Legal Aid
NEW SOUTH WALES

INQUIRY INTO THE ADMINISTRATION AND OPERATION OF THE *MIGRATION ACT* 1958

SUBMISSION ON BEHALF OF

THE LEGAL AID COMMISSION OF NEW SOUTH WALES

TO

THE SENATE LEGAL AND CONSTITUTIONAL COMMITTEE

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act* 1979 (NSW) to provide legal services and resources to the community, with a special focus on people who are socially and economically disadvantaged. Legal Aid NSW also works in partnership with private practitioners in representing legally aided people.

Legal Aid NSW's Civil Litigation section provides advice and representation in immigration matters, subject to Legal Aid guidelines. The Commonwealth Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), under its Immigration Advice and Application Assistance Scheme (IAAAS), contracts Legal Aid NSW to provide legal services to members of the community and to protection visa applicants at Villawood Detention Centre. In the period 1 July 2002 to 30 June 2005 Legal Aid NSW provided 3629 advices and 299 grants of aid in immigration matters.

As a general principle, Legal Aid NSW believes that it is essential to good administration and fair decision making in migration matters that applicants have access to legal advice and representation. In the case of financially disadvantaged applicants, this legal advice and representation should be provided through government-funded services. Funding for these services is currently inadequate.

Legal Aid NSW appreciates the opportunity to contribute to the inquiry into the administration and operation of the *Migration Act* 1958 and would be pleased to elaborate on any of the points made in this submission.

For further information or discussion of any of the issues raised in this submission, please contact Geraldine Read on 9219 5910 or via email at geraldine.read@legalaid.nsw.gov.au.

Senate Legal and Constitutional Committee

Inquiry into the administration and operation of the *Migration Act* 1958

Terms of Reference

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.

This submission does not attempt to address all of the committee's Terms of Reference but concentrates on those areas in which Legal Aid NSW has particular experience and expertise:

A. Processing and assessment of visa applications

- Natural justice issues
- Offshore humanitarian applications
- Onshore protection visa applications
- Inconsistency in processing
- Inconsistency in the application of criteria
- Delays in processing
- Processing of spouse applications
- Confidentiality concerns
- Conclusion on immigration policy and implementation

B. The legal needs of immigration applicants

- Commonwealth legal aid funding for immigration matters to financially disadvantaged people
- Detainees

C. Deportation of people from Australia

- Visa cancellations

D. Migration detention – access and communication

- Availability of interview rooms
- Quality of the interview rooms
- Telephone and fax access.

A. Processing and assessment of visa applications

Natural justice issues

1. Legal Aid NSW considers that current visa determination processes often do not accord with basic principles of natural justice. DIMIA processing, which can be characterised as inconsistent and time consuming, regularly creates bureaucratic hurdles for unrepresented applicants. 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.

2. Subdivision AB, Division 3 of Part 2 *Migration Act* establishes the procedural guidelines for fair, quick and efficient decision making related to visa applications. Section 51A states that the subdivision is '*an exhaustive statement of the requirements of the natural justice*

hearing rule'. However these sections represent a limited and uncertain outline of procedural fairness in administrative determinations. The onus is clearly on the applicant to provide required information within the stipulated limits. There is little corresponding onus on Departmental delegates to give the applicants an opportunity to be heard or to comment on adverse information.

3. While s.54(1) requires the delegates to consider all information in the application, s.54(3) permits a decision to be made without '*giving the applicant an opportunity to make oral or written submissions'*. As applicants are frequently non-English speakers and unrepresented, they cannot be expected to be aware of the need to supply information beyond that required on the application form.

Offshore humanitarian applications

4. Both in Australia and offshore, applicants for humanitarian visas regularly fail to submit supporting statements to address complex visa criteria. For example, an applicant for an offshore Subclass 202 visa is required to convince the delegate that:

   - He/she is subject to substantial discrimination in his/her home country,
   - There is a connection with Australia,
   - There is no other suitable country for resettlement , and
   - He/she can be supported in the resettlement process in Australia.

5. There are questions relating to these issues on the application form but unrepresented applicants tend to give cursory responses. They do not give sufficient information to convince the decision maker that there are '*compelling reasons'* for the grant of the visa as required in Migration Regulation 202.222.

6. It is our experience that offshore humanitarian visa applicants are often refused without interview or written request for further information. As there is no requirement to give reasons for refusals of offshore

applications under *Migration Act* s.66(2)(c) and (3), rejections regularly include only a photocopy of the visa criteria with a mark next to the supposedly unmet criteria. This is not sufficient to meet the stated aim of fair decision making. Perhaps delegates have been encouraged to give priority to meeting Departmental performance indicators for finalising applications, rather than affording justice to the applicants.

7. 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.

Onshore protection visa applications

8. Similarly, onshore applicants for protection visas are rarely interviewed or asked to comment on adverse information, and decisions can be made soon after application. In our experience, until July 2005 all applicants for *further* protection visas were interviewed by DIMIA delegates. However, most decisions about *initial* protection visas are made on the papers, regardless of the applicant's source country.

9. The standard letter of receipt sent to applicants states *".. your case manager does not have to delay making a decision on your application, even though you … may have told your case manager that you intend to give more information*.' Therefore an application 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.

10. 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.

11. Inevitably, many rejected applicants seek a review by the Refugee Review Tribunal (RRT). In most cases the RRT hearing is the first and only real opportunity for a proper assessment of the applicants' claims and, importantly in many cases, their credibility. When interviews were conducted by the Department in the past, the RRT had the benefit of a delegate's primary interview tape-recording as a preliminary means of assessing credibility. That material is now usually not available. The RRT is therefore often the first chance that asylum seekers have to discuss their claims. Applicants may feel that this is, in effect, their first chance of having their case properly considered. When there are shortcomings at the RRT stage, applicants are more likely to seek judicial review.

12. It is our submission 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 (Geneva, September 1979). Paragraph 200 of that Handbook provides:

> An examination in depth of the different methods of fact-finding is outside the scope of the present handbook. It may be mentioned, however, that basic information is frequently given, in the first instance, by completing a standard questionnaire. Such basic information will normally not be sufficient to enable the examiner to reach a decision, and one or more personal interviews will be required. It will be necessary for the examiner to gain the confidence

> of the applicant in order to assist the latter in putting forward his case and in fully explaining his opinions and feelings. In creating such a climate of confidence it is, of course, of the utmost importance that the applicant's statement will be treated as confidential and that he be so informed.

13. A reconsideration of DIMIA's policy of rarely interviewing applicants for initial protection visas, especially those from "refugee producing" countries (for example Iran, Sri Lanka, Turkey, Democratic Republic of Congo, China) would go some way to allowing a proper and thorough consideration of an applicant's claims. As well it would assist in alleviating the pressure upon the RRT to make credibility findings based upon limited material.

Inconsistency in processing

14. As the large body of Australian jurisprudence indicates, there are difficult tests implicit in the Refugee Convention and statutory definitions of key terms such as those in *Migration Act* s.91M to s.91S. Many of these issues are not directly addressed in the Form 866 application. Unrepresented applicants cannot be expected to address these issues without a written request or interview.

15. It is the experience of Legal Aid NSW staff that DIMIA processing of protection visa applications is inconsistent. Individual Departmental delegates make their own decisions about procedural fairness and the appropriate handling of an application.

16. As noted above, there are many delegates who very rarely interview or ask for further information and whose decisions do not reflect the complexity of claims or country material provided.

17. When interviews are conducted, some delegates are well prepared for interviews and are able to narrow the questioning to key points in

dispute. Others seem to have read little of the applicant's claims and ask him/her to give a general narrative.

18. It appears that often delegates rely only on country information provided by the Department of Foreign Affairs and Trade; they discount the applicant's references to reports by leading human rights organisations. Similarly, some delegates appear to apply their own cultural or religious norms when assessing an applicant's claims and deciding that these lack credibility.

19. Some delegates appear to rebut claims on the basis of a shallow assessment of country information. For example, an applicant may explain that he/she only obtained a passport through the payment of a large bribe. Some delegates would discount this on the grounds that bribery is endemic in that country; they would not regard it as a reflection of any political, religious or ethnic profile. A preferred approach would be for the delegate to ask for detailed information on the process of obtaining the passport and whether there could be any link with Convention grounds.

20. Similarly, delegates can assume that there is no risk of persecution if the applicant's family still resides at the applicant's known address. However the applicant is not asked to provide information on any problems faced by the family.

21. In relation to this issue, we note the following observations in paragraph 202 of the UNHCR Handbook:

> Since the examiner's conclusions on the facts of the case and his personal impression of the applicant will lead to a decision that affects human lives, he must apply the criteria in a spirit of justice and understanding and his judgement should not, of course, be influenced by the personal consideration that the applicant may be an 'undeserving case'.

Inconsistency in the application of criteria

22. As well as demonstrating a misinterpretation of factual information and a reluctance to request further details from the applicant, DIMIA decisions can demonstrate inconsistency in the interpretation of key criteria.

23. For example, the '7 day rule' in Migration Regulation 866.215 requires an assessment of whether the applicant has resided in a transit country for more than 7 days and whether they could have sought protection there. If the '7 day rule' is applied, current temporary protection visa holders are granted a further temporary protection visa rather than permanent residence.

24. Some delegates waive the '7 day rule' after considering the mitigating circumstances of an applicant's transit, while other delegates apply the rule narrowly by considering only physical presence in the transit country. They do not take account of information regarding the availability of "protection" in the transit country.

25. There is a large number of temporary protection holders (see statistics at paragraph 44 below) and offshore refugee and humanitarian visa applicants who are affected by the '7 day rule'. All are vulnerable to the anxiety associated with the grant of a visa that is temporary rather than permanent. For them it is essential that this criterion should be uniformly applied so as not to result in arbitrary and inconsistent decision-making.

Delays in processing

26. 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. The comments below do not apply to detention cases or to protection visa applicants who have been granted assistance under

the Asylum Seekers Assistance Scheme (ASAS), as these matters are given priority.

27. The allocation of case officers to new protection visa applications commonly occurs a considerable time after the lodgement of the application. It is our experience that the matter may then be processed quickly in the manner described above, that is, without the case officer interviewing the applicant or seeking clarification of their claims.

28. Applicants for both initial visas and further protection visas also commonly experience lengthy delays at the end of the process, after DIMIA has asked for health and character checks, before a visa is issued. These delays are most commonly associated with ASIO security checks.

29. Applicants can wait for many months for a security clearance to come through, in some cases up to one year. This exacerbates the anxiety and fear for many traumatised applicants, particularly further protection visa applicants who 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.

30. Administrative procedures should be implemented to reduce the delays described above, particularly the excessive delays that can be caused by security checks at the end of the process.

Processing of spouse applications

31. Processing of spouse applications, particularly applications processed offshore, is marred by superficial assessment of the genuineness of relationships. For example, a lack of cultural sensitivity among some delegates results in reluctance to accept arranged marriages as

genuine; and the emphasis placed on shared financial arrangements creates difficulties for applicants in countries where the banking system is poor or prone to corruption. Poor decision making on spouse visas is evidenced by the statistics from the Migration Review Tribunal, which indicate that for the last three years the set-aside rate for spouse visas has been over 60 per cent.

Confidentiality concerns

32. A key aspect of refuge law is that an applicant's identity or fears should be kept confidential, especially in the country of feared persecution. Legal Aid NSW is concerned that this confidentiality is being breached by staff of overseas posts. Two case examples are provided below.

33. In one case, a spouse visa applicant was asked what she knew about her husband's secret political activity, but was too frightened to give any details for fear that this may be divulged to the national security forces. Her apparent ignorance was used to impugn the genuineness of the relationship, whereas she was in fact trying to maintain her and her children's safety.

34. In another case, a protection visa applicant applied for financial support through ASAS, which is funded by DIMIA to provide support to impecunious refugee applicants. DIMIA requested that the Australian Embassy in his home country ascertain his financial position. Embassy staff visited his home there without the applicant's permission or knowledge. He found out from his teenage daughter. The family were terrified that the visit from embassy staff would be known to the authorities and would endanger them.

35. Legal Aid NSW stresses the importance of maintaining the confidentiality of refugee applicants, especially in the country of feared persecution, and recommends that all offshore staff be trained accordingly.

Conclusion on immigration policy and implementation

36. Legal Aid NSW agrees with many of the findings of the July 2005 report of the *Inquiry Into the Circumstances of the Immigration Detention of Cornelia Rau* ('the Palmer Report') relating to immigration policy and implementation. We support that report's Recommendation 7.1:

> The Inquiry recommends that DIMIA develop and implement a holistic case management system that ensures that 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.

37. We believe that this recommendation should be extended to apply to all migration applications, irrespective of whether they are lodged onshore or at an overseas post.

B. Legal needs of immigration applicants

38. The *Migration Act* can only operate effectively if people understand their rights and are able to present their claims. As pointed out above, migration law is very complex and failure to satisfy very prescriptive criteria, in some cases even failure to use the correct application form, can lead to refusal of an application.

Commonwealth legal aid funding for immigration matters to financially disadvantaged people

39. There is inadequate free immigration legal assistance available to people in immigration detention and in the community.

40. Since 1 July 1998 legal aid has been unavailable for visa applications. Previously legal aid was available in New South Wales, subject to a means and merits test, to people applying for refugee visas and other

visas where there were strong humanitarian or compassionate grounds.

41. Commonwealth legal aid guidelines for immigration matters now provide as follows (guideline is 2.2(d)):

> **Aid for limited migration matters**
>
> Legal aid may be granted for proceedings in the Federal Court, Federal Magistrates Court or High Court dealing with a migration matter, including a refugee matter, only if
>
> (i) there are differences of judicial opinion that
> - have not been settled by the Full Court of the Federal Court or the High Court, and
> - relate to an issue in dispute in the matter, or
>
> (ii) the proceedings seek to challenge the lawfulness of detention, not including a challenge to a decision about a visa or a deportation order.
>
> The above paragraph applies to a matter, even if the matter could also be characterised as falling within another Commonwealth priority or guideline.
>
> In all other cases applicants should be referred to the Immigration Advice and Application Assistance Scheme (IAAAS) for possible assistance.

42. The requirement that there be "*differences of judicial opinion"* before legal aid can be granted for judicial review proceedings is extremely limiting. It means that impecunious visa applicants with meritorious cases are denied access to legal aid.

43. The Immigration Advice and Application Assistance Scheme (IAAAS), administered by DIMIA, provides very limited funding for assistance to prepare, lodge and present primary applications for visas and to represent applicants in merits review. Assistance is available under the scheme to "disadvantaged" visa applicants in the community and to asylum seekers in detention.

44. In 2003-2004, according to DIMIA figures, application assistance was given to 456 disadvantaged visa applicants in the community throughout Australia. This represents only a small fraction of the visa applicants who need assistance. The need is particularly acute among temporary protection visa holders applying for further protection visas. As at 31 October 2003, temporary protection visa grants by nationality were:

1999-2003	Afghanistan	3658
	Iraq	4260
	Others	954
	Total	8872

45. There is strong demand for assistance in particular from temporary protection visa holders whose claims for further protection visas are being processed. Many are in a poor financial position and suffer poor physical and/or psychological health. Some fall prey to unscrupulous migration agents who encourage them to present false information.

46. The legal issues involved in further protection visa applications are complex. They include the application of the cessation clause (Article 1C(5)) of the Refugees Convention to changed circumstances in countries of origin, the need to submit comprehensive evidence about current conditions in those countries and relate them to the applicant's fears, and to address the '7 day rule' (the 7 day rule is discussed at paragraphs 23-25 above).

47. Legal Aid NSW is a contractor for the provision of services to asylum seekers under the IAAAS scheme. 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.

48. Another area of great unmet need is services to people, particularly protection visa holders, seeking to sponsor family members from overseas. Under the IAAAS, assistance is limited to the giving of advice and limited help in completion of forms, but assistance required is often much greater due to factors such as:

    - lack of birth and marriage certificates for applicants from countries like Afghanistan and Somalia
    - DNA testing required
    - need to prove dependency of adult children separated from the parent in Australia for many years
    - lack of English language capacity of relatives overseas
    - long periods of family separation as a result of the temporary protection visa regime.

Detainees

49. As noted above, legal representation for protection visa applicants who are in detention is funded and administered by DIMIA under the IAAAS.

50. People in immigration detention who seek to apply for a protection visa are offered IAAAS assistance. DIMIA refers cases to IAAAS contractors who prepare a protection visa application and then, if refused by DIMIA, refer the matter to the RRT.

51. While the IAAAS scheme provides every asylum seeker in detention with free representation for a primary application, detainees who do not have refugee claims are left with few options to seek advice or representation.

52. In the past, at least at the Villawood Immigration Detention Centre, a lawyer from Legal Aid NSW would attend at the detention centre once a week to provide general immigration advice. The types of matters handled there varied; they included advice on options after refusal of a visa application, the possibility of applying for a different type of visa, and in some cases visa cancellations on character grounds.

53. It is submitted that the availability of such a face-to-face advice service is needed for detainees. Conversations with those detainees who are able to contact Legal Aid NSW by telephone show there is a significant degree of misunderstanding of their legal position and an acceptance of misinformation that circulates in the detention environment.

54. For example, one Legal Aid NSW lawyer was attending Villawood IDC to assist an asylum seeker referred under the IAAAS. One of the professional people working at the detention centre approached the lawyer and asked for advice in relation to a particular detainee who had been in detention for many months, had no refugee claims but who had a very complex immigration history and needed advice about his position. When interviewed, the client clearly had not had any independent legal advice about his position for some time and was confused about his rights and options.

55. The availability of a regular legal advice service at detention centres would assist detainees to obtain accurate, independent advice about their legal position. This in turn could assist those who have no or very limited other options to make an informed choice about leaving Australia.

56. 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. The position

of people subject to criminal deportation orders or visa cancellations on character grounds is discussed below.

57. It is contended that the availability of comprehensive advice would discourage unmeritorious applications, particularly for judicial review. It is our experience that many detainees accept poor advice from fellow detainees and continue to lodge judicial review applications which have no chance of success.

58. Access to a regular comprehensive advice service would also bring to light cases of wrongful detention.

C. Deportation of people from Australia

59. The *Migration Act* 1958 enables DIMIA to deport permanent residents where they have been convicted of an offence for which they were sentenced to at least 12 months imprisonment (section 200). DIMIA issues a document titled *Letter Advising Deportee In Prison of Deportation Order* to non-citizens informing them that they will be deported after completion of their custodial sentence. Where DIMIA is unable to deport them immediately section 253 of the Act provides that they may be detained upon completion of the custodial sentence until they are deported (section 253). The letter also informs the non-citizen that they may lodge an appeal with the Administrative Appeals Tribunal (AAT) to seek review of the DIMIA decision. It directs them to contact the Legal Aid Office or Commission in their state or territory for assistance with this appeal.

60. 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, as discussed above,

this assistance is not available. The applicant is denied the right to access the advice and assistance they require.

61. 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 (see above). The only remaining option is private representation, which is often not affordable, or pro bono assistance, which is in short supply.

62. Those individuals who are aware of their right to seek review of the DIMIA decision may lodge an appeal with the AAT. However, without adequate means, they are forced to represent themselves in adversarial proceedings that may last two to three days. Where the applicant cannot obtain representation the review process at the AAT is inevitably one-sided.

63. We are aware of individuals in this situation who are detained for an indefinite period, with no right to a bridging visa (as they are not unlawful non-citizens) and no legal representation. The Minister for Immigration and Multicultural Affairs (the Minister) or the Secretary may order the release of the applicant from detention (section 253(9)). However this is a non-compellable and non-reviewable discretion.

CASE STUDY

Mr M arrived in Australia as a refugee in 1989 with his wife and three young children. He was convicted of a criminal offence in 1991 and sentenced to 14 months imprisonment. He was released after eight months on a good behaviour bond. In 1992 DIMIA issued a deportation order on the basis of the criminal conviction. He lodged an appeal to the AAT. He did not have the means to obtain legal assistance and was self-represented at the hearing. DIMIA was represented by a solicitor who introduced into evidence statements from Mr H's estranged wife (now an Australian citizen) and her uncle who provided that Mr M had misrepresented his claims to UNHCR and the Australian Government in

obtaining refugee status. The DIMIA solicitor produced evidence from a psychologist which provided that Mr M's young children would benefit from his deportation. The AAT decided to affirm the DIMIA decision to deport Mr M. DIMIA then detained Mr M.

In the first 12 months he was detained in a state correctional facility. He was later moved to Immigration detention. Whilst in detention he lodged an out of time appeal to the Federal Court. He was again self-represented. The Federal Court dismissed his appeal and advised him to request a revocation of the deportation order directly from the Minister for Immigration. He prepared a letter to the Minister for Immigration informing the Minister that more than ten years had passed since the conviction, he had not committed any criminal acts in that time, he has a wife and four children who are Australian citizens, he has an excellent relationship with all of his children and sees them on a regular basis, he was recognised as a refugee through a lengthy and thorough determination process, he maintains a well-founded fear of persecution in his country of origin and he regrets his past wrong doing. He also requested that he be released from detention as he suffers from poor health and cannot be properly cared for in detention and hopes to reside with his wife and young child. The Minister refused his request for revocation of the deportation order. His request for release from detention has yet to be addressed. He has resided in detention for 4 years.

64. The Minister has a non compellable discretion to intervene and revoke the deportation order (section 206). However this discretion is rarely exercised. Where an applicant has no access to legal assistance or representation in a lengthy and complex legal process, the Minister's intervention powers are especially significant.

65. In exercising this discretion the Minister may consider a number of factors in reaching her decision. These include: whether the applicant has been recognised as a refugee, the lapse in time since the offence was committed, changed circumstances, the risk of recidivism and links to the Australian community. However, where there is no transparency in the deliberation process and there are no reasons provided by the Minister when refusing to revoke the deportation order, it is difficult to ascertain the basis for the Minister's decision not to intervene. We are aware of cases where an individual meets all of the aforementioned considerations, yet the Minister has not revoked the deportation order.

66. We recommend that:
    - legal aid or IAAAS representation be available to financially disadvantaged people affected by deportation orders
    - a decision not to release a person who is subject to a deportation order be reviewable
    - the power to intervene be clearly drafted (currently it is a passing reference in section 206) and termed a compellable discretion
    - in deciding whether to exercise her intervention powers, the Minister consider the effect that the denial of legal advice and assistance has on an applicant's case and make a decision after careful consideration of the evidence on file, and after the applicant and others affected by the outcome of the order are fully consulted
    - the Minister provide a statement of reasons for refusing to revoke a deportation order.

Visa cancellations

67. The *Migration Act* 1958 enables DIMIA to cancel a visa for a range of reasons, including non-compliance with visa conditions and failure of the character test (section 501). Where a decision is made to cancel a visa a notice of intention to cancel is served on the person affected, including an invitation to comment on information affecting the decision to cancel. If comments are not received by a prescribed date DIMIA may proceed to cancel the visa.

68. As with deportation cases, free legal representation is not available either under the IAAAS or under Commonwealth legal aid guidelines. The only remaining option is private representation or pro bono assistance.

CASE STUDY

In 2005 a community mental health centre approached Legal Aid NSW for immigration assistance for a client who had recently received DIMIA

correspondence notifying him of the intention to cancel his permanent residence visa. He had been granted permanent residence in 1983 along with his mother and brother. He developed psychosis in the late 1980s and killed a person during an episode in 1991. He pleaded guilty to manslaughter and was sentenced to five and half years' imprisonment after which he was admitted to a psychiatric hospital. From 1997 he was permitted leave from the hospital until release into the community in 2002. Cancellation would have resulted in his return to his country of birth where he had no recent connections and would be unable to access medical assistance.

His illness had been totally controlled and there had not been any further psychotic episodes, therefore his family and doctors were stunned by DIMIA's advice that they intended to cancel his visa.

Legal Aid NSW agreed to assist with preparing the response to DIMIA because the client's situation was so compelling and his family did not have the financial resources to obtain private legal representation. After a submission from family members, medical practitioners and community members was lodged DIMIA decided not to cancel his visa.

69. The affected person may have the right to seek review of the DIMIA decision to the AAT. A review application must be lodged within a very short period (nine days). Failure to lodge an appeal within the strict time limit results in the applicant being detained and removed from Australia.

70. One of the most vulnerable groups affected by this regime is individuals serving custodial sentences at the time that their visa is cancelled. 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.

CASE STUDY

The sister of a prisoner (a New Zealand citizen) serving a prison sentence of 12 months for malicious wounding approached Legal Aid NSW by telephone to seek assistance in replying to a DIMIA Notice to Cancel her brother's Special Category visa on character grounds. He had 20 days to reply from 30 December 2004. He had no family or any connections with NZ, his parents were deceased and he and his sister had been raised by their grandmother in Australia. He had a girlfriend and a 3 year old son and wanted to stay close to them. His sister was an Australian citizen. LAC NSW tried unsuccessfully to obtain pro bono assistance for him and was only able to give advice to the sister on the preparation of the response to DIMIA.

71. We are aware of permanent residents affected by this regime who arrived in Australia as refugees more than 20 years ago, but did not become citizens because they were either unaware of their rights or did not satisfy the English language requirement. Their family resides in Australia and they have no links whatsoever the country to which they are deported. It is not uncommon for these people to have arrived in Australia as infants. We are also aware of permanent residents who suffer from mental illness who have been affected by this regime. Legal assistance was not available and these individuals were inevitably deported.

72. 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 case, 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.

73. We recommend that:
    - IAAAS or legal aid funding be provided to represent people affected by DIMIA decisions to cancel their visas.
    - People in custody or in detention have access to IAAAS providers or funded legal aid services for migration advice and representation.

D. Migration detention – access and communication

74. The problem of lack of advice and representation services for detainees has been addressed above.

75. In this part, Legal Aid NSW concentrates on difficulties for detainees and their legal advisers in access and communication. Legal Aid NSW represents protection visa applicants at the Villawood Immigration Detention Centre who are referred by DIMIA under the IAAAS, and provides telephone advice to detainees who are able to contact us.

76. Access to detainee clients by lawyers/migration agents at the Villawood IDC remains difficult despite some recent improvements. This issue has been repeatedly raised by various organisations, including Legal Aid NSW, at forums such as the NSW Asylum Seeker Refugee Forum (NASRF). The following issues have caused concern of a long period of time:

Availability of interview rooms

77. At the moment there are only two dedicated legal interview rooms available for Stages 2 and 3 of the Villawood IDC. There is a demount-able building in Stage 2 that has four rooms, however one is permanently set aside for Onshore Protection officers and will not be opened by the detention centre staff, even when the room is not being used. Another is used by DIMIA Compliance staff.

78. There is a system of pre-booking interview rooms by fax. This has only recently started to operate to an acceptable standard. However DIMIA staff from the IDC have advised that the needs of DIMIA take precedence and rooms can be taken by DIMIA staff if required at short notice and despite a booking.

79. Given the strict time frames that are imposed on IAAAS contractors in preparing and lodging protection visa applications from detention (five working days), the interview room arrangements are unacceptable. At the end of May 2005 there were about 400 detainees in Stages 2, 3 and Lima compound, and about 35 protection visa applicants (either at primary or RRT stage) in the detention centre (Source: NASRF meeting, 26 May 2005). To have only two dedicated rooms for legal interviews in the circumstances described above is totally inadequate. There should be urgent steps taken to increase the number of room available for use by legal advisers.

Quality of the interview rooms

80. It has been noted at NASRF that the sound-proofing of the interview rooms at Villawood IDC is poor and that interviews being conducted in adjoining rooms are clearly audible.

81. Given the sensitive nature of the matters being discussed, particularly for asylum claims, interviewing rooms should be properly insulated to allow for privacy.

Telephone and fax access

82. The following issues are long-standing problems at the Villawood IDC that have been raised at fora such as NASRF over a long period of time.

83. Fax delivery to detainees has improved recently but telephone access, particularly to Stages 2 and 3, continues to be problematic. This causes particular problems when the detainee must be called using the Telephone Interpreter Service (TIS) and the detainee does not know of the call. Given the very strict time limits that apply in migration matters, whether for seeking review or responding to requests for information

from a Tribunal, difficulties in communication can potentially cause serious problems for a person's case.

84. A better telephone system to enable detainees and their legal representatives to communicate is urgently required.

THE SENATE LEGAL AND CONSTITUTIONAL COMMITTEE

INQUIRY INTO THE ADMINISTRATION AND OPERATION OF THE *MIGRATION ACT* 1958

SUMMARY OF RECOMMENDATIONS

Processing and assessment of visa applications

1. The current system of processing visa applications should be improved, with the following areas requiring particular attention:

   a) Natural justice issues

   b) Better training of case officers in assessment of cases, including an understanding of the suggested criteria for the determination of refugee applications enunciated by the UNHCR Handbook

   c) A reconsideration of DIMIA's policy of rarely interviewing initial protection visa applications, especially with respect to those applicants from "refugee producing" countries

   d) Inconsistency in the application of visa criteria, especially for protection and spouse visa applications

   e) Protection of applicant confidentiality

f) Administrative procedures should be implemented to reduce delays, particularly the often excessive delays at the end of the process that can be caused by security checks for protection visa applicants.

g) Legal Aid NSW supports Recommendation 7.1 of the July 2005 report of the *Inquiry Into the Circumstances of the Immigration Detention of Cornelia Rau* ('the Palmer Report', as extracted below) and recommends that the approach be adopted across all areas within DIMIA.

> The Inquiry recommends that DIMIA develop and implement a holistic case management system that ensures that 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.

Legal needs of immigration applicants

2. There is inadequate free immigration legal advice and representation available to financially disadvantaged people in the community and in immigration detention. Funding for such advice and representation should be increased substantially through the IAAAS or through legal aid funding, and should include:

   a) Assistance to people, particularly protection visa holders, seeking to sponsor family from overseas

   b) A regular legal advice service at detention centres

   c) Assistance to apply for non-protection visas from detention

   d) Assistance and representation for financially disadvantaged people and detainees affected by deportation orders or cancellations of permanent residence visas.

3. The requirement in Legal Aid's Commonwealth guidelines 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.

Deportation orders

4. A decision not to release a person who is subject to a deportation order be reviewable.

5. The power to intervene be clearly drafted (currently it is a passing reference in section 206) and termed a compellable discretion.

6. In deciding whether to exercise her intervention powers, the Minister consider the effect that the denial of legal advice and assistance has on an applicant's case and make a decision after careful consideration of the evidence on file and after the applicant and others affected by the outcome of the order are fully consulted.

7. The Minister provides a statement of reasons for refusing to revoke a deportation order.

Migration detention – access and communication

8. Steps must be taken to increase the number of interview rooms available for use by legal advisers at the Villawood Detention Centre.

9. Interviewing rooms should be properly sound-proofed to allow for privacy.

10. A better telephone system that would enable detainees and their legal representatives to communicate more easily is urgently required at the Villawood Detention Centre.