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SENATE

LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

Reference: Administration and operation of the Migration Act 1958

MONDAY, 26 SEPTEMBER 2005

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SENATE

LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

Monday, 26 September 2005

Members: Senator Crossin *(Chair)*, Senator Fierravanti-Wells *(Deputy Chair)*, Senators Bartlett, Joyce, Kirk and Ludwig

Substitute members: Senator Parry to replace Senator Fierravanti-Wells for the committee's inquiry into the administration of the Migration Act

Participating members: Senators Abetz, Barnett, Mark Bishop, Brandis, Bob Brown, George Campbell, Carr, Chapman, Colbeck, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Humphries, Lightfoot, Lundy, Mason, McGauran, Milne, Murray, Nettle, Parry, Payne, Robert Ray, Sherry, Siewert, Stephens, Stott Despoja, Trood and Watson

Senators in attendance: Senators Bartlett, Crossin, Kirk, Ludwig, Nettle and Parry

Terms of reference for the inquiry:

To inquire into and report on:

- 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;
- 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;
- the adequacy of healthcare, including mental healthcare, and other services and assistance provided to people in immigration detention;
- the outsourcing of management and service provision at immigration detention centres; and
- any related matters.

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CLARK, Ms Kerry Emma, Member, Human Rights Committee, Law Society of South Australia

ESZENYI, Ms Dymphna ('Deej'), President elect, Law Society of South Australia

FOUNTAIN, Mr John Austin, Chair, Accident Compensation Committee, Law Society of South Australia

LOWES, Ms Sasha Jane, Member Human Rights Committee, Law Society of South Australia

CHAIR (Senator Crossin)—I welcome everyone to this inquiry into the administration and the operation of the Migration Act 1958. Our 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.

Our hearing today is the first of a number of hearings in this inquiry. If witnesses today wish to give evidence in camera, which is a confidential session, you can make a request to the committee and we will consider that. To begin our hearing today, I welcome the representatives from the Law Society of South Australia. Your submission is numbered 110. Do you have any changes or additions you want to make to that submission?

Ms Eszenyi—On page 5 of our submission, third paragraph from the bottom, in the third line, the words 'and judicial review' are to be deleted. On page 6, paragraph 2, after the words 'the MRT' it should read 'and RRT should be granted the discretion to allow extensions of time in appropriate circumstances and the federal courts should retain their discretion'. There is a similar change on page 8 at recommendation 5, which reflects the paragraph that I have just read. Again after the words 'the MRT' it should read 'and RRT should be granted the discretion to allow extensions of time in appropriate circumstances and the federal courts should retain their discretion'.

CHAIR—We invite you to make an opening statement after which we will proceed to questions.

Ms Eszenyi—The Law Society of South Australia is a voluntary professional association for members of the legal profession in South Australia. It includes experienced migration lawyers among its membership. South Australia has been home to two key immigration detention facilities, namely Woomera and Baxter. Large numbers of detainees in those facilities have sought the assistance of South Australian lawyers either while in detention or after their release

into the community. The Law Society is of the opinion that urgent reforms of the current immigration system are needed. The terms of reference for this inquiry are sweeping. It has not been possible for us to address all areas in which reforms are needed.

Our submission focuses primarily on law and policy with respect to refugee and humanitarian visa applications. This is the area which we believe is in the most urgent need of reform. We generally endorse the comprehensive submissions put forward by, among others, the Law Institute of Victoria, which is submission No. 206; the Legal Aid Commission of New South Wales, No. 166; the South Brisbane Immigration and Community Legal Service, No. 200; and the Refugee Advocacy Service of South Australia, No. 51.

The Law Society wishes to emphasise five key points to members of this committee. The first relates to the temporary protection visa regime, which I will refer to as TPV. We recommend the abolition of the TPV regime. The use of temporary protection is at odds with the language and spirit of the refugees convention, it is inconsistent with the approach taken by most civilised countries, it generates fear and uncertainty, it has been linked to serious mental health problems in visa applicants and it separates families, because holders of TPVs are not granted family reunion rights. If the TPV regime is not abolished altogether then we recommend that DIMIA policy with respect to the cessation of refugee status be amended in response to the high percentage of delegates' decisions which are overturned on appeal, and in response to the recent Federal Court decision in QAAH against the minister. I will give the committee a copy of my remarks which contains the references to that and other cases. Put simply, once refugee status has been recognised with the initial grant of a protection visa, the onus should be on the minister to show that the refugee status has ceased. DIMIA's current practice of requiring a person to prove their case a second time, three or more years after the initial protection visa grant, must be amended.

Our second point relates to detention. We wish to emphasise our concerns about procedures with respect to detention. The system of mandatory detention of asylum seekers has been condemned by many, including UNHCR and HREOC. The Federal Court in S v Secretary, DIMIA [2005] FCA 54 found that the Commonwealth breached its duty of care owed to detainees, in part by failing to take account of evidence that detention is itself a contributing cause of mental illness in some detainees. Other submissions made to the committee by mental health professionals, notably submission No. 31 from Dr John Jureidini, support that finding.

The present legal position permitting the indefinite detention of people who cannot be removed from Australia is unconscionable. It is more punitive than the regime that exists for convicted criminals in Australia. In the criminal jurisdiction, at least in South Australia, indefinite detention is not countenanced for anyone other than serious sexual offenders who have been determined to be unable to control their criminal sexual urges. Even then, regular reassessments of their situation are mandatory. It is our view that these specific procedures surrounding the removal of detainees from Australia, which are identified in our written submission, are part of the broader cultural problems within the department.

The department is perceived by many to view both the detainees and those who may wish to assist them with scant regard. Any possible deterrent effect of the present system of detention is outweighed by its inhumanity, and your committee has received numerous submissions from individuals attesting to that. We recommend that legislative safeguards be introduced to ensure

that no person is kept in indefinite detention. Detainees should have proper access to representation and appropriate interpreters. They and their advisers should receive proper and timely advice from DIMIA of proposed actions which materially affect them, particularly with respect to imminent removal or deportation.

Our third recommendation relates to the watering down of the refugees convention. The TPV regime is itself a watering down of the protections which Australia, by signing the 1951 refugees convention, agreed to afford to those in need. In more recent times, the level of protection offered by Australia has been further diluted by various legislative reforms, including the excision of certain territories from Australia's migration zone, the refusal of permanent protection to people who fail to satisfy the so-called seven-day rule, the restriction of appeal rights and the failure to provide adequate access to legal assistance. This has resulted in a system of inequality which fails to treat like cases alike and produces harsh outcomes for some applicants. The Law Society refer the committee to the recommendations on pages 8 and 9 of our written submission, which set out our proposals for the reform of specific legislative provisions.

Fourthly, we make recommendations with respect to flawed administrative processes. The administrative processes around protection visa applications are often characterised by excessive delays, including with respect to freedom of information applications and the 'character checks' carried out by ASIO. Although there are some capable and skilled decision makers within DIMIA, in our experience there is considerable inconsistency among delegates. This includes factors such as the assessment of credibility issues and the weight attached to linguistic analysis evidence. This experience of inconsistency among delegates has been noted in other submissions to your committee, including that of the Legal Aid Commission of New South Wales—No. 166. The Law Society recommends that these issues of arbitrariness and inconsistency among delegates be addressed by developing a consistent method for the assessment of credibility, including the use of linguistic evidence, in protection visa applications. The 'benefit of doubt' approach recommended by UNHCR should be consistently applied. We are also of the opinion that the excessive delays associated with the processing of applications must be addressed.

Fifthly, we recommend broad reforms to the existing system of ministerial discretion and the introduction of a complementary humanitarian regime. Australia once led the way in offering protection to those fleeing their homes and in need of protection by the international community. We once set the standard in best practice in this area. We had a highly respected international reputation for upholding human rights. In recent years, under governments of both major parties and via policies implemented with bipartisan support, our reputation has been severely tarnished due to the manner in which we have treated asylum seekers. Our leaders have ignored the criticism of international bodies such as the UNHCR and human rights organisations such as Amnesty International. Our leaders have largely ignored the advice of Australian bodies such as HREOC. Although we welcome recent legislative and policy changes towards a more flexible and humanitarian system, we are disappointed at the tardiness in reforming an area of law which in several respects flies in the face of our international obligations. It is frankly an embarrassment and should be a source of national shame.

The Migration Act must be amended so as to afford some form of protection to persons who fall outside the narrow definition of refugee set out in the refugee convention. We frequently hear about how times have changed. We are now living in the so-called 'age of terror'. The 1951

definition is insufficient in the current day and age to protect some people who would face serious breaches of their human rights if returned to the country of their origin. We must ensure that no person is returned to danger. This obligation, called nonrefoulement, is recognised in international law. We must not allow a single person to fall through the cracks. That could mean arbitrary imprisonment, torture, disappearance or even death for the person concerned.

We are deeply concerned by the findings of a study by the Edmund Rice Foundation referred to in our written submission which suggests that failed asylum seekers have been removed from Australia and placed in direct danger. Even one such outcome is unconscionable. The UNHCR urges nations to afford such persons what is referred to as ‘complementary protection’. Our submission is that Australia should do this by introducing a legislative structure which would allow a person’s need for complementary protection to be assessed, against a uniform set of criteria, from the outset by DIMIA at the same time as their refugee status is determined. Similar systems already operate in the United Kingdom and other European nations.

Currently, ministerial discretion is operating as a ‘safety net’ in circumstances where a person requires complementary protection. This is an inherently inappropriate means of meeting our obligation of nonrefoulement. For the person involved it may be a life or death decision, yet an application in the case of an asylum seeker under section 417 is non-compellable and non-reviewable. Instead of a fair, transparent and efficient administrative process with the safeguards afforded by judicial review, we offer a single decision by the minister. The decision will be made ‘in the public interest’, not on the basis of whether the person will be in danger if returned. We say this needs to be the primary consideration if Australia is serious about ensuring that no-one is returned to a situation where his or her basic rights will be violated.

By its very nature, the exercise of ministerial discretion lacks transparency and accountability. It may result in inconsistent outcomes because of the vagueness of the criteria which must be established in order for the minister to intervene. It is open to allegations of actual or apprehended bias and corruption. People seeking our protection, and citizens too, expect that in a country such as Australia, where the rule of law and natural justice are respected, administrative decisions will be made fairly, efficiently and consistently.

Furthermore, many applications for intervention by the minister are made either by the applicant themselves or with the assistance of people in the community who are ill equipped to put before the minister the information relevant to the decision of whether to exercise the discretion. Even those who are fortunate enough to be represented by a lawyer or migration agent may experience difficulty in obtaining documentary evidence to support their claim if this involves attempting to obtain documents from a country in chaos, such as Afghanistan or Iraq.

These concerns would be alleviated to some extent if a person’s need for complementary protection was assessed by DIMIA from the outset against a legislated set of criteria. It would also reduce the number of persons who, although they would be at genuine risk if returned, do not meet the strict convention conditions and end up going through the motions of appeals to the RRT and federal courts and eventually seeking intervention by the minister, whilst all the time languishing in detention.

We can hardly blame people for lodging appeals when they have a genuine basis for their fear of being forcibly returned to dangerous circumstances. It is our fault for failing to offer effective

protection in the first instance. The current heavy reliance on ministerial discretion leads to the inefficient use of resources. Such requests would be substantially reduced if Australia offered a proper system of complementary protection. Intervention by the minister would then, as was probably the original legislative intent, be reserved for exceptional cases.

We note that numerous other submissions—including those prepared by the Legal Aid Commission of New South Wales, to which we have already referred; by Amnesty International, submission No. 191; by Dr Penelope Matthew with the ANU law students' for social justice society, submission No. 204; and by the Refugee Council, submission No. 148—have made similar points in relation to ministerial discretion. We strongly urge the committee to recommend reform in this area.

In conclusion, the Law Society thanks this committee for the opportunity to comment further on its submission. We note that it has not been possible to address all areas in our written submission. In particular, we wish to note our opinion that the cultural problems that have been identified within the department extend to the processing and assessment of offshore humanitarian visa applications, an area which was not addressed in any detail in our written submission.

In the experience of some of our members, this has become an increasingly important area for reform. and we specifically endorse the comments of the Legal Aid Commission of New South Wales in relation to offshore humanitarian applications. We would be pleased to expand on this and the points raised in our submission through questions or to provide further information to your committee in writing at a later date.

CHAIR—Thank you very much for a very comprehensive introduction to this inquiry in summarising your submission. Ms Lowes or Ms Clark, did you also want to say something at the beginning?

Ms Lowes—Not at this stage.

CHAIR—I will start with a question before I hand over to my colleagues. In some of the background reading I have done for this inquiry, there has been a lot of commentary that changes to the Migration Act have occurred through regulation rather than substantial changes to the act. Do you have a view on what that means when it comes to public servants then trying to interpret changes to a substantive law if it is done by substantial regulation changes rather than the body of the law?

Ms Lowes—Certainly, as a practitioner working in the area, I find it is a very unwieldy piece of legislation to deal with. It often requires tracing your way through a web of regulations which, in many cases, appear to have been ad hoc responses to particular issues that have arisen, as opposed to a comprehensive, ordered piece of legislation that is clear and easy to understand. I think the South Brisbane Immigration and Community Legal Service have also made the point that it is an extremely complex piece of legislation. They recommended that it be simplified in order to ensure that people working in the area dealing with applications, the applicants themselves and members of the public can have a better appreciation of the process and the issues that it raises.

Ms Eszenyi—At a practical level, we would be surprised if DIMIA staff are regularly and adequately trained as to all of the current legislation and regulations. We suspect that that might be one of the things that contributes to inconsistency in decision making.

CHAIR—Is that one of the reasons that people such as yourself, in dealing with the department, have come to a conclusion that there is a quite obvious inconsistency in dealing with different department officials? At the end of the day, does that inconsistency and unsureness about the regulations lead to, as you adequately described it, the minister's discretion now being a safety net rather than something applied in exceptional circumstances?

Ms Eszenyi—Yes.

CHAIR—What practical problems does that present to you in trying to assist people in this situation?

Ms Lowes—It is our experience that some delegates appear to be unaware of certain aspects of the regulations and also differ greatly in their application of them in terms of things like preparation for interviews. When applicants are being interviewed there is great variation in the degree of preparedness shown by the delegates. For example, some will be very well prepared and narrow their questions to particular issues; some ask the applicant to relay everything. In terms of the complexity of the regulations it does appear that some delegates are simply unaware of some legal issues.

Ms Eszenyi—That delegates are unaware of regulations which ought to be taken into account in decision making throws into stark relief the need for the applicants to have representatives with them who understand the intricacy of the regulations.

Senator KIRK—I am interested in the idea that you had about introducing this complementary humanitarian regime. That was your idea, was it?

Ms Clark—I could not claim that it was my idea, but I did write that aspect of our submission.

Senator KIRK—You refer to practice in the United Kingdom and Europe in relation to that. Could you expand on how that works for us—give us a bit more detail?

Ms Clark—I will say first that we endorse the proposal put forward by the Refugee Council. An attachment to their submission to this committee included a proposal that was put together jointly by the Refugee Council, Amnesty International and the National Council of Churches. That proposal gives a very comprehensive overview of the different things that could be done in this area. We say that the approach taken in the United Kingdom and in other European nations is the most desirable one—that is, to assess a person's need for complementary protection at the outset of their claim, side by side with an assessment of whether or not they meet the strict 1951 convention definition as to who is a refugee. That basically means that somebody who clearly is in need of protection will be identified as soon as possible.

There are other ways of doing it. For example, in Canada they have a slightly broader definition of what a refugee is. That means they would accept people there as refugees who

would not be accepted in Australia. They also have a test which they apply before they remove somebody from Canada just as a safeguard, to see if there is a possibility that the removal of that person might place them into danger or in a situation where their rights might be violated. We say that, if we are not prepared to go so far as to introduce a new class of visa for these people, at least that would be one measure that could be looked at. Currently, I believe the European Union countries are attempting to harmonise their asylum seeker refugee laws. One part of that harmonisation will be the recognition by all European nations in the EU of the need for complementary protection, just because it is so obvious that there are people in this day and age who will not fall within that strict convention definition but who cannot be returned for whatever reason.

Senator KIRK—So what you are saying is that there are two ways of going about it—either amending what it means to be a refugee or introducing this approach?

Ms Clark—That is right. I think that approach, which is used in some places such as Canada, is a possibility. But I think it is less straightforward. That is a well-known definition now. It is probably preferable in our view not to attempt to change that. There are other criteria that could easily be legislated so that a person who is sitting there as a delegate within the department can look at the 1951 convention test and say: 'Okay, does this person meet these criteria? If not, we will move to the next step: does this person need complementary protection?' They can have a list of criteria there and move through the process that way. Our view is that that would be the most logical way of offering protection.

At the moment, if the person does not meet the strict 1951 convention definition, it does not matter if they appeal to the RRT and then to the Federal Court or even to the High Court. Even if it is obvious from the outset that they do not meet the convention definition, they still end up going through this process to eventually make an application to the minister to intervene. We say that is a waste of resources. It may be that the minister is now able to intervene at an earlier stage, but we still say that is inappropriate for a person to be applying for that form of protection. It should be another class of visa and it should be assessed against set criteria by a delegate within the department from day one.

Senator KIRK—As to the nature of the visa, would it be the same type of visa as would be issued under the convention criteria?

Ms Clark—We would say yes. It would essentially be the same as the protection visa that is now offered. Again, we disagree with the idea of temporary protection. We realise that is the government's policy at the moment. Perhaps if this was to be introduced tomorrow then we would also be stuck with a temporary protection regime for people in need of complementary protection. But the types of violations of people's rights that would be at issue are similar to those with a person who is a convention refugee. We say they would require a similar level of protection. We are not talking about things that are temporary in nature because they are complementary as opposed to convention reasons. Essentially, in either scenario we are talking about very serious violations of people's fundamental rights.

Senator KIRK—The risk, though, is that, if this were to be introduced, it would be on the basis of a TPV type arrangement. I wonder if that is really an improvement at all.

Ms Clark—I am not sure that I can provide you with an answer to that.

Senator NETTLE—Thank you for your submission. I agree with what you said. The problem is: where we do start when dealing with so many concerns? I was pleased to hear your comments on comparisons with the criminal justice system. One of the areas of concern for me in this inquiry is the nexus between the criminal justice system and the immigration detention regime. People who have committed a crime may be sentenced to 12 months in prison or whatever it may be. I have the view that, if people have done their time, they have done their time and they should subsequently be treated as any other individual.

Is that an area you want to make any comments on? How does the current system of a character test for people impact on that? I know and I am sure you know examples of people who are permanent residents who have been in detention centres for years as a result of this interplay between the two. We have received submissions which say that the process of a very low threshold character test whereby people are very easily brought into the immigration detention regime once they have finished their sentence is impacting on the whole administration and the number of people who are in there. We have had views to say that section 501 should be abolished because of that impact and that there are things that we should do. Do you want to express any views on that?

Ms Lowes—Certainly I am aware of situations where someone who has been in the country for 20 years—or a very lengthy period of time—has been caught by that provision and has ultimately been removed from Australia, despite having perhaps been here since an extremely young age, having family connections in Australia and so on. I think probably commenting on section 501 and whether it should be abolished is beyond the scope of anything I could comment on today, although it is possibly something we could take on notice. The South Brisbane Immigration and Community Legal Service had some interesting comments about that situation.

The other aspect which has been dealt with in our submission is that the character test is actually much more restrictive for protection visa applicants, which is one of the big concerns that we have. They have an extra criterion, which actually goes far beyond section 501, which says that if they are convicted of an offence which has a maximum penalty of 12 months or longer—so that is the maximum penalty under the legislation, not the actual penalty imposed—they are not eligible for permanent protection if that conviction was in the last four years, which really is vastly beyond the scope of section 501. It potentially incorporates certain traffic offences, which we have pointed out in our submission. It really does seem tremendously punitive and harsh, even in comparison to section 501. That is one of the key concerns we wanted to point out, because the consequences for the type of offence that that may incorporate for the individual involved are just so vastly disproportionate to the nature of the offence that it really is a huge concern.

Senator NETTLE—You mentioned the word ‘punitive’ in relation to that form of detention, and of course that is an issue the government has sought legal advice on—about whether mandatory detention by its very nature is punitive. It has also sought legal advice on the management unit and ‘red one’ at Baxter detention centre. I know you are not here to give legal advice, but do you have a view about whether detention is punitive by its very nature?

Ms Clark—Yes is the obvious answer there. Speaking for myself, having had clients who have experienced the management unit and red one and all that comes along with that and then also be aware of the type of conditions that people in our criminal justice system experience, I can safely say that I am confident that those situations that people are placed in in that management unit are far worse than anything that I have ever seen in jail for a convicted criminal—and these are people who have not actually committed any crime other than coming here asking for our assistance. So I would say, yes, there definitely needs to be something done about the use of basically putting people in isolation cells. It is not appropriate. I know there is this concept of administrative detention. I am not sure how that could possibly encompass keeping people in small cells with hardly any light, being constantly under surveillance, being allowed out for less than one hour in every 24. It is not on in anybody's book.

Senator NETTLE—There are a lot more questions that I could ask, but I will let someone else have a turn.

Senator LUDWIG—In your submission on page 4 you say:

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

Could you expand on that? What you are effectively saying, as I understand it, is that you do not think the announced list of policy changes, although welcome, actually address the most significant reasons for the delay.

Ms Lowes—That was getting at the fact that DIMIA continues to require people to prove their refugee status—again—three years, or around that time frame, after they were granted a temporary protection visa. When we wrote the submission, our view was that the onus should be on the minister to prove that the circumstances which led to the recognition of refugee status have ended, as opposed to the onus being on the applicant to prove their refugee status again, taking changes in country circumstances into account. A case was handed down about two days before the closing date for submissions ended, which was QAAH and the minister, which now supports that position. We are saying that DIMIA policy should be amended to reflect that.

Senator LUDWIG—Have you noticed any change in DIMIA policy? If we track back to April-May this year as being a watershed for DIMIA in terms of both the Rau case—and subsequently the departmental inquiry—and the Solon case, have you noticed whether or not there is anything at your level starting to feed through in cultural change in the way they are addressing the cases and in the way DIMIA is now looking at these cases or is it much of the same?

Ms Lowes—It is correct to say that there has been a noticeable change since those announcements. But that is based on the current climate. There are still those issues of what is potentially arbitrary and inconsistent, because that is what is happening now. But what guarantee is there that that will continue in future policy? Also, it has not addressed all the issues. We are still aware of people who have been waiting in excess of a year for a decision after their interviews, despite the time frame that has been set. Certainly there have been improvements but they have not gone far enough.

Senator LUDWIG—Is it fair to say that the improvements are in what DIMIA may be able to do within the arbitrary nature of their discretion but that you are concerned that, because it is arbitrary discretion, it can easily slip back to a more negative outcome than a more positive outcome, which you might be suddenly starting to experience now?

Ms Eszenyi—We are concerned that the black-letter law is not sufficiently clear to help DIMIA staff understand what their decisions should be. They are relying on the announcement of a policy and a way in which they should view things, and that is inherently unhealthy. The law should tell them what the law is.

Senator LUDWIG—That also goes to the series of ministerial instructions—the MSIs. I take it that you are familiar with those and how they operate.

Ms Eszenyi—Yes.

Senator LUDWIG—Do you find that they are kept up to date with current law and practice by DIMIA?

Ms Lowes—I am aware that the recent changes have been updated. The Migration Amendment (Detention Arrangements) Act 2005, passed around July, has been updated. But there are also some examples where there are no guidelines at all. An example of that is that the minister has the power to shorten the time frame for someone to be eligible for a permanent protection visa. The basic position is that you must have held a temporary protection visa for 30 months before you can be considered for a grant of a permanent protection visa. The minister has the discretion to waive that 30-month period so that the person is eligible for the permanent visa within a shorter time frame. However, there is absolutely no guidance in either the regulations or the policy documents as to what considerations might be relevant to the exercise of that discretion. As a practitioner, it is very hard to try to advise clients on what information they should put to the minister to try to convince her that, in this case, it is a compelling example of where the discretion should be used. So there are situations where not only is it not up to date but there is no policy document on it which can be used to inform people about what their position is.

Senator BARTLETT—As the Law Society, do you have any concerns or experience with so-called unscrupulous lawyers or migration agents encouraging unmeritorious claims? As a society, have you had complaints referred to you about that type of activity?

Ms Eszenyi—I cannot tell you whether the society has had such complaints referred, but I am aware of one matter and I think that is the matter that you might have in mind, Senator, which is being dealt with through the South Australian Legal Practitioners Conduct Board. The conduct board, which is the disciplinary regulator, is constituted quite separately from the Law Society. A complaint about professional misconduct by a migration lawyer has, as I understand it, been referred directly to the conduct board. It does not necessarily come through the Law Society, although the Law Society does retain an ability to make its own referrals to the conduct board in cases where they are not otherwise made.

Senator BARTLETT—I do not want you to go to the specifics of that case, but I am sure you would be aware that regular comments are being made about the migration industry and the

significant number of lawyers and others who are encouraging people to make unmeritorious claims and that these claims are clogging up the courts. Do you think there is any substance to those comments? If people are encouraging unmeritorious claims, which I presume is a breach of your code of ethics, are the mechanisms currently in place adequate?

Ms Eszenyi—Our experience in South Australia is that the majority of migration work being done by lawyers for asylum seekers is being done free, gratis and pro bono publico by a very large number of South Australian legal practitioners, including literally half the South Australian bar, who give their time for nothing to put forward to the courts, in a proper manner, cases which they believe are of merit. We are not aware, as a society, of any one of those persons spending their time free, gratis and for nothing putting forward cases which they think do not have merit.

Ms Clark—Quite the opposite, I think. The experience has been that, because so many people are in need of legal assistance, lawyers have had to sit down and go through, case by case, to try and pre-assess whether there is any possibility of a case having merit before taking it on because there are just not the resources. For people who might have a glimmer of hope, even that is probably not enough when you are talking about trying to offer people pro bono services. It is in fact quite the opposite: only those who do have solid claims are being represented.

I might just add that also in our experience there have been plenty of examples of people who have been represented by lawyers in South Australia and been successful, only to have the Commonwealth continually appeal those successful decisions. I guess some people start to get a little bit frustrated when they feel that the lawyers are being accused of starting unmeritorious litigation when in fact the Commonwealth itself has not been a model litigant when it comes to this type of litigation.

Senator BARTLETT—I do not want to put words in your mouth, but in a public policy sense would it be fair to say that, if there had been more resources at the start in providing people assistance in putting forward a proper claim, that would have saved everybody a lot of time, effort and—more to the point—money with the court processes, where, of course, if the claim is successful, it ends up going back to the start anyway.

Ms Eszenyi—The answer to that question is yes.

Senator BARTLETT—I probably did put words in your mouth, but as long as you agree with those words that is okay. Evidence comes to light from time to time in some of the controversial cases about the department relying on information from anonymous dob-ins and the like to assess a claim—whether it relates to refugees or other areas of migration law—and knocking that claim out. Then down the track there is a contention about how accurate that dob-in was and whether there was fair testing of the evidence. Have you any experience of that or any comment to make about that type of situation?

Ms Lowes—I am not aware of a situation where reliance has been placed on a dob-in, as you put it. I am aware of situations where delegates have relied on information provided by other applicants in their own application to cast doubt on the credibility of another applicant's claims. There is really no assessment of how much reliance can be placed on that sort of information. I am talking about things like the procedure that might take place in a particular country which then casts doubt on another applicant's account of that same procedure. Reliance on that sort of

information as opposed to independent country information does not seem to have any valid basis, and it does occur in my experience.

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

Ms Lowes—Another example of the inconsistencies is where practice varies in terms of whether applicants are given the opportunity to comment on adverse information like that.

CHAIR—Ms Eszenyi, you did actually mention in your opening statement that you would provide us with the information about the case that had just been handed down.

Ms Eszenyi—Yes, that is QAAH v MIMIA—that is, the minister—[2005] FCAFC 136. That was dated 27 July 2005.

CHAIR—Thank you for appearing before us today. We appreciate your effort and your time.

[9.59 am]

BIRSS, Ms Thea, Managing Solicitor, Refugee Advocacy Service of South Australia Inc.

HARBORD, Mr Graham Alexander, Board Member, Refugee Advocacy Service of South Australia Inc.

HEYWOOD-SMITH, Mr Paul, QC, Chairperson, Refugee Advocacy Service of South Australia Inc.

CHAIR—Welcome. The committee has numbered the submission that you have provided us No. 51. Do you want to make any changes or provide us with additional information?

Mr Heywood-Smith—No.

CHAIR—If at any stage you have some evidence you want to provide to us in camera, you can make that request to the committee and we will facilitate that request. Do you have any comments to make on the capacity in which you appear?

Mr Harbord—I am the author of this report.

CHAIR—Do you have an opening statement?

Mr Heywood-Smith—I have delegated the opening statement to Ms Birss.

CHAIR—When you have completed that, we will go to questions.

Ms Birss—We are grateful for the opportunity to voice our concerns about the current operation of the Migration Act. RASSA provides legal assistance exclusively to asylum seekers, but you could be forgiven for believing that our clients are hardcore criminals under the current operation of the act. If they arrive as an unauthorised entry, they are locked up in immigration detention centres in a prison like environment in remote locations, often for years on end, purely because they have exercised their international and domestic rights to claim asylum. They are treated as criminals and yet they are not provided with the protections and safeguards that criminals in Australia receive. People charged with serious criminal offences who cannot afford their own legal representation are entitled to legal aid due to the serious implications of being found guilty of such charges, yet in many cases asylum seekers face more serious repercussions if it is found that Australia does not owe them protection.

We would like to address the current problem of lack of representation for asylum seekers due to the grave dangers they face if an error in the assessment process is made. We have observed the adversarial application of migration law to our clients, both by DIMIA and by the Refugee Review Tribunal. Granted, RASSA really only focuses on the negative RRT decisions, but the quality of those decisions is still of serious concern to us. Tapes and transcripts of the tribunal hearings often reveal hostile interrogation of asylum seekers and attempts to find unimportant

inconsistencies in their evidence in order to screen applicants out, rather than making an impartial inquiry into their stories.

We welcome the prospect of cultural change in DIMIA, but I do not see that that will entirely resolve this problem. We say that further safeguards need to be introduced to ensure that asylum seekers get a fair go. One of those safeguards would be representation. Asylum seekers deserve migration assistance and legal advice throughout the entire application process, right from the beginning. They have significant barriers to overcome: cultural and language differences, sometimes a lack of any educational at all and of course past trauma and fear of government authorities. They need some help.

Section 256 of the act provides for access to legal assistance only when a detainee requests it. I find that section indicative of the adversarial attitudes of the past. Currently, asylum seekers can only access legal assistance if they are knowledgeable enough to ask for it, so those most vulnerable, most isolated and most in need of assistance are left to fend for themselves. I do not see that that is the Australian way.

Organisations like RASSA have had enough wins in the courts and revealed enough legal errors in the RRT decision-making process to establish that there is a genuine need for representation, so we submit that section 256 should be redrafted to ensure the provision of migration and legal assistance throughout the entire application process. I think it is appropriate for the government to fund this important work, similar to the funding provided for legal aid matters.

We submit that a duty solicitor and migration agent service should be established and funded at each of the immigration detention centres under Australian control. We also submit that recent attempts to restrict judicial review of tribunal decisions amount to an attempt to deny asylum seekers a fair go. We support the submissions of the Australian section of the International Commission of Jurists that, far from restricting judicial review, we ought to be expanding the scope of the courts to review the merits of RRT decisions.

Recently, difficulties with the use of ministerial discretion under sections such as 417, 48B and 501 have been highlighted at RASSA, with the tragic deterioration in mental health of some of our clients. Our clients who are in fear of persecution are living on a knife edge while they wait for a decision to be made under any of these sections. They are also locked up in detention. Some of our clients have waited over a year for a decision on a 417 request, and their minds are disintegrating while they wait. One of my clients told me that in Afghanistan the Taliban could kill him only once whereas here in Australian immigration detention they are killing him every day. Very proud men break down in tears in front of me, a female, begging to me to assist them. Under the current regime, I am unable to do so as section 417 is a non-compellable power.

In particular, the minister's policy of refusing to consider exercising her discretion while court proceeds are on foot is causing unnecessary delay. It is causing a waste of legal and administrative resources, and it is causing our clients to suffer terrible mental health problems. Even when a decision is made it is not reviewable, despite these being life or death decisions, and often those decisions are not even made by the minister but, rather, by staff of the ministerial intervention unit, who screen our communications to the minister. These are actually administrative decisions, yet they are not reviewable. We submit that accountability,

transparency and timeliness are essential to the integrity of this screening process, so we recommend that the use of ministerial discretion be replaced by reviewable and timely administrative decisions. We commend the submissions of the South Australian Law Society in that regard.

We ask the committee to consider our recommendations: firstly, that section 256 be amended to fund lawyers and migration agents to assist asylum seekers right from the beginning and to establish a duty solicitor service at immigration detention centres; secondly, that judicial review of RRT decisions should be expanded to include merits review and not be subject to restriction in order to ensure refugees get a fair go; and, thirdly, that the use of ministerial discretion on life or death decisions under sections such as 417, 48B and 501 be replaced with reviewable administrative decisions to ensure accountability, transparency and fairness within the application process.

CHAIR—Thank you, Ms Birss. Mr Harbord and Mr Heywood-Smith, if you do not have anything further to add we will go to questions.

Senator NETTLE—Thanks for the recommendation in relation to clinics or duty solicitors at immigration detention centres. We have heard from people, particularly those who also work in the criminal justice system, that that is a way in which people are able to access legal advice. The consequences of there not being legal advice from the primary decision and at RRT all the way through are dramatic in terms of the amount of time that people are in detention. When you talked about clinics and duty solicitors, I note that you said that the Australian government has control over where they are in those detention centres. From my perspective, I would like to see duty solicitors there for those 32 men in Nauru as well so that they can get that sort of access. I want to ask you about the changes that the minister has announced recently. I do not know if you were here, but Senator Ludwig asked the previous witnesses about what they have seen to be the consequences of those decisions. That is a broader question, if you want to talk about what you have seen.

A particular concern that I have is to do with residential determinations and the consequences for children in that situation. As I understand it, the minister is still the guardian over those children, whether they are in residential determination or in the detention centre. Do you have any experience of how those residential determinations are operating so far? Do you have any comments that you would like to make about their effectiveness or otherwise? It might be too early to make those kinds of comments.

Ms Birss—RASSA's story is really a story of fighting to get access to our clients. I think that fight continues. We have had better access in getting psychiatrists in to assess the clients we are concerned have mental health problems, but there are still obstructions, particularly with people who we do not know are in Baxter detention centre. We operate solely out of Baxter. It used to be that the majority of detainees at these centres would relate to each other. They were from a similar background. They shared languages, so they could spread the word that there were lawyers available to assist them. Now there are detainees from a wide variety of cultures and languages. They are not communicating with one another, so I have no doubt that there are currently people in Baxter in need of a lawyer who do not know we exist, and we are unable to offer our services to them. That is still a problem.

Senator NETTLE—In your submission you talk about wanting the capacity to advertise your legal representation in the immigration detention centres and how that would ameliorate that particular concern.

Ms Birss—I do not think that that is asking too much.

Senator NETTLE—There are notice boards; it would help even if you could put your information on only one. I ask you more generally about the recent changes that have been made and whether you have had long enough to assess what changed situations might come from them. Do you want to make a comment about what areas you think the changes do or do not address?

Ms Birss—The removal pending bridging visa has meant that I have actually had some clients in my office rather than meeting them up at Baxter. That is great for them. Removal pending bridging visas and residence determination seem to be an improvement on detention. Initially, there is an improvement in our clients' mental state, but that soon deteriorates, as with the bridging visa E that some of our clients have been on for quite a while now. They are almost as depressed as they were in detention. It is the waiting for a decision, not being able to get on with their lives and not being able to consider reunion with their families at any time in the short-term future. It is not good enough—not by a long shot.

Senator NETTLE—Do you have any clients that you are working with, or are you aware of people in Baxter, for example, who have not been offered removal pending visas? I am aware of some of those people and the consequences for them of not being offered a removal pending visa when they do not know, and none of us know, how the invitation to have a removal pending visa has been made.

Ms Birss—The mental health situation at Baxter is in crisis. All the long-term detainees who we deal with who are left at Baxter feel as though they are the only one left. It is a pressure cooker in there. All I can say to them is: 'We don't know why you weren't offered a removal pending bridging visa and I can't get an answer from the government about why you weren't offered a removal pending bridging visa.' That is no answer at all.

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

Mr Heywood-Smith—I will pick up on one of the matters that have been raised, and that is the need for access to legal advice at an early stage. I have only recently become the chairperson of this association, but I have recently been involved in seeking special leave to appeal to the High Court on one matter. This necessitated me going back through and reading the RRT hearing transcripts and decisions, and then the decisions from there to the single judge of the Federal Court and the full court—and then of course taking the matter to the High Court.

It struck me that the quality of our country's compliance with these international obligations is only as good as its weakest link. Obviously we have a judiciary at the Federal Court and High Court level that is unquestioned in its competence, and those courts are ably assisted by solicitors and counsels before them. But, at the end of the day, the appellate justices simply have to point to a finding of fact made by a tribunal member and say, 'We can't go behind that finding of fact.' Then, as a counsel, one looks at the evidence and has to ask oneself: 'How on earth could a tribunal member have made that factual finding?' In this particular case, the tribunal member had assiduously set out the independent country information and the reasons, and then at the end of it made almost a throwaway finding that was not supported by any of the independent country information. Certainly I think—and I am sure that I am supported by Graham and Thea—we really have to look at the RRT and the quality of the decision making there. I am sure that the tribunal members would be grateful for the assistance that the legal profession can provide at that stage.

Senator NETTLE—The circumstance that you describe is also an argument for being able to have a merit review of the decision at that point.

Mr Heywood-Smith—Absolutely; quite so.

Senator BARTLETT—Do you believe that the ministerial discretion power—there are quite a few ministerial discretion powers these days, but I mean areas 417 and 351 in particular—should be fully scrapped? You made some comments to that effect. Do you want it to be more precise or do you think it should perhaps be confined and narrowed?

Ms Birss—With respect to the request for a humanitarian visa, I would like to see that addressed by way of an administrative decision that is reviewable. There may well be scope for a limited exercise of ministerial discretion for exceptional cases that fall beyond even those 417 requests.

Senator BARTLETT—Are you able to give a sort of a snapshot of the types of things that come under 417 requests? I know they are all individual cases, so it is a bit hard to summarise. One area I am interested in goes back to a previous committee recommendation, about five years ago, to incorporate the convention against torture and other things into the Migration Act. Do the requests tend to go to issues like that or are they just broader, humanitarian, 'this is a terrible individual circumstance' type of request?

Ms Birss—That is a classic example of where the person is in serious danger but it is not for a refugee convention reason. Let us say 50 per cent of our submissions go to an issue like that, and others are on broader humanitarian grounds.

Senator BARTLETT—With the current policy of the minister or the department not to consider requests for use of the discretion whilst court action is afoot, that is basically just a policy and there is no legal underpinning of that, is that correct?

Ms Birss—Yes. I think it is under the ministerial guideline for the exercise of her discretion under section 417 and other sections.

Senator BARTLETT—Are you aware of any examples of where that has been waived, where they have decided to exercise discretion, even though there is court action afoot?

Ms Birss—I believe it has been waived on occasion.

Senator BARTLETT—Again, it is a bit hard to quantify with something as ephemeral as discretion, but I would be interested in any perceptions you have about the extra length of time that it adds to the whole process—having to have people go through the full Federal Court and the High Court et cetera before they can then access discretion. Do you have any sort of rough figure or data on those sorts of things?

Ms Birss—Look, if they get to the High Court, you would be talking about four or five years.

Senator BARTLETT—I appreciate you are an immensely stretched organisation, but are you able to provide some data about cases where you have come in at a certain stage—where you could have put in a request, and maybe you did—and then how long it was before someone finally was successful because of that policy requirement?

Ms Birss—Can you ask the question again.

Senator BARTLETT—I am interested in some hard data about the extra lengths of time that have been caused by that policy requirement and examples you could provide of case studies or something, just for us to see what it means in specific cases where somebody did end up being successful with a 417, and if it had been considered at the start, instead of after the various appeals—

Ms Birss—I am sure we could gather up a couple of case studies for the committee.

Mr Harbord—Perhaps we could take that on notice and provide some further information on that.

Senator BARTLETT—I am just trying to get a sense of it. I appreciate the point in an academic sense, but what does it mean in reality for people?

Mr Heywood-Smith—I had the pleasure of going to Baxter on Saturday and speaking with seven inmates there. What struck me was that a number of these people were clearly on edge. You could tell that they were in a difficult way. It struck me that if, in fact, that decision could be taken three years earlier and if the decision were to grant a visa, those people could be entering our society in a non-traumatised position, unlike how they end up being received three years later.

Senator LUDWIG—It concerns me greatly that in your submission you talk about the government's inability to respond quickly to an FOI request—that it takes six to 12 months to do that. That certainly would hamper the way that you address cases and the way you gather information to assist clients to present a case. Is that going to change? Has there been an indication from DIMIA that that is going to continue?

Mr Harbord—I will ask Thea to comment on this as well. For period of time, we were suffering huge delays in response to FOI requests and the feedback we were getting from DIMIA was that they do not have the resources to conduct the FOI requests. More recently, we started threatening legal action if the requests were not complied with. As a result of that, we have been getting a far more rapid response, which leads us to infer that DIMIA did in fact have the resources all along. This is symptomatic of what we have had to do throughout the existence of RASSA and even before we were set up. We have experienced continual obstruction and delays by DIMIA in relation to the most simple of requests. It is only when we have threatened legal action or have taken legal action that we get a reasonable response. Thea, do you wish to add anything?

Ms Birss—Yes. It does help to file an appeal to the AAT, and suddenly the documents turn up when they are supposed to. I have a classic example of the obstructionist attitude of the department. I did file an appeal to the AAT on a delay in the provision of urgent FOI documents. I received a letter in the post, an FOI determination, saying that I was refused access to the documents on the grounds that they could not find any. Subsequently, they have found documents relating to my client but, instead of producing them, they are fighting me in the AAT about whether I am entitled to those documents under section 37 of the AAT Act. They have requested that I send a fresh FOI request with a further 30-day time limit and a further opportunity to appeal to the AAT if they do not comply with that time limit in order to obtain these urgent documents. In the meantime, I am unable to put a submission forward for my client and hopefully prevent him from being forcibly returned to a position where he feels that he is in danger.

Senator LUDWIG—Is it that you are experiencing a hopeless department or one that has turned its mind to a culture of concealment and cover-up? That is one of the areas that we explored in a different committee but with similar people when we looked at the Rau case and the Solon case. It just seems that the same thing is starting to emerge in other areas with other clients.

Ms Birss—I have met good eggs and bad eggs in the department. The problem to me seems to be that there is a lack of accountability—so the bad eggs can get away with malicious behaviour.

Senator LUDWIG—So you are finding that it is a culture of concealment and cover-up? They are my words, but I am just wondering how you are finding it. You are the people on the ground experiencing this day to day. Unfortunately, the only evidence we can garner is from people with direct contact with the department about how it operates.

Ms Birss—Yes, I would agree with that.

Mr Harbord—Yes. If there were a change of attitude within the department I am sure a lot of the day-to-day work that we undertake would be made a lot easier. But my experience has been that there is an ongoing attitude of: ‘We will only do something if we are really forced to or if there is a threat hanging over us.’ As Thea said, there are good eggs and bad eggs, but there is an overall attitude in the department that has been there from day one. Our experience has been that from the very start, when detention centres were set up in the outback away from any legal access, there has been a culture of concealment, obstruction and prevention of due process and proper legal representation.

Senator LUDWIG—Is that also reflected in what I saw in your submission? It seems anecdotal, but I am wondering if you can confirm that it costs $4 to send a fax from, say, a client in one of the detention centres to their solicitor, with relevant information that might be needed. Faxes can sometimes run to 20 or 30 pages and, of course, not all clients are going to be able to foot the bill and will pass the bill on.

Ms Birss—It is $4 for the first page, I believe.

Senator LUDWIG—That is the cover page?

Ms Birss—Yes, and $1 each for the pages following that.

Senator LUDWIG—Where does that money go? Who collects that? Do you know if that is to the benefit of GSL or DIMIA?

Ms Birss—I do not know that they are required to pay it up front.

Senator LUDWIG—Perhaps you could take the question on notice. I am just really interested in that. I suspect that it really makes it hard for a client to then liaise with their solicitor, especially if they are in the detention centre to begin with, then they are a long way away for a face to face visit, to take documents. When you do visit, do you have access to photocopy machines?

Ms Birss—Provided we bring our own paper.

Senator LUDWIG—Do they charge you for the use of the photocopy machine?

Ms Birss—Not currently, no.

Senator LUDWIG—I had better not suggest that.

Mr Harbord—That has varied. In the past we have not had access to any such facilities. Certainly we were not able to take phones in, and problems with access to phones, faxes and photocopiers in detention has been a problem in the past. At times it seems to be somewhat arbitrary as to what facilities we might have access to. Again, this is compounded by the fact that it is not as if we are just down the road; it takes us at least four hours to get to Baxter and in the past it took seven hours for a trip up to Woomera. We just did not have the facilities there, so that again produced delays and obstruction in being able to provide proper advice to our clients.

Senator LUDWIG—Yes. So what you are suggesting, in my words, is that DIMIA could use that to their advantage to put roadblocks in your path?

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

CHAIR—I am going to go to Senator Kirk but, just before I do, I want to continue on that theme. As you would know, the government is building a Taj Mahal on Christmas Island at more than $220 million, and the costs blow out every year. The implication of what you are suggesting is that problems with access to services and support will intensify if in fact refugees are placed on Christmas Island in the large numbers that are envisaged by the building of that detention centre, because it is due to hold 400 people.

Mr Harbord—Absolutely. Which legal firm and which lawyers are going to be able to access Christmas Island? Do we try and set up a house on Christmas Island? One can only assume that a key reason for doing that is to prevent access by lawyers. It seems as if in the past South Australia and Western Australia in particular have been used as somewhat of a dumping ground for refugees, nuclear waste or whatever because we have such a large outback. But Christmas Island and the distances there are going to make it even more problematic for those people to get proper access to both legal advice and other services, such as health services.

Senator KIRK—Thank you very much for your submission. I want to return to the RRT. You have made quite a few observations and criticisms of that tribunal. You say in your submission that it should be completely overhauled. How would you see the tribunal being changed? Would it be by the appointment of legally qualified people, by tenured appointments or by fixed terms? Could somebody elaborate on that?

Mr Harbord—In our submission we make a couple of key points about that. One is that lawyers should be able to represent clients at the RRT. There does not seem to be any rationale for their not being able to represent people at the RRT apart from, again, trying to kick lawyers out of the system. The other real concern we have is the way in which the RRT members are, even subtly, subject to the favour of the government in terms of their reappointments. We recommend that there should be fixed term appointments and one-off appointments so that at least they are not seen to be favoured by any decision at the end as to whether their contract will be extended. We also feel that those people should be legally trained. As Thea and Paul mentioned, some of the decisions we have seen at the RRT level bear not even a logical thinking process let alone a legally trained thinking process that identifies what the key facts are in relation to the law and applies the proper inferences.

Senator KIRK—Are the current appointments three- or five-year appointments?

Mr Harbord—I believe they are five but I might be corrected on that. They are fairly limited terms that may then be extended.

Senator KIRK—You talk about perhaps tenured appointments or longer fixed term appointments—for what, seven years, 10 years?

Mr Harbord—Yes. My view is that there should perhaps be a seven-year appointment but with no extension of that time.

Senator KIRK—I suppose the other argument is that if people are able to be reappointed then you do have that consistency and the effect that might have on the institution. That is the other side to that. But, in your view, it is outweighed by the fact that there is the perception of bias.

Mr Harbord—Yes. In our view, there are many people out there who have the experience and knowledge to fill those positions. So I do not think there would be any detriment to the tribunal itself.

Senator KIRK—The other point that was made by Mr Heywood-Smith and Ms Birss was in relation to merits reviews of the decisions of the RRT. I would have thought that would be quite difficult for a court to undertake. Are you suggesting that perhaps the AAT ought to be involved?

Ms Birss—I do not see why the courts cannot undertake that kind of assessment. Currently, we are dressing up merits review issues with legal gymnastics to try to find jurisdictional error. Ultimately, it is a question of whether sufficient logic was applied to come to a conclusion. I would say that the judiciary are well able to make that assessment.

Senator KIRK—I would have thought there would be constitutional issues with courts undertaking that sort of merits review.

Mr Heywood-Smith—I cannot see why there cannot be a normal appeal process that applies in our civil courts throughout the country which allows the appellate court to actually receive further evidence if they consider it is appropriate.

Senator KIRK—Are you suggesting further appeals would be set up by statute?

Mr Heywood-Smith—That is right. It would simply give the appellate body the capacity in the appropriate case to both review the existing evidence and, if necessary, receive further evidence that can often come to light—particularly some of this independent country information where the quality of the information itself, it seems to me, is questionable. Events may happen in another country, between the time of the initial determination and the appeal, that might make it quite appropriate for the appeal court to receive further evidence.

Senator KIRK—Finally, on a completely different point, when persons are removed or deported to another country there are often suggestions made—which I think are most wise—to monitor what happens to them once they have returned. The difficulty is how you actually undertake that sort of monitoring process and who does it. Have you any thoughts about that?

Ms Birss—I expect the Edmund Rice Centre would be able to give the government some clues.

Senator KIRK—So I ought to ask them? They are not witnesses, but I will take note of that.

CHAIR—Thank you for your evidence today and for taking the trouble to send the committee your submission. It was much appreciated.

Evidence was then taken in camera but later resumed in public—

[11.49 am]

O'CONNOR, Ms Claire, Private capacity

CHAIR—Welcome. Do you have anything to add to the capacity in which you are appearing?

Ms O'Connor—I am a lawyer who has appeared for and represented many refugees.

CHAIR—We invite you to make an opening statement, and at the end of that we will go to questioning. I want to remind you that if at any stage you want to give part of your evidence in confidence or in camera you can request that of the committee and we will facilitate that request.

Ms O'Connor—From the outset can I say that I did not actually tender a submission to the inquiry. I cooperated with the Newcastle Legal Centre, who were representatives of Cornelia Rau's family. I had made a submission to the Palmer inquiry which I had assumed had been attached to their submission. They told me they were going to attach it, but I am not sure whether it has been attached. When I checked the index today, it had not.

CHAIR—No, it was not.

Ms O'Connor—I can certainly forward that. My submission to the Palmer inquiry was not really about Ms Rau; it was about the problems in immigration detention that brought us to a situation where you could have someone like Ms Rau in detention with no review of her situation and no dealing with or recognition of her mental health issues. What I sent to the Newcastle legal service did not include any of the appendices. The appendices will assist because they really are a look at the systemic problems associated with the mental health issue, which has been one area of my concern. I would like the committee to receive that information, and I will email to the committee my actual submission.

Secondly—and I will address this issue in a moment—I have also collected some further materials that were prepared as a result of court cases I took about mental health issues. They are materials that were filed with the court by DIMIA officers. The third matter is a decision of 'S' which I am sure you have read. It is a decision of the Federal Court in relation to immigration detention conditions for people who are mentally ill. So I will tender those three documents at this stage with that understanding.

I will give a quick history of what my involvement has been in relation to migration matters. In 2002 when I was working at legal aid—I am presently on leave working on another matter, so I am not working there at the moment—a number of detainees were charged with escaping from immigration detention. All together, over three different escape periods, there were maybe 50 or 60 detainees charge. Julian Burnside was running a test case on behalf of one detainee to argue that conditions of detention can mean that to escape is not a crime. That matter went through to the High Court and appears in the decision of Behrooz, where the High Court held six to one that that was not a defence for the charge of escape. What that meant was that all the detainees who had escaped had their matters waiting two or two and a half years before they entered pleas of guilty.

Following the judgment in Behrooz, we then listed a number of matters in the Magistrates Court for submissions to be made. I asked a psychologist to attend at Baxter and asked those who were still in the country—because some had actually been removed before then—to write reports. That psychologist then saw 11 detainees in that one group and contacted me very distressed and said, ‘These people are extremely ill.’ He felt that one client in particular ought to be removed straightaway to a mental hospital. That client then had submissions made and the court dismissed his matter under the Crimes Act because he was so mentally ill, based on that psychologist’s report.

The mental health legislation in South Australia is such that a psychologist cannot detain someone under the Mental Health Act. I asked DIMIA if I could have a psychiatrist examine the client. My request was: ‘Can a psychiatrist, at my cost and my choice, go to Baxter and see this man, because I am worried that he may take his life.’ That request was refused, so I lodged an application in the Federal Court for, first of all, an assessment and, secondly, that, if that assessment was consistent with the psychologist’s assessment, this man be sent to a hospital because he was in urgent need of medical treatment. The way the Federal Court operates is that, if you have an urgent application, you get an interlocutory application and then list the whole trial later on. My interlocutory application, listed in November 2004, was simply for a doctor to see this man. That was refused. I think, Senator Nettle, you asked a question in parliament about how much DIMIA paid their barrister to refuse that application just to get Dr Jureidini to see him. They paid over $13,000 in barrister’s fees.

On day 8 of the hearing, after their psychologist and their GP gave evidence, the judge said to the Commonwealth, ‘Go and get some further instructions; this man is ill.’ By that stage, while we were in court, this man had sewn his lips together, had stopped eating and had refused treatment. Their psychiatrist and our psychiatrist saw him on 23 December and he was, of course, immediately transferred under the Mental Health Act to Glenside. As a result of that, he stayed in Glenside until about three or four weeks ago when he was released on a permanent visa. He is now living in Adelaide and is still very ill. I saw him yesterday. He is extremely ill.

As a result of that court case, it became apparent to me that the level of mental health care in Baxter was appalling. We had evidence that they had a psychiatrist who used to fly in from his home town for one day every six to eight weeks. He had seen this man only to medicate him in August 2004 and was not due to go back to Baxter until February 2005. I now know, as a result of all the other evidence that I have obtained from other clients who were ill, including Cornelia, that there were a number of people who were suffering from severe psychiatric disorders sitting in Baxter at that time.

Why doesn’t DIMIA know that? Why doesn’t DIMIA and the mental health services in there—the IHMS private company and Carlton medical practice who run the general practitioners service—know that they are dealing with a number of people who are extremely ill? I think it is a mind-set problem and is something that Mr Palmer in his final report addressed. He says that it is a systemic problem related to the attitude. You might think that, following Cornelia’s discovery in immigration detention, following the decision of S where the Federal Court held that there was a failure to deliver appropriate medical services and following the transfer of, I think, about 14 or 15 detainees in the last nine months to our hospital from Baxter, DIMIA might change their mind. But only last week Senator Vanstone said, when she was confronted with the number of people who have harmed themselves in immigration detention,

words to the effect of: ‘They might do that because they want something. They are doing it as a form of acting out. We don’t know that that’s mental illness.’

The client I was talking about a moment ago, who is referred to as H in the decision in the transcript in the Federal Court, is still extremely ill. When I saw him in 2002 when he had first escaped he was covered in scars because he had a habit of taking glass or razors and cutting himself quite badly. The reason he does that he tells me is that voices tell him to. When the nursing and medical staff at Glenside finally gave him the medical and psychiatric treatment he needed they measured the number of scars on him, and there were metres of scars on his stomach, his neck, his wrists. He even tried to cut his throat while he was in Glenside. He tells me even today that voices are still telling him to harm himself. He is not an isolated case. There are a number of people who are equally as depressed and ill in Baxter. Since I took that matter, I have been asked by about 12 or 13 detainees to get them into hospital.

The process of getting someone into hospital is not to facilitate their release into the community. Many of the detainees are extremely concerned that in fact their application, where they are taking a challenge to the Federal Court on the conditions they are being kept in, will harm their migration cases. Many detainees are reluctant to get treatment but as one detainee who appeared in the decision of S—the decision of S actually started out with three detainees but two of them got removed before the judgment; all of them got removed to hospital before the judgment but before the trial had even finished two were removed to hospital; that is how ill they were—said to the court, ‘I’m really worried now because my friends who are sick in Baxter who get visas when they get out don’t become better. I’m worried that I’ll be sick forever.’ I still have contact with that detainee. He is out in the community and he was right: he has not recovered, and my fear is that he will not recover. So the applicant that I first took who is still psychotic and still hearing voices is not the only one.

Over 90 per cent of the people who are in immigration detention are eventually given visas and accepted as being refugees. What does that mean? That means when they arrived here—because it is when you arrive that you receive the status; you cannot become a refugee while you are living in Australia—they had such a fear of persecution that another country ought to give them that sort of status. It is not just, ‘I’m not really happy with the political system where I live,’ but it is a genuine fear of the political system that they come from—and we know how horrific some of those environments are.

We know sometimes the stories of how these people arrived; they arrived already traumatised by their experiences. Then we took them in a fragile psychological state, perhaps already suffering from trauma, and locked them up in conditions of detention which would not be allowed in a prison environment in Australia—conditions of punishment, lack of access to proper services in environments that were harsh, mean, controlling and uncaring. We expected those people to be able to survive that, and they have not. As a result of that, there are dozens of people living in our community who we now say to, ‘Sorry, you are refugees; here is your visa,’ who we have harmed. They will not be able to recover.

In immigration detention there are two ways your mental illness will present itself to DIMIA. The first way is the ordinary way. The ordinary way is extraordinary. People harm themselves. Not only had the first client I took cut himself to that extent but he had swallowed shampoo, he had tried to jump into razor wire at one stage and he had tried to hang himself and had been cut

down by another detainee. Many people tell you horrific stories of the self harm. That, you might think, is an obvious way of somebody saying that they have a mental illness.

But of course the other way that people react when they are mentally ill is to act out in a way that is stressful. Dr Jureidini will probably talk about this this afternoon. The sorts of behavioural issues which will not see them treated are things like Cornelia did—refusing to obey orders, refusing to stay off the lawn when she was meant to, refusing to eat a meal when she was supposed to, refusing to go through a particular door when she was requested to. That is the way that mental illness affects behaviour. Many of my clients destroyed property. I had lots of clients who just got to the end of their time and the end of their mental ability to be able to control themselves and broke windows, broke furniture and broke equipment.

What happened to those people then exacerbated their mental illness because they were then put in the management unit. I am sure you would have received already a number of submissions addressing the conditions in those units. What you will see in the written material I have given you today at least is the regime for Red One, which was also called 'Red Gum', which was the step down from the management unit where Cornelia was kept, where all of my clients were kept and where Mr H was kept whenever he harmed himself or threatened to harm himself. He was locked in a room without any reading material, writing material or personal effects, with the window blacked, with a camera in the corner and with no access to other detainees or visitors. They may be allowed out of that room for one hour a day, which has now been increased to four hours a day. People in the management unit can get access outside the unit for up to four hours a day. They have nothing to do.

I did a court case involving clients who had broken windows at Baxter and we got the tapes to see them breaking the windows. The tapes then followed on to tapes that were then obtained through those management units. You get a video of a person in a cell. It was sped up because that is the way the tape records. You see them get up in morning, you see them go to the toilet, you see them have a shower, you see them pray. Then they sit, they stand, they sit, they lie down, they sit, they stand. You realise the impact of locking someone up with nothing to do for hours on end. If you do that to someone with a mental illness, you are going to harm them even further.

Following the Palmer report, I would have liked somebody to say, 'How can we cure this?' It is interesting that in some of the recommendations of Mr Palmer's report, he does address ways of perhaps ensuring we do not do this to the people who remain in there. Those methods have not been picked up by the department.

The first way is to allow access immediately to a proper psychiatric assessment of all remaining detainees in immigration detention who have been in there in excess of two years. You have to do it now. The second thing is that it has to be independent of the DIMIA system. Dr Frukacz, who failed to diagnose many of my clients—although on one reading he probably did diagnose Ms Rau correctly but failed then to ensure her treatment—is still the visiting psychiatrist. Okay, he goes every two weeks now instead of every two months but he still flies in, sees people and flies out.

Since the decision of S and since the recommendations from Mr Palmer, I have been instructed by a number of detainees to get the mental health treatment. The first three, before we could lodge in court—through legal aid, I paid for a separate psychiatric assessment, sent those

to DIMIA, told them I was going to lodge—those people miraculously got transferred to Glenside. I then lodged another three and they were not transferred to Glenside. We went to court. By the time we were at our second hearing, one of them had been transferred. At the third hearing, two had been transferred.

On the first day I appeared, the Commonwealth told the court that they were foreshadowing an application against me personally for costs for taking these sorts of cases. All I am doing is making applications for people who I genuinely believe need hospital treatment so as to get them treatment before someone gets more seriously damaged.

Last week my instructing solicitor and I were instructed by another 13 detainees in Baxter who claim they are so mentally ill that they are scared of long-term harm and want treatment in the hospital. I cannot believe that I have accidentally stumbled across the only people who are sick in Baxter and also that, accidentally, the only people I get reports for and either lodge or make generally known that I am going to lodge for are the ones who get transferred. I think there have only been about three or four in last year who have been transferred besides the ones I am acting for. Most of the transfers are done as a result of me accidentally finding those people. That cannot be true. That is the first issue.

Mental health is a real problem. It is not being addressed properly in the immigration system at the moment. There has to be a proper review of the way it is being conducted. You cannot just send more psychiatrists into Baxter because Baxter is causing the illness in the first place. The perfect analogy is one that I gave in an interview once. I said that you can put as many ambulances as you like at the bottom of a cliff. It is all very well to say, ‘We have three or four there now. People keep falling off that cliff, but they will get into an ambulance quicker.’ You have to look at why people are falling down that cliff in the first place. If you put someone in immigration detention for four or five years where they have a genuine fear of being returned to the country they came from and where they do not want to be—and they have a no-choice situation; they cannot go back, so they stay and they are getting sicker and sicker—and you eventually release them, you have caused great damage and great harm to people who did not deserve it.

The other problem with the Commonwealth Migration Act is that there are no regulations dictating the minimum standards of detention. In our prison systems we have regulations, so it is quite easy then to take the case to court if someone’s minimum standards are not being met. But in the Migration Act we do not. We just have a common-law duty of care. You might be aware of how difficult it was to get that judgment of S. We had to file applications and affidavit material and a number of witnesses were called. Our experts were accused of being biased in the court room; they were only interested in closing down detention centres. They are all matters addressed by the judgment of Justice Finn in that matter.

I am also aware of the decision of Mastapour, which was the first decision really that looked at changing someone’s accommodation because of the lack of care in the environment they were being kept in. The problem with those, of course, is that you have to actually then apply a common-law standard of care. Time after time the immigration lawyers tell us through the affidavits provided by the DIMIA staff and those treating the detainees, ‘Don’t worry, we’re doing a good job on the ground; we’re assessing and monitoring all of the time and we’ve improved the number of doctors who attend,’ et cetera.

The second problem is in relation to the conflict that exists. There is a conflict. The psychologist, Mr Micallef, who gave evidence in the case of H, whom I was telling you about before, said himself that he felt in conflict. I am not surprised that he no longer works in that environment. He said in the hearing that there is a conflict between his role as a psychologist treating people in that environment and actually being employed as a contractor by the very people who, I suppose—I am paraphrasing his words—are causing the problem. In fact, I suppose, to be fair to him, he was actually talking about being in the environment where the problem was being caused. He was being more neutral. But there is clearly a conflict.

I do not understand for the life of me why I as a lawyer cannot go into Baxter without an appointment made by the client, a letter from the client saying the area of law that is going to be covered and that they want to instruct me. That was the problem with Cornelia Rau. There were a number of people who were trying to get me to go and see her, because I had a bit of a reputation for dealing with people with mental illness. Lots of detainees thought she was ill. Certainly, people in the community who had contact with her thought she was ill. But I could not get in there without a request from her. She is ill—how is she going to make a request that she needs to see a lawyer? If I want to go to Yatala tomorrow and see someone who has been charged with the Snowtown murders—I am not sure if all of you are aware of them, but they are the most horrific murders here and we now know that there were cannibals involved in that—I can just go and see them. I will ring the prison system and say, ‘I want to see X.’ They will say, ‘Sure, what time can you come?’ They will not ask me whether that person has asked to see me. They will not ask me what area of law is being covered. They will not make those requests of me. This is for someone who has committed the most horrific crimes in South Australia. If I want to go to Baxter, I cannot do that.

What I think should happen right now is not only open and free access for doctors and an open assessment to make sure that we actually are diagnosing and treating people properly but also free access for the Legal Services Commission, which is the legal aid body, or anyone else who is willing to provide a free clinic to people in there. They could set up a clinic where people can come without any request or any form to fill out beforehand. Secondly, it is a breach of confidence for a client to have to tell those people who are detaining them what area of law that is being covered. That occurred right up until about two months ago, even with people in Glenside. I could not go to Glenside unless I had faxed Baxter first and said who I wanted to see, had proof that I was acting for them, stated the area of law I wanted to talk to them about and told them the time I was going. That is the real problem.

CHAIR—Ms O’Connor, do you want to wind up so we can get to some questions?

Ms O’Connor—Yes, that is about all I had to say actually. I know that I sound like I am on a roll here. There are three areas of concern. Firstly, it is all being done behind closed doors and we cannot find out about it. The Commonwealth put it in the case of X. They said, ‘We have to look at whether it is consistent with the kinds of mental health services that are available in the countryside.’ Justice Finn said, ‘You’ve built it in the countryside; it’s your fault.’ The reality is that Woomera and Baxter are so isolated that it is difficult to get there. You have to be really committed. Secondly, it is intimidatory to say to a lawyer, just because they are taking an application to get someone into hospital: ‘What about your costs? We will make you pay personally.’ I am a legal aid lawyer. I have taken some time off at the moment, but I am a legal aid lawyer on legal aid wages. Thirdly, there is the issue in relation to the uncertainty of

detention and what happens to people who are stateless. I am sure you would have had some submissions in that regard. I see that one of my clients, Mr Al-Kateb, has given a submission. His was a matter that went to the High Court in relation to statelessness. As I see it, they are the three main problems. I know that many people are addressing you about the process, but that has not been my area of practice.

CHAIR—Ms O'Connor, it has been put to us this morning by the Refugee Advocacy Service of South Australia that in fact the mental health situation at Baxter is in crisis.

Ms O'Connor—I agree—100 per cent. For me to get 13 clients in the last week who want to be transferred to hospital for proper assessment and treatment is extraordinary. How many long-term detainees are left there—about 30 or 40?

CHAIR—It has also been put to us that perhaps there are some genuine GSL staff who understand that this is the situation, but that when concerns are raised DIMIA do not respond, that in fact a wall goes up in relation to being alerted by GSL staff to some of the problems that detainees are having. Have you experienced that?

Ms O'Connor—The health problems?

CHAIR—Yes.

Ms O'Connor—It is a bit more complicated than that, because GSL contract out two sections of their health service. There is the IHMS, who deal with the psychological and nursing issues, and then there is the Carlton Medical Service, who deal with the general practitioner services. In fact a GSL officer informs one of those two filters and then those two private companies are meant to alert the psychiatric system. It actually does not go through DIMIA. DIMIA have washed their hands by having a private contractor and part of that contract is to then provide the mental health services. I do not think it is a GSL officer going through to DIMIA; I think it is what then happens in the systemic contracting out business.

DIMIA's view is: 'We've contracted that out. We're happy. We've done this accountability test and all the boxes are ticked,' but they have never actually said, 'This is the way you have to assess whether or not your service is working.' You get someone in to assess the detainees and say if they are ill and if they are receiving treatment, and then you look at the treatment and illnesses that are being diagnosed. That is the only way of doing it. You cannot turn around and ask, 'How often do you see people?' and decide that once a fortnight is okay. Some people need to be seen every day. I do not think it is as simple as a GSL officer going to DIMIA. DIMIA have washed their hands of it. They cannot, though, because they have a duty of care.

CHAIR—This government is building a detention centre on Christmas Island.

Ms O'Connor—That will be even harder to get to than Baxter.

CHAIR—I would appreciate your comments about lack of access to services not only from doctors, counsellors, psychiatrists and lawyers. What problem does that pose if the $220 million detention centre on Christmas Island actually opens?

Ms O’Connor—It poses all the problems—unless you have a properly funded legal service and medical service to give people the right to access those facilities. It does not matter whether it is in the middle of Sydney or on Christmas Island, access is one issue. People are then dependent on offering free legal services. You will be aware of the Woomera lawyers’ submission and you will know that a number of people travel up and down to Baxter all the time for free. That will not happen on Christmas Island—it is an island. We are also aware of what happens when people are outside a zone, where they have to get permission to go to that zone. I am concerned that the government could take away the ability of lawyers to go there for free. It is hard enough to see a client as it is.

It puts it be behind closed doors and out of sight. You see, the big difference between Woomera and Baxter is that you could drive up to Woomera and talk to people through the fence. You cannot do that at Baxter. There is absolutely no access to the outside world for people in Baxter. It is designed so that if you are in a unit you cannot see the outside world. You can only see the sky above you. And that means that people cannot see in, either. That has not worked; we are still hammering on the door, asking: ‘What’s going on here? What are you doing in our name?’—that is, the name of the Australian community. If you put them on Christmas Island, that is even more out of sight. So it is not just that issue of people going in there, it is the most important issue: you can do bad things to good people if they cannot be seen.

CHAIR—There have been some comments made this morning about the lack of consistency between the minister’s application of section 417 and 48B. It has been suggested that, in fact, problems occur with the ministerial investigation unit. When cases are presented to that unit, the regulations are not being applied consistently and therefore the minister is inconsistent as well.

Ms O’Connor—That is true.

CHAIR—Where is the responsibility? Is the responsibility at the feet of the minister to ensure that all cases are read, so that her own regulations are applied consistently, or does a lack of training of DIMIA staff lead to this?

Ms O’Connor—I think it starts way back at the beginning. The case officers do not have the appropriate training and understanding. There are stories all the time about particular case officers who have a consistently ignorant approach to a particular country or regional application—for example, a case officer saying to a detainee: ‘Well, I don’t believe you were locked up for nothing. What government would waste money locking someone up for no reason?’ That is a complete lack of understanding of what happens in Iran.

That is where the errors first occur. So you are then compounding the randomness of the situation. I know clients who have been transferred to another detention centre as they are about to be deported, then a lawyer gets hold of the case, we get a stay for a short time, and suddenly they have a permanent visa. There is randomness all the way through. If you made the case officer system more informed and appropriate and people were allowed to have legal advice before they presented their case to a case officer, I think all the rest of the randomness and accountability would not be a problem. That is the first thing.

The second thing is that I think the minister, of course, is entitled to delegate some of those functions, and you are also going to have a randomness. But because it is a rather closed process

you get all these fearful anecdotal statements, like when people assumed for a while that if you converted to Christianity you were more likely to get a visa. There was a view that if you contacted the press it would be a problem, then people started to notice those people were getting visas. Because there is inconsistency, there is then this anecdotal kind of approach of people advising people about what is important and what is not. The minister has to be able to delegate. In that delegation process there are going to be inconsistencies, but that is not where the problem is. The problem is right at the beginning.

CHAIR—Should there be a royal commission?

Ms O'Connor—Definitely. There definitely should be a royal commission into the processing of applications, into the conditions in which we keep people, and into the fact that there are no saving provisions in the Migration Act in relation to the length of detention and for people who are stateless. We have a High Court that says you can lock someone up until the state of Palestine is created. That is taking a long time. It was 1949, I think, when they first started hoping for a state. Yes, we have to have it across the board to see what has been happening in our names, as people who live in this country. We can then find out what has actually been occurring and comment on it. Too much has happened behind closed doors.

Senator NETTLE—You talked about how detention is one of the causes of mental illness. Do you have a view on whether or not the current system of mandatory detention, in itself, is punitive?

Ms O'Connor—It is definitely punitive. You take someone and lock them away, they have no freedom of movement, they have no freedom of association, and you detain them in environments like management units and Red One units. All the detention centres have those sorts of disciplinary environments. What part of that is not punishment? That is punitive. The only thing that is required under our international obligations—and, in fact, under the Migration Act—is that you hold someone while you process them. We all know that can be done in environments that are not razor wired or surrounded by metal fences or cameras, without people being allowed to come and go as they want.

We are supposed to be fearful of people who arrive by boat and not fearful of the five million people who come and go each year via plane. It is ridiculous. We have a former Liberal MP here who talks about quarantine reasons. You could fly to Iran and back and go into the largest populated school in South Australia tomorrow. There is no quarantine issue involved here. So, yes, it is ridiculously punitive—of course it is. You do not have to do it that way. We did not do it before 1992. There was no threat to security. Large numbers of people were not arriving and then dispersing within the community without being processed properly.

Senator NETTLE—You commented on the recent changes that have been made and whether or not they have had any impact in the community. I do not want to ask you to talk in too much detail about the cases you are dealing with at the moment, but are the people who are long-term detainees still in Baxter who have not been offered a removal pending bridging visa your clientele? Are they the 13 cases that you got last week? We are trying to understand. The government has made some changes, but the system of removal pending visa does not allow us to have any scrutiny of who does or does not get invited to receive them. What are the mental

health consequences of having a system like that for those continuing long-term detainees at Baxter?

Ms O'Connor—I do not think I could point to one thing as being the cause of the mental illness. The mental illness was probably something that they were susceptible to when they arrived because of the environments they had come from and was then compounded by conditions in detention. As I said earlier, sometimes you can release someone on a permanent visa and they will still be mentally ill. The reason I have been approached is that these people have not been released yet. Some of them have been processed and are just awaiting their date, but they are ill and their illness is not made better by a visa. It is about where they are located at the moment. There may be a number of reasons why they are not in some other environment. You know how long those character tests sometimes take—they can take weeks and weeks. People are getting ill in there.

Senator PARRY—I know that by the very nature of this inquiry we hear all the negatives, and that is what we expect. Can you point to any positives within the system that are good and should be retained?

Ms O'Connor—In the detention system?

Senator PARRY—Yes.

Ms O'Connor—I suppose if a case officer did their job properly, found someone to be a refugee and released them within the first six to eight weeks, that would be a positive. If at the end of the day 90 per cent of people were not genuine then you would say the case officers must be getting it right. But if eventually people are being processed and given visas then someone is making a mistake, and if case officers are getting it right and releasing people then that is a good thing.

Senator BARTLETT—Your court actions and a lot of the recent activity you have been involved in seems to go, as I understand it, basically to trying to ensure that detainees can get a mental health assessment. Is that right?

Ms O'Connor—I took the Al-Kateb case to the High Court. I argued the indefinite detention and lost in the High Court. Since then I have run a number of escape matters in the Magistrate's Court. Almost everybody got dealt with without conviction and put on a bond and the Commonwealth appealed every one of those. We then had to argue a justices appeal in the Supreme Court in relation to whether the punishment for escaping was fitting for the person who was before the court. Mr H was the worst, but almost every person the psychologist had seen was mentally ill. On appeal a couple of those people got convicted but there was still no penalty, so we had to go through that process as well. That was a very lengthy process. The others have been reviews of mental health treatment in detention. Sometimes physical ailments are not being dealt with, but generally it is mental health issues.

Senator BARTLETT—Given the focus of the Palmer report, I think there is a reasonable expectation amongst the community, as well as parliamentarians, that changes and improvements will have been made. Your evidence today suggests that there may have been some but there are still problems. Is that a fair summary?

Ms O'Connor—Definitely. As Dr Jureidini said in one interview, you could have 100 psychiatrists visiting Baxter every day and you would not stop the problem. The problem is being caused by the conditions in detention. It is like having a woman in a domestic violence situation—if you send a psychiatrist in to deal with her post-traumatic stress disorder from being beaten every day and she stays in the home where she is being beaten, you could deal with the problem while you were talking to her, but when you walked out she would keep getting hit and would stay ill. You have to remove the person from the environment that is causing harm and then treat them outside that environment. I think it was a lie to say that the increase in psychiatric treatment by just having psychiatrists visit more often dealt with those matters that Mr Palmer raised. He did not say, 'Put more psychiatrists in there.' I am not sure that, if you had had more psychiatrists in there, a case like Cornelia Rau's would not happen again.

Senator BARTLETT—There have been a number of questions and various bits of information over time about development of an MOU between DIMIA and the South Australian government to deal with mental health matters and to make things work better. What is your understanding of where that is at and how it is working?

Ms O'Connor—I have seen a copy of the draft MOU. I saw that when I was doing the S case. It was sent to my pigeonhole at work somehow. It seemed to me to have some areas which, if they could negotiate it, would ensure that once people are so ill that they should be in hospital at least they would be transferred.

At the moment, there is a determination by the head of Mental Health Services at Glenside that if a doctor sees someone on a video link, that is not sufficient for hospital detention under section 12 of the Mental Health Act. So for me to get a doctor to detain someone under the Mental Health Act, that doctor would have to travel to Baxter, assess someone and say, 'Yes, they should be in hospital.' They then could make the order and detain them.

I do not think that DIMIA, at the moment, would refuse to detain someone that a doctor has made an order for. But we have to get somebody up there all the time and we just do not have the resources to get people up there. The mental health system here is such that they will not accept people ordered to be detained on video. So that is a problem, and I think the doctors could sort that out themselves.

Senator BARTLETT—How potentially important is this MOU? It seems to have been in draft form for a long period of time. Will it significantly assist if it is agreed to?

Ms O'Connor—I suppose it is still the issue of the better equipped ambulances being at the bottom of the cliff. It is all very well to talk about that, but the reality is that minute-by-minute we are harming people by keeping them in that environment. They do not need to be there. They are simply being processed for the purpose of determining their refugee status.

Senator BARTLETT—You have had a lot of experience in immigration law, going through the courts and dealing with some of the hard cases or potential problem areas. Having that experience, do you see the core problems as mainly being with how the act is administered in the so-called culture we keep hearing about, or do you think we really need to look at significant reform of the law?

Ms O'Connor—I think the Migration Act needs to be reformed. I do not think it is appropriate that you lock people up for the purposes of processing and removal. Other nations do not do it; we never used to do it. You do not need to do that. There are clearly some people who ought to be locked up while you process them, and there needs to be a short time of detention for the purpose of assessing the nature of their claim and working through some very fundamental matters, but you do not need to do it that way.

The bottom line is that it is racist. If these people were travelling from a white country where they were escaping a regime that was not white—for example, a number of white farmers from the old Rhodesia, Zimbabwe, who managed to travel over here on a boat—we would not be locking them up in Woomera or Baxter. We would be opening our arms to them and allowing them to live in the community.

The reality is that it is based on a fear that the community has, in this present climate, of people from a Middle Eastern background, which is ridiculous. When you think about it, they were under the regimes that we also believe are wrong. We thought it was okay to invade Afghanistan because the regime was unfair. The same happened with Iraq. We thought that was okay. People are questioning Iran. Yet it is the very people opposing those regimes in those countries who are seeking sanctuary. The fear is based on those sorts of misconceptions within our community, and it is easy to feed on that sort of fear. We all know that there have been random acts of violence in the last five years across the planet by people who are the very people that our clients are suffering from.

Senator BARTLETT—Your last answer predominantly went to the issue of mandatory detention.

Ms O'Connor—That is right. That is the biggest problem.

Senator BARTLETT—My question is: do you see that as the biggest problem and are there other areas we should look at?

Ms O'Connor—I have addressed the issue of regulation. There has to be regulation for minimum standards. The act allows for regulations to be passed but I understand there never has been a set of regulations passed about minimum standards. There has to be, encompassed in the act, the right to legal advice before processing and the right to medical treatment and advice by a doctor of your choice, because we know it is not happening by discretion. So if you are talking about those sorts of issues, yes.

There are a whole range of things in the act that need to be tinkered with, but my area is in relation to the processing of applicants and how you do not need to lock them up to do that. We know that now. We do not lock women and children up any longer. Nothing bad has happened; the sky has not fallen in by making that improvement. And it took so much energy and effort to get that changed.

In relation to the conditions and the punishment regime once people are in there, I think it is wrong to tender that out to a private company. It means that there is very little or no accountability. I do not think the contract has been viewed properly or that there has been a

proper audit of any of the contracts in the areas that relate to the conditions in detention. There are a whole lot of problems with the Migration Act.

Senator KIRK—Thank you very much for your submission, Ms O'Connor. My question goes to the matter of regulations as to the minimum standards of detention. You touched on some of the matters that you believe ought to be included in those regulations. Can you elaborate a little more on the sorts of things you would like to see included in those standards?

Ms O'Connor—If we start with the premise that there is going to be a continuing private contractor, first of all a proper auditing of that system has to be set up for the regulations, not just a ticking of boxes, which I have seen. Up until April this year, one audit has been done of the health services in Baxter, and that audit was appalling. Anyone could have slipped through; Cornelia Rau slipped through that audit. That is the first thing: proper auditing.

Secondly, there needs to be a proper review. People need proper access. They need to be able to go in and assess the conditions in detention. You have to have new regulations on access to mental and physical health services and access to minimum recreational time outside the detention environment. All the time we hear the minister and those working for the minister saying that people are allowed on excursions, but none of the clients that I took had been on an excursion more than once. One client was taken night fishing in 2001 while he was in Perth, and we are now in 2005. He has not been outside the detention environment except when he tried to hang himself and was put in Port Augusta Hospital. That has to be included. You cannot create a management unit without people having access to facilities and not expect them to exit from that environment without some mental harm to them. As healthy and strong as I am, if I were put in there, after two weeks I would be climbing the wall, having nothing to do all day. So that has to be reviewed.

There needs to be a review of simple dignity issues. From the cameras I saw, I can see that there is no way that a female in those environments would not have been able to be viewed by any male who looked at the tapes. The tapes are fed through to the DIMIA office, and whoever is in the DIMIA office would be able to see her on the toilet or in the shower. That is appalling. You could not do that in a male environment. Searching should be only by people of the same sex. All those things need to be reviewed. If you are going to use the prison system as your system of detention, call it what it is: it is not a detention centre; it is a jail. From the point of view of human rights, at least have the minimum standards of a jail.

You are asking me to say how well the ambulance should be equipped. I am saying: do not throw people off the cliff. I cannot help but go back to that analogy. You do not need to keep people in this environment. You can drive down Grand Junction Road here and see the area where we used to keep Cambodian and Vietnamese people who were applying for asylum. There was accommodation and they could get out and about. The kids went to school and the parents shopped. They were processed, returned or given visas. That can still happen and that is what ought to happen.

Senator LUDWIG—I am curious as to whether or not you think Palmer represented a watershed and whether there has been a change in DIMIA. I know it is early days yet, but Palmer hit the nail on the head, I think, when he talked about the culture. Do you perceive a change or a fresh breeze coming through or that it is continuing in the same way?

Ms O'Connor—Palmer did not. Do you know what happened? A blonde Australian got detained, and that is what changed things. We did to someone something we would not excuse. That is the problem. The Palmer report has brought about some, I suppose, motherhood statements. I was in court after Palmer, trying to get a sick person into hospital. They are all in hospital now, I might add. They went to hospital before we had to argue for it, and I am told that I have to pay personally for the costs. That, to me, tells me that systemically it has not been changed.

After Palmer, I would have thought that I would just get a psychiatric report to DIMIA and say, 'This is what this client's going through, can you transfer him to a hospital?' They would ring me and say, 'Thanks very much for letting us know. He'll be on the next bus down.' But instead, I have to fight it in court. I think on the ground that culture has not changed. Unless you employ all new staff and management, I do not know how you could change that culture. I understand the head of DIMIA has a different culture. I hear that his approach is more open and I hear that he is more amenable to conducting the detention system in a way that sees people are treated properly.

How can you systemically change it? You have the same company operating the service and the same people providing the mental health and physical health services. The same manager is still operating Baxter. That manager did not lose her employment, was not made accountable or criticised at all, not only for what happened to Ms Rau—that was inexcusable; I am her lawyer so I would be the first person to tell you that—but in relation to all those other cases where the court was critical that they had not received appropriate treatment. She is still there. She still manages the place. So, no, I do not think it has made a difference.

Senator LUDWIG—Do you think the culture of concealment, cover-up and obstruction is going to continue and not only within the department? Do you think it goes to the ministerial area as well? The department now, under Mr Metcalfe, has indicated that they are going to do something. Are you saying that it has yet to trickle down?

Ms O'Connor—It has to trickle up. I am not happy with what the minister said. There have been over 800 acts of self-harm. What rate is that compared to the prison population? These people are not in prison. There has to be someone who is actually in charge of the department—because there are people in the same party who are obviously sympathetic—who says, 'If we're causing harm, let's make it better. If 800 acts of self-harm occurred on my watch or on the watch of the minister before me, I want to make this better, what can we do?'—instead of once again saying, 'What are these people doing that for? We don't know what that means.' Compare that figure with the jail population. It does not trickle down; it has to trickle up before it can trickle down.

CHAIR—We do not have any more questions. Thank you very much for making your time available and for the evidence that you have provided.

Proceedings suspended from 12.36 pm to 2.01 pm

JUREIDINI, Dr Jon, Private capacity

CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear?

Dr Jureidini—I am a child psychiatrist and a general psychiatrist.

CHAIR—The committee prefers all evidence to be given in public, but if at any time you have something you want to tell us in confidence or in camera you can ask that of the committee and we will facilitate that request. We have the submission that you have lodged with us and have numbered it 31 for our purposes. Do you have any changes or additions you want to make to that submission?

Dr Jureidini—No.

CHAIR—I invite you to make an opening statement. When you finish, we will go to questions.

Dr Jureidini—It is clear now that the implementation of immigration detention over the last five years has caused severe psychological damage to probably hundreds of detainees. Parents who previously had been competent have been crippled by their experiences to the point where they not only have they been unable to protect their children but they have directly harmed them children on occasions. All the children who have spent time in detention have witnessed frightening violence and adult self-harm. Most single men who have been in detention for longer periods are grossly damaged. Unfortunately we have little reason to expect that all or most of these detainees will recover from that experience. We do not know that they will not recover, but we have no good evidence to suggest that they will. The early signs are that many of them are still very incapacitated months and years after coming out of detention. So the long-term cost to individuals and the community is going to be great.

The psychiatric suffering, the morbidity, is a direct and predictable consequence of the enactment of indefinite mandatory detention, which is cruel in its outcome if not its design. The cruelness results from the harsh and restrictive environment in which we have kept these people as part of an overly punitive model of custodial care. It is also a consequence of outsourcing custodial and health care responsibilities, producing a system which is cumbersome, inefficient and ineffective. Our government has continued to implement indefinite mandatory detention in spite of information being repeatedly made available over several years to departmental officers, ministers and their advisers, and the Prime Minister and his staff that has demonstrated the severe damage being done to detainees, the inappropriate management and health care strategies being implemented by contractors and the fact that there are more humane alternatives. That information has been readily available to all the people with decision-making responsibilities for many years.

Mental health services in immigration detention have been poor, unresponsive and ineffective. However, no amount of strengthening of those services will solve the problem of the high levels of psychiatric suffering in and beyond detention, because the environment itself is so toxic. In

that toxic environment, meaningful treatment cannot occur. In addition to the damage done to detainees, there is damage potentially being done to custodial, administrative and health service staff in implementing the cruel policies of the government and its contractors. Therefore, any consideration that this committee makes of the ongoing health requirements in dealing with the aftermath of immigration detention will require giving consideration to assessing the wellbeing of current and former staff and implementing any necessary treatment that they require.

Finally, in addition to the damage done to the staff, there is likely to have been damage done to the community through the implementation of cruel practices in our name. Experience worldwide suggests that dealing with such social and cultural damage requires an acceptance of responsibility for wrongdoing at the highest level. Therefore, it is not likely that health services can help very much in healing the community in the absence of leadership by the ministers and Prime Minister in taking responsibility for the harm that has been done.

Senator KIRK—Thank you very much for your submission, Dr Jureidini. You mentioned in your opening statement and also in your submission that you think that some of the worst abuses come about as a result of the subcontracting of services to private businesses and poor collaboration between the contractors and DIMIA. Could you expand on that a bit more for the committee?

Dr Jureidini—I learned most about this in a period when I was responsible for the care of two patients—a husband and wife—while they were in Glenside hospital for a total of about six months. The patients were being guarded. I think it was still in the days of ACM. We learned what I think the detainees experience on a daily basis, which is that, when you want something simple done, the response is: ‘It’s not my decision. That’s not a bad idea but you’ll have to check with DIMIA.’ And then you check with DIMIA and they tell you that you need to go back to ACM. For example, we thought that it was an important part of the male patient’s rehabilitation that he have some level of physical exercise. He was in a confined space and we thought that it was very reasonable that he attend the hospital gym, as any other hospital patient is entitled to do. It took us something like four weeks to get permission for him to go to the gym.

There were some constraints from the hospital, because he had to fit in with hospital times, but there was a wide array of times when he could attend the gymnasium. But, in the end, it was only possible to get permission, from ACM and DIMIA combined, for him to attend the gym between three and four o’clock in the afternoon. He was responsible for caring for a very sick wife and, at times, his three children. So, clearly, there were going to be lots of occasions when it was not going to be possible for him to use the gym at that time. That in and of itself is not a particularly telling example, and whether or not they are able to get access to a gym is not going to change somebody’s life, but we found that there would be five or six issues like that on the go at any one time. And, on each and every occasion, there would be difficulty in identifying who was in the position to make a decision and difficulty in getting them to make a decision and then getting the other team—ACM or DIMIA—to act on the decision that had been made.

Senator KIRK—I would have thought that, once a person is put into an institution such as Glenside and put under the care and supervision of someone such as yourself, those decision would be left to the doctor and those in charge at the institution. But that is clearly not the case.

Dr Jureidini—No. We had to have head-to-head, stand-up arguments with people to get them to behave in a civil, ordinary way. One of the reasons that the female member of the couple was there was that she was extremely frightened of guards. We had secured permission for the nurses, instead of the guards, to act as the designated persons in relation to the wife but they would not give permission for that in relation to the husband. Because they had to keep an eye on the husband, they argued initially that they could come into the husband and wife's room at any time of the day or night in order to check on the husband's whereabouts. That issue was not resolved through the bureaucratic pathways, which probably would have taken weeks; it was resolved through me going head to head with one of the officers from ACM and, by force of personality, getting the thing change. Detainees have to grapple with that sort of thing on a day-to-day basis, and they do not have my authority, the freedom or the safety from which to argue the toss about something like that. They are coming up against that sort of thing minute after minute. I think it is quite knowingly cruel to treat people like that.

Senator KIRK—I assumed that once a person was in Glenside they would be under the care of the nurses and the medical staff there. I did not realise that there was still such an interventionist role played by DIMIA and ACM.

Dr Jureidini—I am not sure what it is like now, but it was certainly the case 18 months or so ago when that was happening.

Senator KIRK—That was one of my next questions—whether or not you have seen any changes in the last 12 months. Are you saying that you are not involved in that capacity?

Dr Jureidini—I am not directly involved. I understand now that the guards have a less pervasive presence in Glenside than they used to, but I am not sure.

Senator NETTLE—What is the situation now for long-term detainees who remain in Baxter and who have not been offered the removal-pending bridging visa? Are you able to talk about the impact of recent changes on the mental health of those people who remain in detention in Baxter?

Dr Jureidini—I have certainly seen a number of the long-stay people for assessments recently, some of whom have now been released. At the time I saw them they were still in detention so they have been able to tell me something about the experience of being the kind of dregs of the system in terms of remaining in detention when most other people have been released. That has been a further devastating experience for them. The way in which the system has always functioned is that people see other people getting released and remain behind themselves, in the vast majority of cases only to be released further down the track and to have their basis for refugee status approved, but in the meantime being subjected to months and years of denigration and mistreatment in the detention environment.

The smaller the number of individuals left behind the worse it gets, in a way. It is kind of distilled hopelessness, really. We know that it is not good social practice to group together people who have lost hope, because they feed off each other's hopelessness and things get worse and worse. There is, understandably, and rightly perhaps, a lot of concern about the level of protest and destructive protest that is engaged in by people. When you put them in untenable situations, they will respond violently. It is reasonable to be concerned about that. What people

do not grasp, though, is that when people stop protesting in this situation it is more often because they have got worse, not because they have got better. What you see is men who spend the vast majority of their time in their room barely interacting with other people and not causing too much trouble for the people managing the detention centre, who therefore think, ‘Well, this person is probably okay.’ That is such a naive and incorrect view, because these guys are just destroyed. I have not seen them get hugely better when they get out of detention. They do have an immediate sense of relief, as you would, being out in the world and appreciating open skies and being treated kindly and all those kinds of things, but my experience has been that, apart from a few very resilient individuals, they are very badly damaged.

Senator NETTLE—We have had copies of and quite a bit of evidence about behavioural management strategies that are used by the detention centre operators. The minister has talked in estimates about them using behaviour management strategies on Cornelia Rau, for example. Can you make some comments from your position as a health professional about whether those sorts of behaviour management plans are an appropriate way to treat somebody with mental illness?

Dr Jureidini—None of them is an appropriate way to treat anybody. The fact that they are labelled as behaviour management strategies gives them some kind of credence. It is an extremely punitive program. The program talks specifically about rewards; there are no rewards. People have absolutely everything taken away from them and then gradually get some of it given back. It is at times almost a sadistic mentality. One example is of a man that I saw who was getting married in detention to somebody who was not in detention. He had permission to get married in the visitors centre. He misbehaved in some way according to the rules of the detention environment. In response to that, he was told that he could no longer have guests or music at his wedding. The person in charge said: ‘I will be kind to you. I will let you go ahead and get married but you are not allowed to have any guests or music.’ What was particularly demeaning was that it was still a number of weeks between then and the time that the man was to get married and he was told that, if he was a good boy, he could earn back guests to his wedding at the rate of two or five a week, or something like that. An environment in which that level of capricious—I think sadistic—demeaning of somebody happens can never be described as a therapeutic environment.

The behaviour management strategies are the consequence of what happens when you set up such a closed environment. If you are going to have a place like Baxter, you are going to end up with something like the management centre. If you lock people up in a really restricted environment and treat them in a very depriving way, then eventually you are going to get people breaking in that circumstance. You have to do something with them. If you are going to keep them in the environment, you have to have a more and more secure place to keep them in. If you are going to get them to behave themselves in a way that is acceptable to the people managing the centre, you are going to have to be very punitive. You can dress it up and call it a behaviour management program if you like, but it is really a system of punishments. You have to be ‘good’ in order to earn your way out of a very depriving environment back into the ordinary depriving environment that is Baxter.

That is a horrible way to treat anybody, let alone somebody with a mental illness who probably cannot even play by the rules that they need to play by. I am not sure that it is healthy to play by those rules anyway—although it might be in your immediate best interests to do so—

but if you are mad and you cannot play by those rules then you keep bouncing back into the system and getting more and more mistreated.

Senator NETTLE—Minister Vanstone has recently made some comments in response to the release of figures of the number of incidents of self-harm that occur in detention centres. As a health professional, do you have a response to the way in which the minister has commented on those incidents of self-harm in the detention centres?

Dr Jureidini—I am not sure of everything that the minister said. I thought the number referred to the number of people who had self-harmed; I am not sure whether it does refer to that or to the number of incidents of self-harm. Nevertheless, it is a worryingly high number, particularly because it is probably concentrated amongst much fewer people than the number of people who have been in detention, because many of the people who pass through the detention system are in and out quite quickly. That number can only be taken very seriously as symptomatic of the fact that it is a sick system.

If we have very high levels of self-harm in a psychiatric ward, that is a very clear signal to us that something is wrong with the way in which we are running our psychiatric service. Even in that setting, we do not attribute the levels of self-harm just to the kinds of people we have in there. Of course, some self-harm occurs in psychiatric wards because you are grouping together people who are at risk of self-harm. In an immigration detention environment, when you are grouping together people who should not on average be at risk of self-harm and you find even low levels of self-harm, you should be worried. In this case we are finding, no matter how you are counting them, very high levels of self-harm. That is a cause for great concern. Anything that tries to explain that away is irresponsible.

Senator NETTLE—When people come to this country fleeing persecution elsewhere and they make their initial claim, do you have any comments on the impact that the trauma or the torture they have experienced elsewhere has on their capacity to give credible claims in the very first instance? I do not know if you want to comment on that.

Dr Jureidini—I do not have expertise on that kind of sociological issue about the behaviour of people who have escaped from persecution, but commonsense would tell you that you could not successfully escape from countries and regimes like these people have by telling the truth all the way out of the country. I would think you would have to lie and be mistrustful of people in positions of authority in order to successfully escape from a repressive regime, at least in some cases. It would hardly be surprising, then, if people were inconsistent in the stories they gave to authority figures when they arrived in our country. Our role should surely be to try to do the best we can to construct the most accurate story, and not try to catch them out with inconsistencies in the stories they tell. When people fear for their lives they will say what they think people want to hear. That does make it difficult. I think we have to be sympathetic to the people who are trying to find out the truth of what is going on; it is not a simple task. But it is not a task you should go into with the mentality of saying, ‘If I can catch this person out with one inconsistency in their story then it disqualifies them from being in the country.’ To me that would be inhumane and cruel.

CHAIR—How long do you think it is appropriate to hold someone in detention, if we are talking about, say, initial health or paper checks?

Dr Jureidini—I cannot comment on what the security demands are. Aspects of the government have been quite open in saying that nobody who has come through the immigration detention system has ever been shown to be a security risk. I do not know how long the government realistically needs to do security clearances, but I would have thought it was a matter of days rather than months. From a mental health perspective, I think that, if a place like Baxter were made less horrible than it is at the moment, people probably would not be harmed by spending a matter of days or a small number of weeks there.

CHAIR—As opposed to years.

Dr Jureidini—Yes. I do not think you can keep people in a closed detention environment, even if it is more humane than Baxter, for months and years without expecting to find significant psychiatric problems amongst at least a proportion of them. When you keep them for as long as these people have been kept, you are going to find significant psychiatric disturbances in all of them, as the research has shown.

CHAIR—Can you tell me about your experience with the management unit at Baxter. Originally it was built to temporarily house detainees who were violent or at risk of self-harm. Is that still the case or is it being used way beyond that original intention?

Dr Jureidini—I only have second-hand information about that so I cannot comment directly on it. Certainly, on the basis of the stories that people I have seen have told me, and what other corroborative evidence has been available to me, it does not sound like the security needs have been such that they should have required being in the management unit. But I am really not much use to you on that.

CHAIR—So would Cornelia Rau's detention in this management unit have adversely affected her condition?

Dr Jureidini—I think that is almost certain. From what I can gather about the management unit, I think anybody who spent more than a day or two in there would be adversely affected by it.

CHAIR—You were reported in recent weeks as saying that the Baxter upgrade will not stop the self-harm acts. No doubt you have a comment about whether providing a new sportsground and entrance is compensation for the treatment of people at Baxter.

Dr Jureidini—It is self-evidently completely useless to somebody who has already been badly damaged by what has happened. Having a different visitors facility when you are not capable of engaging with any other human being is not going to do you much good. Having sports facilities when you cannot rouse yourself from your room more than once a day to limp off to get something to eat is not going to be of any benefit to you.

CHAIR—Do you think it is a bandaid fix to provide these sorts of conditions rather than look at the systemic problems that exist there?

Dr Jureidini—It is not even a bandaid. It is a distraction in the sense that just by virtue of spending money we think we are doing a good thing. One of the tragic things, apart from all the

human loss and what we have done to ourselves as a society through this process, is the stupid waste of money that is associated with it that could be spent on better things.

CHAIR—We have got $220 million being spent on a detention centre that is being built on Christmas Island nearly 5,000 kilometres from Perth. What sort of impact will that have on people who may be either relocated or sent there as people seeking asylum?

Dr Jureidini—If a culture like Baxter developed there, which is quite possible, then the only way you could see it evolving, I think, would be into full-scale riots and bloodshed. To be unable to get people out to care for them when they are over the edge is a disaster, I think.

CHAIR—Do you have difficulty accessing Baxter yourself? Have you encountered any problems in trying to get in there?

Dr Jureidini—I have given up trying to get there in person, having encountered some difficulties nine or 12 months ago. All the work I have done in recent times has been by telelink. I do not know what would happen if I attempted to go and see somebody there again now. I have not tried for some time. The only way I have ever had any access to any detainees over the last year or so is when it has been arranged by a lawyer. I have given up trying to gain access myself.

CHAIR—Why is that? What forced you to come to that situation?

Dr Jureidini—Right from when I first started to work in the detention centres there were bureaucratic bungles. Two members of our team went to Woomera to see a series of patients. They ended up sitting in the Woomera hospital for the whole day and flew back to Adelaide without seeing a single person. They had not filled in the right forms and nobody would do what needed to be done on the day in order that they could see the patients they had come from Adelaide to see. You would go in and you would arrange a meeting with the health services manager and you would sit and wait for an hour, only to be told that the health services manager was somewhere else and was not going to be able to meet with you.

At the last meeting that I was in Baxter for, the operations manager from GSL behaved in a very intimidating and demeaning manner towards me and my team of staff who were there. I have been told on occasions that I could not go and see a particular person, that they did not need expert child psychiatric input, and that they had services in there readily available. After getting knocked back for a while and refused, if there is a way that you can do it that works a bit better, you give up trying to gain access.

CHAIR—It has been put to us this morning that the mental health system in Baxter is in crisis and witnesses today have called for an immediate mental health assessment of all refugees. Would you agree with either of those statements?

Dr Jureidini—Absolutely. The mental health system in there is like having a major fire in a building and somebody is in there with a little office fire extinguisher squirting away while the fire is raging around them. What is driving people mad is happening all around the health workers and the detainees all the time. How can a health worker help a detainee except by taking a little bit of an edge off the pain with some medication or providing a human ear? I am sure that it is not just health workers but other workers in the detention centre too who are trying to take

the edge off the pain and trying to do the right thing. I feel for them because I think that they are doing something that is part of an immoral system and they are going to be hurt as a result of doing their best in that environment.

CHAIR—Should we be embarrassed internationally by the way we now treat our refugees in this country?

Dr Jureidini—I am. Are you?

CHAIR—Unfortunately I get to ask questions at these hearings. Your experience would lead you to suggest that that is the case? Do you have contact with perhaps colleagues in your arena in other countries that raise this with you?

Dr Jureidini—Yes, I do, and it is regarded with some amazement by people from overseas that we behave like this.

Senator BARTLETT—Obviously there has been a lot of attention in recent months with the Palmer report about a range of things, including the mental health situation. Do you feel, following the Palmer report and some of the things that have been announced since then, that there has been an improvement?

Dr Jureidini—Yes, in the sense that there are people getting out. Clearly somebody somewhere thinks it is a good idea that people come out of detention, and that is good for the people who are coming out of detention. It is certainly better for them to be out of detention than in. But I cannot help but come back to this idea that there is a healing process for the detainees, for the people who have worked there and for all of us, and an essential part of that is the acknowledgment of responsibility for wrongdoing. This is what we apply on a day-to-day basis in working, for example, in the child protection or child abuse field. We think that healing cannot happen within a family until the person who has been responsible for doing the harm says, ‘Yes, I did it and I recognise that was the wrong thing to do and we need to move on.’

People are being let out of detention as though it is an act of generosity, as though it is something people have not known all along. The various ministers stand up and say, ‘We’re going to create a more compassionate system.’ You were the same people who gave us the less compassionate system. If you are now going to give us a more compassionate system, part of that is to say: ‘We’re really sorry. We did this the wrong way and we are now going to make a shift and we’re going to do things differently.’ That might seem tokenistic or something, but I think it is far from it, in fact. A genuine acceptance of responsibility for the harm that has been done is an essential part of the healing process for these people. That is not a moral or an ethical statement so much as a clinical statement. It is just in the same way that children cannot properly recover from the damage that is done to them by abusive parents until and unless that abusive parent says, ‘I was wrong and I did the wrong thing to you.’ That is an essential part of the healing process. It might not be realistic to expect politicians to do that, but it is something that, from the point of view of a psychologist, needs to be done in this case. To just dribble people out of detention, while it is infinitely preferable to them remaining within detention, is not actually resolving the problem.

Senator BARTLETT—Do you have a background or experience in dealing with people in a prison environment and some of the psychological consequences of that?

Dr Jureidini—I have quite a bit of experience dealing with youth detention environments. I have only a small amount of experience in dealing with prison environments.

Senator BARTLETT—How does it compare for young people—or others, for that matter—in immigration detention?

Dr Jureidini—When I went to Woomera, it was clearly worse than any jail I had been to, and I have been to the Adelaide Remand Centre and Yatala Labour Prison—I do not think Yatala is regarded as one of the prestige jails around Australia. I think Baxter is worse than Woomera. The environment—the physical environment and the pervasiveness of the security and so on—is at least as bad or worse than a jail environment. What makes this worse than being put in jail is the fact that, when you are put in jail, you are jailed after a court process which identifies a wrongdoing. You might not agree that you did that wrong, but at least that is on the table. It is clear why you are there: you are there because you did X, not because of who you are. People who are in immigration detention are there not for any circumscribed period of time but indefinitely, and not because of what they have done but because of who they are.

One of the things that get you through adversity is a sense of relatedness and a sense of identity. If you take somebody out of their usual circumstances and put them in a strange environment where they do not have the level of relatedness that they need to survive, then you are really pushing them back onto their own internal resources and identity to get through that process. So it is not an insignificant attack on somebody's identity to say, 'You're such a nonperson that we're going to lock you up.' The ability to survive an experience of being in immigration detention is more demanding, on average, than the ability to survive an experience of being in jail.

Senator BARTLETT—We have had a bit of evidence already today and elsewhere about the state of many of the people that are in the community, particularly those that are long-term detainees, that there are significant health problems. I do not know how much contact you have directly with many of those people, but is it pretty much too late for those people or is there more that we could do and should be doing specifically?

Dr Jureidini—I think that it is too early to say whether it is too late. The characteristic pattern that I have seen is that, with families, at least some members of the family in most families seem to go ahead and do okay after they have been released, but at least two or three family members usually struggle. That becomes worse rather than better with time. A lot of people have missed the opportunity to learn English, for example. They cannot concentrate well enough to get their English skills up to a level where they can become employable, and their sense of identity is largely organised around their professional or other qualifications. I fear that for those people it may be too late, they may never make what approximates a good recovery from being in detention.

Hopefully for the children it is not too late. There I think the importance is in recognising just how impaired people are when they come out of detention. There is a tendency to underestimate that. That does not just apply to immigration detainees; people on humanitarian visas are also at

great risk in that way. We cannot expect kids who have grown up their whole life in refugee camps to adapt to school in Australia in a year or two and then just kind of pick up the pace.

The other thing that counts against people's attempts to support people once they have been released from detention is how disintegrated the services are and how everything is subcontracted out. In immigration detention, it is subcontracted in a malignant way, with a very cynical form of care being provided. After release, the subcontracting is directed towards people who have the refugees' needs very much in the front of their minds and are trying really hard. Nevertheless, the subcontracting breaks up the resources. You have four or five different agencies doing something for a family all at once and then suddenly they all disappear and nobody is doing anything. When we keep subcontracting out services in this way, the risk is that people will not get the very specialised and prolonged services that they need.

Senator BARTLETT—Are you aware of the detail surrounding the negotiation of the MOU between the South Australian government and the immigration department around this mental health area—where it is up to and how significant or otherwise that might be?

Dr Jureidini—That memorandum of understanding was first raised 18 months or two years ago. I expressed reservations about it at the time, for the reasons that I have outlined today. I thought that having a more efficient system of dealing with those people who were identified as being mentally ill still relied on the system within Baxter to identify who was mentally ill. It risked colluding with—I will take a step back because I realise that I have not given the background to that.

One of the things about providing psychiatric services as an outside independent agency to somewhere like Baxter is what happens if you agree to do it, as we did for child and adolescent services in around 2002. What happened was that we got to go in a bit and provide some services to kids and families in detention. But we did not really feel like we were doing any good. We were bearing witness. We got the kids out for the day to take them to parks and things like that, but there was not very much psychiatric going on. Our concern was that what we were doing was making it look like these kids were getting the state's best child psychiatry services. We really had to weigh up whether we were doing more harm than good. By it appearing that we were coming in and providing psychiatric services, was that allowing the system to keep kids in detention for longer than they otherwise would, from damping down protest and so on?

When the memorandum of understanding came along I was worried that on the adult level it was going to do something similar. So far as I know the memorandum of understanding has not been signed. I still hold the same reservations about just upgrading the quality of mental health services that you provide, because I think it is the wrong level of intervention. There is a cliche about having an ambulance at the bottom of the cliff rather than stopping people from jumping off.

Senator LUDWIG—I just wanted to follow up from where Senator Bartlett was questioning you in respect of post release from detention, in terms of the range and availability of services, particularly for your area of psychiatric care and the like. You indicated that it was disjointed, contracted out and fragmented. Is it the experience across the board for refugees, both humanitarian and those that are released from detention centres, as far as you are able to say?

Dr Jureidini—Yes, it is in my experience. I do not have very much experience with refugees in those other areas, but the experience I do have is consistent with the fact that the whole range of services is very disjointed. The role of the lead agency seems to alter from time to time. In South Australia we have just had a change in lead agency. That seems to be as much about political game playing as about who can provide best service. I think it is really important for your committee to look at the whole area of integration and management of services for people once they have been released from detention, or once they arrive in the community, by whatever other means.

Senator LUDWIG—Is there a sufficient range of services available? Does it meet all the requirements or needs that you have identified? In your submission today you talked about a range of services that people may need, from children and adolescents to young adults and adults. There are different torture and trauma treatments.

Dr Jureidini—I think all the headings are covered. But whether people actually get the services they need when they need them and where they need them is a more difficult question. There are specific torture and trauma services. There are specific child psychiatry and adult psychiatry services. But there is a lot of: 'It doesn't quite fit for us. Perhaps you could take this one.' That is mostly out of people feeling uncomfortable, lacking confidence and feeling outside their area of expertise. There is mostly quite a bit of goodwill.

Senator LUDWIG—In terms of service delivery?

Dr Jureidini—Yes.

Senator LUDWIG—Does it compound it when the current government's policy is also to send people to regions? You might then end up with 30 people in Toowoomba—for argument's sake—two somewhere else and 20 somewhere else. So the group sizes are a lot smaller. Then there is the ability of regions to meet those requirements. Do you have any knowledge about that area, or a view about it?

Dr Jureidini—Only indirectly. There is not necessarily anything wrong with sending a group of people to a region, as long as you have planned it properly, you have thought it through and it is coherent and cohesive.

Senator LUDWIG—And the services are available.

Dr Jureidini—Yes. They might not need many services. If you set up a particular project, plan it properly and properly recruit people to it, it might work without a huge range of services. It is not just quantity of services that is important; it is the planning, quality and integration. What bothers me most is when you get some people being grossly overserviced and other people getting no services at all.

Senator LUDWIG—Do you expect this government to be able to do that?

Dr Jureidini—If the government cannot do it I do not know who else can.

Senator LUDWIG—No, I meant do you see this government doing that—planning for post-release detainees to ensure that they do have appropriate services?

Dr Jureidini—Wouldn't that be one really good way of making retribution for the horrible things that it has done to this population?

Senator LUDWIG—No, you missed the question. Do you see that as in fact in place now by this government?

Dr Jureidini—No. I think at the moment what is happening is that subcontracting is the pervasive thing. Also, overriding all of that is the Commonwealth versus state thing—what is a state responsibility and what is a Commonwealth responsibility. The confusion is really difficult for us. Can you imagine what it is like for people who do not have English as a first language? It just came into my mind when I had the experience of ringing the immigration department the other day and getting the message, 'Press 1 if ... and press 2 if ...'. I have pretty good English skills and I could not do it.

Senator LUDWIG—That challenges us all, that rotary dial-up.

CHAIR—Thank you for your efforts in giving a submission to this committee and making yourself available to meet with us today.

Dr Jureidini—I have a few copies of my opening remarks. Would like me to leave them with you?

CHAIR—Yes, you can table that. Thank you.

[2.47 pm]

BOYLAN, Mr Paul Ignatius, Woomera Lawyers Group

MOORE, Ms Jane Frances, Woomera Lawyers Group

MOORE, Mr Jeremy James, Woomera Lawyers Group

CHAIR—I welcome representatives from the Woomera Lawyers Group. To begin with, can you please state the capacity in which you appear.

Mr Boylan—I am with the Woomera Lawyers Group and I am a practising solicitor.

Ms Moore—I am with the Woomera Lawyers Group and I am a law student and social worker.

Mr Moore—I am a lawyer and a member of the Woomera Lawyers Group.

CHAIR—We have your submissions before us today. For our purposes, they are numbered 187, 112 and 165. Before I invite you to make an opening comment, do you have any changes or additions that you would like to make to your submissions?

Mr Boylan—No.

CHAIR—I invite you to make a short opening statement and when you finish we will go to questions.

Ms Moore—I will give a synopsis of my submission. I went to Woomera in December 2000 for the first time. Coming from a background in social work and having worked with children, I believe the environment there was a completely inappropriate one in which to accommodate and care for children. I realise you have just heard from Dr Jureidini and I imagine he has given you much information about children's psychological states, but the thing that appeared important to me was that the high level of security would have made the children feel that there was something wrong with them and that they must have done something wrong. Certainly, I was aware of children who said those sorts of things: 'What have we done wrong to be here?'

On walking into the centre it was distressing for me to see that at, say, about ten o'clock in the morning there might no children actually visible in the centre, which does not seem normal to me. I would imagine, at that hour of the day, that children would be running around and playing but I came to understand that the reason was that the detainees were probably generally pretty depressed and slept a lot of the day, so normal hours were not being kept there. In general, normal family routines could not happen either, because of the high level of security and the prison-like nature of the environment. The children were unable to function like normal children in normal families.

One of the most important things, I thought, was that the parental role was undermined simply by being in a high-security environment where people who the children would have seen as prison officers were the ones who had the say in what happened, not their parents. That was borne out in routines such as mealtimes—children could only have food then and their parents had no say or control over giving them food at other times of the day, which would happen in a normal family environment. It really concerned me that the whole nature of the place worked against a normal family being able to function.

When I went to Woomera on a few occasions there was certainly very little for children or adults to do. There was a general feeling of malaise and boredom in the place. All this caused a lot of family stress. Some things particularly concerned me because they indicated to me that the nature of detention had a lot to do with deterrence. For example, we knew of a family who on release were sent interstate rather than remaining in South Australia where they already had some contacts. There were people in the community who would have supported them and their child. There seemed to be no reason for that family to be sent to Darwin, which is a long way from Adelaide. Another instance of that was when a woman whose husband, I believe, is on a temporary protection visa in Melbourne was sent to Brisbane with her children. There was no apparent reason for that either. The only reason I could think of was that this was a policy of deterrence.

It concerns me greatly that we perhaps have yet to see the effect of the detention environment on the, I believe, more than 90 per cent of asylum seekers who now have visas and are living in our communities. I think it may be a long time before we truly understand the repercussions for those people of having been in a detention centre as children and having had a normal childhood stolen from them. Also, when they are adults, we may well have to deal with some of the fallout from that. It does not seem productive having people in detention for a very long time if they are, ultimately, going to end up as members of our community.

In my submission I recommend, primarily, that the Migration Act be changed. Mandatory detention is a problem. More importantly, the greatest problem is the indefinite nature of detention. I am sure that Jon Jureidini and others have attested to the effects of the indefinite nature of detention and the psychological effect that has on people. The other effect it has is that we are complicit in allowing such a fundamental breach of human rights to take place. We do not generally detain people indefinitely in our communities; why should we detain people who are seeking asylum here indefinitely—especially, why would we detain children, who have even greater needs—in that way?

The processing of refugee applications needs to be speeded up. Another concern is that sometimes asylum seekers go through the process and are then judged to be refugees and it is only at that point that health and security checks are then done, which only prolongs their detention even further. There seems to be no reason why that could not be done beforehand. I also believe that the location of our detention centres in remote outback areas is part of a policy of deterrence, regardless of what might have otherwise been said. I cannot see any reason for people to be detained so far away from centres where there are facilities available to deal with some of the issues that arise, particularly for people in detention, or just for people in general in our communities. Woomera detention centre was 5½ hours from Adelaide. That is a long way from health, psychiatric, psychological and other services. And it is a long way from the Australian community in general.

Finally I draw your attention in my submission to the plight of unaccompanied minors. I think there is still the problem of many unaccompanied minors who have had experiences that I wish they had not had in detention and now find themselves in the community. With protection visas they are, however, unable to be reunited with family members. I think we should do something about that because, if we have caused some problems for those young people in our detention regime in the past, it is now an opportunity to perhaps redress some of those things.

Mr Boylan—My submission is basically nine examples of how my clients and I were dealt with by the immigration department and the detention authorities. They are a few examples of the many instances where, basically, humanity went out the window when dealing with ACM, APS and DIMIA. I practised extensively in criminal law in the early part of my career. I have been practising for about 28 years. One of the examples shows how easy is it is to access clients at our prisons and how difficult it is to access our clients in our detention centres. I went to Woomera with Jane on 1 December 2000. We continued to go there until it was closed. I have also done a fair bit of work at Baxter, attempting more often than not to see clients.

Not only is it the humanity but the law—the law which I love and have dedicated my life to—that seems to have gone out the window with this regime. The very basic part of our common law is that we should not be detained without good reason and that we have a right to have that detention reviewed by a court. I acted for Ali Bakhtiyari, who, with his family, was deported from Australia on I think 28 December last year. Leading up to that, the current minister said several times of the Bakhtiyaris' plight that the courts had had a good look at it. That is all they were allowed to do. Our courts have never been able to review the facts of an RRT decision. People that are coming here claiming the protection of our country want to be here. They view our country as being fair and just. But they do not get the same treatment as we do under our law.

To take up something Jane put, on 11 September 2001, a bloke called Mohammed Haliji received the decision of the RRT that he was indeed a refugee. He was then held in Woomera pending the character and police checks. A check that the department wanted was that he had committed no crimes while living in Seoul prior to going to Iran, where he was subsequently imprisoned and from whence he came to Australia. It was quite clearly stated by the police authorities in Seoul that they would not bother giving that sort of information out, yet we had to take an application for habeas corpus before our Federal Court. I think the documents were filed in April and the first hearing was in May. You will see on the transcript that, when the Commonwealth minister was seeking an adjournment because her counsel did not have information the court required at her fingertips, she sought an adjournment for, I think, three weeks. Mr Justice Mansfield replied that he thought three hours would be more appropriate. The matter was adjourned for two weeks and Mr Haliji was released about seven days later. There was no explanation or reason whatsoever. The Seoul check had not come. Those sorts of things occur time and time again.

I point to the matter where my vehicle was stopped on the road outside Port Augusta. There was a current Federal Court order saying that that was not to happen, but it did happen. Those sorts of things continue to happen. For no good reason at all, we cannot see our clients; we cannot get access to them. Slowly, some of the really harsh things that we have done at Woomera have been replaced. We have released, in particular, the children. I cannot see anywhere that anything has changed that would dictate that particularly children should be released from

detention. No event has occurred that would make that somehow different now than it was the day Woomera opened. It seems to me that the regime is very much directed towards appeasing the Australian voter rather than considering the humanity of the people we are dealing with and in particular the rule of law, which is the basis of our whole society.

Mr Moore—I got to meet hundreds of people who went through Woomera, and they all said: 'Australia was known as the golden asylum. This was the best place on earth to come to.' They all got a shock, of course, because things had changed. The Woomera Lawyers Group was made up of just ordinary people—people who had a sense of fair play. What we tried to do was to get justice for the boat people from the Middle East. It is common knowledge that we went to all the courts that we could go to. We went to the Federal Court. We had to go to the Federal Court to get started. When we started there was no access for lawyers to the Woomera Detention Centre.

A *Four Corners* program, which was on television on 16 October 2000, showed that something was on the nose about Woomera. With that, I went off and found another lawyer who was working and who had some access to different information, and the word was out that I was in the game and available to help. On that particular day, I met a refugee who was locked up in the Adelaide Magistrates Court. So we started talking to refugees about providing assistance to them, trying to get their confidence. When it came time to visit Woomera, I wrote, as is proper, and I was fobbed off by the authorities. I then issued proceedings in the Federal Court, demanding that, as a lawyer, I be given access to people who wanted to see me. We got that access begrudgingly, and it was like that until Woomera closed.

We focused on Woomera only because we could not do everything—we have to know our limitations. We tried everything humanly possible to bring to the attention of the Australian people, the government and anyone who would listen to us the arguments as to why Woomera was wrong. I have said that we went to the courts. We went to the Federal Court, we went to the Family Court and we went to the High Court. We screamed and we yelled.

We went to the media. We got great coverage on the radio; we got great coverage on the television; and, of course, we did not get much of a run in the Murdoch press—there were no photos of any of the Woomera Lawyers Group in the Murdoch press that I can remember. We had songs written. We organised for children's artwork to be displayed all around Australia. We inspired the establishment of hundreds of groups around Australia advocating for reform for refugees. We went to the UN. We thought: 'This has to be a goer. We'll give the UN a call.'

We did more than that. We chased the UN and the UN sent his Honour Chief Justice Bhagwati, the former Chief Justice of India, which is the biggest Commonwealth country. He came and looked and he told everyone that Woomera was wrong. We did all of this. We lobbied politicians. And here we are today, at the end of the road, and it really comes down to the Senate being the only place where there is a real opportunity for democracy to do its work.

I have written lots of words on this page and I have lots of different notes about different things. Sometimes I have things written on the back of my telephone directory. We all have these telephone directories with everyone's names and phone numbers in them. We knew everyone around Australia who would help and occasionally someone would tell us something that was really important so we would write it down—things like harsh laws and severe punishments are

a sign that something is wrong with the state. That is from Confucius. There is something else from a Lutheran pastor. He wrote:

They came first for the Communists,

and I didn't speak up because I wasn't a Communist.

Then they came for the Jews,

and I didn't speak up because I wasn't a Jew.

Then they came for the trade unionists,

and I didn't speak up because I wasn't a trade unionist.

Then they came for the Catholics,

and I didn't speak up because I was a Protestant.

Then they came for me,

and by that time no one was left to speak up.

There were 4,000 children that went through Woomera and all of the detention centres in Australia. People have to keep in the backs of their minds that the refugee is the poorest of the poor and what we do to them we do to all of us. Hopefully I can leave you today with three words that I think are important—conscience, conviction and courage. I hope that you people can fix what no-one else has been able to fix—that is, this intolerable situation. I have said some very nasty things about politicians from each side of the parliament. It is not about that. It is very much about the sort of country that we want for ourselves and our children. We have to move on. Those are my opening comments for today. I am happy to answer any questions that anyone would like to ask me.

I have given you today an appendix that I think is quite helpful for anyone who is interested in the history of the detention centre. It is not a very long period from 1 December 1999, when Woomera opened. The worst thing about it was that it happened in my backyard and on my watch. I am an Australian lawyer. I was taught that liberty is sacred and that I could do something about this. A lot of other people took the same view. Collectively we have done our bit. We have not succeeded because Woomera is ready to go tomorrow. It is ready to take 800 people—women, children and men—and start again. That is why I think it is a good case study about the treatment of the boat people who have come to this country over the last five years—10,000 of them, 90-odd per cent of whom have been accepted as genuine refugees. None of them that I have met have been shown to be a serious risk to Australia as far as being a national threat.

Senator BARTLETT—You mentioned the Bakhtiyari case. It is not our role as a committee to pass judgment on the rights and wrongs of that, but I think it is certainly within our ambit to see if there are lessons that can be learned from it. There are regular complaints made, as I am sure you would know and would have heard, about the number of so-called unmeritorious claims

clogging the courts and leading to vast expense and delays. I think that for the Bakhtiyari case the figure of about 20 different proceedings or something like that was thrown around by the minister. Firstly, can I establish clearly—I do not know if you acted in all of those or just some—as far as you are aware whether any of those court cases involving the Bakhtiyaris actually went to the merits of their claim or the merits of their nationality?

Mr Boylan—I did not act in all of them. Most of the proceedings before the RRT and the Administrative Appeals Tribunal were handled by another solicitor in Sydney. I was involved in all of Mr Bakhtiyari's Federal Court appeals, Family Court appeals and High Court appeals. The Family Court appeals did go to the merits of the arguments; however, those merits were not relevant to whether the family should be given refugee status—it was simply how the children should be treated while they were in Australia's care. None of the others—the two Federal Court appeals or the High Court appeal—could actually go to the facts. They were only reviews of natural justice and whether they had received procedural fairness. Not in that case but in others, if you read some Federal Court judgments, it is not infrequent that the Federal Court judges have said, 'It's not the decision I would have made, but I'm not allowed to go there.'

Mr Moore—What happened originally was that Roqia Bakhtiyari, when she arrived in Australia, made an application with the assistance of a migration agent which included her and her five children. That application worked through the process. A review officer from the Refugee Review Tribunal made some pretty unusual findings. That was the decision. She had a very short period of time in which to appeal to the Federal Court. Appeals to the Federal Court were often successful at that time. We were involved in a number of appeals before the law got changed, and they were winning. The thing about her being an Afghani was that the Afghanis were really cautious and they did not trust anyone. A number of them just did not present for any assistance in relation to appeals to the Federal Court. She was one of those people. We just did not have the resources in any event. So no appeal was lodged, and so the original decision from the RRT stood. It has been very difficult in a legal sense from that point on.

Senator BARTLETT—I want to go to the point that you made, Mr Boylan, about the rule of law and those sorts of due process ideas. One of the things the committee can look at is whether there are changes to the act that we should recommend. I have been in the Senate for about eight years now. I have seen a lot of changes to the Migration Act, quite a number of which have purported to be to try to address this problem of migration cases clogging up the courts. Things seem to have got worse. Whether this is because of the law changes or other things is another matter. Do you have any views or suggestions about changes to the act that could be made that might actually address this problem? It seems to me that, if you actually take away people's opportunity to get proper examination of potentially flawed decisions, if we stop them going to court it means they spend longer in the courts trying to get the justice they should have got in the first place. I do not know whether that is making sense or not. Do you have any views about possible legislative changes that might assist in not having these sorts of situations happening again?

Mr Boylan—Let us start from the top down, with the separation of powers. Most lawyers are quite aware of the separation of powers and the separateness of the judiciary from the executive arm of government. When we confront people in these sorts of situations, we are almost incensed that you can never get a judicial decision; it is always a decision by the executive arm of government—from the very start, the delegate of the minister and the RRT. Even in the case

of the RRT, as Justice Bhagwati said to us, 'There's only one person on it—it's meant to be a tribunal.' He could not understand that.

If someone had received a decision from a federal magistrate, I think my advice to such a person as to whether or not to appeal would be very different, generally, from my advice to someone who had come up before a minister's delegate or someone who had come up before the Refugee Review Tribunal. I might respect the people in those positions, but I do not respect their knowledge of the law or their understanding of it. My understanding is that initially most of the RRT presiding officers were ex-DFAT people, people with a lot of training in diplomacy but who were constantly employed by the government and still contracted to the government. When I see that, I really do not get the feeling that there has been fairness or justice and I will advise people, if they can, to appeal. But if it were a Federal Court magistrate, I think my view of the situation and my advice to my client would be different.

Senator BARTLETT—So do you suggest we should significantly change the determination process we have at the moment and make it more of the judicial one rather than this mix that we have?

Mr Boylan—I really do think that you would have less clogging, upstairs, of the Federal Court and the High Court if you had a judicial officer who was able to review the facts. If we followed on with our current system, of course, you would then go all the way up, but I think you would find that you would not be getting appeals to the full court of the Federal Court and the High Court if there had been judicial consideration downstairs. Admittedly, it is practical for the first decision to be an executive one, because a large amount of people claiming the status have got it—a fair few of them at that very first assessment.

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

Senator BARTLETT—That inability to get advice, if you like, at the start meant a much greater delay?

Mr Boylan—Yes. That is coming to legal advice. To be out at Woomera was very difficult. We ended up hiring a house in the township so that we could have people there constantly and not be travelling from Adelaide—it is a five-hour trip from Adelaide; it is a long way.

Senator BARTLETT—I have one final question about the Bakhtiyari case. Answer it if you wish to; you do not have to. I am conscious of the dangers of focusing just on one or two cases, but we have heard fairly concerning allegations about the Kolas, Albanian-Serbian people, in recent times. I do not know if you are aware of those. There was certainly some concerning evidence presented by the Edmund Rice Centre and some allegations about the Bakhtiyaris in regard to the actions of the departments in producing documents that seemed to be dodgy, to put politely. Do you have any comments you would like to make on that sort of thing? Do you have

any first hand knowledge or views about that? They are serious allegations, but I take the opportunity to at least explore them.

Mr Boylan—Those allegations were developing in the last six months of last year. I was not particularly looking at the so-called dodgy documents. However, more documents were coming into our hands. One of my solicitors went to London and did some research in the national library there which pointed towards Mr Bakhtiyari's dad receiving a British Army pension, which was very indicative of him being a Hazara Afghani.

So there were more documents—and they are still coming, by the way. Identification documents from the village that Roqia comes from came in last week or the week before. Family members are now identifying the Bakhtiyari family. A highlight of the Bakhtiyari case was the rule of law and the laws of evidence. The RRT, in relation to Mr Bakhtiyari, considered articles written in the *Sydney Morning Herald* and the *Age*. Neither of the journos was asked to give evidence. What was written those articles was accepted as truth by the RRT. That just would not have happened if there had been a judicial decision.

Senator BARTLETT—I am not sure that I would like everything written about me in the newspaper accepted as truth on face value, I must say!

Senator NETTLE—We are currently operating in an environment in the Senate where the government is making a number of decisions in response to the Palmer recommendations. We are being constantly told by the government about different forms of the process that will provide detainees with safeguards in relation to the Ombudsman or whatever it might be. One of the safeguards which the government says is there to support detainees is IDAG. Mr Moore, I noticed in your submission that you commented on the relationship that you had with IDAG. I do not know how long ago your interactions with IDAG were, but I wonder whether you would like to comment on what kinds safeguards or avenues for appeal or fairness IDAG injects into the process of a detainee going through our immigration detention regime.

Mr Moore—The Immigration Detention Advisory Group is there to assist and advise the government. The first time I met them was when a great group of us had gone up to Woomera. We used to take up a large number of people, and on this day we may have had 20 people with us. We had travelled up on a Saturday. It was hot, and I was anxious to get to the detention centre because I knew that there were some really serious problems there. People were swallowing shampoo and, if they were not trying to commit suicide, they were certainly trying to self-harm. When we got to the gates, people were being carried out of their rooms on stretchers and other people were being taken down to the medical centre. I saw all this happening, and then a car came through the gate and I realised that it was carrying IDAG people. I had been to the detention centre on a number of occasions and seen their photos up on the wall. These were the government's representatives who, we could all be reassured, were looking after people by making sure that this place was run in a proper and reasonable way.

Seeing these people in front of me, I knew it was an opportunity for me to speak with them about what was going on. At that stage we had the confidence of most of the people who were in the detention centre; we had been acting for them in a number of different ways. When I saw the people from IDAG, I said: 'We really want to talk to you. It is important. We have not had an opportunity to meet with you and we would like to talk to you.' Begrudgingly, Harry Minas said:

'We're busy. We've had a big day and we want to go.' Paris Aristotle was there and he said: 'All right. I'll talk to you, but only for half an hour.' At that stage we had the Woomera Lawyers Group house. Paris Aristotle and Professor Harry Minas and a man who was an interpreter, I think, and also part of IDAG came to the house.

We wanted to talk to them about the serious issues that were facing these people at Woomera. There was a hunger strike on the go, I think, at this time. I will never forget talking to these people and saying to them, 'I think I can help and maybe I just might be able to stop what's happening.' Harry Minas said, 'I bloody well hope not.' That conversation went on for a little bit longer. We left and they then engaged in a process of negotiating the end of the hunger strike by foul means. They were the agents of government and they certainly, in my view, did not provide an independent view. In my time, I did not see any changes come about because of their efforts and certainly I think it is not a proper safeguard for people like this.

The problem is simply this. You can change the law. You can make the act 1,000 pages long or you can make it 23 pages long. But if you have a bureaucracy that is hell-bent on following a particular policy, which is to make it as hard as possible for these people to come here and stay here, so that a message gets sent back to where they have come from, 'Don't come here, you're not welcome,' then it does not matter unless Australian people say, 'We don't want that to happen.' The media were not allowed in there; lawyers were not allowed in there. Woomera opened on 1 December 1999. It took us until 1 December 2000. We are not migration lawyers. We are just ordinary country lawyers who knew something was wrong. If it had not been us, it would have been someone else. However, it was a bureaucratic plan to put this place in such an out-of-the-way desert that it was just about impossible. But we got a couple of lucky breaks. We got the names of a couple of people who were interested in wanting some assistance. With that—bang!—we were in there and we never let go.

This is not about a little finetuning with a jeweller's screwdriver. It is about coming back to the position that most people who came here as refugees were genuine. Either we have an obligation or we do not. If we do not have an obligation, for God's sake, let's get rid of those UN conventions because they just confuse us all. If we are going to say that we do respect human rights then, for God's sake, let's do it. Let's say that if someone comes here we will process them in three weeks. We will not lock them up in places like Woomera. We will put them in places next to townships and cities where there are proper hospitals. We had women who were having babies. These were women who had never had children before. They were taken from that place. They were taken to a public hospital. They were induced. Their husbands were not there; they had no friends with them and that is how they delivered their babies. You can write what you like in the legislation about those sorts of things, but how else is it going to come out? It is really about putting strict limitations on how long you can detain people unless you have a court order.

The Red Cross used to go to Woomera. People would say to me, 'The Red Cross is there; it's okay.' I knew the mother of a woman working in the Red Cross who said, 'Woomera's not that bad, Jerry. My daughter goes to Woomera and she said it's not bad and the management's pretty good.' I said, 'Okay.' I listened to that and put it to one side. What they did was that they had the Red Cross entering that place listening to refugees and helping those refugees maybe write to their families back home. That was the extent of it. But the rest of the world thinks the Red Cross is there; therefore it must be okay. The Red Cross were not doing anything. They did not complain about anything.

A friend of mine got cross about this. He went off and screamed and yelled at the Red Cross overseas, and we have seen some changes in how the Red Cross now behave. This act does not need just simple little changes; it is going to have to be really hard, solid things, like: 'You can't lock up people, women and children, for more than X number of days.'

Ms Moore—A suggestion from one of our group that she asked us to convey today was that there be a limit on the length of time that someone can be detained. I cannot remember how long it was. When that period expires, if the processing for the asylum seeker has not been finished, it should be deemed that they are accepted. That may put some pressure on the processes.

Mr Boylan—To answer your question, Senator Nettle, when the UAMs were threatening suicide en masse in January-February 2002, they spoke with us as a group on several occasions. As Jeremy said, we did have their confidence. It was a very serious situation. When they wanted to talk to IDAG, IDAG's response was, 'We'll only talk to you if the lawyers aren't there.' These were kids. They are useless.

Senator NETTLE—Mr Moore, in your comments you talked about culture. We have seen in the government's responses to Palmer that they currently claim to be addressing that culture. A lot of the examples that you are talking about are not necessarily in that period of time since Palmer to now. Have any of you seen any evidence of a change in that culture since the government made their recent changes as a result of Palmer?

Mr Moore—No. Woomera is still ready to go.

Mr Boylan—As is Christmas Island.

Mr Moore—Christmas Island has got a lot of cement there. They are ready to build some serious accommodation there. There has to be monumental change. Someone has to throw out the jeweller's screwdriver and talk about serious changes, like a time frame. We could have processed all these people offshore. The government are entitled to say, 'We really don't want people coming here by boat.' I can accept that. The reality is that we supported immigration processing facilities in Indonesia. We paid, as a country, for those facilities during the years 1999 to 2003. Hundreds of people came on boats, and they all ended up in Indonesia.

Without giving you a huge history lecture, people had two choices: they could go to the left side of the world and head to Europe, or they could go to right side of the world and head towards Australia. Australia was really the first country that they got to that was a signatory to the UN conventions. To get to Australia they needed to end up in Indonesia. Basically, you are entitled to go to Indonesia if you come from a Muslim country. There are no problems about getting a visa there. You could stay there for a few months without any trouble.

We had these facilities run by the UNHCR. One of them was in Lombok, I think. They could have processed all these people. None of them needed to come to Australia. We could have got serious about it. We could have sent up lots of people. They could have processed them and given them an answer. Hundreds of people did go through those facilities, and they were accepted as genuine refugees. My best information is that at a particular date in 2002—I think it was 31 March 2002—Australia took only three people who had been granted refugee status by

the UN. I do not know what their names were—whether they were Jack, John and Jill—but those three were the only people Australia took.

So we have a facility. People are encouraged to get in the line. There was a queue in Lombok. If you went through the queue and you were accepted as a genuine refugee with a UN stamp then you had to go somewhere. Australia's obligation was to take three—that is all. We have never been really serious about a fair go for these people from the Middle East on boats.

CHAIR—It has been the position of some political parties in this country that, in fact, we should deal with this on a regional basis. There should be more emphasis, in that case, on getting South-East Asian countries together to have a look at this on an international basis.

Mr Moore—I accept what you are saying. But if you have a mum and three kids in Lombok and dad is in Australia, you just do not have time. You have to do what is appropriate and that is what Australia should have done. That is our reputation around the world. We are the place of the fair go. In this instance, we have failed badly. We could have done better; we should have done better and we have to make sure that we do not do this again.

CHAIR—Do you believe refugees should have automatic access to legal representation at DIMIA interviews? Do you think they should have to tick a box to request that, or should it be an automatic right?

Mr Moore—They tell me in other countries that refugees are told the way it works in Australia: 'We're going to tell you the questions we will ask you. There are no trick questions in this. If you can answer the questions and we're satisfied you're telling the truth, you can stay.' That is how it works. It does not work in the way that we did it. We would have someone getting off a boat holding onto three kids, kids vomiting on the beach, and the woman would be interviewed for five minutes. 'What is the reason you came here?' It would all be written down, it would be recorded and then it would be used against her down the track. We were into catching them out because they are all liars and cheats. If you come from that basis, then anything goes. In a civilised country like ours, the home of the fair go, if we are so cruel and mean, what do we expect other countries to do? We should have taken in the woman and three kids, found somewhere where it was safe, dry and homely for them to live and then looked at their situation. If we could have helped them, we should have helped them.

CHAIR—In 90 per cent of the cases these people are genuine refugees and yet they spent months if not years, waiting for that decision. Is the system fundamentally flawed?

Mr Moore—Yes.

CHAIR—So what needs to be done to make significant changes to it?

Mr Moore—I think you have to throw out the act and throw out the jeweller's screwdriver, because it is not going to be fixed like that.

CHAIR—So is the minister the jeweller in this case? Does the responsibility rest with the application and interpretation of the regulations or does it stem from too much ministerial discretion?

Mr Moore—I do not think it is that simple. Our experience was that a culture emanated from above as to what the policy was and people did their bit to follow on. If it was not appropriate to be soft on refugees; you were hard on them. That was the culture. So it came down to those sorts of issues. If you give the minister carte blanche to do what he or, in this case, she likes then I suppose we can have another example of what we had at Woomera. We had lots of regulations about Woomera and immigration detention but none of them made any difference because they were just ignored. We signed up to all these UN conventions about respect for children, refugees and people coming here. We ignored every part of them. So I am not so sure that it is a discretion. I think it needs some pretty hard line positions such as you cannot lock anybody up for more than this number of days. If we come back to those basic things then the rest will all get sorted out. It is really about a limit on detention arrangements unless you have judicial review.

Ms Moore—I think inherent in legislation that legislates for indefinite detention is an attitude that will create a culture of breaching a fundamental human right. Would any of us accept that we could be detained indefinitely? And should we?

Senator KIRK—At the risk of sounding like I am just tinkering at the edges, I want to ask a few more questions in relation to the RRT. You have made some comments about that. Mr Boylan made the point about Justice Bhagwati saying that there was just a single member and how extraordinary that is. If we were to, say, tinker at the edges, do you have any views on whether or not we should increase the number of members sitting on a particular case, whether those people should have legal qualifications, the terms of appointment for those individuals and whether or not reappointment should be permitted? Have you addressed your mind to those issues?

Mr Boylan—Obviously my position is that it is practical to have a departmental decision as decision No. 1. The quicker we get to a judicial decision after that, the better. So, you are right: it is tinkering at the edges. Obviously if you have three people presiding it costs more but it is more likely that you will get a fair decision. I notice our juries have 12. As to legal qualifications, yes, I think you would get slightly better decisions if people were legally qualified. With regard to reappointment, I do not see a great problem with that as long as they do not go past 70, like our judges. How they are appointed is very important. It cannot be an appointment by the government of the day.

Senator KIRK—Judicial appointments are made that way too, though, are they not? So how do you overcome that?

Mr Boylan—If you are going to leave them until they are 70, it would, but hopefully we do not need that. It is not the type of system where you would need a whole lot of people appointed til they are 70. This seems to have happened in waves in the seventies, the eighties, the nineties and the 2000s. I suspect that enough resources were not thrown at the problem when this wave came. We coped extremely well with the last two waves—the Vietnamese and the Chinese.

Senator KIRK—I understand your preference is for these matters to be reviewed by the Federal Magistrates Court for the reasons that you outline—because of the separation of powers type issues. Do you think if the matter were to be reviewed by the FMC that the problems would be overcome, as you see them, about the absence of review on the merits that currently exist, or

would that be alleviated by having the Federal Magistrates Court look at the matter, as opposed to the RRT?

Mr Boylan—I think you would decrease the number of appeals clogging up the full court of the Federal Court and the High Court.

Senator KIRK—Just because of the perception of independence on the part of a court, as opposed to a tribunal? Is that the way you see it?

Mr Boylan—It is not just a perception. From the point of view of lawyers who are advising clients, it is a hell of a lot more than a perception. It is a very strong belief.

Senator KIRK—I would agree. Finally, you have made some comments in relation to detainees' access to legal advice. I think Mr Moore and Ms Moore made the point that, when you were attending Woomera, people were not even aware that they were able to see lawyers, and it was very difficult for you to get in. Has that changed at all?

Ms Moore—They were not even aware of the fact that they could have their spouse visit them at the beginning.

Senator KIRK—So there was a huge amount of misinformation.

Mr Boylan—There was not a visiting room.

Senator KIRK—Has that changed at all? If not, how can that matter be resolved? Should it be by legislation that a person must be advised of their entitlement to obtain legal advise? Then perhaps it goes to the culture issue that you were mentioning before—that just because it is written into the law does not mean it is going to occur. How do you see that changing at a practical level?

Mr Boylan—We are not allowed to advise people at level 1 unless we are migration agents. That should change, for sure. I cannot see that all the lawyers in Port Augusta or Port Pirie, where I come from, are going to become migration agents.

Mr Moore—The government, through the way it sets things up, had a system where migration agents were allocated to particular refugees. People would want to come and see us and they were told by DIMIA officers: 'You already have a lawyer. If you persist in wanting to see that other lawyer, who cannot help you by the way—here is a press cutting to show what sort of idiot, nuisance and troublemaker he is—we will cancel that one.' They say that even though they know that the first lawyer is not a migration agent and cannot help with a migration application. So I do not understand how you can, with your jeweller's screwdriver, write in another clause that is going to make that work. It has not worked before, because there is always a way around things. Someone might be able to have certain representation and certain opportunities, and I applaud that you are trying to find a better way. However, the reality is that there is no simple solution when you have people 450 kilometres away in the desert in South Australia who, in the early days, could not see a doctor. The medication they were offered was water, they were short on clothes, there were no phones available and all of those things. From

my recent experience, I do not see how it is going to help by changing an obligation to provide that.

Senator PARRY—Concerning the RRT, you were quite emphatic about the government not appointing the people for that tribunal. Who would do it if not the democratically elected government of the day? What is your suggestion? Do you have an alternative?

Mr Boylan—Perhaps this committee. If you are going to appoint people for a short period of time and people would obviously like to be reappointed afterwards then you have a problem. Basically, get rid of the RRT. But, if you have to do it, then do it in some way where at least it is not a decision of cabinet made behind closed doors.

CHAIR—Thank you Mr Boylan, Ms Moore and Mr Moore for your efforts in putting a submission together for our inquiry and for taking the time to appear before the committee this afternoon. It is much appreciated. The committee thanks all the witnesses who appeared today.

Committee adjourned at 3.53 pm