roche] is required to provide advice in relation to Palmer Report recommendations 7.5, 7.6 and 7.7 by conducting a review of the current Detention Services Contract. The review will cover matters raised by both Palmer and by the Australian National Audit Office.
>
> The review is also to provide an outline strategy for implementing the recommendations.
>
> [Mr Roche] is also to provide advice in relation to Recommendation 7.3 of the Palmer Report.[72]

7.65 DIMIA also advised the committee that the maximum total value of the fees payable under the Roche contract is $198,000 and that the contract is to be completed no later than 31 December 2006, unless extended in writing by agreement. Other than for extension of time, the contract does not provide for renegotiation.[73]

Criticisms of outsourcing arrangements at immigration detention centres

7.66 Many submissions and witnesses to the inquiry expressed the view that the current arrangements in relation to the management and provision of services at immigration detention centres are highly unsatisfactory and inappropriate. They maintained that outsourcing should not be used by the Commonwealth Government as a mechanism for avoiding responsibility and accountability for the conditions and practices at such facilities.[74]

7.67 Many argued that management and service provision at these facilities should not be outsourced to private third-party entities which are primarily driven by requirements to maximise their profits.[75] Accordingly, they asserted strongly that direct responsibility for the management of immigration detention centres should revert to the Commonwealth Government.

7.68 These concerns are considered in further detail below.

General observations

7.69 Many submissions and witnesses questioned the feasibility of the Commonwealth Government outsourcing a fundamental public function to care for people. The Bishops Committee for Migrants and Refugees (on behalf of the Australian Catholic Bishops Conference) (the Bishops Committee) made an

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72 DIMIA answers to Questions on Notice, 16 December 2005, p. 1. See http://www.aph.gov.au/senate/committee/legcon_ctte/migration/qon/16dec-dimia.pdf

73 DIMIA answers to Questions on Notice, 16 December 2005, p. 1. See http://www.aph.gov.au/senate/committee/legcon_ctte/migration/qon/16dec-dimia.pdf

74 For example, see Ms Gwen Gorman, *Submission 136*, p. 1; Brotherhood of St Laurence, *Submission 175*, p. 4.

75 For example, see Jamal A. Daoud, *Submission 85*, p. 5.

interesting general observation about the merits of outsourcing as a means of providing services to the community:

> There is no doubt that some services are better provided by outsourced providers than by government agencies. Such services usually are ones in which the primary measures of performance are quantative. However, for services in which the primary measures of performance are qualitative, the merits of outsourcing are not as clear-cut. Performance management of immigration detention facilities should be mainly qualitative and thus the merits of outsourcing such a service can be difficult to justify.[76]

7.70 In the context of immigration detention centres, the Bishops Committee noted:

> Recent events have illustrated that the quality of service provided in immigration detention facilities has been inadequate. Either the performance of the outsourced provider has not been in accordance with the contract or the contract provisions have been inadequate. In either case the provision of the outsourced management of immigration detention facilities has been unsatisfactory. Either the activity should be brought back 'in-house' or substantial changes should be made to improve outsourced arrangements.[77]

7.71 The Asylum Seeker Resource Centre was particularly scathing in its criticism of the management and provision of services at immigration detention centres by private contractors:

> By any criteria, this has been an abysmal failure. Both ACM and GSL have demonstrated their ineptitude and unsuitability to manage immigration detainees.
>
> ACM's failings were so serious that DIMIA was forced to choose another contractor… GSL have fared little better… Such failings… should immediately disqualify them from continuing to manage detention centres in Australia. The experiment with private contractors has failed.[78]

7.72 The Federation of Ethnic Communities' Councils of Australia (FECCA) argued that the Federal Government should instigate a full judicial inquiry to examine the management and treatment of detained asylum seekers within all detention centres. FECCA was also mindful of recommendations in the Palmer Report indicating 'the need for a re-examination of the contractual relationship between DIMIA and GSL, to ensure more positive outcomes for asylum seekers within immigration detention facilities'.[79]

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76 Bishops Committee for Migrants and Refugees, *Submission 73*, p. 9.

77 Bishops Committee for Migrants and Refugees, *Submission 73*, pp 9-10.

78 Asylum Seeker Resource Centre, *Submission 214*, p. 34.

79 Federation of Ethnic Communities' Councils of Australia, *Submission 101*, p. 5.

7.73 FECCA also stressed the importance of clear guidelines for the management of detention centres:

> It is vitally important that there be clear guidelines and protocols for management of detention centres that ensures that human rights are upheld, that people be treated with compassion and concern for their physical, emotional, spiritual and psychological welfare.[80]

7.74 At the Sydney hearing, Mr Abd-Elmasih Malak from FECCA commented on its concerns about the management, and location, of detention centres:

> We do not believe the current, private management is appropriate. We do not believe the management is appropriately monitored or that there are any appropriate benchmarks or quality assurance to look after people's human rights—and we do not believe there is the ability to do that. As well, we cannot see the rationale behind having the detention centres as far as possible from other people. We believe that, if we have them as close as possible, like the one at Villawood, that will provide some sort of community support and enable people to recover and move as quickly as possible to successful settlement. I do not know if the private management issue is the reason for that or for anything else, but even if the centres are privately managed we need to have very strong, clear guidelines and management processes and legal professionals and health professionals need to be able to visit.[81]

7.75 In a paper comprising part of its submission to this inquiry, Women and Reform of Migration (WRM) provided a comprehensive assessment of the framework relating to the management of immigration detention centres. In its view, '(t)he overall picture of accountability is dismal and raises major questions on whether the system can be effectively changed to at least do what it claims to do'.[82]

7.76 In WRM's opinion, criticisms by the ANAO in its reports of the contractual arrangements with GSL, reinforced in the Palmer Report, 'could be used to improve the formal processes of administration and internal information flows'.[83] WRM also noted that:

> The ANAO report is particularly scathing about the contract and the performance indicators that DIMIA requires from GSL who run the facilities for them. Global Solutions further contracts out some services, including healthcare, to other providers, thus stretching the lines of accountability further. Global Solutions is expected to report its own

80 Federation of Ethnic Communities' Councils of Australia, *Submission 101*, p. 5.

81 *Committee Hansard*, 29 September 2005, p. 15.

82 Women and Reform of Migration, *Submission 189*, p. 29.

83 Women and Reform of Migration, *Submission 189*, p. 19.

> breaches that incur the fines they have to pay. The ANAO and other critics have pointed out the basic absurdity of this process![84]

7.77 WRM made a particularly pertinent argument in relation to an important area not specifically dealt with in the ANAO reports or the Palmer Report, that is the lack of external scrutiny of DIMIA:

> What neither [the ANAO or Palmer R]eport deals with specifically is the problems that emerge from the limitations of external scrutiny and the limited capacity of any external groups to compel DIMIA to improve or change their processes. For example, the Human Rights and Equal Opportunity Commission (HREOC), the ANAO, and the Commonwealth Ombudsman have no power to compel, only to report, and it is then up to DIMIA or the Government to act… The above reports are also relatively silent on the necessary public scrutiny required to ensure that even their recommendations are acted upon. Sadly, many recommendations they make are not new and there are other reports dating back to the nineties that have been ignored.[85]

7.78 Ms Claire O'Connor, a lawyer who has appeared for and represented many refugees, was critical of the auditing process with respect to immigration detention centre contracts:

> In relation to the conditions and the punishment regime once people are in there, I think it is wrong to tender that out to a private company. It means that there is very little or no accountability. I do not think the contract has been viewed properly or that there has been a proper audit of any of the contracts in the areas that related to the conditions in detention.[86]

7.79 Ms O'Connor continued:

> If we start with the premise that there is going to be a continuing private contractor, first of all a proper auditing of that system has to be set up for the regulations, not just a ticking of boxes, which I have seen. Up until April this year, one audit has been done of the health services in Baxter, and that audit was appalling. Anyone could have slipped through; Cornelia Rau slipped through that audit..[87]

7.80 The WRM also contended that, while immigration detention centre standards suggest that DIMIA facilities must comply with national and international requirements, there are considerable difficulties in activating such scrutiny:

> The external bodies that detention services are subject to scrutiny from to ensure that detainees are treated 'humanely, decently and fairly', are listed as HREOC, the Commonwealth Ombudsman, the United Nations High

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84 Women and Reform of Migration, *Submission 189*, p. 25.

85 Women and Reform of Migration, *Submission 189*, p. 19.

86 *Committee Hansard*, 26 September 2005, pp 34- 35.

87 *Committee Hansard*, 26 September 2005, p. 35.

> Commissioner for Refugees (UNHCR) and the Immigration Detention Advisory Group (IDAG). Although these bodies have the capacity to review and report, their primary function is to receive and act on complaints. None have the power to compel the government to act on their recommendations and all are government bodies. Under the circumstances, it is most significant that some of these bodies have been highly publicly critical of IDFs and interesting to note that DIMIA and the Government have not been keen to take up the issues and change the processes with any alacrity.[88]

7.81 Therefore, WRM concluded that:

> There are… strong signs that more effective monitoring be carried out by DIMIA and more importantly, that there be external reviews on an ongoing basis. Another point to seriously consider is whether contracting out such services to private providers can ever ensure enough accountability. Direct government provision is open to more effective scrutiny as there is no commercial-in-confidence constraint on access to material.[89]

Limited accountability and abrogation of duty of care

7.82 Most submissions and witnesses commenting on the issue of outsourcing were critical of the Commonwealth Government's failure to provide sufficient accountability in relation to immigration detention centres, and to properly discharge its duty of care to detainees.

7.83 The starting point for the Refugee Council of Australia (ROCA) was the broad notion of responsibility for fulfilling Australia's international obligations: that is, the Commonwealth Government is party to certain international treaties and is the entity responsible for compliance with internationally accepted standards; therefore it is directly responsible for ensuring proper effect to those obligations.[90]

7.84 In his submission, Mr Angus Francis summarised the problems associated with outsourcing the management of detention centres as follows:

> Instead of ensuring the professionalism and quality of services to detainees, repeated audits by the Australian National Audit Office and now the Palmer Inquiry confirm that the detention service contracts between the Commonwealth and Australasian Correctional Management and the current service provider, GSL, have engendered the abrogation of the Commonwealth's duty of care to detainees. Therefore, although Gleeson CJ in *Behrooz v Secretary, DIMIA* (2004) 208 ALR 271, [21] recently reminded officers that they owed a duty of care to detainees, the reliance on

88 Women and Reform of Migration, *Submission 189*, p. 30.

89 Women and Reform of Migration, *Submission 189*, p. 25.

90 Refugee Council of Australia, *Submission 148*, p. 10.

> outsourcing has clouded the duties of those responsible for administering detention centres.[91]

7.85 Mr Francis also argued that the Commonwealth Government's approach to immigration detention centres has resulted in the executive asserting its authority to detain and remove people, independent of the courts and Parliament. For example, 'the executive bias in the administration of the detention power is apparent in the fact that DIMIA has eschewed the making of regulations… to govern the operation of detention centres in favour of policy documents (the Immigration Detention Standards) and contracts with the detention service providers'.[92]

7.86 In effect, therefore, the current system involves Commonwealth officers operating within a legislative framework in which few conditions attach to the exercise of detention (and removal) powers, and within a wider administrative framework in which the executive asserts that it is the principal arbiter of the proper exercise of powers of detention (and exclusion/expulsion).[93]

7.87 The Refugee Advocacy Service of South Australia (RASSA) also made strong criticisms of outsourcing arrangements which, in its view, have resulted in avoidance of responsibilities:

> It has been the experience of RASSA that DIMIA officers, and in particular those in management positions at the Detention centres, have tried to hide behind the veil that the company which has been contracted to run the Detention centres is responsible for all matters concerning detention under the Migration Act. DIMIA has used this excuse to try and escape its responsibilities under the Migration Act and not to be accountable for its role in relation to detention. There has been an ongoing lack of transparency in the decision-making processes of DIMIA.[94]

7.88 Further:

> …contracts which have been largely drafted by the Commonwealth and entered into by the Commonwealth are quite inadequate in relation to clearly setting out standards required in detention and the appropriate demarcation of responsibilities between the parties. We refer to the comments and recommendations of the Palmer Inquiry in this respect.[95]

7.89 The Social Justice Committee of the Conference of Leaders of Religious Institutes in New South Wales (CLRINSW) argued that the outsourcing of detention 'can serve to compromise the fundamental human rights of detainees'.[96] While

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91 Mr Angus Francis, *Submission 234*, p. 4.

92 Mr Angus Francis, *Submission 234*, p. 10.

93 Mr Angus Francis, *Submission 234*, p. 10.

94 Refugee Advocacy Service of South Australia, *Submission 51*, p. 8.

95 Refugee Advocacy Service of South Australia, *Submission 51*, p. 8.

96 Conference of Leaders of Religious Institutes in New South Wales, *Submission 171*, p. 6.

privatisation and outsourcing might be 'justified on the grounds that they facilitate higher efficiency and less expense in the provision of services', in the case of management of detention centres, outsourcing 'also serves to lower standards, and to limit the accountability of detention centre operators'. This is because the Commonwealth Government and the private contractors 'can avoid giving out information about their operations, because of commercial confidentiality'.[97]

7.90 HREOC expressed its concerns in relation to the management of immigration centres as follows:

> The Commission is concerned that it remains the case that the manner in which detention centres are managed is largely unregulated by legislation and does not have the transparency and accountability required by Australian public servants in the provision of government services and programs.[98]

7.91 In her submission, Dr Margaret Kelly argued that the Commonwealth Government is ultimately responsible for immigration detention centres. Therefore, she recommended that the contract with GSL should be either terminated or bought out:

> It should be transparently and clearly accountable for them. In order for this to occur, the government itself should operate and maintain any such detention centres, and documentation concerning them, while protecting individual privacy and security matters, should be made publicly available. The contracting-out system is opaque. It is by no means certain to what extent DIMIA knows what occurs in the centres; it is by no means clear that the government currently has any timely mechanism for responding to problems in such centres, and under the contract it is most likely prevented from certain action. As it is, the government wears the flak from any failures or perceptions of failures in the running of these centres. While it is also clear that it is difficult to recruit personnel for distant centres, the government should establish its own protection and maintenance, and perhaps medical service for the centres. The government should be clearly and unequivocally responsible to the Australian people for these centres, and the contract should be rescinded or bought out.[99]

7.92 The Law Council of Australia (the Law Council) agreed that there is a fundamental problem with the notion of outsourcing a public service function to care for people to a private entity. It argued that to do so 'is at the peril of discharging the duty of government effectively'.[100]

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97 Conference of Leaders of Religious Institutes in New South Wales, *Submission 171*, p. 6.

98 Human Rights and Equal Opportunities Commission, *Submission 199*, p. 9.

99 Dr Margaret Kelly, *Submission 103*, pp 21-22.

100 Law Council of Australia, *Submission 233*, p. 8.

7.93 Ms Frederika Steen emphasised that there have always been fundamental problems with the outsourcing of the detention centre function:

> DIMIA supervision of the contract to manage remote detention centres and services from a Canberra base was always likely to suffer from a huge culture gap. It was new territory and very unfamiliar and there was no expertise to support effective management. Out of sight was largely out of mind. Outsourcing was somewhat confused with washing ones hands of a matter, and relinquishing responsibility.[101]

7.94 CLRINSW stressed that ultimate responsibility lies with the Commonwealth Government:

> These criticisms are not levelled at [private contractors], but rather at the intention behind contracting out of services which are legitimately those of governments. CLRI[NSW] asserts that as deprivation of liberty constitutes a serious restriction of a fundamental human right in itself, the conditions under which detention centres operate must be open to public scrutiny. We are concerned that a private company, with an obligation to its shareholders to make a profit, may place more emphasis on financial efficiency and profitability than on optimum conditions for detainees.[102]

7.95 The Law Institute of Victoria (LIV) suggested that the nature of private companies providing critical public services, such as the detention and care of immigration detainees, is fundamentally at odds with the commercial realities of providing a human service.[103]

7.96 At the hearing in Melbourne, Ms Maria Jockel, appearing on behalf of the Law Council of Australia and the Law Institute of Victoria, provided arguments opposing the current arrangements with respect to immigration detention:

> Regarding the role of detention, the Law Council of Australia is concerned that no minimum standards of detention have been prescribed. We know that it has been outsourced to a private organisation and that does not sit consistently with the responsibilities that the Commonwealth has, which include a duty of care. There is a legal duty to take care of people who are in detention. The Law Institute [of Victoria] argues that minimum standards must be adhered to. They should be transparent and capable of being known to the public so that the detention policy, if it is to continue, will be more accountable. The excesses that have occurred, as are evident from the Palmer inquiry and other inquiries, are simply no longer acceptable to the Australian community.[104]

7.97 Ms Jockel went on to say:

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101 Ms Frederika Steen, *Submission 224*, p. 13.

102 Conference of Leaders of Religious Institutes in New South Wales*, Submission 171*, p. 6.

103 Law Institute of Victoria, *Submission 206*, p. 28.

104 *Committee Hansard*, 27 September 2005, p. 75.

> Insofar as the issues of performance standards and measures are concerned, there is a real concern, as I said earlier, in regard to a mechanism which basically outsources detention policies yet seems to have very few measures in regard to performance. The Law Council is of the view that, if detention is going to continue to be outsourced – which is obviously a topical issue – one should adopt a qualitative measure of service provision. It should be transparent; people should be accountable. The Law Council makes a number of recommendations in the substantive paper on how that could take place. The current system is clearly not working, and that is quite evident from the Palmer inquiry.[105]

7.98 At the Adelaide hearing, Mr Graham Harbord from the Refugee Advocacy Service of South Australia told the committee 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.[106]

7.99 Further, Mr Harbord noted the confusion that exists in determining who has responsibility for certain aspects of the immigration detention system:

> Another feature of the whole regime has been that at times we do not know if it is DIMIA, 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.[107]

Profit motive

7.100 Many submissions pointed of course to the fact that the making of a profit by GSL is its main motivation in managing immigration detention centres.[108] A key finding in the ANAO's Part B report was that 'payments for detention operations have increased under the Contract [with GSL]. At the same time, the detention population has declined slightly since 2003'.[109]

7.101 The Australian Psychological Society offered the following opinion:

> It is the opinion of the APS that the outsourcing of management of immigration detention centres increases the risk that they are not managed in a way that is consistent with international treaties, conventions and guidelines that are concerned with the rights and wellbeing of people

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105 *Committee Hansard*, 27 September 2005, pp 75-76.

106 *Committee Hansard*, 26 September 2005, p. 19.

107 *Committee Hansard*, 26 September 2005, p. 20.

108 For example, see Mr Brian Davies, *Submission 113*, p. 2; Ms Elizabeth Gibbings, *Submission 114*, p. 2; Mr Ian Knowles, *Submission 118*, p. 10; Ms Ruth Graham, *Submission 122*, p. 2.

109 ANAO, *Management of Detention Centre Contracts – Part B*, Audit Report No. 1 2005-2006, p. 17.

> deprived of their liberty, because of the inevitable focus on profitability by nongovernmental security agencies. It is the responsibility of the Australian Government to ensure adherence to these conventions, and this is best ensured when the management of immigration detention centres remains with the Government.[110]

7.102 The Western Australian Government expressed concern about 'the apparent poor communication between the private operators of [immigration detention] facilities and the Commonwealth authorities'. Further:

> Private, profit-making enterprises have been given apparently conflicting roles: where they are charged with security and detention of detainees and their families, and at the same time providing high levels of general welfare and health needs.[111]

7.103 The Western Australian Government also argued that:

> If outsourcing of the management of detention centres is to continue, it is incumbent upon the Government to ensure that the welfare of detainees is not compromised for monetary gain. As a democracy we must ensure that standards of decency and decorum are followed at all times. It is also important to ensure that, by regularly monitoring and reviewing the management practices of private operators, transparency is paramount and that they are held to account at all times.[112]

7.104 The St Vincent de Paul Society noted its concern that:

> … vulnerable traumatised people are in the custody of a company which is motivated by profit, not by care. The commercial framework, including the competitive tendering process, has resulted in negative outcomes for the quality of care experienced by those unable to speak out.[113]

7.105 In her submission, Ms Rosi Aryal argued that:

> The fact that Global Solutions Limited (GSL) has a contract with the government to have a minimum number of people in detention in order to keep the operation of IDCs profitable is of great concern. Australia's immigration policy should respond to the needs of individuals and groups seeking to establish a safer life here and contribute to our society, not to the needs of a private company seeking to simply maximise profits to its shareholders.[114]

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110 Australian Psychological Society, *Submission 223*, p. 7.

111 Government of Western Australia, *Submission 226*, p. 3.

112 Government of Western Australia, *Submission 226*, p. 4.

113 St Vincent de Paul Society, *Submission 147*, p. 2: see also A Just Australia, *Submission 184*, p. 18; Coalition for the Protection of Asylum Seekers, *Submission 174*, p. 16; Great Lakes Rural Australians for Refugees, *Submission 150*, p. 3.

114 Ms Rosi Aryal, *Submission 98*, p. 2.

7.106 In their submission, Ms Annette Shears and Ms Peta Anne Molloy argued that there 'has been a failure to set measurable standards for the delivery of care in [immigration detention] centres.' Further, the Detention Services Contract 'does not delineate statutory standards enforceable by third parties in the courts'.[115]

7.107 The Refugee Council of Australia (RCOA) argued that, further to the importance of accountability remaining squarely with the Commonwealth, using private contractors for the provision of detention services is inherently problematic for a number of reasons. These include:

- private contractors are driven by the requirement to maximise profits for their shareholders;
- if contractual requirements are inadequate and fail to comply with certain standards, there is little incentive or compulsion for contractors to ensure compliance with these standards; and
- contracts contain penalty clauses which create a disincentive for contractors to be forthcoming about problems and report incidents.[116]

Inadequate training of staff

7.108 Some submitters raised the issue of the failure of GSL to recruit and train staff appropriately. For example, Ms Genevieve Caffery argued that detention centres 'should not be run by private concerns with no clear accountability, whose personnel have inadequate training in dealing with people in cross-cultural situations who are already suffering trauma from their prior experiences'.[117]

7.109 In evidence at the Adelaide hearing, Ms Claire O'Connor concurred:

> 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.[118]

7.110 In her submission, Ms Frederika Steen made the following observation:

> The transfer of detention services from Australian Protective Services to a for profit contractor, Australian Correctional Services, was not accompanied by essential safeguards about the quality of service required. Staff did not understand and may not have been trained to know that those

115 Ms Annette Shears and Ms Peta Anne Molloy, *Submission 105*, p. 3.

116 Refugee Council of Australia, *Submission 148*, p. 10.

117 Ms Genevieve Caffery, *Submission 78*, p. 1.

118 *Committee Hansard*, 26 September 2005, p. 30.

> detained were not criminals. Some staff were belligerently racist and anti Muslim. The culture promoted was a prison culture insensitive to government policy on multiculturalism and apparently oblivious to international conventions on human rights.[119]

7.111 Ms Gwen Gorman, while noting that outsourcing has been a 'disaster' and that private entities are not accountable to the Minister, to DIMIA, nor to anyone else, pointed out that:

> Too many staff are ex-prison officers and assume too much power over the detainees. The outstanding problem is placing people in solitary confinement for perceived misbehaviour without charge or legal authority to do so.[120]

Recommendations for change

7.112 The committee received several suggested recommendations for change to the arrangements relating to immigration detention centres. Some of these suggested changes are outlined below.

7.113 ROCA suggested that the committee 'should recommend that immigration detention centres revert to Commonwealth management under codified minimum conditions and with appropriate scrutiny'.[121]

7.114 The Law Council also provided some useful recommendations in relation to how the risks of outsourcing effective management practices might be minimised if outsourcing of this function continues. These included:

- ensuring that the Commonwealth Government is involved in the management of the business;
- the provision of adequate means of monitoring the treatment of detainees (particularly where there are allegations of mistreatment); and
- ensuring that DIMIA is accountable to Parliament in relation to the management of immigration detention centres, notwithstanding that the function is outsourced to a private contractor.[122]

7.115 In relation to the last dot point above, the Law Council submitted that this might be better achieved by:

- the provision of reports by DIMIA in relation to detention centres at close regular intervals, which are tabled in Parliament;

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119 Ms Frederika Steen, *Submission 224*, pp 12-13.

120 Ms Gwen Gorman, *Submission 136*, p. 1.

121 Refugee Council of Australia, *Submission 148*, p. 10.

122 Law Council of Australia, *Submission 233*, p. 9.

- establishing, as a minimum, a charter of rights for detainees to promote uniformity in standards and treatment of detainees across all detention centres, and to provide certainty and accuracy of information to detainees;
- selecting entities that are suitable to run detention centres in a way that does not compromise the Federal Government's duty of care to detainees, with a particular focus on care (as opposed to containment); and
- placing Federal Government officials permanently at the sites of detention centres in order to oversee their operation more closely, effectively and accurately (for example, to perform problem resolution/complaint handling, keep statistics, and to provide management reviews and reports).[123]

7.116 The Law Council concurred with the findings in the Palmer Report that 'the performance management system does not provide a meaningful evaluation of the quality of the services provided and, in particular, whether the services meet the fundamental needs of detainees'.[124] The Law Council argued that the performance measures in the Detention Services Contract are highly inadequate:

> …minimum standards for detention must be prescribed. Currently, the schedule to the contract between Global Solutions Limited and DIMIA provides performance standards and measures. However, based on the findings of the Palmer Inquiry, the well publicised blunders and mishaps in recent times and the ongoing investigation by the Commonwealth Ombudsman in relation to about 200 detainees who may have been mistakenly detained, the Law Council submits that incorporating standards necessary for the discharge of a public service into the terms of a private contract is not satisfactory.[125]

7.117 The Law Council put forward a number of models which, in its view, should be explored in order to entrench minimum standards in relation to detention services. These included the following:

- the enactment of legislative provisions specifying the minimum standards and rights of detainees in immigration detention in either the Migration Act or the Migration Regulations; or
- a charter in the form of a public document which establishes minimum standards for detention.[126]

7.118 The Law Council submitted that a number of concerns raised in the Palmer Report would be addressed by one of these models.[127] Significantly, the adoption of

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123 Law Council of Australia, *Submission 233*, p. 9.

124 Law Council of Australia, *Submission 233*, p. 7.

125 Law Council of Australia, *Submission 233*, p. 5.

126 Law Council of Australia, *Submission 233*, p. 5.

127 These include Recommendations 4.3, 4.6 and 4.9 of the Palmer Report.

one of the models would also ensure that the rights of detainees in detention centres would be safeguarded.[128]

7.119 Further, A Just Australia argued:

> The rationale for outsourcing services is usually economic rationalism – it is claimed to be cheaper to allow private companies to run services. It is generally held that because they are run for profit, they will be run more efficiently and therefore be more cost effective. While it is debatable whether it is morally defensible to allow a company to make profit from the detention of people not charged or found guilty of any offence, the evidence shows that in this case it is not economically defensible. Simply, the outsourcing of immigration detention facilities is incredibly expensive compared to the alternatives.[129]

7.120 LIV recommended that a charter setting out the rights of detainees and responsibilities of DIMIA, compliance and detention officers be incorporated into the Migration Regulations for the protection of detainees.[130]

7.121 A Just Australia's submission recommended that all contracts in relation to outsourcing of detention centre management should be revoked. It added:

> DIMIA must relinquish the role of caring for asylum seekers to qualified practitioners in the welfare sector who have viable and affordable alternatives to detention which could solve the serious problems of the current system.[131]

7.122 WRM proposed an urgent review by the ANAO of the appropriateness of contracting out the management of immigration detention centres to private organisations and their capacity to further contract services, to examine whether such extended and complex lines of accountability can deliver quality services.[132]

7.123 Mr Angus Francis argued that, rather than the Federal Government relying on policy documents and the contract with GSL to create broad and unencumbered detention (and removal) powers, the development of clear and legally enforceable obligations and conditions, amenable to judicial review, is required. This would necessitate a profound shift in government policy from undefined and non-statutory powers to a simplified and enforceable statutory duty of care under the Migration Act in relation to detention (and removal).[133]

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128 Law Council of Australia, *Submission 233*, pp.5 & 6.

129 A Just Australia, *Submission 184*, p. 19.

130 Law Institute of Victoria, *Submission 206*, p. 28.

131 A Just Australia, *Submission 184*, p. 19.

132 Women and Reform of Migration, *Submission 189*, p. 20.

133 Mr Angus Francis, *Submission 234*, p. 11.

Committee view

7.124 The committee acknowledges the inherent and diverse challenges involved in the provision of detention services within a complex legal and operational environment, including difficulties arising from the diverse geographic areas in which immigration detention centres are located across Australia.

7.125 However, in the committee's view, the serious condemnation of current contractual arrangements regarding immigration detention centres by submitters to this inquiry and others, including the ANAO, the Palmer Report, and various Federal Court judgements,[134] is a powerful indicator that fundamental aspects of those arrangements are flawed. The Palmer Report and reports by the ANAO contain many useful recommendations that, if implemented in their entirety, would vastly improve the overall operation of immigration detention centres. In this context, the committee also notes and supports the comments and recommendations by the JSCM in its recent review of the ANAO's Part B Report.

7.126 The committee acknowledges the Commonwealth Government's acceptance of relevant recommendations in the Palmer Report, and all recommendations in the ANAO's Part B Report, and its implementation of a number of initiatives to address the issues identified as highly problematic in those reports. In particular, the committee applauds the Commonwealth Government's decision to undertake a comprehensive review of the detention services contract, and the involvement of both DIMIA and GSL in that review process. The committee awaits the outcome of that review with interest.

7.127 Nevertheless, at a fundamental level, the committee believes that the arrangements in relation to immigration detention centres need to be revisited and improved as a matter of urgency. The contracting-out system is far from transparent and the Commonwealth Government should not continue to 'hide' behind its contracted parties. While the Commonwealth Government's accountability for the management and operation of immigration detention centres is not theoretically minimised by outsourcing – the Commonwealth Government maintains supervision and ultimate control at all times – this has nevertheless been the result in practice. The committee considers that the Commonwealth Government has increasingly evaded its responsibilities in this regard.

7.128 The committee is of the view that the outsourcing of service provision and management of immigration detention centres increases the risk of inconsistency with relevant international treaties, conventions and guidelines concerned with the rights and wellbeing of people deprived of their liberty. The committee agrees with arguments put before it during this inquiry that such fundamental responsibilities and obligations cannot be reconciled with the inevitable focus on profitability by private

134 See, for example, *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* [2005] FCA 549 (5 May 2005).

companies that outsourcing brings. It is the responsibility of the Commonwealth Government to ensure absolute adherence to its human rights obligations; the committee agrees with evidence suggesting that this is best ensured by direct management of immigration detention centres by the Commonwealth Government.

7.129 The committee remains unsure exactly when and how the Commonwealth Government's review of the detention services contract, and any changes it brings about, will impact on the existing contractual arrangements. The committee considers that the Commonwealth Government must be involved immediately and more directly in operating and maintaining immigration detention facilities. Regardless of the status of its contractual arrangements with GSL, the Commonwealth Government should be held to account for any shortcomings and failures in the management and operation of immigration detention centres, to date and in the future.

7.130 Notwithstanding the outcome of the review of the detention services contract and the committee's recommendation that responsibility for the management and provision of immigration detention services should revert to the Commonwealth, the committee calls for the establishment of an independent body with ongoing responsibility for monitoring the operation and management of immigration detention centres. Such a body should also be tasked with monitoring and managing the detention services contract to ensure the appropriate and effective provision of immigration detention services.

7.131 The committee also considers that many of the problems associated with the conditions imposed on detainees in the detention centres will remain unresolved until there is created a clear system of detainees rights, which are able to be enforced by third parties. Currently, a detainee's capacity for redress is limited by the fact that key documents are essentially elements of the contract between DIMIA and GSL. It would be preferable therefore, to locate such rights in regulations.

Recommendation 48

7.132 The committee recommends that, as a fundamental overarching principle, direct responsibility for the management and provision of services at immigration detention centres in Australia should revert to the Commonwealth.

Recommendation 49

7.133 The committee recommends that the detention services contract between DIMIA and GSL be redrafted immediately to incorporate all relevant suggestions and recommendations from the Palmer Report, the Hamburger Report and recent ANAO performance audit reports, particularly in relation to performance measures, outcomes, service quality and risk management.

Recommendation 50

7.134 The Committee recommends that a statement of detainees' rights and conditions be established within the Migration Regulations, including clear provisions for the making of complaints to a third party, and third party powers to make rectification orders.

Recommendation 51

7.135 The committee recommends that an independent body be established with ongoing responsibility for monitoring the operation and management of immigration detention centres and the detention services contract.

CHAPTER 8

TEMPORARY PROTECTION VISAS, BRIDGING VISAS, AND COST SHIFTING

8.1 A large number of submitters raised concerns about the operation of the Temporary Protection Visa (TPV) regime, and sought its abolition. The committee also received complaints about bridging visas, and the current status of Commonwealth/State relations in regard to refugee settlement issues. The evidence received in relation to these issues is discussed in this chapter.

8.2 Until recently, the majority of people held in immigration detention were unauthorised arrivals awaiting the outcome of their application for refugee status. The detainee population also includes non-citizens who have overstayed their visa or whose visas have been cancelled for a variety of reasons.

8.3 Unlawful non-citizens may be released from an immigration detention centre under various arrangements. These arrangements include the granting of visas such as a Temporary Protection Visa (TPV) or a Bridging Visa (usually Bridging Visa E or a Removal Pending Bridging Visa). Under a recent amendment to the Migration Act, a detained person can also be released into the community under community detention arrangements, at the discretion of the Minister.[1]

8.4 Most submissions and witnesses agreed that releasing detainees into the community, on any basis, is preferable to prolonged periods of immigration detention. However, a number of aspects of the post-detention visas were criticised, particularly the eligibility criteria and the restricted benefits they provide.

8.5 Concern was also expressed that the limited support provided by the Commonwealth Government for some classes of visas effectively means that State and Territory government agencies and community and charity organisations bear the responsibility and burden of looking after many of those visa holders.

Temporary Protection Visas

8.6 Until October 1999 all asylum seekers who were assessed as meeting the criteria set out in the 1951 UN Convention Relating to the Status of Refugees and the 1967 Protocol on the Status of Refugees, including unauthorised arrivals in Australia, had immediate access to a Permanent Protection Visa (PPV).

8.7 On 20 October 1999, the migration regulations were amended to include a new visa class — the Temporary Protection Visa (TPV). From that time the eligibility criteria for temporary and permanent protection visas depended on the mode of entry.

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1 *Migration Amendment (Detention Arrangements) Act 2005.*

A person who arrived with a visa and subsequently claimed asylum continued to be eligible for a PPV. By contrast, an unauthorised arrival (such as a 'boat person') was only eligible for a TPV.[2]

8.8 The TPV was introduced in response to a significant increase in the number of unauthorised boat arrivals using people smugglers to travel to Australia. The temporary protection visa regime was intended to reduce the incentive for people to abandon or by-pass access to effective protection in another country and travel on to Australia.[3] In effect, unauthorised arrivals, even if they were subsequently assessed as meeting the refugee criteria, no longer received the same benefits as those resettled in Australia after assessment by the United Nations High Commissioner for Refugees (UNHCR).

8.9 A TPV is limited to 3 years duration. Refugees holding a TPV can apply for a PPV, which may be granted (after 30 months as a TPV holder) if they meet the relevant criteria. However, if on their journey to Australia an asylum seeker resided for 7 days or more in a country where they could have sought and obtained effective protection they are excluded from applying for a PPV – they can only apply for another TPV (the '7 day rule').[4]

Entitlements under TPV

8.10 TPV holders are provided with various benefits. DIMIA argued that the benefits available under to TPV holders fulfil Australia's obligations towards refugees, while still recognising the temporary nature of this visa class. These entitlements include:

- three year temporary residence in the first instance;
- access to Australia's public health services including Medicare benefits, Pharmaceutical Benefits Scheme (PBS), and public hospital benefits;
- permission to work (including Job Matching assistance through Centrelink);
- access to a limited range of welfare benefits (including Child Care Benefit, Special Benefit, Maternity and Family Allowances and Family Tax Payment); and

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2 Between 1 July 1999 and 30 December 2005, 12,480 PPVs and 9,766 TPVs were granted. 64% of the PPVs were issued to former TPV and THV holders. 110 of the 9,766 TPVs were granted to applicants for a further protection visa. Of those 110, 13 were granted on the basis of the '7 day rule', while 97 were granted on the basis that the applicant had a conviction punishable by a penalty of 12 months imprisonment or more (Migration Regulation 888.222A). There were 1,440 TPV holders in Australia as at 30 December 2005. DIMIA provided these statistics to the committee on 13 January 2006.

3 DIMIA Fact Sheet no. 64a '*New Measures for Temporary Protection and Temporary Humanitarian Visa Holders'*. Accessed on DIMIA website 3 January 2006.

4 *Migration Regulations 1994*, 866.215(1). The '7 day rule' was introduced on 27 September 2001.

- access to a limited range of settlement services (such as Integrated Humanitarian Settlement Strategy and Programme of Assistance for Survivors of Torture and Trauma).[5]

8.11 Importantly, a TPV does not allow the holder to sponsor family members nor does it provide any right of re-entry if they depart Australia.

Criticism of TPV regime

8.12 Many submissions and witnesses were critical of Australia's use of a temporary protection visa regime and some suggested that Australia could be in breach of its obligations under the Refugee Convention.[6]

8.13 There was a widespread belief among submitters that if an asylum seeker has been found to satisfy the criteria of a refugee, as defined by the Refugee Convention, they should be granted a PPV. The Law Society of South Australia (LSSA) pointed out that Australia is the only country in the world which uses a temporary protection visa regime:

> Australia is the only country to grant temporary status to refugees who have been through a fully adjudicated process and have been found to be refugees according to the 1951 Refugees Convention definition. Australia's approach is at odds with the United Nations High Commissioner for Refugees (UNHCR) Handbook, which emphasises the importance of providing refugees with the assurance that their status will not be subject to constant review in the light of temporary changes in their country of origin.[7]

8.14 The main criticism of the TPV was that, because visas are only for a limited period of 3 years, it prolongs fear and uncertainty for asylum seekers. Before the expiry of their TPV, the person must re-apply for a further protection visa, requiring a full re-examination of their case. This means that TPV holders live in a constant state of uncertainty, which often adversely affects their mental health. The LSSA claimed that:

> The impact of the TPV regime and extended processing periods on applicants is enormous … Lawyers/migration agents and mental health professionals who work with TPV holders report a high incidence of mental health problems in this client base … Research carried out by the University of New South Wales supports this, with preliminary findings showing that refugees placed on TPVs have a 700% increase in risk for

5 DIMIA, *Submission 205*, p. 27.

6 For example, Edmund Rice Centre for Justice and Community Education, *Submission 151*, p. 7.

7 Law Society of South Australia, *Submission 110*, pp 1-2.

> developing depression and post-traumatic stress disorder compared to refugees with Permanent Protection Visas (PPVs).[8]

8.15 Some of the strongest criticism of the TPV regime was aimed at the prohibition on sponsoring family members and the ban on re-entry if the TPV holder leaves Australia.[9]

8.16 Submitters argued that the restrictions on family reunion and travel have a highly detrimental effect on all family members, both in Australia and overseas, which is a major contributing factor to deterioration in the mental health of asylum seekers. This policy can also impact on families when they are finally reunited, as explained by the Brotherhood of St Laurence:

> It also creates havoc later when families that have been forcibly separated are reunited and welfare agencies are left to clean up the mess. Another unintended consequence relates to TPV minors who, because of the extended periods – it is not 36 months but much longer than that – move out of their minor status into adult status. That means that they cannot then sponsor their families as they fully expected they would be able to do, and therefore have to use other provisions which are very costly.[10]

8.17 The UNHCR noted that the TPV regime was introduced in response to a large influx of unauthorised arrivals, rather than to deal with individuals or small numbers of unauthorised arrivals. The UNHCR's main concerns about Australia's TPV regime are:

> Our concerns about the existing laws on temporary protection visas and temporary humanitarian visas are that they deny an entitlement to family reunion, they provide no right to re-enter Australia if they leave and that they are not eligible to receive convention travel documents.[11]

8.18 Another criticism of the TPV regime was the open-ended nature of its application. The LIV pointed out that refugees are often TPV holders for many years, not just three. The LIV said:

> The intended three year duration for these visas has often blown out, and there are many people who have only obtained permanent visas after five or six years in Australia. When their spouses and children are in limbo overseas this can have a devastating impact on their family relationships,

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8 Law Society of South Australia, *Submission 110*, p. 2. See also Ms Rosemary McKenry, *Submission 2*, p. 2; Ms Sue Hoffman, *Submission 37*, p. 2; Ms Helena Leeder, *Submission 46*, p. 1;

9 See, for example, Ms Sue Hoffman, *Submission 37*, p. 1; Ms Genevieve Caffery, *Submission 78*, p. 1; Ms Amanda Kube, *Submission 107*, p. 1; LSSA, *Submission 110*, p. 2; LIV, *Submission 206*, p. 16; Brother of St Laurence, *Submission 175*, p. 3; NCCA, *Submission 179*, p. 25.

10 *Committee Hansard,* 27 September 2005, pp 34-35.

11 *Committee Hansard*, 7 October 2005, p. 35.

> and the delay and uncertainty in the meantime are also recognised to have caused or exacerbated mental health problems.[12]

8.19 This criticism was echoed by Ms Sarina Greco of the Ecumenical Migration Centre with the Brotherhood of St Laurence. She advised the Committee:

> … the temporary protection visa is not for 36 months at all. On average, people are on temporary protection visas for between five and eight years and this has catastrophic consequences for people who have enormous barriers to their settlement because of that policy, the lack of support and the intended exclusions that it carries.[13]

8.20 The TPV regime was described by LSSA as a costly and inefficient use of resources because the same refugee application has to be re-assessed a number of times. The LSSA said:

> In addition to the obvious human cost, the economic cost of TPV system and prolonged decision making process are also significant. Each individual claim must be evaluated at least twice, possibly more if the decision is appealed, necessitating the inefficient allocation of resources.[14]

8.21 Some submissions argued that if the TPV regime is retained the burden of proof should be reversed – that is, when a TPV comes up for review it should be DIMIA's responsibility to prove that the refugee's protection is no longer required. In that regard LSSA suggested:

> 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.[15]

8.22 Several submissions and witnesses described the TPV's '7 day rule' as harsh and inhumane.[16] As described above, the operation of the rule prevents TPV holders applying for permanent protection if, before arriving in Australia, they resided continuously for at least 7 days in a country where they could have sought and obtained effective protection. Such TPV holders can only apply for another TPV when their current visa expires which means that refugees in that situation may never obtain family reunion or travel rights.

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12 Law Institute of Victoria, *Submission 206*, pp 15-16.

13 *Committee Hansard,* 27 September 2005, pp 34-35.

14 Law Society of South Australia, *Submission 110*, p. 2.

15 Law Society of South Australia, *Submission 110*, p.2. See also *Submission 204*, p. 17.

16 See, for example, UNHCR, *Submission* 74, pp 5-7; LSSA, *Submission 110*, p. 6; Albany Community for Afghan Refugees, *Submission 177*, p. 3; SBICLS, *Submission 200*, p. 8.

8.23 In relation to the 7 day rule, the South Brisbane Immigration and Community Legal Service (SBICLS) noted:

> The result of the 7 day rule may mean that refugees are eligible for continual temporary visas and never be eligible for family reunion. Even if the Minister eventually allows a permanent visa (eg via exercise of discretion in Reg 866.215(2)) the delays may mean that the refugees spouse and children have become lost or have died in the ensuing period.[17]

8.24 SBICLS recommended that 'the 7 day rule for temporary protection visas be abandoned. Failing this, applicants subject to the 7 day rule should be able to sponsor immediate family'.[18]

8.25 The UNHCR raised three specific concerns in relation to the operation of the 7 day rule. It said:

> Our first concern is that it creates a potential for rolling temporary protection visas … The second is that there is an overly broad interpretation of what is effective protection by other states. The third and final one is the reference to the presence of an UNHCR office in a country providing the availability of effective protection … UNHCR's position remains that the presence of a UNHCR office does not afford any form of effective protection. It is there to support the government of that country and only that government can afford effective protection.[19]

8.26 The Community Relations Commission for a multicultural NSW (CRC), which presented a coordinated submission on behalf of NSW Government agencies, highlighted the growing burden on community organisations. It noted that TPV holders (including children) are given only limited access to a range of Commonwealth-funded settlement services such as accommodation, English language programs, and psychological and physical health services. This, it argued, 'has placed a heavy burden on community organisations struggling to meet the special needs of refugees who are TPV holders and who are left outside the mainstream humanitarian settlement services'.[20]

8.27 The Law Institute of Victoria (LIV) recommended that all persons holding a TPV for more than two years be given a PPV. It said:

> Temporary Protection visas create substantial uncertainty and continuing fear in those to whom they are granted. They fear being returned to their country of origin after three years or at a future point if the Government determines, possibly for political reasons, that their country of origin is safe enough for the TPV holder's return. In the case of Afghanistan and Iraq,

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17 South Brisbane Immigration and Community Legal Service, *Submission 200*, p. 8.

18 South Brisbane Immigration and Community Legal Service, *Submission 200*, p. 8.

19 *Committee Hansard*, 7 October 2005, p. 35.

20 Community Relations Commission for a Multicultural NSW, *Submission 232*, p. 14.

> this is clearly not the case, yet hundreds of Iraqi and Afghan nationals remain on TPVs awaiting a determination on their application for Permanent Protection visas.[21]

8.28 A large number of submissions recommended that the TPV regime be abolished. The common strand in their argument was that if an asylum seeker is assessed to be a legitimate refugee he or she should be offered permanent protection with the full range of rights and entitlements available to people on PPVs. For example, the Australian Political Ministry Network Ltd (APMN) said:

> On a successful determination, refugees should be offered permanent protection and the full range of rights and entitlements available to people on permanent protection visas, including settlement services, travel rights and family reunion.[22]

8.29 Similarly, the National Council of Churches in Australia (NCCA) recommended that everyone who is assessed as a refugee be given a permanent visa:

> The NCCA recommends that the Government grant permanent residency to all refugees presently holding Temporary Protection Visas and in the future award immediate permanent residency status to those asylum seekers determined to be refugees.[23]

8.30 The Victorian Government believes that holders of TPVs should be converted to PPVs. It advised the Committee that:

> At the May 2005 Meeting of the Ministerial Council for Immigration and Multicultural affairs (MCIMA), Victoria proposed a resolution that the Commonwealth grant permanent resident status to all TPV holders. Victoria's paper noted that many TPV holders have been living in Australia for over 5 years with no certainty as to their future. They have been separated from their families and have been unable to access educational opportunities or services available to other Australians. Temporary Protection Visas demonstrate a lack of compassion for people who have been persecuted in the past or who have a well-founded fear of persecution if they were to return to their own country.[24]

8.31 The committee notes that the Government has acted to amend the Migration Act and Regulations to allow certain TPV holders to be granted various mainstream or non-humanitarian visas. This was in recognition that some current and former TPV holders had made important contributions to the community during their time in Australia, particularly in rural and regional areas and some have special skills that

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21 Law Institute of Victoria, S*ubmission 206*, pp 15 – 16.

22 Australian Political Ministry Network Ltd, *Submission 164*, p. 8. Similar comments were expressed by SAVE – Australia Inc., *Submission 203*, p. 5.

23 National Council of Churches in Australia, *Submission 179*, p.2. Other submissions which call for the abolition of the TPV regime include LIV, *submission 206*, p. 16.

24 Government of Victoria, *Submission 227*, p. 2.

would otherwise qualify them for a migration visa. It was also recognised that some TPV holders have established strong links to Australian nationals and may be able to qualify for the grant of a mainstream visa.[25]

Committee view

8.32 There is no doubt that the overwhelming view put to the committee by State Governments, refugee groups, and church and charitable groups favoured the abolition of the TPV regime, which was described as harsh and inhumane. However, the Government sees the TPV regime as an integral part of Australia's strategy to limit and control the number of unauthorised arrivals. It believes that the TPV regime, together with mandatory detention and off shore processing, is an effective deterrent to large influxes of boat people . It can also be argued that providing such a deterrent is also in the wider interests of illegal arrivals, since it limits incentives for people to risk using people smugglers, with all of the attendant risks.

8.33 Given that the number of unauthorised arrivals has fallen to very low numbers in recent years, the committee considers that the time is right to abolish the operation of the TPV regime. Although there is little real evidence of its deterrent value, the TPV regime may have acted as a deterrent to some. But there is no doubt that its operation has had a considerable cost in terms of human suffering. It may be arguable that such a measure was appropriate in a time of a large increase in the number of unauthorised arrivals but those circumstances no longer apply.

Recommendation 52

8.34 The committee recommends that the Temporary Protection Visa regime be reviewed. Specifically, the review should consider the possible abolition of the '7 day rule', and that all TPV holders be given the opportunity to apply for permanent protection visa after a specified period.

Bridging Visas

8.35 A bridging visa (BV) enables a non-citizen to lawfully stay in Australia during a period of transition. A BV is not considered to be a substantive visa. Temporary situations in which a BV might be granted include:

- while an application for a substantive visa is being processed by DIMIA;
- while a non-citizen is waiting for the outcome of a merits or judicial review; and

25 DIMIA Fact Sheet 64d, *New Onshore Visa Options for Temporary Protection and Temporary Humanitarian Visa Holders*, 24 August 2004. DIMIA, *Submission 205*, p. 24. The changes apply to current and former holders of certain sub-classes of Temporary Protection Visas and Temporary Humanitarian Visas who were in Australia on or before 27 August 2004.

- while a non-citizen who does not hold a substantive visa makes arrangements to leave Australia.

8.36 The migration regulations establish seven classes of BVs (Bridging Visa Class A; B; C; D; E; F; and R).[26] The conditions attached to a BV vary according to the class of visa applied for and the applicant's immigration status and personal circumstances at the time of application.

8.37 A person who arrives lawfully in Australia and subsequently claims asylum may be granted a bridging visa that provides them with lawful status and permission to remain in Australia during the processing of their application for a protection visa. The bridging visa ceases 28 days after notification of a decision that a person is not a refugee. If an application for review is lodged with the Refugee Review Tribunal (RRT) during that 28-day period, the bridging visa remains active for the duration of the RRT review. It ceases 28 days after notification of a decision by the RRT that a person is not a refugee.[27]

8.38 The number of BVs in existence as at 30 June is shown in Table 8.1 below:

Table 8.1: Bridging visa classes A, C and E in effect as at 30 June

As at 30 June	BV – class A	BV – class C	BV – class E	Total all BVs
1999	28,650	4,719	4,555	38,436
2000	30,458	4,552	5,604	41,258
2001	27,134	3,950	6,967	38,583
2002	25,608	3,470	8,616	38,111
2003	22,692	2,866	8,605	34,539
2004	20,192	1,663	6,207	28,376
2005	14,689	1,458	7,927	24,364

Source: Figures provided to the Committee by DIMIA on 9 and 12 January 2006.

Note: Figures for Bridging Visa classes B, D and F not shown as they only represent about 1 per cent of the total. Bridging Visa Class R ('Removal Pending Bridging Visa - RPBV) came into existence on 11 May 2005. There were no RPBVs granted during 2004-05. Thirty one RPBVs were granted between 1 July 2005 and 12 January 2006.

26 For details of the seven classes of bridging visas see Chapter 1, p. 12, Footnote 28. These definitions are taken from DIMIA, *Submission 205*, p. 10.

27 DIMIA, *Submission 205*, p. 29.

8.39 The committee received a number of criticisms in relation to bridging visas, specifically in relation to Bridging Visa Class E (BVE) and the Removal Pending Bridging Visa (RPBV).

Bridging Visa Class E

8.40 A Bridging Visa Class E (BVE) is available to certain unlawful non-citizens who are located by DIMIA and who may be applying for visas or making arrangements to depart Australia.[28] That is, a BVE is for people who are detected as unlawful non-citizens and who either make arrangements to leave Australia or make an application for a substantive visa. There are two sub-classes within BVE: 'general' and 'protection visa applicant'. The latter is available to some people who have been refused or have bypassed immigration clearance and who have applied for a protection visa.

8.41 People in immigration detention can apply for a BVE and if granted they must be released from detention.

8.42 Depending on the individual circumstances, a BVE may include a 'no work' condition. Protection visa applicants who did not lodge their application within 45 days of their arrival, or whose application is under judicial review, can not get permission to work as part of their BVE.[29]

8.43 Table 8.1 above indicates that the number of BVEs has remained at a relatively high level over the last 5 years. BVEs represent an increasing proportion of total bridging visas granted, rising from 12 percent as at 30 June 1999 to 33 per cent as at 30 June 2005.

Criticism of BVE

8.44 The conditions commonly applied to BVEs were severely criticised by several submitters. In particular, the prohibition on undertaking work, including voluntary work, and the exclusion from services such as Medicare, rental assistance and transport assistance.[30]

8.45 Because of their inability to work and to access Commonwealth support services, BVE visa holders are released into the community without adequate means of support and may be left destitute. To survive, BVE holders are forced to seek assistance from State and Territory government agencies and particularly from

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28 DIMIA, *Submission 205*, p. 10.

29 J. Burn and S Reich, *The Immigration Kit*, 7th Edition, pp. 154 – 158.

30 Asylum Seekers Centre Inc., *Submission 201*, p. 3; Ms Hoa Pham, *Submission 35*, p. 1; LSSA, *Submission 110*, p. 7. Without work rights (and tax file numbers) asylum seekers do not have access to Medicare.

community and charitable organisations.[31] For example, Mr Ahmed Al Kateb, a stateless Palestinian asylum seeker, stated that he is :

> … presently in community detention on a Bridging Visa E (50). Although I am no longer in an Immigration Detention Centre, having been released from the Baxter facility in April 2003, I simply moved from a "small detention" to "big detention". My life is hopeless. I was psychologically damaged by my 2 years experience in detention and my condition gets worse, not better because there is no solution in sight to my problem. DIMIA has washed its hands of me and is not taking any action to help me find a solution. I am not allowed to work and not entitled to any welfare benefits. I am full of despair and often consider committing suicide.[32]

8.46 Ms J Turner, a volunteer with the Asylum Seekers Resource Centre Melbourne, made a strong plea for greater assistance to BVE holders:

> … the daily experiences of people in our community surviving somehow (just) on Bridging Visa E without access to the right to work (even volunteer work), to Medicare and health care, to any refugee programs, to schools and education, even to concession rates on public transport. They have no dignity whatsoever, no hope and no ability to trust DIMIA advice or outcomes. These people in contemporary Australia are literally starving, dependent on charity for food and a roof over their heads, for an unlimited and uncertain period of time.[33]

8.47 A number of submissions argued that the welfare of BVE holders is the responsibility of the Commonwealth Government. However, by denying them access to income support and welfare services, the Commonwealth has effectively shifted this responsibility onto State and Territory governments and community and charity organisations.[34]

8.48 The Catholic Migrant Centre maintained that any asylum seeker who is released into the community on a visa should be given appropriate support. They said:

> Currently, when a detainee is released into the community on a bridging visa … the Australian government makes no provision for the basic needs of that person (accommodation, income, medical care etc). The bridging visa holder is entirely reliant upon the Australian community and charity

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31 DIMIA provided funding of $3.4 million in 2004-05 to the Asylum Seekers Assistance Scheme (ASAS) administered by the Red Cross. To be eligible for ASAS help, applicants must hold a bridging visa and be in financial hardship. Usually ASAS funding is only provided after 6 months have elapsed from when they applied for a protection visa. The assistance ceases when the protection visa application is decided. *The Immigration Kit*, pp. 456-457.

32 Mr Ahmed Al Kateb, *Submission 86*, p. 1.

33 Ms Julie Turner, *Submission 104*, p.1.

34 Mr Roland Good, *Submission 1*, p. 1; Ballarat Refugee Support Network, *Submission 52*, p. 4; Mr Don Stokes, *Submission 64*, p. 2; Pilgrim Circle of Friends 27, *Submission 79*, p. 3; APMN, *Submission 164*, p. 8; Buddies Refugee Support Group, *Submission 167*, p. 2; Government of Western Australia, *Submission 226*, p. 1.

> for his or her day to day survival … The provision of adequate support for asylum seekers should be the responsibility of government. It is totally inappropriate to expect the community and charities to provide for the most basic and fundamental needs of asylum seekers in the community.[35]

8.49 The Uniting Church commented:

> Typically, these vulnerable people are denied working rights and access to the income support scheme administered through the Australian Red Cross as a result of their BVE status. Additionally, without a valid tax file number these asylum seekers are unable to access the Medicare scheme and are cut off from access to fundamental and necessary health and medical services.[36]

8.50 The St Vincent de Paul Society highlighted the plight of children and the sick in these situations:

> The plight of people within the community on Bridging Visa E with no work rights, medical care and welfare support is quite desperate and of grave concern to the Society, especially given that in many cases children are also affected … It is a particular concern when individuals are released for health reasons without a health management plan, or the resources to provide health care, being put in place prior to their release.[37]

8.51 The NSW Refugee Health Service (RHS) advised the committee that it sees many patients who are ineligible for Medicare and income support because, although arriving in Australia on a valid visa, they failed to lodge their application for refugee status within 45 days of arriving in Australia. Besides the limited services offered by RHS such people had few options:

> Other options include charity run organizations or a number of general practitioners, dentists and other willing to see patients for free or for a nominal cost. However such understanding health professionals and services can rapidly become overwhelmed by the need.[38]

8.52 The RHS argued that the denial of access to Medicare could have serious consequences not only for the asylum seeker but also the community at large. For example, the early diagnosis of communicable diseases, such as tuberculosis, may be delayed with dire implications for both the patient and the community. The RHS recommended that asylum seekers living in the community should be given work rights and Medicare access until their refugee assessment has been completed. However, if that is not acceptable they recommend that, at least:

- ASAS funding should be expanded to cover preventive and curative health care costs for anyone in need;

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35 Catholic Migrant Centre, *Submission 165*, p. 3.

36 Uniting Justice Australia and Asylum Seeker Project Hotham Mission, *Submission 190*, p. 15.

37 St Vincent de Paul Society, *Submission 147*, p. 2.

38 Sydney South West Area Health Service, *Submission 209*, p. 4.

- asylum seekers should be given access to PBS medication; and
- Commonwealth/State agreements should allow hospitals to provide free care for asylum seekers on humanitarian grounds.[39]

8.53 The Community Relations Commission for a multicultural NSW (CRC) recommended that the assessment of visa applications for asylum seekers on bridging visas be expedited. It gave an example of pressure placed on the State's housing resources by holders of bridging visas requiring emergency assistance to tide them over while their visa application is being assessed:

> The NSW Department of Housing also provides housing assistance to homeless asylum seekers who are on bridging visas, while they are awaiting resolution of their permanent residency. A number of these cases may take lengthy periods of time to resolve. During that time asylum seekers are subject to high levels of hardship as they have no income and are not permitted to work. These delays place additional pressures on State government resources. A speedier determination of visa status would alleviate some of this pressure.[40]

8.54 The Migration Institute of Australia (MIA) noted that bridging visas normally exclude work rights, access to Medicare and ASAS. Exclusion from the normal means of support can cause great hardship, especially when there are protracted delays. It was argued that this group of people are vulnerable to homelessness, illness and extreme poverty; and their children are denied education and basic health care. The MIA recommended that the Migration Act be amended to require that all bridging visas include work rights[41]

Removal Pending Bridging Visa (RPBV)

8.55 A RPBV enables the release from immigration detention of certain unlawful non-citizens who are awaiting removal from Australia and are invited by the Minister to apply. The Minister's offer is open for 7 days.

8.56 The key eligibility requirements for RPBV are that the person is in immigration detention; any visa applications made by the person have been finally determined; and the person's departure from Australia is not reasonably practicable for a time but the Minister is satisfied that the person will do everything possible to facilitate their removal from Australia.[42]

8.57 RPBV holders are entitled to benefits similar to those accorded to TPV holders. The RPBV does not allow for sponsorship of family members or provide any

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39 Sydney South West Area Health Service, *Submission 209*, p. 5.

40 Community Relations Commission for a Multicultural NSW, *Submission 232*, p. 16.

41 Migration Institute of Australia, *Submission 144*, p. 3.

42 http://www.immi.gov.au/facts/85removalpending.htm

right of re-entry if the visa holder departs Australia. Access to the visa is not merits reviewable.[43]

8.58 The RPBV came ito operation on 11 May 2005. No RPBVs were granted in May or June 2005. Thirty one RPBVs were granted between 1 July 2005 and 12 January 2006.

Criticism of RPBV

8.59 This visa class attracted criticism on the grounds that

- the period (7 days) in which the Minister's offer must be accepted is too short;
- the requirement to agree to do 'everything possible' to facilitate removal from Australia is ill defined and creates significant uncertainty;
- a person can be removed at any time; and
- forcible repatriation is not reviewable.

8.60 The Uniting Church expressed concern that a person's desire to leave detention might unduly influence them to agree to an offer of such a visa, even though it may not be in their longer-term interest to do so.[44]

8.61 The Asylum Seekers Resource Centre (ASRC) said that release from detention on an RPBV is clearly preferable to remaining in detention for a detainee who has exhausted all legal avenues. The ASRC expressed its general support for the RPBV based on the recent removal of two major defects of the visa — the precondition requiring detainees to sacrifice their legal rights to apply to remain in Australia, and the precondition forcing detainees to provide a signed undertaking agreeing to co-operate with arrangements to remove them from Australia. However, the ASRC remains concerned about two other aspects of the RPBV — the fact that RPBV holders can be removed from Australia at short notice and at any time, and the non-reviewability of forcible repatriation arrangements.[45]

Committee view

8.62 The committee's main concern is the financial hardship faced by asylum seekers, particularly those with families and children, who are granted a BVE with no work rights and inadequate access to basic services., A policy which renders a person destitute is morally indefensible and an abrogation of responsibility by the Commonwealth.

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43 For details of entitlements see http://www.immi.gov.au/facts/85removalpending.htm

44 UJA and ASPHM, *Submission 190*, 18.

45 Asylum Seekers Resource Centre, *Submission 214*, p. 20.

8.63 The committee notes a recent decision of the House of Lords, which held that removal of subsistence support from asylum seekers leading to destitution breached their right not to be subjected to inhuman or degrading treatment.[46]

8.64 In the absence of a constitutional or statutory bill of rights, such issues cannot be tested in the courts. Primary responsibility for ensuring that minimum standards essential to the survival and wellbeing of all people in Australia rests with the Government and the Parliament.

8.65 The necessity to rely on State/Territory agencies and community and charitable organisations for service essential to survival represents a significant cost-shifting by the Commonwealth. During Hotham Mission advised the Committee:

> For the past 3 years, the Victoria State Government has provided emergency relief funding to not-for-profit charitable agencies working with asylum seekers in the Victorian community who are denied the right to work, Medicare or any form of income due to federal policies introduced in 1997. An allocation of $300,000 has been provided over the past 3 years to Network of Asylum Seeker Agencies Victoria (NASAVic) and distributed by the Victorian Council of Social Services through the Department of Human Services.[47]

8.66 The committee also notes that the Senate Select Committee on Ministerial Discretion in Migration Matters considered the issue in its report of March 2004. That committee concluded that visas with work rights should be available for all applicants during the appeal periods, up to the time of an outcome of a first request for ministerial intervention (to discourage repeated appeals as a strategy to prolong their stay in Australia). The Select Committee report also recommended that children who are seeking asylum should have access to ASAS or some other form of social security support throughout the period of any requests for ministerial intervention.[48]

8.67 This committee endorses the findings and recommendations of the Select Committee on Ministerial Discretion in Migration Matters, particularly as they relate to bridging visas. The relatively high number of BVEs makes the issue more pressing.

Recommendation 53

8.68 The committee recommends that all holders of Bridging Visas Class E should be given work rights.

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46 *Adam R (Limbuela, Tesema v Secretary of State for the Home Department* [2005] UKHL 66 (3 November 2005) accessed at http://www.bailii.org/uk/cases/UKHL/2005/UKHL_2005_66.html on 18 January 2006.

47 Response by Hotham Mission to Question on Notice No. 1, *Committee Hansard*, 28 September 2005, p. 36.

48 Senate Select Committee on Ministerial Discretion in Migration Matters, March 2004, pp. 78 – 80.

8.69 If the Government rejects this recommendation, the Committee considers that the current requirements should at least be loosened. In that regard it recommends that the '45 day rule' be extended to 90 days.

Recommendation 54

8.70 The committee recommends that if the Commonwealth Government rejects the proposal that all Bridging Visa holders have work rights, the Committee recommends that the current '45 day rule' be doubled to 90 days to give people more time to apply for a protection visa.

Humanitarian Program – cost shifting

Background

8.71 The Commonwealth has constitutional responsibility for immigration matters.[49] The committee considers that part of this responsibility is to make provision for the health and welfare of immigrants, including asylum seekers. However, as discussed under the section on Bridging Visas, certain asylum seekers are released into the community on visas which provide limited Commonwealth support. Many submitters argued that the Commonwealth is effectively abrogating its responsibilities to those visa-holders, and cost-and-responsibility shifting to the States/Territories and charitable organisations.

8.72 The same allegation was made in relation to the provision of support for refugees entering Australia lawfully under the Humanitarian Program. Submissions from the Governments of New South Wales, Victoria and Western Australia contended that Commonwealth support for entrants under the Humanitarian Program has not kept pace with funding requirements.

8.73 The offshore resettlement component of Australia's Humanitarian Program includes two categories of permanent visa, viz:

> **Refugee** — for people who are subject to persecution in their home country and who are in need of resettlement. The majority of applicants who are considered under this category are identified and referred by the UNHCR to Australia for resettlement.
>
> **Special Humanitarian Program (SHP**) — for people outside their home country who are subject to substantial discrimination amounting to gross violation of human rights in their home country. A proposer (or sponsor) who is an Australian citizen, permanent resident or eligible New Zealand citizen, or

49 *Commonwealth of Australia Constitution Act*, ss. 51(xxix).

an organisation that is based in Australia, must support applications for entry under the SHP.[50]

8.74 A permanent offshore humanitarian visa (refugee or SHP) gives the holder:

- Permanent residence
- Access to Australia's public health services through Medicare
- Permission to work
- Access to welfare benefits
- Access to the Integrated Humanitarian Settlement Strategy
- Permission to travel and enter Australia for five years after grant; and
- Eligibility to apply for citizenship after two years permanent residence.[51]

8.75 Table 8.2 shows the number of visas granted, by major category, under Australia's Humanitarian Program.

50 DIMIA website accessed 5 January 2006, Fact Sheet 60. http://www.dimia.gov.au/facts/60refugee.htm Australia's Humanitarian Program also includes two types of temporary visa, but the discussion here relates more to permanent visa categories. Note the term 'proposer' is used by DIMIA in relation to offshore humanitarian visas, while the term 'sponsor' is used for other visa categories.

51 DIMIA, *Submission 205*, p. 31.

Table 8.2: Australia's Humanitarian Program, visas granted by major category

	Refugee	Special Humanitarian Program	Other*	Onshore Protection	Total visas issued under Humanitarian Program
1998-99	3,988	4,348	1,190	1,830	11,356
1999-2000	3,802	3,051	6,549	2,458	15,860
2000-01	3,997	3,116	1,043	5,577	13,733
2001-02	4,160	4,258	46	3,885	12,349
2002-03	4,376	7,280	3	866	12,525
2003-04	4,134	8,927	2	788	13,851
2004-05	5,511	6,755^	17	895	13,178

Source: Derived from DIMIA Fact Sheet 60 'Australia's Refugee and Humanitarian Program', accessed on website 5 January 2006.

Other* — includes Special Assistance Visas, Safe Haven Visas, and Temporary Humanitarian Visas. 5,900 Safe Haven visas were issued in 1999-2000 (4,000 to Kosovars offshore and 1,900 to East Timorese onshore). That was the only year Safe Haven Visas have been issued since 1998-99.

^ The total of 6,755 SHP visas granted in 2004-05 includes 170 visas granted onshore to East Timorese and others. A total of 12.096 offshore Refugee and SHP visas were granted in 2004-05.

8.76 DIMIA provides services to permanent humanitarian visa holders through two main programs — the Integrated Humanitarian Settlement Strategy (IHSS) and the Community Settlement Service Scheme (CSSS).

8.77 IHSS provides intensive settlement support to help humanitarian entrants achieve self sufficiency as soon as possible. IHSS services are generally provided for up to six months, but may be extended for particularly vulnerable clients. Services provided under the IHSS include case coordination, information and referrals; on-arrival reception and assistance; accommodation services; and short term torture and trauma counselling services.

8.78 IHSS services are delivered by service providers contracted to DIMIA – often State and Territory Government agencies such as Departments of Housing, Education and Health. Volunteer groups also work with service providers to support entrants and assist them to settle into the local community.

8.79 When humanitarian entrants exit the IHSS, they are referred to general settlement services funded under the Community Settlement Services Scheme (CSSS) and provided through Migrant Resource Centres, Migrant Service Agencies and organisations.[52]

8.80 The main complaint of the States is that the Commonwealth has been slow to recognise and respond to the many unique and unanticipated problems brought about by the changing make-up of humanitarian program entrants.

8.81 Africans now receive about 70 per cent of offshore humanitarian visas, compared to just 16 per cent seven years ago (see Table 8.3). That dramatic change in the demographic make-up of the humanitarian intake has involved many issues which the States assert require more input by the Commonwealth.

8.82 The top five countries of birth for offshore humanitarian visas granted in 2004-05 were: Sudan – 5220; Iraq – 1,589; Afghanistan – 1,291; Liberia – 868; and Sierra Leone – 751.[53] In contrast in 1998-99 the top five countries of birth were: Former Yugoslavia – 2,202; Iraq – 1,545; Croatia – 1,225; Bosnia-Herzogovina – 1,180; and Afghanistan – 660.[54]

52 DIMIA website accessed 5 January 2006, Fact Sheet 66, http://www.dimia.gov.au/facts/66ihss.htm

53 DIMIA website accessed 5 January 2006, Fact Sheet 60, http://www.dimia.gov.au/facts/60refugee.htm .

54 Figures provided to the Committee by DIMIA on 10 January 2006.

8.83 Table 8.3 shows how the intake of the offshore part of the humanitarian program has changed:

Table 8.3: Offshore resettlement program (Refugee & SHP) visa grants, by region of origin

	Europe (%)	Middle East & SW Asia (%)	Africa (%)	Asia & Americas (%)	Total offshore Refugee and SHP visas granted (number)
1998-99	50	31	16	3	9,526
1999-2000	46	29	23	2	7,502
2000-01	43	27	25	5	7,992
2001-02	32	32	33	3	8,458
2002-03	10	40	29	1	11,656
2003-04	3	24	71	2	11,802
2004-05	-	26	70	4	12,096

Source: Derived from DIMIA Fact Sheet 60 'Australia's Refugee and Humanitarian Program', accessed on website 5 January 2006.

Note: percentages in the table have been rounded.

8.84 Table 8.4 shows the distribution by State/Territory of entrants under the Humanitarian Program in 2004-05.

Table 8.4: Distribution by State/Territory of entrants under the Humanitarian Program in 2004-05.

New South Wales	3,844	**Victoria**	3,829
Queensland	1,510	**South Australia**	1,519
Western Australia	1,762	**Tasmania**	448
Northern Territory	185	**Australian Capital Territory**	250

Source: Figures provided to the Committee by DIMIA on 9 January 2006.[55]

8.85 A number of specific issues were raised by the NSW, Victoria and Western Australia Governments to illustrate the extent of the alleged cost shifting by the Commonwealth. The submission from NSW was particularly comprehensive and provided the basis for much of the following discussion.[56]

Changing settlement needs

8.86 The NSW and Western Australian Governments both highlighted the increased numbers of humanitarian entrants arriving from Africa with their unique and complex settlement needs. The WA submission noted:

> These recently arrived refugees, many of whom have spent years in refugee camps, require a higher level of intensive service to meet their complex health, education and housing needs.[57]

8.87 The Commonwealth's IHSS program generally provides support services for up to 6 months. The States argue that timeframe may be sufficient for entrants from

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55 The figures are based on DIMIA's IHSS database, derived from Graph 8, Chapter 4 in DIMIA's 'Blue Book' and can be found at http://www.immi.gov.au/search_for/publications/humanitarian_support_2005/index.htm DIMIA explained that the figures in Table 8.3 may differ slightly from the numbers shown in Table 8.2 because of delays in visa holders actually arriving in Australia for resettlement.

56 The State submissions are NSW - *Submission 232*, Victoria – *Submission 227*, and Western Australia – *Submission 226*.

57 Government of Western Australia, *Submission 226*, p. 4.

Europe, but it is insufficient for entrants from more less developed regions. The WA submission said:

> Consultations with the community and service providers reveal the gross inadequacy of this time limit for refugees and humanitarian entrants who have complex needs and require more ongoing settlement assistance.[58]

8.88 There are severe shortages of experienced case workers and interpreters with the required language skills, and few local African-focused community organisations to assist with new arrivals.

8.89 The NSW Government recommended greater consultation between the Commonwealth and States / Territories about future groups of humanitarian entrants so that pre-arrival planning can be improved and an extension of the IHSS program both in terms of time and range of services provided to better cater for refugee needs, especially those coming from Africa.[59]

New Settlement Grants Program

8.90 The NSW Government submission noted that from July 2006 a new Commonwealth Settlement Grants Program will replace the current Migrant Resource Centres (MRC) / Migrant Service Agencies (MSA) Core Funding and Community Settlement Service Scheme (CSSS). The new program will be an annual application-based grants program. Funding, including overheads, will be provided to successful organisations on a project basis for one, two, or three years.

8.91 The submission voiced a number of concerns with the new approach, such as the need for longer funding cycles (of at least 3 years) to maintain consistent services to immigrant communities. NSW recommended that the Commonwealth closely monitors the impact of the change in program funding and arrangements on the quality and range of services provided to migrants and new entrants.[60]

The role of 'proposers' under the Special Humanitarian Program

8.92 A proposer is an essential requirement for a person to be considered for entry to Australia under the Special Humanitarian Program (SHP), but not under the Refugee category (although the inclusion of a proposer can help the assessment of an application for an offshore refugee visa).

8.93 Proposers of successful applicants under SHP (or the applicants themselves) must pay for the applicant's travel to Australia. For applicants in the Refugee category, the Australian Government pays this cost.

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58 Government of Western Australia, *Submission 226*, p. 4. See also Community Relations Commission for a multicultural NSW, *Submission 232*, p. 37.

59 Community Relations Commission for a Multicultural NSW, *Submission 232*, p. 37.

60 Community Relations Commission for a Multicultural NSW, *Submission 232*, p. 33.

8.94 On the entrant's arrival in Australia, the proposer is expected to assist in the settlement of the entrant, including:

- meet the entrant at the airport;
- provide for the entrant's immediate accommodation needs;
- assist the entrant to find permanent accommodation; and
- familiarise the entrant with services and service providers such as Centrelink, banks, public transport, translating and interpreting services, health care, permanent housing, education, employment services and childcare.[61]

8.95 The NSW Government submission raises a number if issues in relation to the provision of support by proposers to entrants under SHP. Experience has shown that many proposers cannot fulfil their obligations, leaving State agencies to pick up the pieces. The submission said:

> In many cases those proposers, who are former humanitarian entrants, face severe hardships in fulfilling the financial and other responsibilities cast upon them when they sponsor family members to enter Australia. While the desire to reunite families and bring relatives out of camps and other conditions of hardship is understandable, the current immigration system, which places significant financial responsibility onto proposing parties, severely disadvantages and places people – both entrants and proposers – under severe financial pressure … The financial obligation on sponsored families to repay the debt incurred by their proposers, such as the cost of airfares, is currently forcing many secondary aged students to leave school early and seek work[62]

8.96 The NSW submission argues that SHP entrants often turn up in locations without any prior notice or consideration as to the availability or appropriateness of local services, such as schooling facilities in rural and regional areas.

8.97 While acknowledging recent DIMIA initiatives to improve support to SHP entrants, the NSW submission expressed concern that the needs of SHP entrants will not be adequately met. The submission strongly recommended greater consultation and coordination between Commonwealth, State and Local Government agencies and community service providers in relation to SHP entrants. The Commonwealth should more closely monitor actual support provided by proposers, and be prepared to quickly intervene if proposers are found not to be fulfilling their obligations.[63]

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61 DIMIA Fact Sheet 'Sponsoring (Proposing) a Refugee or Humanitarian Entrant', DIMIA website accessed 10 January 2006.

62 Community Relations Commission for a Multicultural NSW, *Submission 232*, pp. 31 - 32.

63 Community Relations Commission for a multicultural NSW, *Submission 232*, p. 33.

Health issues

8.98 The State Governments of NSW, Victoria and Western Australia (WA) all expressed concern at the impact on health services of relatively large numbers of African refugees arriving in Australia. The Victorian Government said:

> There is a need for a review of the pre-arrival, post-arrival and longer term health needs of sub-Saharan refugees with respect to:
>
> - Current arrangements for pre-departure medical assessment and treatment of refugees;
> - Levels of funding support for State and Territory health services to undertake appropriate screening and specialist care; and
> - The degree of Medicare support for the time and complexity required in the initial assessment of a refugee and their family, and for the continuing primary health care of newly arrived refugees with multiple complex health issues.[64]

8.99 These sentiments were echoed by Western Australia which noted:

> The volume, health care complexity, and acuity of newly arrived African refugees entering Australia have risen significantly over the last 12 months. The WA Department of Health is having to provide care and treatment for large groups of refugees (100+) from sub-Saharan Africa who are arriving with minimal notice, discussion, or new financial investment. Existing services cannot cope with the size of the groups, their multiple needs, and high acuity, creating an urgent need for an improvement in the health services provided.
>
> The pre-departure medical assessments performed in Africa are of dubious accuracy and, in their current form, do not assist in the assessment of new arrivals. There is no pre-departure screening or treatment for acute malaria and no clear pathway for the required medical assessment within a short time frame after arrival.[65]

8.100 The point was emphasised that several of the diseases suffered by these refugees are not common in Australia. That means normal general practitioners and even emergency departments of public hospitals are not equipped to handle such cases. This difficult situation is often exacerbated by communication difficulties caused by newly arrived refugees having little English and a shortage of appropriate interpreters.[66]

8.101 The NSW Government submission emphasised that the health and welfare of refugees must be cared for, while the wider community must be protected from the

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64 Government of Victoria, *Submission 227*, p. 3.

65 Government of Western Australia, *Submission 226*, p. 6. Apart from malaria, African refugees need to be screened for tuberculosis, HIV, gastrointestinal parasites and other tropical diseases.

66 Government of Western Australia, *Submission 226*, p. 6.

importation of infectious diseases. It is the Commonwealth's responsibility to ensure that these twin objectives are met.

8.102 All three State Governments argued that current Commonwealth funding for health services for refugees is totally inadequate. Although Medicare covers the cost of most of the blood tests undertaken, medications are often not covered by the Pharmaceutical Benefits Scheme (PBS), and there is no provision for the intensive use of staff resources (including clinical, specialist and pathology services) and the work involved with the follow-up of screening checks and treatment.[67]

8.103 The NSW submission made a number of recommendations, including that the Commonwealth undertake an urgent review of the pre-departure, post-arrival and longer term health care needs of the sub-Saharan refugees. The submission argued that while this macro review is being undertaken the following changes should be introduced immediately:

- The Commonwealth to finance a comprehensive pre-departure medical assessment and treatment service for African refugees;
- The Commonwealth to provide additional funds to State and Territory Health Services to enable the provision of appropriate screening and specialist care and health liaison services; and
- The Commonwealth to introduce a Medicare item which reflects the time and complexity required in the initial assessment of a refugee and their family (similar to the Indigenous Health Check item), and a separate item for continuing primary health care of refugees with multiple complex health issues.[68]

8.104 The NSW submission noted that refugees have often experienced extended periods of stress and trauma and as a result have acute counselling needs. Counselling organisations should employ appropriate bilingual case workers. Traditional counselling techniques and services should be reassessed to ensure that they are appropriate to newly-arrived refugees.[69]

Housing issues

8.105 The NSW submission identifies housing as a major issue for entrants under the humanitarian program. The submission points out that many of the families are large (55 per cent of families assisted in 2003-04 had more than 5 members), and housing options for large families are limited in availability and cost in both metropolitan and regional areas. Furthermore, real estate agents are often reluctant to rent properties to newly-arrived immigrants.

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67 Community Relations Commission for a Multicultural NSW, *Submission 232*, p. 38.

68 Community Relations Commission for a Multicultural NSW, *Submission 232*, p. 41.

69 Community Relations Commission for a Multicultural NSW, *Submission 232*, p. 42.

8.106 NSW recommends that the Commonwealth enhance its programs for humanitarian entrants to gain suitable housing. In the meantime, the Commonwealth should provide on-arrival accommodation for longer than four weeks, especially for groups which are known to have difficulty finding suitable accommodation.[70]

Educational issues

8.107 The NSW and WA Governments noted the special educational challenges faced by students from Africa and the Middle East. They often arrive with limited or no schooling, little or no literacy in their first language, and may have experienced torture and trauma.

8.108 The Commonwealth's 'ESL New Arrivals' program provides a grant of $4,854 for one year of intensive English training. However, the State Governments have calculated that the real cost of providing intensive English tuition to refugees from Africa is actually between $10,000 and $12,000, two to three times the allocated amount per refugee. The cost of educating a person who is basically illiterate is high due to the intensive and extensive tuition required. Furthermore, with such students there is a need for schools to employ specialist bilingual support staff to assist teachers and school counsellors.[71]

8.109 There is a severe shortage of interpreter services for African, Arabic and other minority languages spoken in African countries, which impedes effective use of government services, including education and training. To overcome these problems the NSW submission recommended that the Commonwealth should:

- provide fee-free interpreting to all agencies providing services to Humanitarian Program entrants during their first two years of settlement, and generally increase funding to community settlement services to engage professional interpreters in delivering services; and
- develop strategies to recruit more professional interpreters for African languages into the Commonwealth Translating and Interpreting Service (TIS), including ways of encouraging more people to become NAATI-qualified.[72]

Committee view

8.110 The Committee commends the government for the provision of the existing and wide-ranging programs to assist newly arrived entrants under the humanitarian program. However, the Committee does have some concerns that the Commonwealth appears to be slow in reacting to the new challenges presented by the changing demographic make-up of entrants under the Humanitarian Program. In the last two

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70 Community Relations Commission for a Multicultural NSW, *Submission 232*, p. 35.

71 Government of Western Australia, *Submission 226*, p. 5; Community Relations Commission for a multicultural NSW, *Submission 232*, pp. 48 & 49.

72 Community Relations Commission for a Multicultural NSW, *Submission 232*, pp. 46 – 47.

years, refugees from Africa represented over 70 per cent of the intake under the Humanitarian Program, and all indications are that the trend will continue in the foreseeable future.

8.111 The States, particularly NSW, presented a strong case that DIMIA's settlement programs needed to be updated to adequately reflect the range of unique issues involving refugees from Africa.

8.112 While immigration is primarily a Commonwealth responsibility, the Committee recognises that a whole-of-society approach is required to make immigration a success. Achieving optimal results requires a good working partnership between the Commonwealth and State and local governments and community and charitable organisations.

8.113 The committee believes that most Australians fully support the Government's Humanitarian Program. They recognise the hardship and suffering experienced by refugees and the difficulties of settling into a new culture and environment. Australians want to see refugees settled quickly and as painlessly as possible, so that they can lead full and productive lives.

8.114 The committee is persuaded by the evidence it received that the settlement of refugees from Africa represent special challenges, which require new and innovative responses. DIMIA needs to adopt a flexible approach so that is can respond to the special needs of new refugee groups. DIMIA must work closely with all levels of government and with community and charitable groups to ensure that these people are settled in their new country as quickly and comfortably as possible. All reasonable costs of implementing resettlement programs should be covered by the Commonwealth.

Recommendation 55

8.115 The committee recommends that, in the light of increasing numbers of refugees from Africa, DIMIA should reassess its resettlement programs to ensure that services are relevant, and that sufficient budget appropriation is made to cover all the costs of implementing those programs.

CHAPTER 9

REMOVAL AND DEPORTATION

9.1 This chapter deals with two important aspects of the administration of the removal and deportation provisions of the Migration Act:

- the implementation of section 198 and the practices associated with the removal of unlawful non-citizens; and
- the deportation of long term Australian residents convicted of a criminal offence.

9.2 An outline of Australia's international legal obligation of *non-refoulement* and the need for a system of 'complementary protection' are discussed in Chapter 4.

Removal of unlawful non-citizens from Australia

9.3 Australia's mandatory detention policy requires unlawful non-citizens to be detained until they are granted a visa or are removed from country. Section 198 is one of the key provisions. It requires that 'unlawful non-citizens' must be removed as soon as 'reasonably practicable', and is generally believed to impose a duty on officials to act promptly to achieve the objects of the section.[1] Dr Nicholls argued that since the extension of mandatory detention to all classes of unlawful non-citizen,[2] any person in Australia may be required to provide evidence of a valid visa to avoid removal:

> Removal follows from failure to do so, or after a person's applications and appeal opportunities are exhausted. There is no requirement for independent review of removal actions themselves.[3]

9.4 The committee agrees with the general view that the recent cases of Ms Vivian Solon and Ms Cornelia Rau illustrate the lack of procedural safeguards in the current provisions of the Migration Act. The details of these cases are recorded in detail elsewhere and the issue of procedural safeguards in the context of mandatory detention generally is explored in detail in Chapters 5 and 6.

9.5 In respect of removals, Dr Nicholls observed that the Palmer Report, 'highlights the importance of independent review of removal actions and that:

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1 Under section 198 of the Migration Act, a mandatory removal process for a number of classes of 'unlawful non-citizens' is established. These classes include: those who have requested the Minister in writing to be so removed; those who have been brought to Australia for a temporary purpose; those who have not made a valid application for a substantive visa when in the migration zone; those who have had an application for a substantive visa finally determined against them; and those who may be eligible to apply for a substantive visa but have not done so.

2 *Migration Reform Act 1992*. Effective from 1/9/1994.

3 Dr Glenn Nicholls, *Submission 102*, p. 1.

> the pendulum has swung so far away from reviewable orders that the Palmer inquiry encountered an attitude in the (D)epartment of (I)mmigration that the power to remove a person from Australia does not require a formal decision at all because it is seen to be required by the (A)ct 4.[5]

9.6 Dr Nicholls further argued that:

> '(i)n moving away from deliberate decision-making on deportations subject to independent scrutiny, the removal system has lost contact with the body of law that enunciated the conditions for lawfully deporting somebody'.[6]

9.7 The ASRC also alleged that DIMIA often exercises its power under section 198:

> Over-zealously and without regard to physical or mental health issues, welfare issues or human rights concerns in the country of repatriation.[7]

9.8 The committee is particularly aware to the vulnerability of people living with disability or suffering mental illness. In relation to pre-departure assessments, ASRC said that:

> Whilst there is an obligation upon DIMIA to conduct a pre-departure assessment of a person's physical fitness to travel, DIMIA do not assess a person's mental fitness to travel. Persons with chronic mental illness are routinely removed from Australia in circumstances where there is no treatment for them upon arrival in the country of repatriation. This does not mean that DIMIA should never remove a person who is psychologically unwell, merely that this should be done in a sensitive and appropriate way in accordance with best mental health practice standards. In many cases it may be appropriate to organise counselling and or psychological treatment prior to removal.[8]

9.9 The Australian Psychological Society (APS) concurred with this view. The APS argued that the involuntary return of people with a mental illness is 'unacceptable' and that 'consideration must be given, in determining if a person is 'fit to travel', to the person's ability to survive, cope and integrate into the other country upon their repatriation'.[9] The committee notes Australian international obligations not to return a person to a country where there is a serious risk of violation of their

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4 *Committee Hansard*, 27 September 2005, p. 11.

5 Dr Glenn Nicholls, *Submission 102*, p. 1.

6 Dr Glenn Nicholls*, Submission 102*, p. 1.

7 ASRC*, Submission 214*, p. 36.

8 ASRC, *Submission 214*, p. 36.

9 Australian Psychological Society, *Submission 223*, p. 5.

fundamental human rights.[10] There will be circumstances where the extent and nature of an illness and the conditions on return are likely to engage those obligations.

9.10 More generally, there are significant practical issues that face a person who is subject to involuntary removal, especially where that person is being returned to a place which is not their country of origin. The APS argued that in these circumstances:

> … it is essential that certain minimum standards are met to ensure that the person is able to integrate into this country, such as some significant prior connection with the country, access to healthcare and mental healthcare, and ability to access other basic rights such as work, education, and legal protection.[11]

9.11 The ASRC also emphasised the importance of undertaking the removal process in a respectful way and using the minimum level of force:

> Restraint may be used only if absolutely necessary to ensure the safety of staff and others, and the use of restraints must be strictly proportionate to the risk posed by the returnee. Escorts, where used, should be adequately trained to conduct the removal safely and appropriately. Clear standards and procedures for the forcible removal of individuals from Australia must be developed and adhered to.[12]

9.12 In relation to the use of physical restraint, the ASRC continued:

> Minimum forms of physical restraint may be used only in exceptional circumstances, and restraints that pose a significant risk to the health or wellbeing of the returnee must never be used. 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. Such cases are clear breaches of fundamental human rights, and Australia must seek to avoid any such further cases.[13]

9.13 On the issue of medicating removees, DIMIA assured the committee that it has a clear policy that medication (including sedatives) must not be used for the purpose of restraint in removals.[14]

9.14 The ASRC also argued that the removals process must be open and transparent:

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10 Discussed in Chapter 4.

11 Australian Psychological Society, *Submission 223*, p. 5.

12 ASRC, *Submission 214*, p. 40.

13 ASRC, *Submission 214*, pp. 40-41.

14 Answers to questions on notice, 5 December 2005, p. 87.

> The returnee should be given sufficient time to prepare for the departure, should be provided with all appropriate information relating to the journey, and should also be given choices about aspects such as the timing of the return.[15]

Lack of independent pre-removal assessment of returnees

9.15 It was against the background of these concerns that some witnesses argued for independent review of the removal decision, including a person's fitness to travel. The Canadian system, which provides for a Pre-Removal Risk Assessment, was generally regarded as having merit.[16] For example, Uniting Justice Australia and the Hotham Mission agreed:

> … with recommendation 8.3 [of the Palmer Report], particularly in developing a briefing program to assess the reason behind a removal, and responsibilities associated with removals. We would ask that clear guidelines be developed in this regard, including an exploration of the Canadian practice of pre-removal assessment to ensure all removals are appropriate and that no refoulement, humanitarian or welfare concerns are present.[17]

9.16 HREOC argued that independent assessment of removal decisions should be built into the system. Mr John von Doussa QC, President of HREOC said:

> There ought to be some additional procedure beyond that which there presently is, a procedure which can be compelled - in other words, a person can require that it be fulfilled - and a procedure that has some review mechanisms at the end. Whether you set up a new tribunal or whether you adopt some of the other procedures, if the exercise were compelled to be done by the department, with reviews thereafter, that might be sufficient. The problem is that at the moment there is no compulsion.[18]

9.17 Dr Nicholls adopted a similar view. He suggested that the Federal Magistrates Court would be an appropriate body to supervise removal decisions:

> The check I have in mind would not be a further merits review but a check of the person's identity and fitness to travel and on the existence of permissions both from transit countries and from the person's country of citizenship. The costs would be modest and there would be three benefits: first, it would prevent any wrongful removals; second, it would entrench standards for the arrangements that need to be in place to ensure a person's health and wellbeing; and, third, it would give the minister and parliament assurance that the removal powers under the act are being exercised

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15 ACRC, *Submission 214*, p. 41.

16 See *Immigration and Refugee Protection Act 2001*, ss. 112-116.

17 ASRC, *Submission 190*, p. 41.

18 *Committee Hansard*, 7 October 2005, p. 53.

> appropriately in all circumstances. This is important in the absence of formal deportation orders issued under the minister's authority.[19]

9.18 The ASRC agreed that there should be independent scrutiny to ensure all removal safeguards have been complied with. ASRC also argued that:

> a pre-departure assessment of the removee's individual circumstances is conducted to ensure that Australia's human rights obligations are being met. In the course of such an assessment any health or welfare needs of the removees must be considered and serious consideration given to their reception upon return. It is not sufficient, in an area where individual human rights are the concern of the global community to abdicate responsibility for a person once they depart our shores.[20]

Insufficient notice of deportation and removal

9.19 The lack of notice to detainees was raised by a number of witnesses. The Law Society of South Australia commented that:

> Reports from legal practitioners who have acted for many detainees is that the Department gives at best brief notice that a deportation will be likely to occur, and at worst often gives notice to legal practitioners or migration agents which only becomes known in circumstances after the deportation has occurred. It is believed by many that this is part of the culture of the Department which views both the detainees and those who may wish to be involved in their dealings with the Department with scant regard.[21]

9.20 The LSSA argued that the Migration Act should be amended to require reasonable notice as a procedural safeguard and an opportunity to raise outstanding issues.[22]

9.21 In reply, DIMIA informed the committee that:

> There is a Migration Series Instruction on Removals, which provides removals officers guidance in providing notification of removal to unlawful non-citizens.
>
> All detainees are notified of the Department's obligation to remove them from Australia by means of a notice provided by the department upon their induction into detention. Detention case managers also raise the issue of removal with detainees at regular meetings.
>
> There is no legislative requirement that detainees be notified of their removal arrangements. However, once arrangements are in place, the detainee is generally advised in advance of their removal by way of a

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19 *Committee Hansard*, 27 September 2005, p. 11.

20 ASRC, *Submission 214*, p. 37.

21 LSSA, *Submission 110*, p. 10.

22 LSSA, *Submission 110*, p. 10.

> removals notice. This notice also outlines the exclusion periods which may apply (ie time restrictions on their re-entry to Australia).
>
> A notice outlining debts to the Commonwealth may also be provided at this time.
>
> The timing of delivery of these notices will depend upon the particular circumstances of the removal. Generally, for low risk compliant removals, the detainee can be advised 48 hours prior, or whenever the arrangements are in place.
>
> If a removals officer believes that the early notification of a removal to a detainee may pose a significant risk to the effective removal of the person, and/or to the detainee's or other person's safety, notification can be deferred until just prior to the commencement of the actual removal process.
>
> If a removee has immediate family in Australia (eg a spouse or parent) then it will be the removee's responsibility to notify their family of their removal.
>
> If a removee is unable to do this because he or she is notified of their removal immediately before it occurs, officers ask the removee if he or she wants their immediate family in Australia to be notified of the removal. If the removee requests that their family be notified of the removal, officers notify the family as soon as practicable after the removee has departed Australia.[23]

Senate Foreign Affairs, Defence and Trade Committee's report on Ms Vivian Solon

9.22 The Senate Foreign Affairs, Defence and Trade Committee (FADTC) inquiry into the circumstances surrounding the removal of Ms Vivian Solon, made several findings relevant to this inquiry.[24] The FADTC expressed the view that:

> It is quite clear that DIMIA was ultimately responsible for Ms Solon's removal, which includes all the associated arrangements on arrival. Records on who was to meet here were confusing. It would appear that these arrangements were left to third parties and were not even checked or confirmed by DIMIA officials.[25]

9.23 The FADTC recommended that DIMIA review its removal processes to ensure that:

- clear and comprehensive records of arrangements should be kept in relation to such removals;

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23 Answers to Questions on Notice, 11 October 2005, p. 46.

24 Senate Foreign Affairs, Defence and Trade References Committee, *The removal, search for and discovery of Ms Vivian Solon, Final report*, December 2005.

25 Senate Foreign Affairs, Defence and Trade References Committee, ibid, p. 15.

- formal and proper procedures are in place for the reception of people being removed from Australia in circumstances similar to Ms Solon.[26]

9.24 The FADTC also noted the 'lack of clarity over when DIMIA's responsibility for a detainee formally ends'. The committee expressed the view that:

> … there should be no 'grey area' with regard to Australia's responsibility for those persons removed from Australia. There must be an indisputable and identifiable point at which Australia's responsibility to these people starts and ends. Ms Solon's circumstances have highlighted the need for the Australian government to review and clarify this area of responsibility.[27]

9.25 The FADTC recommended that 'DIMIA review and advise staff when their responsibilities for a detainee begin and end, noting there may be circumstances like that of Ms Solon where there may not be a strict legal obligation but a moral obligation to ensure their welfare'.[28]

Committee view

9.26 This committee agrees with the views and recommendations of the FADTC concerning the process of removing Ms Solon The committee also accepts the evidence received in the course of its inquiry suggesting that a pre-removal risk assessment system should be instituted as a safeguard to ensure that any 'refoulement', humanitarian or welfare concerns are dealt with. The committee considers the practice in Canada to be a worthy example and one that might usefully be followed in Australia. The provision of reasonable notice is a procedural safeguard against illegal or improper removals and should also be provided for by statute.

9.27 Were such a pre-removal risk assessment implemented, it would address many of the committee's concerns, and there would be less cause to consider the need for a review process for removal decisions.

Recommendation 56

9.28 The committee recommends that the Migration Act be amended to require a comprehensive pre-removal risk assessment to ensure no 'refoulement', humanitarian or welfare concerns exist.

Recommendation 57

9.29 The committee recommends that the Migration Act be amended to require that all prospective removees be provided with reasonable notice.

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26 Senate Foreign Affairs, Defence and Trade References Committee, ibid pp 15-16.

27 Senate Foreign Affairs, Defence and Trade References Committee, ibid p. 16.

28 Senate Foreign Affairs, Defence and Trade References Committee, ibid p. 16.

Deportation of long term Australian residents

9.30 The committee received a considerable amount of evidence about the use of section 501 to deport long term Australian residents on character grounds. The evidence indicates that the Commonwealth has abandoned reliance on the criminal deportation provisions (section 201) in favour of the wider power to cancel visas on character grounds under section 501, where a person has been convicted of a criminal offence.

Background

9.31 Section 201 of the Migration Act provides for the deportation of non-citizens who have been in Australia for less than 10 years, convicted of a serious criminal offence and sentenced to imprisonment for one year or more. Under section 201, a person cannot be deported after being lawfully resident in Australia for more than 10 years, except in very exceptional circumstances.

9.32 A decision to cancel a visa under section 501 consists of two stages:

- the decision-maker must find that the visa holder does not pass the 'character test' (defined in subsection 501(6)); and
- if it is found that the visa holder does not pass the character test, then the decision-maker must decide whether it is appropriate to cancel the visa, given all of the relevant circumstances.[29]

9.33 *Ministerial Direction No. 21 – Visa Refusal and Cancellation* provides guidance on the exercise of discretion under section 501.[30]

9.34 However, evidence indicated that since the introduction of a broader character and conduct test in section 501 of the Migration Act,[31] it has become routine practice to deal with convicted non-citizens by cancelling their visas on character and conduct grounds, rendering them unlawful non-citizens and liable to removal.[32]

9.35 Several witnesses argued that section 501 is being used increasingly as a way of 'bypassing' the specific deportation power contained in section 201. For example, the South Brisbane Immigration & Community Legal Service (SBICLS) informed the committee that, in its experience, 's[ection] 501 is being used far more than the s[ection] 201 power'.[33]

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29 DIMIA, Answers to questions on notice, 11 October 2005, p. 17.

30 DIMIA, Answers to questions on notice, 11 October 2005, p. 17. Issues that must be considered under the Ministerial Direction in the exercise of the power under section 501 are set out later in this chapter.

31 Effective 1 June 1999.

32 See, for example, Dr Glenn Nicholls, *Submission 102*, p. 2.

33 SBICLS, *Submission 200*, p. 4.

9.36 It was said that the change in Commonwealth practice reflected a tension between the executive and the judiciary. CCHRL explained:

> Recently, following a battle between the executive and the courts and tribunals over the implementation of the [criminal deportation power under section 201 of the Migration Act], the Department of Immigration has abandoned the use of the [criminal deportation power] in favour of the powers to cancel visas on character grounds…[34]

> There is evidence that the current section 501 is being used as a form of 'disguised' deportation to bypass the specific power in section 201 of the Act – the Criminal Deportation Power (CDP) … The use of section 501 (the 'character test' power) in lieu of section 201 (the CDP) is significant because of several important differences between the powers…[35]

9.37 During hearings DIMIA provided background to the amendments to section 501:

> My recollection is that [amendments to section 501 in 1998 were] against the background of a number of cases that occurred in the mid-1990s where the government was unable to remove non-citizens who had committed very serious violent crimes in Australia, but because of the nature of the provisions the government decisions were overturned in the courts. The government took the view at the time that that was an outcome that it did not agree with.[36]

9.38 DIMIA argued that the primary purpose of the 1998 amendments was to:

> ensure that the Government can effectively discharge its fundamental responsibility to prevent the entry and stay in Australia of non-citizens who have a criminal background or have criminal associations.[37]

DIMIA also noted that the amendments were supported, at the time, by both the major parties.[38]

9.39 A brief review of the second reading debate on the Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct Bill 1998, indicates that the bill was intended to:

- broaden the criteria upon which a person might be refused entry or have their visa cancelled on character grounds; and
- facilitate quicker removal.

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34 Castan Centre for Human Rights Law, *Submission 71*, p. 10.

35 Castan Centre for Human Rights Law *Submission 71*, p. 10.

36 *Committee Hansard*, 11 October 2005, p. 19.

37 *Committee Hansard*, 11 October 2005, p. 19.

38 *Committee Hansard*, 11 October 2005, p. 19.

9.40 The emphasis during debate was on screening of people seeking to enter Australia and the prompt removal of people who committed a serious offence while in Australia. There is no evidence that the bill was intended to apply to long term permanent residents and no suggestion that section 201 should be repealed.[39] The committee is only aware of one case in mid 1997 in which the Minister sought to cancel a visa and subsequently abandoned the action.[40]

Differences between sections 201 and 501 of the Migration Act

9.41 The committee notes the important differences between section 201 and section 501; and the human rights and legal concerns raised by the Commonwealth's preferred use of section 501. Some of these concerns are:

- section 201 assumes that a person, 'integrated' into the Australian community after a period of 10 years, with extensive ties in Australia should be removed. This includes permanent residents who have spent the majority of their lives in Australia, have children and other dependents who are Australian citizens, or have already served their time in prison. In contrast there is no time limit in section 501.[41]
- section 201 is confined to persons sentenced to a term of imprisonment of not less than one year but no more than 10 years. In this way, section 201 reflected a certain level of seriousness about the crime. By contrast, the 'character test' in section 501 captures a far wider range of behaviour. Mere association with someone else reasonably suspected of criminal activity by the Minister is sufficient to establish that a person is not of good character; and cumulative periods of periodic detention count toward the calculation of a term of imprisonment which constitute a 'substantial criminal record';[42]
- section 501 is intended to facilitate *refusing* visa applications from people seeking to enter Australia or cancel a visa where the person present a

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39 *House Hansard*, p. 1229.

40 In mid 1997, the then Acting Minister for Immigration and Multicultural Affairs (Senator Vanstone) cancelled the visa of Lorenzo Ervin, who had been convicted of air piracy and kidnapping in the United States in 1969. Mr Ervin sought judicial review of the decision in the High Court. On 10 July 1997, counsel for the Minister proposed that the Minister's decision cancelling Mr Ervin's visa be set aside: *Re: The Minister for Immigration and Multicultural Affairs Ex parte Ervin* B 29/1997 (10 July 1997); See Spry M. and Margarey K., *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998,* Bills Digest No.48 1998-99, 11 November 1998 p.3.

41 For example, see CCHRL, *Submission 71*, p. 11; Dr Glenn Nicholls, *Submission 102*, p. 2; Migration Institute of Australia, *Submission 144*, p. 4. The committee notes that in 1998 the Joint Standing Committee on Migration examined this issue and 'resolved to maintain the ten year limit on liability for deportation for juveniles (immigrants who arrive in Australia under the age of 18) as an appropriate balance between the need to protect the community and the obligation Australia accepts for very young immigrants': Joint Standing Committee on Migration, *Deportation of Non-Citizen Criminals*, June 1998, p. 17.

42 CCHRL, *Submission 71*, p. 11.

significant risk. It was not intended to be relied on for the purpose of deporting Australian residents convicted of minor or even serious criminal offences if they lived in Australia more than ten years;[43]

- decisions under sections 201 and 501 are reviewable by the AAT. However, the section 501 is subject to personal intervention by the Minister (which is unreviewable, and not subject to independent scrutiny or the rules of procedural fairness);[44]
- the policy directions which govern the exercise of powers under sections 201 and 501 are significantly different. For example, the power to deport under section 201 requires a range of personal considerations relating to family unity to be taken into account. By contrast, section 501 emphasises the 'expectations of the Australian community';[45]

9.42 It was also argued that section 501 effectively exposes a long term Australian resident to an additional penalty: The ICJ said:

> Someone has done their time and yet they are further penalised as a result of the immigration implications once they are released. That is one of the public interest considerations that should be taken into account in the discretion not to cancel.[46]

9.43 The committee understands that the ICJ is emphasising the practical effect of deportation rather than making a legal argument that deportation constitutes double jeopardy and questioning the policy of deportation. Based on the evidence before the committee, it does appear that the policy considerations for criminal deportation overlaps with, but is substantially different to, those which inform cancellation on character grounds.

No right to legal representation

9.44 LACNSW criticised the lack of legal assistance available to permanent residents who face criminal deportation under section 201. LACNSW informed the committee that DIMIA notifies the person that they will be deported after completion of their custodial sentence. The letter of notice includes information about appeal rights. Where DIMIA is unable to deport immediately, section 253 of the Migration Act provides that such persons may be held in immigration detention on expiration of the custodial sentence until deported.[47]

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43 Dr Glenn Nicholls, *Submission 102*, p, 3.

44 CCHRL, *Submission 71*, p. 11; SBICLS, *Submission 200*, p. 4.

45 CCHRL, *Submission 71*, p. 11.

46 *Committee Hansard*, 28 September 2005, p. 45.

47 Legal Aid New South Wales, *Submission 166*, p. 18.

9.45 According to LACNSW, the notice also advises the individual to contact the Legal Aid Office or Commission in their state or territory for assistance with their appeal.[48] However, as LACNSW explained:

> The fact that the letter directs the applicant to the Legal Aid Office or Commission in their state or territory, clearly attests to the necessity for legal assistance in these proceedings. However … this assistance is not available. The applicant is denied the right to access the advice and assistance they require.
>
> A challenge against a DIMIA decision is a complex and lengthy process. At the AAT, DIMIA is represented by a solicitor; the non-citizen (the applicant) is often unrepresented because free legal representation is not available either under the IAAAS or under Commonwealth legal aid guidelines … The only remaining option is private representation, which is often not affordable, or pro bono assistance, which is in short supply.[49]

9.46 It was argued that people serving custodial sentences who have their visas cancelled under section 501 of the Migration Act are extremely vulnerable and need legal assistance:

> DIMIA detains or deports them immediately after they complete their custodial term. Whilst in custody or detention they are not referred to a registered migration agent for advice on their legal rights. This group is largely unrepresented throughout this process. The visa cancellation process is complex. DIMIA is represented by a solicitor or trained officer of the Department of Immigration throughout the process. The unrepresented applicant is greatly disadvantaged as he or she cannot effectively participate in this process.[50]

9.47 Further:

> Legal assistance and representation in this process is essential in enabling individuals to exercise their legal rights, given the serious consequences to people who have, in many cases, spent much of their lives in Australia and face being returned to the country of their birth with which they have little or no connection.[51]

The risk of breaching Australia's international obligations

9.48 The committee received evidence suggesting that Australia may be acting in breach of its international obligations if it has or is deporting someone originally accepted by Australia as refugee. Mr David Bitel from the Refugee Council of Australia argued that

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48 Legal Aid New South Wales, *Submission 166*, p. 18.

49 LACNSW, *Submission 166*, pp 18-19.

50 LACNSW, *Submission 166*, p. 22.

51 LACNSW, *Submission 166*, p. 22.

> In the criminal deportation area, one commonly hears of cases involving people, particularly from Vietnam, who have come to Australia as refugees, as minors in earlier years, who have then got themselves caught up in serious criminal activity and in respect of whom deportation orders have been signed following section 501 orders or decisions. In my mind, that certainly does enliven the question as to whether Australia is in breach of its obligations, because there has been no change in country situation in Vietnam in terms of the refugee convention.
>
> … I cannot give you a settled, learned opinion as to whether Australia is in breach of its obligations. My gut reaction is that Australia may well be, but then other considerations may come into play such as the effluxion of time and the cessation provisions under the convention.[52]

9.49 The committee notes that whether the expulsion from Australia is executed under sections 189, 201 or 501, the facts of an individual case may engage Australia's international legal obligation not to return a person to a country where there is risk of breaching the non-refoulement obligation under the CSR, CAT or ICCPR. The issue is whether there is adequate procedural safeguard to ensure that Australia does not act inconsistently with those requirements. Australia's protection obligation towards refugees raises a particular set of cases where vigilance is required to prevent refoulement.

The Commonwealth's increased use of section 501

9.50 The committee notes recent media reports about the extent to which section 501 has been used to deport long term Australian residents with criminal convictions. In November 2005, it was reported that since 2000-01, some 293 people have been removed under this section, while only 18 people have been deported under the section 201, criminal deportation provisions.[53] Media reports indicate that some of these people have lived in Australia since infancy and have never turned their mind to or simply been unaware that technically they were not citizens. It follows that their family life, work and community ties are Australian – for all practical purposes they are Australian.

9.51 There have been a number High Court cases concerned with the deportation of British nationals.[54] In *Shaw* the High Court held that British migrants who had arrived in Australia after 1949 are 'aliens' unless they become citizens and, although the person in that case had lived in Australia since the age of 2, he could be deported to his birthplace.[55] The ruling in *Shaw* overturned the 'protection against deportation

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52 *Committee Hansard*, 28 September 2005, p. 11.

53 Meaghan Shaw, Get out: almost 3000 given their marching orders from Australia, *Age*, 25 November 2005, p. 2.

54 *Shaw v Minister for Immigration and Multicultural Affairs* [2003] HCA 72; Re Patterson; Ex parte Taylor (2001) 207 CLR 391.

55 Prince P., *Deporting British Settlers,* Research Note No.33, 2003-04, Parliamentary Library, 10 February 2004, p. 1.

conferred on long term British settlers conferred by the High Court in Taylor (2001)'.[56] In *Taylor*, the majority held that 'such people were 'non-removable non-citizens'.[57] These cases raise what some witnesses have described as the constitutionally entrenched 'alien-citizen dichotomy', which underlies an general lack of sense of responsibility toward the rights and humanitarian needs of non-nationals.[58] In a settler country with high levels of migration the potential reach of section 501 is considerable. There are, for example, some 355,000 British born migrants in Australia who have not become citizens.[59]

9.52 Recent Federal Court cases involving the use of section 501 have drawn rare judicial comment.[60] Most notable is the recent case of *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs,*[61] in which Moore and Gyles JJ expressed concern about the inappropriate use of section 501:

> 'This is yet another disturbing application of s[ection] 501 of the Migration Act … [which] suggests that administration of this aspect of the Act may have lost its way'.[62]

9.53 The majority in *Nystrom* noted the need for change:

> … it is timely for there to be a review by the Minister of the proper approach to matters such as this. That would be very likely to yield a different result in this case. In our opinion, it is difficult to envisage the bona fide use of s 501 to cancel the permanent absorbed person visa of a person of over 30 years of age who has spent all of his life in Australia, has all of his relevant family in Australia, by reason of criminal conduct in Australia so leading to his deportation to Sweden and permanent banishment from Australia.
>
> … Section 501 should not be used to circumvent the limitations in s 201. Apart from anything else, to do so is to retrospectively disadvantage permanent visa holders who happen to be non-citizens.[63]

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56 Prince P., *Deporting British Settlers,* Research Note No.33, 2003-04, Parliamentary Library, 10 February 2004, p. 1

57 Prince P., *Deporting British Settlers,* Research Note No.33, 2003-04, Parliamentary Library, 10 February 2004, p. 1.

58 See Assoc Professor Kneebone, Castan Centre for Human Rights Law, Submission, 71, p. 4.

59 See The United Kingdom born Community at http://www.immi.gov.au/statistics/infosummary/textversion/uk.htm, citing 2001 census referred to in Prince P., *Deporting British Settlers,* Research Note No.33, 2003-04, Parliamentary Library, 10 February 2004, p. 1.

60 For example, see *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121 and *Ayan v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 7 & 139.

61 [2005] FCAFC 121.

62 *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121 at para 1.

9.54 Further, the majority stated that:

> It is one thing to say that the responsibility to determine who should be allowed to enter or to remain in Australia in the interests of the Australian community ultimately lies with the discretion of the responsible minister. That has little to do with the permanent banishment of an absorbed member of the Australia community with no relevant ties elsewhere. [Mr Nystrom] has indeed behaved badly, but no worse than many of his age who have also lived as members of the Australian community all their lives but who happen to be citizens. The difference is the barest of technicalities … Apart from the dire punishment of the individual involved, it presumes that Australia can export its problems elsewhere.[64]

9.55 The committee questioned DIMIA about the impact of the judgment in *Nystrom*, and the issue of 'absorbed persons' visas. DIMIA provided the following information:

> Assessment of whether someone holds an absorbed person visa is a complex legal and evidentiary task and can only be determined after a comprehensive review of a range of information relating to the individual in question. Such assessments therefore are only done where it is necessary to determine the immigration status of the person.
>
> Once a full analysis of the court decision [in *Nystrom*] had been completed, including its implications for other persons who could be in a similar situation, the department commenced a case by case review of persons whose visas had been cancelled under section 501 and who were in immigration detention to see if they were affected by the *Nystrom* decision. As a result, twelve people in immigration detention and one in prison were identified as likely holders of an absorbed person visa that was not considered in the cancellation process. Apart from the person in prison, all were released immediately the assessment had been completed. In a small number of these cases, involving very serious crimes, action has commenced to consider again whether to cancel the visa under section 501.[65]

9.56 DIMIA also advised, as a result of *Nystrom*, that:

> … an assessment has been done for persons in immigration detention as a result of visa cancellation under section 501, persons about to be transferred from prison to immigration detention as a result of visa cancellation under section 501, and non-citizens being considered for visa cancellation under section 501.[66]

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63 *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121 at paras 26 and 27.

64 *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121 at para 29.

65 Answers to questions on notice, 5 December 2005, p. 1.

66 Answers to questions on notice, 2 December 2005, p. 2.

9.57 The impact of the Commonwealth's use of section 501 in individual cases is a matter of considerable concern. Some submitters argued that permanent residents who suffer from mental illness have been affected by the regime under section 501.[67] SBICLS argued that '(a) person who has become an Australian permanent resident as a juvenile and become part of the Australian community should not be subject to cancellation under s[ection] 501 on character grounds'; rather, the 10-year rule in section 201 should apply.[68]

9.58 Mr Julian Burnside QC also highlighted some of the specific problems with section 501:

> … some people have come here, not as refugees, to take up permanent residency but do not bother to apply for citizenship, and there are many illustrations of this problem. But the general shape of it is that people come here, sometimes as infants. They live here without becoming Australian citizens and get into trouble in their 20s or 30s. They are then deported to the streets of Croatia or goodness knows where, without any support, any of the language of the country they are sent to and without any real prospect of surviving, except at the lowest imaginable level. That seems to be infinitely unjust. As one judge in a case of this sort mentioned: 'This person's offences may be unfortunate, but on any view they are the product of his upbringing in Australia. To throw him out of the country into a place where he will be a complete alien seems unjustifiable.' It is not as though we have such a burgeoning criminal class in Australia that we have to clear out the rubbish to make room for more. Every society will have a few people who misbehave; you should not throw them out just because you can.[69]

9.59 Mr Burnside continued:

> I would take a different approach, if you have someone who has committed high-level criminal offences and has only lived in Australia for, say, the last 10 years of their adult life. But, if they have been here from infancy or childhood, to send them back by themselves to a country where they have no connections but for it being their place of birth is plainly unjust. I know of one case where a guy is living on the streets of Zagreb, I think. He speaks nothing but Australian, he has no contacts, none of the support agencies is able to help him and he is living from hand to mouth on the streets. We sent him back because he committed a low-level offence in Australia, after living here for 25 years. His wife and children are still here. It is not something we can be proud of.[70]

9.60 Mr Burnside suggested a possible alternative approach which might help overcome some of the current problems with section 501:

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67 For example, see LACNSW, *Submission 166*, p. 23.

68 SBICLS, *Submission 200*, p. 5.

69 *Committee Hansard*, 27 September 2005, pp 51-52.

70 *Committee Hansard*, 27 September 2005, p. 52.

> In principle - I have not thought this through - you start with the fact that there is ministerial discretion to cancel a person's residency or visa where they have been convicted of an offence that carries a sentence of 12 months or more. There ought to be guidelines for the exercise of that discretion to introduce considerations of fairness and humanitarian concern that would look to the consequences, both for the family here and for the person's future wherever they are sent, in order to restrict the discretion.[71]

9.61 However, in Mr Burnside's opinion, the ministerial discretion device should be used with caution:

> Unbounded discretions, wherever they appear in the act, have certainly been useful in recent times because the act otherwise allows such harsh outcomes, but they are not a long-term solution. The discretions I think need to be bounded or guided by considerations of fairness and compassion.[72]

9.62 In evidence, the Migration Institute of Australia also raised concerns about section 501 and offered a possible alternative approach:

> Section 501 and the ministerial directions, which is a policy document that says how section 501 is to the administered, tend to leave aside that a person can have a period of years where they have reformed whatever bad behaviour there was and that some of the bad behaviour might have even been innocent. But it is a situation where perhaps the term 'a spent conviction' should be used. It is a fundamental part of the process of law that a conviction after 10 years - in this state anyway - is considered to be a spent conviction. If that is the way our community operates why could that not be included in section 501 so that somebody who has reformed is a public or community benefit, and we go back to section 4. If somebody has reformed and they have paid their debt to society, whatever that particular debt is, they should be treated like any of the rest of us, and in that sense it should be written into section 501 that there should be some community benefit recognition. Perhaps the best way of doing it is simply to write in words about the acceptability of a spent conviction. There may be other ways of doing it but when we put submissions forward about section 501 we refer to spent convictions as a community norm, but it is not enshrined in the Act.[73]

Commonwealth Ombudsman's own-motion investigation

9.63 The committee notes that the Commonwealth Ombudsman is currently undertaking an own-motion investigation into the issue of criminal deportation under section 501 of the Migration Act. The Ombudsman provided the committee with some background into the investigation:

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71 *Committee Hansard*, 27 September 2005, p. 52.

72 *Committee Hansard*, 27 September 2005, p. 52.

73 *Committee Hansard*, 28 September 2005, p. 75.

> Independent of the Federal Court decision on Nystrom, I decided to commence an own-motion investigation into the issue of criminal deportation. There is a draft report which has been completed and is currently sitting on my desk which I hope will be going to the department within the next week or two. The reason we commenced the own-motion investigation is because we had received a number of complaints from people who were in detention. The general picture is that these are people who were Australian residents. Some of them came to Australia many years ago, while some came as young people. Some were even unaware that they were not Australian citizens, because they had simply grown up in Australia. Then a decision was made by the minister under section 501 of the Migration Act that, after conviction of an offence, a person failed the good character test in that section and should be removed from Australia.[74]

9.64 The Commonwealth Ombudsman highlighted the complex issues arising from the implementation of section 501:

> The complaints to our office have, again, illustrated the complexity and sensitivity of the different issues that arise. As I have indicated, sometimes these are people who really have grown up in Australia. Most of them are people who have completed the term of imprisonment for the offence committed in Australia and their removal to another country raises distinct issues. Often they are people with close family and other connections. Sometimes the country to which their citizenship belongs is a country that no longer exists or they may be a country that the person has never visited and in which they are not proficient in the language or culture. Sometimes that results in the person being in detention for quite a long period in Australia while these issues are addressed, reviewed and so on. Indeed, some of the people within this group come within our two-year detention review. Because of the range of issues we decided that it was an appropriate topic for an own-motion investigation. I should add that there is one major restriction - the Ombudsman has no jurisdiction to investigate decisions of the minister. But, nevertheless, we have been able to investigate the general picture. Again, I will not foreshadow what the recommendations are, because the draft is on my desk and I may well vary it, and, under our act, it has to go to the department for comment before we make any adverse public comment.[75]

9.65 The Commonwealth Ombudsman also clarified that 'the focus of the s[ection] 501 own motion investigation is limited to the visa cancellation of long-term Australian residents who had been in Australia since childhood'.[76] The Ombudsman also advised that:

> '(a)s at the commencement of the own motion investigation, the office was dealing with seven complaints into the visa cancellation of long-term

74 *Committee Hansard*, 7 October 2005, p. 64.

75 *Committee Hansard*, 7 October 2005, p. 64.

76 Answers to questions on notice, 24 October 2005, p. 2.

> Australian residents. These people had spent their formative years in Australia and were in detention pending removal'.[77]

9.66 The committee was subsequently advised that the Ombudsman aims 'to complete to the bulk of the investigations in 2005-06'. However, 'this timeframe may change due to matters beyond the control of this office as the investigations proceed, for example, due to the unforeseen complexity of some matters or the availability of information from DIMIA'.[78]

Government response

9.67 In response to suggestions that visa cancellation amounts to 'double jeopardy', DIMIA stated its view that:

> Visa cancellation and consequent removal of a non-citizen is not an additional punishment for the commission of a criminal offence by a non-citizen – it is an administrative decision taken by Australia pursuant to its sovereign right to decide the circumstances in which a non-citizen is permitted to enter and remain within its jurisdiction, with the power to do so clearly enacted by the Parliament.[79]

9.68 Further, DIMIA explained that:

> Although a substantial criminal record is a trigger for considering the exercise of the power, the test for visa cancellation considers the totality of a non-citizen's circumstances. These include the length of the sentence and the seriousness of the crime, in the context of the protection of the Australian community, and also include a range of other factors such as the best interests of any children, and the extent of their ties to the Australian community. These matters are covered in *Ministerial Direction No. 21 – Visa Refusal and Cancellation* under section 501.
>
> A decision to cancel a visa under s501 is not taken lightly, and all relevant information is taken into account.[80]

9.69 DIMIA also pointed out that the Joint Standing Committee on Migration, in its 1998 report on *Deportation of Non-Citizen Criminals*,[81] accepted that removal of non-citizens following the commission of a criminal offence is not a second punishment.[82] As noted above, the committee understands that technically that is the case. The issue is whether section 501 is being used to avoid the justifiable limitations

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77 Answers to questions on notice, 24 October 2005, p. 2.

78 Answers to questions on notice, 15 December 2005, p. 2.

79 Answers to questions on notice, 5 December 2005, p. 93.

80 Answers to questions on notice, 5 December 2005, p. 93.

81 Joint Standing Committee on Migration, *Deportation of Non-Citizen Criminals*, June 1998.

82 Answers to questions on notice, 5 December 2005, p. 93.

enshrined in section 201 – that is, long term Australian residents should not be exposed to the risk of deportation.

9.70 Responding to criticisms by several witnesses that section 501 is being used in this way, DIMIA argued that, in its view, section 201 has been effectively superseded by section 501:

> Section 501 achieved its current form in 1999, when Parliament approved amendments to strengthen the provisions relating to character and conduct. In his Second Reading Speech, the then Minister indicated that the amendments were designed "to ensure that persons who are found to be of character concern can be removed". Therefore, unlike the deportation power, the exercise of the character power is not subject to restrictions based on a non-citizen's length of residence in Australia, and the section does not specify any period of residence after which a noncitizen falls outside its scope.[83]

9.71 Further:

> As above, section 501 applies to all non-citizens, including those who are permanent residents of Australia. It does not specify any period of residence after which a noncitizen falls outside its scope. Thus, a resident's visa may be cancelled if it is found that they fail the character test. However, a decision to cancel a visa is not made lightly and is only made following a detailed assessment against the considerations set out in the Ministerial Direction.[84]

9.72 The Ministerial Direction does not require consideration of the length of residency but does include consideration of the following factors:

- the extent of disruption to family, business or other ties to Australia that visa cancellation would cause;
- whether a genuine marriage (including de facto or interdependent relationship) with an Australian citizen exists;
- the degree of hardship that would be caused to immediate family members lawfully resident in Australia; and
- the purpose and intended duration of the non-citizen's stay in Australia (including any relevant compassionate circumstances).[85]

9.73 DIMIA also stated that:

> Links with the probable receiving country, including the non-citizen's proficiency in their language and culture, are not factors referred to in the current Ministerial Direction. However, language and cultural barriers are

83 Answers to questions on notice, 5 December 2005, p. 94.

84 Answers to questions on notice, 5 December 2005, p. 94.

85 Answers to questions on notice, 5 December 2005, p. 95.

> factors to be considered in respect of any children, in the context of the best interests of the child, which is a primary consideration.[86]

9.74 Where a visa has been cancelled under section 501, non-citizens who are in Australia have rights of appeal: to the AAT (in cases of delegate's decisions) or the Federal Court of Australia (for both ministerial and delegate's decisions). DIMIA also noted that, in some cases, appeals can lead to extended periods of immigration detention, along with additional factors such as difficulties establishing identity and obtaining travel documentation.[87]

9.75 DIMIA provided the following data on the number of permanent residents who have been detained under section 501 in the past three years:

- 2002-03 - 106
- 2003-04 - 26
- 2004-05 - 49[88]

9.76 The number of permanent residents who have been deported after their visas were cancelled under section 501 for the past three years is:

- 2002-03 - 115
- 2003-04 - 44
- 2004-05 - 74

9.77 DIMIA defended its position as follows:

> Departmental policy requires that, before returning a person to another country, officers are to consider if the person has special needs which require support upon their arrival. For example, if a person has special medical needs, the Department may arrange for the person to be met by medical staff or referred to a medical facility upon their arrival. If a person is destitute then the Department may provide them with a small allowance that will allow the person to obtain accommodation, purchase food and arrange travel back to their preferred destination within the country.
>
> Many people who are removed from Australia arrange to be met by family or friends in the country to which they are being returned. Where a person is to be returned to a country where they have not resided for a long time, they will usually be encouraged to contact any family or friends in that country. They will also often be encouraged to discuss their return with their consulate.[89]

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86 Answers to questions on notice, 5 December 2005, p. 95.

87 Answers to questions on notice, 5 December 2005, p. 95.

88 Answers to questions on notice, 11 November 2005, p. 63.

89 Answers to questions on notice, 5 December 2005, p. 97.

9.78 However, DIMIA admitted that:

> There have been instances where intended support arrangements are not properly effected or break down following the person's return.[90]

9.79 In this context, DIMIA also advised the committee that it is currently developing a new Case Management Framework to provide a nationally consistent service delivery approach for 'holistically managing clients', particularly those who are vulnerable or have complex circumstances. Arrangements will involve departmental case managers who work with the community and other service providers, as well as with DIMIA's overseas missions, to ensure that, as far as practicable, clients with identified special needs are appropriately supported upon removal from Australia.[91]

Committee View

9.80 The committee is mindful of the serious issues raised by the increased use of deportation under section 501. The deportation of a long term Australian resident on character grounds because of a criminal conviction engages significant questions about the development of public policy. The committee is concerned by the apparent disregard for the welfare of Australian residents. As noted above, there is no evidence in the parliamentary record that amendments to section 501 were intended to supersede the criminal deportation provisions, and the committee rejects the proposition that section 201 repealed. To accept the proposition would be in effect to bypass the role of the Parliament in the debate and passage of laws which affect the fundamental rights and interests of Australians

9.81 As such, the committee does not accept the argument that amendments to section 501 implicity supersede the criminal deportation provisions. The abolition of a significant safeguard against deportation of people who are, in all practical senses, Australian is a matter of serious public policy. Section 201 is the current Australian law in relation to criminal deportation of permanent residents and the abolition of the ten year rule, if it is to occur, must be repealed by the Parliament not by administrative practice.

9.82 In addition to *Nystrom*, the committee notes several other high profile cases involving long-term Australian residents who have been deported to countries to which they have little or no connection. The recent cases of Mr Gerard Coleman and Mr Robert Jovicic illustrate the problem.[92]

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90 Answers to questions on notice, 5 December 2005, p. 97.

91 Answers to questions on notice, 5 December 2005, p. 97.

92 See further: 'Terminally ill migrant sues over 'wrongful' detention', *ABC News Online* at http://www.abc.net.au/news/newsitems/200510/s1485243.htm (accessed 19 October 2005); 'Sister's plea for stateless brother', *Sydney Morning Herald*, 24 November 2005; 'Deportee's only home a snowy road', *Sydney Morning Herald*, 25 November 2005.

9.83 There is also likely to be significant expenditure of public funds involved in the deportation of a long term Australian resident in these circumstances that warrants careful investigation.[93] The committee understand that the Commonwealth is appealing the decision in *Nystrom*, as well as decisions in other cases and the cost of this litigation alone should raise public concern.

9.84 While the Committee accepts that DIMIA is reviewing the section 501 deportation processes, this does not address the fundamental issue: the use of section 501 to achieve a policy objective for which it was never intended. The report of the Commonwealth Ombudsman's investigation will provide important insight into the administration of section 501. The committee recommends that it revisit the operation of section 501 in light of that report to ensure the fullest possible examination of the issue.

Recommendation 58

9.85 That the committee further review the operation of section 501 and the report of the Commonwealth Ombudsman investigation into the administration of the cancellation of visas on character grounds. Further, the committee recommends that, as per the Ombudsman's recommendations, the use of Section 501 to cancel permanent residency should not be applied to people who arrived as minors and have stayed for more than ten years.

Failure to monitor after removal or deportation

9.86 As the committee has previously noted, Australia, as a sovereign nation, has the right to determine who is allowed to enter and remain in the country and, when appropriate, remove them.[94] However, when Australia exercises these rights there are no formal processes in place for monitoring returnees. International conventions do not consider the issue of monitoring; rather the basic notion is that persons at risk will not be 'refouled', and therefore those who are returned are deemed not to be at risk.[95]

9.87 However, concerns about the removal of persons who have unsuccessfully claimed refugee status in Australia have prompted the call for the monitoring of removal cases. The committee received evidence arguing that the obligation not to 'refoule' implicitly requires Australia to monitor persons who are removed or deported after their return to another country.

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93 See, for example, 'Court ruling opens door for deportation payouts', *ABC News Online* at http://www.abc.net.au/news/newsitems/200510/s1474824.htm (accessed 5 October 2005).

94 Senate Legal and Constitutional References Committee, *A Sanctuary under Review, An Examination of Australia's Refugee and Humanitarian Determination Processes*, June 2000, p. 329.

95 Senate Legal and Constitutional References Committee, ibid p. 330.

The committee's earlier conclusions

9.88 In *A Sanctuary under Review*, the committee expressed the view that an area where monitoring may prove especially useful is in those cases where an individual may not have been subject to persecution on Refugee Convention grounds prior to departure from their country of origin, but for whom the act of leaving would result in persecution, not necessarily in the form of torture, on their return.[96]

9.89 The committee also noted that some form of monitoring may be the only way in which Australia can be assured that its refugee determination processes are correctly identifying genuine refugees and humanitarian cases.[97] The committee considered that the most effective and efficient way of ensuring that Australia's international *'non-refoulement'* obligations are met is to improve current refugee determination procedures and to ensure that a sufficiently wide humanitarian safety net, in the form of the Minister's discretionary power under section 417 of the Migration Act, is in place for those in genuine need of protection.[98]

9.90 The committee was conscious of the many concerns raised in submissions and evidence about the fate of returnees and the inadequacy of the present refugee determination system to provide categorical assurance that genuine asylum seekers are not returned to face persecution, death or torture. The committee also understood the dilemma facing the Commonwealth Government, both diplomatically and economically, in devising a system that tests whether Australia meets its international *'non-refoulement'* obligations.[99]

9.91 In conclusion, the committee was of the view that, while there is scope for further development of the informal representations and monitoring currently undertaken by Australian overseas missions and local and international human rights organisations, the operation and funding of a formal monitoring system would be impractical and may also be counter-productive. However, the committee also expressed the view that the Commonwealth Government should take every opportunity to raise human rights obligations in its dealings with foreign governments and at the UN.[100]

9.92 The committee recommended that the Commonwealth Government place the issue of monitoring on the agenda for discussion at the Inter-Government/Non-Government Organisations Forum with a view to examining the implementation of a system of informal monitoring.[101]

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96 Senate Legal and Constitutional References Committee, ibid p. 337.

97 Senate Legal and Constitutional References Committee, ibid p. 337.

98 Senate Legal and Constitutional References Committee, ibid p. 342.

99 Senate Legal and Constitutional References Committee, ibid p. 342.

100 Senate Legal and Constitutional References Committee, ibid p. 343.

101 Senate Legal and Constitutional References Committee, ibid p. 343.

9.93 In the Government Response to the committee's report, the Commonwealth Government dismissed the committee's recommendation. It stated that:

> DIM[I]A is in continuous contact, directly or through DFAT or other agencies, with the UNHCR and NGOs in order to gain up-to-date information on the human right situation and the treatment of returnees in relevant countries … A system which monitors individual returnees is considered to be impractical and possibly counter-productive. Where it is assessed as part of the protection determination process that there is no real chance of persecution of the applicant on return, Australia is not responsible for the future wellbeing of that person in their home land merely because at some stage they spent time in Australia.[102]

Concerns raised in the current inquiry

9.94 Similar concerns to those presented to the committee in its 2000 inquiry were again raised by submissions and witnesses in the course of the current inquiry. Some of these arguments are set out below.

9.95 The Refugee Advocacy Service of South Australia (RASSA), was highly critical of the actions of DIMIA in relation to removal of detainees from Australia:

> A person may for instance have had their claim for refugee status rejected, even thought they would still face danger in being returned to their country of origin, on the basis that the danger does not occur for a [Refugee Convention] reason. In our view section 198 of the *Migration Act* should at least be amended so that a person cannot be removed to a situation of danger of death or torture to them, or where their removal would trigger death or torture of a family member.[103]

9.96 The Coalition for the Protection of Asylum Seekers (CPOAS) submitted that the Commonwealth 'has deported asylum seekers to countries of origin or third countries whose governments have not demonstrated their willingness and ability to offer effective protection'.[104] CPOAS also expressed concern about the removal of asylum seekers whose claims have been rejected but who are in need of protection for other humanitarian reasons, and the removal of asylum seekers to a third country where there is a possibility of forced deportation to their home country.[105]

9.97 CPOAS recommended that the Commonwealth should monitor the outcomes of deportation to ensure that where humanitarian concerns arise, including the serious violation of human rights, disappearance, or death of a person removed from

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102 *Government Response to the Senate Legal and Constitutional References Committee Report: 'A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes'*, February 2001, response to Recommendation 11.1.

103 Refugee Advocacy Service of South Australia, *Submission 51*, p. 10.

104 Coalition for the Protection of Asylum Seekers, *Submission 174*, p. 2.

105 Coalition for the Protection of Asylum Seekers, *Submission 174*, p. 2.

Australia. This information should inform the Commonwealth Government's decisions relating to deportation.[106]

9.98 The ASRC also argued that Australia has obligations to undertake a monitoring role after removal:

> Appropriate procedures should be set in place to check that returnees have reached their destination safely, and to ensure that there is no risk of persecution. This monitoring process may be used not only to ensure the safety of the repatriated individual, but also as a mechanism to evaluate whether the Australian immigration system has undertaken thorough and accurate assessments of the protection needs of asylum seekers. HREOC has explained that 'Australia must be confident that its processes are effective and its determination accurate. The only way to be sure of this is to follow up those returned in order to document whether their claims to be at risk prove unfounded as predicted'.[107]

9.99 In her submission, Ms Frederika Steen argued that:

> Given the reliance placed in refugee determination on this and additional information about conditions in the country, DFAT should be given the task of monitoring the return of all deportees and be required to report on their safety after return for at least a year. If deportation to countries like Iran and Afghanistan is Government policy, Australia has a civilised country's responsibility to confirm that the former detainees who were refused refugee or humanitarian status are safe from persecution. Ethnic communities in Australia from those source countries are closely and anxiously watching and evaluating Government credibility in dealings with their former country.[108]

9.100 Amnesty International Australia maintained its view expressed previously to the Senate Select Committee on Ministerial Discretion in Migration Matters in 2004 that there should be:

> … a requirement for select returnees to be monitored, to ensure that the integrity decision making is properly tested (where, for example an assessment is made that a particular group will not face persecution in a particular country).[109]

106 Coalition for the Protection of Asylum Seekers*, Submission 174*, p. 4.

107 ASRC, *Submission 214*, p. 41.

108 Ms Frederika Steen, *Submission 224*, p. 11.

109 Amnesty International, *Submission 191*, pp 12-13.

Edmund Rice Centre's study

9.101 Many submissions and witnesses referred to the Edmund Rice Centre's study, *Deported to Danger* (the Edmund Rice Centre's study),[110] which reported on a significant number of persons who were placed into dangerous situations upon their removal from Australia.

9.102 In evidence, Sister Margaret Leavey from the Edmund Rice Centre, elaborated on the details of the Edmund Rice Centre's study:

> The original question … was: what has happened to Australia's rejected asylum seekers? This original question spanned out into five questions. The first was: has the Australian government or its agencies sent rejected asylum seekers to places of danger? 'Places of danger' means that the respondents have no proper identity papers, they are in prison, they are subject to torture, they are unable to work, they have to live in hiding, they fear persecution because of religion or ethnicity, they are in a war zone or they are subject to threats from police. The second question was: has Australia or its agencies increased the dangers to rejected asylum seekers by sending incriminating evidence about them to overseas authorities? The third question was: in managing removals, has the Australian government or its agencies encouraged asylum seekers to obtain false papers and become associated with corruption? The fourth question was: is the manner of conducting asylum seeker removals consistent with Australia's legal obligations? And the fifth question was: is the manner of conducting asylum seeker removals consistent with Australia's traditional values?[111]

9.103 Sister Leavey told the committee that the Edmund Rice Centre's study revealed that 'Australia has deported people to danger, it has increased the dangers to asylum seekers by sending incriminating evidence and it or its agencies have become involved with false papers and corruption'.[112]

9.104 In an answer to a question on notice, the Edmund Rice Centre advised the committee that, for the purposes of its research, it interviewed 40 people in 11 different countries, of 13 different nationalities:

> [T]hey did not know each other, and yet their claims were remarkably similar. Of the 40 interviews only 5 were safe.
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> We also contacted another 10 people whose situation was so dire and dangerous that to include them in our reports would increase the risks to their safety. Whilst their inclusion would have given us a stronger report, we were not prepared to take the risk to their lives.[113]

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110 Edmund Rice Centre for Justice & Community Education, *Deported to Danger*, *A Study of Australia's Treatment of 40 Rejected Asylum Seekers*, September 2004.

111 *Committee Hansard*, 28 September 2005, p. 48.

112 *Committee Hansard*, 28 September 2005, p. 48.

113 Answers to questions on notice, 28 October 2005, pp 1-2.

9.105 Sister Mary Britt from the Edmund Rice Centre pointed to evidence indicating that the lives of returnees can be changed irreparably after removal or deportation:

> We have met people whose lives are in ruins after deportation. But, as some of them said in interviews about other aspects of their experience, Australia does not care. The issue of refoulement came up during the 2000 Senate inquiry, which recommended that a system of informal monitoring of the results of deportation be established to test whether we were in fact meeting our obligations to people seeking our protection. The principle of non-refoulement, which safeguards asylum seekers against being returned to the situation from which they fled, is part of customary international law, and it binds all states, even those who have not signed the conventions which Australia has signed and ratified. The disturbing question of refoulement is again raised by our research. Has Australia been engaged in refoulement in breach of international law? We believe, at least with regard to the 40 people we interviewed, that the government has a case to answer in relation to that principle.[114]

9.106 The Law Society of South Australia was extremely critical of such removals:

> The circumstances of the persons included in the [Edmund Rice Centre's] study together with the fact that some were subsequently granted protection by other developed countries constitutes an embarrassment and a serious blight on Australia's human rights record. The study shows that the current system is clearly failing and Australia is not meeting its obligation of non-refoulement in some cases. Our view is that the removal of even just one person who is placed into a situation where they are at risk of a serious human rights violation is unacceptable. The consequences of administrative error in this area are potentially tragic.[115]

Government response to the Edmund Rice Centre's study

9.107 In a detailed explanation to the committee, DIMIA rejected the findings in the Edmund Rice Centre's study, as well as the Edmund Rice Centre's evidence presented to the committee in this inquiry:

> The evidence provided to the Committee by the Edmund Rice Centre (ERC) is based on its earlier published report "Deported to Danger". This evidence makes a number of assertions which are not substantiated. The report seeks to identify what it considers to be returns from Australia to dangerous or unsafe situations, but does not clearly acknowledge that the broad concepts of danger or safety it uses do not correlate with international obligations to provide protection. Nor does it indicate why the authors

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114 *Committee Hansard*, 28 September 2005, p. 51.

See also

115 Law Society of South Australia, *Submission 110*, p. 13. See also

Refugee Advocacy Service of South Australia, *Submission 51,* p. 9

Social Issues Executive Anglican Diocese Sydney, *Submission 155*, p. 2

> believe that general disadvantage or hardship experienced by a person after return to their homeland, which are broadly similar to those experienced by many people in these countries, are Australia's responsibility.[116]

9.108 DIMIA also asserted that:

> People in many countries can face generalised dangers, hardships and uncertainty. This does not mean that Australia has obligations to them under the specific terms of the Refugees Convention or other international instruments. Generalised considerations of danger, hardships and uncertainty do not equate to the criteria for grant of a protection visa which are set out in legislation and which must be applied by departmental and Tribunal decision-makers. The fact that an individual may experience some hardship on return does not automatically establish any entitlement to obtain residence in any country of choice.[117]

9.109 DIMIA questioned the objectivity of the findings in the Edmund Rice Centre's study:

> The ERC report does not appear to test the assertions in the report. It relies heavily on the self assessment by individuals themselves to indicate the existence of danger without assessment of whether subjective views have any objectively legitimate basis. Importantly, the report does not disclose the identity of the persons cited as case studies and the ERC has not separately passed this information to the Department. This seriously limits any prospect of exploring the claims in the report and accordingly substantially diminishes any value the report might have as a resource to the Department for identifying any aspects of processing which might be improved. To the extent that there is sufficient information in the report to enable some exploration, the Department has found nothing to substantiate assertions that such people have been removed in breach of any international obligations owed by Australia.[118]

9.110 DIMIA emphasised the point that 'Australia does not return anybody who is found to be a refugee and asylum seekers are not returned if they have a real chance of facing persecution'.[119] The committee notes that the test referred to is that which applies to a refugee status determination under the Refugee Convention, and not the tests which apply under the CAT or ICCPR.

9.111 DIMIA also explained that returnees are not monitored since 'monitoring, by its very nature, would be intrusive and could draw unwelcome attention to the individuals concerned and to those with whom they associate'.[120] Moreover, '(i)t is not

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116 Answers to questions on notice, 5 December 2005, p. 91.

117 Answers to questions on notice, 5 December 2005, p. 91.

118 Answers to questions on notice, 5 December 2005, p. 91.

119 Answers to questions on notice, 5 December 2005, p. 91.

120 Answers to questions on notice, 5 December 2005, p. 92.

general international practice for countries returning failed asylum seekers to their country of origin to monitor those individuals'.[121]

9.112 DIMIA also advised the committee that:

> A thorough internal investigation of two cases that the Department could identify has also not revealed any misconduct or criminal behaviour by Departmental staff. The Department has been looking at the ERC's final document which was released in November 2004. DIMIA officers met with the ERC on Monday, 23 May 2005 and again on Thursday 8 September 2005 to seek further information, which might enable the investigation of any residual matters not covered in the first investigation.
>
> The Department is waiting for information promised by the ERC of contact details of further witnesses.[122]

9.113 The Edmund Rice Centre vigorously defended the findings in its report and was highly critical of the Commonwealth Government's reaction to it. The Edmund Rice Centre informed the committee that:

> … DIMIA staff have apologized to the Edmund Rice Centre on two different occasions over the Minister's response to the *Deported To Danger* Report. They had travelled to Sydney to deliver this apology. This was after the Minister had claimed – incorrectly – in the Senate that the Edmund Rice Centre had not cooperated with the Department. This was after the Centre sent the Minister both the interim and final reports prior to any publication on our web-site and before their presentation in Geneva. Also after the Minister wrote a critical letter to The Australian claiming that the evidence presented in our reports was 'rumour and innuendo masquerading as fact' the Edmund Rice Centre was visited in Sydney by DIMIA staff to apologise for the Minister's claims stating that she had been 'poorly advised' and that the Department had evidence of our meetings in Sydney, Canberra and Geneva. When I asked if we could have that apology on the public record I was informed – in the presence of a witness – 'You have got to be joking'.[123]

9.114 The Edmund Rice Centre emphasised that its study was put through the Ethics Committee of the Australian Catholic University and was overseen by some of Australia's leading barristers and lawyers. Further:

> The Edmund Rice Centre unequivocally and in the strongest terms remains adamant that Australia is refouling refugees as the evidence suggests, and as the cases coming into our office each week continue to suggest.[124]

9.115 The Edmund Rice Centre staunchly maintained the veracity of its findings:

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121 Answers to questions on notice, 5 December 2005, p. 92.

122 Answers to questions on notice, 5 December 2005, p. 92.

123 Answers to questions on notice, 28 October 2005, p. 1.

124 Answers to questions on notice, 28 October 2005, p. 2.

> The Australian Government does not know what happens to people removed or deported from Australia. It does not do the work that we have done. It is therefore not in a position to assert that the findings of the Reports are not valid. We have the evidence that suggests that serious risks are being taken with the lives of people removed from this country. Australia must do better than this.[125]

9.116 Moreover, as Sister Mary Britt from the Edmund Rice Centre told the committee:

> Last year - it may have been earlier - Minister Ruddock publicly said, 'What happens to people after they have left Australia is not our concern.' It is my concern and it is the concern of thousands of Australians because it has to do with the way we have treated these people.[126]

Committee view

9.117 The committee reiterates its views in *A Sanctuary under Review* in relation to the monitoring of returnees, particularly noting that some form of monitoring of returnees may be the only way in which Australia can be certain that its refugee determination processes are correctly identifying genuine refugees and humanitarian cases. The committee again acknowledges concerns about the fate of returnees and the inadequacy of the present migration system to implement Australia's international obligations under Refugee Convention, CAT and ICCPR. On the other hand, it must also be accepted that there are practical impediments to the Commonwealth implementing a system that formally monitors returnees after they have left Australia.

9.118 The committee strongly supports the findings and recommendations of the Senate Foreign Affairs, Defence and Trade Committee's inquiry into the circumstances of Ms Vivian Solon. Most importantly, this committee agrees that in many cases Australia has a moral obligation to protect the welfare of removed or deported persons, even where there may not be a strict legal obligation to do so. Significantly, the FADTC recommended that DIMIA should review its removal processes to ensure that formal and proper procedures are in place for the reception of people being removed from Australia who have welfare and health needs. It also emphasised the importance of clarifying exactly where responsibility for a removed or deported person formally ends. This committee repeats that recommendation.

Recommendation 59

9.119 The committee recommends that, in order to comply with its 'non-refoulement' obligations and to ensure the welfare of persons removed or deported from Australia, the Commonwealth continue to enhance the scope of its informal representations to foreign governments, encourage monitoring by

125 Answers to questions on notice, 28 October 2005, p. 2.

126 *Committee Hansard*, 28 September 2005, p. 56.

Australian overseas missions, and continue to develop strong relationships with local and overseas-based human rights organisations.

Recommendation 60

9.120 The committee recommends that the Commonwealth Government review and clarify its removal and deportation processes to ensure that formal and proper procedures for welfare protection are in place for the reception of persons being removed or deported from Australia.

CHAPTER 10

STUDENT VISAS

10.1 This chapter will consider specific issues raised during the committee's inquiry about the operation and administration of the Migration Act in relation to overseas students, including:

- key legislation relating to overseas students;
- the importance of overseas students to Australia;
- student awareness of migration law and policy;
- the cancellation of student visas;
- student visa administration and enforcement issues; and
- detention of students.

Relevant legislation

10.2 Under the Migration Act and Regulations, people who are not Australian citizens or Australian permanent residents can be granted a visa to study in Australia. There are currently seven student visa subclasses for overseas students enrolled in registered courses. The subclasses generally relate to specific education sectors, such as 'schools' (subclass 571) or 'higher education' (subclass 573).[1] A range of conditions can be imposed on student visas under the Migration Regulations, such as work limits, and performance and attendance requirements. Some of these conditions will be considered further where relevant below.

10.3 The Department of Education, Science and Training (DEST) also regulates education and training services to overseas students in Australia through the *Education Services for Overseas Students Act 2000* (ESOS Act) and associated legislation. According to the DEST website:

> The purpose of the [ESOS Act and associated] legislation is to protect the interests of people coming to Australia on student visas, by providing tuition and financial assurance and by ensuring a nationally consistent approach to provider registration. The legislation also seeks to ensure the integrity of the industry through visa-related reporting requirements.[2]

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1 See further: http://www.immi.gov.au/study/visas/subclasses_assessment.htm (accessed 3 November 2005).

2 http://www.dest.gov.au/sectors/international_education/policy_issues_reviews/key_issues/esos/ (accessed 3 November 2005).

Review of the ESOS Act

10.4 The ESOS Act was recently reviewed, and the report, *Evaluation of the Education Services for Overseas Students Act 2000* (ESOS Evaluation Report), was published in June 2005.[3] The ESOS Evaluation Report made a number of recommendations, mostly relating to amendments to the ESOS Act and the associated *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students* (the National Code). However, some recommendations were also made in relation to migration legislation and policy, including:

- that the National Code, Migration Regulations and student visa conditions be amended to reflect basic principles in relation to issues such as full-time study, completion of course requirements, and student attendance and performance; and to remove 'outmoded assumptions about educational practice that inhibit providers' ability to support visa integrity';[4]
- that restrictions on students changing their education provider be transferred from the Migration Regulations to the Regulations under the ESOS Act;[5] and
- that DIMIA consult with DEST with a view to amending the Migration Regulations to enable the three-year exclusion period (against a student whose visa has been cancelled for not meeting course requirements) to be waived under certain circumstances.[6]

10.5 In response to the Committee's Questions on Notice, DIMIA noted that it was currently considering the implications of the recommendations made in the ESOS Evaluation Report. DIMIA observed that, if implemented, the recommendations may require amendments to the Migration Regulations and DIMIA systems, policies and procedures. DIMIA noted that it was consulting closely with DEST on progressing the recommendations relating to the ESOS Act, Regulations and National Code. DIMIA advised:

> When the DEST response is more fully articulated, DIMIA will need to take the necessary steps to implement the required changes in our Regulations.[7]

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3 PhillipsKPA and LifeLong Learning Associates, *Evaluation of the Education Services for Overseas Students Act 2000*, June 2005 (ESOS Evaluation Report), Available at: http://www.dest.gov.au/sectors/international_education/policy_issues_reviews/reviews/evaluation_of_the_esos_act_2000/esos_reforms_default.htm (accessed 3 November 2005).

4 See ESOS Evaluation Report, recommendation 28.

5 See ESOS Evaluation Report, recommendation 35; see also DIMIA answers to Questions on Notice received 5 December 2005, p. 103. Under Schedule 8 of the Migration Regulation, Condition 8206 generally precludes students from transferring from the education provider of initial enrolment to another provider during the first 12 months of their course.

6 See ESOS Evaluation Report, recommendation 35.

7 DIMIA answers to Questions on Notice, received 11 October 2005, p. 69.

10.6 Other findings and recommendations of the ESOS Evaluation Report are considered where relevant throughout this chapter.

Importance of overseas students to Australia

10.7 Some submissions pointed out the importance of overseas students and the 'education export industry' to Australia.[8] Similarly, the ESOS Evaluation Report declared that education is now Australia's third largest service export industry, and pointed to recent studies which:

> …estimate that incoming international students spent $5.2 billion in 2002 on tuition fees, goods and services, and that the economic activity this generated had an employment impact of about 42,650 jobs.[9]

10.8 DIMIA provided statistics indicating that, in the last three years, around 170,000 student visas have been granted each year. The majority of these student visas grants were for the higher education sector.[10] Indeed, the Law Institute of Victoria (LIV) suggested:

> …Australian tertiary education providers have also become substantially reliant upon income generated through full fee paying overseas students.[11]

10.9 Ms Jockel of the Law Council of Australia (LCA) observed that Australia is competing globally for students, and as a result, we need to consider how our immigration law and policies may affect our international reputation:

> We are competing with the US, Canada and England for the same international students, and we are competing with the offshore campuses which are now being developed in Asia. If we lose this source of revenue, we are going to suffer as a nation.[12]

10.10 Ms Michaela Rost, whose submission focussed on the issue of student visas and detention of international students, expressed concern that, under Australia's migration system:

> …despite students' significant payment for education services and their economic contribution to Australia's sixth largest export industry, as trading partners, they seem to receive little understanding, assistance or compassion in exchange, and have instead been subject to harsh, uncompromising and unjust treatment.[13]

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8 See, for example, Ms Michaela Rost, *Submission 220*, p. 1 and *Committee Hansard*, 27 September 2005, p. 3; LIV, *Submission 206*, p. 12; Dr Anthony Pun, *Submission 94*, p. 2.

9 ESOS Evaluation Report, p. 8; see also Ms Michaela Rost, *Submission 220*, pp 1 and 12.

10 See DIMIA answers to Questions on Notice, received 11 October 2005, p. 64.

11 Law Institute of Victoria, *Submission 206*, p. 12.

12 *Committee Hansard*, 27 September 2005, p. 84.

13 Ms Michaela Rost*, Submission 220*, pp 1 and 12.

Student awareness of migration law and policy

10.11 The committee heard evidence of the need to ensure international students are made sufficiently aware of Australia's immigration system, and that education agents need to be better regulated in this context. For example, Ms Michaela Rost argued that education agents:

> …may not be adequately and correctly informing prospective students about the complexities and implications of Australian immigration laws pertaining to visas and extensions. Students may also be lured to study in Australia under misleading information about education providers. These agents, well paid by Australian universities (up to $900 per student they enrol), are not accountable to any Australian regulatory body.[14]

10.12 The Migration Institute of Australia (MIA) expressed similar concerns about the lack of regulation of education agents operating overseas:

> Unregistered agents including education agents soliciting students from overseas for universities continue to provide visa assistance … and continue to have unfettered access to DIMIA at all levels.[15]

10.13 The MIA told the committee that it has:

> …repeatedly sought with DIMIA and successive Ministers to enforce the provisions of the Act where such practices are occurring. Some of the unethical behaviour and exploitation of clients by such unregistered people has been well documented across a wide range of the media.[16]

10.14 The MIA reported to the committee its understanding that:

> Current DIMIA plans are to give these people [education agents] a new ID number which will is similar to that given to Registered Migration Agents, so that they may access DIMIA for their clients. Yet there is still no regulation of unregistered agents, no legally enforceable code of conduct for them, and no fees to pay DIMIA. An Australian Registered Migration Agent spends up to $6000 per year in direct costs including statutory fees to MARA [Migration Agents Registration Authority], insurance and compulsory continuing education costs, just to remain registered. An Australian registered agent is subject to a well developed and serious complaints handling system where serious misbehaviour may cause them to have their registration (practicing license) cancelled.[17]

10.15 The MIA continued:

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14 Ms Michaela Rost*, Submission 220*, p. 8; see also Debra Jopson, 'Migration agents risk universities' future', *Sydney Morning Herald*, 9 May 2005, p. 4.

15 Migration Institute of Australia, *Submission 144*, p. 7.

16 Migration Institute of Australia, *Submission 144*, p. 7.

17 Migration Institute of Australia, *Submission 144*, p. 7.

> Unregistered overseas agents and domestic education agents face none of these requirements, yet DIMIA intends to allow them to continue to operate alongside Australian registered agents. We put the obvious questions to this inquiry: Where is the justice and equity in allowing this situation to continue? And in doing so, how can DIMIA be said to be acting in the interests of all Australians?[18]

10.16 Ms Rost was further concerned that:

> …in the huge marketing campaigns and expos by universities prior to arriving here, prospective students are never told by education recruitment agents that students may be 'detained' on cancellation of visa, and what 'detained' really means…It is unlikely that they even know about detention. Such information would not enhance a university's marketing strategy. [19]

10.17 Ms Rost concluded that the Australian Government has a:

> …duty of care to ensure that prior to arrival, overseas students are thoroughly informed about all details of immigration and visa laws through its embassies, as well as by its universities and education providers.[20]

10.18 The committee questioned DIMIA as to the measures it has put in place to ensure that overseas students are aware of the requirements of their visa and the consequences of not meeting such requirements. DIMIA replied that it has a range of measures in place, including:

- the visa approval letter sent to students which provides information about their visa, and the conditions that have been imposed on the visa;
- regular outreach activities by DIMIA's state and territory offices, including information sessions for international students at universities and other institutions during student orientation periods. Visa conditions, particularly those relating to study and work, are a central focus of these sessions;
- training for education agents, conducted by DIMIA migration officers based in Australian missions overseas, to assist agents in advising clients about student visa requirements; and
- information about visa conditions on DIMIA's website.[21]

10.19 In relation to the regulation of education agents, a representative of DIMIA explained that, where they are playing an immigration advisory role, education agents are required to be registered if they are within Australia. However, the representative also acknowledged that offshore education agents are not required to be registered.[22]

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18 Migration Institute of Australia, *Submission 144*, pp 7-8.

19 Ms Michaela Rost*, Submission 220*, p. 8.

20 Ms Michaela Rost*, Submission 220*, p. 8; see also *Submission 220A*, p. 3.

21 Answers to Questions on Notice, received 11 November 2005, p. 67.

22 *Committee Hansard*, 11 October 2005, p. 10.

10.20 The representative further told the committee that this issue was being examined, and that DIMIA would:

> … work with the education industry onshore to encourage more education agents to become MARA [Migration Agents Registration Authority] registered ... Offshore, we are consulting with the industry on the possibility of a legislative change that will remove the requirement for a migration agent to be either an Australian citizen or a permanent resident. That would enable overseas education agents to at least have the option of becoming MARA registered, and thereby to come within that framework. [23]

10.21 The representative explained that DIMIA was also trying to train and encourage education agents to enter into administrative contracts with DIMIA. The representative told the committee that this would mean the agents are:

> ...committed to abiding, at least administratively, by a code of conduct and a code of behaviour associated with the lodgment of electronic student visa applications…we believe it is the most practical way of going forward in the interests of Australia's education industry, the interests of the overseas students and the interests of the agents themselves.[24]

10.22 The committee notes that the ESOS Evaluation Report recommended that the National Code and the Migration Regulations be revised to require DIMIA and education providers to inform each other of concerns with an education agent in relation to immigration and visa-related matters.[25]

Student visa cancellations

10.23 A key concern raised during the committee's inquiry was the problem of the cancellation of student visas, and in particular, the inflexible provisions of the migration legislation in this area.

10.24 A number of conditions can be imposed on student visas under the migration legislation.[26] One of the key conditions raised during the committee's inquiry related to the work limits imposed on student visas.[27] First-time grants of student visas initially have a condition that the visa holder is not permitted to work.[28] However, once in Australia, a student can apply for permission to work. If granted permission, that student must not work for more than 20 hours a week during any week when their

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23 *Committee Hansard*, 11 October 2005, p. 11.

24 *Committee Hansard*, 11 October 2005, p. 11.

25 See ESOS Evaluation Report, recommendation 16.

26 See further DIMIA, "Student Visa Conditions", http://www.immi.gov.au/study/visas/conditions.htm (accessed 4 November 2005).

27 See Ms Michaela Rost, *Submission 206*, p. 12.

28 See Migration Regulations, Schedule 8, condition 8101.

course is in session (under 'Condition 8105').[29] Importantly, a breach of this condition is grounds for mandatory cancellation of a student's visa. That is, where the grounds for cancellation are established, the visa *must* be cancelled.[30]

10.25 Another key condition raised during the committee's inquiry was 'Condition 8202', which requires the visa holder to satisfy certain enrolment, attendance and course requirements (such as academic results).[31] Again, breach of this condition is grounds for mandatory cancellation of a student's visa.[32] However, DIMIA informed the committee that the Migration Regulations were amended on 8 October 2005 to allow for 'exceptional circumstances beyond the student's control to be taken into consideration prior to cancelling a student visa for a breach of condition 8202'.[33]

10.26 Ms Michaela Rost was highly critical of these mandatory cancellation provisions. Ms Rost recognised that the relevant provisions were 'designed to guard against a minority of non-genuine students from abusing Australia's immigration laws',[34] but still considered the migration legislation to be 'unforgiving'.[35] For example, Ms Rost described the work limits in condition 8105 as 'draconian' because:

> A student can have worked two hours more and then have the entire visa cancelled and be sent back, even if they are one subject off a master's degree.[36]

10.27 Ms Rost further argued that:

> The conditions of the visa are just totally unrealistic for the needs of students because a lot of them need to work here to pay for living costs … They should be allowed to work for longer. There should not be blanket cancellation of the visa and then possible detention.[37]

10.28 The LIV recognised that visa conditions, such as the work limits and attendance requirements, are based on genuine concerns that student visas should not be misused for other purposes, such as obtaining work in Australia. At the same time,

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29 See Migration Regulations, Schedule 8, condition 8105.

30 Migration Regulation 2.43(2)(b)(i). Note also that section 137J of the Migration Act provides for automatic cancellation of student visas in certain circumstances.

31 See also Ms Michaela Rost, *Submission 220*, p. 13.

32 Migration Regulation 2.43(2)(b)(ii).

33 DIMIA answers to Questions on Notice received 5 December 2005, p. 101; and Migration Regulation 2.34(2)(b).

34 Ms Michaela Rost*, Submission 220*, p. 6.

35 *Submission 220*, p. 8; see also pp 12-14 and *Committee Hansard*, 27 September 2005, p. 3.

36 *Committee Hansard*, 27 September 2005, p. 6.

37 *Committee Hansard*, 27 September 2005, p. 6.

the LIV expressed concern about DIMIA's enforcement of those conditions.[38] This is discussed further later in this chapter.

10.29 A representative of DIMIA acknowledged that the work limit conditions under the Migration Regulations 'do not provide a significant degree of flexibility', and that this is something that the DIMIA was 'looking at'.[39] However, the representative maintained that the work limit itself of 20 hours was quite generous.[40]

10.30 More generally, Ms Rost pointed out the high financial and personal impact of a student visa cancellations on those students:

> … because they now do not have a student visa, they are no longer considered to be a student, despite having paid fees in advance, having study materials in their possession, and their parents owing vast sums of money for their Australian education.[41]

10.31 Indeed, Ms Rost gave the committee a number of unfortunate and distressing examples of students who had found themselves in this situation.[42] Ms Rost argued that automatic cancellation for breach of a student visa is too harsh a penalty:

> … for the seemingly minor offences that constitute a breach of the student visa, a draconian punishment is meted out – the visa is cancelled, the student is immediately relegated to "unlawful non-citizen" status must leave the country within 28 days – unless he/she appeals against the decision, a process taking up to 6 months and [which] prohibits study.[43]

10.32 Ms Rost suggested that a system of fines for breaching visa conditions may be more appropriate.[44]

10.33 The ESOS Evaluation Report also expressed concern about the lack of flexibility in relation to non-compliance with student visas:

> The 'all or nothing' nature of present requirements for providers to report students for breach of their visa conditions has brought the full weight of DIMIA's compliance processes into play too early and the provider has insufficient flexibility to make educational judgements.[45]

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38 Law Institute of Victoria, *Submission 206*, p. 12; referring to [2005] FCAFC 132 (23 July 2005); and see also Ms Michaela Rost, *Submission 220*, pp 17-19.

39 *Committee Hansard*, 11 October 2005, p. 9.

40 *Committee Hansard*, 11 October 2005, p. 9.

41 Ms Michaela Rost*, Submission 220*, p. 12.

42 Ms Michaela Rost*, Submission 220,* pp 27-34 and also *Committee Hansard*, 27 September 2005, pp 4 and 7-9.

43 Ms Michaela Rost*, Submission 220*, p. 12.

44 *Committee Hansard*, 27 September 2005, p. 6.

45 ESOS Evaluation Report Executive Summary, p. xxv.

10.34 The ESOS Evaluation Report concluded that this inflexibility was part of the reason for the high number of student visa cancellations.[46] Indeed, the figures provided by DIMIA indicated that, for the last three years, around 8,000 student visas have been cancelled each year.[47] Although the ESOS Evaluation Report noted that in 2003 the actual number of student visa cancellations (8,243) represented a small proportion of the total number of international students in Australia (303,324), it considered that the overall level of student visa cancellation was 'too high'.[48] Ms Rost pointed out that student visa cancellations represented around one-third of total visa cancellations.[49]

10.35 Nevertheless, DIMIA's 2004-05 Annual Report noted that 'since the student visa reforms of 2001 there has been a steady improvement in compliance levels against all key indicators.'[50] In particular, DIMIA reported that 'the number of student visa holders who became unlawful in 2004-05 was 1,514, a 33 per cent decrease on the 2003-04'.[51]

10.36 A representative of DIMIA explained to the committee that DIMIA was working to ensure that it got the 'balance right' in relation to student visa cancellations. The representative noted that DIMIA was consulting with industry, DEST and other government agencies (particularly state government agencies) with a view to making improvements in this area. The representative was hopeful that:

> …as a result of those consultations, a set of arrangements will emerge which is both suitable to the industry and also suitable to ensuring immigration integrity.[52]

Appeals of student visa cancellations

99.1 The committee heard that a related problem is the high, and growing, levels of appeals of student visas. For example, Ms Rost estimated that 12% of all students with visa cancellations appeal to the MRT.[53] The ESOS Evaluation Report noted that there has been a growth in the number of appeals to the MRT in relation to cancellations of

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46 ESOS Evaluation Report, p. 153.

47 DIMIA answers to Questions on Notice, received 11 October 2005, p. 2. Note that as a result of the case of *Uddin V MIMIA* [2005] FMCA 841 (7 June 2005), some of these visa cancellations may have been ineffective and subsequently reversed. See DIMIA, answers to Questions on Notice, received 11 October 2005, p. 65.

48 ESOS Evaluation Report, p. 153.

49 Ms Michaela Rost*, Submission 220*, p. 11. DIMIA confirmed this statistic in answers to Questions on Notice, received 11 October 2005, pp 2-3.

50 DIMIA *Annual Report 2004-05,* p. 66; see also DIMIA, *Committee Hansard*, 11 October 2005, p. 12.

51 DIMIA *Annual Report 2004-05,* p. 66.

52 *Committee Hansard*, 11 October 2005, p. 10.

53 Ms Michaela Rost*, Submission 220*, p. 11.

student visas.[54] The ESOS Evaluation Report commented on the high proportion of visa cancellations set aside by the MRT — 'averaging 39 per cent over the last three years.'[55] The committee notes that this effectively means that over one in three cancellation decisions by DIMIA which are appealed in the MRT are overturned. The committee considers that this rate is unacceptably high, particularly given the consequences suffered by students whose visas are wrongly cancelled. These consequences include personal and financial hardship for both the student and their family, not to mention the possibility of ending up in immigration detention.

10.37 These problems are exacerbated by the delays in finalising appeals in relation to those cancellations. For example, the ESOS Evaluation Report found that:

> This high rate [of visa cancellations being set aside] is compounded by the lengthy time taken to finalise appeals, which in 2003–04 averaged five and a half months.[56]

10.38 DIMIA responded to these concerns by telling the committee that:

> All student visa cancellation cases are allocated Priority 1 (highest priority) status, and the Tribunal aims to finalise student visa cancellation cases within 90 calendar days… In 2004-05, the average processing time for all student visa cancellation cases was 152 calendar days. For applicants in detention, the average processing time was 91 calendar days.[57]

10.39 DIMIA also noted that applicants can contribute to delays:

> In individual cases, there may be requests from applicants for hearings to be rescheduled or for applicants to be given more time to present submissions or further evidence.[58]

10.40 Nevertheless, the ESOS Evaluation Report found that the rates and timeliness of appeals:

> … imposes financial and emotional burdens on students, costs on DIMIA and providers dealing with visa cancellation issues, and unnecessary administrative complexities for those managing international student programmes.[59]

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54 ESOS Evaluation Report, p. 153; see also Ms Michaela Rost, answers to Questions on Notice, 28 October 2005, p. 9.

55 ESOS Evaluation Report, p. 153; see also DIMIA answers to Questions on Notice, 11 October 2005, p. 66 and DIMIA answers to Questions on Notice received 5 December 2005, p. 105. This compares with the evidence of Ms Michaela Rost, *Committee Hansard,* 27 September 2005, p. 3 – Ms Rost estimated that only 5-10% of students who appeal their visa cancellations are successful.

56 ESOS Evaluation Report, p. 153.

57 DIMIA answers to Questions on Notice received 5 December 2005, p. 105.

58 DIMIA answers to Questions on Notice received 5 December 2005, p. 105.

59 ESOS Evaluation Report, p. 153.

10.41 Ms Rost also told the Committee that students with cancelled visas can end up resorting to other avenues, such as applications for refugee status, which are unlikely to be successful, and merely result in further appeals and time in detention.[60]

Administration and enforcement issues – recent cases

10.42 The committee was also told of two recent Federal Court cases which have highlighted concerns about DIMIA's approach to administration and enforcement of student visas.

10.43 The first case, *Uddin v Minister for Immigration and Multicultural and Indigenous Affairs*,[61] related to notices given to student visa holders. According to DIMIA, the court in this case found that:

> … a defective form was used to advise some students that they had breached their conditions. The court found the form did not meet mandatory legislative requirements setting out to whom and where students need to report to DIMIA after being notified that they had breached their conditions (the form indicated students should report to a compliance officer when it should have said to any DIMIA officer and it also indicated the nearest specific DIMIA office when it should have said any DIMIA office).[62]

10.44 DIMIA explained that the relevant form was revised in July 2005, but that the case affected all cancellations of student visas under section 137J of the Migration Act between May 2001 and 16 August 2005. DIMIA told the committee that it had:

> …decided that the best way to deal with this situation was to reverse on DIMIA systems all section 137J cancellations recorded in this period.[63]

10.45 DIMIA continued:

> Some 8,450 section 137J cancellations were reversed. Most such visas would have in any case expired and some people have other visas. As at 4 October 2005, there are 625 people in Australia with a current resurrected student visa.[64]

10.46 DIMIA also told the committee that DIMIA would be seeking a single blanket debt waiver for students found to be affected by the *Uddin* decision.[65] Finally, DIMIA

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60 Ms Michaela Rost*, Submission 220*, pp 24-25.

61 [2005] FMCA 841 (7 June 2005).

62 DIMIA answers to Questions on Notice, received 11 October 2005, p. 65.

63 DIMIA answers to Questions on Notice, received 11 October 2005, p. 65.

64 DIMIA answers to Questions on Notice, received 11 October 2005, p. 65.

65 DIMIA answers to Questions on Notice, received 31 October 2005, p. 2.

noted that it had developed a 'comprehensive information campaign to advise students who may be affected by the decision' and its consequences.[66]

10.47 However, the committee understands that most of the 8,450 students affected by DIMIA's actions have left Australia and returned home, presumably after some considerable cost to themselves and their families. The Committee also understands that those affected students located by DIMIA would be advised that they could return to study if their institutions would have them. If not, or if their visas had expired, they would be offered bridging visas, while they applied for a regular visa.[67]

10.48 More troubling to the committee was the recent case of *Minister for Immigration & Multicultural & Indigenous Affairs v Alam*,[68] where the Federal Court considered the work limits condition on student visas. This case highlighted considerable concerns in relation to DIMIA's approach to compliance and enforcement of student visa conditions. For example, the LIV suggested that the case:

> … dentified alarming concerns about DIMIA's 'manner of its enforcement' of student visa conditions which 'go beyond the terms of the regulation'.[69]

10.49 The case concerned Mr Alam, whose student visa was cancelled after DIMIA officers came to his home, looking for someone else, and subsequently searched Mr Alam's room and belongings.[70] During that search, the officers found payslips and then cancelled Mr Alam's student visa on the basis of their interpretation that he had breached condition 8105 of his visa by working 22¼ hours in a week, rather than the permitted 20 hours.[71]

10.50 The main issue in question in this case related to the definition of a 'week'. However, in coming to its decision (to dismiss the Minister's appeal), the Federal Court was very critical of the treatment of Mr Alam and the conduct of DIMIA officers. In particular, Justice Wilcox felt the case raised 'disturbing questions.'[72] He

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66 DIMIA answers to Questions on Notice, received 11 October 2005, p. 65; also DIMIA answers to Questions on Notice received 5 December 2005, p. 108; and DIMIA website 'Important Information for students who have had their student visas automatically cancelled between May 2001 and 16 August 2005', at http://www.immi.gov.au/study/overview/student_visa_cancel.htm (accessed 31 October 2005).

67 See Joseph Kerr, 'Another bad mark for Immigration', *Sydney Morning Herald*, 16 September 2005, p. 1; also Jewel Topsfield, 'Immigration bungle sends 8000 students home', *The Age*, 16 September 2005, p. 1.

68 [2005] FCAFC 132 (23 July 2005).

69 Law Institute of Victoria, *Submission 206*, p. 12; referring to [2005] FCAFC 132 (23 July 2005); see also Ms Michaela Rost, *Submission 220*, pp 17-19.

70 For further information on DIMIA's 'compliance field operations' in relation to students, see DIMIA, answers to Questions on Notice, received 11 October 2005, pp 67-68.

71 [2005] FCAFC 132 (23 July 2005), see discussion by Wilcox J at para 7.

72 [2005] FCAFC 132 (23 July 2005), para 11.

described the relevant migration regulation as providing a 'drastic, non-discretionary penalty'.[73] However, Justice Wilcox further commented that:

> Concerns about this case go beyond the terms of the regulation. They extend to the manner of its enforcement. By what right did the DIMIA officers enter and search Mr Alam's home and take away his payslips? They had no search warrant. Nothing in the *Migration Act 1958* (Cth) confers on DIMIA officers such extraordinary powers. Counsel for the Minister was unable to point us to any legislative provision authorising such conduct.[74]

10.51 Justice Wilcox continued:

> Even if the DIMIA officers had power to do what they did, why did they act in such a heavy handed fashion? Mr Alam's request to be allowed to put on a shirt before he was taken to Lee Street was entirely reasonable. Unless it was to humiliate him, what reason could the DIMIA officers have had to refuse this request? After his interrogation, Mr Alam was informed he would be detained unless he could put up a $10,000 bond. It was unlikely in the extreme that he was carrying that amount of money on his person, yet he was refused the opportunity of telephoning his sister for assistance. What reason could there have been for that refusal? [75]

10.52 Finally, Justice Wilcox observed:

> [Visa] control should be firm, but it should be exercised in a fair and courteous manner. Inappropriate regulatory provisions and heavy-handed enforcement are likely adversely to affect our international reputation and ultimately to undermine the overseas student program itself. [76]

10.53 DIMIA acknowledged that the Full Federal Court in this case was 'highly critical of alleged conduct by departmental officers', and told the committee that the allegations 'are taken seriously by the Department', as detailed in Chapter 2.[77] DIMIA told the Committee that as a response to criticisms about its compliance actions, $50.3 million would be spent to establish a College of Immigration Border Security and Compliance in 2006. DIMIA explained:

> This college will provide new compliance and detention staff with a 15 week induction program and existing staff in border security and compliance areas will complete regular refresher training each year.[78]

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73 [2005] FCAFC 132 (23 July 2005), para 13.

74 [2005] FCAFC 132 (23 July 2005), para 16.

75 [2005] FCAFC 132 (23 July 2005), para 17; see also Ms Michaela Rost, *Submission 220*, pp 17-19 and *Committee Hansard*, 27 September 2005, p. 7 and Ms Jockel, Law Council of Australia, *Committee Hansard*, 27 September 2005, p. 81.

76 [2005] FCAFC 132 (23 July 2005), para 18.

77 DIMIA answers to Questions on Notice received 5 December 2005, p. 34.

78 DIMIA answers to Questions on Notice received 5 December 2005, p. 34.

10.54 DIMIA further explained that 'there will also be enhanced training for compliance and detention staff in the period leading up to the establishment of the college,' and that 'DIMIA is also reviewing its procedures and policy to enhance openness and accountability, and improve its service to clients.'[79]

Detention of students

10.55 Another concern raised with the committee was that some international students, whose visas are cancelled, end up in immigration detention. Ms Michaela Rost was concerned the consequences can be quite severe for a student whose visa is cancelled:

> …they become unlawful citizens and may be detained before being required to leave the country. If they then decide to contest the alternative of deportation but cannot afford a bond of up to $10,000 for the granting of a bridging visa, some overseas students have continued a nightmarish journey in detention rather than returning home to face disgrace for their family, huge education debts incurred, a totally ruined reputation and great mental stress.[80]

10.56 Ms Rost acknowledged that only a minority of students end up in longer-term detention – usually those who decide to contest their visa cancellation and deportation.[81] Nevertheless, Ms Rost suggested that very few Australians, including those in educational institutions, are aware that international students have been, and are being, detained under Australia's immigration detention system.[82] Mr Rost claimed that: 'Australia's unique mandatory detention policy makes this the only country in the world to incarcerate some of its full fee paying international students'[83] and that:

> Students detained for both short and long terms have been severely punished for the relatively very minor offences constituting a breach and are held strictly accountable.[84]

10.57 However, Ms Rost noted that it has been difficult to establish how many students with cancelled visas have been detained in immigration detention facilities, and the length of the detention of those students.[85]

10.58 The committee notes that DIMIA has previously advised that:

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79 DIMIA answers to Questions on Notice received 5 December 2005, p. 35.

80 *Committee Hansard*, 27 September 2005, p. 3.

81 Ms Michaela Rost*, Submission 220*, p. 11.

82 Ms Michaela Rost*, Submission 220*, p. 1 and *Committee Hansard*, 27 September 2005, p. 3.

83 Ms Michaela Rost*, Submission 220*, p. 11.

84 *Committee Hansard*, 27 September 2005, p. 3.

85 Ms Michaela Rost*, Submission 220*, p. 11 and *Submission* 220A, p. 1; also *Committee Hansard*, 27 September 2005, p. 3.

> Generally overseas students are only detained for short periods and are often granted bridging visas or if appropriate they are removed within a short time of becoming lawful. If a former student visa holder is detained for anything more than a matter of days, it is usually because of issues which are not directly relevant to their stay as a student.[86]

10.59 Further, DIMIA also informed the committee that 'most persons who have had a student visa cancelled are granted a bridging visa pending the outcome of the MRT's review'.[87]

10.60 In terms of the time spent in detention, DIMIA reported to the committee that between September 2002 and 21 October 2005, 1,375 people were detained 'as a direct result of overstaying their student visa or having their student visa cancelled.'[88]

10.61 DIMIA provided information on the length of time spent in detention by these 1,375 people (see Table 10.1 below). The committee notes that other evidence provided by DIMIA indicated that one former student visa holder (who was subsequently released on a Bridging Visa E) spent 2 years and 4 months in detention.[89]

Table 10.1: Periods of detention – former student visa holders

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

Source: DIMIA answers to Questions on Notice, 5 December 2005, p. 104.

86 Budget Estimates May 2005, answer to question on notice No. 28.

87 DIMIA answers to Questions on Notice received 5 December 2005, p. 105.

88 DIMIA answers to Questions on Notice received 5 December 2005, p. 104. DIMIA noted that, of these people, 17 remained in immigration detention as at 21 October 2005. Note that DIMIA has also previously advised that around 2,310 former student visa holders were detained between 1 January 2001 and 22 July 2005: Budget Estimates May 2005, answer to question on notice No. 28.

89 Answers to Questions on Notice, received 31 October 2005, p. 4; see also Ms Michaela Rost, *Submission 220*, pp 27-33.

10.62 As both Ms Rost and DIMIA pointed out, there have been a wide range of outcomes in the cases of former student visa holders held in detention, including: the grant of a bridging visa; the cancellation being overturned; a criminal justice visa grant; departure from Australia; or the grant of a temporary or permanent substantive visa. For example, according to DIMIA, during 2004-05:

- 155 former student visa holders who had been detained subsequently departed at their own expense;
- 244 former student visa holders were recorded as having been removed (some of these may have departed voluntarily); and
- 153 former student visa holders were released from detention on a Bridging Visa E.[90]

10.63 However, Ms Rost argued that former student visas holders who are released on a Bridging Visa E will still have considerable problems completing their studies, because this visa 'prohibits work, study or Medicare'.[91]

10.64 Further, the committee also heard that many students who have been held in immigration detention have accrued detention debts. For example, Ms Rost gave the example of a former student visa holder who was detained for two years, and who accrued a detention debt of $97,000.[92] In answers to Questions on Notice, DIMIA reported that, as at 7 October 2005, there were 17 students in detention who had accrued a debt. The total amount of debt accrued by these students was $394,447. However, DIMIA declined to provide the details of the individual amounts accrued by each student 'because it would enable the identification of individuals'.[93].

Committee view

10.65 The committee acknowledges concerns raised in evidence in relation to the treatment of overseas students under the Migration Act and Regulations.

10.66 In particular, the committee is concerned by the levels of student visa cancellations, and the fact that a number of students are finding themselves in immigration detention. The committee considers that this has negative consequences both in terms of the personal impacts on overseas students, as well as the negative impacts on the wider 'education export industry'.

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90 DIMIA answers to Questions on Notice, received 31 October 2005, pp 3-4; see also Ms Michaela Rost, *Submission 220*, p. 1.

91 Ms Michaela Rost*, Submission 220*, p. 20. Bridging visas are also discussed in Chapter 8.

92 Ms Michaela Rost*, Submission 220*, pp 25 and 28.

93 DIMIA answers to Questions on Notice, received 31 October 2005, p. 3; see also pp 2-3 for further evidence in relation to the process for the waiver of detention debts.

10.67 The committee recognises the importance of compliance with student visa conditions – particularly academic performance and attendance requirements. However, the committee believes that there are considerable problems with the restrictive and inflexible nature of the legislative provisions relating to student visas. In particular, the committee is concerned that the mandatory visa cancellation provisions under the Migration Regulations allow for no discretion and little consideration of the circumstances surrounding an alleged breach of a student visa.

10.68 The committee is pleased to note that the Migration Regulations were amended on 8 October 2005 to allow for 'exceptional circumstances beyond the student's control to be taken into consideration prior to cancelling a student visa for a breach of condition 8202' (which relates to academic and performance requirements). However, the Committee considers that such changes could have gone further.

10.69 For example, in relation to the work limits conditions (Conditions 8104 and 8105), the Committee is satisfied that the policy of imposing work limits on students is appropriate. However, the Committee agrees with the evidence that the mandatory cancellation provisions for an alleged breach of such work limits are draconian and heavy-handed. The Committee notes that DIMIA acknowledged that the lack of flexibility in the regulations in this area could be addressed.[94]

10.70 The committee considers that a more flexible and compassionate approach should be taken in relation to the cancellation of student visas. The committee also believes that this may help to reduce the high levels of student visa cancellations and, in turn, reduce the number of appeals of such cancellations and the rates of detention of international students. In particular, the committee recommends that the Migration Act and Regulations be amended to allow for greater flexibility and discretion in dealing with breaches of conditions of student visas.

10.71 Specifically, the committee recommends that consideration be given to replacing the current provisions requiring mandatory cancellation, with a rebuttable presumption in favour of cancellation. This would satisfy the legitimate policy objectives of creating an incentive for compliance and thereby help to prevent abuse of the student visa system. It would however, introduce an element of flexibilitiy in cases where a student can show, in all the circumstances, that the visa should not be cancelled.

Recommendation 61

10.72 The committee recommends that the Migration Act and Regulations be amended to allow for greater flexibility and discretion in dealing with breaches of the conditions of student visas.

10.73 In the committee's opinion, another key problem with the student visa regime relates to the inappropriate administration and enforcement of the Migration Act and

94 *Committee Hansard*, 11 October 2005, p. 9.

Regulations. Indeed, the committee considers that the issues raised in relation to the treatment of student visa holders are a good example of the wider cultural problems within DIMIA. The committee notes DIMIA's evidence that it is working to address these issues and encourages DIMIA to continue its efforts in this area.

10.74 Finally, the committee notes that the recommendations of the ESOS Evaluation Report may also assist in addressing many of the issues and concerns raised in relation to student visas. The committee therefore recommends that the recommendations of the ESOS Evaluation Report continue to be implemented as a high priority.

Recommendation 62

10.75 The committee recommends that the recommendations of the *Evaluation of the Education Services for Overseas Students Act 2000* continue to be implemented as a high priority.

Senator Patricia Crossin

Chair

ADDITIONAL COMMENTS FROM THE AUSTRALIAN DEMOCRATS

1.1 The majority report contains many positive suggestions and recommendations which we support. However, before more piecemeal changes are made to the administration of the Migration Act in response to ongoing problems that have been identified through this Inquiry, I believe there is an urgent need for a complete review of the entire Migration Act.

1.2 More piecemeal actions attempting to patch up a flawed system runs the risk of more complexities and inconsistencies. The evidence to this Inquiry has been valuable, but it has not been able to fully canvas the operation of many sections of the Migration Act.

1.3 The 'culture problems' within the Department of Immigration have now been widely acknowledged, but efforts to address it can not fully succeed just through administrative restructuring. This Inquiry has again demonstrated that the migration law itself inevitably impacts on the culture of how it is administered and enforced, and without significant changes to that law, some of the same problems that have been identified in inquiry after inquiry will inevitably continue to occur.

1.4 Following the introduction of the *Migration Legislation Amendment Act 1989*, the complexity and harshness of the legislation has been continually increasing, with the Executive and the Senate regularly adopting a wide range of changes. Whilst most of these amendments to the Migration Act have been aimed particularly at asylum seekers and refugees, it has impacted on the fairness, adequacy and administration of the entire Migration Act, with more and more power being placed in the hands of the Minister and the Department, more restrictions placed on the powers of the Courts and a continual reduction in the rights of those who are subjected to the Migration Act and its Regulations.

1.5 It is my view that the widely acknowledged problems with the culture of the Immigration Department stems in significant part from the innate unfairness and restrictions on due process, as well as the complexity, built into much of the Migration Act.

1.6 There have been many harmful changes made to the Migration Act and Regulations since 1989. A good starting pointing for improving the law would be to examine these changes with an eye to whether reversing them would help undo the negative impacts on the culture of how our migration laws are administered. Attention should especially be paid (but not limited) to assessing the consequences and impacts of the following measures:

- The Migration Reform Act and a range of other amendment Bills from 1992 which introduced mandatory detention into immigration law, along

with a number of other restricting measures, including the introduction of the insidious practice of billing of people for their detention costs.

- The Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998, which toughened the existing provisions in the Migration Act enabling the refusal or cancellation of visas on character grounds. Specific warnings were made at that time about what these changes could mean for the culture of how our immigration law would be administered.[1]
- Amendments to Migration Regulations, Statutory Rules 109 of 1997 which imposed the 45 day rule severely restricting support for many asylum seekers in the community, as well as a $1,000 fee for unsuccessful appeals to the Refugee Review Tribunal.
- The Migration Amendment Regulations in Statutory Rules No. 210 of 1998, which brought in the termination of work rights for asylum seekers with an unsuccessful RRT decision.
- The Migration Legislation Amendment Bill (No.2) 1998, which prevented legal advice or assistance from HREOC being offered to people in immigration detention unless a specific request is made by the detainee.
- The introduction of Temporary Protection Visas, contained in Migration Amendment Regulations 1999 (No. 12), Statutory Rules 1999 No. 243.
- The Migration Legislation Amendment (Temporary Safe Haven Visas) Bill 1999, which created a class of visa known as a 'temporary safe haven visa' which prevented holders from applying for a protection visa or any other type of visa while in Australia, and from seeking merits review or judicial review of decisions by the Minister.
- The Migration Amendment (Excision from Migration Zone) Act 2001. This amendment created a separate visa application regime to apply to people who arrive in Australia at places that are excised from the migration zone.
- The Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001. This amendment further restricted the rights of people who arrive in areas excised from the Australian migration zone. It also amended the Migration Regulations to create a new restrictive class of refugee and humanitarian visa for dealing with temporary movements of persons seeking asylum.
- The Migration Legislation Amendment Act (No.1) 2001. This amendment restricted access to the courts for judicial review of

1 See Senate Legal and Constitutional Legislation Committee report into the Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997 – additional comments by Australian Democrats and by Senator B.Cooney

migration decisions. It did this by preventing class actions in migration matters before the Federal and High Courts, by changing the requirements for standing in the Federal Court and by introducing time limits for original applications to the High Court in migration matters.

- The Migration Legislation Amendment Act (No.6) 2001, which re-defined certain key terms used by the Federal Court and the Refugee Review Tribunal (RRT) in determining refugee status, aimed at narrowing the eligibility for protection visas.
- The Migration Legislation Amendment (Judicial Review) Act 2001, which introduced a privative clause mechanism, intended to severely restrict access to Federal and High Court judicial review of administrative decisions made under the Migration Act.
- The Migration Legislation Amendment (Immigration Detainees) Act 2001 which introduced tighter restrictions on access to detainees.
- The Migration Legislation Amendment (Transitional Movement) Act 2002 enabled some non-citizens to be brought to Australia temporarily whilst preventing them from being able to apply for any form of visa, including a protection visa, while in the country.
- The Migration Legislation Amendment (Procedural Fairness) Act 2002 excluded the common law rules of procedural fairness, and attempted to make it explicit that the procedures set down in the statute are all that decision makers must comply with.
- The Migration Amendment (Duration of Detention) Act 2003 prevented and limited courts from issuing interim orders for the release of immigration detainees. The Bill was introduced to prevent interlocutory or interim orders for the release of detainees whether or not in the context of broader judicial review proceedings. This has been prompted by several cases where such release has been ordered by the Federal Court, for example Al Masri's Case.
- The Migration Amendment (Detention Arrangements) Act 2005 prevented the courts from issuing interim orders for the release of immigration detainees.

1.7 Numerous submitters to the inquiry also expressed concern at the unnecessary complexity of the legislation for migration agents and lawyers, let alone unrepresented asylum seekers and other visa applicants to navigate through.

1.8 There are currently 88 visa classes set up under the *Migration Act 1958,* [2] and contained within this are 147 Visa subclasses.

2 This includes 81 'standard' visa classes and another 6 "operation of law" visa classes (s.32 Special Category visa, s.33 Special Purpose visa, s.34 Absorbed Person visa, s.35 Ex-citizen visa, s.38

Complementary Protection

1.9 I strongly support the recommendation made by the Committee that a system of complementary protection be introduced into the Migration Act. I believe that it is essential that additional safeguards ensuring the protection of fundamental human rights are reflected in the Migration Act.

1.10 However, in absence of this I recommend the following:

Recommendation 1

1.11 That the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CROC) and the International Convention on Civil and Political Rights (ICCPR) be enshrined into domestic law to give legally enforceable protection to asylum seekers and others at risk of being deported or returned to unsafe situations.

Differences from the majority report

1.12 I have a divergence in views with the following Committee recommendations:

Temporary Protection Visas (TPVs)

1.13 The Democrats moved in the Senate in 1999 to prevent the introduction of TPVs, but did not get support from others. I believe the concerns we expressed then have clearly been vindicated. The TPV has been shown to be unjust to refugees, prolonging the state of limbo they are subjected to and significantly affecting their ability to settle and rebuild their lives.

1.14 The lack of access to family reunion is particularly harsh and harmful to refugees, and also is against the interest of the wider Australian community, as it makes it far more difficult for refugees to be able to settle, adapt and contribute effectively to their new country.

1.15 Once asylum seekers have been granted refugee status, they should have permanent protection rather than having to present their cases again. This is especially cruel and unjust for those caught under the 7 day rule, who have to live with the prospect of potentially never being eligible for permanent protection.

Bridging Visa E (BVEs)

1.16 People on this visa face conditions that force them to rely solely on private charity, with NGOs, churches or ad-hoc community groups often providing the basic needs such as food and shelter.

Criminal Justice visa, s.38A Enforcement visa) and also a Special Circumstance visa, which do not have the usual identifier like other visa classes.

1.17 The committee has recommended that work rights be given to those on BVEs. I support this, but are concerned that there is no mention of provisions for Medicare. Numerous submitters have noted that those on BVEs are often in urgent need of medical attention and medication. This applies particularly for those who have been released from detention, as many have been heavily reliant on medication while in detention in order to cope in the environment. To then be denied Medicare assistance when they are released on BVEs is a counter-productive and irrational policy.

1.18 It is reprehensible that the system which caused their dependence on medication does not provide for continuing medical entitlements, which is often enough very expensive and needed on a regular basis.

Recommendation 2

1.19 Abolish Temporary Protection Visas, the 7-day rule, the 45-day rule and the prevention of access to assistance which currently applies for Bridging Visa Es.

Humanitarian settlement

1.20 I support the committee's recommendations in regards to resettlement issues particularly with respect to the increasing numbers of refugees from Africa and acknowledge the Government's increased uptake and funding in this area.

1.21 However, I believe the following should also be noted:

- Pre-embarkation information for Humanitarian intake: - there is a great inconsistency in understanding among people coming from different countries about the situation and services they will be offered in Australia, and information seems to vary greatly from country to country. It is evident that blanket processes do not work. Rather, information should be tailored to the situation and the people involved and it must dovetail with post-arrival information when they arrive. The information also needs to be provided in culturally appropriate ways to ensure that it is as meaningful as possible.
- Post-arrival issues: - under the SHP, settlement under the IHSS should be expanded further than just the initial 6 months. While recent improvements are welcome, more needs to be done, as 6 months is often an inadequate timeframe. Many migrants need more time to acclimatize to foreign system of education, health and life in Australia. The nature of changing demographics and countries of origin also mean there is often a significant lag before the service-providers can adapt to the new cultures they are dealing with – different languages, sensibilities and new cultures. A sub group within this group which are suffering a distinct lack of specialised response/services are women arriving under the Woman At Risk category. Many of these women have fled from oppressive situations where they have been systematically abused and raped.

Recommendation 3

1.22 There must be uniformity in information given as part of pre-embarkation orientation, as well as a proper system of ensuring that migrants fully understand the terms involved in their settlement.

Recommendation 4

1.23 That the initial settlement services provided under IHSS be extended to 12 months.

Recommendation 5

1.24 That service providers are given regular and updated cultural training session and briefings in order to cope with the divergence of cultures that they are servicing. Appropriate interpreters should also be available.

Recommendation 6

1.25 That current services for women arriving under the Women at Risk be reviewed immediately to ensure an adequate delivery of services.

Other assistance to migrants

1.26 An aspect of Australia's modern migration program is the huge increase in people arriving on temporary residency visas. Some of these visas apply for prolonged periods and can involve migrants whose level of English is not of a high level. [3]

Recommendation 7

1.27 Consideration be given by federal, state and territory governments to the long-term benefits of ensuring appropriate assistance is available to all people who are residing in Australian on long-term temporary visas, as well as those on permanent visas.

Senator Andrew Bartlett

Australian Democrats

3 For example, the subclass 457 visa for skilled temporary business entrants

ADDITIONAL COMMENTS FROM THE AUSTRALIAN GREENS

1.1 The scandalous treatment of Cornelia Rau in the immigration detention system shocked the Australian public. Then the discovery that Vivian Solon had been unlawfully detained and deported raised serious questions about the competence and humanity of Australia's immigration policy. The almost universal call for a Royal Commission to investigate what looked like a Department 'out of control' and seriously damaging people, was ignored by the Government. Instead it instigated two private inquiries with limited terms of reference.

1.2 Despite the narrow scope of their investigation, the Palmer Inquiry and the Comrie Inquiry reported damning findings that indicated 'systemic failures' and serious 'cultural problems' within the Department of Immigration.

1.3
The Senate called on the Government to establish a Royal Commission. The Government refused to heed this demand and the Senate initiated this Senate Inquiry to investigate whether the serious failures exposed by the Rau and Solon cases was widespread and endemic.

Submissions & Hearings

1.4 The submissions received and the evidence given at public hearings presented the inquiry with a consistent criticism of the administration of the Migration Act and remarkably similar suggestions for reform.

1.5 The evidence presented to the inquiry made it clear that the incompetent handling and mistreatment meted out to Ms Rau and Ms Solon was not an isolated incident. The widespread incidences of such behaviour mostly went almost unnoticed and unreported in remote or off-shore detention centres.

1.6 The evidence indicated the Department of Immigration was failing to administer the Act to afford fairness, justice and proper process, and more disturbingly it was failing in its duty of care to people in its custody. Indeed there was compelling evidence that the Department and the private companies administering detention centres were administering the Act in a manner that was hostile to people and in some instances contributed to their abuse.

1.7 The evidence also indicated that parts of the Migration Act contribute to the failures of the Department, particularly the failure of some sections of the Department to ensure that its officials can use appropriate discretion and common sense. The sections of Migration Act that most significantly contributed to this occurrence were sections 189 and 196 of the Act relating to detention, section 501 relating to

deportation, parts of the Act relating to Temporary Protection Visas and the failure of the Act to properly provide complementary or humanitarian protection.

1.8 The Senate Committee inquiry visited Villawood Immigration Detention Centre (IDC), considered by many commentators on Australia's immigration detention centres to be one of the better detention centres. Two features of Villawood IDC were particularly disturbing. The first was the dorm style accommodation located in Stage One – a room filled with about 60 bunk beds less than a metre apart. This looked more like a prison in a developing country than administrative detention in Australia. Indeed, one detainee shouted at the committee members that Villawood was "worse than jail". The second disturbing experience was being inside the isolation unit. The small cold bare walled cell with its heavy metal door and tiny window reminds one of the cruelty of the silent prison at Port Arthur, colonial Tasmania. To think of Cornelia Rau with untreated schizophrenia, or the many asylum seekers, spending endless days in an isolation cell is a reminder of just how badly the policy of mandatory detention has failed. During the course of the inquiry the Senate Legal and Constitutional Committee was informed that an asylum seeker was held in the Villawood IDC isolation unit for 76 days.

The Report

1.9 The Australian Greens are happy to sign on to the main committee report with dissent our noted for two recommendations. If the recommendations of this report were adopted it would assist the Department of Immigration in administering the Act in a fairer and more humane way. I commend the report to the Parliament and urge the Government to put party politics aside and adopt the recommendations of the main committee report in the interest of good governance, competent administration of the Migration Act and respect for human rights.

1.10 Despite the broad range of the inquiry, two themes consistently emerged throughout.

1.11 The first theme relates to the cultural attitude within the Department of Immigration. The Secretary and Minister have admitted that the department is in need of "cultural change". Witnesses told the inquiry that there was a culture of suspicion and hostility toward asylum seekers. The committee was told that departmental officials were 'trying to catch them out', 'looking and probing for inconsistencies', or 'searching for a reason to reject'. The result of this attitude, one lawyer said, was "randomness all the way through" the protection visa determination system.

1.12 It is clear that the culture that led to Cornelia Rau being unlawfully incarcerated and mistreated for 10 months and led to the deportation of a broken women to a hospice in the Philippines, is widespread in the Department of Immigration and as the Comrie Report found this culture is driven in the Department by a view held by departmental officials that this is what is being asked them by the government through government policy and directions.

1.13 The second theme that consistently emerged during the inquiry was that the policy of mandatory detention was seriously damaging people, particularly their mental health. What is meant to be detention for purely administrative purposes had morphed into a system of punitive detention without the same safeguards that are in place in the criminal justice system.

1.14 The power to detain 'unlawful non-citizens' has meant that cultural hostility toward asylum seekers has been manifested into cruel behaviour toward detainees behind the razor wire.

1.15 A lawyer and migration agent recently opined to me that the Department of Immigration was misnamed. It should be re-named the "Department of Compliance and Detention". This gets to the crux of the current problem. Instead of the Department making impartial, unbiased and well considered decisions and treating its 'clients' with dignity and respect, the policies of this Government have led to the virtual criminalisation of asylum seekers.

1.16 The Australian Greens lay the blame for the criminalisation of asylum seekers directly on this Government. The Prime Minister, the former Minister Ruddock and the current Minister Vanstone, all bare responsibility for the current cultural and policy problems of the Department of Immigration. The trails from Cornelia Rau suffering untreated schizophrenia in the Baxter isolation cell, and the trail from Vivian Solon enduring her injuries in a hospice in the Philippines lead directly to the Prime Minister's door.

1.17 The exploitation of xenophobia by this Government and the demonisation of asylum seekers and refugees has led to the culture of hostility that exists in the Department of Immigration. Continual public comments, some of which have been found to be untrue, from the Prime Minister and Ministers about the 'security threat' posed by the boat people, the need to 'repeal and deter' asylum seekers and the discrediting of asylum seekers as non-genuine or queue jumpers, have directly led to the culture problems evident in the recent actions of the Department of Immigration.

1.18 It should be no surprise that the bureaucracy has taken on the culture attitudes that have been so vehemently expressed by government ministers and subsequently administered the Act in a way that they thought the government wished. The political eagerness to exploit xenophobia, particularly during the 2001 federal election, has meant that innocent people seeking Australia's protection have been turned into 'undesirables' that the Department of Immigration felt compelled to repel and filter out.

1.19 **The Australian Greens can not sign onto recommendation 45.** Although the spirit of this recommendation seeks to limit the extent and use of immigration detention, the Australian Greens oppose mandatory detention as a matter of policy. While we note that this recommendation mitigates some of our concerns about mandatory detention, we believe that mandatory detention is a fundamentally flawed policy and should be abolished.

1.20 A policy that incarcerates innocent people indefinitely breaks fundamental rights and the norms of our legal system. Of particular concern is the lack of discretion under Section 189 of the Act and the lack of judicial oversight of the decision to detain people. The Australian Greens have moved amendments in the Parliament to implement judicial oversight into the current detention regime, but these were rejected by the Government and Opposition.

1.21 **The Australian Greens dissent from recommendation 50** relating to temporary protection visas. The Australian Greens do not support the use of temporary protection visas as a matter of policy. The Australian Greens agree with the United Nations Protocol relating to Refugees that refugees should not be discriminate against on the basis of the method by which they arrive.

Additional Recommendations:

1.22 The Australian Greens recommend the following recommendations in addition to those contained in the report:

- In relation to chapter three - reform of the Refugee Review Tribunal (RRT). The Australian Greens support more fundamental reform than proposed in the Report. I recommend the removal of privative clause from the Migration Act to allow comprehensive review of RRT decisions. Many submitters suggested abolishing the RRT with the review function passing to another body, possibly the Federal Magistrates Court or AAT. The Australian Greens support such a position and recommend that the Australian Law Reform Commission investigate a replacement body for the current RRT.
- In relation to chapter six, *The use of detainee labour*. The Australian Greens recommend:
- - all work should be voluntary and remuneration for work should be equivalent to established employment and industrial laws and regulations of Australia."
- - Current and past detainees who have been employed via the 'merit system' should have a capacity to apply for appropriate compensation for work completed within the immigration detention system.
- In relation to chapter six, The Australian Greens recommend the policy of mandatory detention be abolished and that asylum seekers be housed in publicly owned and managed open reception centres that are accountable pursuant to Commonwealth legislation and where entry and exit are unrestricted and that, provided medical and security checks are satisfied or after 14 days has passed, whichever occurs first, they be granted a bridging visa and assisted without delay to move into the community.

- In relation to chapter eight, The Australian Green recommend the Temporary Protection Visa be abolished and all current Temporary Protection Visa holders be automatically granted a Permanent Protection Visa.

Senator Kerry Nettle

Australian Greens Senator for NSW

Spokesperson on Immigration

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.
>
> 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.
>
> 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:
>
> - 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.
>
> 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.
>
> 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

APPENDIX 1

SUBMISSIONS RECEIVED

1	Mr Roland Good
2	Ms Rosemary McKenry
3	Mr Jonathan Peter
4	Ms Katherine Knight
5	Mr John Merkel
6	Mr Jo Wall de Gallo
7	Mr David Bennett
8	Project SafeCom Inc.
8A	Project SafeCom Inc
9	Ms Lyn Nasir
10	Name Withheld
11	Mr Gareth Gillham
12	Ms Judy Witney
13	Ms Nancy Peters
14	Ms Margaret Carey
15	Ms Nancy Murphy
16	Ms Julia Edwards
17	Ms Tracey Puckeridge
18	Mrs Jean Jordan
19	Ms Sandra Green
20	Ms Margaret McGregor
21	Ms Katherine Raymond
22	Mr Ian McFarlane

23	Ms Pat Law
24	Mr John Biggs
25	Ms Euthymia Sephton
26	Ms Moira McAuliffe
27	Dr Peter and Mrs Jan McInerney
28	Ms Judy Donnelly
29	Tasmania Police
30	Hopestreet Urban Compassion
31	Dr Jon Jureidini
32	Ms Nina Boddenberg
33	Mr Paul Lightfoot
34	Ms Jane Keogh
35	Ms Hoa Pham
36	Ms Kim Baird
37	Ms Sue Hoffman
38	Mr Tony Kevin
38A	Mr Tony Kevin
39	WA Women in Black
40	Ms Hazel Brimley
41	Medical Association for the Prevention of War (WA Branch)
42	Ms Lillian Harris
43	Ms Paula Young
44	Mr John and Mrs Shirley Gunson
45	Ms Bernadette McKenna
46	Ms Helena Leeder

47 Mr David Wallin

48 Marchlewski Family

49 University of Newcastle Legal Centre

50 Ms Pauline Green

51 Refugee Advocacy Service of South Australia Inc

52 Ballarat Refugee Support Network

53 Name Withheld

54 Mr Bert and Mrs Christine Fabel

55 Mr John Card

56 Ms Meryl McLeod

57 Ms Melinda Beasant-Commerford

58 Mr Harold Jones

59 Ms Daniela Franz

60 Mr Mike Murphy

61 Ms Dorothy Babb

62 Ms Maria Pinferi

63 Mr Ray and Mrs Bronwyn Robinson

64 Mr Don Stokes

65 Ms Jane Moore

66 Ms Lizz Hutchinson

67 Echuca/Moama Rural Australians for Refugees

68 Mr John Croyston

69 Strathalbyn Circle of Friends 22

70 Mrs D. Lascaris

71 Castan Centre for Human Rights Law

72 Ms Pauline Bleach

73 Catholic Bishops Committee for Migrants and Refugees

74 United Nations High Commissioner for Refugees

75 Dr Miriam Orwin

76 Ms Erika Munton

77 Ms Helen Lewers

78 Ms Genevieve Caffery

79 Pilgrim Circle of Friends 27

80 Mr Tom Mann

81 Mr Guy Coffey

82 Name Withheld

83 Mr James Poland

84 Name Withheld

85 Mr Jamal A. Daoud

86 Mr Ahmed Al Kateb

87 Mr Agostino Renda

88 Rural Australians for Refugees

89 Mr Colin James Apelt

90 Mr John Schindler

91 Ms M.E. Flenley

92 Ms Halina Rubin

93 Ms Moya Turner

93A Ms Moya Turner

94 Dr Anthony Pun

95 Ms Linda Anchell

96 Ms Margaret Tonkin

97 Ms Diane Gosden

98 Ms Rosi Aryal

99 Australian National Audit Office

99A Australian National Audit Office

100 RMIT Refugee & Asylum Seeker Project

101 Federation of Ethnic Communities' Councils of Australia

102 Dr Glenn Nicholls

103 Dr Margaret Kelly

104 Ms Julie Turner

105 Ms Annette Shears and Ms Peta Anne Molloy

106 Ms Mary Dagmar Davies

107 Ms Amanda Kube

108 The Royal Australia and New Zealand College of Psychiatrists

109 Australian Education Union

110 Law Society of South Australia

111 Ms Melanie Mumford

112 Mr Paul I. Boylan

113 Mr Brian Davies

114 Ms Elizabeth Joy Gibbings

115 International Commission of Jurists

116 Ms Brooke Eddington

117 Mr Richard Babb

118 Mr Ian Knowles

119 Name Witheld

120 Ms Annabel Brown

121 Ms Halinka Rubin

122 Ms Ruth Graham

123 Ms Judith McArthur (nee Cullity)

124 Ms Barbara Couston Cliff

125 Mr Tim Allen

126 Ms Mary J de Merindol

127 Elm Grove Sanctuary Trust

128 Ms Marissa Monagle

129 Ms Genevieve Lloyd

130 Mr Allan Nield

131 Mr Anthony Krohn

132 Ms Norrie May-Welby

133 Ms Corinne Salmon

134 Ms Juineta Boyd

135 L V Nayano Taylor-Neumann

136 Ms Gwen Gorman

137 Ms Rosalind Berry

138 STTARS (Survivors of Torture and Trauma Assistance and Rehabilitation Service)

139 Mr Matt E. Robinson

140 Mr Paul Hense

141 Companion House

142 Dr Joan Beckwith

143 Falun Dafa Association of NSW Inc

144 Migration Institute of Australia

145 Judith Quinlivan and Leith Maddock

146 Ms Kerrie Barry

147 St Vincent de Paul Society

148 Refugee Council of Australia

149 Mr Daemon Singer

150 Great Lakes Rural Australians for Refugees

151 Edmund Rice Centre for Justice and Community Education

152 Ms Joan Nield

153 Ms Dallas Louise Fell

154 Ms Vicki McDuie

155 Social Issues Executive Anglican Diocese Sydney

156 Ms Rosalie Lackie

157 The George Institute of International Health

158 Mr Ralph Schwer

159 Mr Damien McInerney

160 Confidential

161 Mrs Elizabeth M. Turnock

162 Confidential

163 Justice for Asylum Seekers (JAS) Network

164 Australian Political Ministry Network Ltd

165 Catholic Migrant Centre

166 Legal Aid New South Wales

167 Buddies Refugee Support Group

168 Ms Joy Elizabeth

169 Ms Kaye Bernard

170 Centre for Refugee Research – UNSW

171 Social Justice Committee Conference of Leaders of Religious Institutes (NSW)

172 Tasmanians for Refugees

173 Ms Glenda Clarke

174 Coalition for the Protection of Asylum Seekers

175 Brotherhood of St Laurence, Ecumenical Migration Centre

176 Confidential

177 Albany Community for Afghan Refugees

178 ChilOut

179 National Council of Churches in Australia

180 Franciscan Missionaries of Mary

181 Ms Jean Oates

182 CASE for Refugees

183 Dr Anne Pedersen

184 A Just Australia

185 Human Rights Council of Australia and Australians for Just Refugee Programs Inc.

186 Australians for Just Refugee Programs Inc. with Ms Naleya Everson

187 Woomera Lawyers Group

188 Kerang Rural for Australian Refugees

189 Women and Reform of Migration

190 Uniting Justice Australia and Asylum Seeker Project Hotham Mission

191 Amnesty International Australia

192 Mr William Fisher

193 Vietnamese Community in Australia

194 Immigration Advice and Rights Centre Inc.

195 Multicultural Disability Advocacy Association of NSW and National Ethnic Disability Alliance

196 Commonwealth Ombudsman

197 Mrs Dallas Mazoori

198 NSW Young Lawyers Human Rights Committee

199 Human Rights and Equal Opportunity Commission

200 South Brisbane Immigration & Community Legal Service Inc

201 Asylum Seekers Centre Inc

202 University of Technology, Sydney

203 SAVE - Australia Inc

204 Dr Penelope Matthew with the ANU Law Students for Social Justice Society

205 Department of Immigration and Multicultural and Indigenous Affairs

205A Department of Immigration and Multicultural and Indigenous Affairs

206 Law Institute of Victoria

207 Ms Susan Metcalfe

207A Confidential

208 Gay & Lesbian Immigration Task Force

209 Sydney South West Area Health Service

210 Name Withheld

211 Ms Marion Le

211A Ms Marion Le

211B Ms Marion Le – Confidential

211C Ms Marion Le – Confidential

212 Melbourne Catholic Commission for Justice, Development & Peace and the Melbourne Catholic Migrant & Refugee Office

213 Ms Marilyn Shepherd – Confidential

213A Ms Marilyn Shepherd – Confidential

213B Ms Marilyn Shepherd

214 Confidential

214A Asylum Seekers Resource Centre

215 Mrs Jennifer Tranter

216 Centre for Philippine Concerns-Australia, Brisgane Branch

217 Hazara Ethnic Community in Australia

217A Hazara Ethnic Community in Australia

218 Justice for Vivian

219 Australian Federal Police

220 Ms Michaela Rost

220A Ms Michaela Rost

221 The United Nations Association of Australia (UNAA)

222 Mental Health Council of Australia

223 Australian Psychological Society

224 Ms Frederika Steen

225 Dr Robert Hirsch

226 Dr Geoff Gallop MLA Premier of Western Australia

227 The Hon Steve Bracks MP Premier of Victoria

228 Mr Paul McKinnon

229 Ms Elaine Smith

230 E. Leta Padman

231 Centre for Philippine Concerns Australia (CPCA)

232 Community Relations Commission for a Multicultural NSW

232A Community Relations Commission for a Multicultural NSW

233 Law Council of Australia

234 Mr Angus Francis

TABLED DOCUMENTS

26 September 2005 - Ms Claire O'Connor – Private Capacity

- Affidavit of James Robert Williams
- Appendices A to Appendix P
- Federal Court of Australia S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs [2005] FCA 549

26 September 2005 – Dr Jon Jureidini – Private Capacity

- Additional Information

27 September 2005 – Ms Michaela Rost – Private Capacity

- Statistics re: Students, Visa Cancellations and relevant information

11 October 2005 –Department of Immigration and Multicultural and Indigenous Affairs

- No 2.6 – Management Support Unit – Transfer and Accommodation Index
- Mental Health Assessment and Multidisciplinary mental Health Care and Services for Detainees in Immigration Detention Facilities
- Direction No. 21(1) Migration Act 1958 Direction Under Section 499(2) Visa refusal and cancellation under section 501 of the Migration Act 1958 Direction – Visa Refusal and Cancellation under Section 501 – No. 21(3)

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Adelaide, Monday 26 September 2005

Law Society of South Australia

Mr John Fountain, Chair, Accident Compensation Committee

Ms Dymphna Eszenyi, President-elect

Ms Kerry Clark, Member, Human Rights Committee

Ms Sasha Lowes, Member, Human Rights Committee

Refugee Advocacy Service of South Australia Inc

Mr Paul Haywood-Smith QC, Chairperson

Ms Thea Birss, Managing Solicitor

Mr Graham Harbord, Board Member

Ms Claire O'Connor

Dr Jon Jureidini

Woomera Lawyers Group

Mr Jeremy Moore

Mr Paul Boylan

Ms Jane Moore

Melbourne, Tuesday 27 September 2005

Ms Michaela Rost

Dr Glen Nicholls

The Royal Australia and New Zealand College of Psychiatrists

Dr Julian Freiden, President

Dr Lousie Newman, General Councillor

Mr Harry Lovelock, Director of Policy

Brotherhood of St Laurence, Ecumenical Migration Centre

Ms Sarina Greco, Manager

Ms Ainslie Hannan, Coordinator

Mr Julian Burnside

National Council of Churches in Australia

Mr Alistair Gee, Director

Mr John Ball, Manager

Asylum Seeker Resource Centre

Mr Martin Clutterbuck

Ms Pasanna Mutha-Merennege, Women's Law Reform Program Manager

Law Institute of Victoria

Mr Michael Clothier, Committee Member

Mr Erskine Rodan, Committee Member

Ms Maria Jockel, Committee Member

Mr Michael Thornton, Committee Member

Sydney, Wednesday 28 September 2005

Refugee Council of Australia

Mr David Bitel, President

Mental Health Council of Australia

Mr Sebastian Rosenberg, Deputy Chief Executive

Professor Ian Hickie, Clinical Advisor to Council

Asylum Seekers Centre

Ms Tamara Domicelj, Coordinator

Ms Maya Cranitch, Board Member

International Commission of Jurists

Mr Nicholas McNally, Honorary Treasurer

Edmund Rice Centre for Justice and Community Education

Sister Margaret Leavey, Volunteer Researcher

Sister Mary Britt, Volunteer Researcher

Legal Aid NSW

Ms Elizabeth Biok, Legal Officer, Civil Litigation Section

Mr Bill Gerogiannis, Legal Officer, Civil Litigation Section

Migration Institute of Australia

Mr David Mawson, Chief Executive Officer

Mr Neil Hitchcock, Fellow of Institute Founding Member, Former NSW President and Former National Executive Member

Ms Marianne Van Galen-Dickie, Member

A Just Australia

Ms Kate Gauthier, National Coordinator

Ms Naleya Everson, Researcher

Ms Trish Highfield, Advocate

Sydney, Thursday 29 September 2005

Community Relations Commission (NSW Government)

Mr Stepan Kerhyasharian, Chair

Mr Richard Acheson, Director

Ms Kamala Truelove, Research Assistant

Federation of Ethnic Communities' Councils of Australia

Mr Abd Malak, Chair

Amnesty International Australia

Ms Rebecca Smith, Advocacy Coordinator

Dr Graham Thom, Refugee Coordinator

Uniting Justice Australia and Asylum Seeker Project Hotham Mission

Rev Elenie Poulos, National Director, Uniting Justice Australia

Ms Katherine Marshall, Case Coordinator and Outreach Volunteer Coordinator, Asylum Seeker Project Hotham Mission

Ms Lucy Bowring, Case Coordinator, Asylum Seeker Project Hotham Mission

Canberra, Friday 7 October 2005

Australian National Audit Office

Mr John Meert, Group Executive Director, Performance Audit Group

Mr Steven Lack, Executive Director

Mr Greg Watson, Senior Director

Ms Rebecca Collareda, A/Director, Performance Audit Services Group

Mrs Marion Le'

Ms Claire Bruhns

United Nations High Commissioner for Refugees

Mr Brendan Peace, Associate Legal Officer

Mr David Wrigth, Regional Representative

Human Rights and Equal Opportunity Commission

Mr John von Doussa QC, President

Mr Craig Lenehan, Deputy Director Legal Services

Ms Vanessa Lesnie, Senior Policy Officer, Human Rights Unit

Commonwealth Ombudsman

Professor John McMillan, Ombudsman

Mr George Masri, Acting Senior Assistant Ombudsman

Canberra, Tuesday 11 October 2005

Department of Immigration and Multicultural and Indigenous Affairs

Mr Abul Rizvi, Deputy Secretary

Mr Andrew Tongue, First Assistant Secretary, Change Management Taskforce

Mr Des Storer, First Assistant Secretary, Parliamentary and Legal Division

Mr Neil Mann, First Assistant Secretary, Compliance Policy and Case Coordination Division

Mr Peter Hughes, First Assistant Secretary, Refugee, Humanitarian and International Division

Ms Lyn O'Connell, First Assistant Secretary, Detention Services Division

Mr Dermot Casey, Assistant Secretary, Detention Services Division, Detention Health Taskforce Branch

Mr David Doherty, Assistant Secretary, Detention Services Division Detention Infrastructure Management Branch

Ms Yole Daniels, Assistant Secretary, Compliance Policy and Case Coordination Division, Compliance Framework Branch

Mrs Marie-Louise Smith, Assistant Secretary, Migration and Temporary Entry Division, Temporary Entry Branch

Mr Robert Illingworth, Assistant Secretary, Refugee Humanitarian and International Division

Mr Todd Frew, Assistant Secretary, Entry Policy and Procedures Branch, Border Security Division

Mr Garry Fleming, Assistant Secretary, Compliance Policy and Case Coordination Division, Case Management Support Branch

Mr Stephen Allen, Assistant Secretary, Border Security Division, Border Security Systems Branch

Mr John Eyers, Assistant Secretary, Parliamentary and Legal Division, Legal Services and Litigation Branch

Mr Barry Welsby, Assistant Secretary, Refugee Humanitarian and International Division, International Cooperation Branch

Ms Judith O'Neill, Assistant Secretary, Refugee, Humanitarian and International Division, Humanitarian Branch

Mr John Bloomfield, Director, Compliance Policy and Case Coordination Division Character, Cancellations and Investigations Branch

Ms Lynne Gillam, Assistant Secretary, Detention Services Division, Detention Services Framework Branch

Mr Douglas Walker, Assistant Secretary, Parliamentary and Legal Division, Legal Coordination Office Branch

Refugee Review Tribunal

Mr John Lynch, Registrar

Mr Steve Karas AO, Principal Member

Canberra, Tuesday 8 November 2005

GSL (Australia) Pty Ltd

Mr Peter Olszak, Managing Director

Mr Mike McCarthy, Commercial Director

Department of Immigration and Multicultural and Indigenous Affairs

Mr Jim Williams, Assistant Secretary, Detention Contact and Services Branch

Commonwealth Ombudsman

Professor John McMillan, Ombudsman

Mr Neil Comrie, Consultant

APPENDIX 3

PALMER REPORT - FINDINGS AND RECOMMENDATIONS AND GOVERNMENT RESPONSE

Main findings

1. When Ms Cornelia Rau came to the attention of immigration authorities in north Queensland and throughout her detention in Brisbane Women's Correctional Centre and Baxter Immigration Detention Facility, Ms Rau consistently maintained that she was a German tourist. She gave several names and dates of birth and conflicting accounts of how and when she had arrived in Australia. She conducted her discussions with German consular officers in German.

2. On the evidence then reasonably available, the responsible compliance officer in the Department of Immigration and Multicultural and Indigenous Affairs had a proper and lawful basis for forming a 'reasonable suspicion' that 'Anna' (as Ms Rau called herself) was an unlawful non-citizen, sufficient to justify her detention. Nevertheless, officers should not only have continued inquiries aimed at identifying Anna; they should also have continued to question whether they were still able to demonstrate that the suspicion on which the detention was originally based persisted and that it was still reasonably held.

3. DIMIA's inquiries concerning Ms Rau focused on establishing her identity for the purpose of enabling her removal from Australia. There was no corporate policy for or instruction to review the continued validity of the 'reasonable suspicion' that Ms Rau was an unlawful non-citizen.

4. There is no automatic process of review sufficient to provide confidence to the Government, to the Secretary of DIMIA or to the public that the power to detain a person on reasonable suspicion of being an unlawful non-citizen under s. 189(1) of the Commonwealth's *Migration Act 1958* is being exercised lawfully, justifiably and with integrity.

5. The case complexity and workload associated with enforcing and managing immigration detention policy have placed much pressure on DIMIA staff. Individual workloads are high, and many of the matters to be dealt with are sensitive and difficult. The speed of change in the immigration detention environment since 2000 has led to policy, procedures and enabling structures

being developed on the run. This has created challenges for DIMIA and its compliance and immigration detention staff.

6. A strong government policy calls for strong executive leadership, together with careful management, to ensure that enforcement and application of the policy are justified and equitable. Such a policy places on the accountable department an onerous responsibility for having in operation systems and processes designed to ensure integrity of application and demonstrable accountability and for engendering public confidence in the policy's operation. Initiatives are now being introduced, but the Inquiry found inadequate evidence of the required systems and processes in the compliance and immigration detention areas of DIMIA during the period of Ms Rau's detention.

7. There is considerable evidence of highly committed DIMIA staff—particularly at Baxter Immigration Detention Facility—having heavy workloads and trying to operate effectively despite instructions and requirements that inhibit or prevent effective performance rather than facilitate it.

8. There is a serious cultural problem within DIMIA's immigration compliance and detention areas: urgent reform is necessary. The combination of pressure in these areas and the framework within which DIMIA has been required to operate has given rise to a culture that is overly self-protective and defensive, a culture largely unwilling to challenge organisational norms or to engage in genuine self-criticism or analysis.

9. DIMIA officers are authorised to exercise exceptional, even extraordinary, powers. That they should be permitted and expected to do so without adequate training, without proper management and oversight, with poor information systems, and with no genuine quality assurance and constraints on the exercise of these powers is of concern. The fact that this situation has been allowed to continue unchecked and unreviewed for several years is difficult to understand.

10. During Ms Rau's detention the DIMIA management approach to the complexities of implementing immigration detention policy appeared to be 'process rich' and 'outcomes poor', with the predominant, and often sole, emphasis being on the achievement of quantitative yardsticks rather than qualitative performance. The organisational structure and arrangements fail to deliver the outcomes required by the Government in a way that is firm but fair and respects human dignity.

11. The lack of comprehensive 'cradle to grave' case management and of any effective accumulated assessment and review process in relation to mental health care, general treatment, and the identity inquiries conducted during Cornelia Rau's 10 months in immigration detention significantly affected the quality of care she received and the amount of time she spent in detention.

12. Ms Rau was detained in Brisbane Women's Correctional Centre for six months—an excessively long time. She was not a prisoner, had done nothing wrong, and was put there simply for administrative convenience. These facts alone should have been sufficient to prompt immediate consideration by DIMIA of her early transfer to a more suitable facility.

13. Ms Rau was held in immigration detention at Brisbane Women's Correctional Centre for six months because of a failure in DIMIA processes. It was not a failure of instructions. Migration Series Instruction 244 is well written and clear. The instructions were not followed. It was a failure of management processes and corporate oversight.

14. Statements by DIMIA operational and field staff make it obvious that many of DIMIA's compliance officers have received little or no relevant formal training and seem to have a poor understanding of the legislation they are responsible for enforcing, the powers they are authorised to exercise, and the implications of the exercise of those powers. The induction training package for compliance officers is inadequate.

15. Officers with direct responsibility for detaining people suspected of being unlawful non-citizens and for conducting identity and immigration status inquiries often lack even basic investigative and management skills. The Vivian Alvarez matter has also demonstrated that their knowledge of the capability of DIMIA information systems is inadequate.

16. The DIMIA database infrastructure is 'siloed', with little connectivity between systems. Important information that needs to be linked frequently for reasons of operational effectiveness and integrity is not effectively networked. There is limited search capacity and until recently little evidence—despite the problems caused by these deficiencies—of any structured attempt to improve the systems and so remove gaps and vulnerabilities.

17. There are serious problems with the handling of immigration detention cases. They stem from deep-seated cultural and attitudinal problems within DIMIA and a failure of executive leadership in the immigration compliance and detention areas.

18. The Vivian Alvarez incident occurred in 2001 and entailed events, practices and actions in 2003 and 2004, most of which confirm the systemic nature of the problems identified by the Inquiry into Cornelia Rau's detention.

19. During Ms Rau's detention there seemed to be a 'disconnect' between DIMIA detention policy development and management in Canberra and the realities of time frames for dealing with operational requirements in Baxter and the Queensland Regional Office. This is reflected in the lack of responsiveness to operational concerns and the failure to achieve desired performance outcomes.

20. Reform will need to come from the top, and external professional assistance will be necessary. The current immigration compliance and detention executive management team is unlikely—without significant independent leadership and support—to have the perspective or capacity to lead and bring about the major changes in mindset and practice that are required.

21. During the term of this Inquiry DIMIA continued to introduce new arrangements to overcome deficiencies. In a statement to the Senate Estimates Committee on 25 May 2005, the Secretary expressed profound regret at what has happened in some cases and acknowledged that DIMIA had made mistakes and that there is a need for change. The Minister also made a statement to the Senate Estimates Committee on the same day, outlining the initiatives taken and emphasising that, although changes can be made to policy, processes and legislation, these will be of little benefit without cultural change.

22. Anna's mental health assessment at Princess Alexandra Hospital, Brisbane, was inadequate, and the finding that she did not fulfil any diagnostic criteria for mental illness seems to have influenced the treatment she received throughout her time in immigration detention. The Inquiry is not critical that a diagnosis of mental illness failed to be made: that was difficult in the circumstances. But the fact that illness behaviour does not seem to have been considered a reasonable possibility and actively pursued and evaluated over the 10 months Anna was in immigration detention is cause for concern.

23. In the mental health assessment of Anna insufficient weight was given to her behaviour patterns and her 'odd' presentation features and history. Collateral history should have been sought from officers, other contact people and fellow detainees at both Brisbane Women's Correctional Centre and Baxter. Collection of integrated, cumulative data is an essential basis for assessment, particularly when a patient is uncooperative. Anna was uncooperative.

24. The mental health care delivered to Cornelia Rau while she was detained at Baxter was inadequate. Clinical pathways had been agreed between DIMIA and the South Australian Department of Health, but they were not effective. There was evidence of a significant communication problem between Glenside Hospital and Baxter, which delayed Ms Rau's admittance to Glenside for assessment by more than two months.

25. The detainee population requires a much higher level of mental health care than the Australian community. The infrequency of the consulting psychiatrist's visits to Baxter constitutes a serious shortcoming. Expert mental health opinion has it that more frequent, regular visits—together with a sufficient number and structure of mental health–trained nurses, psychologists and primary practitioners who could initially assess and triage for mental illness—would allow a more effective clinical system of care.

26. The lack of any focused mechanism for external accountability and professional review of standards and arrangements for the delivery of health services is a significant omission. An expert body specifically focused on health matters is recommended, to complement and strengthen the efforts of the Immigration Detention Advisory Group and the Commonwealth Ombudsman.

27. The infrastructure and operations at Baxter do not allow the Government's policy expectations for the environment for immigration detainees to be realised. Structural modifications are needed, and greater flexibility should be allowed in the care and management of detainees and the treatment of problems associated with mental health.

28. The current detention services contract with Global Solutions Limited is fundamentally flawed and does not permit delivery of the immigration detention policy outcomes expected by the Government, detainees and the Australian people.

29. The systems and processes at Baxter that derive from the detention services contract make it impossible to deliver the desired policy outcomes. The problems result from a mix of poor procedures and processes; an excessive focus on auditing compliance with performance measures that often provide little information about the outcomes actually being delivered; limited management flexibility; and lack of oversight by executive management in Canberra.

30. The arrangements governing surveillance of female detainees in Red Compound and the Management Unit at Baxter are unacceptable. Contract requirements should insist that, in all but emergency or extraordinary circumstances, surveillance of female detainees should be done by female detention officers.

31. The primary deficiency in DIMIA's efforts to identify Anna was the lack of an organised, systematic approach to the inquiry process. Individual officers did their best, but their efforts were not coordinated and there was nothing to guide them in their actions. There was no coherent methodology, and nobody was in charge.

32. There is an urgent need for the establishment of a national missing persons database or capacity that will provide a national recording and search capability and enable searches against a range of biometric data—including photographic facial recognition, personal description and distinguishing features—that would aid in personal identification. This is a national priority, and it calls for a whole-of-government approach.

33. The links between managing 'missing patients' and 'missing persons' are not well defined in Australia. They do not consistently allow for the exchange of personal information between medical facilities and police sufficient to enable police to identify the level of risk and vulnerability of a mental health patient who goes missing.

34. DIMIA's attitude to the provisions of the Commonwealth *Privacy Act 1988* is unduly cautious and has operated to limit the range and effectiveness of inquiries into the status and identity of suspected unlawful non-citizens in a way that is clearly against the public interest and the intent of the Act. Had a photograph of Anna been released early, her journey might have been a short one.

Recommendations

The Inquiry's recommendations are numbered according to the report section in which they appear.

3.1 Immigration detention under s. 189 of the Migration Act

Recommendation 3.1

The Inquiry recommends that DIMIA:

- design, implement and accredit—for all compliance officers and other staff who might reasonably be expected to exercise the power to detain a person under s. 189(1) of the *Migration Act 1958*—a legislative training package that provides the officers with the requisite knowledge, understanding and skills to fairly and lawfully exercise their power

- ensure that the training comprehensively covers the use of DIMIA and other agencies' databases and search capability and the conduct of searches to support investigations

- restrict the authority to exercise the power to detain a person under s. 189(1) to staff who have satisfactorily completed the training program and who are considered to be otherwise sufficiently experienced to exercise that power

- ensure that a component on 'avenues of inquiry' be included in the Certificate IV in Government (Statutory Investigation and Enforcement) Training Program delivered to DIMIA officers.

3.2 Imprisonment in Brisbane Women's Correctional Centre

Recommendation 3.2

The Inquiry recommends that, as a matter of urgency, DIMIA:

- take all necessary action to formalise its arrangements with the Queensland Department of Corrective Services for the detention of immigration detainees, to ensure that the arrangements reflect the standards of care and treatment necessary for detainees and that the responsibilities, accountabilities and reporting arrangements of all parties are clarified and understood.

- adopt and confirm the principle that, unless there are exceptional circumstances, detainees will be held in correctional facilities only until alternative arrangements can be made for their immigration detention

- consistent with the foregoing—and having regard to the recently introduced government policy to restrict the period of detention in a prison to 28 days—take all necessary action to minimise the period of time that immigration detainees are held in a prison or other correctional facility

- settle arrangements with relevant governments or corrective services departments to enable the placement of a DIMIA officer (or officers) in each corrections facility in which immigration detainees are being held, to ensure that the Commonwealth's duty of care obligations towards each person in immigration detention in a prison can be demonstrably met and that the Immigration Detention Standards are maintained.

3.3 Management responsibilities

Recommendation 3.3

The Inquiry recommends that, as a matter of priority, DIMIA ensure that when an immigration detainee who has committed no criminal offence is placed in a correctional facility immediate steps are taken to find a more suitable place of detention and to transfer the detainee to that place.

Recommendation 3.4

The Inquiry recommends that DIMIA create a dedicated Identity and Immigration Status Group to ensure that, where the identity or immigration status of a detainee remains unresolved after initial inquiries have been completed, frequent follow-up reviews are conducted.

The Identity and Immigration Status Group should:

- review the continued validity of 'reasonable suspicion'–based detention on a regular basis—and at least every month—against the background of accumulating information
- be staffed by people who have wide experience in compliance and detention policy and operations, are familiar with the associated Commonwealth and state and territory legislation and arrangements, and have skills in investigation and analysis
- have the authority, responsibility and accountability for conducting and/or overseeing all necessary inquiries to establish the identity and immigration status of unidentified detainees
- report monthly to executive management on the status of individuals still in immigration detention, the reason why they are being detained, what is currently being done to resolve the situation, and the expected date for resolution.

Recommendation 3.5

The Inquiry recommends that DIMIA critically review the functions of the Detention Review Committee and restructure its focus and operations to ensure that it:

- is chaired at branch head level or higher, depending on the matter under consideration
- draws on advice and reports from the Identity and Immigration Status Group
- comprehensively reviews and analyses complex or difficult detainee cases

- seeks input from detention facility managers and provides feedback
- determines appropriate action and ensures monitoring and reporting on progress and outcomes to executive management
- clarifies case management responsibility, intended outcomes and reporting time frames
- is responsible for providing to executive management advice on critical or sensitive cases.

4.2 Development and functions

Recommendation 4.1

The Inquiry recommends that DIMIA develop and implement arrangements to ensure that a detainee's file—together with their medical file and any related performance and behaviour notes or review—accompanies the detainee wherever they are placed or transferred. Such files should be tracked centrally by Canberra to ensure consistency in the briefings that are provided.

Recommendation 4.2

The Inquiry recommends that, as an integral part of renegotiating its contract with GSL (see recommendation 7.7), DIMIA:

- agree with GSL innovative changes to overcome the challenges to staffing and service delivery presented by Baxter's remote location
- develop and implement effective arrangements for monitoring and managing the outcomes, to maintain quality services and ensure that the Government's policy objectives are met in a way that protects the health, safety and dignity of detainees
- rely on the advice and leadership of the Detention Contract Management Group (see recommendation 7.6) when negotiating these changes.

4.3 The immigration detention environment

Recommendation 4.3

The Inquiry recommends that DIMIA and GSL—in consultation with detainees—establish a continuing program of communication and information provision to:

- ensure that all detainees understand why they are being kept in detention, the nature of the detention environment, the Commonwealth Government's duty of care and its objectives for the immigration detention environment, and the respective roles of GSL and DIMIA
- explain to detainees how the different compounds and the Residential Housing Project work, why they have different rules and how they are administered, and the details of the complaints process and its purpose
- explain the visitor arrangements, the process visitors need to go through to get into the Visitors Centre, and why it is necessary
- explain to detainees the arrangements, and the reasons for them, in relation to such things as food storage, contraband and drugs, medical treatment, distribution of medicines, why requests for particular medications are refused, and any other concern that consultation with detainees might reveal
- establish a process for determining a list of topics for discussion one week before each consultation forum is to be held.

Recommendation 4.4

The Inquiry recommends that GSL and DIMIA prepare a small number of information posters for the Visitors Centre to inform visitors about important things such as:

- booking arrangements for visits, the 'visitor lists' prepared for each detainee, and why visitors can see only the detainees they have nominated on their visitor application form

- why food brought into the Visitors Centre must be consumed there and cannot be taken back to detainees' rooms and why parcels cannot be left for detainees but must be sent via Australia Post

- what is and is not allowed to be brought into the Visitors Centre—for example, photographs, photo albums, clothes and books

- what the security screening machine is, what it does, why it is necessary, and why some items and articles of clothing (such as shoes) give the wrong signal and might need to be removed.

GSL and DIMIA should also establish for visitors a program of information sessions that provide a general briefing on Baxter, covering such topics as what the compounds are, why they differ and how they operate, arrangements for food preparation and barbecues, the nature of education sessions and how they are run, access to telephones, inter-compound movement, and the arrangements for dealing with complaints. The arrangements for these information sessions—developed in consultation with visitors—should cover the frequency of the sessions, their format, and the topics for discussion.

Recommendation 4.5

The Inquiry recommends that GSL and DIMIA—in consultation with detainees and visitors—establish arrangements for regularly:

- providing to detainees and visitors feedback on questions they have raised

- informing them of action being taken and progress made

- advising them when action has been taken and the matter has been finalised and what were the outcomes.

Visitors should be encouraged to raise queries, perhaps through a request form, which must be promptly acknowledged and followed up.

Recommendation 4.6

The Inquiry recommends that DIMIA and GSL consult with detainees and explore options—such as cooking their own food—that will facilitate greater independence and variety in detainees' food ordering and preparation.

Recommendation 4.7

The Inquiry recommends that GSL and DIMIA:

- replace the current security screening machinery with two or, preferably, three more modern machines
- take immediate steps to update and increase the size of the Visitors Centre
- in consultation with detainees and visitors, ensure that the environment is more open and hospitable
- establish processing arrangements for visitors that begin before the official visiting hours and do not result in a decrease in the available visiting time.

Recommendation 4.8

The Inquiry recommends that DIMIA, in consultation with GSL, consider allowing detainees to make regular, supervised monthly visits to Port Augusta and other suitable locations, to enable them to interact with the community and participate in activities such as sporting fixtures, picnics and barbecues. Participation would be a privilege that is earned. The arrangements should be reviewed after six months in order to determine how well they are working.

4.4 Operational considerations

Recommendation 4.9

The Inquiry recommends that, as an immediate priority, DIMIA and GSL:

- agree on and implement arrangements that will ensure that when female detainees are placed in Red One or the Management Unit they are checked only by female detention officers

- negotiate whatever changes to the contract are needed in order to accommodate this initiative
- ensure that staffing of detention officers when female detainees are in Red One and the Management Unit is reflected accurately in the operational records that are kept.

Recommendation 4.10

The Inquiry recommends that DIMIA develop and implement arrangements to ensure that:

- accurate, relevant, clear and concise briefing notes on each detainee are prepared before they arrive at Baxter and that these records are attached to the detainee's file
- DIMIA and GSL staff and contractors who are likely to have close contact with detainees are given an accurate briefing on each detainee before the detainee's arrival at Baxter or as soon as practical thereafter
- the briefing notes are used to inform the detainee induction process
- staff refer to the briefing notes for guidance, so that they can respond suitably to the needs of individual detainees.

4.5 Infrastructure

Recommendation 4.11

The Inquiry recommends that, having regard to the findings of the Royal Commission into Aboriginal Deaths in Custody, DIMIA and GSL:

- seek expert advice on the Muirhead standards as they relate to a custodial environment
- carry out an immediate review of the Management Unit and effect the changes necessary to conform with the Muirhead standards

- carry out a thorough review of the purpose and nature of the Management Unit in the light of a changed immigration detention environment and a changed detainee population

- agree on the changes that need to be made to the Operating Procedures in order to give effect to the new arrangements.

Recommendation 4.12

The Inquiry recommends that DIMIA consider constructing a flexible 'intermediate facility' at Baxter to enable more appropriate accommodation to be provided to detainees who cannot be allowed to remain in an open compound but who for various reasons should not be placed in the behaviour management environment of Red One or the Management Unit. The facility should be designed in such a way as to provide sufficient flexibility to be configured to accommodate a person with specific needs, such as Anna, or a family or individual requiring temporary relief from their compound or intensive medical observation.

Recommendation 4.13

The Inquiry recommends that DIMIA consider making structural changes to the Baxter compound accommodation for detainees in order to:

- create two-room and three-room family units from adjacent rooms by removing walls between adjoining rooms and replacing them with movable dividers

- open up the closed compound structure by removing some of the rooms and allowing views outside the compound and beyond the detention facility itself

- use the opened-up space to create a vegetable or native garden or to other good effect.

5.3 Some possible solutions

Recommendation 5.1

The Inquiry recommends that the DIMIA Secretary:

- commission and oversee a review of departmental processes for file creation, management and access
- take a leadership role in implementing the major changes that will probably be necessary as a result
- ensure that staff receive training in effective file management practices and the reasons for them
- make executive management personally accountable for ensuring that sound file management practices are followed.

Recommendation 5.2

The Inquiry recommends that the DIMIA executive ensure the preparation for staff of a checklist to be used as a minimum standards template for conducting identification inquiries. The checklist should provide a menu of avenues of inquiry, specify a sequential order for investigations, be included as an attachment to the DIMIA Interim Instruction on Establishing Identity in the Field and in Detention, and form a part of the personal investigation file.

The DIMIA executive should also:

- formalise the Interim Instruction together with the checklist attachment as soon as practicable
- ensure that suitable training modules are developed and delivered to all staff—including managers—who might be involved in identification inquiries
- institute management arrangements to ensure that such inquiries are linked as appropriate to the Identity and Immigration Status Group.

Recommendation 5.3

The Inquiry recommends that, as a matter of urgency, the Commonwealth Government take a leadership role with state and territory governments to develop a national missing persons policy to guide the development of an integrated, national missing persons database or capacity. Initial policy development could be carried out under the guidance of the Australasian Police Ministers Council, with the output submitted to governments for consideration and agreement.

Recommendation 5.4

The Inquiry recommends that, on the basis of an agreed national missing persons policy, the Commonwealth Government take a leadership role with state and territory governments in developing and implementing a national missing persons database or capacity that will provide an effective national recording and search capability under both names and biometric data. Discussions in this regard should be informed by reporting on the progress and success of the Minimum Nationwide Person Profile project to the Australasian Police Ministers Council.

Recommendation 5.5

The Inquiry recommends that DIMIA reassess its position in relation to privacy in all its public policy operations associated with immigration detention. In revising its practices, it should:

- seek advice from the Privacy Commissioner and the Minister
- take immediate steps to increase awareness and understanding on the part of relevant DIMIA staff—including executive staff—of the principles and provisions of the Commonwealth's *Privacy Act 1988*
- revise and strengthen procedures relating to identity in immigration detention, to ensure that the wider options potentially created by this approach are considered.

Recommendation 5.6

The Inquiry recommends that DIMIA establish for inquiries about immigration detainees a 'hotline' facility that can deal with those inquiries as a 'one-stop shop'. DIMIA should ensure that the contact officer position is continuously staffed, regardless of the absence of any officer, and that all embassies and high commissions are advised of the details of these arrangements and ask their consular officials to direct all immigration detention inquiries to the nominated DIMIA contact officer in the first instance.

Recommendation 5.7

The Inquiry recommends that DIMIA ensure that:

- fingerprints and other biometric data collected from individuals in immigration detention are stored on a national database to facilitate investigations by Commonwealth and state and territory police and other law enforcement agencies
- appropriate liaison arrangements are made with CrimTrac
- any DIMIA decisions in relation to the collection and storage of biometric data are consistent with strategies being pursued by CrimTrac in response to guidance by Australian governments.

6.3 Events in New South Wales

Recommendation 6.1

The Inquiry recommends that the Commonwealth Government encourage state and territory authorities to implement a requirement that on each occasion a 'missing patient' report is made to police by a hospital, a medical practitioner or other facility, the report must be accompanied by sufficient information about the patient's history to clearly indicate the person's degree of risk and vulnerability, so that police can determine whether the person should be also classified as a missing person and what immediate action is necessary.

6.4 Events in Queensland

Recommendation 6.2

The Inquiry recommends that governments and health authorities take steps to encourage clinicians to be more clinically assertive in creating the optimum conditions in which to assess patients—noting that there is little point in making a referral to an in-patient unit if adequate assessment cannot take place.

In consultation with the hospital, facility or clinic, DIMIA should establish containment arrangements that do not adversely affect the assessment environment and also meet the requirements of the Migration Act. If the problem lies in the Act, the Act should be changed.

Recommendation 6.3

The Inquiry recommends that, when immigration detainees are entrusted to the care of a hospital, medical centre or other health care facility, DIMIA ensure that clinicians are asked to pay particular attention to 'odd' presentation features and to any 'odd' history. If a detainee provides little information or is uncooperative, collateral history should be sought from officers and others, including fellow detainees.

Recommendation 6.4

The Inquiry recommends that DIMIA develop and implement procedures and systems at immigration detention facilities to provide for the progressive collection, integration and assessment of cumulative data from all records of detainee activity. It should ensure that such information is available and is provided along with medical information when clinicians are making mental health assessments and determining treatment options.

Recommendation 6.5

The Inquiry recommends that the Commonwealth Government initiate early discussions with the Queensland Government to identify and explore ways in the Queensland mental health system of more effectively aligning existing clinical pathways between prison and in-patient units, to allow for continuity of clinical care and assessment following an immigration detention patient's return to prison, so that clinicians assessing patients can follow them up.

Recommendation 6.6

The Inquiry recommends that DIMIA work closely with the Queensland Department of Corrective Services to review existing clinical pathways and training to:

- identify and explore practical ways in which preliminary observations of an immigration detainee showing signs of possible mental illness could be more speedily advanced towards action for assessment
- institute effective reporting and consultation mechanisms, so that DIMIA can discharge its responsibilities for the care and safety of detainees.

6.5 Events in South Australia

Recommendation 6.7

The Inquiry recommends that DIMIA ensure that mechanisms are established to:

- require GSL to provide for detention officers training in observing, recognising and reporting behaviour and signs that may be symptomatic of mental illness
- ensure that as much emphasis is given to recruiting people with health and welfare training and skills as is given to custodial and security qualifications and experience
- capture significant concerns about the wellbeing of any detainee, as expressed by detention officers, other detainees and visitors
- ensure that this information is communicated in a timely manner to medical staff, to allow the information to be taken into account in the mental health assessment process.

Recommendation 6.8

The Inquiry recommends that DIMIA explore the possibility of contracting the South Australian Mental Health Service or the South Australian Forensic Mental Health Service to service the mental health care needs of immigration detainees at Baxter, with a view to providing seamless, effective service and improving the continuity of patient care.

Recommendation 6.9

The Inquiry recommends that—in consultation with the Rural and Remote Mental Health Service and the Baxter medical team—DIMIA and the South Australian Department of Health:

- conduct a thorough review of clinical pathways, arrangements and consultative machinery proposed in the memorandum of understanding to make certain that respective responsibilities, and particularly lead responsibilities, are clearly defined

- ensure that consultation, coordination and reporting arrangements are clearly defined and enable management oversight of the delivery of appropriate levels of mental health care to detainees and provide to DIMIA adequate information to enable it to demonstrably meet its duty of care on behalf of the Commonwealth Government.

6.7 Standards of health care

Recommendation 6.10

The Inquiry recommends that, as a matter of urgency, DIMIA establish the Health Advisory Panel, as specified in the detention services contract, to help GSL develop and review Baxter's health plans and to provide, for health and social service professionals employed by GSL, access to well-qualified specialists and consultants—particularly in more complex cases or cases that have become protracted.

Recommendation 6.11

The Inquiry recommends that the Minister for Immigration establish an Immigration Detention Health Review Commission as an independent body under the Commonwealth Ombudsman's legislation to carry out independent external reviews of health and medical services provided to immigration detainees and of their welfare. The Commission should report to the Minister and:

- be appropriately staffed and resourced, with a core of experienced people with relevant skills
- have the ability to invite specialists to participate in particular reviews and audits
- have the power to initiate its own reviews and audits
- in consultation with the Immigration Detention Advisory Group and the Health Advisory Panel, carry out an independent assessment of the current structure of health care arrangements at immigration detention facilities and of the adequacy and quality of the services provided
- in consultation with the Detention Contract Management Group (see recommendation 7.6), review each health and medical care performance measure specified in the detention services contract and, where necessary, replace it with a more appropriate measure and propose arrangements for monitoring the measures
- recommend more effective arrangements for providing health and medical services to immigration detainees, together with arrangements for monitoring and management of the provision of those services
- identify the most appropriate national accreditation standards applicable to the immigration detention environment that service providers should be required to meet
- coordinate its operations with the Ombudsman and the Immigration Detention Advisory Group in order to maximise the effectiveness of oversight machinery.

Recommendation 6.12

The Inquiry recommends that the Immigration Detention Health Review Commission, in consultation with the Health Advisory Panel and the Mental Health Council of Australia, investigate relevant studies of detainee populations and advise on the level of mental health services applicable to the immigration detention population in Baxter, to reflect the much higher incidence of mental disorders that is evident.

Recommendation 6.13

The Inquiry recommends that the Immigration Detention Health Review Commission work closely with the Immigration Detention Advisory Group and the Health Advisory Panel to review the adequacy of current systems for continuing professional development, to ensure the maintenance of high standards in the delivery of health services to immigration detainees.

6.8 Mental health legislation

Recommendation 6.14

The Inquiry recommends that, in redrafting the state's *Mental Health Act 1993*, the South Australian Department of Health ensure that the Act makes provision for greater access to psychiatric in-patient assessment for involuntary patients. The Queensland *Mental Health Act 2000* and other legislation, such as that applying in New Zealand, might offer useful insights.

7.2 Immigration policy and implementation

Recommendation 7.1

The Inquiry recommends that DIMIA develop and implement a holistic corporate case management system that ensures every immigration detention case is assessed comprehensively, is managed to a consistent standard, is conducted in a fair and expeditious manner, and is subject to rigorous continuing review.

7.3 Culture, processes and attitudes

Recommendation 7.2

The Inquiry recommends that DIMIA critically review all Migration Series Instructions from an executive policy and operational management perspective with a view to:

- discarding those that no longer apply in the current environment
- where necessary, rewriting those that are essential to the effective implementation of policy, to ensure that they facilitate and guide effective management action and provide real guidance to busy staff
- ensuring that up-to-date, accurately targeted training is delivered to staff who are required to implement the policy guidelines and instructions
- establishing regular management audits that report to executive management, to ensure that the Migration Series Instructions are up to date and DIMIA officers are adhering to them.

7.4 Structure and operations

Recommendation 7.3

The Inquiry recommends that the Minister commission the Secretary of DIMIA to institute an independent professional review of the functions and operations of DIMIA's Border Control and Compliance Division and Unlawful Arrivals and Detention Division in order to identify arrangements and structures that will ensure the following:

- DIMIA's compliance and detention functions are effectively coordinated and integrated.
- The desired outcomes of these functions and the necessary resources—including the number and the skills profile of staff—are clearly identified before a decision is made on the structure that will best enable effective and equitable service delivery.

- The restructuring accommodates these requirements and ensures that arrangements are made to monitor and manage the high-level risks to the Commonwealth inherent in immigration detention.

- There is a seamless approach to dealing with immigration detention operations and case management.

- The aims and objectives of the Government's immigration detention policy are fairly and equitably achieved and human dignity is demonstrably respected.

Recommendation 7.4

The Inquiry recommends that DIMIA:

- review the current training programs for compliance and detention officers to ensure that induction and in-service programs convey an accurate and contemporary picture of DIMIA operations and adequately prepare operational and management staff for all aspects of the work they will be expected to do

- ensure that such training particularly deals with the consultation, coordination, reporting and management requirements of compliance and detention operations and shows how to manage the risks inherent in the performance of these functions

- immediately develop and implement a policy that requires that every decision to detain a person on the basis of 'reasonable suspicion of being an unlawful non-citizen' is reviewed and assessed within 24 hours or as soon as possible thereafter.

DIMIA should incorporate this policy of 24-hour review in all relevant training programs and operational guidelines to ensure that compliance officers understand the need to:

- objectively determine the reasons and facts upon which a decision to detain is made

- verify the validity of the grounds of 'reasonable suspicion' and the lawfulness of the detention

- take immediate remedial action as necessary and report the circumstances of any unresolved matter to the Identity and Immigration Status Group.

7.5 Contracting and government policy outcomes

Recommendation 7.5

The Inquiry recommends that DIMIA seek from the Australian National Audit Office a detailed briefing on the findings of the ANAO report on the detention services contract with GSL, to obtain the ANAO's guidance on reviewing the Commonwealth's current detention services contract with GSL and identify where and how changes can and should be made.

Recommendation 7.6

The Inquiry recommends that the Minister establish a Detention Contract Management Group made up of external experts to provide direction and guidance to DIMIA in relation to management of the detention services contract and report quarterly to the Minister. Group members should have expertise in the following areas:

- project management in a high-risk government policy environment
- corrections management
- contracting strategy and management
- performance monitoring and management
- legal contracting and statutory reporting requirements
- management accounting and financial management.

The Detention Contract Management Group should have DIMIA representation at First Assistant Secretary level to advise on policy implications and ensure that the Group's directions are implemented effectively through new departmental arrangements.

Recommendation 7.7

The Inquiry recommends that, as a priority task, the Detention Contract Management Group review the current contract for detention services and advise DIMIA, in consultation with GSL, in order to identify and agree changes in arrangements that would:

- facilitate delivery of the detention services outcomes required by the Government
- provide the basis for an effective, responsible business partnership that values and encourages innovation by GSL
- encourage GSL to carry out internal audits of its own performance and arrangements in order to maintain high-quality service delivery
- develop, in consultation with GSL, a new regime of performance measures and arrangements for their continued monitoring and management that are meaningful and add value to the delivery of high-quality services and outcomes
- agree with GSL arrangements for independent, external assessment and review as required
- provide for renegotiating arrangements for the provision of health care when the Immigration Detention Health Review Commission and the Health Advisory Panel have been established and have provided advice on new requirements
- foster a shared partnership interest in achieving effective policy outcomes to ensure that the Government's objectives and the high standards of behaviour expected by the Government are met.

8.4 The Vivian Alvarez matter

Recommendation 8.1

The Inquiry recommends that, as an urgent priority, DIMIA commission a thorough, independent review and analysis of its information management systems. The review should be carried out by an experienced, appropriately qualified information technology systems specialist and should aim to:

- identify the real organisational policy and operational information management requirements—particularly requirements for interconnectivity, search capacity and growth
- assess whether these requirements can be met cost effectively by further development of existing systems under the current architecture
- if not, identify the broad development parameters and indicative cost and time frame for implementation
- formulate an implementation plan for consideration by the DIMIA executive.

Recommendation 8.2

The Inquiry recommends that, as a priority, DIMIA take steps to establish links or authorised access to the Immigration Review Tribunal's information systems, sufficient to ensure that the names and immigration status of people whose circumstances are subject to review are readily available to DIMIA compliance officers.

Recommendation 8.3

The Inquiry recommends that DIMIA:

- develop, for all immigration detention and compliance executives and managers, a briefing program that clearly explains the need for a decision to be made to remove from Australia a person reasonably suspected of being an unlawful non-citizen and the responsibilities associated with exercising that power
- ensure that the central factors relating to removals and the implications for identity investigations and the exercising of detention powers are included in departmental training programs for compliance and removals officers
- ensure that the implications of all aspects of identity checking, detention and removals are included in the checks and balances exercised by the Identity and Immigration Status Group.

Australian Government
Department of Immigration and Multicultural and Indigenous Affairs

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

people our business

Contents

1. Background

In February 2005, the Minister for Immigration and Multicultural and Indigenous Affairs, Senator the Hon Amanda Vanstone (the Minister) commissioned Mr Mick Palmer AO APM to investigate the circumstances of the immigration detention of Ms Cornelia Rau.

The Inquiry was conducted in accordance with the terms of reference issued to Mr Palmer on 9 February and 2 May 2005. The report was highly critical of the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA). The 49 recommendations go to specific issues raised by Ms Rau's case and Mr Palmer's preliminary examination of the Vivian Alvarez/Solon case. Mr Palmer's findings also point to the need for broader cultural change in DIMIA across leadership, governance, training, client service, openness, quality assurance, values and behaviour. On 14 July 2005, the Australian Government indicated that it accepted the thrust of the findings and the recommendations. Clearly mistakes were made. This report shows the very substantial commitment the Government is making to address the concerns Mr Palmer has raised.

This report has also been informed by my discussions with the Commonwealth Ombudsman and Mr Neil Comrie AO APM on the draft report of the inquiry into the circumstances of the Vivian Alvarez matter. The initiatives described below are consistent with both the recommendations of the Palmer Report and those in the draft report by the Commonwealth Ombudsman on Ms Alvarez's case.

This Plan indicates action the Government has taken to date, and measures that will be taken, to address both the specific recommendations in the Palmer Report and the need to achieve cultural change in DIMIA.

I will provide a progress report to the Minister in September 2006 that will be tabled in Parliament.

2. Achieving cultural change in DIMIA: values, standards, stronger accountability and governance

The Prime Minister announced my appointment as Secretary to DIMIA on 10 July 2005. On 14 July 2005 Dr Peter Shergold, Secretary, Department of the Prime Minister and Cabinet announced the appointment of two Deputy Secretaries and a Change Management Taskforce (CMTF) to lead DIMIA in a process of administrative reforms. This process must shift DIMIA from an organisation described by Mr Palmer as 'process rich and outcomes poor', 'overly defensive', 'assumption driven' and 'unwilling to engage in genuine self-criticism or analysis' to one which is client-focused and effective in its decision-making and operational roles.

On 8 August 2005, I briefed all DIMIA staff on the direction for change and the three major themes that emerge from the Palmer Report. In order to meet the expectations of the Government, the Parliament and the wider community, DIMIA must:

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

Change is needed at the most fundamental levels if these objectives are to be met. It is not a short term agenda. DIMIA is an organisation of approximately 5,600 people who work on a range of activities across Australia and in approximately 60 countries around the world. Changing the culture in an organisation this size will take time, resources and ongoing commitment. Strong leadership, vision and direction from the DIMIA executive, appropriate governance arrangements, clear lines of communication, including expectations from senior management and a supportive environment will be fundamental aspects of the change.

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 1958* (the Migration Act), and the need for a substantial investment in appropriate systems and other support for their activities. Together with the governance and accountability measures described above, better training and support will result in much better case management and a firmer client focus for the Department.

3. Implementing change

The response to the Palmer Report is complex. It addresses both the specific recommendations and the need for broader cultural change. The plan places each recommendation and project under broad themes in line with the spirit of the Palmer recommendations. These are that DIMIA will be a more open and accountable organisation, it will ensure and demonstrate fairer and more reasonable dealings with clients, and will have well trained and supported staff who actively embrace the first two themes.

Some initiatives were underway before Mr Palmer reported, which have improved the handling of DIMIA compliance and detention cases. These were announced by the Minister in Parliament on 25 May 2005. A range of new initiatives will be delivered by the end of 2005 and further measures will be developed during that period for implementation in 2006. These are listed in Attachment A.

3.1 An open and accountable organisation

DIMIA's broad objectives against this theme are to improve the structure and governance of the Department, to focus on clients as individuals, to ensure quality decision making, and to communicate better with the wider community.

Part of the solution lays in improving departmental structures and governance frameworks. Change in DIMIA is underway and will be fully implemented by the end of December 2005. The new structure will establish clear lines of responsibility and accountability through:

- three Deputy Secretaries (this includes an additional Deputy Secretary position);

- improved governance arrangements - in particular, there will be a high level Values and Standards Committee with external representation (including from the Commonwealth Ombudsman's Office and the Australian Public Service Commission) to ensure the organisation is meeting community expectations and focusing on meeting the Australian Public Service values;
- a new branch led by a Chief Internal Auditor, with a significantly expanded budget, to manage an enhanced internal audit programme that will strengthen compliance checking (i.e. are DIMIA officers actually doing what the law or our instructions require?) and areas identified as high risk by Mr Palmer, and to implement a national quality assurance framework, particularly around decision-making;
- a new Strategic Policy Group to monitor and report on the implementation of the Palmer programme and to better coordinate the development and delivery of policy in DIMIA; and
- examining State and Territory Office arrangements, with a particular emphasis on appropriate funding levels for operations, training and support.

As recommended by Mr Palmer, there has been a particular focus on the detention and compliance areas of the Department:

- a consultant has been engaged to review the functions and operations of detention and compliance activities (to report by end December 2005);
- the consultant will also review the detention services contract (also reporting by the end of December);
- the Unauthorised Arrivals and Detention Division and the Border Control and Compliance Division (at the centre of Mr Palmer's criticism) have been split into three new divisions that will provide a better balance of responsibility and accountability; and
- two key senior executives have been recruited from other agencies to perform critical roles leading the new Detention Services Division and the Compliance Policy and Case Coordination Division.

Quality decision-making is fundamental to the success of DIMIA operations. Measures to address this issue include:

- Detention Review Managers (DRM) have been established in all State Offices where people are detained. They review all detention cases and ensure compliance with standard procedures. DRMs are alerted of all cases within 48 hours of a person's detention, but within 24 hours where the identity is in doubt. DRM arrangements will be assessed as part of the review of the functions and operations of detention and compliance activities;
- the new Chief Internal Auditor will develop a national quality assurance programme, an expanded and retargeted internal audit programme, and improved risk management processes; and
- the DIMIA Chief Lawyer will examine the legislative framework to identify any amendments that would minimise the prospect of illegal detention and anticipate possible legal defects.

Public confidence in DIMIA's implementation of policy is an important indicator of the Department's overall effectiveness. The executive of DIMIA will work closely with the new National Communications Manager to drive more open engagement with the public and key individuals and organisations. The Immigration Detention Advisory Group (IDAG) will be expanded in membership and scope and additional resources will be provided in DIMIA to support IDAG. The DIMIA internet website will be redeveloped to ensure better public access to information. There will be improved engagement with agencies that have a role in external scrutiny through a new Review Coordination Branch and the involvement of external agencies and the community in the Department's governance framework (e.g. the Audit Committee will have an external chairman and the Values and Standards Committee will have external members).

3.2 Fair and reasonable dealings with clients

DIMIA has a very broad client base and receives multiple contacts from individuals in a range of ways: face to face, by telephone, by email, and through electronic and traditional means of lodging applications. Because of DIMIA's international network, this contact goes on 24 hours a day, seven days a week all around the world. In 2004-05, DIMIA handled:

- over 4.5 million visa applications;
- over 4.2 million temporary entry grants;
- over 130,000 permanent migration grants;
- nearly 100,000 citizenship grants;
- 1.9 million telephone inquiries; and
- over 22 million people travelling across the border.

Case management

The majority of cases handled by DIMIA are relatively simple and finalised quickly. A very small proportion become complex for a range of reasons. Mr Palmer criticised DIMIA for its lack of holistic case management and a sufficiently flexible and responsive approach that allows for effective management of the more complex cases.

A high level taskforce has been established in DIMIA to provide advice on the handling of complex and sensitive cases. It will have an ongoing role under the new DIMIA structure.

A national case management framework will be developed in the new Compliance Policy and Case Coordination Division that will involve better organisational arrangements, better systems support and a more clearly defined role for the non-government sector. The framework will be developed by the end of 2005 for implementation during 2006.

An important aspect of the framework is development of a pilot community care model for immigration detainees assessed as eligible for alternative detention arrangements and for others of particular compliance interest (e.g. those who have multiple bridging visas). The model will be developed in partnership with the community sector. Services such as counselling, assessment, care and community placement will be considered for certain

individuals while DIMIA decisions are made regarding removal or, where appropriate, temporary or permanent settlement. The model will address concerns about the health impact of placing low risk unlawful non-citizens in detention centres while their cases are being resolved. The model will be developed by the end of December 2005 and the pilot will be conducted over the 12 months from January to December 2006, with further implementation to be considered by the Government once the pilot has been assessed.

Health and well being of detainees

A Detention Health Services Taskforce has been established in DIMIA, led by a policy expert on mental health issues, which is working closely with the Department of Health and Ageing and relevant State health authorities. The Taskforce will develop a long term detention health services delivery strategy by the end of December 2005 aimed at providing better mental health care arrangements and a transparent governance framework for health services delivery. The governance framework will include the enhanced role of the Commonwealth Ombudsman as Immigration Ombudsman. The strategy will address all of the specific health related recommendations made by Mr Palmer. In the meantime the following measures are already in place or are being addressed:

- a multidisciplinary mental health clinical team is in place at Baxter Immigration Detention Facility (BIDF), with an equivalent capacity in other detention facilities to be established;
- a Memorandum of Understanding with the South Australian Department of Health is close to finalisation to formalise the current clinical protocols currently in place at BIDF;
- access to private psychiatric facilities has been established for immigration detainees;
- Professor Harvey Whiteford (one of the Government's key mental health advisers) has been engaged to advise DIMIA on detainee health strategies;
- clinical audits of health services have been commissioned and will be undertaken by members of the Royal Australian and New Zealand College of Psychiatrists and the Royal Australian College of General Practitioners; and
- additional expertise has been recruited by the detention service contractor (GSL).

The new Detention Services Division in DIMIA is developing a detention services strategy that will address infrastructure issues. The strategy will be developed by the end of 2005, for delivery in 2006. The Minister has already announced a major development programme for Baxter that addresses the infrastructure issues raised in the Palmer Report. Mr Palmer's recommendation regarding arrangements for the handling of female detainees in the management unit at Baxter has already been addressed. The provision of immigration detention facilities in Queensland is under consideration. Negotiations are underway with the CEO of the Shaftesbury Campus near Brisbane, who has offered the facility to assist with accommodation of people in immigration detention. However, the Queensland Government has

indicated it has concerns about whether the CEO is entitled to sublease campus facilities for immigration detention purposes. DIMIA is very keen to take up the offer, but cannot proceed until this issue is resolved between the Queensland Government and the lessee.

Identity issues
The National Identity Verification and Advice (NIVA) Section was established in DIMIA in May 2005 to ensure identity issues in relation to persons of compliance interest are resolved as quickly as possible. NIVA is progressively expanding its role to other relevant migration business processes across DIMIA. Updated instructions on identity checking (including an identity checklist) are being trialled by DIMIA officers before being finalised in the near future. State and Territory Police will be able to pursue immigration inquiries through a dedicated 24 hour a day hotline, which will allow rapid resolution of issues in the majority of cases and capacity to escalate complex issues should that be necessary. The hotline facility will also operate for consular officials seeking information regarding immigration detainees.

Amendments to the Migration Act are currently before Parliament that will allow publication of photographs and related information to assist in identifying a person of immigration interest where other reasonable steps to identify that person have not succeeded.

Client service
DIMIA has significant client service responsibilities. A new Client Services Division will lead implementation of a better client service focus and will enhance client service delivery across DIMIA's operations. DIMIA has been consulting widely on a new Client Services Charter and Client Services Strategy for Visa and Citizenship Services. Both documents will be finalised by the end of December 2005 along with arrangements to centralise the recording, tracking, management and reporting on client feedback. DIMIA has already implemented improved protocols, scripts and training for call handling in contact centres to ensure that information is correctly recorded and followed up. A programme of client surveys will commence early in 2006.

3.3 Well trained and supported staff

Training
Specialist technical immigration training will be enhanced. A model for a College of Immigration Border Security and Compliance (the College) will be developed by mid-December 2005 and established by mid 2006. 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. Ahead of the physical establishment of the College, the curriculum will be established. Enhanced training for compliance and detention staff will be provided in the interim, focusing on the application of 'reasonable suspicion', emerging legal issues, identity investigations,

search warrant training and capacity to search and interrogate all DIMIA systems.

Migration Series Instructions (MSIs) are an important part of the support provided to staff in the operation of their responsibilities and a component of the training programmes. Key compliance and detention MSIs will be reviewed and reissued before the end of 2005, with remaining MSIs to follow.

Changing the culture in DIMIA goes to values, ethics and standards and excellence in leadership. A new national training strategy will be implemented in DIMIA. A national executive leadership programme commenced in September 2005 and will be provided to all executive level staff in DIMIA over the next 18 months. Management training for APS staff and training in a range of departmental systems, records management, visa cancellation, and name searching will all be rolled out by the end of 2005.

Information and systems issues

As recommended by both Mr Palmer and Mr Comrie, DIMIA has tendered for an independent review of its information requirements and systems, to be completed by the end of January 2006. The consultant will recommend medium and long term action for Government consideration. A second review will provide a 'health check' in regard to the appropriateness of the mix and deployment of DIMIA's technical platform to support current and future business needs. The focus of both reviews will be to ensure that DIMIA systems adequately support decision-making and case management in the longer term.

In the meantime systems improvements to support decision-making and case management are underway. A single entry client search facility is being developed to improve access to all information about an individual client (the pilot, using existing search capabilities will be in place by the end of December 2005, a second phase incorporating new search tools will be available in March 2006). There will be substantially enhanced training in ICSE (Integrated Client Services Environment, DIMIA's primary transaction processing system) available for all staff who undertake case and client related activity. Pilot programmes to better support DIMIA staff on field operations will be undertaken.

Records management

A records management improvement plan is being developed by DIMIA in consultation with the National Archives of Australia. The plan will include a strong training component (to be delivered to all staff undertaking case and client related activity by the end of 2005), a systems upgrade for the DIMIA records management system (by the end of June 2006), and redeveloped policies and practices. The plan will particularly focus on the links between electronic and paper records and archiving arrangements.

Links between DIMIA and the Refugee Review Tribunal and the Migration Review Tribunal information systems will be established as soon as the current tribunal systems upgrades have been completed. In the meantime

DIMIA client records are updated on a daily basis to reflect client status when a client has an appeal on foot with either tribunal.

4. Governance

The response to the Palmer Report is being managed as a single programme in DIMIA. The Palmer Programme Office (PPO) has been established, reporting directly to the Secretary (while it currently sits within the Change Management Taskforce, it will become a permanent part of the new Strategic Policy Group, once the new DIMIA structure has been implemented). Each initiative which is being implemented to address either a specific Palmer recommendation or the broader themes for change will be monitored by the PPO and progress against key milestones and expenditure will be reported to the Secretary and Minister. Each project will have an assigned project manager who will manage the day-to-day activities of the project. They will identify, monitor and resolve project issues and identify and mitigate project risks. Each project will be oversighted by a steering committee chaired by a senior executive and will draw members from other key business areas across the Department. Each steering committee is likely to oversight a number of projects. DIMIA will report quarterly to the Government on implementation of the Palmer Programme, through the Cabinet Implementation Unit. A further progress report will be provided to Parliament in September 2006.

This is clearly an ambitious reform agenda, but the package has been carefully developed to ensure key milestones are achievable. I am engaging with all staff on the change process through regular briefings and twice weekly messages about important issues and developments. The DIMIA executive is firmly committed to the change process. The package will ensure staff have the necessary information, support and skills to achieve change.

5. Resources

Over $230 million over five years has been committed to implement the response to the Palmer Report. A substantial proportion of this expenditure will be for new staff to implement the enhanced client service focus, improved quality assurance and accountability mechanisms, and provide better and more focused training. The PPO will monitor all expenditure against Palmer projects.

6. Communications with key stakeholders

A range of stakeholders have an interest in the DIMIA change management process and the implementation of the response to the Palmer Report. To maximise the opportunity for acceptance of the process, there is a need for sustained communication between DIMIA and stakeholders. A new National Communications Manager will drive more open engagement with the public and key individuals and organisations.

In my first weeks as Secretary to DIMIA, I took immediate steps to engage a wide range of stakeholders, particularly those who have been critical of DIMIA's performance. I have met and briefed many individuals and representatives of key organisations, including the Joint Standing Committee

on Migration. There are dedicated liaison arrangements in DIMIA's State and Territory Offices to ensure constituents' issues are handled quickly. I will ensure that DIMIA executives regularly engage with a wide range of interest groups to ensure there is high level exchange of information and views. I have already mentioned the enhanced client focus for DIMIA – people are our business. Staff are constantly reminded of the need to approach each client contact as contact with an individual person.

Some of the recommendations in the Palmer Report can only be implemented with the cooperation of State and Territory Governments. Colleagues in the Attorney-General's Department and the Department of Health and Ageing in particular are working with DIMIA to ensure recommendations in relation to national missing persons policy and health service delivery are implemented.

7. Success Factors

The success of the change process will be measured by the level of confidence DIMIA is able to inspire in the Australian community and the clients it serves. This will be achieved through the development of national strategies for client service, case management, detention health service delivery, detention infrastructure, and staff training and their implementation through the remainder of 2005 and 2006. Success will be reflected in the fact that every decision DIMIA takes is demonstrably fair and reasonable, that implementation of policy is open and there are clear lines of accountability through the DIMIA executive, to the Minister and Government and to the Parliament and the broader community.

Andrew Metcalfe
Secretary
Department of Immigration and Multicultural and Indigenous Affairs
27 September 2005

ATTACHMENT A

PALMER PACKAGE

OBJECTIVE
TO ACHIEVE CULTURAL CHANGE IN DIMIA

PALMER RECOMMENDATIONS

	OPEN & ACCOUNTABLE ORGANISATION	FAIR & REASONABLE DEALINGS WITH CLIENTS	WELL TRAINED AND SUPPORTED STAFF
	3.5, 4.11, 5.1, 5.5, 7.3, 7.5, 7.6, 7.7	3.2 – 3.4, 4.1 – 4.13, 5.1 - 5.4, 5.6, 5.7, 6.1 - 6.13, 7.1, 7.4	3.1, 5.1, 5.2, .7.1. 7.2, 7.4, 8.1, 8.2, 8.3
DELIVERED BY 1 OCTOBER 2005	**Restructuring the Department** • New divisional structure for compliance and detention activities in National Office – new Division heads appointed **Detention & compliance issues** • Consultant appointed to review activities and detention services contract **Better external engagement** • Briefed Standing Committee on Migration • Secretary's engagement with key individuals and organisations • MP liaison arrangements in all State and Territory Offices **Privacy issues** • Migration Act amendments	**Client service focus** • Client Service Strategy/Charter consultations commenced **Case coordination/management** • Detention Review Managers/arrangements for Detention Review Committee • Management of detainee files • Complex Case Review Taskforce established **Identity issues** • National Identity Verification & Advice Unit (NIVA) established **Health and wellbeing of detainees** • Improved health services for detainees at Baxter • Detention Health Service Delivery Taskforce established • Audit of health service delivery at Baxter • Razor wire removed from Villawood	• Minister's suggestion scheme • All staff briefings • SES forum • Leadership training pilot course • Palmer Programme Office established
DELIVER IN FIRST 100 DAYS – by the end of December 2005	**Restructuring the Department** • New National Office Structure and appointments to key positions • New National Communications Manager • New Internal Auditor • New Chief Lawyer **Detention & compliance issues** • Consultant to advise on detention & compliance activities and the detention services contract • Establish Detention Contract Management Group • Review of decision-making & quality control for detention, compliance, & removals • New IDAG structure and expanded membership • Work with ANAO on lessons learned from recent audits **Better external engagement** • Review & implement communications strategy • Develop strategic relationships with external scrutineers • Appoint external members of DIMIA governance committees • Web redesign and content management **Privacy issues** • Strategic Privacy Impact Assessment	**Client service focus** • New Client Services Division • Client service satisfaction surveys (initiate tender process) • Centralise client feedback mechanisms • Integrated email/telephony enquiries • Enhance oversees call handling arrangements **Case coordination/management** • Single entry client search facility • Training in effective name search methods • DIMIA Community Care Model • Handling of detention records • Compliance/Detention case management system **Identity issues** • Expand role of NIVA • Enhance handling of ID issues across Dept (instructions and training), including use of biometrics **Health and wellbeing of detainees** • Long term detention strategy • Liaison with States/Territories on health issues (with DHA) – finalise MOU with SA Health – common training for clinical staff • Finalise detainee management procedures at BIDF (Red One and MSU) • Improved arrangements for food services	**Training for staff** • National Training Manager & Branch • Staff Training: compliance & detention (search warrants, reasonable suspicion, identity investigations, Sray cases), visa cancellation, leadership, values & conduct, ICSE, TRIM, records management, systems security **Support for Staff** • Review/reissue key compliance and detention Migration Series Instructions • Enhanced compliance helpdesk capability **Information and systems issues** • IT platform & governance review • Usability evaluation • Pilots: Mobile access to ICSE, integrate passport readers into ICSE • MRT/RRT linkages **Other issues** • Staff surveys • Rural and remote compliance activity
DEVELOP IN FIRST 100 DAYS – by the end of December 2005 for delivery during 2006	**Restructuring the Department** • New State/Territory Office Org. Structure – implement from mid-December 2005 **Detention & compliance issues** • Compliance strategy **Quality assurance** • National Quality Assurance Programme – decision making • Enhanced internal audit programme **Other issues** • Unlawful detention legal mitigation strategy	**Client service focus** • Client Service Strategy & Charter • Develop client service surveys **Case coordination/management** • National Case Management Framework • Develop Community Care Model –pilot to commence Jan 06 **Identity issues** • National missing persons database (thru APMC, AGD to lead) • 24/7 'hotline' for police and consular inquiries **Health and wellbeing of detainees** • Long Term Detainee Health Services Strategy including mental health services and governance • Baxter Improvement Programme (the Baxter Plan) • Advice on implementing Muirhead Standards • Remove razor wire from other IDCs • Queensland Detention Facility - Shaftesbury **Bridging visas** • Bridging Visa Review • Regional Compliance Enhancement Taskforce	**Training for staff** • Establish College of Immigration Border Security & Compliance - comprehensive training for compliance and detention staff • National Training Strategy • Review/reissue remaining MSIs **Information and systems issues** • I.T. Business Needs Analysis & Action Plan • Digitising historical manual movement records • Central IRIS project • Compliance case management discovery exercise • Records management improvement plan

APPENDIX 4

COMRIE REPORT – FINDINGS AND RECOMMENDATIONS AND GOVERNMENT RESPONSE

Main findings

1. Vivian[1] was born in the Philippines on 30 October 1962. She married an Australian citizen, Robert William Young, on 26 May 1984 and came to live in Australia on 7 July 1984. She became an Australian citizen on 3 March 1986 and used the name Vivian Solon Young.

2. On 30 March 2001 Vivian was found injured in a park in Lismore, New South Wales, after having fallen into a deep drain. She was taken by ambulance to Lismore Base Hospital, where, under the name Vivian Alvarez, she was admitted as an involuntary patient to the Richmond Clinic Psychiatric Unit.

3. On the basis of information Vivian provided, a social worker at the Richmond Clinic advised the Department of Immigration and Multicultural and Indigenous Affairs office in Southport, in south-east Queensland, that Vivian might be an illegal immigrant. Apart from initial database searches, DIMIA staff did not actively pursue Vivian's case for a month.

4. DIMIA officers first interviewed Vivian on 3 May 2001, at Lismore Base Hospital. On the basis of information Vivian gave them, the officers involved assumed she was an unlawful non-citizen, and it is this assumption that appears to have been the catalyst for much of the subsequent response by DIMIA. The officers did not seek access to hospital records, which contained personal information that would have helped to identify Vivian. Nor did they actively pursue a male friend of Vivian's in Lismore who had information that would have helped with identifying her.

[1] Vivian used or was referred to by a variety of names. Vivian Alvarez is used in this report, since that is the name under which she first came to the attention of the Department of Immigration and Multicultural and Indigenous Affairs in 2001. In the interest of clarity and readability, she is generally referred to as Vivian throughout the report.

5. On 12 July 2001 DIMIA officers collected Vivian from the St Vincent's Rehabilitation Unit in Lismore and took her by car to the DIMIA office in Southport. From the time of Vivian's first interview with DIMIA on 3 May, the DIMIA officers had done little about the case; active use of this time might well have resulted in her being identified. One DIMIA officer made the erroneous assumption that Vivian might have been a sex slave, and this assumption appears to have influenced the way in which her case was handled.

6. On 13 July a formal interview was conducted with Vivian. During it, she said she was an Australian citizen, that she wanted to remain in Australia, and that she wanted to apply for a visa. Inadequate action was taken by DIMIA to pursue these crucial remarks.

7. The inquiries DIMIA officers made focused on confirming the name Vivian Alvarez. Insufficient attention was given to questioning whether this was the correct name. The DIMIA officers were aware Vivian had recently been a patient in a psychiatric facility, so it seems logical that they would have pursued the question of her name more diligently.

8. The inquiries made in an attempt to identify Vivian were ad hoc and symptomatic of a situation in which DIMIA officers had been inadequately trained for their role as compliance officers, particularly in relation to the interrogation of IT systems and databases. There were on DIMIA's TRIM database details that would have linked the name Alvarez to the names Solon and Young, but these were not accessed by compliance officers.

9. The management of Vivian's case was very poor, lacking rigour and accountability. Migration Series Instruction 267 requires that a compulsory checklist be completed in removal cases. It was not complied with. This meant that another requirement under the instruction—that the checklist be approved by the Officer in Charge of Compliance—was also not complied with. Failures are evident in the management of the case from the time of Vivian's first contact with DIMIA until her removal from Australia on 20 July 2001.

10. The DIMIA officers involved in Vivian's case had a flawed understanding of the application and implications of s. 189 of the *Migration Act 1958*.

11. The Inquiry recognises that only a court of competent jurisdiction can ultimately determine whether the detention of Vivian was lawful or unlawful. Nevertheless, it is the Inquiry's view that the decision to detain her under s. 189 of the Migration Act was not based on a reasonable suspicion: the relevant inquiries were neither timely nor thorough and there was a lack of rigorous analysis of the available information. Accordingly, this action was unreasonable and therefore, by implication, unlawful.

12. Vivian is an Australian citizen, so the application of visa provisions to her is irrelevant. The approach DIMIA compliance officers took, however, persuades the Inquiry that the visa provisions were manipulated to accommodate their management of Vivian's case.

13. When she was taken into detention Vivian was photographed, but the photograph was not used adequately in an attempt to identify her. She was not fingerprinted, and this omission precluded the opportunity to match her fingerprints with those held at the National Automated Fingerprint Identification System of CrimTrac (the national law enforcement database).

14. Vivian's serious physical and mental health problems received insufficient attention in decision making associated with her detention and removal from Australia.

15. Although DIMIA officers were presented with a difficult decision about where to detain Vivian before removing her, her detention for one week in a single motel room was inappropriate. Her privacy, dignity and welfare were compromised by the fact that she was guarded in this room at all times by two contracted security guards and had no access to the medical facilities available to people held in immigration detention centres.

16. Although Vivian's disappearance (as Vivian Solon @ Young) had come to the attention of the Queensland Department of Family Services and the Queensland Police Service on 16 February 2001—when she failed to collect her son from a child care centre in Brisbane—it was not until five months later that the Queensland Department of Family Services reported her as a missing person. The Queensland Police Service activated a missing persons report on 17 July 2001, when Vivian was being held in detention. The delay in reporting her as a missing person

greatly limited the likelihood of locating her before her detention and her removal by DIMIA on 20 July 2001.

17. On 19 July 2001 the Queensland Police Service Redcliffe Intelligence Office made inquiries with the Brisbane office of DIMIA about the travel movements of Vivian Solon @ Young. DIMIA's response was that Vivian Alvarez Solon @ Young had last arrived in Australia on 2 September 1993. This was the first time since Vivian had come to DIMIA's attention that DIMIA had linked the name Alvarez with Solon @ Young. Despite the fact that on that very day Vivian was being held in detention in a Brisbane motel, the limited name connectivity of DIMIA databases did not allow for the association of these names. A major opportunity to prevent Vivian's removal was lost.

18. In response to welfare concerns raised by the Philippines Embassy through its Honorary Consulate General in Brisbane, two members of the Filipino community visited Vivian at the motel in which she was detained. The first visit occurred on 18 July, and Vivian gave her name as Solon. The second visit was on 19 July; Vivian again gave her name as Solon and said she had been married to a Mr Young. This crucial information was neither sought by nor supplied to DIMIA.

19. The Philippines Embassy had expressed concern about Vivian's fitness to travel and as a result did not issue a travel document allowing for her removal to the Philippines. A locum medical practitioner visited the motel on 19 July, examined Vivian and certified her as fit to travel. The Philippines Consulate General then issued a travel document that allowed Vivian to be removed the next day.

20. The use of a locum medical practitioner to certify Vivian as fit to travel was inappropriate in the circumstances—including the fact that he had no knowledge of or access to Vivian's medical history. This situation provides evidence to support the Inquiry's contention of a flawed DIMIA culture—one that pays insufficient attention to detainees' welfare and care needs.

21. On 20 July Vivian was removed to the Philippines, escorted by a female officer of the Queensland Police Service. In view of Vivian's poor physical and mental health and the unsatisfactory manner in which her case had been managed, the Inquiry considers that Vivian's removal was effected with undue haste and without adequate consideration of her welfare. DIMIA failed to meet its duty of care obligations to Vivian and unlawfully removed her from Australia.

22. The unlawful removal of Vivian was a consequence of systemic failures in DIMIA—among them inadequate training programs, database and operating system failures, poor case management, and a flawed organisational culture.

23. On 14 July 2003 the Queensland Police Service Missing Persons Bureau contacted the DIMIA Entry Systems and Movements Alerts Office to ask about Vivian Solon @ Cook @ Young. Two DIMIA officers independently carried out database searches that linked Vivian Alvarez with Vivian Solon Young. Both these officers advised the same supervisor of their discovery that an Australian citizen had been removed. The supervisor took no action to redress this serious problem.

24. The television program *Without a Trace* went to air on 20 August 2003; it featured a segment showing Vivian's photograph. The following day, an officer at the Entry Systems and Movements Alerts Office, who had seen the program the night before, performed database checks that linked Vivian Alvarez and Vivian Solon Young. This officer informed the supervisor who had been advised of the discovery on 14 July 2003 that an Australian citizen had been removed. Again, the supervisor failed to take action.

25. A DIMIA Brisbane officer who had been involved in the removal of Vivian also saw the *Without a Trace* program. The following morning this officer performed database searches that linked Vivian Alvarez with Vivian Solon Young. The officer took the search results to the person who had been her supervisor at the time of Vivian's removal and advised him of her discovery that an Australian citizen had been removed. This supervisor failed to take any action.

26. On 9 September 2003 the Queensland Missing Persons Bureau—which by now was aware that Vivian had been removed in 2001—contacted the Department of Foreign Affairs and Trade in Canberra, seeking information in an attempt to locate Vivian in the Philippines. Communications between DFAT in Canberra and the Australian Embassy in Manila record that the DFAT officers involved were aware that an Australian citizen had been removed. These DFAT officers provided the information the Missing Persons Bureau sought but took no action to follow up on the question of how an Australian citizen came to be removed to the Philippines.

27. Robert Young, Vivian's former husband, had persisted in his attempts to locate Vivian. Having been advised by the Missing Persons Bureau that she had been removed to the Philippines in 2001, he contacted the DIMIA Contact Centre in Sydney on 24 September 2003 and provided important information about Vivian's wrongful removal. The officer at the Contact Centre failed to pursue the matter.

28. Robert Young's persistence led the Missing Persons Bureau to contact the supervisor at the DIMIA Entry Systems and Movements Alerts Office in Canberra on 28 September 2004. This supervisor—the supervisor who had been advised on 14 July and 21 August 2003 of Vivian's removal—carried out further database searches that linked Vivian Alvarez with Vivian Solon Young. He contacted DIMIA's Southport office and obtained a photograph of Vivian. He then contacted DIMIA's Brisbane office and had discussions with a senior officer there.

    Inquiries by staff at the Brisbane office established that Vivian was an Australian citizen when she was removed in 2001. Two senior officers and other more junior staff in the Brisbane office were aware of these facts. One of the two senior officers was the supervisor who had been told on 21 August 2003 of Vivian's unlawful removal. Apart from forwarding Vivian's compliance file to the Entry Systems and Movements Alerts Office in Canberra on 30 September 2004, none of the three senior officers (one in Canberra and two in Brisbane) took any action.

    It is the Inquiry's view that the conduct of these officers could constitute a breach of one or other of the requirements of the Australian Public Service Code of Conduct, as detailed in s. 13 of the *Public Service Act 1999*.

29. After 30 September 2004 Vivian's file was kept at the Entry Systems and Movements Alerts Office in Canberra, where it was found on 21 April 2005, in a correspondence hutch attached to a desk. Standard practice for the securement of official files was that they be placed in the office correspondence locker. Vivian's file had not been put there.

30. It is of serious concern that Vivian's unlawful removal was the subject of considerable discussion in DIMIA's Compliance and Investigations Office in Brisbane in 2004 and that a number of officers performed database searches that linked the names Vivian Alvarez and Vivian Solon.

31. Vivian's unlawful removal in 2001 was eventually acknowledged officially only because of the continued inquiries by Robert Young, who brought the matter to the attention of the Minister's office in an email of 4 April 2005. Had Mr Young not persisted, the wrong done to Vivian and DIMIA's failures in the management of her case—including the failures of three senior officers—might well have remained unknown to the Australian community.

32. Misinterpretation of the provisions of the *Privacy Act 1988*, by both DIMIA officers and officers of the Queensland Missing Persons Bureau, created a situation in which important information that could have led to the discovery of Vivian's whereabouts was not released to Robert Young.

33. The Inquiry's investigation of this case was hampered by the fact that DIMIA had failed to maintain email business records for more than 12 months during the period in question.

34. DIMIA's overall management of Vivian's case can only be described as catastrophic. Nevertheless, it is important to record that some DIMIA officers performed their duties diligently and professionally. Having discovered that Vivian had been unlawfully removed, they took the evidence that established this fact to their supervisors and advised them of a grave problem. That these supervisors failed to take action should not obscure the diligence and professionalism of their subordinates.

35. The Inquiry's investigation produced substantial evidence to support many of the findings and recommendations in the Palmer report—the July 2005 report of the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau. Since the circumstances of the Alvarez matter first arose in 2001 and the Palmer report focused on matters that occurred in 2004, this Inquiry into the Circumstances of the Vivian Alvarez Matter concludes that many of the systemic problems identified by both investigations had been present in DIMIA for some years.

Recommendations

The recommendations of this Inquiry into the Circumstances of the Vivian Alvarez Matter follow immediately. The inquiry's investigation also revealed evidence that supports a number of the recommendations made in the Palmer report—the report of the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau. Those recommendations are recorded immediately following this Inquiry's 12 recommendations.

Recommendation 1

The Inquiry recommends that the Secretary of DIMIA take all necessary steps to:

- redress the negative culture in the Brisbane Compliance and Investigations Office—as demonstrated by the failure of a number of officers to take action on becoming aware that an Australian citizen had been unlawfully removed from Australia

- ensure that the problems and deficiencies identified in relation to the Brisbane Compliance and Investigations Office do not exist in other regional offices and in related areas in DIMIA head office.

[See Section 3.3.1.]

Recommendation 2

The Inquiry recommends that the Secretary of DIMIA instruct staff to comply with the requirement of Migration Series Instruction 267 that a compulsory checklist be completed to record the actioning of a removal and that the actioning of a removal be approved by a senior compliance officer—the Officer in Charge of Compliance. The checklist should be attached to every compliance file.

[See Section 3.3.2.]

Recommendation 3

The Inquiry recommends that the formal interview of detainees be constructed in such a way as to require that, where necessary, responses from a detainee be further investigated. The interview process should be dynamic and designed to elicit information useful to the making of decisions about detention and removal.

[See Section 3.3.2.]

Recommendation 4

The Inquiry recommends that, as an urgent priority, DIMIA commission a thorough, independent review and analysis of its information management systems. The review should be carried out by an experienced, qualified IT systems specialist and should aim to do the following:

- identify the real organisational policy and operational information management requirements—particularly requirements for interconnectivity, compliance management functionality, and growth
- explore the potential for single-search entry to all DIMIA databases
- formulate an implementation plan for consideration by the DIMIA executive.

[See Section 3.3.3.]

Recommendation 5

The Inquiry recommends that DIMIA commission a thorough, independent review and analysis of the IT training requirements for the Border Control and Compliance Division and the Unlawful Arrivals and Detention Division. The review should identify the requirements for the various functional responsibilities within the divisions.

[See Section 3.3.4.]

Recommendation 6

The Inquiry recommends that in the training program for compliance and investigations officers there be a focus on objectivity in decision making and a strong warning that false assumptions will contribute to poor decisions. Further, all staff at DIMIA should be reminded of the need for great care in the spelling and recording of names in files and records.

[See Section 3.5.]

Recommendation 7

The Inquiry recommends that DIMIA institute a review of the operations of contact centres, to determine more effective procedures for dealing with information those centres receive.

[See Section 3.7.]

Recommendation 8

The Inquiry recommends as follows:

- that compliance staff be trained to exercise greater caution in performing their duties—including verification of information—where it is known or suspected that a possible unlawful non-citizen may have mental health problems

- that any training program developed as a result of recommendations in the Palmer report and this report include a component designed to better equip compliance officers to deal with people with known or suspected mental health problems.

[See Section 4.2.2.]

Recommendation 9

The Inquiry recommends as follows:

- that DIMIA take all necessary action to ensure that appropriate standards for health and care needs are developed and introduced for situations involving detainees in transitional detention

- that, where it is necessary or appropriate to conduct a medical examination to determine the fitness to travel of an unlawful non-

citizen, DIMIA officers make all reasonable efforts to ensure that the medical practitioner concerned receives the medical history and record of the unlawful non-citizen and that the medical practitioner—who, if possible, is someone who has previously treated the patient—is advised of the factual circumstances, including the behaviour of the unlawful non-citizen, that have led to the need for the medical examination.

[See Section 4.2.2.]

Recommendation 10

The Inquiry recommends that the Secretary of DIMIA take all necessary steps to ensure that email business records are kept in accordance with the requirements of the *Archives Act 1983*.

[See Section 5.3.]

Recommendation 11

The Inquiry recommends that the Minister for Immigration and Multicultural and Indigenous Affairs write to Mr Robert William Young to commend him for his diligence in pursuing the matter of Vivian Alvarez and bringing it to the attention of the Australian Government.

[See Section 5.1.]

Recommendation 12

The Inquiry finds that the conduct of officers A, B and C, as described in this report, might constitute a breach of one or other of the requirements of the Australian Public Service Code of Conduct, as detailed in s. 13 of the *Public Service Act 1999*. The Inquiry recommends that this opinion be brought to the attention of the Secretary of DIMIA, in accordance with s. 8(10) of the *Ombudsman Act 1976*.

[See Section 7.3.]

Relevant recommendations from the report of the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau

Recommendation 3.1

The Inquiry recommends that DIMIA:

- design, implement and accredit—for all compliance officers and other staff who might reasonably be expected to exercise the power to detain a person under s. 189(1) of the *Migration Act 1958*—a legislative training package that provides the officers with the requisite knowledge, understanding and skills to fairly and lawfully exercise their power

- ensure that the training comprehensively covers the use of DIMIA and other agencies' databases and search capability and the conduct of searches to support investigations

- restrict the authority to exercise the power to detain a person under s. 189(1) to staff who have satisfactorily completed the training program and who are considered to be otherwise sufficiently experienced to exercise that power

- ensure that a component on 'avenues of inquiry' be included in the Certificate IV in Government (Statutory Investigation and Enforcement) Training Program delivered to DIMIA officers.

Recommendation 3.4

The Inquiry recommends that DIMIA create a dedicated Identity and Immigration Status Group to ensure that, where the identity or immigration status of a detainee remains unresolved after initial inquiries have been completed, frequent follow-up reviews are conducted. The Identity and Immigration Status Group should:

- review the continued validity of 'reasonable suspicion'–based detention on a regular basis—and at least every month—against the background of accumulating information

- be staffed by people who have wide experience in compliance and detention policy and operations, are familiar with the associated Commonwealth and state and territory legislation and arrangements, and have skills in investigation and analysis

- have the authority, responsibility and accountability for conducting and/or overseeing all necessary inquiries to

establish the identity and immigration status of unidentified detainees

- report monthly to executive management on the status of individuals still in immigration detention, the reason why they are being detained, what is currently being done to resolve the situation, and the expected date for resolution.

Recommendation 5.1

The Inquiry recommends that the DIMIA Secretary:

- commission and oversee a review of departmental processes for file creation, management and access

- take a leadership role in implementing the major changes that will probably be necessary as a result

- ensure that staff receive training in effective file management practices and the reasons for them

- make executive management personally accountable for ensuring that sound file management practices are followed.

Recommendation 5.2

The Inquiry recommends that the DIMIA executive ensure the preparation for staff of a checklist to be used as a minimum standards template for conducting identification inquiries. The checklist should provide a menu of avenues of inquiry, specify a sequential order for investigations, be included as an attachment to the DIMIA Interim Instruction on Establishing Identity in the Field and in Detention, and form a part of the personal investigation file. The DIMIA executive should also:

- formalise the Interim Instruction together with the checklist attachment as soon as practicable

- ensure that suitable training modules are developed and delivered to all staff—including managers—who might be involved in identification inquiries

- institute management arrangements to ensure that such inquiries are linked as appropriate to the Identity and Immigration Status Group.

Recommendation 5.3

The Inquiry recommends that, as a matter of urgency, the Commonwealth Government take a leadership role with state and

territory governments to develop a national missing persons policy to guide the development of an integrated, national missing persons database or capacity. Initial policy development could be carried out under the guidance of the Australasian Police Ministers Council, with the output submitted to governments for consideration and agreement.

Recommendation 5.4

The Inquiry recommends that, on the basis of an agreed national missing persons policy, the Commonwealth Government take a leadership role with state and territory governments in developing and implementing a national missing persons database or capacity that will provide an effective national recording and search capability under both names and biometric data. Discussions in this regard should be informed by reporting on the progress and success of the Minimum Nationwide Person Profile project to the Australasian Police Ministers Council.

Recommendation 5.5

The Inquiry recommends that DIMIA reassess its position in relation to privacy in all its public policy operations associated with immigration detention. In revising its practices, it should:

- seek advice from the Privacy Commissioner and the Minister
- take immediate steps to increase awareness and understanding on the part of relevant DIMIA staff—including executive staff—of the principles and provisions of the Commonwealth's *Privacy Act 1988*
- revise and strengthen procedures relating to identity in immigration detention, to ensure that the wider options potentially created by this approach are considered.

Recommendation 5.6

The Inquiry recommends that DIMIA establish for inquiries about immigration detainees a 'hotline' facility that can deal with those inquiries as a 'one-stop shop'. DIMIA should ensure that the contact officer position is continuously staffed, regardless of the absence of any officer, and that all embassies and high commissions are advised of the details of these arrangements and ask their consular officials to direct all immigration detention inquiries to the nominated DIMIA contact officer in the first instance.

Recommendation 5.7

The Inquiry recommends that DIMIA ensure that:

- fingerprints and other biometric data collected from individuals in immigration detention are stored on a national database to facilitate investigations by Commonwealth and state and territory police and other law enforcement agencies

- appropriate liaison arrangements are made with CrimTrac

- any DIMIA decisions in relation to the collection and storage of biometric data are consistent with strategies being pursued by CrimTrac in response to guidance by Australian governments.

Recommendation 7.1

The Inquiry recommends that DIMIA develop and implement a holistic corporate case management system that ensures every immigration detention case is assessed comprehensively, is managed to a consistent standard, is conducted in a fair and expeditious manner, and is subject to rigorous continuing review.

Recommendation 7.2

The Inquiry recommends that DIMIA critically review all Migration Series Instructions from an executive policy and operational management perspective with a view to:

- discarding those that no longer apply in the current environment

- where necessary, rewriting those that are essential to the effective implementation of policy, to ensure that they facilitate and guide effective management action and provide real guidance to busy staff

- ensuring that up-to-date, accurately targeted training is delivered to staff who are required to implement the policy guidelines and instructions

- establishing regular management audits that report to executive management, to ensure that the Migration Series Instructions are up to date and DIMIA officers are adhering to them.

Recommendation 7.3

The Inquiry recommends that the Minister commission the Secretary of DIMIA to institute an independent professional review of the functions and operations of DIMIA's Border Control and Compliance Division and Unlawful Arrivals and

Detention Division in order to identify arrangements and structures that will ensure the following:

- DIMIA's compliance and detention functions are effectively coordinated and integrated.

- The desired outcomes of these functions and the necessary resources—including the number and the skills profile of staff—are clearly identified before a decision is made on the structure that will best enable effective and equitable service delivery.

- The restructuring accommodates these requirements and ensures that arrangements are made to monitor and manage the high-level risks to the Commonwealth inherent in immigration detention.

- There is a seamless approach to dealing with immigration detention operations and case management.

- The aims and objectives of the Government's immigration detention policy are fairly and equitably achieved and human dignity is demonstrably respected.

Recommendation 7.4

The Inquiry recommends that DIMIA:

- review the current training programs for compliance and detention officers to ensure that induction and in-service programs convey an accurate and contemporary picture of DIMIA operations and adequately prepare operational and management staff for all aspects of the work they will be expected to do

- ensure that such training particularly deals with the consultation, coordination, reporting and management requirements of compliance and detention operations and shows how to manage the risks inherent in the performance of these functions

- immediately develop and implement a policy that requires that every decision to detain a person on the basis of 'reasonable suspicion of being an unlawful non-citizen' is reviewed and assessed within 24 hours or as soon as possible thereafter.

DIMIA should incorporate this policy of 24-hour review in all relevant training programs and operational guidelines to ensure that compliance officers understand the need to:

- objectively determine the reasons and facts upon which a decision to detain is made

- verify the validity of the grounds of 'reasonable suspicion' and the lawfulness of the detention

- take immediate remedial action as necessary and report the circumstances of any unresolved matter to the Identity and Immigration Status Group.

Recommendation 8.3

The Inquiry recommends that DIMIA:

- develop, for all immigration detention and compliance executives and managers, a briefing program that clearly explains the need for a decision to be made to remove from Australia a person reasonably suspected of being an unlawful non-citizen and the responsibilities associated with exercising that power

- ensure that the central factors relating to removals and the implications for identity investigations and the exercising of detention powers are included in departmental training programs for compliance and removals officers

- ensure that the implications of all aspects of identity checking, detention and removals are included in the checks and balances exercised by the Identity and Immigration Status Group.

Australian Government

Department of Immigration and Multicultural and Indigenous Affairs

Report from the Secretary

To
Senator the Hon Amanda Vanstone
Minister for Immigration and Multicultural and Indigenous Affairs

RESPONSE TO THE RECOMMENDATIONS OF THE REPORT OF THE COMMONWEALTH OMBUDSMAN OF THE INQUIRY INTO THE CIRCUMSTANCES OF THE VIVIAN ALVAREZ MATTER

October 2005

people our business

1. Background

On 2 May 2005 the Acting Minister for Immigration and Multicultural and Indigenous Affairs, the Hon Peter McGauran MP, referred to the Palmer Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau a request to examine the circumstances surrounding the removal from Australia of Ms Vivian Alvarez, an Australian citizen. The Palmer Report was released on 14 July 2005 and included comments on the progress of the investigation into Ms Alvarez's case. The Government asked the Commonwealth Ombudsman to take responsibility for completing the investigation into the removal of Ms Alvarez from Australia. The Ombudsman accepted the request and Mr Neil Comrie AO APM was retained to continue the investigation.

The Ombudsman's report of the Inquiry into the Circumstances of the Vivian Alvarez Matter (referred to as the Comrie Report) was provided to me on 29 September 2005 and will be made public by the Ombudsman on 6 October 2005 under section 35A of the *Ombudsman Act 1976*.

An additional 201 immigration matters, covering the period July 2000 to April 2005, have been referred to the Ombudsman by the Minister for Immigration and Multicultural and Indigenous Affairs (the Minister) for investigation. Until improved arrangements are in place to ensure cases of particular concern (out of those cases recorded in the system as 'released not unlawful') can be more easily identified, there will be ongoing discussion with the Ombudsman regarding any cases which appear to involve unlawful detention. To date an additional 20 matters, covering the period May to June 2005, have been referred.

The Comrie Report is highly critical of the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) and makes twelve recommendations covering training, record-keeping, case management, information systems and the prevailing culture in some parts of the Department. These are very serious issues. Clearly, the circumstances surrounding Ms Alvarez's case were highly unsatisfactory. The Prime Minister publicly conveyed an apology to Ms Alvarez on 14 July 2005. I would like to take this opportunity to apologise most sincerely on behalf of DIMIA.

Mr Comrie also reinforces the findings and recommendations made in the Palmer Report, the broad thrust of which has already been accepted by the Government. New initiatives to address both his specific recommendations and the broader concerns he raised have been underway for some time. Further measures have also been announced by the Government. Their implementation is set out in more detail in my response to the Palmer Report, which I have provided to the Minister and which I understand is to be tabled in the Parliament on 6 October 2005 (a copy is available at www.immi.gov.au). These measures also provide an effective response to the matters raised in the Comrie Report, as set out below, and will ensure that DIMIA becomes an organisation that meets the expectations of the Government, the Parliament and the wider community. An organisation that is: more open and accountable; deals more reasonably and fairly with clients; and has staff that are well trained and supported and who embrace the first two themes.

2. Response to the recommendations in the Comrie Report

Recommendation 1
The Inquiry recommends that the Secretary of DIMIA take all necessary steps to:

- redress the culture in the Brisbane Compliance and Investigations Office – as demonstrated by the failure of a number of officers to take action on becoming aware that an Australian citizen had been unlawfully removed from Australia
- ensure that the problems and deficiencies identified in relation to the Brisbane Compliance and Investigations Office do not exist in other regional offices and in related areas in DIMIA head office.

Response
Agreed. I have appointed a new SES Band 1 level Deputy State Director to assist the Queensland State Director in implementing change throughout DIMIA's Queensland Offices. The new Deputy State Director will commence duties as soon as possible and will focus on improvements in the compliance, border security and detention areas to ensure higher standards in decision-making and operational activity.

As previously recommended by Mr Palmer, I have also appointed a consultant to provide independent ongoing advice on compliance and detention activities within DIMIA and the detention services contract. Mr Mick Roche, a former Deputy CEO of the Australian Customs Service, Deputy Secretary in the Department of Health and head of the Defence Materiel Organisation, will commence his contract in the very near future and will provide advice to me by the end of 2005.

I announced the restructure of the detention, compliance and border security areas of the Department on 31 August 2005. Three new divisions, Detention Services, Compliance Policy and Case Coordination, and Border Security have been established to provide a better balance of responsibility and accountability for these activities. The key positions at the head of the detention and compliance divisions have been filled by experienced external senior executive officers. The new head of the Compliance Policy and Case Coordination Division will, in close consultation with me, the relevant Deputy Secretary and Mr Roche, address the wider issues in relation to compliance activity in DIMIA's National and State and Territory Offices.

The restructure in these areas forms part of my broader plan to improve departmental structures and governance frameworks within DIMIA to address concerns about the culture in the wider Department. Three Deputy Secretaries (one more than at present) will ensure there are clear lines of responsibility and accountability. The improved governance arrangements include a high level Values and Standards Committee with external membership (including from the Commonwealth Ombudsman's Office, the Australian Public Service Commission and the community) to ensure the Department is meeting community expectations and focusing on meeting the Australian Public Service values. There will also be a significantly enhanced internal audit programme to strengthen compliance checking (i.e. are DIMIA officers actually doing what the law and our instructions require?) and areas

identified as high risk by either Mr Palmer or Mr Comrie. The Chief Internal Auditor will report regularly to the Department's Executive Management Committee.

Better structure and governance models are not the full answer to improving the culture in DIMIA. Better training and support for staff is a significant driver for cultural change. Dramatic improvements to the provision of technical training are described under Recommendation 5 below. A new national training strategy that directly addresses concerns about values, ethics and standards and excellence in leadership is being implemented in DIMIA.

Recommendation 2
The Inquiry recommends that the Secretary of DIMIA instruct staff to comply with the requirement of Migration Series Instruction 267 that a compulsory checklist be completed to record the actioning of a removal be approved by a senior compliance officer – the Officer in Charge of Compliance. The checklist should be attached to every compliance file.

Response
Agreed. MSI 267 has been revised and will be reissued in the near future. In the interim the removals checklist has been replaced by a 'removal availability assessment' which was distributed to State and Territory Directors and Removals Managers by Deputy Secretary Bob Correll on 25 August 2005. This assessment includes the same rigorous checks as contained in MSI 267 and, in addition, it requires that the assessment be signed off by either the relevant State or Territory Director or a Senior Executive Service officer prior to a removal taking place. The assessment is required to be attached to every compliance file.

As part of the Government's response to the Palmer report, DIMIA is also reviewing all MSIs to ensure they facilitate and guide effective management action.

Recommendation 3
The Inquiry recommends that the formal interview of detainees be constructed in such a way as to require that, where necessary, responses from a detainee be further investigated. The interview process should be dynamic and designed to elicit information useful to the making of decisions about detention and removal.

Response
Agreed. All compliance and detention Migration Series Instructions will be reviewed as part of the response to the Palmer Report and this report, including instructions on the conduct and recording of interviews. In the interim I will issue procedural advice in relation to the specific issue raised in this recommendation.

The new National Identity Verification and Advice Section has been in place since May 2005 to ensure identity issues in relation to persons of compliance interest are resolved as quickly as possible. Updated instructions on identity checking are currently being trialled operationally before being finalised in the near future.

Recommendation 4
The Inquiry recommends that, as an urgent priority, DIMIA commission a thorough, independent review and analysis of its information management systems. The review should be carried out by an experienced, qualified IT systems specialist and should aim to do the following:

- identify the real organisational policy and operational information management requirements – particularly requirements for interconnectivity, compliance management functionality, and growth
- explore the potential for single-search entry to all DIMIA databases
- formulate an implementation plan for consideration by the DIMIA executive.

Response
Agreed. A request for proposal for a consultant to review information requirements and systems was issued on 24 August 2005 following the Government's acceptance of a similar recommendation from Mr Palmer in his July report on the Cornelia Rau matter. The consultant is to report by the end of January 2006 with an implementation plan over the medium and long term for consideration. A second review is also underway to provide a 'health check' in regard to the appropriateness of the mix and deployment of DIMIA's technical platform to support current and future business needs. The focus of both reviews will be to ensure that DIMIA systems adequately support decision-making and case management in the longer term.

A single entry client search facility is being developed. A pilot using existing search capabilities will be rolled out later this year. A second phase facility incorporating more powerful search tools will be available by late March 2006. Training in more effective use of name searching facilities will be rolled out as part of the response to the Palmer Report.

Recommendation 5
The Inquiry recommends that DIMIA commission a thorough independent review and analysis of the IT training requirements for the Border Control and Compliance Division and the Unlawful Arrivals and Detention Division. The review should identify the requirements for the various functional responsibilities.

Response
Agreed. As part of his consultancy, Mr Mick Roche will examine the training needs of DIMIA officers working on compliance and detention activities.

The Government has also announced that it will establish a College of Immigration Border Security and Compliance to deliver comprehensive, tailored operational training for DIMIA officers. All new compliance and detention staff will be required to complete a 15 week programme of training and existing staff will complete regular refresher training. We anticipate that the College model will be developed by mid-December 2005 and established by mid-2006. In the meantime, enhanced training for compliance and detention staff will be provided by December 2005, focusing on the application of 'reasonable suspicion', emerging legal issues, identity investigations,

search warrant training and capacity to search and interrogate all DIMIA systems. The latter specifically picks up on IT training requirements.

Recommendation 6
The Inquiry recommends that in the training program for compliance and investigations officers there be a focus on objectivity in decision-making and a strong warning that false assumptions will contribute to poor decisions. Further, all staff at DIMIA should be reminded of the need for great care in the spelling and recording of names in files and records.

Response
Agreed. Quality decision-making will be a key focus in the curriculum at the College of Immigration Border Security and Compliance. These messages will be part of the training programme. The curriculum will address the need for objectivity, care in the recording of names and the need to take extra care in the handling of people who may have mental health problems (in line with Recommendation 8 below).

On my first day as Secretary I reminded staff of the need for care and diligence in all aspects of decision-making – the need to be fair, reasonable and lawful. I have repeatedly reinforced this message to all staff and in particular, I have made it clear on several occasions that should any staff member become aware that we have acted in an unlawful way they must advise their State or Territory Director or Branch Head immediately. I have placed a personal responsibility on those officers to resolve the matter quickly and effectively.

A specific project is being undertaken as part of the Records Management Improvement Plan to correct the large number of multiple 'Person Identifiers' already recorded.

Recommendation 7
The Inquiry recommends that DIMIA institute a review of the operations of contact centres, to determine more effective procedures for dealing with information those centres received.

Response
Agreed. DIMIA will further review the operation of the contact centres to address these concerns. DIMIA has introduced improved protocols, scripts and training for call handling in contact centres (which handle telephone inquiries to DIMIA). Collectively, these centres handle over 1.3 million calls per year.

Recommendation 8
The Inquiry recommends as follows:

- that compliance staff be trained to exercise greater caution in performing their duties – including verification of information – where it is known or suspected that a possible unlawful non-citizen may have mental health problems;
- that any training program developed as a result of the recommendations in the Palmer report and this report include a component designed to better equip compliance officers to deal with people with known or suspected mental health problems.

Response
Agreed. These issues are being addressed in the development of enhanced training for compliance officers (see Recommendations 5 and 6 above).

Recommendation 9
The Inquiry recommends as follows:

- that DIMIA take all necessary action to ensure that appropriate standards for health care needs are developed and introduced for situations involving detainees in transitional detention;
- that where it is necessary or appropriate to conduct a medical examination to determine the fitness to travel of an unlawful non-citizen, DIMIA officers make all reasonable efforts to ensure that the medical practitioner concerned receives the medical history and record of the unlawful non-citizen and that the medical practitioner – who, if possible, is someone who has previously treated the patient – is advised of the factual circumstances, including the behaviour of the unlawful non-citizen, that have led to the need for the medical examination.

Response
Agreed. The existing guidelines for fitness to travel and fitness to depart are to be examined by DIMIA in consultation with Health Services Australia and the Department of Health and Ageing, with a view to their revision. The current arrangements for fitness to travel assessments will also be considered at a workshop being convened by DIMIA's Detention Health Services Branch in October 2005. The detention service provider, Global Solutions Limited, International Health and Medical Services and Professional Support Services (all involved in health care delivery to detainees, including those in transitional detention) will be involved in the discussions.

Mr Comrie focuses more broadly on shortcomings in arrangements for detainees in transitional detention, which is exacerbated in Queensland because there was at the time of Ms Alvarez's detention no immigration detention facility (IDF) in that State. The Government has decided to establish better transitional detention arrangements in Queensland. DIMIA has entered into negotiations with the CEO of Shaftesbury Campus (at Burpengary, just outside Brisbane) who has offered the facility to assist with accommodation of people in detention in Queensland. The Queensland Government has raised concerns about whether the CEO is entitled to sublease campus facilities for this purpose. DIMIA cannot proceed until this issue is resolved between the Queensland Government and the lessee.

Recommendation 10
The Inquiry recommends that the Secretary of DIMIA take all necessary steps to ensure that email business records are kept in accordance with the requirements of the *Archives Act 1983*.

Response
Agreed. Following the Government's acceptance of the similar recommendations from Mr Palmer in his July report on the Cornelia Rau matter, a comprehensive Records Management Improvement Plan is being developed in close consultation with the National Archives of Australia. The Plan includes: a strong training component to ensure all staff are aware of

obligations under the Archives Act; a focus on the links between electronic and paper records; and an upgrade to DIMIA's email management system. The administrative instruction on internet and email usage will be revised and reissued to ensure alignment with recordkeeping policies and statutory obligations.

Recommendation 11
The Inquiry recommends that the Minister for Immigration and Multicultural and Indigenous Affairs write to Mr Robert William Young to commend him for his diligence in pursuing the matter of Vivian Alvarez and bringing it to the attention of the Australian Government.

Response
Agreed. The Minister has written to Mr Young along these lines.

Recommendation 12
The Inquiry finds that the conduct of officers A, B and C, as described in this report, might constitute a breach of one or other of the requirements of the Australian Public Service Code of Conduct, as detailed in s.13 of the *Public Service Act 1999*. The Inquiry recommends that this opinion be brought to the attention of the Secretary of DIMIA, in accordance with s.8(10) of the *Ombudsman Act 1976*.

Response
Noted. Having considered this recommendation from the Ombudsman, and pursuant to section 13 of the Public Service Act (PSA), I appointed Deputy Secretary Bob Correll as my delegate to examine these issues and to consider whether there may be a basis for DIMIA instituting a formal disciplinary process to determine whether or not any DIMIA employees have breached the APS Code of Conduct. Mr Correll has now advised me that, pursuant to section 13 of the PSA, he has formed a view that a Code of Conduct investigation is needed. He has also advised me that he intends to appoint Mr Dale Boucher, a former Australian Government Solicitor and a senior administrative lawyer and consultant, to undertake the investigation. The investigation will commence as soon as possible.

Andrew Metcalfe
Secretary
Department of Immigration and Multicultural and Indigenous Affairs
4 October 2005

APPENDIX 5

THE PROCESSING OF VISA APPLICATIONS - BACKGROUND

This appendix provides background information on Australia's system for processing visa applications, particularly in relation to protection visas.

It outlines the statutory framework and the processing and assessment systems. It also outlines the key findings of previous inquiries.

The statutory framework

The *Migration Act 1958* (Cth) establishes the rules governing immigration and entry to Australia. As DIMIA explained:

> The Migration Act and Regulations made under the Act provide the statutory framework under which the Department manages the delivery of the Government's Migration and Humanitarian programs, facilitates the entry into Australia of persons whose presence is beneficial to Australia, and enforces the requirements of Australia's migration laws, including removing persons with no entitlement under those laws to enter or remain in Australia.[1]

The Migration Act's stated purpose is to regulate in the national interest the travel to, entry and stay in Australia of people who are not Australian citizens.[2] To this end, the Act establishes a system for the grant and cancellation of visas. A visa is in effect a permission to travel to, enter and remain in Australia. That is :

> A visa is similar to a ticket. If a visa is granted to a person who is outside Australia, it will authorise travel and entry to the country and specify the period during which the person is entitled to stay. In the event that the visa is granted inside Australia, it will authorise the period of time that the holder is entitled to remain. The authorised period will be indefinite in the case of a permanent visa, or for a specified period (or periods or until a specified event) in the case of a temporary visa. A visa can authorise single or multiple entry during the term of the visa.[3]

The Migration Act establishes a universal visa regime in that all persons who are not Australian citizens must hold a visa in order to come to and remain in Australia. Non-citizens who do not hold a visa will generally be refused immigration clearance and/or

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

2 *Migration Act 1958*, section 4.

3 K Cronin et al, *Australian Migration Law*, Butterworths Australia, 2001, p. 6127.

taken into immigration detention pending their removal – unless they are granted a visa.[4]

There are over one hundred different visas provided for under the Act. However, these generally fall into one of four main types:

- permanent visas which entitle a person to remain permanently;
- temporary visas which authorise a temporary stay subject to conditions;
- protection visas for people who have been granted refugee status or protection on humanitarian grounds; and
- bridging visas which confer temporary lawful status on someone who would otherwise be unlawful.[5]

The rules governing the grant of each type of visa are specified in the Migration Act and Regulations made under that Act. The Act sets out the broad structure of the legal rules about which non-citizens can come to and remain in Australia. In contrast, the Migration Regulations contain the detailed requirements that non-citizens must meet in order to be granted a visa and about how an application for a visa must be made.[6] They also detail the conditions which may be imposed on any particular visa.

Also relevant are the policies and procedures developed by DIMIA and contained in the Department's *Procedures Advice Manual* and in its *Migration Series Instructions* (or MSIs)**.** These are in effect DIMIA's commentary on and interpretation of the applicable law or rules, especially those that provide decision-makers with some discretion, and are intended to be a guide for decision-makers.[7]

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4 DIMIA *Submission 205*, p. 16. Persons who may be in need of Australia's protection at the border undergo an entry interview are then by the Onshore Protection area of the Department to determine whether they raise information or claims which, prima facie, may engage Australia's protection obligations.

5 Permanent visas, protection visas and most temporary visas are 'substantive' visas for the purposes of the Act. Bridging visas are not. This distinction is important as it is a requirement for most visa applications made in Australia that the applicant hold or has recently held a substantive visa. Non-substantive visa holders – such as the holder of a bridging visa – cannot therefore meet this requirement. K Cronin et al, *Australian Migration Law*, Butterworths Australia, 2001, para. 20.500.

6 DIMIA, *Submission 205*, p. 5. The fact that the detail is contained in regulations reflects the need to change the relevant rules often and quickly.

7 DIMIA, *Submission 205*, p.8. As DIMIA explains, they are intended to provide guidance for decision-makers on how the regulations are to be interpreted.

Also applicable are the Ministerial Directions which govern the exercise of any powers under the Act or the performance of any function under the Act. These are binding on any person or body which has powers or functions under the Act.[8]

Process for lodgement and assessment of visa applications

The following paragraphs outline the process prescribed under the Act for the lodgement and assessment of visa applications.[9] The process and requirements involved may vary according to the type of visa being sought.

Lodgement of a valid visa application

A valid visa application must be lodged. As a general rule, if a visa application is invalid, it cannot be considered.

Prerequisites for a valid lodgement include— use of approved forms; payment of a visa application charge; satisfaction of prescribed criteria and requirements; and lodgement at a prescribed place or address. There are a range of methods and places for making a visa application depending on the type of visa being applied for and where the applicant lives. Most applications must be in writing. However, for some visa types, it is possible to apply on the internet or to make an oral application.

Processing and assessment

Once a valid application has been received, it must be dealt with in accordance with the provisions of the Act and Migration Regulations.[10] In practice, most decisions or determinations made under the Act are made by DIMIA officials acting as the delegate of the Minister.

After an application is lodged, it is registered and acknowledged. Each application is given a file number and a computer generated client identification number. A case officer will be allocated to process the application.

In assessing the application, DIMIA must generally have regard to all the information in the application. DIMIA must also provide applicants with an opportunity to

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8 *Migration Act 1958*, section 499. There are several policy directions in force and they relate to diverse matters such as assessment of applications for a visitor visa, visa processing priorities, and visa cancellation and refusal on character grounds.

9 The outline is drawn from: DIMIA, *Submission 205*, pp 22-23; K Cronin et al, *Australian Migration Law*, paragraphs 9.500-95.210; and J Burn and S Reich, *The Immigration Kit. A Practical Guide to Australia's Immigration Law*, 7th Edition, Federation Press 2005, pp 75-85.

10 Sections 51A to 64 of the Migration Act, for example, provides 'a code of procedure for dealing fairly, efficiently and quickly with visa applications'.

comment on adverse information in certain circumstances.[11] Time limits apply to any response to adverse information.

An applicant can provide further information to DIMIA regarding their lodged application at any point up until a decision on their application has been made. Any information that is provided must be considered by the decision-maker. DIMIA may also invite the applicant to provide additional information. Communications with DIMIA concerning an application must generally be in writing.

Interviews may be required where information on an application needs to be clarified or where there are perceived inconsistencies in the application. Applicants are obliged to attend an interview if requested to do so. At an interview, an applicant will be questioned on their application and asked to explain any suspicious or inconsistent circumstances. A sponsor or other applicant may also be interviewed to check consistency. The interview is recorded and the interview record is kept on the relevant departmental file.

Permanent visas and some temporary visas require that the applicant be in good health and applicants must make themselves available for a medical examination if requested.

Once an applicant appears to meet the main eligibility criteria, they will be asked to have a health check and undergo character or police checks. If the applicant and their family members satisfy the health criterion and criteria for the class of the visa, they will be advised whether an assurance of support and social security bond are needed and whether they will need to pay a second instalment of the visa application charge before the visa is granted.

Processing times

The time taken to process an application depends on a range of factors, including the type of application and the place it is lodged. As DIMIA noted:

> Some visas have very fast processing times whereas others are more protracted. At one end of the spectrum, Electronic Travel Authority (ETA) visas (which provide for tourism or business visits to Australia for nationals considered a low security and compliance risk to Australia) are lodged via

11 The Act imposes obligations to disclose adverse information where the application relates to a class of visa which may be granted while the person is in Australia and there is a right of review to the Migration Review Tribunal or the Refugee Review Tribunal. In these circumstances, DIMIA must invite an applicant to comment on information that: would constitute a reason or part of a reason for refusing the application; is specific to the person (as opposed to the class of persons to whom the applicant belongs); and was not provided by the applicant for the purposes of the application. This statutory duty does not extend to information or matters the disclosure of which would found an action for breach of confidence or which, in the Minister's opinion, would be contrary to the national or public interest. Other limitations also apply. See *Migration Act 1958*, sections 5 (definition of 'non-disclosable information') and 57.

> the internet and are processed electronically mostly in a matter of seconds. … Processing times for migration visas are significantly longer reflecting the more complex nature of the assessments involved – including medical and character checking procedures, verification of relationships and, in some cases, assessment of skills and other attributes. … Processing times for individual cases are [also] dependent on the characteristics of the case – for example, a case with complex health, character or fraud issues will inevitably take longer to resolve than a simple well-documented application.[12]

With the recent exception of applications for protection visas, there is no general statutory obligation placed on DIMIA requiring it to make a decision within a specified time frame.[13] However, Ministerial Directions require officers to have regard to 'compassionate circumstances' and to give priority to certain types of visa applications.

Decision-making

In deciding on a visa application, DIMIA must have regard to the relevant provisions of the Act and Regulations, any applicable ministerial directions, relevant gazettal notices issued to define elements within specific regulations and departmental policy documents that assist in interpreting the prescribed criteria and conditions.

DIMIA can make a decision on a visa application without giving the applicant an opportunity to provide written or oral submissions. DIMIA can also proceed to make a decision if further information has been promised or sought, but not given within the required time frame.

If the Minister or his or her delegate is satisfied that the prescribed health and eligibility criteria are met and that any required payments have been made, the visa must be granted — provided no other provision of the Act or Regulations prohibit it (such as provisions setting a quota or cap restricting the number of certain types of visas that may be granted each financial year). Conversely, decision-makers generally have no discretion to grant a visa if the prescribed criteria are not met.

If the applicant fails to satisfy the eligibility criteria or fails to pay any relevant charges, then the application must be refused. The applicant must be given written notification of the refusal by hand, prepaid post or by electronic means. The notification must state which criteria were not met and/or any provision of the Act or Regulations which prevented the grant of the visa.

If a right of review exists, then the notification must explain that there is a review right. A person who has had their application refused and has an Australian

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12 DIMIA, *Submission 205* p.19.

13 Statutory time limits imposed on applications for protective visas are discussed at paragraph 2.127.

connection may seek merit review by the Migration Review Tribunal (MRT). Generally, an Australian connection will be either that the person was physically present in Australia at the time of making their application, or that they are being sponsored by an Australian citizen or permanent resident. Persons whose applications to the MRT are unsuccessful can seek Ministerial Intervention under section 351 of the Act.

Number of visa applications

It is important to appreciate the volume of decision-making involved in the above processes. In the 2004-05 financial year, for example, DIMIA received a total of 4,555,730 visa applications and granted a total of 4,214,574 temporary entry visas and 133,060 permanent migration visas.[14]

Lodgement and assessment of protection visa applications

Much of the evidence received by the committee during the course of this inquiry related to protection visas. The following paragraphs outline the lodgement and assessment process for protection visa applications.[15]

The international context

Australia is a signatory to the United Nations 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol. As such, Australia is required to provide protection to persons who are in Australia or who arrive in Australia if they fall within the definition of a 'refugee'. The Refugees Convention defines a refugee as a person who:

> Owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his *[sic]* nationality and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.[16]

The obligation to provide protection arises out of Article 33 of the Refugees Convention which prohibits its signatories from returning a refugee to a country, where, among other things, the life and freedom of that person would be threatened on

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14 DIMIA, *Submission 205*, p.6.

15 A more detailed analysis of the application and determination processes for refugee status is contained in the committee's earlier report on Australia's Refugee and Humanitarian Determination Process. See Senate Legal and Constitutional References Committee, *A Sanctuary under Review. An Examination of Australia's Refugee and Humanitarian Processes*, June 2000, chapters 3 to 6.

16 *1951 Convention Relating to the Status of Refugees*, Article 1A(2). The definition is the result of the combined effect of the 1951 Refugee Convention and the 1967 Protocol.

account of his or her race, religion, nationality, membership of a particular social group or political opinion.

Australia also has similar obligations not to return (or *refoul*) persons who do not satisfy the Refugee Convention's definition of a 'refugee', but who face a risk of a violation of their fundamental human rights. This obligation derives principally from the following conventions:

- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified by Australia on 8 August 1989);
- Convention on the Rights of the Child (ratified by Australia on 16 January 1991); and
- The International Covenant on Civil and Political Rights (ratified by Australia on 13 August 1980).

The Australia's Refugee and Humanitarian Program – which is administered by DIMIA – is the primary means by which Australia seeks to meet the above obligations. This program has two main components: offshore and onshore. The offshore program seeks to resettle refugees and others in humanitarian need who are outside Australia, while the onshore program provides asylum for people in Australia who meet the refugee criteria as set out in the Convention on Refugees.

The types of visa available and applicable rules and procedures governing assessment of visa applications differ for each program.

The Offshore Humanitarian Resettlement Program

The objective of the Offshore Humanitarian Resettlement Program is to provide resettlement in Australia for refugees and people overseas who are in humanitarian need.[17] The Refugee Convention does not require Australia to accept refugees who are overseas. However, as a humanitarian response, the Australian Government permits overseas refugees to be granted visas and to seek protection in Australia. Every year, the Australian Government, in consultation with the United Nations High Commissioner for Refugees (UNHCR), determines the total number of places that Australia will accept as part of this humanitarian program.[18]

Types of protection visa available

A person who has been recognised as a refugee by UNHCR or another official body must still meet the legal requirements imposed under the Migration Act and Regulations in order to travel to and enter Australia. To this end, the offshore program allows for two categories of permanent visa and two categories of temporary visa. The permanent offshore humanitarian visa categories consist of the following:

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17 DIMIA, *2003-2004 Annual Report*, pp 66-67.

18 DIMIA, Fact Sheet 60, *Australia's Refugee and Humanitarian Program*, 26 August 2005.

The Refugee category, which applies to people who are subject to persecution in their home country and who are in need of resettlement. The majority of applicants who are considered under this category are identified as refugees and referred by the UNHCR to Australia for resettlement. This category includes the Refugee, In-country Special Humanitarian, Emergency Rescue and Woman at Risk visa sub-categories.

The Special Humanitarian Program (SHP) category, which provides for people outside their home country who are subject to substantial discrimination amounting to gross violation of human rights in their home country, are living outside their home country and have links with Australia. A proposer who is an Australian citizen, resident or an organisation that is based in Australia must support applications for entry under the SHP.

An offshore temporary humanitarian visa (THV) is for a person who is subject to persecution or substantial discrimination in their home country and has bypassed or abandoned effective protection in another country and for whom humanitarian entry to Australia is appropriate. There are two types of THV:

- Secondary Movement Relocation Visa. This visa subclass offers a temporary visa to people who have moved from a safe first country of asylum to another country before applying to enter Australia. This visa is valid for five years and enables a person to apply for a permanent protection visa after four and a half years if there is a continuing need for protection.
- Secondary Movement Offshore Entry Visa. This visa subclass offers a temporary visa to people who arrived unlawfully in Australia at offshore excised places and have moved from a safe first country of asylum.[19] A temporary visa will be granted if they can show that they are at risk of persecution or substantial discrimination in their home country. This visa is valid for three years.[20]

The differing rights conferred by the grant of permanent visa and a temporary visa are outlined below.

Lodgement and processing of offshore applications

Offshore applications are generally lodged with Australian diplomatic missions overseas.[21] The committee understands that applications may be assessed by DIMIA

19 An excised offshore place is a place in Australia – such as Christmas Island - that has been excluded from the migration zone for the purpose of prohibiting people who arrive at such places from making a valid visa application. Unlawful non-citizens who arrive at excised offshore places cannot make a valid application for any visa while they are in Australia. DIMIA, Fact Sheet 65 *New Humanitarian Visa*, 22 July 2002; DIMIA *Submission 205*, p. 8.

20 DIMIA, *Submission 205*, p. 30; Burns, *The Immigration Kit*, pp 399-400; DIMIA, Fact Sheet 65- *New Humanitarian Visa*, 19 July 2002.

21 One exception is Special Humanitarian Program applications for persons in Africa or the Middle East. These must be lodged at the relevant processing centre in Australia.

officers at the overseas post concerned or can be referred for assessment in Australia. Applications may also be referred to the UNHCR or another national or international human rights organisation to check claims made by applicants. All applicants must satisfy public interest criteria relating to health, character and national security. The applicant and his or her family must have a medical examination. Police clearances are usually required for every country that the applicant and certain family members have lived in for more than 12 months over the past four years. Clearances are not required from the country in which the applicant suffered persecution or human abuse.[22]

The committee understands that offshore refugee and humanitarian visa applicants are usually interviewed to determine the veracity of their claims, to obtain any additional information required, and to assess whether settlement in Australia is the most appropriate solution.[23]

DIMIA will inform the applicant whether they have been accepted or refused. If accepted, they will be issued with a visa. If refused, an applicant will be sent a letter explaining the reasons for the refusal. The committee understands that applicants outside Australia have no right to merit review if their application is refused.[24]

Numbers of offshore protection visa applications

A significant number of offshore protection visa applications are lodged each year. The number of applications is also increasing each year. In 2004-05, for example, 90,539 applications were made offshore, an increase of 15% in comparison with 2003-04. The number of offshore applications finalised during 2004-05 was 114,060, which is 70% more than in the previous year.[25]

The Australian Government, in consultation with the UNHCR, determines an annual total number of persons that Australia will accept under its Humanitarian Program. In 2004-05, for example, the Government allocated 13,000 places under the program, with 6000 places allocated for the refugee category and 7,000 places allocated for SHP and onshore protection visas. This was an increase of 1,000 on the 12,000 places allocated annually since 1995-96.[26]

A total of 13,178 visas were granted under the Humanitarian Program in 2004-05. Some 12,096 of these were granted to persons overseas and 1,082 visas were granted to people in Australia. Visas were generally granted in line with regional priorities

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22 Burn & Reich, *The Immigration Kit*, pp 428-429, DIMIA, *Submission 205*, pp 30-32.

23 Burn & Reich, *The Immigration Kit*, p. 428.

24 Burn & Reich, *The Immigration Kit*, p. 404.

25 DIMIA, *2004-2005 Annual Report*, p. 90. In 2003-2004, 78,971 applications were made offshore, an increase of 25% from the previous financial year. DIMIA, *2003-2004 Annual Report*, p. 68.

26 DIMIA, *2004-2005 Annual Report*, p. 88.

recommended by the UNHCR, with 70 per cent of visas being granted to applicants from Africa, 26 per cent from the Middle East and South West Asia and the remainder from the Asia/Pacific, Europe and the Americas.[27]

Processing times for offshore protection visa applications

DIMIA's aim is to finalise 75 per cent of offshore applications within 12 months of lodgement. In 2004-05, 75 per cent of offshore applications were finalised within 9.5 months, with 79 per cent being finalised within 12 months.[28]

The Onshore Protection Program

The second component of the Refugee and Humanitarian Program is the Onshore Protection Program. It applies to people already in Australia when they claim Australia's protection.

Types of protection visa available

Two general types of protection visas are available to onshore applicants. A person who arrived lawfully in Australia (for example, with a valid visa) and is found to require protection may be granted a permanent protection visa (PPV).[29] This enables them to live permanently in Australia. A person who arrived unlawfully in Australia (for example, without a valid visa or passport) and is found to require protection may be granted a temporary protection visa (TPV), which provides them with temporary residence for three years in the first instance.[30]

DIMIA advised that the grant of a permanent protection visa confers the following rights:

- permanent residence in Australia;
- access to Australia's public health services including Medicare benefits, Pharmaceutical Benefits Scheme, and public hospital benefits;
- permission to work;

27 DIMIA Fact sheet 60. *Australia's Refugee and Humanitarian Program*, 26 August 2005.

28 DIMIA, *2004-2005 Annual Report*, p. 90. In 2003-2004, 87 percent of offshore applications were finalised within 12 months of lodgement, with 75 percent finalised within 10 months of lodgement. Applications from 67,081 persons were finalised within that program year. DIMIA, *2003-2004 Annual Report*, p.68.

29 The Migration Act generally requires all persons, including Australian citizens, arriving in Australia to pass through immigration clearance. This typically occurs when a person passes through customs at an airport or port. Non-citizens generally must show evidence of a valid visa and their identity to be immigration cleared. DIMIA, *Submission 205*, p. 15.

30 DIMIA, *Submission 205*, p. 24.

- access to a range of employment benefits (including Disability support pension, Newstart Allowance, Fully Job Network Eligible, and other similar benefits);
- access to a wide range of welfare benefits (including Austudy, Carer Allowance/Payment, Child Care Benefit, Family Tax Benefit, Health Care Card, Maternity Payment, Mobility Allowance, Sickness Allowance, Youth Allowance, Special Benefit, and other similar benefits);
- access to a range of settlement services (such as Adult Migrant English Programme, Community Settlement Services Scheme, Integrated Humanitarian Settlement Strategy, Programme of Assistance for Survivors of Torture and Trauma, and other similar services);
- access to a range of education services (including ESL New Arrivals Programme, Language, Literacy and Numeracy Programme, New Apprenticeships, Vocational Education & Training Priority Places Programme, and other similar schemes);
- permission to travel to and enter Australia for five years after grant; and
- eligibility to apply for citizenship after two years permanent residence.[31]

In contrast, a temporary protection visa provides:

- three year temporary residence in the first instance;
- access to Australia's public health services such as Medicare benefits, Pharmaceutical Benefits Scheme, and public hospital benefits;
- permission to work (including Job Matching assistance through Centrelink)
- access to a limited range of welfare benefits (including Child Care Benefit, Special Benefit, Maternity and Family Allowances and Family Tax Payment); and
- access to a limited range of settlement services (such as Integrated Humanitarian Settlement Strategy and Programme of Assistance for Survivors of Torture and Trauma).[32]

The TPV provides no rights for people to bring their families into Australia and does not provide an automatic right of return to Australia if the TPV holder departs Australia.[33]

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31 DIMIA, *Submission 205*, pp 26-27, 31-32. The committee understands that the Australian Citizenship Bill 2005 will require three years permanent residence before one can apply for citizenship.

32 DIMIA, *Submission 205*, pp 26-27, 31-32. See also DIMIA Fact Sheet 64, *Temporary Protection Visas*, 20 November 2005.

33 DIMIA, S*ubmission 205*, p. 27.

TPV holders may apply for a further protection visa at any time. However, a further protection visa may be granted only after a period of 30 months and if they are still considered to need protection at that time.

Whether the further protection visa is a permanent or temporary protection visa depends on a number of factors including their actions before they arrived in Australia. DIMIA advised, for example, that certain restrictions apply to persons who, before arriving in Australia, resided for a continuous period of seven days or more in another country in which they could have sought and obtained effective protection of the country or through UNHCR offices located in that country.[34] Persons in this category who apply for a further protection visa may only be granted another TPV (ie, as opposed to a PPV). The Minister has the power to waive this restriction if satisfied that it is in the public interest to do so.[35]

It is understood that the rationale for this 'seven day rule' is that unlawful arrivals who could have sought protection in another country on the way to Australia should not benefit by being granted a permanent protection visa in Australia.[36]

The Migration Regulations also provide that being convicted of any offence for which the maximum penalty is imprisonment for at least 12 months can bar a TPV holder from obtaining a permanent visa for a period of four years from the time the conviction is given. That is, the person is only eligible for a grant of a further TPV as opposed to a PPV.[37]

Until recently, TPV holders were barred from applying for any visa other than a further protection visa while they remained in Australia. However, the Government in 2004 announced measures whereby certain TPV holders may apply for and be granted various mainstream or non-humanitarian visas.

This change was made in recognition that some current and former TPV holders have made important contributions to the community during their time in Australia, particularly in rural and regional areas and some have special skills that would

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34 As a general rule, 'effective protection' is considered by DIMIA to involve the person not only being permitted to remain in the third country without risk of persecution for a Convention reason, but also not being at risk of being refouled to their country of origin where they have a well-founded fear of persecution for a Convention reason. It is not necessary for a country to be a signatory to the Refugees Convention for it to be capable of providing effective protection. It is not necessary for a country or the UNHCR to provide a speedy decision, or for a resettlement or local integration solution to be provided, in order for effective protection to considered to be available. Advice to the secretariat from DIMIA, 15 January 2006.

35 DIMIA, *Submission 205*, p. 24. The rule applies to applications for a further protection visa application lodged after 27 September 2001 (depending on individual circumstances).

36 Burn & Reich, *The Immigration Kit*, p.438.

37 Migration Regulations, Regulation 866.222A. There is, however, a power to waive this rule so that a permanent protection visa can be granted, if it would be in the public interest (see Chapter 3).

otherwise qualify them for a migration visa. It was also recognised that some TPV holders have established strong links to Australian nationals and may be able to qualify for the grant of a mainstream visa.[38]

Bridging or interim visas and entitlements

Asylum seekers who apply for protection in Australia may be granted a bridging visa pending the determination of their application.[39]

The grant of a bridging visa allows the applicant to remain lawfully in the community until their application is finalised. A bridging visa will usually cease on the grant of a protection visa or 28 days after notification of a decision that a person is not a refugee. It will also remain in force if an application for review is lodged with the Refugee Review Tribunal (RRT) and provides lawful status during the review. A bridging visa will cease 28 days after notification of an adverse Tribunal decision.[40]

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38 DIMIA Fact Sheet 64d, *New Onshore Visa Options for Temporary Protection and Temporary Humanitarian Visa Holders*, 24 August 2004. DIMIA, *Submission 205*, p. 24. The changes apply to current and former holders of certain sub-classes of Temporary Protection Visas and Temporary Humanitarian Visas who were in Australia on or before 27 August 2004.

39 DIMIA's submission summarises the classes of Bridging visas, established by the Regulations, as follows:

- Bridging visa A. It is available to non-citizens who apply for a visa within Australia and who hold another visa (other than a Bridging Visa or Criminal Justice Visa) at time of application. It does not come into effect unless the first substantive visa ceases in which case it serves to keep them lawful until the application is decided.
- Bridging visa B. It is available to all Bridging visa A holders who have valid reasons for wanting to travel outside Australia while their substantive visa application is being considered.
- Bridging visa C. It is available to applicants who do not hold a visa when they apply for another visa while in Australia, with the exception of people who have been granted a Bridging visa E since they last held a substantive visa.
- Bridging visa D. It is a short term bridging visa available to persons who are unlawful or will soon become unlawful and want to make an application for a visa but are temporarily unable to do so; or, who do not want to or are unable to apply for a visa but a compliance officer is not available to interview them.
- Bridging visa E. It is available to certain unlawful non-citizens who are located by DIMIA and who may be applying for visas or making arrangements to depart Australia.
- Bridging visa F. It enables the release from immigration detention of certain unlawful non-citizens who may be able to assist with investigations into people trafficking, sexual servitude and/or deceptive recruiting offences.
- Bridging visa R. It enables the release from immigration detention of certain unlawful non-citizens who are awaiting removal from Australia and are invited by the Minister to apply.

The conditions attached to a Bridging visa vary according to the type of visa applied for, the applicant's immigration status and personal circumstances at the time of application. DIMIA, *Submission 205*, p.10.

40 DIMIA, *Submission 205*, p. 29.

The following table shows the total number of bridging visas in force in recent years:

Table 1: Bridging visas in effect as at 30 June

As at 30 June	A	B	C	D	E	F	**Total**
1999	28,650	509	4,719	3	4,555		**38,436**
2000	30,458	640	4,552	4	5,604		**41,258**
2001	27,134	531	3,950	1	6,967		**38,583**
2002	25,608	415	3,470	2	8,616		**38,111**
2003	22,692	374	2,866	2	8,605		**34,539**
2004	20,192	313	1,663	0	6,207	1	**28,376**
2005	14,689	282	1,458	8	7,927	0	**24,364**

Source: The table was provided to the committee by DIMIA on 9 January 2006.

Note: DIMIA advised that the data on Bridging Visa E (BVE) is taken from a snapshot of BVEs in effect as at 24 June 2005. The Bridging Visa F was introduced on 1 January 2004. The total number of bridging visas in effect as at 30 June 2005 also varies from that reported in *Managing the Border 2004-05*, which was in error.

The type of bridging visa issued to an applicant is determined in part by the time and circumstances in which they lodge their protection visa application. This in turn determines the conditions under which the applicant may remain in Australia pending the outcome of their application.

An example is the right to work in Australia pending the determination of an application for protection visa. Applicants who have been in Australia for fewer than 45 days in the 12 months before they lodge their application may be granted a bridging visa with work rights. In contrast, work rights are not generally available to applicants who have been in Australia for 45 days or more in the 12 months before they lodge their application. They can only be granted a bridging visa with a condition attached that prohibits them from working. This condition can only be changed if the person falls within in a particular class of applicant specifically exempted by the Minister from this 'forty five day rule' or if DIMIA fails to determine the application within six months of its lodgement. In the latter case, an applicant who held a valid visa on the day they lodged their application (that is, they were not unlawful), and who can demonstrate a compelling need to work, may then apply for and be granted another bridging visa with permission to work.[41]

The grant of work rights also determines whether an asylum seeker can access Medicare and related public health benefits while his or her application for a

41 The 45 day rule applies to protection visa applications lodged on or after 1 July 1997. DIMIA Fact Sheet 62, *Assistance for Asylum Seekers in Australia*. 20 November 2003. See also Germov & Motta, *Refugee Law in Australia*, Oxford University Press 2003, p.69.

protection visa is being assessed. An asylum seeker must hold a valid visa (including a bridging visa) with work rights in force in order to access Medicare.[42]

As a general rule, protection visa applicants in Australia are not entitled to social security benefits while their application is being determined. However, they may be eligible for assistance under the Australian Government's Asylum Seekers Assistance Scheme. To be eligible for assistance, an applicant must generally hold a bridging visa, have applied for a visa at least six months ago, and be unable to meet their basic needs for food, accommodation and health care. Recipients under the Scheme who do not have access to Medicare can receive assistance with health care costs and counselling services.[43]

Protection visa applicants on bridging visas must generally stay in Australia until their application is finalised. If they leave the country, they will not be allowed to return unless they hold a visa giving them permission to re-enter Australia.[44]

Processing and assessment of onshore protection visas applications

A person in Australia must apply to DIMIA for the grant of a protection visa. In order to engage Australia's protection under the Onshore Program, he or she must establish that he or she is a 'refugee' within the Convention definition as it is understood in Australia. Once a valid application – on the proper form and with the appropriate fee -- – is lodged with DIMIA, a DIMIA officer (acting as delegate of the Minister) is assigned as a case officer. Their role is to assess the application against the relevant definition of a refugee, as well as other criteria prescribed under the Migration Act for the grant of a protection visa – such as health and character requirements.[45]

It is important that the application form be completed as fully as possible or it may be rejected as an invalid application. An application must contain substantive claims in order to be valid.[46] An applicant must make a claim under the Refugee Convention that they are a person to whom Australia has protection obligations.

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42 DIMIA Fact Sheet 62, *Assistance for Asylum Seekers in Australia*. 20 November 2003. Some asylum seekers without work rights may qualify for Medicare if they are the spouse, child or parent of an Australian citizen or permanent resident. Burns, *The Immigration Kit*, pp 456-457.

43 The Asylum Seekers Assistance Scheme is administered by DIMIA through contractual arrangements with the Australian Red Cross Society. In 2002-03, the Scheme assisted 1,865 clients at a cost of $9.566 million. DIMIA Fact Sheet 62, *Assistance for Asylum Seekers in Australia*, 20 November 2003.

44 An example is Bridging visa B. See above.

45 The requirements for a valid protection visa application are set out in the Migration Regulations. These include the requirement that an application be made on Form 866. *Migration Regulations 1994*, Item 1401 of Schedule 1. For further information concerning Form 866 and the requirements for a grant of a protection visa, see Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, pp 109-114.

46 See cases cited in Germov, *Refugee Law in Australia*, p. 69.

If more information or clarification of claims is required, the primary decision-maker can seek further written information from the applicant or interview the applicant. Not all applicants are interviewed. An applicant may take an adviser or a friend with them to attend an interview, but the adviser can only observe and cannot participate in the interview.[47] DIMIA can provide interpreters at the interview, if required.

In making a determination, the primary decision-maker can refer to information on the social and political situation in the applicant's country of origin obtained through the department's Country Information Service (CIS) – a database containing information from a range of sources, including DFAT. Information from other sources may also be used in deciding whether an applicant's claims come under the definition of a refugee.

Applicants are given the opportunity to respond to certain adverse material that is before the primary decision-maker and which may be taken into account when a decision is made. All statements made by or on behalf of the applicant may form part of the evidence that the primary decision-maker considers in deciding the application.

The decision-maker then makes a determination whether the applicant meets the tests for refugee protection at Article 1A of the Refugee Convention. If so, the prescribed health and character checks are then undertaken. Provided that the character checks are clear and the applicant is not considered a danger to the security of Australia, a protection visa is granted.

Applicants assessed as not meeting the criteria for refugee status may appeal to the Refugee Review Tribunal (RRT). They are provided with a written record of the decision, outlining findings of fact and the reasons for the decision, and details of their right of review.[48]

Numbers of onshore protection visas granted

DIMIA finalised 8,278 onshore protection visa applications in 2004-05.[49] This resulted in 4,601 protection visas being granted, of which 4,293 were PPVs and 308 were TPVs. Of these, 922 visas were the result of an initial application and 3,679 arose out of applications by TPV holders for further protection. [50]

Processing times for onshore protection visa applications

DIMIA advised the committee that:

> Current protection visa processing times are short by world standards. In 2004-05, some 80 per cent of initial applications for protection from

47 Burn & Reich, *The Immigration Kit*, p. 450.

48 DIMIA, *Submission 205*, p. 24.

49 DIMIA *2004-05 Annual Report*, pp 94-95. Finalisation decisions including primary decisions, visa grants resulting from review tribunal decisions and certain visa cancellation decisions.

50 DIMIA, *2004-2005 Annual Report*, pp 94-97.

> applicants in the community were finalised by DIMIA within 90 days of application. For 2004-05, some 81 per cent of initial protection visa applicants from persons in detention were finalised by DIMIA within 42 days of lodgement.[51]

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 reflected in legislation. The Prime Minister also set a deadline of 31 October 2005 for DIMIA to complete all primary assessments of the 3400 applications for permanent protection visas arising from the existing caseload of temporary protection visa holders.[52]

Offshore processing in 'declared' countries – 'the Pacific solution'

The Migration Act provides for the offshore processing of protection visa applications made by asylum seekers in 'excised' areas of Australia.

The Migration Act was amended in September 2001 to allow for certain parts of Australian territory to be excised from the migration zone.[53] The effect was that asylum seekers who enter Australia unlawfully at these places are prevented from making an application for any visa for Australia, unless the Minister considers this to be in the public interest. The legislation also conferred discretions on officials to detain unlawful non-citizens in an excised offshore place, or persons seeking to enter an excised offshore place, who would be unlawful on entry.[54]

The amendments also provided that unlawful non-citizens who enter an excised offshore place could be taken to a 'declared country' for processing and determination of their refugee claims.[55] DIMIA advised that:

> A declaration of a country for this purpose can be made only by the Minister, where fundamental safeguards to adhere to Refugee Convention obligations are in place. The Minister must be satisfied that a declared country provides people seeking asylum with access to effective procedures for assessing their claims. Asylum seekers must be provided with

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51 DIMIA, *Submission 205*, p.25. DIMIA's target for processing of protection visa applications from persons placed in immigration detention is to finalise 60% of those applications within 42 days of lodgement (excluding periods where there are factors outside of DIMIA's control that prevent finalisation). DIMIA, *2004-2005 Annual Report*, p. 96.

52 DIMIA, *2004-2005 Annual Report*, p. 96. See also Senator the Hon Amanda Vanstone, 'DIMIA meets commitment to Protection Visa applicants', Media Release, 1 November 2005. See also DIMIA, Answer to Question on Notice, 5 December 2005, p. 40.

53 Christmas Island, Thursday Island, Horn Island and Ashmore and Cartier Islands and the Cocos (Keeling) Islands, Australian sea installations and Australian resource installations are excised offshore places. The Migration Regulations may also prescribe certain islands or external territories as excised offshore places (section 5 definition).

54 *Migration Act 1958*, sections 189(3) and (4).

55 *Migration Act 1958*, section 198A.

> appropriate care and protection pending the determination of their refugee claims and while they await either resettlement or return.[56]

Pursuant to the above, the Australian Government established offshore processing facilities in two declared countries – Nauru and Papua New Guinea. These facilities were set up with the cooperation of the Governments of Nauru and Papua New Guinea. Asylum seekers are granted special purpose visas by those countries to facilitate their stay while they await processing and resettlement or return.[57]

Assessment of protection claims by asylum seekers in the offshore processing facilities to date has been undertaken by both UNHCR representatives and DIMIA officials. DIMIA advised the committee that these processes were consistent with Australia's obligations under the RefugeeConvention.

> Australia's processes for refugee status determination for persons who arrive without authority in excised offshore places or for persons taken to the Offshore Processing Centres are modelled on those of the UNHCR. These processes enable Australia to conduct refugee assessments, and reviews of such assessments, offshore and to advise the Minister accordingly.[58]

Offshore processing centres accommodated 1,547 people from September 2001 to June 2004. Their claims for refugee protection were considered by Australian authorities or the UNHCR. Of the 1,547, some 839 were resettled prior to 30 June 2004. In 2003-04, 122 were resettled in Australia, New Zealand, Sweden and Canada. Of these, 90 were assessed as refugees, while 32 non refugees were resettled in New Zealand and Canada under humanitarian or other programs. Of those found not to be refugees, 93 returned voluntarily to their country of origin or to a third country. At 30 June 2004, 225 people remained in Nauru, most from Afghanistan and none in Papua New Guinea.[59]

On 14 October 2005, the Minister announced that 25 of the 27 people then remaining on Nauru would be brought to Australia. The Committee understands that this decision follows a review of their cases and a report by independent experts, who warned that urgent action was required to prevent further deterioration in the mental health of those in the offshore processing camp.[60] The Minister advised that the Nauru Offshore Processing Centre would remain available to deal with future cases if the need arises. The Minister also advised that:

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56 See DIMIA *Submission 205*, pp 28-29.

57 DIMIA *Submission 205*, p. 29.

58 DIMIA, *Submission 205*, pp 29-30.

59 DIMIA, *Managing the Border: Immigration Compliance 2003-2004 Edition*. (Commonwealth of Australia, 2005).

60 Michael Gordon 'Detainees leave Nauru" *Sydney Morning Herald*, 14 October 2005, p. 5. Michael Gordon, 'Asylum Seekers: Vanstone promises quick response to Nauru report', *The Age,* 30 September 2005, p. 6.

> … the remaining two people had received adverse security assessments and therefore remained on Nauru.[61]

Problems inherent in assessing protection visa applications

The very nature of protection visa applications and claims on which they are based pose difficulties for applicants and decision-makers alike.

As the committee noted in its 2000 inquiry into the operation of Australia's refugee and humanitarian program, there is often a great disparity among asylum seekers in terms of knowledge, education and financial resources.[62] The circumstances in which they have left the country of origin may mean that many will not have documentation immediately available to support their claims or which can confirm their identity, nationality or citizenship. Moreover, as the committee also noted in its earlier report, asylum seekers:

- are often under a great deal of emotional stress;
- are frequently apprehensive about dealing with government officials;
- have few if any links to friends, relatives or community networks who may be of assistance;
- commonly cannot speak, read or write in English;
- sometimes lack any education at all;
- have little, if any, understanding of how the refugee determination system works, or of what their rights and responsibilities are in Australia; and
- have limited, if any, income or financial resources at their disposal.[63]

Compounding these difficulties is the fact that some asylum seekers have been subjected to torture and trauma. As the Survivors of Torture and Trauma Assistance and Rehabilitation Service (STTARS) advised:

> The first interview with a DIMIA case officer is often difficult for a number of reasons. … case officers sometimes fail to recognise that the after effects of trauma commonly include discontinuity of experience, a sense of detachment and loss of control. This may mean that during structured assessment interviews a traumatised individual may suffer significant short and long term memory loss or impairment. The phenomenology of Post Traumatic Stress Disorder often involves memories which are vivid and emotionally laden but fragmented and disorganized. ... This will adversely

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61 Minister Vanstone, 'Update on Nauru', Media Release, 14 October 2005.

62 See Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, pp 76-77.

63 Senate Legal and Constitutional References Committee, *A Sanctuary under Review*, pp 76-77. Ms Birss, Refugee Advocacy Service of South Australia, *Committee Hansard*, 26 September 2005, pp 14, 26.

> affect an applicant's ability to recall the strict chronology of events or the detail of events which are embedded in experiences of high emotional valence. In some interviews where the officer is predisposed to doubt the veracity of claims, the questioning style may begin to resemble an interrogation. This may trigger intrusive thoughts and feelings from the past and precipitate mild dissociative episodes or other defensive strategies where the applicant may appear disinterested or remain silent. This may be interpreted as the applicant being uncooperative or evasive. Over a period of time and with fairly intensive counselling and therapeutic interventions, the applicant may begin to integrate some past experiences and recall further details. When this additional information is submitted, it may be viewed with suspicion or even considered a fabrication to strengthen his or her claim.[64]

Issues of culture can make the application and assessment process even more complex. An applicant's cultural background and gender can affect communication with and assessment by officials. In many Asian and Middle Eastern countries, for example, it may be considered discourteous to look a 'higher ranking' person in the eye, or to answer a question directly without giving the background details or history to the answer. As one commentator noted:

> This style can appear evasive and irritating to persons operating within an Anglo-Saxon legal system [or context], which emphasises direct and concise responses. Excessive detail about tangential issues can convey the impression that the applicant is trying to mask a lack of substance which, in turn, can create a perception in the mind of the decision-maker that the applicant lacks credibility. However, lack of detail or an overly laconic response can [also] create the same poor impression albeit this is more likely in cases where the applicant has claimed a reasonably direct and active involvement in political or religious movements.[65]

Decision-makers need also to take account of the social and cultural barriers faced by some female protection visa applicants, such as those who face difficulties in making their case when they have endured painful experiences (including sexual violence or forced marriage). Cultural norms may also mean that in some cases the experience of female family members may not be given sufficient weight by male members of the family.[66]

A further difficulty is the complexity of Australian migration law and the application and assessment process itself. The latter begins with a requirement to fill out long and complex forms, posing particular problems for applicants who may not read, speak, or write English. As the Legal Aid Commission of NSW pointed out:

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64 *Submission 138*, p. 2.

65 Germov & Motta, *Refugee Law in Australia,* p. 522.

66 Germov & Motta, *Refugee Law in Australia*, p. 522.

> It is a very complex area, and yet most of the applicants are people who do not speak English, who do not have legal representation and who are confused and often traumatised.[67]

Concerns previously raised over DIMIA's processing

Many of the submissions received by the Committee during this inquiry expressed significant concern at the manner in which DIMIA processes and assesses visa applications, particularly protection visa applications. These issues are discussed in Chapter 2 of this report.

Concerns raised during earlier reviews

There have been several reviews in recent years of the processing and assessment of visa applications, including protective visa applications.[68]

This committee conducted an extensive inquiry during 1999 and 2000 into the onshore determination processes for refugee and humanitarian visa applications.[69] The focus of that inquiry (and of most other inquiries in this area to date) was on the quality of service and assistance provided to asylum seekers in Australia, especially the most vulnerable such as those held in detention while their claims for protection visas were being assessed and adverse decisions appealed.

A key theme or claim put forward in submissions and hearings at that time was that changes and improvements were required to ensure that the processing and assessment of refugee and humanitarian visa applications was more transparent and equitable and did not unduly disadvantage the most vulnerable of asylum seekers.

A range of concerns were raised at that time over whether asylum seekers in Australia were being provided with or had ready access to appropriate information, advice and assistance (including legal advice and interpretation services) when preparing and lodging their applications. It was recognised that access to the latter at the outset can result in a higher quality application that better addresses the refugee criteria, and therefore increases the efficiency of the determination process and the likelihood of a correct decision early in the process.[70] As the committee acknowledged in its 2000 report:

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67 Ms Biok *Committee Hansard*, 28 September 2005. p. 62.

68 The following paragraphs are drawn from a summary prepared by the Parliamentary Library of four recent inquiries - into Australia's onshore asylum system, aspects of immigration detention and discretionary ministerial powers to grant visas. Adrienne Millbank, Parliamentary Library Memorandum, 22 September 2005, p. 3.

69 Senate Legal and Constitutional References Committee, *A Sanctuary under Review: the operation of Australia's Refugee and Humanitarian Program,* report tabled June 2000.

70 Senate Legal and Constitutional References Committee, *A Sanctuary under Review,* para 3.41.

> For the refugee determination process to work, it would appear that access to accurate information is critical. 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. The corollary to this point is that access to interpreter and translator services is equally critical since it is generally the medium by which such communication takes place.[71]

Concerns were also expressed at that time over departmental procedures and standards for the assessment of applications. These included :

- inflexible time frames for lodging applications for protection visas at the primary decision-making stage;
- DIMIA's potential conflict of interest in being the department responsible for determining both migration matters and refugee matters;
- the adequacy of DIMIA decision-making and the limited number of interviews conducted by DIMIA at the primary application stage;
- the quality of information available from DIMIA's Country Information Service and the DIMIA's use of that information; and
- perceived inconsistencies in the quality of DIMA decision-making, where, on occasion, departmental conclusions appeared contrary to the country information.

It was put to the committee at that time that changes and improvements were needed to make decision-making more transparent and more transparently equitable, to improve the skills and training of DIMIA decision-makers, and to provide more assistance to asylum seekers, including legal advice and access to the judiciary via review rights.

In light of the above, the committee's recommendations in its 2000 inquiry report focussed on measures to improve the provision of information about the existing system to asylum seekers at all stages of the process. It also recommended further investigation and research into the operation of the onshore asylum system (including that the Australian National Audit Office (ANAO) should determine whether asylum seekers in the community were getting their full financial and other entitlements and whether improved primary decision-making would reduce program costs, and that DIMIA should analyse the cost of 'fulfilling Australia's international legal obligations'). The committee also recommended the development of better protocols and information around removals and the Minister's discretionary powers.[72]

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71 Senate Legal and Constitutional References Committee, *A Sanctuary under Review,* para.3.31.

72 Adrienne Millbank, Parliamentary Library Memorandum, 22 September 2005, pp 1-3.

The Government's response

The Government's response to the above-mentioned recommendations was tabled in the Senate on 8 February 2001.[73] Its response was recently described as follows:

> The Government response to the inquiry's report was dismissive, with the Government claiming either that it was already doing what was recommended or that it was already doing what was reasonable and appropriate and practical. … to some extent events overtook this inquiry, with tougher measures (the TPV regime) being introduced while the inquiry was running, boat arrivals virtually stopping following the stand-off with the Tampa in late August 2001, and onshore asylum claims declining dramatically.[74]

The ANAO audit

The ANAO undertook a performance audit of DIMIA's management of the processing of protection visa applications, the report of which was tabled in June 2004.[75]

The audit's objective was to assess the extent to which protection visa applications in Australia were processed in accordance with relevant laws and policies, and whether DIMIA employed appropriate mechanisms to ensure compliance with those laws and policies.[76] The audit did not specifically undertake the efficiency audit recommended by the committee in 2000 to determine whether improved primary decision making would reduce program costs. Instead the focus was more on whether:

- DIMIA's decisions on protection visa applications were accurate, timely, consistent and in accordance with law and policy;
- DIMIA effectively managed its relationship with the RRT;
- DIMIA monitored, reviewed, and assessed the risks to the decisions in the processing of onshore asylum seekers; and
- DIMIA consulted relevant stakeholders regarding the processing of asylum seekers.

The ANAO's overall conclusion in 2004 was that DIMIA's onshore processing of asylum seekers was managed well.[77] Specific findings included the following:

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73 Government response to the Senate Legal and Constitutional References Committee report:' *A Sanctuary under review, an examination of Australia's refugee and humanitarian determination process*', Australian Government, 8 February 2001. See Appendix 6.

74 Adrienne Millbank, Parliamentary Library Memorandum, 22 September 2005, p. 3.

75 Australian National Audit Office, *Management of the Processing of Asylum Seekers,* Audit Report No. 56, 2003-2004. The committee had written to the Auditor-General to draw his attention to the committee's recommendations.

76 Australian National Audit Office, *Management of the Processing of Asylum Seekers*, p. 11.

77 Australian National Audit Office, *Management of the Processing of Asylum Seekers*, p. 15.

- The overall standard of record keeping on protection visa application case files was high and the decision-making process and the reasons for decisions made were adequately documented. However, the standard of decision records varied between processing offices. In a small number of cases, the ANAO was also unable to determine the rationale behind the decision.
- The timeliness of application processing was in line with the quality measures prescribed by DIMIA's Portfolio Budget Statements. There were cases where applications took longer to process than the times prescribed by DIMIA's published performance indicators. However, these were generally cases in which external factors, including those beyond DIMIA's control, influenced the timeliness of processing. These included clearances and checks processed by police and health officials in other countries. The ANAO recommended that DIMIA enhance its monitoring of such cases in order to identify common causes of extended delay and any actions that could be initiated to improve timeliness.
- DIMIA had adequate formal and informal quality assurance mechanisms in place to monitor and enhance the quality of its decision-making for onshore protection visas.
- DIMIA decision-makers had access to a comprehensive and well defined set of procedures and guidelines that are updated to reflect changes to legislation and policy. However, the ANAO also found that:
- … there was a significant time lag between the announcement of a change in legislation and/or policy and the provision of updated guidance to decision-makers. During focus group discussions with PV decision-makers, staff advised the ANAO that it was difficult, at times, to determine what the current guidance regarding a certain aspect of PV processing was. The processing of further PV's for Temporary Protection Visa (TPV) holders … had highlighted the need for accurate and up to date guidance for decision-makers due to the complex nature of the case and legislation.
- The ANAO also identified some shortcomings with the Country Information Service (CIS):
- … the information contained within DIMIA's CIS does not always provide decision-makers with the level of detail of a situation in a particular country that they required. As a result, decision-makers were required to supplement the information gained from CIS with other sources. This increases the risk that the information is neither up to date nor accurate.[78]

The ANAO audit also examined the quantity and quality performance measures or indicators specified for the Refugee and Humanitarian program in DIMIA's Portfolio Budget Statement. Then, as now, DIMIA's quantity indicators required that a certain

78 Australian National Audit Office, *Management of the Processing of Asylum Seekers*, p. 15.

number of applications be finalised in the financial year (for example, 7,650 onshore protection applications and 8,950 ministerial intervention assessments of which 5,123 are post review assessment). The quality indicators required a certain percentage of applications be finalised within a certain time frame (for example, 60 per cent of applications by persons in immigration for protection visas and 80 per cent of community applications are to be finalised within 42 and 90 days of lodgement respectively where there are no factors outside DIMIA's control).[79]

The ANAO found that the latter did not provide a complete indicator of quality of decision-making as they only measured the timeliness of visa processing. It noted that better practice required a broader set of indicators such as coverage, accuracy, peer review, conformity to specifications and client satisfaction. To this end, it recommended that the quality indicators for DIMIA's protection visa decision-making be expanded beyond timeliness.[80]

DIMIA accepted the above recommendation and undertook to explore 'appropriate opportunities to adjust its performance measures' accordingly.[81] The committee notes, however, that the quality performance measures or indicators prescribed for Australia's Refugee and Humanitarian program appear to have remained unchanged.

The committees notes the advice from ANAO that, in auditing DIMIA's onshore processing of asylum seekers claims, the ANAO had to rely on, and measure DIMIA against the rules, standards, targets and measures that DIMIA itself had developed and put in place for itself.[82]

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79 Australian National Audit Office, *Management of the Processing of Asylum Seekers*, p. 49; DIMIA, *2004-2005 Annual Report*, p. 95.

80 The ANAO proposed that the new performance indicator or measure incorporate DIMIA's formal quality assurance program which examines aspects such as accuracy of records, the level of documentation and whether correct checks had been carried out. Australian National Audit Office, *Management of the Processing of Asylum Seekers*, p. 50.

81 Australian National Audit Office, *Management of the Processing of Asylum Seekers*, p. 50.

82 Mr Meert, ANAO, *Committee Hansard*, 7 October 2005, pp 3-4, 12.

APPENDIX 6

GOVERNMENT RESPONSE TO THE SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE'S REPORT 'A SANCTUARY UNDER REVIEW'

Full title of report: 'A Sanctuary in Review: an examination of Australia's Refugee and Humanitarian Determination Processes', tabled June 2000.[1]

The following is a list of the recommendations in the committee's report, and the Government response to each recommendation. The Government response was published in February 2001.

1 The report can be found at http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/1999-02/refugees/report/index.htm

Recommendation 1.1

That the Government arrange for a detailed cost-benefit analysis of the concept of the provision of temporary safe haven, including estimates of all services likely to be provided by both Government and non-government agencies. (p.38)

Government response

Decisions on the merits of engaging safe haven provisions are necessarily taken on a situation-by-situation basis and cannot be pre-empted. The cost so far of the safe haven program is on the public record. The benefits are difficult to quantify as they relate in large part to foreign and aid policy.

CHAPTER TWO: AUSTRALIA'S INTERNATIONAL OBLIGATIONS AND THE PRINCIPLE OF NON-REFOULEMENT

Recommendation 2.1

That the Government ensures decision-makers are well enough resourced to facilitate proper assessment of claims for refugee status in accordance with the Convention definition of "refugee". (p.52)

Government response

The Government will continue to implement its commitment to adequately resource onshore protection decision-makers to enable them to properly assess claims according to the criteria of the UN Convention.

Recommendation 2.2

That the Attorney-General's Department, in conjunction with DIMA, examine the most appropriate means by which Australia's laws could be amended so as to explicitly incorporate the non-refoulement obligations of the CAT and ICCPR in domestic law. (p.60)

Government response

The current provisions of Section 417 of the Migration Act, allowing for Ministerial discretion on humanitarian grounds, are adequate to ensure compliance with CAT and ICCPR.

CHAPTER THREE: LEGAL AND OTHER ASSISTANCE TO ASYLUM SEEKERS

Recommendation 3.1

That DIMA investigate the provision of videos or other appropriate media in relevant community languages, explaining the requirements of the Australian onshore refugee determination process. This material should be available to those in detention, and to IAAAS providers. (p.89)

Government response

DIMA already ensures that a range of information on the protection visa process is available. The protection visa application form provides comprehensive information on the protection process. In addition, DIMA Fact Sheets 41, 'Seeking Asylum within Australia', and 42, 'Assistance for asylum seekers in Australia', are publicly available. A large body of information on onshore protection processes is also made available by IAAAS service providers to both detainees and applicants in the community.

Recommendation 3.2

That an appropriate body such as the ANAO undertake an efficiency audit to determine if community-based protection visa applicants, eligible for IAAAS assistance, are not receiving it. The audit should assess if funds could be managed more efficiently to provide additional services. (p.89)

Government response

The effectiveness with which IAAAS providers target available resources to those individuals in greatest need is being considered in an audit conducted by Ernst and Young. The audit report will indicate whether further exploration of this issue is warranted. These matters are also assessed as part of the IAAAS tender evaluation and contractor performance monitoring processes in DIMA. The audit report will be provided to the Committee.

Recommendation 3.3

That the IAAAS provide a separate fund for translation and interpretation services. These should be capped at an appropriate level, with IAAAS managers having the discretion to extend the funding in cases where more extensive services are required. (p.92)

Government response

The cost of translation and interpreting services is included in IAAAS funding. DIMA monitors the quality of these services to ensure that adequate standards are met.

Recommendation 3.4

That the IAAAS provide a separate fund for medical and psychiatric assessments. These should be capped at an appropriate level, with IAAAS managers having the discretion to extend the funding in cases where more extensive services are required. (p.92)

Government response

Assessments and treatment are available when needed from professional torture and trauma counselling services funded through DIMA's Early Health Assessment and Intervention Services program. To the extent that assessments are sought solely to support protection claims as distinct from providing treatment, IAAAS pro-

viders are expected to factor such costs into their tendered service prices.

Recommendation 3.5

That an independent evaluation of the administration of IAAAS, including the quality of work performed by contractors and the effectiveness of the complaints mechanism, be undertaken and completed by a qualified body within two years. (p.99)

Government response

The current Ernst and Young audit of the IAAAS program (Recommendation 3.2 refers) is assessing DIMA's administration of the IAAAS, including effectiveness of the complaints mechanism. The outcome of this assessment will determine whether further evaluation is necessary. As stated in the response to 3.2, contractor performance issues are already closely assessed through monitoring mechanisms which are being examined by the current audit and are addressed also in re-tendering processes.

Recommendation 3.6

That a body such as the Australian Law Reform Commission be asked to undertake a comprehensive study of:

- the causes of appeals to the courts in refugee matters, and whether increases in legal assistance would serve to reduce the numbers of unmeritorious claims; and
- the costs associated with unrepresented litigants in refugee matters, and whether increases in legal assistance would be effective means of reducing the costs to the wider system. (p.106)

Government response

See response to Recommendation 3.7 below.

Recommendation 3.7

That the Government amend the legal aid guidelines to enable the Legal Aid Commissions to provide limited legal advice to help applicants consider the value of an appeal. (p.107)

***Government response* (Recommendations 3.6 and 3.7)**

The Government has previously examined the level of unmeritorious applicants before the Federal Court and has introduced legislation in the form of the Migration Legislation Amendment (Judicial Review) Bill 1998 to address these concerns. The Government has also introduced legislation to address the abuse of class action procedures in migration matters. The Government has presented evidence on these issues to the Parliamentary Committees examining those Bills.

In July 2000 the Department of Immigration and Multicultural Affairs, in conjunction with the Federal Court, instituted and funded a pilot scheme which allows every legally unrepresented applicant to the Federal Court in Sydney in migration matters to receive advice from a lawyer in respect of that application. It is expected that further information, similar to that set out in Recommendation 3.6, will flow from that pilot scheme.

One objective of the pilot scheme is to allow such applicants access to independent legal advice on the merits of their Federal Court application. In this context it is not proposed to revise the legal aid guidelines.

CHAPTER FOUR: DECISION MAKING – PART 1

Recommendation 4.1

That all information provided by non-citizens on arrival during an interview with a DIMA officer be retained, even if the individual is removed. In cases where individuals make an application, this information should be made available to them. (p.120)

Government response

This is current practice. All reports of entry interviews with illegal arrivals are retained by DIMA. Where an arrival applies for protection the entry interview report is included on the case file. Any information particular to the individual that is adverse to a case is presented to the applicant for comment under natural justice provisions. Information on the applicant's file is accessible under Freedom of Information provisions.

Recommendation 4.2

That DIMA continue to use the current Australian Public Service level case officers to make decisions at the primary determination stage on the basis that the following proposals are implemented. (p.127)

Government response

The current practice whereby DIMA officers at APS6 level decide protection applications is appropriate. However, the proposal contained in Recommendation 4.4 below is not accepted.

Recommendation 4.3

That decision-makers have the necessary skills, knowledge and ability and the necessary personal attributes to perform the decision-making function, the Committee recommends that primary decision-makers have additional specialist training, both before and during their tenure. Such training can be obtained from a cross-section of sources, including the legal profession,

European judicial specialists and other government and non-government organisations. (p.127)

Government response

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.

Recommendation 4.4

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. (p.127)

Government response

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 reasons for the decision, are always provided.

Recommendation 4.5

That the responsibility for refugee determination under the Protection Visa system remain in the DIMA portfolio. (p.130)

Government response

There is no expectation that the current arrangements whereby the DIMA portfolio has responsibility for refugee determination will be altered.

Recommendation 4.6

That accurate and up-to-date information from a broad cross-section of Government and non-government sources should be entered into CIS. Staff using CIS for visa determination decisions should be trained in rapid information retrieval, information analysis and methods of critical evaluation. (p.133)

Government response

This is current practice. CIS already collects up-to-date country information from a wide range of sources. Case officers are trained to retrieve and appropriately use that information in decision-making.

Recommendation 4.7

That the ANAO conduct an efficiency audit to determine if improved primary decision-making will reduce program costs. (p.138)

Government response

ANAO conducted an efficiency audit of primary decision-making as part of its audit, 'The Management of Boat People', in 1998. As part of the on-going DIMA-wide evaluation program, a number of reviews affecting the onshore protection program are planned, including an evaluation of the IAAAS due for completion by December 2000 (Recommendation 3.2 refers), and pricing and bench-marking reviews. These will seek to establish appropriate prices and resources for the program. The need for a further ANAO efficiency audit and its possible scope and timing is a matter for the Auditor-General.

Recommendation 4.8

To facilitate the preparation of more complete and accurate applications, the Committee recommends that sufficient resources be made available to ensure that applicants are better able to understand the requirements of Australia's refugee and humanitarian program and to provide the necessary detailed information required. (p.139) (See also Recommendation 3.1)

Government response

(Recommendation 3.1 refers). Appropriate resources are made available to properly inform applicants of the requirements of the program. Protection visa application forms contain extensive information on requirements and processing arrangements for this visa. All applicants in detention are offered publicly funded assistance under the IAAAS. Applicants in the community who are in greatest need also receive assistance under the scheme.

CHAPTER FIVE: DECISION MAKING – PART 2

Recommendation 5.1

That a clear statement should be available on the nature and operation of the RRT and this should be freely available, including to detainees. (p.151)

Government response

This is current practice. The letter from DIMA informing an unsuccessful protection applicant of the decision, contains information about review provisions and encloses a separate brochure on the RRT. The RRT produces a handbook on its purpose and procedures which is regularly updated. The RRT also provides a copy of its Client Service Charter to all review applicants, including those in detention. It also has a website providing information about its procedures.

Recommendation 5.2

That further training be provided for RRT members in the use of those inquisitorial methods accepted as integral to the Tribunal. (p.151)

Government response

This is current practice. The RRT has an ongoing development and training program, including training in inquisitorial methods appropriate to the RRT.

Recommendation 5.3

In carrying out its task to determine whether a person is a refugee, the Committee recognises that the RRT's assessment of a claim for refugee status will and should be influenced by matters that go to an applicant's credibility. The Committee recommends that credibility continue to be a factor in the determination of refugee status. (p.158)

Government response

This recommendation is currently complied with by the RRT and members are provided with ongoing training on matters of credibility assessment.

Recommendation 5.4

That the RRT be able to sit as a single member body and as a panel of two and up to three members as appropriately determined by a Senior, or the Principal Member. Members would be drawn from people with appropriate backgrounds for considering refugee and humanitarian applications. (p.169)

Government response

Multi-member panels of the RRT are not possible under the current provisions of the Migration Act. However, the proposed Administrative Review Tribunal (ART), which will replace the RRT, will provide a facility for multi-member tribunals. RRT members are currently drawn from people with appropriate backgrounds for considering refugee and humanitarian applications.

Recommendation 5.5

That the Principal Member of the RRT should be a person with judicial experience. (p.172)

Government response

The Principal Member of the RRT is a person with an appropriate background. Judicial experience is valuable, but not the sole factor to be considered.

Recommendation 5.6

That officers from DIMA, Attorney-General's or DFAT should not be RRT members. Officers seeking such placements should move to the unattached list. (p.173)

Government response

RRT members are drawn from people with a broad range of experience and there is no reason why officers from these Departments should be ineligible for consideration. However, Australian Public Service regulations prevent any officer in the pay of the Commonwealth being paid concurrently by the RRT.

Recommendation 5.7

That DIMA and the Department of Finance and Administration acknowledge the changing workload of the RRT and differing complexity of its cases. This information should be used to assess appropriate funding levels and/or systems. (p.174)

Government response

The Government has long recognised that resourcing of Commonwealth funded bodies should be adapted to meet their changing roles and workload and this is implemented through purchasing agreements. In the case of the RRT such an assessment was completed as part of the 2000-01 Budget process in a Pricing Review.

Recommendation 5.8

That members of the RRT be drawn from a broad cross-section of the Australian community, including the legal profession, with experience in refugee and humanitarian issues. (p.179)

Government response

This is current practice.

CHAPTER SIX: JUDICIAL OVERSIGHT OF ADMINISTRATIVE DECISIONS

Recommendation 6.1

That DIMA maintain an up-to-date comparative database of international refugee determination systems in a number of countries which are State parties to the relevant international conventions. This material should be made available in a format that is easily accessible. (p.201)

Government response

The International Section of DIMA has information on refugee determination systems of a number of other countries. A principal source of information is the Inter-Governmental Consultations on Asylum Refugee and Migration Policies in Europe, North America and Australia (IGC) of which Australia is an active member and which produces regular comparative reports and data on refugee matters. Most of this IGC information is publicly available. Since countries adopt different legislative and policy approaches to their refugee determination systems, data collected by countries are not always strictly compatible.

Recommendation 6.2

That DIMA commission an independent analytical report on State parties' incorporation into domestic law of international legal obligations

requiring access to courts and tribunals, and judicial oversight of the refugee determination process. The Committee further recommends that DIMA provides that report to the Parliament. (p.201)

Government response

There are no international legal obligations under the Refugees Convention requiring access to courts and tribunals or judicial oversight of the refugee determination process. However, the UNHCR provides non-binding procedural guidance to the effect that persons found not to be refugees should have an opportunity to seek a review of that decision which is either administrative or judicial. Australia currently provides both administrative and judicial review options sequentially.

Recommendation 6.3

That an analysis of the cost of fulfilling Australia's international legal obligations be provided by DIMA to the Committee within three months of the completion of the inquiry referred to at Recommendation 6.2. The analysis should include a comparison of the cost of the administration of both migration and refugee applications under the current two-tiered administrative determination and judicial review system. (p.202)

Government response

The costs of the current protection procedures (primary and RRT) and migration procedures (primary and MRT) are provided in the DIMA Portfolio Budget Statement. Costing and analysis of the existing two-tier determination and judicial review system relating to migration and refugee processes is under preparation and will be forwarded to the Committee. However a range of work relating to costing and benchmarking of DIMA operations and the purchasing agreement needs to be completed first.

Recommendation 6.4

That the Government commission an independent study on the benefits of modifying the current on-shore refugee determination process. The study should assess, among other matters, the feasibility of moving to a wholly judicial determination process, including the costs of any such process. (p.202)

Government response

The Government has in place mechanisms to closely monitor the performance and effectiveness of the current onshore refugee determination process. Efforts are continually made to maintain its integrity and improve its efficiency. In the circumstances there is no need for an independent study of these matters. In any event, any move to a wholly judicial process could be expected to incur significantly greater costs.

Recommendation 6.5

This inquiry and report is evidence of the fact that Australia has not escaped the pressures placed on refugee-receiving countries. In light of these developments, the Committee recommends that the Government continue to monitor the attitudes of other signatory nations in relation to the terms and protocols of the Refugee Convention. (p.202)

Government response

The Government continually monitors the attitudes and practices of other signatory nations, through the IGC and other means. The Government announced in August 2000 measures to work with other countries and the UN to reform the UNHCR. Suitable reform would enable UNHCR and its Executive Committee to provide better assistance and support to countries in meeting challenges to provide refugee protection to those most in need, while combating people smuggling. As part of this the Government will review the interpretation and implementation of the Refugees Convention in Australia and other states.

CHAPTER EIGHT: MINISTERIAL DISCRETION

Recommendation 8.1

That the Minister should note the concerns expressed about the s417 Guidelines and consult widely with stakeholders on a regular basis to ensure that the content of the Guidelines remains contemporary and addresses the specific purposes of Australia's obligations under the CAT, CROC and the ICCPR. (p.241)

Government response

The Minister for Immigration and Multicultural Affairs regularly consults stakeholders on issues relating to his portfolio. The Ministerial guidelines on s417 are regularly reviewed to ensure that they remain appropriate and reflect Australia's obligations under CAT, CROC and ICCPR.

Recommendation 8.2

That the RRT continue the current practice whereby members informally advise the Minister of cases where it is considered there may be humanitarian grounds for protection under international conventions, as opposed to grounds under the Refugee Convention. (p.251)

Government response

Current arrangements whereby RRT members are asked to flag cases of possible humanitarian concern will continue.

Recommendation 8.3

That an information sheet be produced to explain the provisions of s417 and the accompanying Ministerial Guidelines. The literature should also include information on the procedure for any subsequent application under s48B. This should be widely available in appropriate languages. (p.257)

Government response

Ministerial Guidelines on s417 and s48B are publicly available. DIMA Fact Sheet 41 explains the Minister's discretionary powers and further publication of such information is not considered necessary. The powers are non-compellable and, in any event, every case where the RRT finds that a person does not require refugee protection, is considered by DIMA against the intervention guidelines as a matter of course. Cases meeting the guidelines are referred to the Minister without any action being required by the applicant.

Recommendation 8.4

That the s417 process should be completed quickly and the result of the request advised to the relevant person. (p.257)

Government response

DIMA strives to expedite processing of s417 requests. Cases decided by the RRT are normally assessed against s417 guidelines within four weeks of finalisation. DIMA procedures are that written requests for intervention receive written responses.

Recommendation 8.5

That the subject of the request should not be removed from Australia before the initial or first s417 process is finalised. (p.257)

Government response

This is current practice.

Recommendation 8.6

That appropriately trained DIMA staff consider all s417 requests and referrals against CROC, ICCPR and CAT. (p.262)

Government response

This is current practice.

CHAPTER NINE: THE CASE OF THE CHINESE WOMAN

Recommendation 9.1

That policies and practices be developed by DIMA to ensure the Minister is made aware of all relevant facts about detainees prior to their removal from Australia. (p.297)

Government response

In the case of group removals it is established practice that, before the removal, DIMA convenes a meeting of all involved parties to discuss issues relating to individuals in the group. These issues include medical fitness, whether there are any applications before DIMA, the RRT or courts and whether there is any unanswered correspondence from any person being removed.

There is close liaison with the Minister's office in the lead up to group removals.

Individual removals occur on a daily basis and the majority are organised by State based compliance officers. A delegate of the Minister must be satisfied that the pre-conditions set out in Section 198 of the Migration Act are met before the removal takes place. Where there are issues of particular concern or sensitivity in respect of an individual removal, those issues are drawn to the attention of the Minister's office. A national removals reporting system designed to improve advance notice of removal issues has recently been put in place.

Recommendation 9.2

That, in respect of removals from Australia, a protocol on the 'fitness to travel' of pregnant women (especially those in later stages) be developed as a matter of urgency. (p.297).

Government response

Recommendation 9.1 refers. The fitness to travel of all persons being removed, including pregnant women, is addressed prior to removal.

Recommendation 9.3

That pregnant women subject to removal should be given special consideration by the Minister, or a senior delegate, to remain in Australia until after the birth to ensure that no woman is returned pregnant to a country in circumstances where there is a risk the woman will be coerced to undergo an abortion. (p.297)

Government response

Recommendation 9.1 refers. Existing measures to assess fitness to travel cover any physical problems likely to arise with pregnant women during removal. Any risk associated with returning a woman to her country of origin will have been assessed as part of the protection determination.

Recommendation 9.4

That until such time as better procedures are developed, persons with possible humanitarian claims in Australia should be advised of the procedures available to them under s417 for Minis-

terial consideration on humanitarian grounds. Claimants with English language difficulties should be provided with appropriate assistance. (p.299)

Government response

Ministerial Guidelines on s417 are publicly available. DIMA Fact Sheet 41 explains the Minister's discretionary powers (response to Recommendation 8.3 refers).

Recommendation 9.5

That all steps be taken and put in place to ensure that the situation of Ms Z never occurs again in Australia. (p.299)

Government response

The visa assessment process, combined with Ministerial intervention powers where public interest grounds exist, enable all cases of possible concern to be sensitively handled.

CHAPTER TEN: REMOVALS FROM AUSTRALIA

Recommendation 10.1

That an inquiry be undertaken into the use of sedation and other means of restraint in detention centres and in the removal of unauthorised non-citizens from Australia. (p.324)

Government response

The use of restraints is under examination as part of a general security review being undertaken within DIMA.

Recommendation 10.2

That DIMA officers, especially senior officers, have a thorough understanding of the relevant international conventions and ensure that appropriate training is given to employees about the requirements of such conventions. (p.327)

Government response

This is current practice. DIMA officers in positions requiring knowledge of international conventions are appropriately informed about and trained in those issues.

Recommendation 10.3

That appropriate protocols be developed between carriers and contract removal service providers. These protocols, and the implementation of them, should be subject to audit by an external and independent body. (p.327)

Government resp onse

Protocols are in place between DIMA and the removal service providers it engages. For DIMA processes, external audit mechanisms exist. Where a particular carrier is responsible for removing an illegal arrival (because that carrier brought the person to Australia) the procedures adopted are a contractual matter between the carrier and the removal service provider it engages.

CHAPTER ELEVEN: MONITORING OF RETURNED PERSONS

Recommendation 11.1

That the Government place the issue of monitoring on the agenda for discussion at the Inter-Government/Non-Government Organisations Forum with a view to examining the implementation of a system of informal monitoring. (p.343)

Government response

The risk to a protection visa applicant inherent in his or her return to the country of origin is assessed as part of the protection determination process. DIMA is in continuous contact, directly or through DFAT or other agencies, with the UNHCR and NGOs in order to gain up-to-date information on the human rights situation and the treatment of returnees in relevant countries. This information is included in CIS country information holdings and is readily available to primary and RRT decision-makers. A system which monitors individual returnees is considered to be impractical and possibly counter-productive.

Where it is assessed as part of the protection determination process that that there is no real chance of persecution of the applicant on return, Australia is not responsible for the future well-being of that person in their home land merely because at some stage they spent time in Australia.

APPENDIX 7

RECOMMENDATIONS OF THE SENATE SELECT COMMITTEE ON MINISTERIAL DISCRETION IN MIGRATION MATTERS

[This report was tabled in March 2004.[1] No Government response to date.]

Recommendation 1

The Committee recommends that the minister require DIMIA to establish procedures for collecting and publishing statistical data on the use and operation of the ministerial discretion powers, including (but not limited to):

- the number of cases referred to the minister for consideration in schedule and submission format respectively;
- reasons for the exercise of the discretion, as required by the legislation;
- numbers of cases on humanitarian grounds (for example, those meeting Australia's international obligations) and on non-humanitarian grounds (for example, close ties);
- the nationality of those granted intervention;
- numbers of requests received; and
- the number of cases referred by the merits review tribunals and the outcome of these referrals. (para 3.54)

Recommendation 2

The Committee recommends that DIMIA establish a procedure of routine auditing of its internal submission process. The audits should address areas previously identified by the Commonwealth Ombudsman, namely identifying ways to improve departmental processes for handling cases, and ensuring that claims are processed in a timely way and case officers consider all of the available material relevant to each case. (para 4.67)

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1 The report can be found at http://www.aph.gov.au/senate/committee/minmig_ctte/report/b01.htm

Recommendation 3

The Committee recommends that the Commonwealth Ombudsman carry out an annual audit of the consistency of DIMIA's application of the ministerial and administrative guidelines on the operation of the minister's discretionary powers. The audit should include a sample of cases to determine whether the criteria set out in the guidelines are being applied, and to identify any inconsistency in the approach of different case officers. (para 4.70)

Recommendation 4

The Committee recommends that the MRT and the RRT standardise their procedures for identifying and notifying DIMIA of cases raising humanitarian and compassionate considerations. (para 4.84)

Recommendation 5

The Committee recommends that the MRT and the RRT keep statistical records of cases referred to DIMIA, the grounds for referral and the outcome of such referrals. (para 4.85)

Recommendation 6

The Committee recommends that DIMIA create an information sheet in appropriate languages that clearly explains the ministerial guidelines and the application process for ministerial intervention. The Committee recommends that the new information sheet be accompanied by an application form, also to be created by the department. Both the information sheet and application form are to be readily and publicly accessible on the department’s website and in hard copy. (para 5.9)

Recommendation 7

The Committee recommends that coverage of the Immigration Application Advice and Assistance (IAAAS) scheme be extended to enable applicants for ministerial intervention to obtain an appropriate level of professional legal assistance. Extending the coverage of IAAAS should assist in reducing the level of risk of exploitation of applicants by unscrupulous migration agents. (para. 5.12)

Recommendation 8

The Committee recommends:

- That DIMIA inform persons when a representation for the exercise of ministerial discretion is made on their behalf by a third party;
- That each applicant for ministerial intervention be shown a draft of any submission to be placed before the minister to enable the applicant to comment on the information contained in the submission. This consultative process should be carried out within a tight but reasonable time frame to avoid any unnecessary delay; and

- That each applicant be given a copy of reasons for an unfavourable decision on a first request for ministerial intervention. (para. 5.18)

Recommendation 9

The Committee recommends that DIMIA take steps to formalise the application process for ministerial intervention to overcome problems surrounding the current process for granting bridging visas, namely:

- processing times that can take up to several weeks;
- applicants not knowing when they should apply for a bridging visa; and
- applicants being ineligible for a bridging visa because an unsolicited letter or inadequate case was presented to the minister, often without the applicant's knowledge (para 5.35)

Recommendation 10

The Committee recommends that all applicants for the exercise of ministerial discretion should be eligible for visas that attract work rights, up to the time of the outcome of their first application. Children who are seeking asylum should have access to social security and health care throughout the processing period of any applications for ministerial discretion and all asylum seekers should have access to health care at least until the outcome of a first application for ministerial discretion. (para 5.44)

Recommendation 11

The Committee recommends that DIMIA consider legislative changes that would enable ministerial intervention to be available in certain circumstances where there is a compelling reason why a merits review tribunal decision was not obtained. (para 5.53)

Recommendation 12

The Committee recommends that the Migration Act be amended so that, except in cases under section 417 that raise concerns about personal safety of applicants and their families, all statements tabled in Parliament under sections 351 and 417 identify any representatives and organisations that made a request on behalf of an applicant in a given case. (para 6.71)

Recommendation 13

The Committee recommends that DIMIA and MARA disseminate information sheets aimed at vulnerable communities that explain the regulations on charging fees for migration advice, the restrictions that apply to non-registered agents and the complaints process. The information should also explain that the complaints process does not expose the complainant to risk. (para 6.74)

Recommendation 14

The Committee recommends that the Migration Agents Taskforce should expand its operations to target unscrupulous operators that are exploiting clients through charging exorbitant fees, giving misleading advice and other forms of misconduct. (para 6.75)

Recommendation 15

The Committee recommends that the minister ensure all statements tabled in parliament under sections 351 and 417 provide sufficient information to allow parliament to scrutinise the use of the powers. This should include the minister's reasons for believing intervention in a given case to be in the public interest as required by the legislation. Statements should also include an indication of how the case was brought to the minister's attention – by an approach from the visa applicant, by a representative on behalf of the visa applicant, on the suggestion of a tribunal, at the initiative of an officer of the department or in some other way. (para 7.53)

Recommendation 16

The Committee recommends that the Migration Act be amended so that the minister is required to include the name of persons granted ministerial intervention under section 351 in the statement tabled in parliament unless there is a compelling reason to protect the identity of that person. (para 7.54)

Recommendation 17

The Committee recommends that the minister should make changes to the migration regulations where possible to enable circumstances commonly dealt with using the ministerial intervention power to be dealt with using the normal migration application and decision making process. This would ensure that ministerial intervention is used (mainly) as a last resort for exceptional or unforseen cases. (para 7.71)

Recommendation 18

The Committee recommends that DIMIA establish a process for recording the reasons for the immigration minister's use of the section 417 intervention powers. This process should be consistent with Recommendation 15 about the level of information to be provided in the minister's tabling statements to parliament. This new method of recording should enable the department to identify cases where Australia's international obligations under the CAT, CROC and ICCPR were the grounds for the minister exercising the discretionary power. (para 8.29)

Recommendation 19

The Committee recommends that the government give consideration to adopting a system of complementary protection to ensure that Australia no longer relies solely on the minister's discretionary powers to meet its non-refoulement obligations under the CAT, CROC and ICCPR. (para 8.82)

Recommendation 20

The Committee recommends that the ministerial intervention powers are retained as the ultimate safety net in the migration system, provided that steps are taken to improve the transparency and accountability of their operation in line with the findings and other recommendations of this report. (para 9.73)

Recommendation 21

The Committee recommends that the government consider establishing an independent committee to make recommendations to the minister on all cases where ministerial intervention is considered. This recommendation should be non-binding, but a minister should indicate in the statement tabled in parliament whether a decision by the committee is in line with the committee's recommendation. (para 9.77)

APPENDIX 8

RECOMMENDATIONS OF THE SENATE FOREIGN AFFAIRS DEFENCE AND TRADE COMMITTEE REPORT ON VIVIAN SOLON

Full title of report: 'The removal, search for and discovery of Ms Vivian Solon', tabled December 2005

Recommendation 1

2.10 The committee recommends that in relation to the interviewing of detainees, if a detainee is unable to sign the record, there must be certification by a third party that the record of interview is correct.

Recommendation 2

2.12 The committee recommends that DIMIA staff are reminded that independent and accredited interpreters must be used and that the use of a departmental officer as an interpreter should occur only in exceptional circumstances.

Recommendation 3

2.28 The committee recommends that DIMIA carefully consider the process to ensure someone in a distressed and confused state has access to legal advice.

Recommendation 4

2.29 The committee recommends DIMIA review checklists regarding identity checking and the decision to detain and remove process to ensure that the actions outlined above regarding contact with the police and advice regarding legal assistance are captured so they are addressed by DIMIA officers when effecting a removal.

Recommendation 5

2.44 The committee recommends that the Australian government review the adequacy of s.189 of the *Migration Act 1958* and/or the introduction of a regulation that stipulates the evidence required for a person to be detained as an unlawful non-citizen.

Recommendation 6

2.53 The committee recommends that the development of appropriate standards for health and care needs for detainees in transitional detention—identified in

Recommendation 9 in the Ombudsman's report—specify mental health as an area to be addressed.

Recommendation 7

2.55 The committee recommends that the explanation of rights regarding the medical examination be included in a relevant checklist as discussed in recommendation 4 above.

Recommendation 8

2.61 The committee recommends that DFAT review internal processes regarding the treatment of concerns expressed by other governments that have the potential to affect bilateral relationships, with a view to ensuring that appropriate senior officers in Canberra and in relevant posts are made aware of these concerns.

Recommendation 9

2.67 The committee recommends that DIMIA review its procedures to ensure that formal procedures are in place for the reception of people being removed from Australia in circumstances similar to Ms Solon and that their final destination is recorded on file.

Recommendation 10

2.69 The committee recommends that DIMIA review and advise staff when their responsibilities for a detainee begin and end, noting there may be circumstances like that of Ms Solon where there may not be a strict legal obligation but a moral obligation to ensure their welfare.

Recommendation 11

2.73 The committee recommends that the independent investigation into whether the actions of individual officers breached the APS Code of Conduct include consideration of any systemic issues that may have contributed to the lack of action. Furthermore, if the investigation identifies any systemic issues that it make recommendations to address them.

Recommendation 12

2.80 The committee recommends that DIMIA and DFAT remind staff of the correct procedures to be followed when making requests for passport information.

APPENDIX 9

INTERIM PROCEDURE FOR INDEPENDENT MEDICAL OPINIONS

1. An external opinion forwarded to GSL or DIMIA must be brought to the attention of the International Health and Medical Services (IHMS) Health Services Manager (and also Professional Support Services (PSS) where the opinion relates to mental health) for immediate forwarding to the detainee's treating physician (ie the General Practitioner, and Medical Specialist and/or the treating Psychiatrist). Where the external opinion received is at odds with the detainee's care plan and the detainee's treating practitioner/s do not have the same clinical and professional qualification as the person who has provided the external opinion (for example, where a psychiatrist has provided an opinion and the detainee has not been assessed by a psychiatrist but is being treated by a psychologist) arrangements must be made immediately to have the detainee assessed at the same level of clinical and professional qualification as the person who has provided the external opinion.

2. Where IHMS is provided directly with an opinion from an external medical service provider that is at odds with the health care plan developed for the detainee, DIMIA must be notified immediately.

3. Written confirmation of receipt of the opinion and advice that this will be referred to the detainee's treating doctor must be provided to the person who provided the external opinion.

4. The detainee's treating doctor must be requested to review the individual detainee's health care plan in light of the opinion provided. The treating doctor is under no obligation to follow the alternative advice. However, the treating Doctor's opinion and advice (drawing on specialist advice as necessary) as to the impact on the current treatment plan and an explanation for any divergence from the recommended course of action suggested by the external party must be noted on the detainee's medical file.

5. Where the detainee's treating Doctor has an alternative view to that expressed by an external medical services provider, the Department must be advised in writing within seven working days so that a review of the detainee and all relevant material can be sought from a suitably qualified independent party (for example a Health Services Australia medical practitioner).[1]

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1 RANZCP, *Submission 205*, p. 49.