10 August 2005

Mr Owen Walsh
Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600

By Post and Email (legcon.sen@aph.gov.au)

Dear Mr Walsh

Submission on the administration and operation of the *Migration Act 1958 (Cth)*

The Law Institute of Victoria (***LIV***) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Committee (***Committee***) in response to its Inquiry into the administration and operation of the Migration Act 1958 (Cth) (***Inquiry***). We are grateful for the extension of time granted by the Committee to make this submission by 10 August 2005.

Attached is the LIV's submission to the Inquiry for your consideration. We provide permission for the Committee to publish the LIV's submission on its website.

We would welcome the opportunity to provide further comments to the Inquiry as a supplementary written or oral submission at a Senate hearing as a means of further contributing to the consultation process. We would be appreciative if you could advise if a Senate hearing is intended to be held and provide relevant location and date details.

If you have any questions about this submission, please contact me (livpres@liv.asn.au / 03 9607 9367) or Jo Kummrow (jkummrow@liv.asn.au / 03 9607 9385).

Yours sincerely

V.E. Strong

Victoria Strong
President
Law Institute of Victoria

Attach.

Submission

Administrative Law & Human Rights Section

To: Senate Legal and Constitutional Committee

The administration and operation of the *Migration Act 1958* (Cth)

A submission from: Administrative Law and Human Rights Section
of the Law Institute of Victoria

Date: 10 August 2005 (extension granted)

Queries regarding this submission should be directed to:

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1. Introduction

The Law Institute of Victoria (***LIV***) through its Administrative Law and Human Rights and Section Migration Law and Refugee Law Reform Committees, is pleased to make this submission to the Senate Legal and Constitutional Committee on its Inquiry into the administration and operation of the *Migration Act 1958* (Cth) (***Migration Act***).

The LIV would welcome the opportunity to make further oral or written submissions regarding the Inquiry.

However, the LIV notes the short time period of just over five weeks in which submissions are due. The Senate referred the Terms of Reference to the Senate Legal and Constitutional Committee on 21 June 2005 with the closing date for submissions being 29 July 2005. This seems an extremely truncated period of time in the context of a review of such a large and complex piece of legislation such as the Migration Act and Migration Regulations.

The process has been further complicated by the delayed release on 14 July 2005 of the report into the matter of Ms Cornelia Rau by Mick Palmer AO APM (***Palmer Report***), which the LIV has sought to review and consider in providing a thoughtful response to the Inquiry.

We suggest that while urgent and immediate reforms are needed in relation to the administration and operation of the Migration Act, the Senate should also provide an adequate and realistic time period in which individuals and organisations can provide a considered response to the Inquiry.

2. Terms of Reference

On 21 June 2005, the Senate referred the above reference inquiry to the Legal and Constitutional References Committee, for inquiry and report by 8 November 2005.

The Committee's Terms of Reference are:

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.

3. Overview of concerns

The LIV has identified a number of overarching concerns in relation to the operation and administration of the Migration Act by DIMIA, detention centre contractors and Tribunal members, which can be briefly summarised as:

(a) DIMIA needs to understand and respect the human nature of its legal responsibilities and the services it provides to all its clients whether they are asylum seekers or visa applicants;

(b) there is a lack of flexibility and discretion able to be exercised by DIMIA decision makers, particularly with respect to notification and time limits;

(c) there is a perceived culture of DIMIA decision makers and compliance officers in administering the Migration Act as a 'negative' rather than a 'positive' piece of legislation which has had the practical effect of DIMIA seeing its primary role as a regulator rather than as a service provider;

(d) the legislative scheme has become too complex, unwieldy, subject to frequent and ongoing change which has resulted in uncertainty in the law[1];

(e) amendments to the legislative scheme are often made to the Migration Regulations in a knee-jerk manner and consultation with stakeholders has been almost non-existent;

(f) as a highly codified complex legislative scheme, successive amendments to the scheme have progressively abrogated people's rights and limited their options to secure temporary or permanent residence in Australia, regardless of the merits of their case. This has resulted in more ministerial intervention or unjust and harsh results;

(g) ongoing legal skills training should be provided to all DIMIA decision makers and compliance officers without legal training or education in principles of lawful decision making, natural justice and procedural fairness;

(h) there is a need for the DIMIA Executive to more closely oversee and monitor the work of the Department, its officers and contractors;

(i) the Ombudsman should be required to report on all complaints received against DIMIA and action taken by the Department to investigate and respond to any founded complaint;

(j) there is a need for an independent audit and report on DIMIA's operation and administration of the Migration Act following the handing down of the Senate's report into this Inquiry;

(k) some of the most vulnerable clients of DIMIA, including asylum seekers, trafficked women, victims of domestic violence and the mentally ill, are treated like criminals rather than victims; and

(l) the contractual services and arrangements between DIMIA and it detention centre contractors need to be urgently reviewed and possibly amended or terminated.

The LIV suggests that since approximately 2000, an imbalance has developed between DIMIA's duties as a regulator and its key role as a service provider, both to Australian citizens and non-citizens. It is arguable that DIMIA has become a Government department to be feared by those who must seek or rely on its services.[2] The reasons for this can be understood in some of the findings in the Palmer Report which identify 'a serious cultural problem within DIMIA's immigration compliance and detention areas' and his recommendation that 'urgent reform is needed'[3].

The LIV further suggests that these cultural problems have emanated from the top echelons of DIMIA from arguably the Minister, down to Executive officers and senior management and finally down through to general staff and has been adopted by detention centre contractor staff. It is not necessarily a phenomenon attributable to frontline DIMIA decision makers and compliance officers.

The LIV acknowledges and commends the Prime Minister and Minister for recognising this culture of imbalance and implementing important measures, including the appointment of Mr Andrew Metcalfe as the new Secretary of DIMIA, a top-level Change Management Taskforce and the establishment of the Immigration Detention Committee to oversee the implementation of policy changes in immigration detention, to redress these cultural issues.[4] In particular, we commend the Minister for extending the need for "cultural change" to "include customer focus, timeliness, openness to complaints and appropriate mechanisms to identify problem areas".[5] The LIV will continue to monitor the progress and effectiveness of such cultural changes.

The LIV submits that an important aspect of "cultural change" will involve the training of DIMIA and compliance officers upon commencement of work at the Department and also on an ongoing basis. As identified in the Palmer Report:

> *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.*[6]

4. Palmer Report

The Palmer Report was released on 6 July 2005 and provides a scathing assessment of DIMIA's administration of the Migration Act across a range of its core responsibilities.

The LIV acknowledges that the personal circumstances of Ms Cornelia Rau are difficult, however, her treatment at the hands of DIMIA and compliance officers, detention centre contractors constitute a gross failure of her rights and human dignity.

The LIV commends the Minister for taking on board public criticism and introducing progressive reforms following the release of Ms Rau and the handing down of the Palmer Report. The LIV stresses the need for DIMIA to continue its agenda of reform and improvement taking into consideration the issues raised in the Executive Summary above and throughout this submission.

5. The administration and operation of the Migration Act

The Migration Act and Migration Regulations are renowned as being one of the most complex and lengthy pieces of legislation in Australia. There is also a layer of policy that underpins the Migration Act and Migration Regulations to which DIMIA decision makers refer and apply to assist in their decision making where Government policy is deeded relevant. Further, the legislation is amended by the Government on a frequent basis, the LIV suggests, by further restricting the application and alleged abuse of Australia's visitor, migration, refugee and humanitarian programs. While some of these changes are pragmatic (ie two stage Spouse visa process), a significant number represent the over regulation of the Migration Program. The LIV suggests that there is a perceived application of the Migration Act as a 'negative' rather than a 'positive' piece of legislation by DIMIA decision makers and compliance officers.

The LIV believes that some of the legal requirements and restrictions placed on visas may result in a reduced number of applications for migration to Australia based on complex, time consuming and costly requirements in comparison to other migrant-friendly countries such as New Zealand, United States and Canada. There are potential serious economic and population consequences for Australia if it is perceived to be non-friendly to eligible migrants. It is also noted that Australia has inalienable responsibilities to provide protection to those in need from other countries suffering persecution or serious harm.

The LIV has responded to this term of reference by examining various categories and classes of visa available, including:

(a) Business Skills visas;

(b) Student visas;

(c) Spouse visas, domestic violence provisions and trafficked women;

(d) Close Ties visas;

(e) Protection visas and asylum seekers;

(f) Ministerial intervention and discretion;

(g) Health and character requirements and visa cancellations;

(h) Compliance;

(i) Access to information;

(j) Other concerns.

5.1 Business Skills visas

5.1.1 Background

The Business Skills Category (***BSC***) is part of the skills grant stream of the migration program and it is said to be designed to attract applicants to Australia who have the skills to enhance the Australian economy by:

(a) developing links with international markets;

(b) facilitating the creation of maintenance of employment in Australia;

(c) exporting Australian goods and services;

(d) manufacturing goods or providing services in Australia which would otherwise need to be imported;

(e) introducing new technologies; and

(f) increasing commercial activity and competitiveness.

The current BSC is the result of an evolving process over a number of years which originally had its origins in what was known as the Business Migration Program. While this program was successful in attracting business migrants to Australia, it was not without controversy because of claims that the system was being abused. These claims caused the Government to commission an inquiry into business migration. Ultimately, the Government reconfirmed its commitment to attracting business people to Australia with the caveat that processing of applicants was to be far more prescriptive than it had been in the past.

5.1.2 Legislative amendments

It was against the above background that the first BSC category was introduced in 1992, and remained largely unchanged until 1 March 2003. At that time the Government introduced significant changes in which all Business applicants, with the exception of those who qualify under the Business Talent (subclass 132) visa criteria, must undergo a two stage visa process in order to obtain a permanent residence visa. Successful applicants will initially enter Australia on a provisional temporary visa valid for four years, and assuming that they can engage in business activities in Australia to a level specified as satisfactory by the Government, may then apply for permanent residence.

Applicants for a provisional visa may even apply in their own right (Unsponsored visas) or with the support of a nominated State or Territory (State/Territory sponsored visas). As part of the rationale for introducing the visa changes, DIMIA claimed that the

changes improve integrity and business engagement – due to the fact that permanent residence cannot be obtained until a business is established and in a way which will satisfy the permanent residence visa criteria.

It is also claimed that the changes will result in a better distribution to low growth and regional areas – through sponsorship and residency requirements.

However, the LIV suggests that the changes have removed the incentive of many prospective visa applicants to remain in Australia, as their right to do so is dependant upon two separate applications - each of which are significantly complex and administered by DIMIA, which is renowned for requiring its procedures to be strictly adhered to.

Further, whether or not a Government push to regional migration will be successful is yet to be determined – some would argue that it is nothing more than a 'broad brush' approach at social engineering and that applicants need more dialogue with States and Territories to make proper decisions about their futures.

5.1.3 Declining applications

It is understood that in 2002/03, 6740 business migration visas were granted to business people and their families. This compares with 7592 visas granted in 2001/02, and 7360 visas granted in 2000/01.

It is also understood that in March 2005, two years after the introduction of the most recent changes, application rates were still lower than the pre-March 2003 application rates.

DIMIA has attributed a decline in application numbers to an unprecedented surge of applications made in February 2003, which had the effect of draining the potential pool of applicants in the first half of 2003/04. While this may have explained the results for 2004, it should be of some concern to DIMIA that the application rates have (apparently) still not reached the pre March 2003 rates. Bearing in mind that the skill component of the migration program is now larger than it was in 2003, it must be fair to assume that BSC now represents proportionately less of the annual skilled intake than was previously the case. The question must therefore be asked is whether, assuming that the objects of the Government as stated above continue to be current, BSC is the most appropriate vehicle to achieve these objectives.

Some of the consequence of the amendments to this visa category can have significant macroeconomic outcomes. Examples include:

(a) significant reduction in migrant transfers on Australia's current account, with the calibre as well as the number of applicants falling, the windfall financial gain to Australia's balance of payments is being eroded;

(b) the Business Talent category, which requires the highest possible political support at the state and territory level, is not attracting the previously strong calibre of applicants that until that time had entered under the pre 2003 criteria;

(c) the employment multiplier of the Business Skills category, and associated economic benefits, is not as strong as it could be;

(d) taxation revenue, such as taxation of offshore assets, is being lost, as the number of persons entering Australia is reduced; and

(e) the Independent Executive visa, which offered temporary residence to those who had a good business proposal and $250,000, has been abolished and replaced with a stream that only allows a few applicants to meet the requirements.

It is submitted that the BSC is a clumsy means of trying to attract successful business visa applicants while being focused (and some would argue excessively so) on processing issues, which result in very lengthy delays, confusion, and in many cases frustration, on the part of most applicants. It is submitted that more thought needs to be put into devising a system which will provide better outcomes for all concerned.

From an applicant's perspective, some of the practical problems which are encountered, and indeed which may contribute to lower application rates include;

(a) Processing delays: While statistics on average processing times are not readily available, business skills applications - provisional and permanent - are slow to process and this of course leads to uncertainty on the part of the applicant.

(b) Two stage processing: This is cumbersome and costly to the applicant and because the transition from temporary to permanent requires completely new material, applicants are faced with the prospect of making two separate applications each of them totally independent of the other. Generally speaking, there is little common documentation involved.

(c) State Sponsorships: Because the sponsorship criteria varies from state to state one must query whether people are picking States for the wrong motives - that is are they trying to determine what is acceptable so far as a particular State is concerned, rather than choosing a State for sound business reasons; Further, from the Regulations it is not clear what happens if people obtain a sponsorship from a State and then move to another State during the course of their provisional visa (ie are there any sanctions for this apparent breach of intention?).

(d) Visa holders are in an extended period of uncertainty. Permanent resident applications are carefully scrutinised and it is not unusual to be rejected on strictly technical grounds – for example, net assets in a business may be close to but less than the stipulated amount; money which has been invested in the business may not have been done so with an idea to migration, meaning that the funds might be treated as capital rather than a loan with adverse consequences for the applicant.

(e) Because of the extended uncertainties which surround the visa process, it is not uncommon for families to have at least one family member continue the family business from their home country. This leads to family disruption and other social issues which are largely ignored.

5.1.4 Other issues

For the purposes of State/Territory Sponsored Business Owner (subclass 892) applications, it must be shown that the applicant has been in Australia as the holder of one of the visas mentioned in paragraph 1104B(3)(f) of Schedule 1 for at least one year in the two years immediately before the application is made. While 1 year as the holder of a subclass 457 visa is sufficient to satisfy this requirement, for some reason it is not possible to combine periods spent on a subclass 457 and/or another class UC visa. This means that for people whose subclass 457 or FAO 457 has expired an application must be made for a provisional visa and "the eligibility clock" for the purposes of a S/C 892 visa starts to run from that date and no credit can be given for past performance. This makes no sense.

Persons such as those mentioned in the preceding paragraph who need to apply for a Provisional visa because their subclass 457 visa has expired may find themselves spending a considerable period of time offshore while waiting for the processing of that visa to be completed. This of course has significant ramifications for the applicant in terms of issues such as how the business can operate during their absence. Consideration should be given to the possibility of making an onshore application when a business is clearly running and is one which would prima facie meet the visa criteria other than in respect of fulfilling time limits.

Rejections on purely technical grounds can be disastrous for applicants who are left running businesses and without status to change to another category. Query whether it is possible to create a "Business Rectification Visa" for people who may be able to rectify identified problems or satisfy another class of visa.

5.1.5 Health requirements

These should be the same standards as apply to the Temporary Contributory Parent under the existing provisions for Business visas, fresh health checks may be required if for example there is a deterioration in a family member's condition. This is not the case with parent visas when applicants progress from temporary to permanent – the medicals done at the initial stage are all that are required.

5.1.6 Other visa options

Query whether it would be appropriate to devise another State/Territory visa which more accurately reflects the Government's objectives whilst retaining the integrity of the selection process. One example might be that in order to encourage more engagement with participating States and Territories, they might offer short term courses in conjunction with local educational institutions. These courses would include State specific information on business conditions and opportunities, and

possibly more general information on how to establish/operate a business in Australia. One outcome of the course would be the development of a realistic business plan for conducting a business within that State or Territory. Applicants who attend the courses and commit to a plan might expect more relaxed entry criteria in exchange for their commitment.

5.2 Student visas

Australia's overseas student program constitutes one of the country's most valuable export industries and plays a major role in enhancing Australia's international reputation, particularly as a quality education provider in the Asia-Pacific region. In 2003 industry growth was 10.8 per cent over 2002 (AEI).[7] According to IDP Education Australia's forecasts, the global demand for international higher education is set to exceed one million students by 2025, which is four times the global demand in 2000.[8]

There is great potential for new skilled migrants to be attracted to Australia through the grant of Student visas. Students are generally highly skilled and well assimilated in Australia at the time of applying for a permanent visa to remain here. The LIV suggests that Australian tertiary education providers have also become substantially reliant upon income generated through full fee paying overseas students. There are numerous other benefits that overseas students bring to the Australian economy including foreign currency, increased demand for housing and consumer goods.

However, similar to other categories of visas, overseas students have been the focus of a tightening of legal requirements and visa restrictions on Student visas. The LIV suggests that there has been an increased focus on enforcement in the area of Student visas and their conditions, such as compliance with work rights and class attendance. While these restrictions are based on genuine concerns of the Government that Student visas not be misused for other purposes, such as purely for obtaining work in Australia, a recent decision of the Full Federal Court of Australia, *Minister for Immigration & Multicultural & Indigenous Affairs v Alam*[9] identified alarming concerns about DIMIA's "manner of its enforcement" of Student visa conditions which "go beyond the terms of the regulation". In this case, DIMIA was found to have entered and searched the applicant's home and removed his pay slips without a warrant. The Court noted that "[n]othing in the *Migration Act 1958* (Cth) confers on DIMIA officers such extraordinary powers"[10]. Further:

> *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?*[11]

5.3 Spouse visas, domestic violence provisions and trafficked women

5.3.1 Provisional visa period

The LIV suggests that the operation of the Spouse visa provisions, where there is a two year period between the grant of a provisional and permanent visa, has led to power imbalance whereby, in a number of cases (including those involving domestic violence), the spouse who has left their home and protection of their family overseas is subject to the will of their spouse in Australia.

The LIV recommends that the two year time limit should be shortened.

5.3.2 Domestic Violence Exception

From 1 July 2005, new regulations apply to determinations on domestic violence in relation to persons applying for a Spouse, Prospective Spouse or Interdependency visa, or a specified permanent skilled or business visa on the grounds that the applicant or another person has suffered domestic violence.

Previously, in non-judicially determined cases involving alleged domestic violence, DIMIA relied on a court determination or two 'competent persons' to engage with the alleged victim and each report on their alleged experiences.

The amendments enable a DIMIA officer to assess evidence of domestic violence that is not supported by a court order or court finding. Domestic violence will be taken to have occurred if the DIMIA officer is satisfied that the victim has suffered domestic violence.

If the DIMIA officer is not satisfied that the alleged victim has suffered 'relevant' domestic violence, they must refer the evidence to an 'independent expert' at Centrelink. DIMIA officer must then comply with the opinion provided by Centrelink. While the amendments have preserved the role of the 'competent persons', the practical effect of their reports is uncertain.

The LIV suggests that many overseas partners do not understand that they can apply for an intervention order through the courts. This can mean that when they do finally obtain advice about their rights (possibly after fleeing their partner), they may not be under an immediate threat of violence requiring court intervention.

The amendments raise many issues in relation how the new procedures will operate, namely:

(a) how a DIMIA officer will assess if domestic violence has occurred;

(b) whether evidence will be obtained from the applicant's former spouse;

(c) whether the applicant will be informed that their case has been referred to Centrelink for determination;

(d) how a Centrelink officer will make an assessment if domestic violence as alleged to have occurred; and

(e) whether any review rights exist in relation to a determination made by Centrelink.

Further, it seems that case law surrounding what entails 'relevant domestic violence' remains current, but other parts of the case law may not be applicable. For example, the Full Court of the Federal Court of Australia recently looked at the meaning of relevant domestic violence in *Sok v Minister for Immigration & Multicultural & Indigenous Affairs*[12]. This case held that domestic violence includes physical force and can encompass psychological or emotional violence, and power differences between people.

The LIV recommends that the domestic violence provisions should not be administered by DIMIA or Centrelink officers.

5.3.3 Time Limits

Domestic violence victims are often extremely vulnerable. It is not uncommon for them to be threatened with being sent back home if they do not comply with their spouse's demands, or for the spouse to hold their travel documents and control the flow of information, including any DIMIA correspondence. Also, keeping DIMIA informed of their current address is often the last thing on the mind of a person fleeing domestic violence. Such people often find themselves unlawful when, if they had had access to proper advice at they appropriate time they could have successfully invoked the domestic violence provisions.

The LIV considers that there is a real need to relax the strict time limits in such cases to protect such people from further victimisation.

5.3.4 Trafficked Women

There is no certainty of protection under the current regime, and little evidence that it is helping to address the underlying problem. As the visa is not one which can be applied for in the ordinary manner, there is no way a victim who is unlawful, for example, can come forward and be assured of at least regularising their status by getting a bridging visa while the merits of their application are considered, and if there is no prospect of a permanent visa for at least two years then such persons have little incentive to testify against the people who have held them in sexual servitude, as to do so would be to risk punitive measures being taken against them if they returned to their home countries.

The LIV recommends that trafficked women should be able to apply in the ordinary manner for a permanent visa.

5.4 Close ties visa

The LIV does not agree with the recent amendments to the Migration Regulations 1994 (effective 1 July 2005) which remove certain Close Ties visa provisions, namely for those persons who arrived in Australia before 1975, and who entered Australia and became unlawful before turning 18 years old.

The amendments mean that the only persons eligible for a Close Ties visa will be former Australia permanent residents who:

- have spent nine out of their first 18 years in Australia as permanent residents, are under 45 years of age and have maintained close ties to Australia; or
- served in the Australian Armed forces for at least three months or were discharged before completing three months service due to medical reasons linked to their military service.

This means that 'innocent illegals', who arrived in Australia before turning 18 and spent their formative years here, are no longer able to seek to remain permanently in Australia under the Close Ties visa category.

The Minister's explanation for these tough new measures is that the Close Ties visa category has been abused. The LIV does not accept that there exists a problem of minors being forced by family members in their home country to come to Australia unaccompanied and spend their formative years here on their own for the longer term purpose of family reunion in Australia. The LIV is aware of approximately only 50 'innocent illegals' who were granted a Close Ties visa last year. This low figure suggests that there is no clear evidence of abuse of the Close Ties visa category to justify the harsh decision to significantly restrict the visa category to a minimal number of persons.

DIMIA will be aware that the Close Ties visa has been appropriately used in circumstances involving minors who have come to Australia and spent their formative years here to the extent that Australia is their home and it would be inappropriate to uproot them to be returned to their country of origin with which they no longer have a substantial connection. In such cases, the Close Ties visa has enabled a workable and just solution to address significant humanitarian considerations.

5.5 Protection visas and asylum seekers

5.5.1 Temporary Protection visas

The LIV commends the recent new approach taken by the Australian Government to current holders of Temporary Protection visas (***TPV***), however, the LIV supports that abolition of TPVs. Temporary Protection visas create substantial uncertainty and continuing fear in those to who 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, 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.

We recommend that all persons holding a Temporary Protection visa for more than two years be given a Permanent Protection visa.

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, and the delay and uncertainty in the meantime are also recognised to have caused or exacerbated mental health problems. Furthermore, there is no evidence whatsoever that this policy has had any deterrent effect. The LIV recommends the abolition of this scheme altogether.

5.5.2 Discriminatory treatment of asylum seekers

Asylum seekers are treated differently with respect to immigration detention according to their mode of arrival in Australia. The LIV suggests that this is contrary to the provisions of the United Nations 1951 Refugee Convention (***Refugee Convention***). This means that asylum seekers, who arrive with a valid visa (even if obtained through false means), are able to make an application for a Protection visa and a Bridging visa which allows them to remain in the community and possibly access to work rights while their substantive application is determined. However, asylum seekers who arrive without a valid visa and subsequently apply for a Protection visa are automatically placed into immigration detention while their application is assessed, and do not generally have the right to apply for Bridging visas. This inconsistency is proscribed by the Refugee Convention, which states that asylum seekers should not be discriminated against according to their mode of arrival.

The LIV recommends that this inconsistency should be addressed by allowing all asylum seekers, who make an oral claim for protection upon arrival at an Australian airport or sea port, to be given the right to immediately apply for a Bridging visa or upon confirmation of health and character checks.

5.5.3 Access to independent immigration advice

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 does not speak English and does not know how to make a valid application. The LIV notes a number of occasions when the Minister has arranged for boats carrying suspected asylum seekers to be intercepted and effectively turn 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.

The LIV recommends that this inconsistency should be addressed by allowing asylum seekers, who make an oral claim for protection upon arrival at an Australian airport or sea port, to 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.

5.5.4 Grounds for protection

The Refugee Convention limits protection to those who claim persecution on the basis of race, religion, political opinion, social status or membership of a particular group. As a signatory to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Australia is obligated not to return any person to another country where there are substantial grounds for believing that the person would be in danger of being tortured. However, the Migration Act does not recognise such grounds as a basis for applying for a Protection visa.

The LIV recommends that there should be specific provision under the Migration Act enabling a person to be granted a Protection visa where they fear that they will be tortured by State authorities upon their return to their country of origin.

5.5.5 Safe third countries

The LIV is aware of a number of cases where asylum seekers have not been granted Protection visas because they are Jewish and are deemed to have a right to seek asylum in Israel, despite ever having been to Israel. In other cases, Ethiopians, who were born in an area that has become Eritrea, have been held to be refugees because Ethiopia persecuted them by forcing them to 'return' to Eritrea, but were not granted a Protection visa because of their right to protection in Eritrea, despite never having lived there as an adult[13].

The LIV recommends that DIMIA officers should be obliged to consider family ties when determining if an asylum seeker, pursuant to section 91D of the Migration Act, has the right to protection in a safe third country.

5.5.6 Documentary evidence of identity, nationality or citizenship

Section 91W allows the Minister, in making a decision whether to grant a protection visa, to draw reasonable inferences unfavourable to the applicant's identity, nationality or citizenship, if the applicant fails to produce documentary evidence of their identity without giving a reasonable explanation for failing to produce such evidence. The LIV suggests that this section is clearly problematic given DIMIA's position on asylum seekers who come from countries that do not have a system of documenting or registering a person's identity.

The LIV recommends that this section should be repealed and each case should be decided on its merits and prescriptions, such as this may lead to Australia failing to properly fulfil its obligations under the Refugee Convention.

5.5.7 Excision of parts of territories

The Australian Government has sought to excise selective parts and territories of Australia for the purpose of the Migration Regulations and the definition of 'migration zone'. Most recently, the Migration Act was amended to excise certain islands that form part of Queensland, Western Australia, Northern Territory and the Coral Sea Islands Territory, from the Australian migration zone.[14] Excising areas of Australian territory from the operation of the Migration Act has resulted in a failure to comply with our obligations under the Refugee Convention. The LIV suggests that while it is not ideal for asylum seekers to arrive in Australia in an unauthorised manner, the nature of international conflict and war does not always provide for 'orderly' migration of those in need of urgent protection. Further, Australia has a comprehensive system of national security and that the Migration Act, if properly administered, should be able to deal with unauthorised asylum seeker arrivals.

The LIV recommends that all parts and territories of Australia should be part of the migration zone. They should not be excised as a means of making it more difficult for genuine asylum seekers to reach Australian territory for the purpose of seeking protection.

5.5.8 Cost of detention

Under section 209 of the Migration Act, detainees are liable for the costs of their detention. 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.

5.5.9 Cost of review

Asylum seekers who apply for review by the Refugee Review Tribunal (***RRT***) are generally unable to afford the review application fee (currently $1,400) which puts an unnecessary burden upon them and their community supporters. The LIV suggests 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. For example, the recent significant number of review applications lodged by East Timorese asylum seekers where required to pay the review application fee. However, most of them were later granted Humanitarian

visas by the Minister exercising her ministerial discretion. While each was entitled to seek a refund of the review application fee, this entitlement was not made clear by DIMIA or the RRT, thus causing many families financial hardship or forcing a number to borrow money to pay the fee.

The LIV recommends that the review application fee should be greatly reduced or altogether removed to provide full access to review.

5.6 Ministerial intervention and discretion

The LIV suggests that the issue of Ministerial intervention and discretion in migration law and policy should be reviewed by the Government.

A number of sections of the Migration Act confer a discretionary power upon the Immigration Minister, including sections 33, 37A, 46A, 46B, 48B, 72, 91F, 91L, 91Q, 137N, 261K, 351, 391, 417, 454, 495B, 501, 501A, 501J and 503A. The current Ministerial Guidelines refer explicitly to sections 345 (now repealed), 351, 391, 417 and 454. The Minister's discretionary power under these sections is only available after a decision of the relevant tribunal, such as the AAT, RRT or MRT, as appropriate to the type of visa sought. The Minister can only substitute a more favourable decision than the tribunal decision where he or she considers it in the public interest to do so. The Migration Act specifies that the Minister's discretionary power must be exercised personally and cannot be delegated.
In 2003, a Select Senate Inquiry (***Inquiry***) was conducted into ministerial discretion in migration matters after it was noted that there had been an exponential increase in the use of ministerial discretion in migration matters.

Prior to reforms made to the Migration Act in 1989, previous legislation enacted in 1901 and 1958 conferred wide discretionary powers upon the Immigration Minister. The 1989 reforms to the Migration Act removed most of these discretionary powers by creating legally binding regulations for visa categories. The remaining discretionary powers were meant to balance what is an otherwise inflexible set of regulations to allow the minister a public interest power to grant a visa in individual circumstances which the legislation had not anticipated and where there were compelling, compassionate and humanitarian considerations for doing so. The Inquiry was launched to effectively determine why, in practice, ministerial discretion had evolved from being an informal mechanism for dealing with unique and exceptional circumstances in a small number of cases to a systematised administrative process employing "more than 50 staff to manage thousands of requests on an annual basis".[15]

It has been suggested that the main reasons for the growth of ministerial discretion under the current Government include:

(a) a growing number of requests for intervention;

(b) the introduction of a broader set of ministerial guidelines accompanied by an administrative procedure for reviewing every negative tribunal decision against those guidelines;

(c) the adherence to a policy approach of dealing with humanitarian cases that fall under a number of international treaties and large group claims of a humanitarian nature also on a case by case basis through ministerial discretion; and

(d) the reliance on ministerial discretion as a de facto humanitarian entry process.[16]

The nature of ministerial discretion is that it is a non-compellable ministerial power which is not subject to scrutiny. For example, the reasons for the Immigration Minister's decision not to intervene do not require written reasons and is not reviewable by a tribunal or court.

The LIV suggests that the current system of ministerial intervention is an unnecessarily lengthy, costly and time consuming process which is in need of immediate reform. There should not be a need for applicants in genuine need of remaining in Australia on humanitarian or compelling and compassionate grounds to go through the steps of a visa application and appeal process before seeking ministerial intervention.

The LIV recommends that a system of complementary protection is required whereby persons seeking to remain in Australia, who are in genuine need of protection or intervention for humanitarian grounds but who fall outside the visa criteria or the Refugees Convention, have a right to a transparent and efficient visa process which would avoid the arbitrariness and non-accountability of the current ministerial intervention process.

The current process is not helped by the confusion over which Minister is responsible for which detention and community based requests. The LIV understands that Minister Vanstone is responsible for considering requests for ministerial intervention for persons in immigration detention, while the Citizenship Minister considers requests made by persons released in the community on Bridging visas. In the case of the former Citizenship Minister Peter McGauran, he reportedly chose not to have regard to the relevant Ministerial Guidelines on ministerial intervention. This made it extremely difficult for applicants and migration agents to identify the factors he took into account in his decisions.

The LIV recommends that the Ministerial Guidelines, which were prepared by former Immigration Minister, Philip Ruddock MP in 1999 should be reviewed and revised with the aim of broadening their application.

There are also substantial fees associated with making a visa application and seeking review of a decision to refuse to grant a visa in the context of a person who knows there is little if any chance of being granted a visa.

The LIV recommends that, in the case of a person who is ultimately seeking ministerial intervention due to humanitarian or compelling and compassionate grounds, all visa

and review application fees should be waived if ministerial intervention is sought. At the very least all visa and review application fees should be refunded upon the grant of a visa by the Immigration Minister.

Registered migration agents are also affected by assisting applicants, who ultimately seek ministerial intervention under the Migration Agents' Code of Conduct as they automatically infringe the Code by lodging a case that has no chance of success with DIMIA on behalf of a client.

The LIV recommends that cases involving clients, who are ultimately seeking ministerial intervention due to humanitarian or compelling and compassionate grounds, should not be counted against migration agents under vexatious litigation requirements introduced by the Government earlier this year.

Many applicants prefer to pursue judicial review rather than request ministerial intervention, even when informed that their prospects for success are low, because they are assured of work rights.

The LIV recommends that there is a need to improve access to work rights associated with Bridging visas.

5.7 Health and character requirements and visa cancellations

The LIV has the following concerns about character requirements and visa cancellations under the Migration Act:

(a) Greater clarity is required in the meaning of 'significant cost' in health matters.

(b) Section 501 inequities and the arbitrary nature of the provisions (and decisions). The recent Full Court of the Federal Court *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs*[17], indicated considerable disquiet at the arbitrary and inequitable cancellation of visas of persons who have been in Australia for long periods of time:

> *[26…29] 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….. That has little to do with the permanent banishment of an absorbed member of the Australian community with no relevant ties elsewhere. The appellant 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.*

(c) Cancellation because of alleged 'character' issues of a 'compliance' nature rather than criminal convictions. For example, inaccurate information given on application forms amounting should not *prima facie* amount to grounds for cancellation or refusal of a visa.

(d) Extensive delays in visa processing caused by referral to agencies like ASIO, particularly in Protection visa cases. The LIV is aware of numerous cases where

long delays have occurred after all other visa criteria have been satisfied, and certainly that has been the response of the Department in those cases that DIMIA is practically powerless when it comes to expediting those enquiries. DIMIA 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.

(e) A serious concern involves circumstances where the Minister, generally on the advice of a member of staff, cancels a visa on character grounds using his or her personal discretion. This method of refusing a visa prevents the visa holder applying to the AAT for review and, in a number of cases, has led to them being detained for lengthy periods awaiting deportation. The case of Mr George Andary is a case in point. His visa was cancelled by the former Minister Philip Ruddock on character grounds. Mr Ruddock personally cancelled the visa thereby removing the opportunity for Mr Andary to seek review of a single decision to refuse his permanent residence visa. The LIV wrote to the Minister in December 2004 advising that compassionate and compelling grounds existed that should be more closely considered by the Minister, namely, the Mr Andary's four Australian citizen children and compliance with Australia's international obligations under the Convention on the Rights of the Child.[18]

(f) The careful exercise of discretion is particularly pertinent in cases involving children. Ministerial Direction 21, pursuant to section 499 of the Migration Act, sets out counterbalancing factors that should be taken into consideration when a decision is being made to cancel a visa including, the best interests of the child, protection of the Australian community, expectations of the community, the person's links to Australia and Australia's obligations under international law.

(g) Inconsistency in the application of 'escape' provisions by the Administrative Appeals Tribunal (**AAT**) based on which Tribunal member hears the matter.

5.8 Compliance

Recommendation 14 of the Palmer Report is critical of the poor training received by Compliance officers. The LIV further suggests that there appears to be limited contact and exchange of information between Compliance officers located in different offices (ie between Dandenong and Melbourne CBD).

There appears to be a problem with the 'siloing' of information in that documents or information provided to Melbourne CBD are not accessible by Compliance officers in Dandenong and vice versa. This leads to misunderstandings that ultimately disadvantage clients.

5.9 Access to information

5.9.1 Processing delays

The LIV suggests that extensive delays are not uncommon in applications for Freedom of Information (***FOI***) requests 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 understand what has occurred in their case.

5.9.2 FOI exceptions

Not all FOI requests are complied with either due to a claimed exception under FOI legislation or a DIMIA officer not reading a FOI request correctly. In such circumstances, the matter is, in practical terms, closed as internal review of a FOI decision generally involves further lengthy delays.

One of the Main Findings of the Palmer Report, was Mr Palmer's criticism of the restrictive interpretation of privacy laws by DIMIA. Recommendation 34 states that, *"DIMIA's attitudes to the Commonwealth Privacy Act 1988 is unduly cautious and has operated to limit the range and effectiveness of inquiries…"*.[19]

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 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 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.

5.10 Other concerns

5.10.1 Schedule 3 criteria

Schedule 3 in the Migration Regulations sets out additional criteria applicable to unlawful non-citizens and certain bridging visa holders. The LIV submits that Schedule 3 criteria is overly harsh and that, in certain cases, flexibility should be applied, particularly in those cases when circumstances arise that the legislation does not anticipate. Such circumstances may relate to flexibility in an application that does not

meet the prescribed time limit (ie 28 days) requirement if a reasonable explanation can be provided.

The LIV recommends that more flexibility be available under Schedule 3 of the Migration Regulations.

5.10.2 Section 48

Section 48 of the Migration Act restricts the types of further substantive visas that a non-citizen, who has been refused a visa or whose visa has been cancelled while in Australia, can apply. The LIV suggests that the provisions in section 48 are too harsh, particularly in circumstances involving an Australian sponsor or nominator. For example, the categories of visas available to those applicants affected by section 48, as specified in Migration Regulation 2.12, does not include a Spouse or Employer Nominated visa application made in Australia. This has been particularly unhelpful in the context of TPV holders who are now working in Australia and whose employers may wish to sponsor them to remain in Australia to address labour shortages, particularly in rural and regional areas.

The LIV recommends that more flexibility be available under section 48 of the Migration Act and Migration Regulation 2.12. Accordingly, both should be amended to allow for more 'change of circumstances' visas, as were previously available a decade ago.

5.10.3 Policy guidelines and regulations

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 DIMIA decision makers.

The complexity of the migration scheme is such that many decision makers, at both the DIMIA and Tribunal level, are now reading and applying policy in preference to the wording of the Migration Regulations.

There are 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 Migration Regulations.

This means that many applications though lawful, are less likely to be successful.

The increasing strictures placed on the Migration Review Tribunal (***MRT***) to determine applications in accordance with policy, rather than the law, also means that a truly independent evaluation of applications cannot necessarily succeed.

The process of applying law over policy can lead to negative outcomes, which we suggest leads to a lack of flexibility and is a further abandonment of the rule of law.

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.

5.10.4 Delays in decision making

While the LIV acknowledges that resources, caseload and the individual circumstances of some cases may cause delay in a visa application decision, we suggest that DIMIA, MRT and RRT should be required to comply with strict visa decision making time periods unless certain exceptions apply.

LIV members have related a number of case studies to demonstrate the unjustifiable and unnecessary delays experienced by their clients at the primary application stage and at review. Delays are not only experienced by applications lodged in Australia, but also with certain overseas Australian Posts.

Case Studies

Case study 1: *This case involved an application for a Spouse visa. The sponsor was an older male who lived in a rural area of Australia where he and his wife had lived together for some time. However, when she had to return to her country of origin and re-apply when she was refused a Spouse visa. An application for review was lodged with the MRT, which received detailed written submissions containing extensive evidence. However, the file was not actioned for one year despite requests for priority processing as the sponsor had suffered a heart attack and needed his wife to join him. Only when his local MP contacted the Minister directly did the MRT action his case.*

Case study 2: *This case involved a Carer visa lodged with an overseas Australian Post. A detailed submission was provided to the Post addressing the legal criteria and including a Carer Certificate. The Australian family were in a desperate situation, however, the case was still not decided after one year. Regular attempts have been made to contact the Post to encourage a decision to be made as the situation for the Australian sponsor deteriorates. To date a decision has still not been made.*

The DIMIA *Manager's Guide to Visa Grant Times by Subclass* (June 2005) 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.

6. 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

The LIV notes the Main Findings and recommendations in the Palmer Report in relation to the activities and involvement of government agencies in the proposed deportation of Cornelia Rau. As stated in Main Finding 3 in the Palmer Report: "DIMIA's inquiries concerning Ms Rau focused on establishing her identity for the purposes of enabling her removal from Australia". The LIV suggests that DIMIA needs to satisfy itself that all investigations into a person's identity have been made before deporting a person suspected of being an unlawful non-citizen. We envisage that this should include a check of all missing persons databases whether on a state by state basis or under a new federal database. Additional checks will also be required in circumstances where the person subject to deportation has a mental illness or lack of capacity. We also await full findings by the inquiry into the matter of Ms Vivian Solon, an Australian citizen who was deported to the Philippines by DIMIA.

7. Adequacy of healthcare, including mental healthcare, and other services and assistance provided to people in immigration detention

The LIV responded to the case of Cornelia Rau in a submission to the Minister dated 10 March 2005. In the submission, the LIV urged the Federal Government to grant Public Advocates or a mental health agency in each state and territory a right under the Migration Act to access immigration detainees in detention who have (or are suspected as having) a mental illness. Alternatively, the LIV suggested that the Government should consider establishing an equivalent Public Advocate at the Commonwealth level to fulfil a similar independent role.

Since that time, the Government has made commendable efforts to release all children and families from detention and has also reconsidered the detention and status of long term detainees, many of whom were suffering mental illness from their long term detention.

At the time of writing the submission, 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.

The LIV suggested that this right should extend to access for the purpose of assessing the mental health of a detainee and determining appropriate treatment or whether the detainee can be adequately cared for in the detention environment. This right should also extend to the appointment of the Public Advocate as guardian for a detainee with a serious mental illness or mental incapacity. This currently occurs upon a mentally incapacitated detainee being released from immigration detention.
The LIV submits that the subcontracting of health services at immigration detention centres has made it extremely difficult for detainees with a mental illness to gain

access to independent specialist psychiatric assessment and treatment. Further, a conflict exists between the roles of detention centre management and health service providers as contracted agents for the Department of Immigration, Multicultural and Indigenous Affairs (***DIMIA***) in providing for the health care needs of immigration detainees in a detention environment while also ensuring an ongoing contract of service with DIMIA. Specifically, the LIV submits that DIMIA 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.

The *Immigration Detention Standards* provide that "All actions relating to the detention and care of detainees are to be consistent with relevant Commonwealth and State/Territory law." The LIV proposes that better cooperation is required between state and commonwealth agencies in relation to the provision of mental health services to immigration detainees. The LIV suggests that a right of access would allow State-funded mental health professionals, with expertise in dealing with persons with mental illness, to independently determine health care needs and treatment required. In doing so, we propose that the Commonwealth Government's detention powers, as currently provided under the Migration Act, would not be reduced by this proposed cooperation with State mental health agencies. Rather, the LIV recommends that DIMIA should refer the responsibility for the mental health care of immigration detainees to State mental health agencies with appropriate expertise in the field of assessing and treating mental illness. This is also consistent with relevant State mental health laws.

8. The outsourcing of management and service provision at immigration detention centres

The Palmer Report sets out a number of concerns in relation to management and service provision at immigration detention centres. In particular, Main Finding 28 emphatically states that:

> *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.*

Main Finding 29 criticises that "systems and processes" at Baxter Detention Centre "that derive from the detention services contract". This finding goes on to state that:

> *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.*

The LIV suggests that the above findings provide a damning critique of the commercial relationship between DIMIA and Global Solutions Limited (***GSL***). These are further compounded by the recent report of an incident involving the inhumane treatment of

five immigration detainees being transferred between Maribyrnong and Baxter detention centres. We understand from media reports that the matter has been referred to the Victoria Police for further investigation while GSL has been fined $500,000. The report found that:

(a) on the first part of the journey, GSL officers accompanying the detainees treated them in an inhumane and humiliating way;

(b) force was used on those who resisted entering the van at the start of the journey;

(c) GSL officers failed to provide detainees with adequate medical treatment for any injuries they had received, causing them unnecessary pain and distress during the journey;

(d) the detainees were denied food, water access to toilets during the long road journey in hot and cramped conditions; and

(e) appeals by the distressed detainees were ignored by GSL officers.

The LIV suggests 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.

The LIV also recommends 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.

Endnotes

[1] The LIV notes that the Migration Act alone has 507 sections with multiple subsections reflecting frequent substantive amendments to the legislation.

[2] Elizabeth Colman, 'Department's culture of fear', *The Australian* (14 May 2005) <http://www.theaustralian.news.com.au/common/story_page/0,5744,15278693%255E28737,00.html>.

[3] Palmer Report, Main Finding 8.

[4] Dr Peter Shergold, Secretary, Department of Prime Minister and Cabinet, 'Managing Administrative Reform in DIMIA', Speech (14 July 2005) <http://www.pmc.gov.au/speeches/shergold/dimia_2005-07-14.cfm>.

[5] Amanda Vanstone, 'Ministerial Statement to Senate Estimates Committee', Media Release 64.05 (25 May 2005) <http://www.vanstone.com.au/default.asp?Menu=64.05>.

[6] Palmer Report, Main Finding 9.

[7] 'Opportunities, trends and characteristics for Australian suppliers', *Education Overview*, Department of Foreign Affairs and Trade <http://www.austrade.gov.au/australia/layout/0,,0_S2-1_CLNTXID0019-2_-3_PWB1109352-4_-5_-6_-7_,00.html>.

[8] Ibid.

[9] [2005] FCAFC 132 (23 July 2005).

[10] Ibid, paragraph 16.

[11] Ibid, paragraph 17.

[12] [2005] FCAFC 56 (11 April 2005).

[13] For example, *VHAU of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 376.

[14] 'Excision of certain islands of Northern Australia from the Australian Migration Zone', DIMIA Notice of Legislation Change (22 July 2005) <http://www.immi.gov.au/legislation/amendments/lc22072005.htm>.

[15] Dr Kerry Carrington, Social Policy Group, *Ministerial Discretion in Migration Matters: Contemporary Policy Issues in Historical Context,* Current Issues Brief no. 3 2003-04 (15 September 2003) < http://www.aph.gov.au/library/pubs/CIB/2003-04/04cib03.htm#exec>.

[16] Ibid.

[17] [2005] FCAFC 121 (1 July 2005).

[18] Refer LIV submission, 'Proposed deportation of a non-citizen in circumstances leading to detrimental consequences for children' (15 December 2004) <https://www.liv.asn.au/members/sections/submissions/20041215_164/index.html>.

[19] Palmer Report, Main Finding 34.