# GOVERNMENT RESPONSE TO

# SENATE COMMITTEE REPORT

## Legal and Constitutional References Committee, March 2006

## "Administration and operation of the *Migration Act 1958*"

May 2007

## GENERAL COMMENTS

The government welcomes the opportunity to provide a response to the Legal and Constitutional References Committee's Report into the Administration and operation of the *Migration Act 1958* ('the Report').

2. In developing this response, the government is mindful of the extensive material provided to the committee in the course of its deliberations, including the then Department of Immigration and Multicultural Affairs' (the department) submission of August 2005 (containing some 56 pages) and response to a request by the committee to address specific witness allegations arising out of the committee's inquiry, forwarded to the committee secretariat on 5 December 2005 (111 pages). The government notes that in furnishing this earlier material, the department extensively covered the broad range of issues raised and provided clarification about its processes and operations.

3. It is mindful too of the position taken by the government Senators on the committee, in that they were unable to agree with either the analysis or findings of the majority Report and expressed the view that the majority Report is substantially flawed by a biased and highly selective use of the evidence presented during the committee's inquiry.

4. The government Senators pointed out in their dissenting report that much of the material provided by the department on 5 December 2005 to deal with material critical of it was not included in the Report. They drew attention to the key elements of the government's reform programme announced since the Palmer and Comrie reports as they felt that these had not been adequately addressed in the majority Report of the committee.

## OVERVIEW OF REFORM INITIATIVES SINCE REPORT TABLED

5. The government has made a significant investment in the department's reform and improvement programme. Around $780 million in new and redirected funding has been committed. The new Budget measures announced on 9 May 2006 were informed by a number of departmental reviews that were recommended by Mr Palmer in his July 2005 report. These included reviews of business information requirements, IT platforms and governance, records management, the detention services contract, long term detention health services delivery, detention infrastructure and compliance activity. All of these reviews pointed to the need for further changes if the department is to meet the expectations placed on it.

6. By far the largest portion of the funding provided to the department in this year's Budget – nearly half a billion dollars - is for Systems for People. This substantial programme of work will deliver the kind of support departmental staff need to do their jobs properly. It will provide better data quality, a single view of a client's dealings with the department, less fragmentation of information and data, more flexible systems all of which mean better decision making. There is also a commitment of $42.5 million over four years in the Budget to support risk based compliance strategies, including deterrence and prevention and quality assurance measures. $22.6 million of that sum will be used to increase case management resources and implement a national case management framework. The framework will ensure that cases involving vulnerable clients with exceptional circumstances are managed in a fair, lawful, reasonable and timely way.

7. A major initiative to complement the case management approach is the implementation of the community care pilot in Sydney and Melbourne announced by the then

Minister for Immigration and Multicultural Affairs in May 2006. The pilot, which is being delivered in partnership with the Australian Red Cross and the International Organization for Migration (IOM), will assist the department's clients who are being case managed and who need either care in the community whilst awaiting their immigration outcomes and/or access to services to inform them of the immigration process, their likely outcomes and prepare them for their immigration outcomes.

8. The Secretary has made it clear to departmental staff over the past year that their job is to implement change and improvement and deliver the government's migration, multicultural and citizenship policies. This depends on careful planning, strong leadership and good administration. Also, longer term planning is being informed by comprehensive staff and client surveys. Much of that work has now occurred and the department is well advanced in developing a new planning framework for 2006-07 and beyond, underpinned by a strong framework of values and an articulation of the kind of behaviours expected of leaders in the department.

9. The Secretary has regularly written to a large number of key external stakeholders to update them on progress and seek their views on issues. Formal feedback sessions have been held with groups of clients and the feedback shows that while it has a long way to go in achieving excellence in client service delivery, there are reports of more positive experiences in recent times. The Minister for Immigration and Multicultural Affairs recently launched a client service improvement programme in Parliament House. This brings together the many strands of work being undertaken to ensure much better client service is provided. This programme develops themes of "our commitment, our presentation, helping you and hearing you". The Secretary reported earlier this year on the outcomes of the first all-staff survey in many years. The survey pointed to concerns about image, leadership and client service, all of which are being addressed.

10. In his opening statement to the Senate Legal and Constitutional Committee at the Budget Estimates hearings on 22 May 2006, the Secretary stressed how the department is absolutely determined to perform professionally, lawfully and reasonably. Its key themes of being an open and accountable culture, having fair and reasonable dealings with clients and well trained and supported staff are crucial to its future. It has listened to criticism, is learning from mistakes and is very much focussed on improvement. A detailed document was tabled by the Secretary at the 22 May Hearing showing progress on implementing the Palmer programme.

## OTHER ISSUES

11. In providing a response to this Report, it is noted that the government has not finalised a response to the Senate Select Committee (SSC) on Ministerial Discretion in Migration Matters. There are five recommendations in the Report which overlap with the Report of the Senate Select Committee. These are cross-referenced at Attachment 1.

## CHAPTER 1 – MINISTERIAL RESPONSIBILITY

### Recommendation 1 (1.37)

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

*Government response*

Not accepted.

## CHAPTER 2 – PROCESSING OF PROTECTION VISA APPLICATIONS

### Recommendation 2 (2.48)

The committee recommends that the Minister ensure all statements tabled in Parliament that relate to protection visa applications and review applications that take longer than 90 days to decide contain sufficient information to ensure effective parliamentary scrutiny of the visa and review determination process.

*Government response*

Accepted.

In accordance with the requirements of the Migration Act 1958 the reports include individual reasons for all applications not being finalised within the 90 day timeframe.

### Recommendation 3 (2.63)

The committee recommends that the *Migration Act* be amended to require that onshore protection visa applicants be given at least two weeks notice of the intention to make a negative decision with respect to an application. In addition, it is recommended that DIMA provide a summary of its reasons for its intention to make a negative decision and the applicant be given the opportunity to respond.

*Government response*

Not accepted.

The Migration Act 1958 already sets out comprehensive requirements for the disclosure of personal and adverse information for comment and response by the applicant and the appropriate timeframes within which applicants are to respond.

### Recommendation 4 (2.64)

The committee recommends that DIMA conduct an interview with all onshore applicants unless they are to be approved on the papers.

*Government response*

Not accepted.

In their dealings with the department prospective protection visa applicants are advised when completing the application form that a decision may be made based on the application and information they have provided. Because of the nature of claims made, the country of nationality concerned and the country information relevant to these claims, it is possible in many cases to reach decisions without an interview. In other circumstances an interview may be necessary.

**Recommendation 5 (2.65)**

The committee recommends that DIMA review the application forms and information sheets provided to offshore humanitarian visa applicants to ensure that they provide applicants with comprehensive and detailed information on the relevant visa criteria and assessment process.

***Government response***

Accepted.

The application form for an offshore refugee and humanitarian visa provides basic information relating to core visa requirements, family reunion provisions, the entry of minors under the offshore programme and the lodgement and processing of visa applications. There are also fact sheets and other information sheets that provide further details on the programme.

All publicly available information is regularly updated and new information sheets developed, where appropriate, to reflect policy and procedural changes. The department is also reviewing the way information is communicated to proposers under the Special Humanitarian Programme.

Also, the department is exploring ways of improving methods of communicating detailed information on offshore humanitarian visa criteria and assessment processes.

**Recommendation 6 (2.73)**

The committee recommends that the Government make training of interpreters a priority and establish a planned, comprehensive training programme to address the development and ongoing needs of interpreting services provided by or on behalf of DIMA.

***Government response***

Noted.

As part of their contractual agreement with the Department of Education, Science and Training (DEST) the Service Industries Skills Council has undertaken a review of career paths and training for interpreters and translators. The resulting report gives a profile of the industry and its stakeholders, describes the current training situation and investigates further training needs for interpreters and translators in Australia.

The report shows that there are currently no nationally consistent competency standards and no consistent approach to training for interpreters and translators. Whilst more discussion needs to occur among stakeholders around areas of debate including levels of proposed qualifications, nomenclature, and other issues regarding the development of competency standards, stakeholders consulted generally supported the development of a nationally endorsed qualifications framework for the interpreting and translating profession.

DEST will ensure that national competency standards and qualifications for interpreters and translators are developed. This work will involve consultation with all stakeholders on issues that need to be addressed, as described in the report of the Service Industries Skills Council.

### Recommendation 7 (2.74)

The committee recommends that a quality assurance process be developed and implemented to monitor and to report to Parliament through the department's Annual Report on the quality of interpreting services provided by or on behalf of the department (including the RRT and MRT).

***Government response***

Accepted in principle.

TIS National already has a number of quality measures presented in the Portfolio Budget Statement and reported against in the department's Annual Report. The quality measures cover aspects such as processing times for example providing an interpreter in a major community language within three minutes (telephone), or interpreter competence eg 90% of interpreter jobs to be done by a NAATI accredited/recognised interpreter (telephone).

In addition to these quality features, TIS National conducts an annual client satisfaction survey, which provides the opportunity for client organisations and individuals (including the department's staff) to provide comment on the capacity of TIS to meet language needs, service quality, conduct and professionalism of interpreters, satisfaction levels with TIS services and confidence levels of clients about its performance. The results of the survey will also be reported in the Annual Report.

### Recommendation 8 (2.109)

The committee recommends that the *Migration Act* and Regulations be reviewed as a matter of priority, with a view to establishing an immigration regime that is fair, transparent and legally defensible as well as more concise and comprehensible.

***Government response***

See comments under recommendation 9.

### Recommendation 9 (2.110)

The committee recommends that the review of the *Migration Act* and Regulations be undertaken by the Australian Law Reform Commission.

***Government response***

Noted.

The government notes the committee's comments regarding the *Migration Act* and *Regulations*. The committee's recommendation has been forwarded to the ALRC for further consideration as to any future work program.

**Recommendation 10 (2.111)**

The committee recommends that the review of the Migration Series Instructions, announced as part of the Government's response to the Palmer report, ensure that the Instructions accurately and clearly reflect and comply with the *Migration Act* and Regulations.

***Government response***

Accepted.

The department is progressively reviewing all compliance-related Migration Series Instructions (MSIs) to make sure they accurately and clearly state the law (as set out in both the *Migration Act* and the Regulations), make sense, are consistent with each other and are written in plain English.

This review will ensure that compliance-related MSIs are up-to-date and provide strong guidance to the department's compliance staff.

The revised MSIs will be made available to Senators by the department via the committee office.

**Recommendation 11 (2.112)**

The committee recommends that DIMA's approach to case management of protection visa applications be reviewed.

***Government response***

Accepted.

The Australian National Audit Office (ANAO) completed an audit report on the management of the processing of asylum seekers, which was published on 23 June 2004. The report concluded, inter alia, that:

> "...the Onshore Processing of asylum seekers is managed well. The overall standard of record keeping, including the documentation of the reasons for decisions was high. This reflects DIMIA's decision to use higher level and more experienced officers to make decisions in processing PV applications. These officers are also supported with appropriate training and guidelines" (Exec Summary at paragraph 18, page 5 refers).

Nevertheless, the department is continually re-evaluating and refining its approach to the case management of protection visa application processing.

The department commenced implementing a new case management service delivery approach from the end of January 2006. The new approach provides for the needs of vulnerable clients and/or those with exceptional circumstances to be managed in a more holistic and coordinated way. Following the 2006-07 Budget measure to increase the department's case management resources, its capacity to manage further clients under this approach will grow significantly as a further 37 case management staff are recruited and trained.

### Recommendation 12 (2.113)

The committee recommends that, as part of its new National Training Strategy, DIMA review the training methods and approaches for officers responsible for the processing and assessment of protection visa applications, with a view to establishing a planned and structured comprehensive training programme.

***Government response***

Accepted.

The department has had a comprehensive and formal training programme in place for protection visa decision makers since 1991. This programme is continually reviewed and developed to ensure that it continues to have a practical focus, reflects the learning needs of decision-makers on the job and provides a pathway for ongoing learning and development.

The review and development of the established training programme for protection visa decision makers is now being undertaken in the context of the department's new training strategy. The department's National Training Branch is providing an internal consulting service to the Onshore Protection area in this work.

### Recommendation 13 (2.114)

The committee recommends that the Government expand the responsibilities of its recently established College of Immigration Border Security and Compliance to include provision of training for officials responsible for the processing and assessment of protection visa applications.

***Government response***

Accepted.

The College of Immigration, which commenced on 1 July 2006, is initially focusing on developing training for compliance, detention, border security, immigration intelligence, investigations and case management. When these streams are complete it will commence work on other priorities including protection visas.

### Recommendation 14 (2.115)

The committee recommends that the ANAO commit to a series of rolling audits to provide assurance that humanitarian and non-humanitarian visa applications are being correctly processed and assessed.

***Government response***

Noted.

The committee's recommendation has been forwarded to ANAO to assist in their deliberations.

### Recommendation 15 (2.140)

The committee recommends that the Migration Series Instructions include a requirement that case officers treat 'dob-in' information with the upmost caution, particularly if the information is provided anonymously, and ensure that such information is provided to applicants and their legal representatives.

***Government response***

Accepted.

As explained below, the concept 'dob in' usually refers to persons alerting migration officials to overstayers or illegal workers. Given that the recommendation is in the context of people who are seeking protection visas it is noted that protection visa decision makers have clear instructional guidance, in the Protection Visa Procedures Manual, on the identification and assessment of evidence which is relevant to the protection visa decision, including on the need to assess credibility of sources. The Procedures Manual also sets out the arrangements to be followed in disclosing personal adverse information to the applicant to enable them to respond.

The existing National Compliance Operational Guidelines advise departmental officers who have collected dob-in information that regardless of the source, all information received must be verified. The guidelines instruct officers to verify information received by checking departmental databases, locating client files and previous applications, contacting overseas posts, conducting checks under section 18 of the *Migration Act*, conducting police checks, and conducting observations of an address of interest in order to ascertain the resource requirements of the operation, to verify the accuracy of the information and to assess access and containment issues.

Section 18 specifically provides:

> *'Section 18. Power to obtain information and documents about unlawful non-citizens:*
>
> *18.(1) If the Minister has reason to believe that a person (in this subsection called the first person) is capable of giving information which the Minister has reason to believe is, or producing documents (including documents that are copies of other documents) which the Minister has reason to believe are, relevant to ascertaining the identity or whereabouts of another person whom the Minister has reason to believe is an unlawful non-citizen, the Minister may, by notice in writing served on the first person, require the first person:*
>
> *(a) to give to the Minister, within the period and in the manner specified in the notice, any such information; or*
> *(b) to produce to the Minister, within the period and in the manner specified in the notice, any such documents; or*
> *(c) to make copies of any such documents and to produce to the Minister, within the period and in the manner specified in the notice, those copies.'*

The revised MSI on Visa Cancellation under sections 109, 116,128 and 140 of the *Migration Act* will instruct officers that they are required under section 120(2) and 121(1) to put all relevant information to a visa holder and invite the visa holder to comment on that information prior to cancelling the visa.

The MSI states that while generally a visa holder is entitled to know the substance of allegations or claims about them and have the opportunity to respond to them, sometimes information provided to the department by a person such as a dob-in caller may be non-disclosable information if the person asks the department that the information be treated in confidence and the delegate agrees that the information should be treated 'in confidence' or it can be inferred from the circumstances that the information should remain confidential. A breach of confidence may lead to legal proceedings against the department.

This instruction also advises officers that if information cannot be disclosed to a visa holder because it contains non-disclosable information, the delegate may give little or no weight to the information, release part of the information, or use the non-disclosable information to obtain other evidence which can then be put to the visa holder.

Under all of these disclosure arrangements the identity of the person providing the information would normally be treated as confidential. Our clients are entitled to know the content of the information, but not details of the person providing information unless that person has agreed to the information being disclosed.

### Recommendation 16 (2.160)

The committee recommends that the quality indicators for DIMA's offshore humanitarian programme and onshore protection visa processing be amended to include qualitative performance measures other than timeliness (such as the number and outcome of review applications and appeals).

***Government response***

Accepted in principle.

The department is already exploring the potential for broadening existing performance measures to include additional qualitative measures in the humanitarian programme. The onshore quality assurance process is currently under review to ensure consistency with the department's national quality assurance framework. This review will include the appropriateness of other qualitative performance measures.

### Recommendation 17 (2.219)

The committee recommends that visa applicants' legal representatives be accorded the right to participate in primary interviews conducted by DIMA.

***Government response***

Not accepted.

Applicants may request that their legal representatives be present at primary interview. However, these requests are considered on a case-by-case basis by the case manager. Attendance of another person may not be possible due to constraints on time and resources, or the case manager may decide that the presence of another person will actually hinder the interview. The representative does not have a right of veto over questions to be asked of an applicant or to respond on the applicant's behalf.

In order to decide an application, case managers may need to be able to discuss the applicant's claims directly with them and be able to hear the applicant clarify, in their own words, any issues that arise. The purpose of conducting an interview with a visa applicant is to provide the applicant with an opportunity to provide further information in support of their application.

If a legal representative is present at the primary interview, they also need to be a registered migration agent in order for them to lawfully provide immigration assistance to help someone apply to enter or to remain. It is against the law for a person who is not a registered migration agent to give immigration assistance.

### Recommendation 18 (2.220)

The committee recommends that the government institute and fund a duty solicitor scheme for all persons held in immigration detention (not solely protection visa applicants).

***Government response***

Not accepted.

The government is of the view that a duty lawyer scheme for all persons in immigration detention (not solely protection visa applicants) is not required. The government reiterates the evidence placed by it before the committee in relation to the access by persons in immigration detention to lawyers and their access to reasonable facilities. The department is piloting limited access to IAAAS services to certain clients in detention who are being case managed.

### Recommendation 19 (2.221)

The committee recommends that DIMA cease its practice of interpreting section 256 of the *Migration Act* narrowly which, in practice, limits access to lawyers. Detainees should be advised of their right to access lawyers, and lawyers should have ready access to detainees with the minimum possible restrictions.

***Government response***

Partially accepted.

The government agrees that people in immigration detention should have ready access to legal representation. However, it does not agree that the department's interpretation of section 256 of the *Migration Act 1958* is narrow. Detainees have access to legal representation on request.

There have been instances in which visits by lawyers and others to detention facilities have been refused for operational reasons. However, such refusals are rare and have generally occurred in relation to specific incidents of unrest or disturbance, during which the detention services provider may not have been able to guarantee the safety of visitors.

A review of complaints received by the department over the last year indicates that only one complainant raised concern about access to legal advice. This complaint was about access to immigration legislation at centres, not access to legal advice or legal representatives. The department has provided additional copies of legislation to centres and is currently conducting trial Internet access at centres which will further facilitate access to sites containing relevant legislation.

## CHAPTER 3 - SECONDARY ASSESSMENT OF VISA APPLICATIONS

### Recommendation 20 (3.198)

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

***Government response***

Partially accepted.

The allocation of revenue to the MRT and RRT is agreed annually between officials of the Department of Finance and Administration (Finance) and the MRT and the RRT. The level of funding is assessed against the number of cases anticipated to be finalised in the financial year, in accordance with a funding agreement between the agencies. The funding agreement is currently being reviewed by Finance.

**Recommendation 21 (3.12)**

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

***Government response***

Not accepted.

Sections 347 and 412 of the Migration Act 1958 state strict time limits for when an application for review must be given to the MRT and RRT. These time limits are generous and provide administrative certainty in government decisions. The Minister also has a personal non compellable power to allow a person to lodge a fresh protection visa application should this be in the public interest.

**Recommendation 22 (3.1)**

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

***Government response***

Not accepted.

The Tribunals are to provide a mechanism of review that is fair, just, economical, informal and quick. The process is intended to be non-adversarial and inquisitorial, and not a formal court hearing.

Section 366A of the Migration Act 1958 already provides for an applicant to be assisted during a hearing but not be represented. This assistance can be provided by a migration agent or solicitor.

Under sections 361 and 362 of the Act, the applicant may request to call witnesses and obtain written material. However, it is discretionary for the Tribunals to do so.

**Recommendation 23 (3.200)**

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

Not accepted.

Assistance is already provided at both the preliminary and review stages to those most in need. Assistance at preliminary and merits review stages is provided by the Department through IAAAS. The IAAAS funds selected registered Migration Agents to provide application assistance to Protection Visa applicants in immigration detention, disadvantaged PV applicants in greatest need (including Temporary Protection Visa holders) in the community, and disadvantaged non-PV applicants in greatest need in the community and immigration advice to disadvantaged members of the community in greatest need.

Application assistance provided under the IAAAS includes assistance to prepare the merits review application should primary application be refused and to explain the implications of visa decisions made by the department and relevant merits review tribunal.

In addition, the Commonwealth legal aid agreements permit legal aid commissions to provide legal advice, minor assistance and duty lawyer services for migration matters where the type of assistance required cannot be obtained through assistance schemes administered by the department.

Subject to merits and means tests, legal assistance for judicial review is available through Commonwealth legal aid for migration matters in the Federal Court, Federal Magistrates Court or High Court if there are differences of judicial opinion that have not been settled by the Full Court of the Federal Court or the High Court that relate to an issue in dispute in the matter, or where the proceedings seek to challenge the lawfulness of detention.

**Recommendation 24 (3.201)**

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

***Government response***

Not accepted.

The Migration Act currently establishes statutory obligations and exceptions concerning the circumstances in which information and documents are to be furnished to review applicants, dependent upon which Tribunal is considering the matter. Certain documents may not be disclosed because either they contain information about other people or it would not be in the public interest. Applicants are availing themselves of the opportunity to apply for access to relevant documentation under the provisions of the Freedom of Information Act 1982. Principles set out in the Privacy Act 1988 must also be followed.

**Recommendation 25 (3.202)**

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

***Government response***

Partially accepted.

In addition to a range of legal resources available to RRT members on the correct approach to assessing credibility and making credibility findings, there is a considerable body of relevant case law which RRT members are bound to observe. This judicial guidance establishes legal principles for the assessing credibility.

The RRT is currently developing, in consultation with the migration industry, a document that draws together guidance and information on assessing credibility. It is intended that this document will be of benefit to members, applicants and migration agents.

**Recommendation 26 (3.203)**

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

***Government response***

Noted.

Specific modules on the role of external oversight bodies and agencies in reviewing the department's actions and decisions are to be included in the department's programmes. This includes bodies such as the Ombudsman, the AAT, MRT, and RRT. The department is already working directly with the Ombudsman and the MRT and RRT in the delivery of training and the development of modules on their respective roles.

**Recommendation 27 (3.204)**

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

***Government response***

Partially accepted.

The RRT is currently developing guidance on its approach to credibility assessment. This will include general guidance on expert medical reports.

It is noteworthy that each member of the RRT must by law assess evidence for themselves. They cannot assess evidence by applying strict guidelines, such as a rule or policy that may result in a relevant fact not being taken into account. In assessing any medical evidence RRT members take into account the expertise and opinion of the medical practitioner and the source of the information. Members are required by law to determine for themselves whether the claimed history of events occurred and whether an applicant has faced or may face persecution.

The RRT recognises that it is vital to assess evidence properly, having regard to the particular circumstances of each case and to do otherwise would amount to a failure to exercise its jurisdiction lawfully.

***Recommendation 28 (3.205)***

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

***Government response***

Not accepted.

The Principal Member of the RRT has the capacity, through the provisions of section 443 of the Migration Act 1958, to refer the decision to the Administrative Appeals Tribunal, which may sit as a multi-member panel.

Members of the RRT are selected for their high level of skills and experience through a competitive nationwide recruitment process. They possess appropriate backgrounds and training to consider refugee and humanitarian applications.

## CHAPTER 4 – MINISTERIAL DISCRETION

### Recommendation 29 (4.122)

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

***Government response***

Not accepted.

A Ministerial intervention request is not a visa application process, nor is it a legal process requiring applicants to comply with statutory criteria. There is no format for making Ministerial intervention requests and persons may make multiple requests to the Minister seeking intervention. No professional assistance is required to make a request for Ministerial intervention, although it is open to a person to make their own arrangements for migration agent assistance, if they choose to do so. Nonetheless, arrangements for supporting the Minister for Immigration and Multicultural Affairs in relation to her intervention powers are being further explored and the department is considering developing further case management processes for supporting clients. The views of the committee will be taken into account in this area.

### Recommendation 30 (4.123)

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

***Government response***

Not accepted.

It is not practical to consult individually on the content of DIMA's submissions to the Minister as this would undermine the personal non-compellable nature of the intervention power and would pose significant and unacceptable costs for DIMA. It could also create extensive delays in resolving intervention cases, with cases where the Minister was minded to intervene taking longer to be submitted for consideration.

DIMA is exploring opportunities for notifying individuals where their request for intervention is assessed as meeting the Minister's guidelines and referred to the Minister for consideration for the exercise of her or his public interest powers. DIMA is also exploring options for advising persons whose requests are assessed as not meeting the Minister's guidelines of the reasons for such an assessment.

### Recommendation 31 (4.124)

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

***Government response***

Not accepted.

People who are the subject of a request for ministerial intervention have already been through the visa application and merits review process and have not met the criteria for the grant of a visa. Existing arrangements enable bridging visas to be granted to persons whose cases are under consideration by the Minister for possible intervention, and for holders of such bridging visas to be granted work rights where they would suffer financial hardship.

There is a need to ensure that the making of a request for ministerial intervention does not result in undue expectations that the Minister will intervene. There is also a need to achieve a balance between providing an appropriate level of support to such persons, while preventing abuse of the protection visa and intervention processes by those merely seeking to delay removal action and gain access to attractive benefits while their case remains unresolved.

DIMA is developing a community care case model which will enable the provision of selected support services to identified groups and individual clients who require support and assistance until they receive an immigration outcome.

### Recommendation 32 (4.125)

The committee recommends that the Minister ensure all statements tabled in Parliament under sections 351 and 417 (which grant the Minister the discretionary power to substitute more favourable decisions from that of the Tribunals) provide sufficient information to allow Parliament to scrutinise the use of the powers. This should include the Minister's reasons for believing intervention in a given case to be in the public interest as required by the legislation. Statements should also include an indication of how the case was brought to the Minister's attention by an approach from the visa applicant, by a representative on behalf of the visa applicant, on the suggestion of a tribunal, at the initiative of an officer of the department or in some other way.

***Government response***

Partially accepted.

Statements tabled in Parliament under sections 351 and 417 of the Migration Act 1958 are prepared in a manner consistent with existing legislative requirements. Any circumstances by which the case was brought to the Minister's attention that would identify the person cannot be included in the tabling statement.

Cases are drawn to the attention of the Minister by the Department on the basis of departmental assessments that they meet the guidelines for referral. Departmental assessments draw on information from a range of sources not limited to, or necessarily related to, material submitted in requests for intervention. Publication of this information would convey an erroneous impression that there is some necessary causal link between the source of intervention requests and the outcome of those requests.

### Recommendation 33 (4.126)

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

***Government response***

Not accepted.

The existing provisions of the Migration Act 1958 allow for ministerial intervention in the public interest to deal with any cases where non-refoulement obligations under the Convention Against Torture and the International Covenant on Civil and Political Rights exist for non-Refugee Convention grounds, and for cases where continued stay on Convention on the Rights of the Child grounds is in the public interest.

The Department continues to monitor and advise the Government on the operation of the Migration Act and Regulations.

## CHAPTER 5 - MANDATORY DETENTION
## CHAPTER 6 – MANDATORY DETENTION IN PRACTICE

### Recommendation 34 (6.15)

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

***Government response***

Accepted in principle.

In June 2006, the department concluded an internal review into the operation of the Merit Points Scheme and Meaningful Activities programme (MPS) following the release of the Roche Report which examined the detention services contract. The MPS was designed to provide detainees with a degree of empowerment and control over their day to day life by engaging voluntarily in useful and meaningful activities that contribute to the care of themselves and the detainee community. The internal review recommended a number of amendments to the policy underpinning the scheme to further improve detainee's health and well-being, and in July 2006 the Minister agreed to implement the new Purchasing Allowance Scheme (PAS) together with a broader programmes and activities initiative.

Under the PAS, all detainees receive a weekly allocation of points that enables them to purchase of incidental items. A minimum number of points are allocated to detainees for incidental purchases regardless of any participation in the programs and activities initiative. Detainees can also accrue extra points by participating in a broad range of programs and activities including life-skills, sport, computer training and English classes.

The PAS and new programmes and activities initiative is currently being implemented across all immigration detention centres.

### Recommendation 35 (6.34)

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

***Government response***

Accepted in principle.

The operating procedures for Management Support Units (MSUs) were developed by the department in consultation with the Ombudsman's office and approved in August 2005. These procedures ensure that placements in more restrictive detention only occur where there is no viable alternative, for as short a time as possible, and under strict health and welfare and reporting requirements. All placements are reviewed by a formally structured Placement Review Team which includes specialist health providers (including mental health).

Contracting of health and psychological services in immigration detention will pass to the direct management of the department. This was one of the recommendations made in the Roche Report. The transition occurred in September 2006.

The department has established the Detention Health Advisory Group (DeHAG) to provide it with the necessary independent, expert advice to design, develop, implement and monitor health care services, including mental health care, for people in immigration detention centres and related facilities. Issues pertaining to care and management of detainees will be referred to DeHAG for expert advice.

### Recommendation 36 (6.35)

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

***Government response***

Partially accepted.

The operating procedures for MSUs ensure that placements in more restrictive detention only occur where there is no viable alternative, for as short a time as possible, and under strict health and welfare and reporting requirements. All placements are reviewed by a formally structured Placement Review Team which includes specialist health providers (including mental health).

In addition to these procedures, placement in an MSU must now be endorsed within 24 hours by the department's First Assistant Secretary, Detention and Offshore Services Division. Since October 2006 the MSU at Baxter has been used for administration and storage by the onsite Facilities Management contractors. It is no longer used as an MSU. The MSU at Villawood IDC remains operationally ready for use if required, however, it is current practice not to use the MSU, with its last use being in early February 2006.

**Recommendation 37 (6.36)**

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

***Government response***

Partially accepted.

The High Court in 2004, in the case of *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 208 ALR 271 reiterated the right of any person in immigration detention to have recourse to the civil courts if they allege that they have suffered injury as a result of the negligent act of another while they are in immigration detention.

In May 2006 the government endorsed departmental principles guiding immigration detention. Those principles include that detention service policies and practices are founded on the principle of the duty of care; people in immigration detention are carefully and regularly case managed as to where they are to be located in the detention services network and the services they require; and people in centre-based immigration detention are to be provided with timely access to quality accommodation, health, food and other necessary services.

The government is exploring the options for the making of the immigration detention standards into appropriate regulations in the Migration Regulations.

**Recommendation 38 (6.44)**

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

***Government response***

Accepted in principle.

A review of the DSC was finalised prior to publication of the Report. In March 2006, a Detainee and Visitor Complaints Management Project was initiated. The scope of the project involves establishing a centralised client feedback mechanism, with a principal focus on complaint handling and reporting.

Part of the project, involves the development and release of posters to assist detainees with greater knowledge of complaint processes, including the department's service guarantee of open and transparent monitoring and reporting of resolutions and outcomes.

As an interim measure, and to assist in the reduction of confidentiality breaches and potential victimisation, the existence of the department's Global Feedback Unit (GFU) is also being notified in all immigration detention facilities as a confidential method for complaint submission and resolution via telephone.

### Recommendation 39 (6.45)

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

***Government response***

Accepted.

In the view of the government, HREOC could have an unrestricted express statutory right of access to all places of immigration detention, if it requests it. Amendments to the Migration Act 1958 made in November 2005 expanded the power and role of the Commonwealth Ombudsman to contact a person in immigration detention where that person has not made a complaint to the Ombudsman.

### Recommendation 40 (6.46)

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

***Government response***

Accepted in principle.

Independent complaints bodies, specifically the HREOC and the office of the Commonwealth Ombudsman, already undertake regular visits to detention facilities.

In 2005 the HREOC visited IDFs 3 times and the office of the Ombudsman visited 14 times. In addition to visits by representatives of their offices, the Human Rights Commissioner and the Ombudsman personally visited some facilities. HREOC and representatives of the office of the Ombudsman are also in frequent phone contact with complainants.

Both bodies have rights to seek entry to immigration detention centres to investigate complaints and also can and do undertake their own inquiries into aspects of immigration detention.

Given the Ombudsman's expanded role in matters of immigration detention it is anticipated that the Ombudsman's office representative will be visiting more often as a matter of course.

### Recommendation 41 (6.58)

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

***Government response***

Accepted in principle.

The Immigration Detention Standards (IDS) outlined in Schedule 3 of the DSC, set out the Detention Service Provider's (DSPs) obligations to meet the individual care needs of detainees and maintain the good order and security of IDFs.

The Roche Report recommended that the IDS should not be used to directly drive performance but to guide and inform the operation of the detention system as a set of overarching principles, and that performance should be driven by a more focussed system, concentrating on systemic issues and quality improvement.

Variations to the current DSC arising from the Roche recommendations were signed on 29 September 2006. These variations include novation of health services, purchase of professional cleaning and catering services, and the introduction of a new performance management regime. New input measures were also included in the contract in the areas of cleaning, catering, education and recreation. These were informed by industry standards.

The contract variation introducing the new performance management regime removed measures and sanctions associated with the IDS, but retained them in the DSC as a set of overarching principles. A new performance management system, which uses risk assessment to identify and address areas requiring quality improvements, is being established in accordance with the contract variation.

The IDS relating to health are being examined in the novation of health services from the existing DSC with a view to making them consistent with recognised health standards and performance measures.

Operational procedures have been developed to provide guidance to DIMA and DSP staff on the ground regarding how to undertake their duties consistent with contractual obligations. Operational procedures have been reviewed on a regular basis.

The Palmer report recommends that the department review its MSIs. All MSIs are being reviewed in the context of a Department-wide Instructions Reform Project. The Detention and Offshore Services Division in the department is conducting a review of key detention related MSIs during 2006. Included in this review are key compliance MSIs some of which will be completed or well advanced by December 2006, with the remainder of the compliance and other Departmental MSIs being reviewed by December 2007.

**Recommendation 42 (6.58)**

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

***Government response***

Accepted.

Pursuant to section 256 of the Migration Act 1958, all people in immigration detention have the right to request access to all reasonable facilities for obtaining legal advice or taking legal proceedings in relation to his or her immigration detention. In addition, a detainee is free to request that a person visit them, subject only to reasonable conditions in which the visit is to take place, and subject to the good order and security of the immigration detention centre. No detainee is compelled to receive a personal visitor if they do not want to see them. Amendments to the Act to this effect will be considered as part of a broader policy review.

**Recommendation 43 (6.60)**

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

***Government response***

Accepted in principle.

Detainees have access to legal representation on request, as required by section 256 of the *Migration Act 1958*. Upon arrival at an IDF people are informed, as part of the induction process, of their right to receive visits from their legal representatives, their right to contact them by phone and to receive and send material to them via fax or post. Facilities, such as interview rooms, are available to support access to legal representatives.

People in detention who seek a protection visa or a review by the RRT of a protection visa decision are offered publicly funded professional assistance with those processes through the Immigration Advice and Application Assistance Scheme (IAAAS). IAAAS assistance must be provided either by a Registered Migration Agent (RMA) or, in the case of Legal Aid Commission IAAAS providers, a person who is an "official" within the meaning of section 275 of the *Migration Act*. Individuals are not obliged to take up the offer of IAAAS assistance. They may choose privately funded alternatives and can change their privately funded representation.

Lawyers are generally given unrestricted access to their clients in immigration detention. This can consist of visits or video conferencing during normal business hours and after hours in emergency cases, or providing advice to detainees by telephone at any time. Private interview rooms can be arranged by contacting the DSP in advance, as access to these private rooms is subject to competing operational requirements.

Access to lawyers and other visitors is not restricted other than in exceptional circumstances and never for disciplinary or behavioural purposes.

The attached information brochure (Attachment 2) on visits has been produced (and is available at all IDFs) as an interim measure to improve communication with visitors pending completion of a comprehensive review of visits policies and procedures.

As part of that review, a survey to obtain feedback from visitors on their experiences of visits to IDFs has been completed. Legal representatives were also included as a target group of the survey.

**Recommendation 44 (6.134)**

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

***Government response***

Noted.

The imposition of a liability to pay the Commonwealth government for the cost of detention is a complex issue and must be considered in the context of the broader Commonwealth policy on debt recovery. Also, any change to the current policy will require an amendment to the Migration Act 1958.

The government will investigate this recommendation further and will report its findings to the committee.

**Recommendation 45 (6.145)**

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

***Government response***

Not accepted.

It is not appropriate to have an arbitrary time limit of up to ninety days established regardless of the circumstances of the case.

The policy of mandatory detention is to ensure that people arriving unlawfully do not enter or remain in the Australian community until any claims as to their rights to be in the community are properly assessed and they have been found to qualify for entry or to remain in Australia. The policy also ensures that essential health, identity and security checks have been conducted in each case.

The policy also ensures that unlawful arrivals who are found to have no grounds for entry to Australia or do not establish a legal claim to remain in Australia will be detained until they are available for removal from Australia.

This policy is an essential element in maintaining the integrity of Australia's planned migration and humanitarian resettlement programs.

Immigration detention centres are managed in accordance with the principles (amongst others) that "people are detained for the shortest practicable time, especially in facility-based detention" and that "families with children will be placed in facility-based detention only as a last resort".

Approximately half of all people currently in immigration detention have been detained for less than ninety days.

**Recommendation 46 (6.146)**

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

***Government response***

Not accepted.

Australia's immigration detention policy has been maintained with bipartisan support since 1994. Immigration detention plays a significant role in maintaining the integrity of Australia's immigration programme, and achieves a number of policy objectives. It ensures that those who arrive unlawfully do not enter the Australian community until their identity and status have been properly assessed and they have been granted a visa, that they are available during processing of any visa applications and are immediately available for health checks, which are a requirement for granting a visa. Immigration detention also ensures that if applications are unsuccessful they are available for removal from Australia.

It is worthy of note that the Commonwealth Ombudsman has been given powers of reviewing cases of immigration detention. The Migration Act 1958 was amended on 29 June 2005 to require the Secretary to report to the Commonwealth Ombudsman on persons who have been detained for two years or more, and then every six months thereafter if the person is still in immigration detention at those times, and for the Ombudsman to provide assessments and recommendations relating to those persons to the Minister, including statements to be tabled.

### Recommendation 47 (6.147)

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

***Government response***

Noted.

The broader issue of support for bridging visa holders is being considered as part of the review of bridging visas the department is conducting. The government will consider this review.

## CHAPTER 7 – OUTSOURCING OF MANAGEMENT OF IMMIGRATION DETENTION CENTRES

### Recommendation 48 (7.132)

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

***Government response***

Not accepted.

The government announced, as part of the Roche Review, that these services will continue to be provided by external service providers.

### Recommendation 49 (7.133)

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

***Government response***

Accepted in principle.

To determine how best to implement the recommendation of these reports, DIMA appointed an independent consultant, Mr Mick Roche, to examine the DSC and its management. In his review, Mr Roche recommended that the department introduce a number of changes including to:

- novate the health and psychological services sub-contract to the department's direct control;
- revise contract management arrangements and monitoring of contract performance;
- establish a National Detention Services Monitoring Unit, based in National Office, Canberra;
- amend the contract to address issues in the insurance and liability and indemnity regime;
- review the fee structure under the current contract;
- encourage GSL to trial model(s) for enhanced Detention Service Officer (DSO)/detainee interaction;
- review the operational procedures with GSL; and
- review and update the requirements for the detention services Expert Panel.

The department completed negotiations in response to Mr Roche's recommendations in September 2006 with the contractual variations signed on 29 September 2006. The variations to the DSC included:

- the novation of the health and psychological services sub-contract to the department's direct control;
- new contract management arrangements and new contract performance management system;
- amendments to address issues in the insurance, liability, and indemnity regime raised by the ANAO;
- provisions requiring professional cleaning in all detainee occupied areas; and
- provisions regarding input measures for catering, recreation and education.

In addition to the contractual variations, DIMA and GSL agreed to the implementation of a trial model(s) for enhanced DSO/detainee interaction. The Detention Services Expert Panel is currently being examined, and the review of operational procedures is ongoing.

The fee structure under the current contract was reviewed during the negotiation process. DIMA and GSL agreed that amendments to the fee structure were not feasible for the duration of the current contract. The department will however, consider changes to the fee structure during the tender for a new Detention Services Contract. Likewise, new governance arrangements were considered, however it was decided that the current system should remain for the duration of the contract.

The Detention Services Tender Branch is continuing to co-ordinate the department's strategy and expectations for the next tender process. The new DSC will have a greater focus on clients, health, and psychological services.

**Recommendation 50 (7.134)**

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

***Government response***

Accepted.

The government accepts the recommendation that a statement of detainees' rights and conditions be established within the Migration Regulations, including clear provisions for the making of complaints to a third party, and third party powers to make rectification orders. This will be addressed in a broader review of detention policy reform, which is envisaged to be completed in 2007. It is noted that the Commonwealth Ombudsman and HREOC already have powers in relation to complaints.

**Recommendation 51 (7.135)**

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

***Government response***

Partially accepted.

The government in 2005 provided the Ombudsman with powers and additional resources for dealing with Immigration matters, in particular, detention issues. His enhanced role in this area includes establishing an expanded programme of regular visits to detention facilities, the development of an inspection function for people in detention facilities and in community detention and important changes to the arrangements for the provision of health care to detainees and the setting of appropriate standards for that care.

In accordance with the recommendations of the Roche report, the department has commenced establishment of a performance monitoring unit that will operate independently of both the department's contract management function and the DSP. This unit will monitor the standard of service delivered to detainees, and report to the department's management at a level above that of the officers responsible for day-to-day centre operations or contract management. It will also deliver feedback to the DSP to facilitate continuous improvement.

## CHAPTER 8 – TEMPORARY PROTECTION VISAS, BRIDGING VISAS AND COST SHIFTING

### Recommendation 52 (8.34)

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

***Government response***

Not accepted.

The temporary protection visa arrangements play an important part in the range of strategies put in place by the government to counter the surge in unauthorised boat arrivals in 1999. These arrangements reduce the incentive for people to engage in unnecessary, unlawful and often dangerous attempts to travel to Australia without authority.

### Recommendation 53 (8.68)

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

***Government response***

Noted.

The department is currently conducting a review of the bridging visa regime. The government will consider this review.

### Recommendation 54 (8.70)

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

***Government response***

Noted.

The department is currently conducting a review of the bridging visa regime. The government will consider this review.

### Recommendation 55 (8.115)

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

***Government response***

Partially accepted.

The department is always looking to improve the delivery of settlement services to ensure the needs of our clients are met. The department works with settlement service providers and other government agencies to help newly-arrived refugees, humanitarian entrants and migrants settle successfully into Australia.

The significant needs of the African humanitarian case load were a key consideration of the department's *Review of Settlement Services for Migrants and Humanitarian Entrants* released in May 2003. The Review identified a number of strategies to improve programme responsiveness to changing settlement priorities and improve integration between settlement and mainstream services. The review was informed by public consultations, attended by over 1000 people and through more than 140 written submissions, including from state and territory government agencies. The 2004 Budget provided an additional $100.9m over four years to strengthen settlement programmes in the department and complementary programmes in other agencies.

The department introduced a new model of the Integrated Humanitarian Settlement Strategy (IHSS) on 1 October 2005. The IHSS provides intensive settlement support to refugees and humanitarian entrants in the first six months after arrival. The key component of this new model is case management, which involves an assessment of individual and family specific needs and the delivery of a package of services through a case coordinator which addresses those needs. There has been a substantial increase in IHSS funding in recent years, from $31.6m in 2003/04 to $62.0m in 2006/07.

A new Settlement Grants Programme (SGP) commenced on 1 July 2006. The SGP provides settlement support and community capacity building to refugees, humanitarian entrants and family stream migrants with low English proficiency for up to five years after arrival. The funding priorities of the SGP are determined through an annual assessment of settlement needs. This approach ensures that the services provided through the SGP are targeted towards those communities and locations in greatest need of settlement assistance, and are responsive to changing settlement patterns and needs. The 2006/07 budget for the SGP is $30.8m.

The government also funds the Adult Migrant English Programme (AMEP) and TIS. AMEP provides up to 510 hours of English language tuition to eligible migrants and humanitarian entrants. The 2004 Budget allocated an additional $36.8m over four years to extend the Special Preparatory Programme (SPP) to provide up to 400 hours of English tuition to humanitarian entrants under the age of 25 years who have low levels of formal schooling (ie 0-7) and to supplement the existing hours offered up to 100 hours for those aged 25 and over. TIS provides translating and interpreting services 24 hours-a-day, seven days-a-week from anywhere in Australia.

While the government funds a range of settlement services to help newly-arrived refugees, humanitarian entrants and migrants settle into Australia through the department, many of the on-arrival and longer term needs of new entrants are most appropriately addressed through mainstream services.

The department liaises with a number of other government departments on the delivery of programmes for new arrivals, such as: the Culturally and Linguistically Diverse Employment Strategy and Action Plan with DEWR; the Newly Arrived Youth Support Services initiative with FaCSIA; and Family Relationship Services for Humanitarian Entrants with FaSCIA.

The Department of Health and Ageing, state health departments and the department are currently part of a multi-jurisdictional working party to provide advice to Health Ministers on the health care of humanitarian entrants and refugees and to explore options to improve the way health care is provided.

A high level Inter-departmental Committee (IDC) on Humanitarian Settlement has recently been formed to address the high levels of disadvantage amongst recently arrived humanitarian entrants and to improve whole-of-the government coordination. The IDC aims to determine ways to improve the delivery of the government services to humanitarian entrants, with a focus on improving health, education and employment outcomes, planning, and early intervention services.

## CHAPTER 9 – REMOVAL AND DEPORTATION

### Recommendation 56 (9.28)

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

***Government response***

Not accepted.

The *Migration Act*, as amended by Parliament in September 1994, provided specific powers of removal for unlawful non-citizens, without the need for a deportation order. If an unlawful non-citizen is in immigration detention, and has no outstanding visa application on foot, including merits and/or judicial review of any visa refusal, the *Migration Act* requires that the person must be "removed" from Australia (section 198).

Pre-removal risk requirements were addressed in the department's instructions for use of departmental officers, formalised in MSI 408 – *Removal from Australia* - which was issued in November 2005.

These included that a person is not to be removed until a number of steps are completed. A DIMA Senior Executive Service officer or State/Territory Director needs to sign off on an assessment that the person is available for removal. This assessment includes nine points covering matters such as that there are no outstanding identity concerns, confirmation that there are no unfinalised visa applications, court actions or Ministerial Intervention requests and no unresolved substantial claims against removal by parties, for example by the Ombudsman and UNHCR. For involuntary and high risk voluntary removees a check is made that the removal would not breach Australia's international humanitarian obligations. A removee is also assessed to determine that they are fit to travel by medical staff.

### Recommendation 57 (9.29)

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

***Government response***

Not accepted.

All removees are provided with a minimum of 48 hours notice of their departure. However, there is an operational requirement that in some cases a person may be given less notice of their removal. If a departmental officer believes that there is significant risk of the person harming themselves or another person or if there is a risk that the removal may be disrupted (by a third party) a shorter notice period may be considered.

National security considerations may also result in a shorter notice period. The department is bound by the Aviation Security Regulations in managing the risks to aviation operations posed by potentially disruptive removees.

A departmental SES level officer or state/territory office director must approve any request to provide less than 48 hours notice of removal and reasons must be clearly articulated.

**Recommendation 58 (9.85)**

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

***Government response***

Not accepted.

The department noted in its response to the Ombudsman's report on the administration of section 501 of the *Migration Act 1958* (as it relates to long-term residents) that any recommendation relating to reviewing or implementing changes to policy or legislation is solely a matter for the government.

A major departmental review of the policies and procedures for section 501 was initiated by the Minister for Immigration and Multicultural Affairs in November 2005. The terms of reference for this review include consideration of *"whether the Ministerial Direction and MSI should be revisited to reflect the government's expectations of the circumstances where a person's visa should be cancelled"* under section 501.

***Recommendation 59 (9.119)***

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

***Government response***

Partially accepted.

Australia continues to cultivate bilateral and multilateral relationships with various countries, particularly those in Asia Pacific region, to address the full spectrum of refugee issues and continues to work closely with key international refugee and migration organisations such as UNHCR, IOM and NGO peak bodies to deliver assistance to refugees and asylum seekers throughout the world.

Australia takes seriously its obligation not to refoule refugees and does not remove people where this would be in breach of its protection obligations under the Refugee Convention and other relevant human rights instruments. Monitoring, by its very nature, would be intrusive and could draw unwelcome attention to the individuals concerned and to those with whom they associate. This is consistent with general international practice for countries returning failed asylum seekers to their country of origin.

**Recommendation 60 (9.120)**

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

***Government response***

Accepted.

The department issued a revised Removals Instruction (MSI 408 - Removal from Australia) on 1 November 2005. This instruction details the consideration that is to be given to post-return arrangements for removees with special needs, for example, those with physical or mental health issues or those who are destitute.

Before a person is removed from Australia, their fitness to travel must be assessed by qualified medical staff. This process will highlight any physical or mental health issues that may require the department to organise post-removal care or referral for the person. The special arrangements put in place will vary according to the circumstances of the case, but may include special escorts and/or arrangements for individuals to be met upon their arrival by medical and/or welfare staff.

If a person is destitute then the department may provide them with a small allowance that will allow the person to obtain accommodation, purchase food and arrange travel back to their preferred destination within the country.

The department also offers reintegration packages, administered by the IOM, to eligible groups. These packages include a cash allowance and where possible, certain post-arrival services such as orientation briefings.

When appropriate, removal officers coordinate post-arrival arrangements for clients with special needs with the Australian mission or a medical/welfare group in the destination country.

Clients with special needs may also be encouraged to seek assistance from their consulate/government, to help with support arrangements once they return home. However, this relies on the willingness of the person to make such contact.

The reception arrangements, if any are required, are detailed in the removal planning documentation. Also, the escorts are required to complete a post-removal report and provide this to the officer coordinating the removal.

The report includes information on the arrival at the destination including who met the client on arrival (if applicable). The removals officer checks the report and addresses any matters requiring follow-up or referral. The report is retained on the client's file.

## CHAPTER 10 - STUDENT VISAS

### Recommendation 61 (10.72)

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

***Government response***

Accepted.

In 2004, DEST conducted a review of the Education Services for Overseas Students Act 2000 (the ESOS Act). Following the evaluation, the department has worked closely with DEST and the education industry in revising the ESOS National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students (the National Code). A number of proposed changes have been agreed with the education industry and are scheduled to be implemented progressively in 2007.

Revisions to the National Code will result in corresponding changes to relevant migration regulations, systems and policies regarding the Student Visa Programme. These changes are designed to allow for greater flexibility and discretion in dealing with breaches of the conditions of student visas. These changes to the National Code will come into effect from 1 July 2007 and will be complemented by changes to the migration regulations also due to come into effect from 1 July 2007.

### Recommendation 62 (10.75)

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

***Government response***

Accepted in principle.

The department continues to work closely with DEST, the lead agency in the evaluation, in responding to the recommendations with a particular focus on the revision of the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students, which will come into effect from 1 July 2007.

| Report of the Senate Select Committee on Ministerial Discretion in Migration Matters | | Report of the Legal and Constitutional References Committee, Administration and operation of the *Migration Act 1958* | |
|---|---|---|---|
| No | Recommendation | No | Recommendation |
| 7 | The committee recommends that coverage of the Immigration Application Advice and Assistance (IAAAS) scheme be extended to enable applicants for ministerial intervention to obtain an appropriate level of professional legal assistance. Extending the coverage of IAAAS should assist in reducing the level of risk of exploitation of applicants by unscrupulous migration agents. | 29 | The committee recommends that coverage of the Immigration Application Advice and Assistance (IAAAS) scheme be extended to enable applicants for Ministerial intervention to obtain an appropriate level of professional legal assistance. |
| 8 | The committee recommends: that DIMIA inform persons when a representation for the exercise of ministerial discretion is made on their behalf by a third party; that each applicant for ministerial intervention be shown a draft of any submission to be placed before the Minister to enable the applicant to comment on the information contained in the submission. This consultative process should be carried out within a tight but reasonable time frame to avoid any unnecessary delay; and that each applicant be given a copy of reasons for an unfavourable decision on a first request for ministerial intervention. | 30 | The committee recommends that each applicant for Ministerial intervention be shown a draft of any submission to be placed before the Minister to enable the applicant to comment on the information contained in the submission. This consultative process should be carried out within a tight but reasonable time frame to avoid any unnecessary delay. |

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| 10 | The committee recommends that all applicants for the exercise of ministerial discretion should be eligible for visas that attract work rights, up to the time of the outcome of their first application. Children who are seeking asylum should have access to social security and health care throughout the processing period of any applications for ministerial discretion and all asylum seekers should have access to health care at least until the outcome of a first application for ministerial discretion. | 31 | The committee recommends that all applicants for the exercise of Ministerial discretion should be eligible for visas that attract work rights, up to the time of the outcome of their first application. Children who are seeking asylum should have access to social security and health care throughout the processing period of any applications for Ministerial discretion and all asylum seekers should have access to health care at least until the outcome of a first application for Ministerial discretion. |
| 15 | The committee recommends that the Minister ensure all statements tabled in parliament under sections 351 and 417 provide sufficient information to allow parliament to scrutinise the use of the powers. This should include the Minister's reasons for believing intervention in a given case to be in the public interest as required by the legislation. Statements should also include an indication of how the case was brought to the minister's attention – by an approach from the visa applicant, by a representative on behalf of the visa applicant, on the suggestion of a tribunal, at the initiative of an officer of the department or in some other way. | 32 | The committee recommends that the Minister ensure all statements tabled in Parliament under sections 351 and 417 (which grant the Minister the discretionary power to substitute more favourable decisions from that of the tribunals) provide sufficient information to allow parliament to scrutinise the use of the powers. This should include the Minister's reasons for believing intervention in a given case to be in the public interest as required by the legislation. Statements should also include an indication of how the case was brought to the Minister's attention by an approach from the visa applicant, by a representative on behalf of the visa applicant, on the suggestion of a tribunal, at the initiative of an officer of the department or in some other way. |

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| 19 | The committee recommends that the government give consideration to adopting a system of complementary protection to ensure that Australia no longer relies solely on the minister's discretionary powers to meet its non-refoulement obligations under the CAT, CROC and ICCPR. | 33 | The committee recommends that the *Migration Act* be amended to introduce a system of 'complementary protection' for future asylum seekers who do not meet the definition of refugee under the Refugee Convention but otherwise need protection for humanitarian reasons and cannot be returned. Consideration of claims under the Refugee Convention and Australia's other international human rights obligations should take place at the same time. A separate humanitarian stream should be established to process applicants whose claims are in this category, including a review process. |