COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

Reference: Administration and operation of the Migration Act 1958

TUESDAY, 27 SEPTEMBER 2005

MELBOURNE

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SENATE

LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

Tuesday, 27 September 2005

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

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, Murray, Milne, Nettle, Parry, Robert Ray, Sherry, Siewart, 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.

WITNESSES

Committee met at 9.04 am

BAKER, Sister Rosemary Tenison, Private capacity

ROST, Ms Michaela, Private capacity

CHAIR (Senator Crossin)—I declare open this meeting of the Senate Legal and Constitutional References Committee. This is the second hearing of our inquiry into the administration and operation of the Migration Act 1958. The inquiry was referred to the committee by the Senate on 1 June 2005 and is being conducted in accordance with the terms of reference determined by the Senate. The committee has received over 200 submissions for this inquiry. The terms of reference are as were agreed to on 21 June 2005 and are also available on the Australian Parliament House web site.

Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Witnesses are also reminded that the giving of false of misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera or in confidence. If you make that request, the committee will facilitate that request.

I welcome our first witnesses. Do either of you have anything to say regarding the capacity in which you appear?

Ms Rost—I am appearing as an advocate for overseas students based on my interest in refugee issues. I am a former secondary teacher and I am an independent writer.

CHAIR—Sister Baker, are you intending to say something today to the committee?

Sister Baker—No, I am here as support.

CHAIR—You have lodged your submission, which for our purposes we have numbered 220. Do you wish to make any amendments or alterations to that submission?

Ms Rost—Yes, I do. I have a new copy of page 11. There is an accidental error on that page. I have also got some supplementary information. There is a name in that which I would like to remain confidential. The rest of the information can probably be released but it is really important that the name remains confidential.

CHAIR—We have the facility to black out that name. If we do that you are happy for the rest of the submission to be made public. Is that correct?

Ms Rost—Yes. Could I discuss it a little further? There may be a couple of other points. Basically it can be made public. This is the situation of the student who was detained for two years—nine months in Baxter.

CHAIR—The secretary of the committee will talk to you about that to find out what he needs to do before the document is made public. I invite you to make a short opening statement at the conclusion of which we will go to questions.

Ms Rost—Thank you, Senators, for your interest in this issue of student detention and thank you for inviting me to come and speak. I am going to read something out. It will be about six or seven minutes. At this very moment there are international students sitting somewhere in an immigration detention facility. In the context of international law, Australia's current practice of detention violates human rights acknowledged in the 1948 United Nations Universal Declaration of Human Rights, one of several international covenants to which Australia is signatory. Article 9 states:

No one shall be subjected to arbitrary arrest, detention, or exile.

Article 10 states:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Yet detainees here, including international students, have neither been criminally charged nor initially given an opportunity for an impartial hearing. Dr Jane McAdam, a law lecturer at the University of Sydney, wrote in the *Sydney Morning Herald* on 31 May:

Australia's laws regulating the reception and processing of asylum seekers are uniquely draconian: Australia is the only Western country with a mandatory detention regime for those who arrive without a valid visa. The detention cannot be reviewed by the courts, and there are no limits on its duration.

… … …

Australia's system of mandatory detention violates key obligations under international human rights and refugee law. International law prohibits detention as a blanket response to illegal entry or presence, and requires that all detention be reviewable by the courts.

According to Dr Eva Sallis, the president of the human rights organisation Australians Against Racism:

The Migration Act is now a stronger instrument at law in Australia than any international covenant, or any human rights protection under domestic law. The problem is bigger—we have no bill of rights.

In fact, Australia is also the only Western democracy without a bill of rights. Since the introduction of mandatory detention for asylum seekers and Indigenous Australians in the Northern Territory, the basic rights of Australians have not been protected. Under common law, it is assumed that no detention is possible without charge or trial. This expected interpretation of common law has failed ordinary Australian citizens such as Cornelia Rau, Vivian Solon and unknown numbers of Aboriginal citizens.

It has also failed full fee paying overseas students and their parents, whose massive financial sacrifices to invest in Australia's education system have created our sixth largest—$7.5 billion—

export industry. However, as trading partners, students seem to receive little understanding, assistance or compassion in exchange and have instead been subject to harsh, uncompromising and unjust treatment. Few Australians know that international students can be detained for up to two years behind razor wire in a high-security prison without being charged. Like asylum seekers, students have suffered similar serious human rights infringements because legislation for students is tightly enmeshed within the confined border protection parameters defined in the Migration Act 1958.

If their student visa has rightly or wrongly been subject to mandatory cancellation, they become unlawful citizens and may be detained before being required to leave the country. If they then decide to contest the alternative of deportation but cannot afford a bond of up to $10,000 for the granting of a bridging visa, some overseas students have continued a nightmarish journey in detention rather than returning home to face disgrace for their family, huge education debts incurred, a totally ruined reputation and great mental stress. It is extremely difficult to get a cancelled student visa reinstated. Only about five to 10 per cent of students succeed in the Migration Review Tribunal. An experienced migration agent in Melbourne describes this as disgraceful and onshore counselling, which the ESOS Act obliges universities to provide, as a joke. Another immigration agent believes: 'The real problem is the cowboy attitude of many DIMIA officers, who have a "Deport, deport!" mentality, rather than trying to understand the student's point of view. It is exacerbated by the mandatory cancellation provisions and by the lack of proper accountability of DIMIA.'

Neither the conditions of the Migration Act pertaining to students nor their only avenue of administrative review, the Migration Review Tribunal, are applied with any discretion and therefore do not take into consideration mitigating circumstances on compassionate grounds. This implies that overseas students are not treated equally before the law although they pay much higher fees than Australian students. Students detained for both short and long terms have been severely punished for the relatively very minor offences constituting a breach and are held strictly accountable. Yet education providers and DIMIA may have contravened fundamental legal requirements but have not been subject to any similar full legislated accountability towards the students. It is a frightening combination of the migration acts, unforgiving laws for students, DIMIA's now well-established wrong practices and rigid interpretation of the act plus DEST's and IDP's failure to ensure that tertiary institutions fulfil legal obligations in providing quality education, adequate staff, resources, support services and consumer protection for international students. This has left many students shattered, wishing they had never come here and feeling that the Australian government has abrogated a fundamental duty of care.

DIMIA has said that 2,310 students have been detained between May 2001 and about July this year but claims to have no details of the length of stay. DIMIA also states that no students have suicided in detention, yet an Indian student, tragically, killed himself in Maribyrnong in 2001. Overseas students can face tremendous hardship here. Detained students, as well as those removed due to visa breaches or DIMIA errors, have been treated disgracefully and denied natural justice. This is how it seems to me. The Human Rights and Equal Opportunity Commission, whom I contacted last year, advised me to 'continue lobbying federal MPs, appropriate government ministers and organisations about this matter for change'. The basis of this submission and research was due to the cooperation of a student who was detained for 15 months in Maribyrnong and for nine months in Baxter. This is how Sister Baker and I met—in

the context of visiting the centre and providing advocacy or just basic comfort for people there. Thank you. Please ask any questions you have.

CHAIR—Thank you, Ms Rost. I will start off the questions. In your opening statement you talked about DIMIA's lack of accountability. Can you give us some examples that lead you to make that statement?

Ms Rost—For example, yesterday I spoke to a student mentioned in the submission as Mr Q. He has since had his visa cancelled. He got very depressed in his second semester. He had medical certificates and he met a counsellor—an Australian gentlemen working for an Indian organisation here. So he had a lot of documented material. When he went to the interview that material was not considered at all. His medical certificates were considered to be 'inappropriate'. Then the DIMIA compliance officer consulted with a trainee and came back and decided his visa was cancelled. He was given seven days to either show a ticket to leave the country or to apply for MRT. A person can make the decision totally by themselves at that point. But the main problem that this particular student wanted me to mention to you was that of colleges and universities really having minimal services for students—services which they are legally obliged to provide under the ESOS Act. These are student services such as student counselling, helping students adjust to the environment here and helping them fulfil their studies. These services are supposed to be provided and it just seems that they barely exist.

CHAIR—So are you suggesting that those services are not provided or that they are inadequate?

Ms Rost—Both of those. This is evidence that has come to me. I have not gone to a university and said, 'Please show me what's happening.' This is evidence that has come in, and there are a few other people who are investigating what is actually provided by the universities. Just to get back to the question about DIMIA and the compliance officer, that person can then make a decision. With the MRT waiting lists it takes six months for an MRT hearing to happen. If a student chooses the MRT option—which, as I said, only has about a five to 10 per cent chance of having the visa reinstated, according to migration agencies—then the student is on a bridging visa E and is not allowed to work or study. So it is very hard if they have come from India where the value of the rupee is 33 to one Australian dollar. Aside from a small proportion of students whose parents are very wealthy, most of them are basically lower-middle-class where the income of a father who is a government official might be $350 a month. They might have other income, like from rent if they have a little property, but the parents make gigantic financial sacrifices to send their children here because Australia has a wonderful reputation. The belief is that it is going to enhance their job prospects. There is also the other side of PR, which is that students might come here looking for more permanent residency.

CHAIR—Are you suggesting that, as you mentioned in your submission, under condition 8202, which relates to academic results and attendance, if somebody is sick, either physically or mentally, and cannot attend classes and they get documented evidence to prove that, it is not considered adequate by DIMIA?

Ms Rost—In the example of the student Mr Q, who is mentioned on page 38 of our submission, this was the case. This is not just one case. It seems to be a blanket response of applying the act without discretion. It seems that the compliance officers are not allowed to

apply any discretion, and the MRT is also not permitted to make any discretionary decisions. It is a really black-and-white application of the interpretation of, for example, condition 8202 on academic results. This is highly questionable. In the case of Mr A—the person on whom I have submitted extra confidential material—in his migration review hearing the presiding member said, 'You have only passed 22 out of 66 subjects, so whatever you say about the college is irrelevant because clearly you have not fulfilled your obligations.' Yet just recently I spoke to a former lecturer at the college and in the supplementary information on page 8, entitled 'Description by former lecturer of conditions at St George Institute of Professionals', is the horrific scenario of what is going on in some private colleges.

This is without even mentioning the universities, which do not have very much counselling at all. This is a really complex issue, you know. It goes in so many directions. For example, she said that, in that college, the students had semesters that lasted three months instead of six, which meant they had to do eight subjects instead of four. If they did two subjects per semester, they had to do eight subjects instead of four. He was supposed to have finished 66 subjects in 18 months. Even that is highly questionable. This has only just come to me in the last couple of days.

CHAIR—I am pretty familiar with the operations of the ESOS Act. Do you find that the problem is actually the ESOS Act, or is it where the ESOS Act interacts with the Migration Act?

Ms Rost—It is the ESOS Act, unscrupulous providers and lack of information given to the students overseas. For example, last night, when I asked, 'Did you know about condition 8202 or condition 8105 before you arrived here?' Mr Q said no, he did not know. I said, 'Do you mean to say that no immigration authorities explained that to you in India?' He said he only found out about those conditions—the 80 per cent attendance—when he arrived here. For example, in the college that Mr A attended, the students had to be there from eight till five daily. That was their obligation. There was no list of recommended texts. The lecturers had no core syllabus; they had to work out their own syllabus for the students. About 80 per cent of the students were very young, straight out of school in India, but another 20 per cent, like Mr A, already had a degree. When that 20 per cent arrived at the college, they were not being taught anything. Given that the law states that students cannot change education provider for one year, that meant he had to stay for one year in a totally substandard environment. His parents had sacrificed some land and given his sister's dowry money, and still he was forced to stay.

What is more, in that college there seems to be some unscrupulousness happening. The students were actively discouraged from changing providers. The students felt that, if they did change educational provider, they would be punished. The student who suicided attended this college, according to Mrs Sudhasaini, who is a lecturer in IT. She said the attitude of the management was unfriendly. She said quite a few students at the college ended up in Maribyrnong detention centre. So, what can happen is that the students can be immediately put into detention. I am still trying to find out what situations they can be put immediately into detention for.

In the case of Mr A, he saw a compliance officer. He might be eligible to be one of the 8,000 students that have recently been absolved of their visa breach because the department now claims that the wrong form was given to the education providers. It claims that they were not given the option to go to any DIMIA office rather than the central office. They were supposedly

directed to a particular office, although they could in fact have gone to any office. There are a few other issues around that. But suddenly 8,000 students are now being notified that their visas were incorrectly cancelled. One migration agent says there is actually probably about 20,000 others. These are supposedly the ones that did not attend the interview, but there are many who did. Again, that is to be investigated.

In the case of students who breach the other condition of not working more than 20 hours, that is draconian as well. A student can have worked two hours more and then have the entire visa cancelled and be sent back, even if they are one subject off a master's degree. There was another situation with Mr B, who Sister Baker and I met. His father had been sick; he went to India, got worried, met him, came back and failed the subject. In order to repeat the subject, he had to get a migration agent to get the visa extension—which all cost money—and then pay $5,000 for an extra term's fee. He was caught working extra and was immediately detained. He could not afford the $10,000 bond that goes with the bridging visa. So he was one of the three students that remained for 12 months in Maribyrnong. He ended up giving up and going.

I have been told that there are raids on student workplaces—for example, in call centres and restaurants. The employers are required to show the time sheets and, if they show more than 20 hours, the students can be apprehended. Another agent—who is very secretive, but this has been confirmed—has told me that, one, the raids do happen and, two, if they contact a migration agent in time, there is a pool of agents who work together with their connections in DIMIA to have that cancellation stopped, but they might have to pay $10,000 to $15,000.

CHAIR—Some of that we can follow up with DEST during our estimates process, particularly the operation of the ESOS Act. What changes do you think need to be made? Perhaps you could try to make your answer brief, because there are other senators who also want to ask questions.

Ms Rost—The recommendations of the ESOS Act should be followed—in other words, ensuring quality so that the students are getting what they paid for. That is on page 1 here; I will not read it out. The conditions of the visa are just totally unrealistic for the needs of students because a lot of them need to work here to pay for living costs. A man with another migration service tells people in India who want to come here that $65,000 is the minimum required cost for the first year. They should be allowed to work for longer. There should not be blanket cancellation of the visa and then possible detention. It is completely contrary to any human rights. Maybe there could be a system of fines. I really believe that the MRT is not appropriate to start off with as the only system of review. For example, Mr Q has chosen to go back to India rather than wait for six months for the MRT hearing, during which time he could get more depressed than he already is. Basically, the conditions are much too harsh. There should be fines instead of breach and a body that can review specifically student issues. If the education provider is not providing the counselling advice and support, then the students should be able to go to another body, without having to spend a lot of money on a migration agent to go through some legal procedure that has very little result.

Senator NETTLE—Thank you for your submission. There is a lot of information in it that I certainly found very helpful in understanding the impact of the Migration Act on international students. Something that is of concern to me is your example of the Federal Court case with—

Ms Rost—Mr A.

Senator NETTLE—Yes. In his Federal Court case, the federal justice is quite damning of the way in which the department of immigration raided the property and did not adhere to the laws they were required to adhere to in getting a warrant before they raided the property. Could you tell us whether you are aware of any changes that have been made by the department of immigration in the way in which they deal with international students, subsequent to the very adverse finding and comments by the judge in the Federal Court case in July this year?

Ms Rost—That, by the way, is not Mr A, but a judge like Judge Allsop being willing to speak in public about it was so damning. I can only guess this, but there might have been a flow-on to the 8,000 students that were suddenly invited to come back and study here, because it is not a well-known issue. I have kept very quiet because of the students. They were terrified to go to the media. They also believed that, if anything went to the media with their names, their cases would be affected.

The three students in Maribyrnong, after failing in MRT, were advised to apply for refugee status. That is the advice that they were given as the only option. They had some difficulties in some situations. They were so desperate to complete their studies that they even went to RRT. That was those students; this student was detained, but I do not know whether he went to MRT and RRT at all. To answer your question: no, I do not really know. The more cases that come to be public, the more reaction there is, I would imagine, and that is good. It is wonderful that there is a response happening.

Senator BARTLETT—Do you have any idea whether all of the students that run into trouble are mostly university students or students at some of the other colleges that target international students? Do you know where they are most prevalent?

Ms Rost—I cannot say that. Senator Carr has asked a lot of questions in the past and I have only looked at a few of his answers. Obviously, there has been a lot of criticism about quite a few colleges in this city. There is one example of a Japanese law student who had no assistance whatsoever at Melbourne University regarding an independent grievance counselling process. Melbourne University at that time had nothing in place. I have an article somewhere here about that.

Senator BARTLETT—Anything extra you can provide is useful. We have time limitations now, so I will keep pressing on with questions. Is there any concern amongst education providers, universities in particular, about these quite widespread visa problems, detention and the like? As you point out, it is quite a large export market for us and it cannot be terribly helpful for the reputation of Australia as a viable destination to have these sorts of things happening on that sort of scale. I have not picked it up a lot from university people, even universities with high international student loads. I would have thought it would have been around. Have you picked that up, or do they basically get their fees and then not mind?

Ms Rost—I sent some material to the vice-chancellors; I had no reply from one single vice-chancellor. The article 'Detention for Visa Offences', which was recently in the higher education section of the *Australian*, mentions the full Federal Court case that you talked about. This was the student whose house was raided to find his housemate. At the same time, the officials

decided to search his property, they found the payslip where he had worked 22½ hours and took him to the DIMIA centre in Sydney. He was required to pay a $10,000 bond on the spot or be detained, so he was detained for three weeks. He made subsequent legal applications and—this is really important—had the right lawyer. The judge slammed the whole practice of raiding without warrants, and other migration agents that I have spoken to say that anecdotal evidence suggests that raiding without warrants happens. In this article, my article in the *South Asia Times* is mentioned. It also says:

IDP Education Australia chief executive Tony Pollock said he knew that from time to time students who breached their visa conditions were detained. He said DIMIA had been working to ensure that its procedures in this respect were "open and fair".

I do not think it is open and fair. It is hard to say. There must be a lot that is going on behind the scenes. I am just a little person. This is just the tip of the iceberg.

Senator BARTLETT—You have produced a lot of useful data. Sometimes it just takes one persistent person to follow through, so I acknowledge that and encourage you to keep going. I have one final question and, again, you might not have been able to draw down deep enough yet to assess this. There is an issue of some contention about how universities can basically do the visa processing and tout for business all in-house, as people normally do when they offer migration advice, without having to be qualified migration agents. Without asking you to comment on that broader principle, is there any evidence of unscrupulous, for want of a better word, or uncaring education providers targeting people in financial situations where they are almost inevitably going to have to risk working more than they should to pay off their fees and those sorts of things? They will grab the business for the sake of it and they get the fees—

Ms Rost—Yes, there seems to be some inappropriate requesting of fees. For example, Mr Q had just paid his fees on the first day of the last semester in July. His TAFE, Holmesglen TAFE, had two weeks to notify him about his supposedly inadequate second semester results—though he had a medical certificate. He paid his fees and then, two days later, got a statement that said his visa was going to be cancelled and he had to report to a DIMIA compliance officer. He mentioned that the compliance officer at the TAFE was very unfriendly. This is what I could not understand. I thought the compliance officer was a DIMIA person, so obviously some TAFEs are talking about a compliance officer within the university who is actually a member of the staff. As you say, they might not be at all trained in these issues and may have absolutely no idea of the context in which the students are coming here—their whole background and the gigantic financial sacrifices.

To go back to India with a cancelled visa or having been in detention means total shame. Mr A had never told his parents and still did not tell his parents when he went back to India, but all his friends in his city knew through the grapevine. It is a terrible humiliation. Mr B felt that he could never find a wife if it were known. He felt that no father would provide a dowry for his daughter to marry somebody who had been imprisoned. Mr B's parents had heard that he was in jail and thought he had done something terribly wrong. Part of my motivation was to show that you need to be able to go back with your head held high and know that there is a mistake in the system. The system is not functioning well; the system is out of control in relation to this—especially when the students are funding this multibillion dollar industry, it is really quite disgraceful. In relation to your question, this student paid eight times the fees. He paid a $4,000 fee for his third

semester and said that the local students pay $950 for the whole year. So there is a lot more to investigate about this issue.

Senator PARRY—Going back to your recommendations on pages 40 and 41, in particular items 2 and 6, have you discussed those recommendations with the vice-chancellors of the universities?

Ms Rost—No, I am sorry. As I say, I am just a little person who has pursued this issue for some reason. It would be wonderful to be able to discuss it. Hopefully, you honourable senators are able to do that.

Senator PARRY—It seems that a lot of what you have put forward to us—and it is quite comprehensive—really is targeted towards the universities. Have you had any discussions with state government to consider some of the proposals in your recommendations?

Ms Rost—Basically, when I have contacted people over the last two years, until the last six months there has been no reply. I have had very little interest and very little reply. I have contacted many politicians as well and had very little reply. It does not mean that things have not happened in the background. Yes, it is universities, and it is also the act. The act is much too harsh for the students' needs here. They do have to work.

For example, if the students sitting in Mr A's college, at the St George Institute for Professionals, were required to stay eight hours a day in the college, they were too exhausted to even go home and work or to find some other work. Students are working night shifts. They are working at petrol bowsers, in 7-Elevens or as taxi drivers. Anecdotal evidence lately is that DIMIA has been targeting student taxi drivers. Recently, I have been told that about 60 of them had their visas cancelled straightaway and were deported. When they work too much and breach condition 8105, they have absolutely no hope of any discretionary hearing. It is extreme. Also, the Canadian system—you may be interested; I have a little bit at the end of this confidential information—seems to be much kinder. Students do not even need to have a permit if they want to study for six months.

Senator PARRY—Moving back to the issue you raised in your opening submission that no students had committed suicide in detention, you then indicated an Indian student had committed suicide but not in detention. I am just clarifying that it was not in detention.

Ms Rost—Yes, it was in detention. This is according to the former lecturer at St George Institute for Professionals. She can verify that. Also, I have been told by some Indian consular officials that students have committed suicide. This is a question that Senator Carr asked. DIMIA replied—that is in their supplementary information, 220A—that a student had died at Villawood and there was a coronial inquiry and no suspicious circumstances were found. However, this former lecturer maintains that a student from this particular college did suicide in detention. Again, some things might be said that a particular officer may have found out, but it is just not properly collated. The information is simply not collated. There are no proper statistics in DIMIA about the length of stay in detention. That was one of the questions Senator Carr asked.

I have one other point. A student applied for the minister's discretional opinion under section 351 to have his condition reviewed while he was in detention. The minister did not even get all

the letters that I wrote initially because the senior officials were not forwarding them to the minister. They were saying that there was no new information attached, yet there was new information attached. In the supplementary confidential information there is a letter to the Territory director, Ms Nelly Siegmund, and a letter to the minister as an example of some of the many letters I have written to the minister, the Attorney-General and the minister for education.

Senator LUDWIG—In the interests of time, I might put some questions on notice to you if you would not mind answering them. I will get the secretariat to ask you a series of questions. I am more interested in the area of monitoring by the migration area and the interaction between migration agents and educational providers. Some of the material you have, obviously, in your quite detailed submission but there are some unanswered questions, particularly the area on page 10 that you have underlined:

> As a result, some international students have experienced considerable educational, economic, and emotionally irreversible hardships.

It seems to point to failures by DEST and DIMIA in monitoring and compliance issues. That is the area I might explore with you in a little more detail, if you do not mind.

Ms Rost—I am happy to cooperate. I will try to use my connections for connections.

CHAIR—Thank you for your very detailed submission and the time you have provided to meet with the committee today.

Ms Rost—Thank you very much for your interest; I am most grateful. This is also on behalf of all the people mentioned at the end of the submission and countless other students. There is a lot more to investigate. I seriously hope the government will make amends. I seriously hope that you can convey the necessity because people's lives are at stake here.

[9.46 am]

NICHOLLS, Dr Glenn Andrew, Private capacity

CHAIR—Welcome. You have sent us a submission, which we have numbered 102. Do you have any changes or amendments you would like to make to your submission?

Dr Nicholls—No.

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

Dr Nicholls—Thank you for the opportunity to give evidence today. My submission addresses the deportation or removal from Australia of noncitizens. It has two parts: first, the need for an independent check on removal actions; and, second, the deportation of noncitizens convicted of a serious crime in Australia. With respect to the first part I submit that there should be an independent check by a suitable body, and I suggest in my submission the federal Magistrates Court, prior to any removal being carried out. I am speaking here about the approximately 3½ thousand removals carried out each year, for which the department of immigration makes all the arrangements for removal. These generally occur from detention centres.

At present there is no independent check on removal arrangements. Instead, removal is a consequence of a noncitizen not having a valid current visa. Such a person must be removed as soon as practicable under section 189 of the Migration Act. No formal deportation order is required. This is different from deportations in the past, which did require a formal order issued under the authority of the minister. Indeed, the pendulum has swung so far away from reviewable orders that the Palmer inquiry encountered an attitude in the department of immigration that the power to remove a person from Australia does not require a formal decision at all because it is seen to be required by the act.

The check I have in mind would not be a further at merits review but a check of the person's identity and fitness to travel and on the existence of permissions both from transit countries and from the person's country of citizenship. The costs would be modest and there would be three benefits: first, it would prevent any wrongful removals; second, it would entrench standards for the arrangements that need to be in place to ensure a person's health and wellbeing; and, third, it would give the minister and parliament assurance that the removal powers under the act are being exercised appropriately in all circumstances. This is important in the absence of formal deportation orders issued under the minister's authority.

The second part of my submission addresses what are called 'criminal deportations'. A noncitizen in Australia renders himself or herself liable to deportation if he or she is convicted of a crime and sentenced to 12 months or more imprisonment. In my submission I echo concerns expressed in July this year by two judges of the Federal Court at the use by the minister and the department of section 501 of the Migration Act to cancel visas rather than the deportation power in section 201 of the act.

The use of the different sections is important, because section 201 contains a limit whereby someone cannot be deported if they have lived lawfully in Australia for more than 10 years. This limit does not exist under section 501, and use of this section is therefore a way of overriding the limit in section 201. In the two cases I cite in my submission the individuals arrived in Australia at 27 days and at six months old, respectively, and had lived their whole lives here. I believe that people who have migrated here as children have lived essentially their whole lives here and to serve their sentence should not be deported to a country they barely remember. In this regard I recall a comment by our first Prime Minister, Sir Edmund Barton: 'We have prosecuted and convicted them and in that sense they are our criminals.' All the more so I think when they have lived in Australia since childhood.

Finally, I would like to add that, if someone faces removal after a long period of residence in Australia, there is an increased likelihood that he or she will have children born and brought up here. I believe that breaking up families in these circumstances should be avoided as far as possible. This is a further reason for reverting to section 201 deportation orders with a 10-year limit. The last part of my submission is to urge a return to deportation decision making under section 201 of the act with the 10-year rule in place. This requires no change in law, but is about reverting to the section dealing with deportation that is still in the act.

CHAIR—Thank you, Dr Nicholls.

Senator LUDWIG—On the issue of the deportation used under section 501, do you think there is a substitution going on between 201 and 501 in that they could have used 201 but they are now using 501 because it is more effective and easier?

Dr Nicholls—That is right. In my submission I give a chart which shows the transition from one to the other.

Senator LUDWIG—The difficulty is that that is what you are purporting. It is a correlation of aggregated material, but it does not demonstrate that there is an actual correlation between the two or a substitution going on. Is it your assertion that there is a substitution? What you have demonstrated is that there is a decrease in 201s and an increase in 501s, but it does not necessarily follow that it is of the same population.

Dr Nicholls—But section 201 deportations have disappeared almost entirely.

Senator LUDWIG—I appreciate that. It seems to suggest that is what is going on. Is that your assertion?

Dr Nicholls—Yes, it is.

Senator LUDWIG—You are aware, of course, that there is in fact an MSI with a check list?

Dr Nicholls—Yes.

Senator LUDWIG—Although in the case of Ms Solon, they could not actually find the check list completed, which was unfortunate, I must say. Do you say that there should be a legislative

response or a regulation made in terms of the check list prior to deportation, given the way section 189 and 196 operate?

Dr Nicholls—Yes, and importantly, that it should be carried out by an independent authority. The importance of independence is that it gives a review of the whole case from the outset rather than a snapshot at any one particular time.

Senator LUDWIG—Who would do the review?

Dr Nicholls—I have suggested the federal Magistrates Court, but I think the importance is independence.

Senator LUDWIG—Thank you.

Senator KIRK—Thank you very much for your submission, Dr Nicholls. You mentioned that now there is no deportation order actually required and you said that that has been the case for some time. When did the need for an order stop?

Dr Nicholls—We need to distinguish here between the two parts of my submission. In regard to the first part, it stopped in 1992 with the introduction of the Migration Reform Act, which came into effect on 1 September 1994. In regard to the second part of the submission, it is later—it is toward the end of the nineties. I cannot give you an exact date because it is this transition I am referring to.

Senator KIRK—Effectively what you are saying is that really there is no decision as such at all being made?

Dr Nicholls—That is right. I laboured to try to make this point clear because it took me a while to grasp it. The removal process is post decision making. The merits review is done and removal then occurs by act of law, and there is no actual decision to deport. I think that is important because, when there is a decision to deport, there are considerations of the things I have mentioned—identity, travel documents, health and so on.

Senator KIRK—So, in a sense, a decision is made that the person in unlawful but the actual decision to deport is not a separate administrative decision.

Dr Nicholls—That is right.

Senator KIRK—Are you envisaging that the review that you refer to by the federal Magistrates Court would be a judicial review or a full merits review of the entire matter?

Dr Nicholls—It would not be a merits review. It would be a review of those issues I have mentioned. It would be about the identity of the person—Is this the right person?—and no more than that. What arrangements are in place? Is the person in a fit state to travel? It is having a review of the whole matter and knowing that health circumstances, particularly in the case of mental health issues, can vary at particular points in time.

Senator KIRK—The way you describe it, it sounds more like an administrative review that is being undertaken. I know that you mentioned the federal Magistrates Court as the body to do it. I think you also suggested that it need not be a court, in your view, just provided there is an independent body of some description too.

Dr Nicholls—That is right. I think independence is the key. I have suggested the federal Magistrates Court. It could be a tribunal.

Senator KIRK—Yes, but would you envisage that that role should be given to the RRT?

Dr Nicholls—No. The AAT perhaps.

Senator LUDWIG—Once you then indicate the AAT as the merits review tribunal, one of the difficulties is the way appeals lie. Then it can be used as a shield against deportation. So you create another link in the chain, which adds costs and delays. But your point is that there should be a check by an independent person. I refer you back to the Solon and Chen report and the transcript where the department made that very point—that in terms of Ms Solon it is an automatic operation between 189 and 196 and there is no independent check, although there is supposed to be a checklist under MSIs. However, if there is an independent check, they may be able to then look at the whole file and make at least an independent assessment to ensure that the original decision, which is the 189 decision, that they are an unlawful noncitizen and should be deported is correct. The point I think you are making is worth further exploration but, in terms of the point you really are pressing, it should be independent and necessarily of a judicial nature.

Dr Nicholls—That is right.

Senator BARTLETT—I am assuming that the Migration Act and the operation of these particular parts is an area of expertise of yours.

Dr Nicholls—I am an academic researcher. I am writing a history of deportation to and from Australia since Federation with a focus on policies and laws.

Senator BARTLETT—That sounds like a fair bit of expertise to me. You have given us a very good and succinct outline of just a couple of aspects. I am particularly interested in the use of section 501 and what sorts of grounds it is being used on and those sorts of things. Have you got further material on that that you might be able to provide us with?

Dr Nicholls—To be honest, no. This is all an evolving situation and quite recent. I wanted to flag it here but, no, I do not have any compendium of information that would be useful.

Senator BARTLETT—That is okay. It is probably particularly germane, even today, with some of the things that might be being talked about in Canberra and the expansion of the use of these sorts of powers for cancelling visas. So it is certainly appropriate to focus on it. With regard to the issue of removals, you have suggested this independent mechanism. That would not be automatic in all cases; it would simply be if someone requests it via some mechanism.

Dr Nicholls—When we talk removals there are 12,000 to 13,000 removals from Australia each year. I am referring to what we might call removals proper—that is, where the department

makes all the arrangements for the removal—and that his where I think there needs to be an independent check. Where there are monitored removals—that is, where the person is compelled to go but makes their own arrangements—I do not think there is that need. Similarly, with supervised removals, where the person is compelled to go but cooperates with the department in making the arrangements, I do not think there needs to be a check. I am talking about those 3½ thousand cases where the department makes all the arrangements for the removal.

Senator BARTLETT—As I read it—and obviously there are circumstances where it is appropriate for people's visas to be cancelled; there are processes for that and we can argue about how well that is working—it is basically a checklist. You have suggested identity, fitness to travel and permissions. I appreciate—and I think this inquiry has already got some evidence—that there are flaws there to raise these concerns. Would it not be better to fix up the flaws in the process for something that is basically just what should be administrative competence, rather than set up a quasi review mechanism?

Dr Nicholls—I think the independence is important for the reason I mention—that it gives an overview over time of a person's health, not at a particular time shortly before removal but of the status of their health over some period of time. If there is that review of the file, that is important and will not necessarily be captured by a checklist that is completed at moment A.

Senator BARTLETT—My other question is about the issues—and again it is more focused on asylum seekers, but obviously 501s can be a whole range of things and, as we have heard in the previous submissions and elsewhere, it is much wider than that. It seems to me that there is certainly a preparedness on the part of the department when, for whatever reason, somebody becomes unlawful. Basically it is automatic and their job is just to find somewhere to dump them, to put it crudely. Should there be a mechanism to ensure that they have not just the right to enter somewhere else—and then it is not our problem anymore—but to have stability, rather than having three weeks in Syria and then they can sort out their own problem, as has been shown in the book that you referred to? As a lawmaker, how do you quantify that—their having to satisfy themselves about being deported or removed to a place of security, stability or with the apparent ability to remain indefinitely? Is there some form of words you would suggest for that type of thing?

Dr Nicholls—It is a good question, and perhaps I can answer it this way: as a researcher in the field I am struck by the corpus of knowledge that was built up by decisions of the Administrative Appeals Tribunal in the 1980s and the 1990s, specifically on matters of deportation. They were published decisions. The AAT considered not only whether a deportation should or should not be carried out but also the conditions in which it should be—what conditions the minister might wish to attach to an order, what would happen if an order could not be carried out within a certain period of time, what would happen if there were a material change of circumstances between the issuing of the order and its execution to do with security and so on. There is a corpus of knowledge there that was built up through specific decision making on deportation matters. There are a lot of helpful principles there that I think have, to some degree, been lost when we simply decide whether or not a person meets the visa category and if they do not, they go. I do not know whether that answers your question. It is not just that a person must be removed; they must have a destination—a destination they know, not a country they have never been to before and one where, as you say, there is some safety and security. In the European jurisdictions the issue of forced return has been a very difficult one for a long time. There are

quite proactive programs, often conducted together with the International Organisation of Migration, which prelocate job opportunities in particular areas for someone who is being forced to leave.

Senator BARTLETT—We could ask the secretariat to read all the AAT rulings from the 1990s and give us a summary! Is that all right?

Senator NETTLE—I have two areas that I want to ask about in relation to the second part of your submission. Thank you for your submission. I think it is really important to look at the 501 cases in particular. Are you aware of any research that has been done, or even anecdotal experience in the cases that you are aware of, to compare the amount of time that people have spent in prison—doing their time, punishment for the crime—and then in detention? I have a view that once you have done that there should not be further punishment, but I am certainly aware of cases where people have spent less than 12 months in prison and then, as a result of the law, find themselves in detention for three to four years. This is three or four times the period for which they have been sentenced for a traffic offence or whatever it might be. Do you know whether anyone has looked at that?

Dr Nicholls—I do know and no-one has.

Senator NETTLE—Yes.

Senator BARTLETT—Could you clarify that?

Dr Nicholls—I looked for literature of that type, not least recently before coming here, and there is, I assure you, nothing.

Senator BARTLETT—More work for the secretariat!

Senator NETTLE—The system as it is currently designed means that people do their punishment in prison and then three or four times that period of punishment in the detention centre.

Dr Nicholls—It can do, and the Human Rights and Equal Opportunity Commission has taken up some of these issues particularly in relation to the cohort of Vietnamese cases where people were kept in detention for long periods of time pending conclusion of a memorandum of understanding between the Australian and the Vietnamese government. There is a human rights report on that.

Senator NETTLE—Senator Ludwig asked about finding a correlation between previously using 201 and now using 501. There are people who are currently being considered under section 501—because there is a lower threshold than exists for section 201—by the character test. Would it be accurate to say that probably not all but the vast majority of people who are caught under section 501 would also be covered by section 201? So there is a decision being made about whether to use 501 or 201. Given that 501 has a lower threshold, it is easier to consider them under that section. Am I right?

Dr Nicholls—I think that is true, except it is not a lower threshold. The threshold is really time. It is the 10-year limit that drops away, otherwise the criteria are the same. The other things that need to be taken into consideration are similar, but the crucial difference is the 10-year limit.

Senator NETTLE—So you are saying the only difference is the 10-year limit.

Dr Nicholls—That is the major one, the 10-year test.

CHAIR—In relation to the last batch, so to speak, of the East Timorese refugees who were here 10 years or more, there are about 1,600 of them here and we had about 80 of them in Darwin. The last couple were due to be deported, you were saying that would have been under section 501 rather than 201. Section 201 has the 10-year limit so technically—

Dr Nicholls—That is specifically in relation to criminal deportations. If the East Timorese were to be sent away now, they would be removed because they had not established a legal right to remain.

CHAIR—I think the last couple were actually being deported because they had not passed the character checks. I know in the case of one particular person in Darwin when we looked at specifically what that was about, he had two traffic infringements.

Dr Nicholls—The character test can be used in two ways. Firstly, it can be used to refuse a visa, which is what I think you are referring to. Secondly, it can be used to cancel a visa. In the case of the East Timorese, I think that the character test was used to cancel the visa, meaning that the person had not succeeded in getting a visa, meaning that they were liable to removal. In that sense, 10 years was neither here nor there.

CHAIR—I understand that Canada's immigration legislation requires a pre-removal risk assessment based on humanitarian grounds.

Dr Nicholls—Yes.

CHAIR—Do you see this as being a possible precedent for Australia?

Dr Nicholls—Yes. They check fitness to travel, destination and so on. That is precisely what I have in mind.

Senator NETTLE—Do you know what section Scott Parkin was removed under when his visa was cancelled in that adverse security assessment?

Dr Nicholls—It was the security subsection of section 501.

Senator NETTLE—I thought it was 501.

Dr Nicholls—So it was section 501 something.

CHAIR—Thank you very much for your submission and thank you for making yourself available to meet with the committee this morning.

Proceedings suspended from 10.11 am to 10.49 am

FREIDIN, Dr Julian Alexander, President, Royal Australian and New Zealand College of Psychiatrists

LOVELOCK, Mr Harry, Director of Policy, Royal Australian and New Zealand College of Psychiatrists

NEWMAN, Dr Louise, General Councillor, Royal Australian and New Zealand College of Psychiatrists

CHAIR—Welcome. Your submission has been lodged with the committee, and it has been numbered 108. Before I invite you to make an opening statement, do you have any amendments or alterations to that submission?

Dr Freidin—Not at this stage.

CHAIR—I invite you to make opening statement, and we will then proceed to questions.

Dr Freidin—Thank you very much for this opportunity to address the Senate committee on our submission. Psychiatrists are medical practitioners with a recognised specialist qualification in psychiatry. By virtue of our specialist training, we bring a comprehensive and integrated biological, psychological, social and cultural approach to the diagnosis, assessment, treatment and prevention of mental health problems. As such, we have a high level of responsibility to provide and advocate for services that meet the needs of the most vulnerable in our community: the mentally ill.

For psychiatrists, detention centres and their consequent effects on detainees pose a professional dilemma because we know that rates of mental illnesses such as post-traumatic stress disorder, depression and anxiety, are very high among people in immigration detention. Detainees need the support of highly trained clinicians, but it is extremely difficult to build a therapeutic relationship in such an environment. In fact, we argue that there is a strong relationship between prolonged detention and the deterioration of a person's mental state and, therefore, the development of severe mental illness.

Our submission provides examples that support our contention that detention centres create mental illness. Of course, there are other contributing factors to the vulnerable nature of detainees which, in other circumstances, would be the basis for special consideration in their treatment. The traumatic history of this group makes them particularly vulnerable to the effects of further psychological distress. Children are particularly vulnerable to the effects of prolonged detention. The government's recent decision to allow children and their mothers into the community has our support. Overall, we believe that the current provision of mental health services to people in detention is clearly inadequate.

Mental illness requires an appropriate treatment environment, trained nursing and mental health staff and a comprehensive biological, psychological and social treatment approach. The subcontracting of detention services to private companies produces a separation of the mental health care of detainees from the mainstream mental health system. This is a key factor in the

deficient treatment of mental illness in detention centres. At present, there is no formalised arrangement between the detention centres and state or private mental health service providers.

The RANZCP recommends that prolonged detention be replaced by an alternative system such as community placements, with detention centres used only for brief initial processing; in other words, an administrative only form of detention. If the mandatory detention model is maintained, the same standard of mental health care that applies generally to the entire community must also be available to detainees. Systems must be set in place to ensure that detainees suffering psychiatric symptoms are adequately assessed and treated for the inevitable mental health problems that will arise.

At a minimum, independent review panels of clinicians must be established to assess detainees for mental illness, and assessments must be conducted regularly. Responsibility for such panels should be assigned to state mental health services to ensure their independence. If a person is found to be mentally ill, he or she must be removed from detention to an appropriate place of treatment. In short, there needs to be an independent review of detainees by psychiatrists and the transfer of those found to be suffering from a mental illness to appropriate psychiatric facilities.

Mental health care for detainees should be provided by mainstream mental health services independent of the Department of Immigration and Multicultural and Indigenous Affairs or the detention provider. Alternatives to the already overstretched mental health services will need to be made available. This could include better utilisation of the private health system. Any establishment of additional services to support detainees who have become unwell as a consequence of their detention and the detention environment will need to be funded with additional resources to ensure that the capacity of existing mental health services are not further compromised. We look forward to discussing the issues with you.

Senator NETTLE—Thank you for coming in and making a submission. I have a range of questions. I might start out by asking you about the behaviour management strategies that are used in the immigration detention centres and whether you, as psychiatrists, have a view as to whether they are an appropriate way to manage people who have a mental illness. Are there any comments you would want to make on that area?

Dr Newman—We have been particularly concerned about the misuse, in our opinion, of so-called behavioural principles, largely because those principles and practices have in some cases been used in a punitive way—merely for the purpose of maintaining behavioural control, with the fundamental problem of a lack of understanding of the reasons behind disturbed behaviour. It is well known that behavioural disturbances of various sorts have occurred in the detention environments, including disruptive behaviours and self-harming behaviours, usually amongst people who are significantly distressed. Significant numbers of those individuals will have diagnosable mental disorders. It is not standard psychiatric practice to use prolonged periods of virtual solitary confinement. It is appropriate to use a low stimulus environment for brief periods of time when someone is acutely disturbed. That might happen in a psychiatric facility but only as part of an overall management plan.

The fundamental problem, particularly in the behaviour management unit Red 1 in Baxter, is the way that simplistic psychological models are applied to really complex and very disturbed people which, in effect, means that those people are potentially made worse by the treatment

they receive. We saw that in the case of Cornelia Rau. There were others in that unit whom I had personally assessed as psychotic. They needed comprehensive management of their illness and became increasingly paranoid and distressed by prolonged periods in isolation. They were probably not in any position mentally to understand the system that was being described to them: 'Behave better and you will have release for this many hours' and so on. I have personally reviewed the documentation from Baxter that outlines that particular management program. To summarise, it is essentially outdated and would be considered inappropriate for the treatment of major mental disorder or mental illness. We believe that it has been used inappropriately, and it is of most concern because it is potentially very detrimental to people with a mental disorder.

Senator NETTLE—Have you seen any changes in the post-Palmer recommendation period to the way mental illness is being dealt with in detention centres?

Dr Newman—Yes, to the extent that at Villawood Detention Centre, where I have been over the last two months or so on a regular basis, there is some increased availability of a junior psychologist. I must say, although I am not commenting on that person as an individual, they are not a clinically trained psychologist. So we still have some issues with the level of qualifications and skills, but there has obviously been an attempt to import more psychological support. However, I have been particularly concerned on recent visits about the persistent lack of recognition of the seriousness of people's mental distress and mental disorder. There was the case of a man I assessed as having a psychotic depression, who has also been assessed by other psychiatrists. We were of the opinion that this man needed to be transferred to a psychiatric hospital, and that had not been acted on. He remained in a very distressed state and was being treated with medication with very inadequate psychiatric review.

Some of those difficulties reflect cultural problems that have obviously been identified in other inquiries, where there is a minimisation of the harm and distress of individuals and where symptoms can be attributed to bad behaviour, to put it simply, as opposed to a mental disorder. So there is a failure to recognise that, because on the whole—and it is not the fault of individual staff—the staff are not qualified to make those judgments.

Senator NETTLE—We have heard reports of detainees who have been given large amounts of medication to the point where they develop some form of addictive response to that medication. Do you want to make any comments about those sorts of reports?

Dr Newman—Our group has made submissions to the Health Care Complaints Commission in New South Wales regarding the inappropriate use of medication in Villawood. Similar concerns have been raised about the use of psychotropic medications in other detention environments. There are several issues. There is no doubt that some of the people do need medication and are being appropriately treated. However, the issue is more about the use of sedating medications, or antipsychotic medications being used inappropriately for the purpose of behavioural control, and about some individuals being threatened with the use of extremely sedating medication when they have been involved in any form of protest or conflict with the management of the centres, which we believe is inappropriate.

There are also individual cases that we have been concerned about and have reported, where combinations of medications that are not standard practice amongst psychiatrists have been used mainly for a sedating effect. There have been cases that I have notified, where women who are

breastfeeding have been given inappropriate medications. So there is a whole series of concerns which perhaps reflects the difficulties within that environment of reviewing medication orders. Because of the very infrequent visits by medical practitioners drugs can be given on a prn basis based on the decisions of others, such as nursing staff in the environment and the review process does not seem to be adequate.

Senator NETTLE—To make those notifications about what you think is inappropriate use, you need to gain access to the centre as an independent mental health professional to find out about that and then to report it. That is the only mechanism open to you to report or notify?

Dr Newman—Yes. We do not necessarily have access to individual medical records. The access to the detention centres we, as psychiatrists, have had is as requested by lawyers acting for the detainees so as to provide an independent medical assessment. As part of that assessment, we ask about medications.

Senator PARRY—You mentioned the inadequacy of clinical practitioners and clinical psychologists. For my benefit, and possibly the committee's, can you explain the difference?

Dr Freidin—The reference was to psychologists and clinical psychologists. There are many thousands of psychologists. One does a basic university degree to be qualified as a psychologist. Having done that, one can work in quite a wide array of areas. Clinical psychologists have a higher degree of training, which takes another three or four years. Sometimes they do a PhD, where they specifically focus on areas of clinical illness, mental illness and their treatments. We would say that, in this sort of work, a graduate out of university with the basic qualification of a psychology degree—I do not know the individual at Villawood, so I am not talking about that person in particular—does not have the skills to work in this area.

Senator PARRY—In your opening submission you said there are other contributing factors that can cause some of the issues in the detention centres. What are those contributing factors? Would they come from a variety of backgrounds or from the types of people that are coming into the country?

Dr Freidin—The very fact that someone is an immigrant increases the likelihood of their having mental illness. They are disrupted from their own environment, possibly as a result of war, trauma or torture. They have made a very arduous passage to this country sometimes under extremely stressful situations. They are in a different culture, with no access to their usual supports—their family and their language. When they arrive in this country, they often feel isolated. All those issues together—the reasons for their being an immigrant and the experience of immigration—add to their psychological burden and put them at increased risk of developing mental illness, whether or not they were in detention. Therefore, they are in even greater need of proper psychiatric or psychological assessment.

Senator PARRY—Would it be your opinion that some of these conditions could present themselves irrespective of whether they are detainees?

Dr Freidin—Certainly, people going through that life story can develop mental illnesses without being in detention. However, we would say that this is an extremely strong factor that would exacerbate their mental illness.

Senator PARRY—In relation to access and the clinicians who attend the detainees, is it better to have someone who constantly attends and builds up a case history, or is it better to have individuals coming in with a fresh perspective? Do you have a view on that?

Dr Freidin—We think the form of treatment these people need is the same as anyone in the general community. In the general community there is a balance between having the same doctor or the same clinician seeing someone regularly, getting to know them, forming a relationship and seeing how their illness changes from time to time and one doctor or clinician calling in another with a particular expertise or to get a second opinion or to discuss a difficult case. I would argue that it is not one or the other that these people need but both.

Senator PARRY—In a detention centre, is it better to have one person attending to a variety of clients within the same set of circumstances or would you advocate having a large number of practitioners coming to see individual clients in the same centre?

Dr Freidin—In that particular setting it would be preferable to have a small group of people who are developing the expertise and seeing people over a period of time. However, they need to have access to specialist backup from a specialist surgeon or a specialist physician.

Senator PARRY—Finally, could the behavioural problems that are experienced manifest themselves as psychiatric conditions easily if those behavioural problems are primarily driven by a need to draw further attention to individual clients or detainees who may wish to advance their cause or to manipulate the system? Is that a possibility that they would be regarded as having psychiatric conditions? Can a genuine case and a non-genuine case be confused?

Dr Newman—The behavioural problems that you are alluding to can sometimes be motivated by a need to draw attention to a legal process. It is quite common in people who find themselves essentially stuck or who do not feel that their issues are being heard adequately. There are usually reasons underlying people's behavioural disturbance. In practice those people usually present with difficulties with anger, occasionally self-harming if they are extremely distressed. However, they do not feign symptoms of psychosis for example—it would be particularly difficult to do—nor is it likely that they could feign and sustain symptoms that were consistent with something like a major depression let alone a psychotic depression.

There is no doubt that people who are distressed can behave in a behaviourally uncontrolled and inappropriate way. That is known not only in the detention environment but also in many other environments. We see those sorts of difficulties in other institutions, for example prisons. It is important that the underlying causes are looked at and that people feel that they have adequate psychological support. There are tried and true methods of reducing the degree of that sort of behavioural disturbance. The most important issue is that the people who work in an institution at least have access to those with the clinical skills to make those distinctions so the assumption is not made that all behavioural problems are attention seeking or manipulative. In many cases that then becomes a very pejorative judgment. In Baxter, in the Rau affair, assumptions seemed to have been made which may have been true of another individual but were not true in Ms Rau's case and have not been true in the cases of others. So it is about the level of skill needed to make that distinction.

Senator PARRY—So your assertion is that the only person to make that distinction of feigning and exaggerating their condition would be a clinical psychiatrist?

Dr Newman—No, it might be a psychiatrist and it could be a clinical psychologist. There are certainly some general practitioners with experience in mental health. Fundamentally it is a clinical decision; it is not a decision that can be made by those without any degree of clinical qualification or training.

CHAIR—In Adelaide yesterday, we heard from people who had had experience of Baxter. They made comments about it being a toxic environment and that the mental health services were appalling—in fact, in crisis. Someone said to us that the access to services was poor and that there was unresponsiveness to people's needs with regard to their mental health condition. In your experience with either Maribyrnong or Villawood, can you make some comments about whether a similar scenario could be described?

Dr Newman—Villawood obviously has the advantage of being a metropolitan centre and, at least theoretically, should have much easier access to psychiatric services. I think it is fair to say that the issues are similar in Villawood, which is concerning but probably not as intense. The issues that I have confronted at both Baxter and Villawood are very similar in respect of having my recommendations as a clinician acted upon in a timely manner. There is a culture of dismissing the seriousness of some of the mental disorders that we have seen. Fundamentally, as has been the case in South Australia, there is a lack of any clear or reasonable arrangement between state mental health services and the Commonwealth with regard to the mental health needs of detainees. That has contributed in both settings to what we would consider on clinical grounds to be an inordinate delay in getting people to an appropriate mental health facility for the treatment that they need.

It should not be such a problem at Villawood because there is a local hospital with a psychiatric unit, there are some psychiatrists in the area, yet it has been a problem. I think some of those difficulties are to do with the employment arrangements between visiting clinicians and the provider of detention, or the outsourcing process. The AMA and our college are of the opinion that psychiatrists should not be employees of a provider of detention because of the fundamental conflict of interest that creates—we cannot treat and advocate for the people we are meant to be helping, at the same time being an employee of the body detaining them, when we believe that, at least in part, prolonged detention and some of the circumstances of detention contribute to mental disorder.

That having been said, there is a complexity there that needs to be addressed. We have previously raised the issue with the Commonwealth, and we would be pleased to raise it again, about the need to have a truly independent body of clinicians. The Committee of the Presidents of Medical Colleges and our college have volunteered to be involved in such a process so that we can independently—as in independent of the Department of Immigration and Multicultural and Indigenous Affairs and the provider of detention—give the assessments that are definitely required, and we can work with the Commonwealth so that those recommendations can be acted upon as is appropriate. My experience in Villawood is that some of those cultural problems still exist. There have been great concerns about people with a serious illness such as psychotic depression not being transferred to hospital when that has been recommended by more than one clinician. There are inadequate psychologists at Villawood, and there is a very low number of

visiting psychiatrists. Overall, it does not meet the standards that we would require in the community.

CHAIR—It was put to us yesterday that there has been very little substantive changes post the Palmer inquiry. To build a sports ground or to put up a flash entrance is not going to address the systemic problems that are still there. In fact one witness yesterday suggested that the government should immediately assess all detainees so they have documentation about the level of their mental state. Following on from Senator Nettle's question, since the Palmer inquiry what have you seen that will substantively change the system?

Dr Newman—Unfortunately we have only seen some fairly superficial changes, though they are important in that, hopefully, they signify greater changes to come. But they are minimal in terms of the immediate mental health needs of the detainee population, particularly long-term detainees in remote facilities. We would support an immediate assessment process. That is something we have been attempting to do in the research that our group and others have done over the last several years. I think it is very important that we have the data to look at the rates of mental health problems across the system. For logistical reasons we have not found it easy to conduct that sort of research, but the figures that have been published in the peer review journals to date suggest very high levels of mental disorder over and above pre-existing problems.

The other issue that we have been very concerned about is the rate of self-harming behaviour and other behavioural disturbances. It would be very useful to have that data. Without the data on the rates of disturbance, it is very hard to know how best to plan ahead to meet those needs and to have a system that can be responsive. We need that data to start discussions with state-level services not only about the detainee population but also about those people who are now in various forms of community detention, or on the various other forms of visa in the community, who we also know have high rates of mental disorder. Some of them do not have access to Medicare, of course, but some do not have access to any specialist services.

CHAIR—You mentioned earlier that you had made some complaints to the Health Care Complaints Commission in New South Wales. Do you have any outcomes? Has it been resolved?

Dr Newman—Not as yet. It is ongoing. The last I heard, several months ago, was that they were still considering the nature of those complaints.

CHAIR—Investigating them?

Dr Newman—Yes, they are being investigated currently.

CHAIR—Do you have some confidence that they will be dealt with adequately?

Dr Newman—The issues we had hoped to highlight by making those complaints was that the provider of detention has a duty of care to provide adequate health and mental health services which, in the cases we reported, had not been met and that there were inappropriate practices that did not meet basic standards of clinical care.

CHAIR—It was put to us yesterday that psychologists or psychiatrists who have tried to access Baxter have met some difficulty—they do not have automatic access, and they have been frustrated in their attempts. It was suggested to us yesterday that it was far easier to access prisoners at Yatala than it was to access people at Baxter. In fact, some of the facilities at Yatala prison and the treatment of people were better than what people experienced at Baxter. In your work I am sure you deal with people in prisons. Is there an analysis between the two or a comment you can make about people you have worked with in the prison system and the people at Villawood?

Dr Newman—Overall the level of service provision for prisoners, at least in New South Wales where I am most familiar with the prison system—maybe Julian can comment on Victoria—is far superior to that which is provided to detainees in terms of absolute staff numbers, qualified clinical staff, rehabilitation programs and so on. They might not be at the level we would like, but they certainly exist. There is greater flexibility there and greater access to a whole variety of medical and mental health services which might be needed.

I agree with the comment that it has been particularly difficult for psychiatrists and clinicians to access detainees or to provide them with any support—particularly in Baxter, which is a very remote facility. This raises concerns about remote facilities in general when we are dealing with a vulnerable population.

CHAIR—It makes you wonder what is going to happen when the centre gets built on Christmas Island.

Dr Newman—Yes, I think that is very concerning. It would be a much more reasonable decision, from the point of view of service provision, to have a metropolitan processing centre if that were required. There is obviously quite a complex process for us to get to see people in Baxter. As I said, we have only done that on the request of lawyers acting for particular detainees who have to consent to and request themselves an independent medical specialist assessment. As has been reported, that was an issue in the Cornelia Rau situation. My colleague Michael Dudley and I were in Baxter at the time and we were aware that, at least on description, she was particularly mentally ill but we were not able to see her, even though we offered to do so, such was the level of concern about her condition amongst other detainees. The fundamental issue there is not that everyone needs automatic access but there needs to be a system of regular and appropriate level review of such a vulnerable population.

CHAIR—I have one last question. I am not sure whether it is outside your area of expertise but I am pretty certain people would have made comment to you about it. Is it that the Migration Act is adequate—and therefore the government is lacking in its duty of care—or are these mental health problems compounded by the complexities or the inadequacies of the Migration Act?

Dr Newman—I am of the opinion that the act is inadequate in many areas. The rates of mental health problems that we are seeing amongst this population are inordinately high. In our last published research, where we looked at one of the remote detention facilities, virtually 100 per cent of people that we assessed in a formal way had mental health problems. I think the fundamental issue is a failure to recognise pre-existing vulnerability, which certainly exists. Rather than providing an appropriate level of services and the appropriate processing of people

in a timely fashion, the way things have been 'operationalised' means we have done the opposite. We have put people into remote areas with less mental health support and other supports than they their circumstances require, and we have detained them for inordinately long periods of time.

All the research not only by our group but by other groups that have done work both here and internationally have found the same relationship between the length of time in detention and deteriorating mental function. We are certainly of the opinion that brief periods of detention for appropriate processing might be required and, per se, are not likely to cause the sorts of difficulties that we are seeing now. That is supported, and we make that statement on the basis of the research. But it is the prolonged nature of detention and the uncertainty and complexity of the legal processes that people find themselves caught up in that contribute to the breakdown of people's mental health, with quite significant clinical degrees of depression and social withdrawal. Those conditions have been quite well documented as severe conditions. By the time people are in that state they cannot be safely or appropriately managed in a detention environment which is not a therapeutic environment.

Dr Freidin—With regard to your question about whether the act has fundamental problems, the act goes so far in the direction of detention, containment and control in all sorts of ways that it seems to miss out somewhere or to have lost sight of the fact that there are people who are suffering already before they come here and that their right, enjoyed by the rest of the community, to simple access to general health care is limited in so many ways, not just to psychiatric treatment but to access to Medicare or to health translation services and so on. It is that balance that we feel needs to be redressed.

Senator BARTLETT—Your submission and the stuff you have done today have been focused on impact of detention, which I appreciate. We should not lose sight of that. Thankfully a growing number of people are finally being released. Do you have the capacity to comment about the adequacy of the services that are available and also the mental health condition of those in the community—both those who have been released on all sorts of visas after a long time in detention and also a group I am concerned about who tend to get forgotten: those on bridging visa Es who have never been in detention but do not have any entitlement to Medicare and are potentially in the community for years while their cases get assessed.

Dr Newman—Overall it is clear that there is a lack of appropriate services and support for that category of person in the community. A group from our college and also the APS—the Australian Psychological Society—and others have established pro bono services for those people who otherwise would have no access to the support that they need. Of course, some of those people have absolutely no Medicare access. There are also issues for children on those various categories of visas and their access to health services—basic things such as immunisations and so on. We have been in a position of providing those services, along with other medical practitioners, on a pro bono basis in New South Wales. I know similar arrangements are made in other states. We have done that out of necessity and in the belief that these people need treatment while we continue to advocate some systemic reform so that they have access. The other issue in most locations is the lack of specialist services with staff experienced in asylum and refugee mental health and health issues. There are very long waiting lists at the available services. They all have pretty limited capacity in terms of their work force and funding, so they cannot meet the need.

Research that Zachary Steel and Professor Derrick Silove have just completed, looking at people on various forms of temporary protection visas and people coming up to review, is quite striking from a mental health point of view. It suggests that it is very hard for people to make an adequate psychological recovery when they are facing uncertainty about their future and that many people continue to suffer what they describe as a form of anticipatory anxiety: 'What is going to happen to me and my family in the future?' We have seen some very distressing cases of people decompensating mentally when they are coming up for various review processes. Again, there is a lack of general skilling in the mental health work force to support those people. We would like to see increased support for the development of specialist transcultural and refugee mental health services, at least to offer training opportunities for younger clinicians so that we have the work force to meet this changing demographic. Obviously this will remain a long-term issue.

But the fundamental issues for many people that I have seen in the community are about the need for permanency of protection or at least decision making in one way or another. Again, we are facing issues of the inordinate period of time in that decision making process, which further increases people's stress and contributes to their mental health problems. Unfortunately we have seen some very unusual decisions made, particularly affecting families and the separation of families. There have been situations—I am sure people can provide details of them if you require—where parents are threatened with deportation but children are to remain. I have dealt with one family of two children with a single father but without a mother. The father was deported and the children were to remain here and be placed in care. They have no other family members. I think somewhere along the line there needs to be a review—hopefully a timely one—of some of those cases where the circumstances and the processing are directly contributing to people's mental health problems.

Senator KIRK—Thank you very much for your submission. I want to explore something a bit more. You mentioned arrangements between the Commonwealth and the states in relation to provisional mental health services. I believe that at one point there was a suggestion that there might be an MOU between the South Australian government and the Commonwealth, and I understand that has not proceeded. I am trying to get my head around the cost of this, and who actually bears the cost of providing psychiatric services. You mentioned that it was on the request of lawyers that you people got into Baxter, for example. I am from South Australia, so my focus is there. I suppose my concern is about who pays for your services. Do you think it is the case that the reason for the poor services in this area may in fact be the cost and the fact that the Commonwealth has tried to minimise costs by having somebody fly in from outside to look at people?

Dr Newman—It has been very complex. In most cases, when people have required transfer to a state run and funded psychiatric facility from a detention centre, there is a complex process of the hospital trying to recoup moneys from the provider of detention for the treatment costs of that individual. That is certainly the case in New South Wales at Bankstown hospital. It does not always happen in a timely way. So the state bears that cost and, in the immediate sense, then tries to recoup. In terms of our costs, we have been providing our assessments on a pro bono basis. I think the actual expenditure on psychiatric services, at least in the detention environment, has been minimal because they have not been provided at an adequate level. The majority of psychiatric time has been on a pro bono basis.

I think the attempt at a memorandum of understanding in South Australia was a genuine attempt but appeared, at least in my understanding, to get bogged down in some of the complexities and pressures that the state mental health services feel with their work force shortages and capacity to provide what would be considered an adequate level of service to that group. There was certainly concern raised by the state hospitals, particularly at Glenside, that the whole remote and rural mental health unit was being filled with ex-detainees. They therefore had to juggle the needs of other people in the community. It happened for reasons that I think are clear: the detainee population were some of the most severely mentally ill at the time and so were able to get in. So there has not been a decision made at any level, I do not believe, about a designated service that is realistically funded in that it acknowledges the vulnerability of that group. If we are to continue to detain them, they will be a group who need hospitalisation and treatment.

Senator KIRK—And, no doubt, ongoing treatment as well, even if they are released into the community on a visa.

Dr Newman—Yes, they will. There has certainly been no decision made and no agreement come to, as far as I am aware, between the Commonwealth and the states about the ongoing mental health and treatment costs. We would be very keen to advocate for some movement in that direction. The state government, at least in New South Wales, have taken the position that what goes on in the detention centres is a Commonwealth responsibility. They do not want to discuss it. We have tried on numerous occasions in New South Wales to raise those issues with New South Wales Health. It has now become an issue that the New South Wales health department needs to acknowledge because of the numbers of people who have required hospitalisation.

Senator KIRK—You also mentioned the independent review panel, which I think is an excellent idea. I wonder if you could elaborate for us somewhat as to how you would see that operating and, again, on the question of cost—whether or not it would seem a bit much to ask for those services to be provided on a pro bono basis. If they were not, how would the cost be allocated in that case?

Dr Newman—We were disappointed in one sense with the Palmer recommendation to establish yet another committee with medical representatives, again as a ministerial appointed committee. We had previously made recommendations about having an independent clinician run group to overview health standards and to look at issues about quality assurance within the detention environment, possibly now incorporating people in various forms of community detention. Our original proposal was made some time ago now. I believe it was to Minister Ruddock at the time. There was an agreement across the medical colleges and the AMA that representatives from those clinical groups who needed to be represented—psychiatrists, paediatricians, physicians, public health and so on—could form such a committee. It would be very happy to work with the Commonwealth on the issues and to report to the minister but should fundamentally be appointed by the medical colleges.

I think the issue of funding that is important, depending on the actual function of such a group. Properly constituted, a group like that could actually do some of the independent assessments that might need to happen. The numbers involved at the moment are relatively low, so I do not think it could easily be costed but we really raised that as a suggestion. Professionally, we still

support the idea of an independent review process and do not see the utility of having yet another ministerial committee.

Senator KIRK—How do you see the independent body that you refer to operating in practice? Would it be a matter of the individuals going into each of the centres and assessing everybody who was there or would it only be persons who had been identified as having problems?

Dr Newman—I personally believe that, if we were to have such a process, it should initially be a data collection exercise with independent assessments of all the current detainees and those people in community detention. I think it would be inappropriate and potentially quite risky to make the assumption that the centres themselves can identify in any clear way those who have problems. Sadly, I think we have seen that they are not qualified currently to make those determinations. That would then allow us to have an idea of the magnitude of the difficulties that we are dealing with. Psychiatrists would obviously play a major role in that because of the mental health problems—some of the major issues—but there are also concerns that have been raised by other medical specialists about general health and physical health matters. Those should be looked at as well.

Senator LUDWIG—I have a couple of questions. Firstly, and this is following up what Senator Kirk said, is there a precedent anywhere for an independent panel? Are independent panels used in prison systems or other places? If so, can you briefly describe those for us?

Dr Newman—Yes, they are. They are used in many states in the management of psychiatric facilities, in terms of independent visitors and reviewers, and in prisons as well—not that they are performing the same function exactly with clinical direct assessments—

Senator LUDWIG—I understand that the functions might be different.

Dr Newman—but as a terms of review function and an independent body to which issues can be raised by detainees and by the centres' operational management there is certainly a precedent for those.

Senator LUDWIG—That is why you say you were disappointed that the Palmer inquiry did not go quite as far as you might have expected it to go—in other words, having an independent panel.

Dr Newman—Yes, we were disappointed because we had raised queries—

Senator LUDWIG—And because you have got some experience as to how it operates in other types of detention facilities.

Dr Newman—Yes, and I think it also allows us to get away from the untenable ethical position of clinicians being directly involved with providers of detention or potentially with the department of immigration. We would prefer it to be a clinically driven process of review, certainly answerable and with reporting directly to government.

Senator LUDWIG—You indicated that you had made a complaint to—I forget the name—a New South Wales tribunal. Have you made similar complaints in other states where there are detention centres and how long ago were such complaints made?

Dr Newman—I have personally been involved only in the New South Wales complaint. That was to our health care complaints commission. Unfortunately, there are not similar bodies in all parts of the country where there are detention centres. I am not aware of any other complaints, although I am aware of a couple of cases, in both South Australia and New South Wales, where the office of the public guardian has been involved in terms of allowing an independent body to make decisions on behalf of detainees. Those cases were successfully argued along the lines that health decisions as to the best interests of particular detainees were not being made by the department of immigration or centre management.

Senator LUDWIG—How long ago was that complaint made?

Dr Newman—Probably 18 months or so ago.

Senator LUDWIG—So it has been ongoing for some time?

Dr Newman—Yes, it is ongoing.

Senator LUDWIG—And there is still no outcome?

Dr Newman—No.

CHAIR—As we do not have any further questions, I thank you very much for the effort that you have put into the submission and also for making yourselves available to meet with the committee today. That is much appreciated.

[11.41 am]

GRECO, Ms Sarina, Manager, Ecumenical Migration Centre, Brotherhood of St Laurence

HANNAN, Ms Ainslie, Coordinator, Ecumenical Migration Centre, Brotherhood of St Laurence

JAYASURIYA, Ms Rasika, Refugee Research and Policy Officer, Ecumenical Migration Centre, Brotherhood of St Laurence

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

Ms Greco—I am the manager of the Ecumenical Migration Centre at the Brotherhood of St Laurence and I am also here as a co-convener of the state-wide coalition in Victoria, Justice for Asylum Seekers.

CHAIR—We have your submissions before us. For our purposes we have numbered them 163 and 175. Before I ask you to make an opening statement, do you have any amendments or additions you want to make to your submissions?

Ms Greco—No, thank you.

CHAIR—Please give us a short opening statement and then we will go to questions.

Ms Greco—Since we are representing both Justice for Asylum Seekers and the Brotherhood of St Laurence, I propose that I spend a few moments on a point out of the JAS submission and then follow on with a couple of points arising from the Brotherhood of St Laurence's submission. That will leave us the rest of the time for your questions.

Thank you for the opportunity to appear before the inquiry. After one of the most shameful periods in Australia's history of managing onshore asylum seekers since the Migration Act in 1958, we have formed a coalition in Victoria, Justice for Asylum Seekers. This is a network of about 30 welfare, church agency and human rights groups working together because there was no voice for asylum seekers in Victoria. The Migration Amendment (Detention Arrangements) Bill 2005 introduced some amendments to the Migration Act which we welcomed. But we understand that these are in response to a period of sustained criticism, very frustratingly for us, over many years when much damage was done to the people who are affected by the act.

In making a statement about the Justice for Asylum Seekers submission I would just like to pick up one point. We are presuming that you will have read the documentation that we have sent you, so I will not go over that. The changes that we have seen this year are very much in line with the proposals that the Justice for Asylum Seekers coalition developed and fully costed. You will know that they are outlined in our brochure, *The Better Way*. I have some copies of that here if you do not have it in that form.

I wanted to restrict this opening statement for JAS to just one issue that continues to appear despite the fact that it is comprehensively dealt with in all of the documentation that JAS has prepared. It seems to be a stumbling block for politicians and for ministers and their advisers—that is, an unfounded fear that if you involve social workers in case managing asylum seekers who want to be recognised as refugees there will be a problem because social workers will not allow people to be returned or will not accept that some asylum seekers or claimants will not be found to be refugees. I think this is wrong. It is unfounded. In the trials that have been conducted that build on the proposals developed by Justice for Asylum Seekers we have seen that this approach that we propose, using casework approaches, gets quite good outcomes and achieves returns in a way that the current system has not been able to achieve—not that that is our aim, of course.

We are committed to a refugee determination system that has integrity. We do not believe that everybody who believes themselves to be a refugee will meet the criteria. If we want that system to work in a global context, where some people will have a need for protection and others who may believe themselves to need protection will not actually fit that criteria, we want to support and strengthen a system that tries to truly respond to the protection needs of those who need it.

The approach set forth by Justice for Asylum Seekers looks at the role of caseworkers as not one where they are involved with the refugee determination system. That role runs parallel to the management system that we are proposing. There is no role for caseworkers in providing any migration legal advice. It is illegal for them to do that. That would be a very clear stipulation and has been in any work that welfare agencies do with asylum seekers. It is not their role to provide migration advice. Their role rather is to ensure—we are talking about vulnerable people here, if they believe themselves to be refugees—that people's needs are properly assessed using all the experience and expertise built up over many decades of welfare work, to develop care plans that help people increase their sense of wellbeing and their psychological health so that they can actively heed the advice that legal practitioners are giving them about their case and so that they can be well prepared to make decisions about how they will manage their lives once a decision is handed down that they are to be given refugee status or not and to heed advice about whether or not the possibility of appeals have merit.

We believe that in the trials that JAS members have undertaken we have had good achievements. For example, in a trial undertaken by the Asylum Seeker Centre of Hotham Mission, 85 per cent of those not found to be refugees returned voluntarily. They accepted the decision, made plans for their return and returned voluntarily. Some of those who made up the other 15 per cent in fact had to return to detention in order to have an air fare paid so that they could leave. These are outcomes that show that our system would not in fact be vulnerable to people not wanting to uphold the integrity of the refugee determination system.

My final comment about that is that that comment is in the context of the need to seriously review the poor decisions that are made at the primary decision making level undertaken by DIMIA officers. There is a high rate of overturning of those primary decisions, which on the whole tend to be negative decisions that are then later overturned under Refugee Review Tribunal mechanisms. Notwithstanding the need to review how decisions are made so that they are quality decisions and that people have access to quality legal advice in migration matters, I think that point stands: people should not be worried that welfare workers would not be able to cooperate with the government's aims to only give refugee status to those who need protection.

I will move on to the brotherhood's submission. We can have questions later if needed. The brotherhood also welcomed the changes in the Migration Amendment (Detention Arrangements) Bill 2005. Disappointingly, the legislation, while responding to the inadequacies in the immigration detention system, actually increased the non-compellable discretionary powers of the minister rather than fully developing and mandating procedures that operate in accordance with international best practice.

However, the significance of the changes, in our view, is in reframing immigration detention policy within broader and more humane principles. These include: the principle of detention of children as a last resort; recognition of the need to maintain family units; an understanding that high security detention is an inappropriate response to vulnerable people, and is unnecessary; recognition of the disproportionate and detrimental outcomes for people who have a very low risks of absconding; acknowledgement of the need to process protection applications in a timely manner; and recognition that review and accountability measures are essential when people are deprived of essential liberties.

While the changes do not achieve the overhaul of the failed immigration detention system that we believe is needed, we believe we have seen a genuine commitment from the government, and more recently from the department of immigration, to implement the changes. So the Brotherhood of St Laurence is now looking to the department to fully implement the intention of those changes and to fully utilise all the mechanisms at its disposal, that it has not utilised to date, in the implementation of the Migration Act.

I wish to make two points. The involvement of welfare agencies, through the leadership of the Brotherhood of St Laurence, has attempted to shift the management of onshore asylum seekers out of the political limelight, away from the place where it is a red hot issue, into a space that is more likely to benefit those affected by the policies—and also the department and broader community—by offering this group the expertise and the well-tried systems that are utilised in welfare approaches for vulnerable people.

We have sought to move towards a more systematic approach to replace the previous ad hoc approach and we have shown in our work and proposals the financial, social and well-being benefits of utilising the model that we have been promoting. This rests essentially on the assessment of vulnerable people, and the development and implementation of care plans that utilise welfare approaches and keep separate the care and support from the determination system, which is not the job of caseworkers. We think it is time to fully trial, document and evaluate what is happening currently with the residence determination releases of families from detention and we believe there are good grounds and the capacity for those trials to be extended to other vulnerable people in detention—not just families. There is a problem about barriers to implementation of the intended changes in the remote detention centres and we believe that the less these are used the better because the full implementation and trialling of some of the approaches would regress incredibly if remote centres like Christmas Island continue to be used.

My second point for the brotherhood's presentation is that the temporary protection visa policy has had many intended consequences for people who have arrived in an unauthorised manner but we believe it has also had many unintended consequences. So we are calling for the abolition of the temporary protection visa and restoration of permanent protection for those who can prove that they need Australia's protection. We are happy to elaborate on some case studies

that show that the temporary protection visa is not for 36 months at all. On average, people are on temporary protection visas for between five and eight years and this has catastrophic consequences for people who have enormous barriers to their settlement because of that policy, the lack of support and the intended exclusions that it carries.

It also creates havoc later when families that have been forcibly separated are reunited and welfare agencies are left to clean up the mess. Another unintended consequence relates to TPV minors who, because of the extended periods—it is not 36 months but much longer than that—move out of their minor status into adult status. That means that they cannot then sponsor their families as they fully expected they would be able to do, and therefore have to use other provisions which are very costly. The brotherhood wishes again to propose the abolition of the temporary protection visa in favour of permanence for those who deserve it.

CHAIR—Ms Hannan or Ms Jayasuriya, do you wish to make any opening statements?

Ms Jayasuriya—No.

Ms Hannan—No.

Senator KIRK—Thank you for your submission. I am very interested in the RTP system that you propose. How do you see this system overcoming the main concerns you have with the existing detention regime for asylum seekers?

Ms Greco—The reception and transitional processing system does not change the concerns about border security and the proper processes for immigration et cetera, but it does propose that high-security detention is not only unnecessary but also harmful. I am sure many of the other submissions would have elaborated on that. The system proposes that, instead of mandatory detention, we have mandatory reception. We do not disagree that people who have made dangerous journeys, who have had very poor or no health care and who have escaped persecution and human rights abuses ought not be released into the community without a proper assessment of their needs. They are vulnerable and they will have health-care needs, and it is true that we may not know who they are and so their identity and security clearance are of concern to us, as they are to everybody else. But we are pleased to see that the detention of children as a last resort has been accepted, and we believe that ought to be extended. What we do know is that there have been no cases of security concerns found by ASIO among all those who have arrived in an unauthorised manner. So there is no need for this incredibly harsh system when the facts say that people arriving are who they say they are: they are people in need of protection and believe themselves to be so.

We would say that mandatory reception is something that is a necessary way of managing unauthorised arrivals, especially when they arrive in remote places. But, after that, once those checks are done—we believe those checks ought to be brought to the beginning of the process and not, as with some of the checks, have them occur at the end of the process, as we saw recently with the Peter Qasim case; there is no reason why that cannot be managed at the front-up—we could then have a structured release program.

We think that the release for some people might need to be in a more supported accommodation set-up, where they might be in a hostel kind of arrangement, because they have

care needs or need to be supported in particular ways. We believe that would be only a small proportion of people. For most people, having them linked into proper supports would mean that they could go into community housing and that their accessing of supports or income support would become the mechanism for knowing where they are and for compliance requirements to be met. That is something the government seems to have accepted with the new arrangements. It is a very loose kind of curfew arrangement that uses the kinds of compliance mechanisms that welfare agencies use every day for parolees or those on community release. They work and they are not overly onerous on either party.

We are promoting the idea of a case management system which would include the development of care plans and making sure that people, because they are vulnerable, are linked into care where they need it. Caseworkers would be allocated to people who are principally concerned with a determination process, which for them means life or an unsafe future. The role of caseworker would have boundaries, be supervised and be undertaken under best practice standards that welfare agencies use for their other welfare programs.

Senator KIRK—You mentioned the 'structured release', as you described it, of individuals and the need to assess on a case-by-case basis exactly what the person's needs are. Who do you envisage would be doing that assessment? Would these people be part of DIMIA or would this service be contracted out to groups such as your own or others?

Ms Greco—I might invite Ainslie to answer that question.

Ms Hannan—In the case of assessment, for people who have been in detention it is critical that the initial assessment is as fluid as other welfare systems. When we talk about other welfare systems, we are talking about the systems of correctional services and protective services where there is some legal mandating of welfare agencies. We think that they are probably closer than other welfare systems.

In that form of assessment, an initial risk assessment would be done around issues of security and care. It would be critical—and it is happening at the moment in the new release process—for every agency that has been involved in the care and security of that individual to be involved in developing a case plan. An independent person from a welfare agency with some psychological and medical training, if needed, would be part of that case plan. That would then determine, first of all, the care and security needs of that individual or family. Part of that assessment would be the release options they would have. That would then be a fluid process. As with other care plans in the community, assessment would happen at different times as you go through.

To make it more concrete, I can quickly take you through a case example of one of the people who we recently had the opportunity to settle from Christmas Island. This young person, part of a family, arrived on Christmas Island when she was 15. Because of the new and welcome decisions of the government, she was released after two years on Christmas Island. Because of the remoteness of the facility, initially there was not segregation on Christmas Island between different families or single people; it was not that transparent. That was not through the will of anybody; it was just the system developing. Also, there were not necessarily qualified social welfare workers within the system. Local people were employed. Lots of people tried to do something about it, but that did not happen for a long time.

At 17—we are moving through her adolescence—she will be granted a temporary protection visa under the new legislation, which is welcomed. She has now settled in Victoria. Fortunately the Victorian government opened up transitional but not permanent housing for her and her family. She came with her extended family, the youngest being six weeks and the oldest being 75 years of age. They all settled in Victoria—17 of them together. This young woman did not have very many educational opportunities on Christmas Island, although she has learned reasonable English.

She will have to wait 2½ years, with another seven or eight months, to get permanency and will then be eligible for higher education which will give her some sense of belonging in the community. We would request that the new changes come under legislation with minimum requirements of processing. At 19½ she may get permanency, pending character and health checks. With other cases that we know, it has taken eight to 10 months for that to happen. So somebody waits when everybody else in the community has to go through that processing—keeping in mind that, from a welfare and care point of view, she is a young person.

The alternative to this system is that, in the beginning, there is a care plan developed with her and her family on Christmas Island. That process only takes a short period. There is potentially no security risk and there is a quick character check and health assessment. She then moves into the community where there is a care plan developed, welfare agencies and a fully costed system—a step forward. She and her family are integrated within and move through the public housing system. If she were eligible—she has a TPV for six years and not 2½ years—and got permanency earlier, she would then be able to move into education.

The thing about the system is that, if there is ongoing assessment, the biggest risk you have with this group of people not returning if they need to is that they do not get information from anybody in an ongoing, systematic way. So part of our system would be to make sure that at critical times of decisions people actually understand what their options are; that, if they need to return, they will and will then make good decisions. For her, she would have a care plan, she would be able to integrate into the community and she would be connected with other people. She would pose no threat to the community. Otherwise, the government is actually going to pick up the cost later, after she is 20. Does that answer your question?

Senator KIRK—Yes, thank you. It does, and it is a very good example. Has the system been submitted in any way to the government? Have you made a formal submission?

Ms Greco—Yes, many times and in many ways. I think that in many senses the changes we have seen now mirror the basic elements of the proposals that Justice for Asylum Seekers and the welfare agencies have proposed. We have been in negotiation with the department for many years. It has been quite a long and tortuous process to get some movement. That was my earlier point: the department had open to it many possibilities within the current act and within its current range of powers but was very loath to use them to pursue some kind of amelioration of the system, even in short-term or smaller steps towards trialling something that was more a mirror of what we have been proposing.

We think that, through the releases that have happened in the last couple of months, the department has responded to our national advocacy. The welfare agencies have been acting as a national group, asking for a movement away from the ad hoc arrangements that had been made

on a family-by-family basis and further towards a coordinated system. We wanted to ensure that the department was developing a proper system of care that could be embedded in current welfare practices, rather than moving to establish a new or parallel system for this group. In many ways, we feel that is progressing quite well. There is some room to expand the releases and to expand a formal trial and evaluation of what is happening, but we believe the major elements are there.

Senator NETTLE—I want to ask you about the residence determinations that have come into play. We have received a number of submissions on these, and your submission also talks about some concerns, in that residence determinations are still a form of detention and the uncertainties inherent in the current system remain in residence determinations. What interaction have you had with people under residence determinations? I was not sure whether or not the example you were giving—the woman from Christmas Island you were describing—was of somebody who fell under that category.

Ms Hannan—No, they were released under a temporary protection visa. They were not released under residential determination.

Senator NETTLE—I do not know whether you have had interactions with people who are under residence determinations. That is a more general question. Specifically, I note that in your submission you have costings about the sort of financial assistance that needs to be provided to people for housing, medical and general living expenses. One of my particular concerns about the residence determinations—and I have asked the government and the department this before—is what amount of money is going to be available for people on residence determinations and whether it is adequate to meet their needs, the sorts of figures that you are talking about in the submission. So I ask those two questions generally.

Ms Greco—I will answer your first question about what relationship we have had with those releases. The brotherhood's role has been one of developing and consolidating a consortium approach, with the assistance and support of the major welfare agencies around the country—the Brotherhood of St Laurence with St Vincent de Paul, the Salvation Agency, Anglicare and UnitingCare. These are the major welfare agencies working together. The brotherhood's role, principally through Ainslie's work, has been in consolidating this consortium approach to support the department of immigration in its capacity to implement a coordinated, comprehensive approach, rather than falling back on more ad hoc arrangements that we have seen in the past.

Our preference all along has been that a well-respected national welfare agency or the Australian Red Cross be the lead agency in this arrangement. In our view the importance of the Red Cross having a lead role is that the groups that we are talking about are in the process of having a decision made and the Red Cross is concerned both with international affairs and these groups before they arrive and also has a domestic presence, whereas the welfare agencies that I mentioned are domestic focused. It is helpful that it be the Red Cross rather than a welfare agency for people who are still in the process of having it decided whether or not they are to remain. I invite Ainslie to comment about the costings.

Ms Hannan—It has actually been on this occasion, as on other occasions, a great opportunity to work with the department of immigration on the implementation of the residence

determination process. We have had a number of national meetings with the department in which all the welfare agencies around the country involved in the consortium—the partnership model under the leadership of the Red Cross—have come together to iron out cases and problems with particular cases. Because the particular people being released from detention had an option which stated that they were actually being released where they had existing ties to the community, few were released into Melbourne. So the Brotherhood of St Laurence has not had direct contact with the families being released, but we know of many of the cases. Altogether—and I could be slightly incorrect; I will check the figure on this—17 families were released under the leadership of the Red Cross. Importantly in this model—and this goes back to the costings that JAS actually did with Milbur Consulting—if it is a case management system, it can be a fully costed system. It also needs to sit within existing systems to get cost efficiencies. For example, the allowances given to people under residence determination. As people know, it is important that it is under a visa class. The payments for those people actually come out of the same structure as the ASAS payments given to other vulnerable groups, which are administered for the government by the Australian Red Cross. You have a system and cost efficiencies because you have similar people coordinating them.

Likewise in that database over the years there have been connections to people who provide psychiatric services and a whole range of other services to people, so you have an existing system. What happened, though, in the rush because of the commitment of the government to remove people from detention—families and children who were vulnerable—is that there was not a lot of lead-up time for the system. The best was done at the time and now we are going not backwards but back to actually correct some of that as the system develops. The government through the department has just committed itself to giving a small amount of coordination resources to the Australian Red Cross to implement that. It has been a good journey in terms of releasing people from detention, and we would hope that we could continue to contribute to the understanding of some systems to release other vulnerable groups or people who do not need to be in detention.

Ms Greco—Senator, I think the question you raise about the adequacy of the income is an important one, because the releases, unlike the JAS proposal and our proposal, are non-visa releases—people are released without a visa. We had expected that any changes would mean that people would be released on a bridging visa while waiting for it to be decided which visa was to be allocated or not. We are keen to see the trial formally documented and evaluated, because those kinds of questions can be addressed in an evaluation of these releases. They are not a huge number but that evaluation ought to tell us whether some income from the government and no visa is a good way to proceed in the future.

It is worth mentioning that, although most of JAS's documentation has focused on asylum seekers held in detention and arrangements that might see them released into better management processes, what we would envisage is that the approach we have developed would then be extended to other asylum seekers currently living in the community who never were in detention. We think that one unified system needs to be in place for both groups, including those who arrive by boat and therefore need some kind of processing because they do not have a valid travel document. The problem with people in the community, although they have not had the distress of detention, is that many of them end up destitute because there are not sufficient supports in place and the determination system for them can extend into very long periods of time. They could benefit from a better system of support, advice and access to legal advice, for

example. We would envisage all asylum seekers in the one unified system that would provide adequate levels of care and support. But I think an evaluation of the current small-scale releases would bring a better answer to your question about the adequacy of the income.

Senator NETTLE—We do not have a unified system currently. I agree with your comment that if we are going to have any system like this it needs to be unified. It is not currently unified. We are in a position, as parliamentarians, of being asked to make decisions about residents' determinations without the information that you are talking about. We have not received any answers from the department. I thank you for what you have been able to describe to us in relation to residents' determinations but you have got more information than us, as parliamentarians, who are being asked to implement these changes.

Ms Hannan—Just to add to that, it is important also for us to be mindful of the fact that the people being released from detention have been at least two years in detention, so the cost and the care needs for these people are more than if you are implementing a care system for when people arrive. That is a critical point to remember in terms of costing.

Senator NETTLE—A criticism that many people have made is that it is again a system which relies on church and welfare groups to provide those services to respond to the mental illness that people have when they come out of detention. If you want to make any comment on that, feel free.

Ms Greco—Yes, that has been true in the past, but I think with residence determination we have now got the taking up of a system that tries to bring in a proper welfare system that is fully funded for this small group.

Senator NETTLE—We do not know if it is fully funded or not yet.

Ms Greco—The medical costs, the assessment, the coordination of the trial that the welfare agencies with the Red Cross are in have some resources connected with them. People being released have some income as opposed to none. So there are the beginnings of a properly funded system. If it were helpful, we could pull together a couple of case studies, since we have regular teleconferences with those dealing with people released under these arrangements. We could perhaps get a couple of case studies to the committee that look at the financial side of it. Obviously it will be different for a family where there are a number of people with some income as opposed to a single person, and that is something we are interested in as well.

Ms Hannan—But in this residence determination process, the Red Cross and other agencies, with Foundation House, have been involved in the initial assessment and the development of the case plan for the release of these people, which has then been costed before release.

Senator BARTLETT—We have limited time, so I have only one question. One of your submissions, I think the JAS MC submission, mentions the Hotham Mission Asylum Seeker Project, which is run here in Melbourne. It says that I think since the year 2000 there have been people released from detention in various circumstances despite the fact that their case had not been finalised—perhaps an early version of what you are now dealing with, in a bit more of an ad hoc and below the radar way. Given that that has been going now for nearly five years, firstly, is there anything we can learn from that project and that experience; and, secondly, specifically,

one of the justifications always used for mandatory detention is that people are available to be removed if they are unsuccessful, and if we release them they might disappear. Have there been any problems with people absconding or disappearing when they have been released into that case management type of arrangement?

Ms Greco—You are correct. The Asylum Seeker Centre at Hotham Mission, which is part of the Uniting Church, has been an important group working with us on the ground and trialling the kinds of approaches that we have developed for JAS. That has been an integral part of how we know what is worth proposing because it works. The Asylum Seeker Centre has been trialling similar approaches. It has been much more about ad hoc releases and releases of people who were incredibly vulnerable and very damaged by their experiences. In some ways that is the hard end of the trial, because in a normal cohort of people who have arrived in an unauthorised manner, you would not have damage from detention compounding the torture/trauma experiences that they might have brought with them.

The Asylum Seeker Centre has done some studies. We published them in *Migration Action* and they have them on their web site. They found that with 200 asylum seekers, some of whom were released from detention into their care, not one absconded. No-one absconded. This is what DIMIA says about the figures that it can pull together. Absconding is a furphy. It does not happen. It is something that really should not divert us because we know from our trials and from DIMIA that it is not a problem because people are not absconding. In fact, they want to stay connected to a system because they think this is the only way that will deliver them the safety that they are looking for.

I mentioned earlier in my statement about the other part of the research. Of a cohort who were not found to be refugees, 85 per cent accepted the decision, made plans to return and returned voluntarily. There are some good lessons to be learnt there, that our system is not without evidence that it can work, and it has been working. It has been working even with those ad hoc releases where people were released because they were so vulnerable. That was extraordinary, and they were extraordinarily difficult cases. I hope that answers your question.

CHAIR—Do you think that the unwillingness to consider the alternatives that you have put up, such as your RTP model, is due to crisis management in DIMIA from things like the large number of arrivals, Timor and Kosovo refugees? Is it crisis management: lurching from one international incident to another? Do you believe it is ad hoc policy or are there cultural problems within the department, such as those identified in the Palmer report, or is it all of the above?

Ms Greco—Hopefully, we will soon be talking about that as past history. What we have seen with the changes is an acceptance of the proposals that JAS and other groups have put forward. I think JAS's proposals have probably been the most well documented and the most comprehensively trialled. I think it is no longer the case that our proposals have not been accepted.

CHAIR—Are you talking about the women and children incident?

Ms Greco—Yes. We see that an acceptance of this approach to releasing people who are not a security concern—with the release of families—shows that if you can release families, including

the menfolk, then you could broaden this. It is obvious that if you can do it for one group there is no reason why you ought not trial the broadening for other groups, single people or people who do not have children. For us, this shows that there is an acceptance that if it can be done for children, perhaps it can be done for others.

As to your other question, I would agree with you that it was a knee-jerk response to what some people found alarming—large numbers of people arriving in an unexpected and ad hoc way—and that there was some need for management. I think it is a failure of imagination not to have a better management system for vulnerable people and to resort to high-security detention and razor wire as a way of managing people. It has been shown over many years that the issue has not been managed. Vulnerable people have been mismanaged in many ways, and there is a lot of evidence for that now. The reasons are varied and many, and we have written on it in many other forums.

CHAIR—So you are putting to us today that women and children are now out of detention and that you hope to see everyone out of detention and being case managed. If that is the case, we would hope to have an announcement by the government that they are not going to proceed with building the detention centre on Christmas Island.

Ms Greco—We would be very grateful if you put that to the government. We do not see any need for it. In fact, our advocacy, along with other people's advocacy, in Melbourne around the public works proposed for the Maribyrnong detention centre centred on exactly that: why would you expand a detention centre when the proposals to reduce the numbers needing to be held in detention had not been adequately trialled? In fact, that never went ahead.

CHAIR—No, but this week the minister was in South Australia looking at redesigning the entrance to Baxter and opening sporting facilities. Yesterday, it was put to us by witnesses in Adelaide that this was simply window-dressing, that it was not really looking at the systemic problems. So there does not seem to be an indication from the government that they are going to embrace your proposals wholeheartedly. Women and children may well be out, but at the same time the government are putting in further facilities at Baxter—I assume with the intent of leaving people there.

Ms Greco—Of course, we would be alarmed if that were the case. Our view is that the way to achieve change is by incremental steps. To us, the trials that we are involved in at the moment are the most significant step forward in a genuine commitment to try a different way, to believe that it is possible to have people living in the community and to still do the determination. Obviously, we agree with you. We would have liked to have seen this trialled much earlier; we understand the suffering that has occurred. But we believe this trial is a step that will allow the government and others to be more convinced that our proposals could be taken up more fully and that we could move not just to a system for those who are released from detention because they do not need to be there but also to a supportive system where those living in the community already—

CHAIR—What evidence do you have that that is the way the government are moving? Have they signalled this to you? Have they made a public announcement about it? Women and children are out of detention, the families. There are still other women and men in detention. What evidence do you have that the government will move in this way?

Ms Greco—Our work in collaboration with the department of immigration on these releases, their willingness to allow us to have a national, coordinated approach—not an ad hoc one—and the movement towards a system that is the system that we have proposed is the evidence we have to date.

Ms Hannan—And there have been some preliminary discussions with the department about which vulnerable group will be released next.

CHAIR—Thank for your time today and for your submission.

[12.30 pm]

BURNSIDE, Mr Julian William Kennedy, Private capacity

CHAIR—Mr Burnside, I welcome you to the hearing. I want to place on record my appreciation for your being available at such short notice. I invite you to make a short opening statement and then we will proceed to questions.

Mr Burnside—As I was invited late I do not have a written submission.

CHAIR—We appreciate that.

Mr Burnside—There are many things I would like to cover, but can I begin by saying one thing: contrary to widespread belief, I do not have any political affiliations and neither do I have a political agenda in my involvement in this debate. My concern in the matter, from first to last, is a moral concern, which is simply this: in my view—and I think it is not a difficult view to hold—it is morally reprehensible to mistreat innocent people as an instrument of government policy in order to deter other people from behaving in particular ways. The system of mandatory detention, as it is designed and as it has been implemented, does precisely that. It involves the mistreatment of innocent people in order to deter other people from behaving in particular ways. Innocent people are simply being used and mistreated as instruments of policy.

That has two elements. One is that they are innocent—and I trust that members of the committee understand that arriving here without papers is not an offence. Therefore, on any relevant test of innocence, they are innocent. They have not committed any offence. I am not advocating an open-door policy—on the contrary. If people come to Australia without papers, I think they should be detained initially, but it should be detention for the purpose of health and security checks, as was suggested, I think, by the last witness. Health and security checks should be able to be done in a month, and I would limit mandatory detention to one month unless a judge orders an extension of that time for some good reason. The discussion, so far as I have listened to it, has in large part been predicated on the assumption that mandatory detention is the background against which we look at what is going on and see how it can be made to work a bit better. I simply want to put on record the moral objection to indefinite mandatory detention as a starting point.

The mistreatment that is associated with indefinite mandatory detention is not really difficult to identify. For people who have not committed an offence, to be locked up indefinitely for months or years, and in particular without knowing how long the detention will continue, is a torment the consequences of which have been thoroughly documented by the medical profession. That is the largest problem—the fact that they do not know when, if ever, they are going to be released. Within that context, the use of solitary confinement without any regulation is an additional problem of very grave proportions. I see that the latest MSI looks as though it is addressing the way in which solitary confinement will be used, but, so far as I am aware, there are still no regulations that dictate and restrict the way in which solitary confinement can be used. That stands in marked contrast to the prison system, where even the worst convicted criminal cannot be put in solitary confinement without a very clearly defined process which is

subject to judicial review if misused. It is very hard to see why a private operator of a detention centre should be allowed to put people in solitary confinement without any preconditions at all and, for practical purposes, without any judicial oversight.

All of this has to be looked at against the background of recent High Court decisions which have found, in the case of Al-Kateb, that the detention of an asylum seeker who has failed may continue for the rest of that person's life if arrangements cannot be made to remove them. The amendments made earlier this year give the minister the discretion—non-compellable, unreviewable—to bring that lifetime detention to an end. But the fact that the act allows lifetime detention of an innocent human being is pretty disturbing and, I would say, represents world's worst practice, and the fact that it can only be brought to an end by the uncompellable, unreviewable discretion of an individual is also disturbing.

The case of Behrooz, decided last year in the High Court, held that as a matter of constitutional theory, no matter how physically bad and harmful conditions in detention may be, it is nevertheless constitutionally valid. That is a rather startling position from which our detention system proceeds. I cannot go past this point without also mentioning that the act makes people liable for the cost of their own detention at rates that are equivalent to city hotel rates, by the day. This is the only country in the world that charges innocent people for the costs of their own incarceration.

In that context, may I mention one thing about Christmas Island. There is obviously a proposal that the facility at Christmas Island be expanded. I would place on record my concern that, if another boatload of refugees were to come to Australia, the likelihood is that they would be placed in Christmas Island. We know from Senate estimates hearings that locking people up on Christmas Island is roughly four or five times as expensive as locking them up in desert detention centres, and that is more expensive again than in metropolitan detention centres because of costs of distance and isolation. So to lock people up on Christmas Island cannot be justified as a matter of cost. It appears to be supported by the fact that those people are less easy to be accessed by those who are concerned for their welfare. It seems to me unfortunate that the government is pursuing a course which makes it less easy for powerless people to get legal, medical and psychiatric help, but the use of Christmas Island seems to be directed at precisely that objective. It is very difficult for most of us to get to Christmas Island in order to help people who need help.

Indefinite detention can be shown to be punitive partly by looking at the effects, which the medical profession have detailed. I think it was Senator Parry who asked whether these people can feign their conditions. I guess it is possible that some people can feign some conditions, although Dr Newman really said that that could only happen at the margins. I had an interesting episode just a few weeks ago in Adelaide when I was appearing for a bloke who had been charged with escaping from Woomera. He had stepped through a hole in the fence during the Easter riots and stood there until the 40 or 50 police surrounding the hole in the fence arrested him and took him away. He was still, I think, a kilometre inside the boundary of the detention centre, but he was charged with escaping.

I went to speak to him in the cells in order to clarify some instructions that he had given. It was in his interests to tell me as much as he could, but he could not answer most of my questions—these were events that had happened three years ago. I became concerned about his

state of mind, so I asked him his name and he gave me his name accurately, which suggested that he understood my use of words. I then asked him his mother's name and he stared into the distance for about half a minute and said he could not remember. I asked him his brothers' and sisters' names and again he stared into the distance and just shook his head and said: 'It's too long ago. I can't remember.'

He could remember nothing at all about his earlier life, and his recollection of things in detention was fragmentary at the most. He is 24 years old, to my recollection. He has been in detention five years now. He is a Hazara from Afghanistan, which makes it startling that he is still in detention. Here was a person whose interests would be best served by remembering everything he could but whose whole past has disappeared. According to psychiatrists I have spoken to, it is a perfectly familiar consequence of long-term detention.

The other thing I would like to say in that context is that I have quite close connections with a number of Afghani asylum seekers, especially in the Melbourne community, all of them on temporary protection visas or gradually being given permanent protection visas because they are Hazaras, and they are typically being given permanent protection. They have no reason in the world, now that they are on permanent protection, to do anything but get on and live their lives, but they are all still demonstrably, plainly suffering post-traumatic stress disorder, all struggling with things like failure of short-term memory and absence of concentration. No matter how hard they try, they are still struggling to operate effectively as human beings in our society. I think it is important to recognise that, amongst people who do not have an interest in faking symptoms, the symptoms are as florid as you could ever expect to see.

There is one other thing I wanted to say in beginning, and that is an observation that I think has arisen several times this morning about the difficulty of coping with large numbers. There is a passing observation in the Palmer report about the difficulty the department had dealing with large numbers. I think it is important to bear in mind that the number of asylum seekers—the boat people stream coming to Australia—is extraordinarily small and always has been. By international standards the numbers are tiny. Historically in Australia, I think from the mid-eighties through to 1992, when mandatory detention was introduced, the numbers were averaging around a thousand people a year. From 1992 to 1997 or 1998 they stayed flat at about a thousand a year. So mandatory detention, if it was a deterrent, had neither positive nor negative effects. In about 1998 the numbers began to increase, largely because of a deterioration of circumstances in Afghanistan and Iraq, and the peak figure in any 12 month period in the last two decades was 4,100 unauthorised arrivals.

That should be put in context. Our annual migrant stream is 120,000 and our annual visitor stream—authorised arrivals for temporary purposes—is between four million and five million each year. So the leakage of unauthorised arrivals is extraordinarily small and, I think, one of the smallest arrival rates in the world. So to talk about large numbers is to detract attention from the reality of what we are facing. Of course, if you are going to lock everyone up in high-security prisons, the overheads associated with managing them will be great. Maybe that causes a problem with numbers. A short-term detention system followed by something like a bail system or something like that which JAS was suggesting seems to me to be much less labour intensive, so the problem of numbers would be greatly reduced, even if the arrival rate remained the same. In a very short compass, those are the things I wanted to start with.

CHAIR—Thank you very much.

Senator BARTLETT—You have had a fair bit of experience now, not just with asylum seekers but with a range of other aspects of the Migration Act and the Australian Citizenship Act as well. I am interested in any observations you would have about areas we as legislators should focus on for improving the Migration Act: things like due process and justice, for want of a better word—not that there is anything wrong with 'justice', but I think you know what I mean. How do you see it operating in terms of some of these distorted or disproportionate consequences that seem to have happened, perhaps inadvertently?

Mr Burnside—I think justice is terrific and it certainly should be introduced into the Migration Act. In the refugee area, there is a real problem with the nature, structure and operation of the RRT, the Refugee Review Tribunal. I do not say this as a criticism of the individuals who are on it, but the reality is that these are people who are making life and death decisions. They are on short-term contracts. They are not independent of government—although notionally they are, in reality they are not because they are on short-term contracts and they are given a very clear message about what outcomes the government wants. It is easy to see broad shifts in their decision-making patterns according to changed government rhetoric about groups from different countries. Frankly, human nature is such that it would be astonishing if people could resist the pressure of government rhetoric.

One of the problems is that there is some pretty bad decision making in the RRT. People then try to go to court, but the court's hands are tied largely because they cannot review the merits of the case; they can only look at whether there has been a jurisdictional error. That is a pretty difficult concept and there have been some quite horrifying decisions that have nevertheless survived judicial review.

A more workable system might be one where, first of all, the members of the RRT are given some sort of independence. They should not be on short-term contracts; they should be given the sort of independence that is commensurate with the importance of the decisions they are making. I think also that a system would we workable if it allowed for an appeal to the courts—not a judicial review, but an appeal—so that you get a merits review in court, but subject to a filter at the front end. The last thing any of us wants, especially those of us in the profession, is to see the courts flooded with merits reviews.

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

Senator BARTLETT—I understand you are dealing with the Scott Parkin case. It is probably not appropriate for you to comment on it specifically, because it is currently before the courts or in process in some form or another. The broader issue there is the concern, for anybody on any

sort of permanent visa or anything, about the potential for that visa to be cancelled at the click of a finger without being told why. You can then be detained, be charged for being detained and the longer you resist the more your bill goes up—all of those sorts of things. It is particularly relevant in the debate that is happening today in Canberra about terror threats and all those sorts of things. Are there ways we can look at potential reforms that would still enable scope for security assessments but deal with what seems to be a pretty scary degree of arbitrary power with no accountability in judicial law?

Mr Burnside—It is not a function of the Migration Act so much. The nexus with the Migration Act is that the minister must cancel a visa if he or she receives a report from a competent authority of a particular sort. The competent authority in this case is ASIO, which reported that Mr Parkin represented a possible security risk to Australia. The consequence of receiving that report is automatic and so the department can only do what the act requires them to do. The real problem of unaccountability is that ASIO will not tell anyone what it is that Mr Parkin is supposed to have said or done that justified an adverse security report. That does concern me. It seems that ASIO may have told a journalist from *The Australian* the reason for their thinking but they will not tell the lawyers.

Senator BARTLETT—Putting that case to one side, there are other commentaries about Muslim clerics who say things we do not like—'They can go somewhere else'—and that sort of stuff. Potentially, for people who are dual citizens, as I understand it, as long as there is some other country that we can send them to, they may even be deported. It would not be a problem in a constitutional sense for changes to be made to the law. In fact, they are probably already capable, in many circumstances—just saying that there is a security assessment and that is it.

Mr Burnside—Actually, my concern goes further than that. You talked about dual citizenship, and there is nothing I can think of, constitutionally, to prevent cancellation of the citizenship of a person who is just an Australian citizen. That would mean the person would then be a noncitizen. It could be any of us. We become a noncitizen if our citizenship is cancelled. If that happens, on the assumption that none of us hold visas to be in Australia, we become unlawful noncitizens and are liable to be detained. Unless we can persuade another country to take us, we would then be in detention for as long as a boat person might be. Theoretically, based on the Al-Kateb decision, we could be detained for life. That is something that worries me a good deal, especially if the foundation of the revocation of citizenship is so secret that you cannot be told what it is, because, if you are not told what it is, you cannot challenge it either on the facts that it depends on or through the evaluative process by which those facts are then considered.

Senator BARTLETT—I know you have had some experience with trying unsuccessfully to assist people on Nauru. It has now been established fairly clearly that how those people are processed and treated is completely beyond the reach of Australian law. Is it your understanding that the effect of the continuing situation of Christmas Island being exempted from the migration zone is that, in effect, the same thing applies there—that the reach of Australian law, in terms of how people are processed, is basically just outside the Migration Act altogether, apart from residual High Court stuff?

Mr Burnside—No, I would not agree with that. Christmas Island is part of Australia, although it is excised from the migration zone, which has consequences for the way the act operates in relation to detention. Nevertheless, it is part of Australia, and Australian law applies

in full force on Christmas Island. The problem with Nauru is that, like people held at Guantanamo Bay, they are outside the reach of the Australian legal system and do not get any of the protections of the Australia legal system. What Christmas Island and Nauru have in common is that, for physical practical reasons, it is very difficult for people held there to get the help they actually need. There are not many lawyers in this country who are going to be willing to spend a couple of weeks, or one week in every four, going over to Christmas Island for the sake of seeing a few people and coming back and doing what they can do. It is enough of a burden to go into Baxter to find out, or even to go to Maribyrnong and do things. It takes a significant amount of time in your day. But if you want to go to Christmas Island, it is much more difficult and very expensive. So, in a practical sense, people can be denied their legal rights even if those legal rights continue to exist in theory. Access to justice is hard enough if you live in the city; if you are on Christmas Island it is very, very difficult.

CHAIR—Christmas Island is part of my electorate in the Northern Territory. You are right that there are two flights a week to Christmas Island. It is 5,000 kilometres north of Perth.

Mr Burnside—And I think you need your passport to get there.

CHAIR—You do have to take your passport to get there. You are absolutely correct. For the record, people on Christmas Island are severely traumatised because they witnessed the *Tampa* event happening on the horizon. They are not happy about a detention centre being built there, I have to say. Anyway, that is my comment for the day. You have already answered a question from Senator Bartlett about the review process of the RRT. One of Mick Palmer's two main findings in his report was that there is no automatic process of review sufficient to provide confidence to the government, the secretary or even the public that decisions are being exercised lawfully, justifiably and with integrity. I think you went to that issue when you answered Senator Bartlett's question about why you believe there needs to be a review process.

Mr Burnside—That was slightly different. I was talking about the orthodox review process where a departmental officer refuses a visa. There is an automatic right of review in the Refugee Review Tribunal, and those processes are, I think, defective in the way they operate. Of course, other decision making under the act, such as the initial decision to detain, is not automatically appellable to the RRT—and especially people who are disadvantaged in some way, such as Cornelia Rau or Vivian Alvarez, have very limited scope to bring their circumstances to the attention of anyone, let alone the RRT.

CHAIR—So you would see that the act needs to be enhanced. I suppose you would say that people should only be detained for a minimum period of time and therefore the need to have a safety valve should not exist if they are going to be held for the least period of time, is that right?

Mr Burnside—Certainly the risk for serious mistakes or abuses would be reduced if mandatory detention were not indefinite. This is the problem: in any system run by human beings, mistakes are going to be made. Where you are dealing with innocent and mostly traumatised human beings, the effect of mistakes can be catastrophic—especially when the system is predicated on the idea that they may be locked up for life. It is a really dangerous starting point.

CHAIR—Quite a number of submissions to this inquiry have put it to us that refugees or those seeking asylum should be able to access a comprehensive set of statutory rights and protection advice. Do you feel that is an area of the act that is lacking?

Mr Burnside—Yes. I think particular problems arise from the fact that social workers, migration agents, lawyers and doctors are not allowed—I do not want to demean it by saying 'trawling through'—to go there just in case someone needs their help. They can only go there if someone asks for their help. But, by the nature of things, the people who most need their help are probably least able to ask for it. Cornelia Rau is a startling example of exactly that.

CHAIR—That concurs with evidence that was put to us yesterday in Adelaide. If people actually had some specified rights and protection, those problems might be alleviated?

Mr Burnside—The problems that are inherent in the system would be reduced if the rights were made available to them in a practical sense, rather than just being theoretically available. Can I give you an example of this, and it was quite funny in a grim way. You may remember Aladdin Sisalem, the last guy who was on Manus Island, who actually got into a non-excised bit of Australia but was taken across to Manus Island after having asked for asylum, told his story and said he was seeking protection. They removed him to Manus Island anyway and it ultimately transpired that the reason they had done that was that he could only apply for protection in Australia by filling out form 866—or whatever it is—and he had not asked them for form 866 so they had not given it to him. So, because he did not know what form to ask for, they removed him to Manus Island. That is pretty worrying. Maybe the mindset has changed. Maybe the culture has changed. I have some confidence in Andrew Metcalfe in changing culture, but you get the idea.

CHAIR—I have one final question. The other main legal issue that was highlighted in the Palmer report is this: the inquiry found that many of the DIMIA officers who were interviewed and who used the detention powers under, say, section 189, had little understanding of what in legal terms constitutes reasonable suspicion when applied to a factual situation. Is that your experience, that there is a culture not so much of ignorance but of people who are untrained or of people in DIMIA who are dealing with such a wide range of regulations that it is particularly hard for them to get an accurate handle on and consistency in decisions that need to be made?

Mr Burnside—Yes. I agree with Mr Palmer's findings. I think the ultimate problem was that people in the department had a pretty clear idea of the outcomes that the minister wanted so they tended to be driven by getting those outcomes rather than looking at what the facts were and how things should be handled. It is mechanical processing rather than considering human reality. But I do not think that I can deal with that as comprehensively or as well as Mr Palmer did.

Senator PARRY—I would love to engage in dialogue for quite some time, Mr Burnside, but I am restricted to two questions. Firstly, going back to your opening remarks concerning innocent people, what in your opinion is an illegal immigrant?

Mr Burnside—A contradiction in terms.

Senator PARRY—Please explain.

Mr Burnside—'Illegal immigrant' is a meaningless slur. First, refugees are not immigrants. There is a world of difference between asylum seekers and migrants. Migrating is a selfish transaction which you do at your own choice; you do it because you want this or that country to take you. The country chooses you or not, according to its selfish demographic social objectives. In that setting, to say that we will decide who will come to our country and the circumstance in which they will come is impeccable as a statement of migration policy.

Refugees have a quite different claim on our care. Not only do they have the rights given to them by the Universal Declaration of Human Rights and the refugees convention; the simple human reality is that, if they end up on our shores by whatever means, they have not broken the law and they are human beings. To call them illegal is plain wrong. To call them immigrants is a mistake; they are people coming, asking for help. You either get the distinction or you do not, but I gather that you do.

Senator PARRY—Secondly, your remarks indicate that you do not see the current act as needing a total overhaul, just enhancement.

Mr Burnside—I am not sure about enhancement. Excision—I would excise its indefinite mandatory detention bit and its RRT bits and overhaul them considerably in the ways that I have indicated.

Senator NETTLE—One area of justice concerns the implementation of section 501 of the Migration Act. It relates to people who, after being sentenced to and serving time in prison, find themselves in a detention centre for a much longer time. You might want to comment on the justice of that situation. I am aware of people who have been brought to Australia, have been convicted of an offence for which the maximum penalty is 12 months and, whether or not they have served that period of time, have been placed in detention and cannot be deported because the UNHCR has found them to be convention refugees. How can we administer justice to those individuals in the current situation? I am not asking for legal advice, but this is the system we have created. Where can we inject justice into a scenario like that?

Mr Burnside—First of all, I would think it is plainly unjust to throw a person back into detention just because you have decided to fail them on character grounds whilst recognising that they are refugees. You have to decide which consideration trumps the other. If the alternative outcome is lifetime detention or having someone in the community who has committed a medium-level offence, I think the second is infinitely better. If they have paid their debt to society, that ought to be enough.

There are other problems with 501. One is that some people have come here, not as refugees, to take up permanent residency but do not bother to apply for citizenship, and there are many illustrations of this problem. But the general shape of it is that people come here, sometimes as infants. They live here without becoming Australian citizens and get into trouble in their 20s or 30s. They are then deported to the streets of Croatia or goodness knows where, without any support, any of the language of the country they are sent to and without any real prospect of surviving, except at the lowest imaginable level. That seems to be infinitely unjust. As one judge in a case of this sort mentioned: 'This person's offences may be unfortunate, but on any view they are the product of his upbringing in Australia. To throw him out of the country into a place where he will be a complete alien seems unjustifiable.' It is not as though we have such a

burgeoning criminal class in Australia that we have to clear out the rubbish to make room for more. Every society will have a few people who misbehave; you should not throw them out just because you can.

I would take a different approach, if you have someone who has committed high-level criminal offences and has only lived in Australia for, say, the last 10 years of their adult life. But, if they have been here from infancy or childhood, to send them back by themselves to a country where they have no connections but for it being their place of birth is plainly unjust. I know of one case where a guy is living on the streets of Zagreb, I think. He speaks nothing but Australian, he has no contacts, none of the support agencies is able to help him and he is living from hand to mouth on the streets. We sent him back because he committed a low-level offence in Australia, after living here for 25 years. His wife and children are still here. It is not something we can be proud of.

Senator NETTLE—Is there any way you can rectify that problem by changing section 501, or do you just need to get rid of it?

Mr Burnside—In principle—I have not thought this through—you start with the fact that there is ministerial discretion to cancel a person's residency or visa where they have been convicted of an offence that carries a sentence of 12 months or more. There ought to be guidelines for the exercise of that discretion to introduce considerations of fairness and humanitarian concern that would look to the consequences, both for the family here and for the person's future wherever they are sent, in order to restrict the discretion.

One thing that is a little bit of a concern is that the amendments this year—created by the political compromise that we all know about—give a great deal of discretion to the minister. They can make the difference between release from detention after two years or lifetime detention. To repose that sort of discretion in one person may solve an immediate problem, but it creates an immense burden on the whole of that office and an immense danger if the future holder of that office is not a person whose compassion you can rely on. Unbounded discretions, wherever they appear in the act, have certainly been useful in recent times because the act otherwise allows such harsh outcomes, but they are not a long-term solution. The discretions I think need to be bounded or guided by considerations of fairness and compassion.

Senator KIRK—Thank you for your submission, Mr Burnside. You have made a few comments in relation to the RRT—its lack of independence due to its short-term appointments and the like. Could you inform the committee, first, of the duration of most appointments and, secondly, what you would see as an improved process in terms of both the duration of the appointment and the process of the appointment of individuals to the RRT?

Mr Burnside—My understanding is that recent appointments have been for periods of between 18 months to 36 months and they are always capable of being renewed. What I say hereafter is predicated on there being something other than the RRT, which I think has too much baggage. I think the new hypothetical body should have people who are selected for their skills in the relevant areas of migration. I do not have a problem with an administrative body and I would not insist that they have legal training, although legal training can sometimes be useful. I think some qualifications ought to be spelt out. At the moment there are no qualifications at all. The act and the regulations do not specify any minimum qualifications. Some commentators

have rather uncharitably pointed out that the principal qualification in recent years seems to be failed candidacy for a Liberal seat. I do not know whether that is true or not.

The other thing I would change is that the tribunal, when it sits, sits alone; individual members sit by themselves. I would like to see a requirement that at least two or possibly three members sit together, although I understand that carries cost implications. But some mistakes seen in tribunal decisions are so disturbing that its performance is likely to be improved if there is the safeguard of having someone else there to pick up the errors. Let us take as a fundamental proposition that these people are making life and death decisions and there should be a zero error tolerance. You cannot have anything better than that, unless you are going to allow a more generous appeal process.

I will give you a simple example. I was involved in a case where a woman from Iran had converted to Christianity and was preaching Christianity in Curtin. That is a capital offence if you are a woman in Iran, and stoning to death is the prescribed penalty. Various people used to come to her talks, one of whom used to take notes. One day that person left the camp and left Australia of his own accord and went back to Iran.

Five witnesses came to the tribunal hearing and gave evidence of this guy's presence and that he had taken notes and had left the camp on a particular date in 2002. After he had gone back to Iran, it turned out that a persegi informer. The woman got word from her parents in Iran that she was in great trouble because he had told the authorities what she was doing. All this was given in evidence at the tribunal. The migration agent who acted for her at the tribunal gave the tribunal member this man's camp number, boat number and date of departure.

The tribunal came down with the finding that this man had not existed—that his existence was fabricated in order to fortify her claim. It rejected the evidence of the five witnesses and refused her a visa. That truly is a life and death decision because stoning to death was her future fate. When the matter went to court, we issued a subpoena to the department to get the records not of her but of the man. The department produced the records, which showed that he did exist, he had been in Curtin and he had left on the day that the witnesses had said—and the tribunal member had not even bothered to ask to see those documents. Maybe I have come across a lot of unlucky cases, but things like that fill me with horror. It is just not acceptable. By the way, the department, when confronted with this, argued in court that the decision should be allowed to stand because no jurisdictional error was shown; it was simply a mistake on the facts.

Senator KIRK—Just out of interest, how did you show the jurisdictional error?

Mr Burnside—I said that to make a decision of such significance without making such a simple inquiry was evidence of bad faith and it was overturned on the grounds of bad faith.

Senator KIRK—How would you see the selection process for members of the revised body, which is no longer the RRT, working?

Mr Burnside—I do not know how they are selected at the moment. It is a process that in any event ought to be transparent; it ought to be open to review so that people know how it is done. I guess it should be along the lines of the way judges and magistrates are appointed, but that is a mysterious process too and I do not know how that happens.

Senator KIRK—It is perhaps more mysterious.

Mr Burnside—But it should be something with the possibility of oversight so that we can see how it is done.

Senator KIRK—Finally what should be the duration of the term—seven years?

Mr Burnside—Seven years is probably enough. You might even think of making it non-reviewable. It is the potential for renewing the term that carries the vice because you are beholden to the paymaster as your term approaches its end.

CHAIR—Thank you, Mr Burnside. We have no further questions. I state once again, on behalf of the committee, that we certainly very much appreciate your availability and the time you have given us today.

Mr Burnside—Thank you very much.

Proceedings suspended from 1.14 pm to 2.06 pm

BALL, Mr John, Manager, National Program on Refugees and Displaced People, Christian World Service, National Council of Churches in Australia

GEE, Mr Alistair Patrick Clement, Director, Christian World Service, National Council of Churches in Australia

CHAIR—Welcome. We have received your submission, which for our purposes has been numbered 179. Before I ask you to make an opening statement, do you have any amendments or additions that you want to make to that submission?

Mr Gee—No, thank you.

CHAIR—I invite you to make an opening statement and to provide us with some comments, and then we will go to questions.

Mr Ball—Honourable Senators, the Commission for Christian World Service of the National Council of Churches in Australia thank you for the opportunity to appear before this inquiry. Our submission is offered in a constructive and collaborative spirit with the aim of working with the federal parliament, the Department of Immigration and Multicultural and Indigenous Affairs, other relevant federal government departments, the United Nations High Commissioner for Refugees and other interested government and non-government groups to help achieve a humane refugee-processing system in Australia and to help secure effective protection for refugees, asylum seekers and other displaced people internationally. We believe there are increasing opportunities for positive change from the changes under the Migration Amendment (Detention Arrangements) Act 2005 and the challenges posed by the Palmer inquiry.

The NCCA's submission makes recommendations on a number of areas: complementary protection, detention, the Pacific solution, temporary protection visas, and asylum seekers in the community. The proposed complementary protection model proposes transferring the minister's decision-making power where it is a last-instance decision to DIMIA, where it will become a first-instance decision along with refugee status. This will significantly reduce the length of time an applicant spends in detention, minimise the trauma experienced by applicants and family members in detention, reduce the costs of detention and of DIMIA and the Refugee Review Tribunal processing irrelevant applications, reduce the cost of income support payments to applicants during processing and reduce the burden on the Minister for Immigration and Multicultural and Indigenous Affairs and the Minister for Citizenship and Multicultural Affairs, reserving section 417 and section 48B applications for those applicants requiring that special consideration. Reform of the existing detention system could best be achieved by the adoption of a community release scheme as detailed by the Justice for Asylum Seekers—JAS—alliance in the model, *The Better Way*. This would be open to all asylum seekers, unless there are strong reasons to continue detention, based on adequate case management which can facilitate both care and compliance and with proper entitlements, namely work rights, Medicare and supplementary income support if required. Such entitlements should also extend to those asylum seekers already in the community, who are usually now reliant on charitable groups.

Within the detention system, it is important that bodies deciding issues of detention and release and provision of mental health needs be independent and have the authority to enforce their decisions, rather than just make recommendations. The specialist services required for those detained, such as mental health care and legal advice, and the need for monitoring and management oversight by DIMIA and independent bodies, as recommended by Mr Palmer, challenges the appropriateness of placing detention centres in remote locations, notably Baxter and Christmas Island or in the Pacific.

The NCCA recommends the replacement of the so-called Pacific solution with a genuinely regional, cooperative approach between governments and the UNHCR to aim to provide effective protection for refugees and other displaced people and to deal with people-smuggling. The disproportionate allocation of resources to the Pacific solution could be far better spent in funding the UNHCR and such regional approaches. In Australia, a more integrated, whole-of-government approach with greater program and policy coordination across government portfolios, and with the contribution of non-government organisations, would assist such a regional approach. NCCA is grateful that DIMIA has already had one meeting with NGOs to explore the whole-of-government approach.

Finally, we recommend that the government grant permanent residency to all refugees presently holding temporary protection visas and that TPVs no longer be used for asylum seekers determined to be refugees. This would avoid subjecting some refugees to uncertainty and denying them full access to settlement services and family reunion so they can get on with the hard job of rebuilding their lives and fully contributing to the Australian community.

CHAIR—Thank you, Mr Ball. Mr Gee, do you have any comments you want to make?

Mr Gee—No, thank you.

Senator LUDWIG—I have been looking at the proposed model you mentioned earlier and the model proposed by you. Are they similar? They do not quite look the same in their operation. I am talking about the model from the earlier submitters today, JAS, and your model. You have added complementary protection in your model. From the committee's perspective, if we were to look at one seriously, which one are we to adopt—yours or theirs? Is there an amalgam of both, or do we choose between the two?

Mr Ball—They are complementary, if you like. You could use an amalgam of both. The main thrust of complementary protection is to try to provide an administrative, first-stop processing stream for those needy people who are applying who may not fit the strict refugee definition. I have been involved with the working group for the JAS model, and I know you have had separate presentations on that. *The Better Way* was more about looking at the community release scheme, which I mentioned. I just referred to *The Better Way* but we did not go into that in any detail in our own submission because we were conscious that you were getting that information through the Ecumenical Migration Centre of the Brotherhood of St Laurence and through Justice for Asylum Seekers. We have been working on that and collaborating on a system that could help people to get into the community and be processed there. Within that, you could have both the refugee stream and the complementary protection stream for processing people.

Senator LUDWIG—Does it become complex at that point, when you say that there should be a community release or processing stream which is then bolted onto a complementary stream which also embraces a refugee stream? There must also be an exit stream, I suspect, for those who do not meet the refugee convention or the optional protocol or obligations under CAT, ICCPR or CROC. As a consequence of failing to meet any of those, they would therefore exit the system again. Do you think that you then add too many layers to the system? The current Migration Act is quite lengthy and convoluted. Are you not adding to that?

Mr Gee—I see it as reducing not only the complexities but the levels and the time taken to process people. Nothing could be more complex than the current Migration Act.

Senator LUDWIG—Except the tax act!

Mr Gee—Perhaps the tax act. We do not see any cross-purposes between the two models being proposed. Certainly the complementary protection model, as proposed, is a lot different from the old section 6A(1)(e), which looked at strong compassionate grounds.

Senator LUDWIG—Yes, I am familiar with that.

Mr Gee—That may well have produced a lot more confusion than what we are proposing here. There is already a strong body of international law based around what we are proposing.

Senator LUDWIG—Is that similar to the UNHCR view of how these matters should be dealt with?

Mr Gee—The UNHCR, when they are reviewing people in refugee camps, are in a different position to the actual asylum process. That is recognised through UNHCR conclusions and the body of international law. The UNHCR certainly approve of what we are proposing here because it is built upon UNHCR conclusions, including the one that is expected to be adopted next week, which is what we understand the Australian government proposes. If I may, currently the latest version includes a paragraph saying that the Executive Committee of the UNHCR encourages states to consider whether it may be appropriate to establish a single comprehensive procedure before a central expert authority making a single decision. The paragraph then continues. That is referred to as paragraph OP(14) on page 5 of the draft conclusion dated 27 July 2005.

Senator LUDWIG—So that is on the earlier process. As you are aware, we effectively contracted out our processing of asylum seekers to the UNHCR at an earlier stage. What you say is that that model—for overseeing the Pacific solution, if I can use that phrase, where effectively it was not the Australian system that we used—has changed since then, or it is soon to be adopted.

Mr Ball—I will try to respond, but I want to be clear exactly what you are asking.

Senator LUDWIG—To bring it back to this more mundane point, there are a couple of models that are being proposed. There is the UNHCR processing regime. You say that it does not apply, as I understand Mr Gee's evidence, in that it is a slightly different system. There are the two models. Effectively, one is complementary protection, which is different from refugee processing. You say the earlier model has been presented to the committee. I then asked about

the complexity of it. The UNHCR say there should be one model. Your evidence seems to suggest that there should be two models: one is complementary protection and one is the earlier model that was presented to us.

Mr Ball—To try and clarify, as I understand it the JAS community release model is an effort to have people released into the community and processed—to try and get people out of detention more quickly. Certainly complementary protection would sit with that. If you have a complementary protection model and the first stop option, someone who does not fit the strict refugee definition and is in the community being processed rather than sitting in a detention centre may fit another need, like fear of being tortured if sent back. So you can get a quicker decision. Ideally that would be done in the community. But even people who are being detained would be out quicker because you would have two streams.

My understanding, in a broad sense, is that with these discussions coming up this following week in Geneva with the United Nations High Commissioner for Refugees Executive Committee there is a proposal that governments adopt a complementary protection stream also. At the moment, as I understand it, if you are processed by the UNHCR, you are determined whether to be a refugee under the strict narrow definition of 'refugee'. But my understanding is that in Europe more streams of complementary protection have been adopted, or a complementary protection approach is being adopted.

Senator LUDWIG—They have talked about that for some years now.

Mr Ball—So the effort, as I understand it, by the UNHCR is saying that it would be good and appropriate for other countries, such as Australia, to also adopt that approach. I think the submission by Margaret Piper of the Refugee Council of Australia gives a bit more detail on previous recommendations from the executive committee and I believe it may be part of the agenda for protection also. So other people are at risk. It relates to the whole issue of return. When the UNHCR found people not to be strictly refugees but they had said that the situation—

Senator LUDWIG—I understand what complementary protection is.

Mr Ball—In terms of the contracting out to the UNHCR, that is an argument, if we were to have complementary protection in Australia, for doing our own processing and having that two-stream approach to protect people. If it were contracted out to IOM or the UNHCR in the Pacific—you would need to get legal advice on this—it may be that the UNHCR is really only entitled or able to decide on the very strict, narrow definition.

Senator LUDWIG—Yes, that is the point I was going to. That was my understanding. It would only be on the 51 convention. It is only on the very narrow area. Would there be any room left for discretion by the minister, or do you say that the complementary protection should remove all the discretion available to the minister or that that discretion has only been reduced to what was envisaged, I suspect, in 1992?

Mr Gee—The discretion is very important. We have submitted in the past that it be retained and this, I think, would make it a whole lot easier to give true meaning to it.

Senator LUDWIG—Does the UNHCR model that you were talking about also include effectively a residual power for discretion to a minister?

Mr Gee—When I was referring to the UNHCR before, I was referring to the way they do resettlement processing in camps. There is no actual minister involved there.

Senator LUDWIG—No, but if they are using a model in European countries to promote then it is within jurisdictions which may have governments. So I am surmising that if they also go that way then they understand that, in the framework in which they work, there will be governments. I will have a look at it myself; that might be easier.

Mr Ball—I know that the UNHCR office in Canberra have certainly made representations to Australian immigration ministers to consider certain people or cases in a favourable way. I am not sure whether that means you tick them off strictly as a refugee or that they are saying, 'We are still concerned about this person.' The UNHCR is concerned with refugees, asylum seekers and other people of concern. I am not familiar with all the subcategories of that, but they have made representations to the Australian government.

Senator KIRK—Just continuing on with the complementary protection model, I am wondering how this would work in practice. Obviously an individual fronts before an immigration official. Is it a two-stage process whereby the person will be assessed first as to whether or not they are a refugee under the 51 convention and then there is consideration given to the complementary protection model? Is that how you envisage it working?

Mr Gee—The decisions about both would be made by the one person at the one time. First of all, they would look at the refugee convention and then, immediately having made a decision not to grant that, they would look at the other grounds. Currently, as set out in our submission, people try to squeeze through the refugee route. That would not have to happen. They could make a very clear submission on the basis of the applicable convention for complementary protection at the outset, and the whole process would be a lot clearer.

Senator KIRK—Is it not the case that, if this model were to be adopted, the grounds for protection under the 51 convention are effectively just being removed and this new model substituted? Is it not just broadening the category of a person who is entitled to protection, thereby effectively making the 51 convention redundant? Is that a counter argument to what you are putting?

Mr Gee—I do not believe it is a counter argument. Australia already has obligations not to refoule people under these other conventions. It would make it no more redundant than it perhaps is otherwise. I do not think the experience of other countries that have complementary protection is that the convention is redundant. Admittedly, in a number of European countries, more people are accepted through complementary protection than through refugee protection. That said, in some of those countries I understand there are compassionate humanitarian arguments in addition to the international legal obligations on non-refoulement.

Senator KIRK—Couldn't the same outcome be achieved just by amending the Migration Act to broaden the definition of what will amount to a refugee? There is no necessity that our act

reflects 100 per cent what the convention says. We can be more generous in our approach if we choose. Is that not the case?

Mr Gee—We understand that what we are proposing does that by ensuring that it uses the wording which is accepted internationally. I think it is appropriate that if we have obligations our law reflects what those obligations are. In that way we can tell easily whether or not we are meeting them.

Senator KIRK—I do not think I am arguing. On the contrary, I am saying: can we not just broaden the grounds—in other words, remove what we currently have, which might be a narrow definition of a refugee, and expand it so that there is a broader definition of what amounts to a refugee, thereby not having to have the two streams in the way you describe it?

Mr Ball—In some countries that has been done earlier. It has been done in the Organisation of African Unity and, I think, the Cartagena declaration—certainly in Latin America—where they said, 'We'll offer hospitality and refuge to people fleeing violence or war in general.' It was just a general broadening. I am not sure whether, in Australia, the government or the people want to make it as broad as that, because then they will say, 'Where do we draw the boundaries?' Having a complementary protection section which spells out the obligations under existing international instruments might be seen as more manageable or not broadening it too much. But there are other precedents for doing that. Whether the international community itself wants to broaden the refugee definition, given some of the more restrictive movements at the moment, is more unlikely.

Senator KIRK—It is unlikely but there is nothing to stop the Commonwealth parliament, if it chooses to do so, from broadening it. But, you are right; that is unlikely to occur and probably the two streams is the safer way to go.

CHAIR—What are the implications of the UNHCR resolution next week? Are you saying that the Australian government has signalled its intention to support that resolution?

Mr Gee—Traditionally Australia have always signed on to all the conclusions, and we do not see any reason why they will opt out on this occasion. We understand that they certainly will sign on. As soft law, which is what the conclusions are, it will not create a binding precedent for Australia. However, we believe that it should be read, as signalled by the international community, including Australia, that this is the better way to go.

CHAIR—So we sign up to it and agree to it, and show to the rest of the world that our intentions are honourable, but we can choose to ignore it and not implement it back at home. Is that right?

Mr Gee—Regrettably, this would not be the first conclusion that we have ignored.

CHAIR—I see. You have outlined areas of improvement—the alternative or the complementary regime. Are there any other areas of the Migration Act you believe need reforming or improving?

Mr Gee—Our submission refers to a number of areas, detention included. If you look at our recommendation 2, you will see that we look at broadening the community release scheme—2b 'Guidelines setting out grounds for detention'. On that point there is a UNHCR conclusion which Australia has signed on to—conclusion 44—which sets out four grounds on which you can detain people. We do not believe that those four grounds are being adhered to. I will not read out the remainder of the recommendations but I believe that most of those have implications for how we believe the Migration Act should be amended.

CHAIR—I will also ask about your reservations about the Migration Amendment (Detention Arrangements) Act 2005. Do you believe there were some limitations in that legislation?

Mr Gee—We believe that it could go further. *The Better Way* sets out a more comprehensive and, we believe, more equitable way of approaching detention.

Mr Ball—While there are welcome improvements, part of the concern was about the independent body or the Ombudsman having the ability to enforce a release or a decision, rather than simply to recommend that. That was one thing. I know that in earlier efforts Petro Georgiou and his supporters were hoping to abolish temporary protection visas and so on, and that did not come about. So it was a compromise. It is a welcome move and an opportunity to try to do things better, with more oversight and ideal time frames set, which should all help. But there still remains very much a hope that the minister will take note of the recommendations.

CHAIR—In your dealing with refugees in the area that you commented on today, have you seen any significant changes since the Palmer report was handed down?

Mr Ball—I know that Alistair has met with the head of the immigration department and had a chance to speak about arrangements.

CHAIR—Is this the new head of the department?

Mr Gee—Andrew Metcalfe, yes. As of yet we have not looked at how it has been working—in effect.

Mr Ball—It was more the intention. The positive thing, as the Palmer inquiry advocated, is cultural change and being prepared to be self-critical and look at new ways of doing things and at new opportunities. There seems, at least prima facie, to be a sincerity there to start doing that, and that is to be encouraged. This inquiry will undoubtedly feed into that process and hopefully help that go ahead. I am not familiar enough with the administration of aspects of the detention centres. I know that on the 28th—this week—a number of church and other religious group representatives are meeting with members of the immigration department to look at the issue of a protocol for religious visitors to detention centres. The churches welcome that dialogue as a way of strengthening pastoral care, oversight and the involvement of church people to try to provide better support for people in detention and to work with the immigration department for a better system. That is certainly a positive.

As you can see from our submission, we had great reservations about the continuation of Baxter. We were supporting the community release scheme, basically, to try to get people out into the community, as the minister has started to do with families and so on, and to extend that

beyond families. I know that the minister has allocated more money for recreational facilities at Baxter. As I say, we would much prefer the community release approach. Because of all the flaws that the Palmer inquiry found in relation to Baxter—and, by extension, you would think, in relation to the Christmas Island and Pacific detention centres—particularly around sufficient oversight of what is going on and the very high mental health needs of detainees, it is far preferable to push the Palmer inquiry further into an alternative community release model.

Senator NETTLE—Thank you for your submission and recommendations. I am pleased to see that Nauru has not been left out of this set of recommendations. Obviously, it has been left out of some other recommendations recently. One of your recommendations is about the monitoring of returned asylum seekers. That has often been raised—because how can we find out whether or not we are complying with the international conventions that we have signed up to if we are not involved in any monitoring process? Have you thought about what you envisage such a monitoring process involving? Suggestions made to the committee so far include, for example, that the Red Cross be an organisation that could play a role in that. Have you contemplated those ideas?

Mr Gee—I certainly have contemplated them; I made the recommendation back in 1999. There was discussion about monitoring and that recommendation was picked up in *A sanctuary under review*. That bipartisan report called on the Australian government to sit down with NGOs to work out the best way that could be done. That has not yet happened, certainly not in any substantive manner. We would ask that that again be put, perhaps a little more firmly this time. There are obviously sensitivities around governments doing things in certain ways. Back in 1999, I recommended that giving the Red Cross a role would be a useful way of doing that. We would be very keen to sit down with the government and talk through that as part of the consultations which occur every six months.

Mr Ball—I have recently returned from a World Council of Churches meeting of the Global Ecumenical Network on Uprooted People this month. The concern of monitoring returnees was raised there. We could try and get more information as it develops. In existence, funded by the UNHCR, with the support of the Church World Service in the United States, is the monitoring of Haitian refugees returned to their local communities. It involves funding through the Mennonites in that area, so you have a local NGO on the ground with some funding prepared to participate. They went with local respected community leaders into areas people been returned to. They had conversations with them about their experience of return, the return on the boats, what had happened to them, how they were coping on return et cetera.

There is discussion presently going on between church groups in Europe and the All Africa Conference of Churches to look at how a monitoring system could be set up in some African countries, because of the concern that a number of European governments have sent African asylum seekers back to dangerous situations or to third countries. They have to work on the mechanisms, but through our international networks and through Alistair's earlier work with other NGOs, we could try and help the government devise some strategies with that.

Mr Gee—I would like to say thank you again for this opportunity and I would also like to make one concluding remark. The changes that have taken place following on from the Palmer inquiry include further training in the areas of compliance and detention. We would ask that

further training also take place in RSD—refugee status determination—including independent legal training. That, ideally, would feed into the complementary protection model.

CHAIR—Thank you for your submission and for making yourselves available to appear before the committee today.

[2.40 pm]

CLUTTERBUCK, Mr Martin, Legal Coordinator, Asylum Seekers Resource Centre

MUTHA-MERENNEGE, Ms Pasanna, Women's Law Reform Program Worker, Asylum Seekers Resource Centre

CHAIR—I welcome our next witnesses. We have your submission, which we have numbered 214. Are there any alterations or additions you would like to make to it?

Mr Clutterbuck—No.

CHAIR—Please make an opening statement if you wish, and then we will proceed to questions.

Mr Clutterbuck—We thank the committee for inviting the Asylum Seekers Resource Centre to address the committee on aspects of the Migration Act. As a specialist asylum seeker health, welfare and advocacy organisation, we will limit our comments to issues pertinent to the refugee and humanitarian aspects of the migration program. Additionally, we have a particular interest in the operation of Australia's system of immigration detention and the physical and mental health of persons in detention. As the legal coordinator at the ASRC, I will make some brief comments on three key terms of reference: firstly, the processing and assessment of refugee applications; secondly, current difficulties with immigration detention; and, thirdly, suggested strategies for a more humane system of removal of failed asylum seekers or unlawful noncitizens from Australia. My colleague, Pasanna Mutha-Merennege, the women's law reform advocate, will present a brief statement on issues specific to the treatment of female claimants through the refugee and humanitarian process and the particular difficulties they have in presenting their claims and assessing protection. We thought this might be a different perspective for the committee.

At the outset, let me explain that we recognise the need for Australia to have a fair but credible process for the determination of refugee and humanitarian claims. This involves correctly identifying persons with legitimate refugee and humanitarian claims for remaining in Australia and implementing a process of dignified and secure return for those without such claims. Nevertheless, we believe that there are a number of black spots in the current system and significant room for improvement in matters of principle as well as matters of practice. The ingredients of an effective refugee determination process are fairness, accessibility, transparency and a high degree of consistency in administrative decision making. There must also be an outlet for compelling and compassionate circumstances.

With this in mind and with particular reference to the experience of temporary protection visa holders, many of whom we have assisted at the ASRC, we have some concerns about the following aspects of the system: the protracted, stressful and ultimately wasteful process for determining the claims to permanent asylum of temporary protection visa holders, the great majority of whom have now been accepted as permanent residents; the large discrepancies in approval and rejection rates between DIMIA and the RRT for Iraqi and Afghan claimants; the

somewhat arbitrary process of decision making, with claimants with nearly identical claims receiving different outcomes depending upon the decision maker, sometimes within the same stage of the process; and overzealous approaches to credibility at the primary and review stages. We also continue to have concerns about the arbitrary and confusing process for humanitarian requests to the immigration and citizenship ministers. These concerns are particularly stark in situations where different ministers have taken different approaches to the exercise of their discretion, which to some degree compromises the objective of administrative consistency in the implementation of our human rights obligations.

In relation to detention, we commend the recent changes introduced by the government to the system of mandatory detention, both in terms of capacity for release of certain categories of persons from detention—that is, long-term detainees, family groups and children—as well as improvements in the monitoring of the mental health of persons in detention, resulting from the recommendations of the Palmer inquiry. Nevertheless, we contend that significant structural difficulties remain. The current system provides some scope for external scrutiny of detention, but not in a way which is fully independent or complete in the sense of reviewing the detention of all detainees, which we submit is necessary for the integrity of the system.

Some suggestions for reform include: delegation of the provision of health services in detention to state health authorities; amendment of the Migration Act to include a detailed statutory and regulatory framework for detention centres, spelling out the duty of care burdened by DIMIA; abolition of the problematic concept of residence determinations and their replacement with a system whereby unauthorised arrivals would be eligible for bridging visas as are other entrants to Australia, subject to the imposition of conditions; and providing the Ombudsman with the power to assess the objective necessity of the detention of all detainees regardless of what stage their process is at.

Thirdly, and finally, in relation to removals, our roles at the Asylum Seeker Resource Centre include not only assisting asylum seekers in presenting their refugee and humanitarian claims as effectively as possible but also taking things a step further and proactively trying to assist unsuccessful claimants who wish to voluntarily depart Australia. So we provide advice about options for departing Australia, liaise with the compliance section about departure arrangements and try, from a social welfare and legal point of view, to prepare applicants for a soft landing back in their own countries.

In relation to the system of removals, our primary concern is that the current process is too harsh and unforgiving and takes little account of the circumstances that claimants find themselves in, particularly those in financial hardship who do not have the financial means to return and who are often detained prior to being removed as destitute removals.

There have been sufficient cases of concern about the removal of certain individuals from Australia to demonstrate the need for an independent review of the process of removals. We believe that such a process should be carried out by an independent watchdog with a special interest in human rights issues, such as the Human Rights and Equal Opportunities Commission. Such an auditor and assessor would ideally look at procedural issues, including the suitability of travel arrangements and travel documentation for forced removees, as well as physical and mental health issues. For example, if someone were to be removed from Australia, a physical fitness to travel assessment and a psychological fitness to travel assessment should be conducted.

The watchdog would also look at substantive issues such as any human rights obligations owed to removees and how Australia could best acquit its obligations to these individuals in a practical sense. These are the issues we put before the committee.

Ms Mutha-Merennege—I would like to raise a number of issues relating to asylum seeker women, family violence and gender-based claims. Whilst no written submissions were made to the inquiry in relation to these issues I believe that, given the government's commitment to tackling the issues of family violence in the broader community at present, these are particularly pertinent issues.

I wish to highlight two interrelated issues which have arisen for asylum seeker women who we have assisted at the centre. The first issue relates to situations where women who are reliant on their husbands' refugee claims find themselves in situations of family violence and relationship breakdown. These women are often reluctant to leave situations of domestic violence, for fear of the consequences such a move may have on their protection visa claims.

The second issue, which is the broader issue, is how the department deals with gender-based claims made by women, particularly where they include persecution by non-state actors and issues of domestic violence. Our position is that there is a flaw in the Migration Act in its failure to allow women to separate from their husbands' protection visa applications in situations of family violence and marriage breakdown and in its failure to have these claims considered independently of the husbands' claims. Currently women in these situations must seek ministerial intervention under section 48B of the act to allow them to apply for protection for a second time. Under section 48B women must firstly overcome the threshold of proving that they have credible new information which strengthens their refugee claims. Only then, if the minister allows them to, can they go through the fairly lengthy process of applying for protection again.

The difficulty for women in this process is the department's inconsistent approach when considering these claims. Often women must rely on their domestic violence experiences as a basis for a new protection visa claim. We have seen in our practice and our dealings with the department the unwillingness of the department to recognise domestic violence as grounds for applying for a protection visa. This leads to a broader issue in relation to gender based claims. We consider that the department has failed in applying gender as a social group and it has failed to recognise violence perpetrated by non-state actors as falling within the refugee convention. I can cite any number of instances where gender based claims have been rejected by the department without the applicant being granted even an initial interview.

The department's process for processing claims made by women on the basis of gender lacks transparency. It has been demonstrated that the department does not seem to have any concrete policies or procedures in place to deal with these sorts of cases. In that context, I note that gender guidelines were introduced by the department in 1996. Due to the lack of transparency in the department's decision-making process, we cannot be assured that these guidelines are being applied appropriately or followed. It is our experience that there is very little evidence that the guidelines are being applied or followed.

The guidelines were created in 1996, which is some nine years ago. Since then there has been quite a bit of jurisprudence—both in Australia, with the case of Khawar, and internationally, with the House of Lords decision of Shah and Islam—which need to be reflected in the guidelines.

There must also be a transparent approach to showing that the guidelines have been applied. They could be referred to in the decisions to show that the guidelines have been considered and applied in women's cases. We also note that these guidelines are only applicable at the department stage and are not applicable to the Refugee Review Tribunal, which we consider to be quite a flaw.

The other option for women in situations of domestic violence is to seek ministerial intervention under section 417 of the act. Again, we have had a number of instances where the minister has refused to intervene in these situations. We would consider that the ministerial guidelines be reviewed to accommodate cases where there are compelling gender based claims.

Mr Clutterbuck—We would certainly be happy to provide the committee with any further case studies or information that might be useful.

CHAIR—Thank you very much. Ms Mutha-Merennege, I am not as familiar with this legislation as some other committee members: are you suggesting that, if a family arrives here seeking asylum for a particular reason and, in the course of being here, domestic violence occurs, the woman needs to reapply for consideration?

Ms Mutha-Merennege—That is correct. If she makes a decision to separate from her husband, and she is not living in the family home and wishes to separate from his claim entirely, then she needs to apply under section 48B or 417 in order to either reapply for protection or seek humanitarian intervention.

CHAIR—When couples come here, do they apply as a family as opposed to individuals?

Ms Mutha-Merennege—Generally, the situation is that the primary applicant is the husband and the family will rely on the husband's claims. The woman does not necessarily put forward her own individual claims.

CHAIR—On what basis has the minister not intervened in the section 417s—do you know?

Ms Mutha-Merennege—It is very difficult for me to tell you what the reasons are, because the minister does not give reasons for not intervening.

CHAIR—Is it just a simple yes or no?

Ms Mutha-Merennege—It is a one-page letter, unfortunately.

CHAIR—The same letter is probably sent to everyone, but with a different date on it each time, I suppose.

Mr Clutterbuck—One particular category of difficult humanitarian cases includes women, for example, who have separated from their husbands on account of domestic violence. Their claim has perhaps been unsuccessful but, because they have invoked domestic violence protections in Australia, perhaps through the Magistrates Court and taken out an intervention order, that may have consequences for them back in their own country where they will not have

the same protections. So women are often very scared of what will happen to them on their return purely by virtue of the fact of having taken out reasonable protections here in Australia.

CHAIR—We heard yesterday of the difficulties doctors and psychologists have in gaining access to refugees. We heard another example this morning where DIMIA often says, 'They didn't get access to a lawyer because they didn't ask the right question or they didn't fill in the right form.' You have to ask yourself how you would know what question to ask. Do you have any view as to whether there should be a set of procedures or a code or statement of rights for refugees that this country should develop and apply when people arrive here?

Mr Clutterbuck—If we could be so bold, starting from the first point, we would advocate on behalf of a bill of rights for the country that would put some of these protections in law. Moving further down the scale, in our submission we have suggested the need for an amendment of the Migration Act to put into place a detailed statutory duty of care for immigration, which would put in place rights that asylum seekers could rely upon and take action against in a usual legal way if they were breached. Of course some of these difficulties would be obviated if asylum seekers were released into the community on bridging visas once basic health, security and identity checks were completed. Then they could access any doctors or lawyers that they wished in the community. Of course, you could impose conditions on those bridging visas as well. But within the detention environment, we have a number of other suggestions. One suggestion would be that the states take over responsibility for health care generally to remove it from the situation where we say there can be a conflict of interest. Immigration at present have a duty to detain all unauthorised arrivals. Our submission is that that sometimes politically compromises them in relation to the decisions they make about people's health and welfare.

CHAIR—There is no territory- or state-Commonwealth agreement about taking over responsibility for health care. I am assuming that the normal buck-passing occurs—that is, the states will not pick up the tab because they believe it is a Commonwealth problem. Is that the way to go? Should we make a recommendation in our report that those agreements should be negotiated and signed in haste or is a release into the community a preferable option which still may not obviate the need for that sort of agreement?

Mr Clutterbuck—Certainly release into the community would be a preferable option from our point of view: firstly, from the point of view of liberty and, secondly, from the point of view of the ability of asylum seekers to then access any doctor or health care that they wanted within the community. Thirdly, there would be no cost to the government, of course; that would then be the responsibility of the asylum seekers. Ideally, they would have work rights and Medicare rights as well, so they could pay for that themselves or through the system.

In relation to the issue of states taking over responsibility, we note that it was also a recommendation in the Palmer report that, at least, consideration be given to that. I think it was in the area of mental health as well. As far as fiscal responsibility goes, we would say that should reside with the Commonwealth because the Migration Act is a Commonwealth responsibility, so the cost should be borne by the Commonwealth government. Certainly, there would have to be some sort of thought given to it and a proper detailed arrangement between the Commonwealth and the states before you could even consider something like that.

Ms Mutha-Merennege—To add to that, states already have in place mental health legislation which means they are able to appropriately deal with those issues, whereas in the federal realm there is not the same sort of legislation in place.

Senator NETTLE—Thanks for your submission. Have you had any interaction to date with people who are on residence determinations? How are they going and what comments do you have about them? I heard your general comment that you would rather not have residence determinations, and I share that view.

Mr Clutterbuck—We do have a client who is on a residence determination at the moment. We referred to her case within the submission as well. It all happened at once for her, in some ways. She was offered different sorts of visas. She was offered a removal pending bridging visa and she was offered a residence determination visa, and there was also a bridging visa which came up. We were in a position where we had to advise her about the best option. She also had a daughter in detention who was fairly severely disabled. She was wheelchair bound, basically, so of course we wanted to get her out as soon as possible. So she was released under a residence determination in the end.

Our point of view is that the conditions are fairly reasonable. She seems to be doing quite well. It was certainly a great relief when the Red Cross became involved. From a case management point of view, it suddenly became much more normal and options started to arise for her. Arrangements were made for her accommodation and the daughter's accommodation in an appropriate house. I think an occupational therapist was even organised to look at the daughter's particular needs. We found that quite ironic, seeing as no consideration had been given to that for the nine months or so that she was in detention.

The one black spot remaining is the lack of an identity document for her. She is still in the community in Melbourne at the moment and she has no identity documentation to prove who she is or that she is legally within the community. We have certainly talked with her about the ironies of that. If she were stopped by the police and she had no identity documentation, the police would say, 'Maybe we will have to detain you as unlawful,' and she would say, 'I'm already in detention here in the community.' That highlights in some ways the absurdity of the residence determinations. We do, of course, agree that they are better than nothing. One suggestion we have made in the submission is a half-way step, whereby when someone has been on a residence determination for a period of time they would then become eligible to be considered for a bridging visa. They would move out of the situation where they are technically in detention while wandering around in the community and move onto a normal bridging visa.

Senator NETTLE—Do you make that recommendation because it would allow them to be provided with an identity document? Or are there other benefits that you see in being on a bridging visa? I am presuming you do not mean a bridging visa E, in which case they have no capacity to work.

Mr Clutterbuck—That is a matter for the government as well. The government can certainly change the conditions. With the residence determinations, you have an income and you have accommodation. You have Medicare. There is no reason why those could not also transfer over to a bridging visa E. It would just be a matter of amending the regulations. More fundamentally, it is because you then would not be in detention. There is still an issue hanging over people's

heads in that they are technically in a situation of detention. It just seems a bit silly, really. Another issue is the liability of the government for people who are technically under the government's ward in immigration detention when they are within the community. It seems a bit odd, a bit confusing. That issue would be removed as well if people were released on bridging visas.

Senator NETTLE—You would just want to make sure that being released out of detention and onto a bridging visa did not take away even more rights than they had under the residence determination.

Mr Clutterbuck—Precisely.

Senator NETTLE—I have just been looking through your submission. I cannot find it, but I think you made some reference in your submission to chemical sedation in relation to deportation of failed asylum seekers. Am I right, or am I thinking about a different submission? Whether you made reference to it or not, it is certainly something that has been raised regularly. We have the opportunity when we talk with DIMIA officials to ask them about this, and we receive a one-sentence answer back, which is, 'It is not government policy to use chemical restraint in any form of deportation.' I am aware, as you probably are, of the evidence provided by asylum seekers that is contrary to that. We are in a situation where we are faced with government officials who do not accept that evidence from asylum seekers as evidence of that occurring. I thought I would use the opportunity while you were here, as I seem to recall that you had mentioned that, to ask about it. We are in a situation where we want to say to government, 'This is occurring.' What we have is the word of the detainees. The government do not believe that. We need other forms of evidence in order to get some response from the Australian government about an action they are taking.

Mr Clutterbuck—It is obviously very difficult to get reliable information about those sorts of matters because often your clients are out of the country—they are back in their own countries—and it is difficult to communicate with them, so we are not really in a position to give any examples to the committee on that issue. But it is an issue of concern generally, and there have been a number of cases which are so concerning that we think arrangements should be put in place to monitor the whole removal process independently, from a human rights point of view as well as a procedural safeguard point of view, which is why we have suggested that perhaps an independent agency such as HREOC should be involved in that process as well as looking at human rights obligations more generally. Of course, that would involve some expense to the government, and that is an issue that has to be considered, but the risks are so serious that we think that would be money well spent. I do not know whether in certain cases it would be worth while having an independent escort going back with a group of asylum seekers to make sure it was a fair and safe removal. I am interested in the questions asked by the National Council of Churches about the monitoring of asylum seekers and other humanitarian applicants upon their return. Again, you would ideally talk to people about the process of removal with a view to improving the system and making it fairer anyway.

Senator NETTLE—Unfortunately, an independent escort for Vivian Solon did not improve her circumstances. We have heard evidence that people have been on temporary protection visas for between five and eight years. I do not know if you want to add anything to that. Another issue we have heard evidence on—and I ask you to comment if you choose to—in relation to

temporary protection visas is access to services for people in the community and the consequences for people's mental health, in particular, in not having certainty for the period of time they are on a temporary protection visa. I am sure you are aware of the studies by a psychiatrist about the increased concern in the lead-up to a review decision, in which the onus is, of course, on them rather than the other way around. So I would like to hear any comments you might have on temporary protection visas, particularly on the length of time that people are on temporary protection visas, because we have had a range of evidence about that.

Mr Clutterbuck—I was at the Refugee Review Tribunal this morning for an Iraqi applicant who was a complete ball of stress leading up to his hearing. He had a very strong case and I am sure he will be accepted—most Iraqis are being accepted at the moment—but it is indicative of how much stress people are under that, at this stage, when most other Iraqis are getting their permanent visas, this gentleman, who is the same as many other claimants, is under such stress. This is after a period of being on a visa for five years. He was concerned that a new law could come in that could suddenly flip things around.

There is a range of issues. The process, as we have said in our opening statements and in our submissions, has sometimes been somewhat arbitrary. There are a lot of cases where people are receiving different outcomes within the department because different decision makers decide cases in different ways. We referred to a case where we acted for a sister and two brothers, in which the sister and one brother got their visas at the department stage but the second brother did not, even though they had exactly the same case. There is a big gap between the approval rates at the department stage and the Refugee Review Tribunal stage. The whole process has been quite confusing for claimants from beginning to end. It would be easy to throw up your hands and say that it is all coming to an end now for the great majority of those people—they are all getting their permanent visas now—but, of course, it continues to apply to people who are arriving every day in an unauthorised way and applying for asylum anyway. So there are ongoing issues as well.

A looming issue is families who are now coming over to Australia to join husbands who now have permanent residency. We suggest: watch this space. There might be some serious social issues that arise on account of that prolonged period of separation, particularly where children are involved. I think that is something that the government and the social welfare sector should turn their minds to as well. Where people have been separated for between four years and, as the committee suggested, eight years that is an issue of real concern as well.

It is exacerbated by people who are just coming out of detention now. There are still persons who arrived in that boatload from 1999 to 2001 who are just being released from detention now. We act for a gentleman who is a Hazara Afghan who has identical claims to all the other Hazara Afghans; there is no issue of credibility or identity in his case. He was refused by the refugee tribunal in 2002 shortly after the invasion of Afghanistan by the coalition forces, on the basis of 'Things will look rosy for you in the future.' He got out of detention a short time ago, a few months ago, and now he has to apply for permanent protection. So he is at the beginning of the process; he now has to wait for three years and of course we do not know what will be the case in Afghanistan in three years time—whether he will be accepted as a refugee or not. But if you look forward to how long he will have been separated from his wife and his teenage children we are talking about nine to 10 years. That is a long time not to be with your children. So they are some of the consequences we would see coming up as well.

Senator BARTLETT—Amongst your recommendations is one to specifically incorporate the non-return obligations under the convention against torture and other conventions—which I note was recommended by a Senate committee about five years ago but has not been acted on yet. Have you had experience with specific cases where this lack of formal legal rights under the convention against torture has led to what you felt was a risky removal or at least a much more cumbersome process than otherwise would have occurred?

Mr Clutterbuck—We were involved in a case many years ago when I worked at the Refugee and Immigration Legal Centre which was the subject of the *A sanctuary under review* report, concerning a Somalian asylum seeker. His claim was upheld by the committee against torture shortly before his removal from Australia. So that was one case of concern which was fully documented in that report. Particularly in relation to the convention against torture: no, we do not have any present cases on the convention.

Senator BARTLETT—I can understand the theoretical principle you are putting forward; I am just trying to get an understanding of how many people it might apply to in a day to day sense in Australia. You have also recommended complementary protection be formalised in some way and you pointed to the refugee council and Amnesty International's proposal in relation to that. Again, given your experience—and not wanting to nail you down to a hard and fast statement here but more just a general impression if you like—how much would that assist with some of the difficult cases that we have in Australia? Would the whole process—the final decision making and the final visa grants— happen more quickly and smoothly if we had a broader, complementary protection, onshore, humanitarian type of visa?

Mr Clutterbuck—If, for example, the minister's guidelines—which prima facie are quite good and quite detailed—were properly implemented, if that was codified in some way and claims were assessed firstly against the refugee convention but secondly in a formal way against the minister's guidelines at the beginning of the process, we would say that would be a significant step forward and it would result in fewer people having to access the humanitarian process, and we could be confident that our human rights obligations were being met in a formal rather than a discretionary way. So that would be one step forward, and there would not be any extra time involved because it would happen at the beginning of the process.

Senator BARTLETT—Do you mean the ministerial guidelines under the ministerial discretion?

Mr Clutterbuck—That is right. If they were formalised in some way and claims were assessed against the criteria in those guidelines, as well as in the refugee criteria, that would be an example.

Senator BARTLETT—So if there were scope to do that in a codified sense at the start of the process rather than having to jump through the hoops to the RRT first, that would save time, money and angst and get a more predictable outcome one way or the other?

Mr Clutterbuck—That is right. For all of those reasons, we would say that would be useful. There are a couple of particular categories at the moment that we would have concerns about. We feel these cases are not properly being dealt with under humanitarian discretion at the moment, if I could just raise that issue. There are five particular categories. One category would

be persons who are in spousal relationships with Australians and who have perhaps got children in Australia. There has been inconsistent ministerial practice on this. In the past, some ministers have allowed humanitarian interventions rather than the claimants having to go offshore to apply to come back again. At present there is inconsistent practice. Some ministers seem to suggest, 'You can go overseas and apply to come back.' Others say: 'It does not make sense. You come from perhaps a dangerous country. It would be more sensible for you to not be separated from your spouse and for your children to remain here in Australia.' A second category would be persons with close family links to Australia who might be eligible for other types of family visas.

A third category that we are concerned about from a humanitarian point of view is that of persons with either physical or psychological mental health issues documented by medical practitioners. We have been involved in some cases where the claimants have been assessed by Health Services Australia—for example, in two cases—as being objectively unable to leave the country. So we have written to the minister about those cases and have suggested that they could remain on a bridging visa until the end of their days, but it would make more sense to provide some certainty and to intervene in those sorts of cases. Within that same category, we suggest there would be cases of persons who have been the subject of past persecution. If there is medical evidence about that—a credible and comprehensive body of evidence—surely that would raise a humanitarian concern. Another category would be persons who have particular skills, for instance, asylum seekers with particular skills. In light of the current skill shortage in Australia, it does not seem to make sense to lose those talents.

The last category would be persons with particular human rights issues. One example would be claimants with gender related claims which perhaps do not fit neatly within the refugee convention. There are obligations under the convention on the rights of the child and under the statelessness convention—a whole range of other human rights issues. All of those five categories can all technically come within the minister's guidelines. They would all seem to meet the criteria, depending on the facts of the individual cases. But it is just not happening in practice. Again, that is why we have suggested that, in relation to the last category—the human rights category—there be an independent watchdog making those sorts of assessments.

CHAIR—We do not have any more questions. I thank you both for your submission and for making yourselves available to appear before the committee this afternoon.

[3.23 pm]

JOCKEL, Ms Maria, Committee Member, Law Institute of Victoria

RODAN, Mr Erskine, Committee Member, Law Institute of Victoria

THORNTON, Mr Michael, Committee Member, Law Institute of Victoria

CHAIR—Welcome. Would you care to elaborate on the capacity in which you appear?

Ms Jockel—I am also appearing on behalf of the Law Council of Australia.

CHAIR—We have the Law Institute of Victoria's submission, No. 206. The Law Council of Australia's submission has been provided to us as well. Before I ask you to make an opening statement, do you have any changes or additions you want to make to either of those submissions?

Mr Thornton—On reading the submission this morning I saw an error in one part of the submission that we could address at some stage. It is not a serious error but it is an error nevertheless.

CHAIR—Would you like to tell us what that is now so we have that on the record.

Mr Thornton—It is at paragraph 5.5.9 on page 18. It mentions the requirement to pay $1,400 to the RRT and that some people cannot afford to pay that fee. That was a misunderstanding on the part of the person who finally drafted this submission. That comment was meant to relate to those cases which have to go through the MRT in order to get to the minister. Some of those people cannot afford to pay the $1,400.

CHAIR—Thank you. I now invite you to make an opening statement. Ms Jockel, we understand that you are also going to provide evidence to us on behalf of the Law Council of Australia. When you have made your opening statements we will go to questions.

Ms Jockel—On behalf of the Law Institute of Victoria and the Law Council of Australia we are grateful to have the opportunity to speak to the committee today. I will start with the Law Council of Australia's comments. It is a national representative body representing some 50,000 lawyers, and as such it expresses serious concerns about the operation of the Migration Act. It supports the concerns addressed in the submission of the Law Institute of Victoria and a previous submission of the Immigration Lawyers Association of Australasia, albeit that the latter submission relates to skills recognition. Both of those submissions refer to the very unwieldy and complex nature of the immigration legislation and the cultural and other imbalances which have occurred and which need to be urgently addressed.

The Law Council endorses both those papers but it makes further submissions focusing on the operations of the Migration Act, particularly as it applies to migration detention policy. It has real concerns about current immigration detention policy. It is opposed to imprisoning people

deemed to be unlawful noncitizens in detention facilities. It has a real concern about mandatory detention but, as it appreciates that the parliamentary inquiry is not dealing with that issue, the issues that I will be addressing will be more to do with the policies and practices associated with immigration detention facilities. There is a real concern about the arrest and detention of any person. In any event, if that regime is to continue, the Law Council of Australia is strongly of the view that it should be subject to judicial oversight.

Regarding the role of detention, the Law Council of Australia is concerned that no minimum standards of detention have been prescribed. We know that it has been outsourced to a private organisation and that does not sit consistently with the responsibilities that the Commonwealth has, which include a duty of care. There is a legal duty to take care of people who are in detention. The Law Institute argues that minimum standards must be adhered to. They should be transparent and capable of being known to the public so that the detention policy, if it is to continue, will be more accountable. The excesses that have occurred, as are evident from the Palmer inquiry and other inquiries, are simply no longer acceptable to the Australian community.

Regarding the duty of care, a lot has been said about the lack of adequate health care, including mental health care and other services and assistance provided to people in immigration detention. The Law Council submits that there is a need to have proper access to adequate health care, including mental health care and other services. It is becoming increasingly accepted that detention affects people deleteriously, regardless of what their circumstances may have been when they first entered detention. As I said earlier, there is a legal duty on the Commonwealth of Australia to take care of people in detention, otherwise it will face the consequences of a lot of people sustaining further injury and distress when they have come to Australia to seek asylum and, hopefully, better conditions than those they perhaps fled from.

There is a real concern that there has been a policy focus on detention facilities. There has been no emphasis on the care of people in detention. The Law Council recommends that the government adopt effective strategies to counteract the denial of an individual's liberty and the condition of involuntary confinement. This is absolutely fundamental to the mental, physical and other aspects of human wellbeing. That is something that we are increasingly accepting in Australia.

Going back to the issue of mental health, there is a real concern that mental illnesses and other conditions are not identified or properly treated and that in fact this puts people at further risk. There is an absolute need to ensure that detainees are able to obtain their own medical specialists and to have proper medical assistance and that there should be no requirement for legal practitioners to be compelled to go to the Federal Court of Australia to obtain medical assessments from independent psychiatrists in regard to a detainee's psychological, psychiatric or other condition, particularly when it is quite clear to those who wish to see it that some of these people are extremely distressed.

Insofar as the issues of performance standards and measures are concerned, there is a real concern, as I said earlier, in regard to a mechanism which basically outsources detention policies yet seems to have very few measures in regard to performance. The Law Council is of the view that, if detention is going to continue to be outsourced—which is obviously a topical issue—one should adopt a qualitative measure of service provision. It should be transparent; people should be accountable. The Law Council makes a number of recommendations in the substantive paper

on how that could take place. The current system is clearly not working, and that is quite evident from the Palmer inquiry.

The Law Council is also of the view that legal assistance should be provided to detainees. Recently, there has been no opportunity for detainees to get proper legal advice. There has been some funding of legal representation in respect of detainees who apply for protection visas, but the Law Council is of the further view that there is a need for legal assistance, that it should be provided, that there are enormous benefits in providing legal assistance on a timely basis and that there are probably, ultimately, substantial cost savings overall.

The Law Council is also concerned about the proposal that the role and the function of the Commonwealth Ombudsman in regard to detainees only kicks in after a detainee has been in detention for two years. It is not an adequate response. It is an excessively lengthy period to have anyone in mandatory detention. If, in fact, that scheme is going to continue, which there are some real concerns about, the Law Council believes that a lesser period should be prescribed, such as six months for example, in accordance with whatever the notion of 'reasonableness' is.

Can I just continue on by saying that there is no doubt that there has been a culture of imbalance within the department of immigration. It has become a regulator at the expense of being a public servant. It is part of a bureaucracy. We have an increasingly active executive to the detriment of other notions which were consistent with my understanding of the Westminster system. The Palmer report is only the tip of the iceberg of a system which has gone awry. Whilst that report focuses on DIMIA's detention and compliance activities and makes very adverse conclusions about those, that culture is prevalent throughout the system. I as an immigration lawyer work predominantly in the corporate commercial end. I see these sorts of excesses in that area as well, although less so because I am dealing with corporates. But systemic difficulties within the system percolate right through to the lowest level case officer.

The Palmer report has indicated not only that there is a culture of imbalance, that there are rigid attitudes and processes and that there is a strong government policy with a lack of assertive leadership to ensure integrity of application but also that there is a lack of accountability and public confidence and that there is a desire to preserve the status quo. The DIMIA review of service quality, with the changes at the top echelon of DIMIA, recognises that there is a need to undertake wholesale and significant change from the point of view of not only culture but also process and that, in terms of the fact that immigration is a vital part of Australia, there is a need to redress some of these imbalances.

So, in terms of the comments that I made to begin with in respect of the Law Council, can I say that the changes which are now on foot insofar as DIMIA are concerned are well and truly welcome and overdue. We have created for ourselves an extremely rigorous and complex system of law. I took the liberty of bringing in volume 2 of Butterworths legal service. My desk has seven of these. This is Australia's immigration law and policy. Do we really need a system as complex as this? Is it servicing Australia's needs as we compete on the global stage, with an ageing population, zero work force participation growth and international competition for skilled labour?

The system has gone askew and needs to be overhauled. You have been very patient in listening to me, but I spend my life reading this. There are people here from the department who

spend their time trying to amend this and bring it in tune with whatever our social, political and other expectations are. What we are creating is uncertainty in the law and that only feeds the judicial process. These are the very things the government has always been trying to avoid. So I think there is a real need for wholesale change. I commend the committee on considering this issue. I will now let my colleagues make some comments. I have probably gone well beyond my five minutes.

CHAIR—That is fine. You can take as long as you like.

Mr Thornton—I will keep my comments fairly brief. As Maria has suggested, this submission comes from a group of people who practise in the area on a daily basis, so we see the system from the customers' point of view. We see clients who are having problems of one sort or another with the system. Our job has been to find a way through the complex mess—around it, over it, under it or whichever way that can be achieved. In the process, we hope to achieve a fair and just outcome for our clients, but too many times we realise that it is impossible for us to do that, largely because of the unforgiving system that we have. The system was designed to be administered by rules. In my view, this sort of system is not compatible with human beings. The law itself is meant to service and serve human beings, and yet at every step it takes advantage of the mistakes that human beings make. All of us make mistakes: people overlook deadlines and make mistakes in the answers they give. People are full of human characteristics like that, and the system does not accommodate that. As a result, we see a lot of injustice.

I will summarise what I was going to say by suggesting that the system needs to be a different sort of system. It needs to be a system where there is room to move—whether that be through discretion given to officers or an adjunct to the system which, like a safety valve, would enable problem cases to be resolved without the current difficulty, which essentially involves going through the process of application, review and minister. There needs to be some other system. We have not come up with any suggestion for that, but it does need to be something different and perhaps outside the current structure. I think it probably needs to be independent and not to do with the department itself.

Our submission endeavours to highlight a number of the visa areas that cause problems on a daily basis. I will not deal with those now. It also deals with the areas of ministerial intervention, cancellations and compliance issues. In the compliance area, I think this once again comes down to culture. We see a lot of excesses in the compliance area. We have cases where compliance officers effectively just turn up on someone's doorstep and demand entry to their house. They go through the house looking at people's bedrooms and private situations. They make assessments of one kind or another. They go away and report back, and they often reach the wrong conclusions and do not give people a fair chance to explain things.

Mr Rodan—I want to talk about some of the issues which affect people on a daily basis. They basically reflect what Michael and Maria have said but I will be speaking in a fairly reflective way. First of all, I want to talk about detention. Recently I have been involved in the Scott Parkin case. Mr Parkin was placed in the Melbourne custody centre, which is a dungeon at the bottom of the Melbourne Magistrates Court. There is no natural light. It is only there as a place for people to come in and out of during the day. It is not really a place for people to live in. It is a place for people coming in from the remand centre, Port Phillip Prison or even Barwon Prison. They stay there for the day, have their case dealt with and are released, liberated, or they go into

custody. It is a place for people who have been sentenced by a magistrate to a custodial sentence. They generally wait there for a few hours and then they get in a car, a truck or whatever and are taken to a particular custodial receptacle.

Mr Parkin was placed in this place, the custody centre, for a period of five days and five nights and, unfortunately, had to pay for it. This is an unfortunate trend that I do not want to see happening in immigration cases when people are detained. It is time that you assessed what we are doing with our detainees. I asked the immigration officer why this person was there and I was told that he was a national security risk and therefore could not go along with all the other people in detention in the Maribyrnong detention centre. I thought that was a very poor answer. It obviously drew a response from me which I do not think I need to extend to you here.

I will look at some of the other issues which come out of these particular submissions. For instance, take the Immigration Lawyers Association's submission on trade recognition. One of the funny things is that these students do a two- or three- or four-year course in Australia, get Australian qualifications but then they have their Australian qualifications assessed. That is silly. Why?

Ms Jockel—To see if they meet the Australian standard is the answer.

Mr Rodan—They meet the Australian standard because they have qualifications which are Australian qualifications. There are some other things. Why should the minister for immigration and/or the citizenship minister be weighed down with hundreds and even thousands of submissions under section 417 or section 351? Instead of these going through the minister, why can't people have a second chance? Quite often people come to our office—and I am sure they go to Maria's and also to Michael's office—and say to us: 'We went to a migration agent and he or she told us this but it is all messed up. We get refused a visa and we go on appeal and it gets refused and somebody says, "Go to a court; I can do this for you for $100," but we get done and it is all messed up.' We find out that they have family here or they have skills or something like that. They are the kind of people that really should have a second chance but we have to say to them, 'We have to pack you off and ask the minister to look at your case.' Why should that happen? The minister is bowed down with 1,500 or 2,000 or 3,000 submissions all the time and the minister's personal consideration is required in quite a number of those cases.

Why should that happen? Why can't we consider second chance procedures? There used to be these second chance procedures until December 1999, when they stopped having applications allowing people to have another shot at getting last remaining relative visas, parent visas and special needs relative visas or carer visas. They used to have those, but they are no longer available. If you restored applications for those particular visas on a second time around, you would have less work to be done by the minister or through the minister's intervention unit. They are things that we have to look at. Some of these people are very worthwhile people. Some of them actually have a lot of money that they want to invest, but they were told the wrong things right at the beginning by one of their colleagues or somebody else, so they have moved into the wrong stream. This will give them an opportunity again.

There is a third issue I wanted to raise, but I will not keep you too long on it. Recently Professor Birrell made comments about restricting students' access to the permanent residence stream, because he says that many of those who get permanent residence then become taxi

drivers. What is the reason for that? Currently students are provided with a special concession, insofar as they do not have to have work experience in order to qualify for a visa. However, overseas medical students, accountancy students, law students and other professional students cannot participate in the normal recruitment program because they do not have permanent residence—a conundrum. So they cannot get jobs in hospitals, accountancy firms, legal firms or architecture firms because the employers will only employ people who have permanent residence. So it is easy to criticise the end result, but to provide the solution is more difficult. If work experience is introduced as a necessity before permanent residence is granted, as Professor Birrell seems to suggest, then they will not even get the work experience because they do not have permanent residence. So there is discrimination against students in that regard.

I want to raise one other issue, and that relates to the spouse claims. We are told that a number of times in spouse claims there are sham marriages, and a lot of difficult situations arise out of some types of marriages. The other side of the Birrell scheme is this: as you are aware, there is now a two-stage procedure. If you are an overseas person and you marry an Australian resident or citizen, you come over here, wait two years and you get a visa. It is the same here in Australia: you get the temporary visa and two years later you get the permanent visa.

But a lot of break-ups are occurring because the visa holder, especially with the overseas ones, is subject to blackmail, parental bullying by the in-laws and domestic violence. These people have broken away from their country of origin and their customs and, if they return to their country of origin, sometimes, especially if they are women, they are disgraced or isolated. There have been remedies, and these are granted if you have suffered domestic violence, but when you look at our submission in regard to domestic violence you will find that we have asked a series of questions as to how the domestic violence laws are going to operate. I draw your attention to pages 13 and 14 of our submission.

Since 1 July domestic violence issues have been decided by an immigration officer and a Centrelink officer, and in many cases that happens. However, we think that these new regulations are a mess. Who do you appeal to against a Centrelink decision? How can an immigration officer make an objective decision in that regard, because it is a very emotional issue? Discussion should be taking place between the profession and the immigration department to ensure that a much smoother operation of this particular provision is made.

Ms Jockel—Can I just take up the issue of domestic violence? Previously you could assert domestic violence and it would be accepted and you could basically get residency. Then a policy was brought in and some regulations were brought in and you either got a court order or you had three types of evidence from competent individuals, including psychologists, psychiatrists, doctors, social workers et cetera. That was then found by the department to be subject to some rorting and the department decided that, to the extent that the case officer is concerned as to the documentation which is presented in support of the domestic violence provisions, Centrelink shall be the ultimate arbiter. If you look at the legislation, the legislation refers to an independent expert. Subsequently, it then refers to Centrelink as being the independent expert. The rationale is that somehow or other Centrelink have some very special skills in this regard in terms of assessing whether domestic violence occurs, presumably because of the fact that they determine these things for purposes of pension rights et cetera.

There seems to be an ongoing tendency within the department to divest itself of core responsibilities and to basically contract them out to other parties. Recently, for example, Centrelink became the determiner as to whether you are an appropriate person to provide an assurance of support. Initially people were waiting for some months for a Centrelink appointment before they could even put forward their documentation in order to show that they had the capacity to be the assurer of support. I presume that the reason Centrelink was nominated in regard to assurances of support is that it has a connection to the tax department and presumably it can check up on whether you as a would-be assurer have been a recipient of social security and therefore that may exclude you from being an appropriate assurer.

My perception is that this legislation seems to bring everything down to its lowest common denominator. There is a perception that you are rorting the system and that you need to be brought to account. You have to follow the rigors and jump through all the hurdles and meet what is a really highly codified, strictly legalistic area of law which has many volumes of policy overlaying it. There are actually four volumes of Butterworths which are policy. This volume 2 is basically your law. In effect you have an incredibly prescriptive, time-driven, non-negotiable, rigid system of law which is not actually working very well. As I understand it, the minister has about 10,000 applications before her to determine who should be given some exceptions to this rigid law and be given the benefit of the right to remain in Australia or to otherwise have the public interest exercised in their favour in a more positive way than whatever the initial outcome was.

The rigor of the system I do not think is working, because every solution is creating a new problem. We are just sort of chasing our own tail. There has been the Palmer inquiry and Alvarez and other things, including the ESOS review—the evaluation of the student visa regime, which is an area I work in very closely. We are competing globally for students. Are we are going to slam them with compliance? In the Uddin case there are 8,000 students whose visas were cancelled inappropriately. What are we going to do about that? How does that affect our international reputation as a premier education provider? The Standard and Poor's report is already saying that we are losing our market in education, yet it generates $7.5 billion for the Australian economy and is our third-largest services export.

These anomalies show to me a far too prescriptive system of law and one where there is so much concentration on visa compliance to the detriment of other policy considerations, be they cultural, social, economic, human rights or otherwise. There is an extraordinary imbalance. The challenge is to find an alternative mechanism which is not as prescriptive. Both Michael and Erskine have mentioned that this highly rigorous system of law does not have any mechanism for discretion. The policy even tells a case officer how certain words are to be interpreted, how they are intended to work. There is no fall-back to a commonsense outcome, to a fair outcome, to something that is going to serve Australia's interests. We did away with the earlier provisions because they were not sufficiently codified. We have gone to a system of law now which has gone to the other extreme. We are arguing that there has to be some sort of balance.

CHAIR—Thank you very much for that comprehensive start to your submission.

Senator KIRK—Thank you very much for your submission. I was interested in the point you made in, I think, the Law Council submission in relation to the arrest and detention power. I

think it might have been Ms Jockel who said in her opening statement that you would like to see some kind of judicial oversight of this power. Could you expand upon that?

Ms Jockel—The Law Council's submission is that people should not be mandatorily detained unless in fact there is some judicial oversight. Basically, the current system permits a person to be deprived of their liberty without any sort of judicial order. We have seen the extremes of what that means in the Cornelia Rau and the Alvarez cases. They are really tragic cases and, in my view, an indictment of all of us in this society.

The Law Council maintains that the power of arrest and detention should be subject to judicial oversight simply because the system has shown that it does not work. Coupled with the privatisation of mandatory detention, there is really no incentive for anybody to say, 'Cornelia Rau, you shouldn't be here.' We have people being mandatorily detained, and what is the cost to the Commonwealth? If they are released, they have a debt to the Commonwealth that they have to pay of something like $300 per night.

Currently DIMIA compliance officers or police officers are able to detain any person they know or reasonably suspect to be an unlawful noncitizen under section 189(1) of the Migration Act. The Law Council submits that this approach, this legislative right which is so broad, is not sufficiently responsibly exercised and that there is a need to curtail that. A system whereby a reasonable suspicion entitles somebody to be mandatorily detained with no right to get proper legal advice basically deprives people of their liberty. This is one of the fundamental tenets that we in a democracy have fought for, for time immemorial, and yet this is a right that is being whittled away from us.

Mandatory detention does not just apply to asylum seekers and boat people. It can happen to anyone. It can happen to a student. There was a recent case of a Mr Alam. The compliance officers went to a house, found him there and immediately dragged him off to DIMIA. They would not even allow him to put on a T-shirt. They found that he had some pay slips even though he was a student. He had supposedly worked more than 20 hours per week. The court held that the attitude of the compliance officers was 'heavy-handed', and they are arguing for a fairer and more balanced attitude.

My view is that there is an excess of zeal and not enough counterbalance of responsibility, accountability and transparency—and, really, leadership at the top to say, 'If I'm going to deprive you of your liberty, what right have I got to do that and how should I be brought to account if I exercise that power in an irresponsible way?' We must take responsibility for our work. You are public servants; you are servicing the public. That is a very longwinded way of saying that a judicial review system is one which the Law Council is of the view ought to be the case. That was the case pre 1994, and the argument is that that should be brought back because all the safeguards have disappeared and we have seen what happens when safeguards disappear.

Senator KIRK—So is your point that it ought to be under judicial review, or should it be a judicial order in the first instance?

Ms Jockel—The Law Council is saying that previously people were brought to a magistrate within 24 hours of their arrest. One can talk about the nature of the mechanism that ought to take place, but under the previous system the person was brought back to the magistrate every seven

days. There was a system of accountability and transparency. The current system means you just get locked away. We have cases of people being locked away for up to seven years, which is just extreme. I think Erskine wanted to say something.

Mr Rodan—I just want to note that the Petro Georgiou proposals, which were in his first private member's bill, were basically for some form of judicial review with regard to detainees; I think it was once a month. The question, I suppose, is whether you want to have two streams of detainees. You are going to have those that are in the camps having one source of justice, to put it one way, and those held for a shorter period in some of the other places, like Villawood, Maribyrnong or Boggo Road. Those people have not been detained under the border protection provisions; they have been detained due to the fact that their visas have been cancelled and they are about to go offshore one way or another. They have got some rights. So for those people, I suppose, there may have to be a different way of looking at it. For instance, as Maria said, within 24 hours of those people being detained, they should go before a magistrate. They should then go there on a weekly basis, like they used to. I think it was under section 37 or 38 of the old Migration Act. As for the Georgiou type proposals, I personally do not believe in mandatory detention, but if the policy is going to be there then of course there should be some form of judicial overview of those people.

Senator PARRY—I go back to the domestic violence exception on page 13 and which continues at the top of page 14 of your submission. When this first came about—and the new regulations have been implemented since 1 July—did you discuss it with the department or the minister at all prior to the implementation?

Ms Jockel—The legal profession has been opposed to these provisions for some time. They were intended to come into effect when the former minister was minister for immigration. Unfortunately, it is our view that there is not sufficient consultation between the department and the legal industry. We feel that often our voices are totally unheard. I commend the department on its recent stakeholders meetings; I have attended a number of them. I think that there is a great need for greater dialogue and for a system that hopefully gives somebody the benefit of the doubt. We used to have a maxim that we would rather let a guilty man go than hang the wrong man. We seem to have a system of law that has gone the other way. You are guilty until you are proven innocent. We do not have domestic violence unless we have got umpteen measures of evidence, and only then will we be satisfied. If there is any doubt, we will offload it to Centrelink and Centrelink shall be the final arbiter. Our concerns have not been heeded. We think that these are just excessive and unnecessary provisions, and they do not help.

Senator PARRY—So you had discussions prior to the implementation?

Ms Jockel—Not extensive ones. Some time earlier we did, but not with regard to the recent spate.

Senator PARRY—What about monitoring since 1 July? Have you had any feedback, any examples?

Ms Jockel—Yes. At the state directors' meeting between the Law Institute and DIMIA in Melbourne I raised with John Williams the issue of if, indeed, Centrelink is the final arbiter, what if Centrelink has got it wrong? Also, if you look at the fine print of the legislative

provisions, it actually provides that consent intervention orders would not be accepted. In other words, they had to be fully judicially determined and imposed by a court. That seemed, to me, a nonsensical issue. I think that the department was concerned about sweetheart deals. We will have mutual restraining orders, and of course they are not really bona fide. My view, again, is that if you have a court order, you have a court order—regardless of whether it is by consent or otherwise. It is a court order and it is not for DIMIA to second-guess a court.

I understand that John Williams said that they were not going to take umbrage at those provisions. Currently, as I understand it, joint undertakings or mutual restraining orders will be acceptable. But some of the provisions—if you look at what came through in the 1 July amendments in respect of domestic violence provisions as they initially read—are of great concern as to the evidentiary burden that a person has to discharge in order to prove domestic violence.

Mr Rodan—Maria and I have tripped up to Canberra on a number of occasions and we find it very pleasant that the senior immigration officers spend time with us and tell us what is actually happening. We are told what is going to happen; we are not necessarily asked for an input. I am hoping that kind of situation will recommence because we used to have some kind of input into these situations. The department would benefit because we are on the ground, we see what happens on a daily basis and we see it from the other side, in many ways. I think that what we say is constructive and what we could say about the system would be most constructive for them.

Senator PARRY—Throughout your submission this afternoon I got an impression. I do not know whether you are wavering or whether it is the way I am interpreting what you are saying. Do you want a wholesale change of the act or do you think that changes within the current act would be sufficient?

Ms Jockel—It is my view, first of all, that we should stop this constant change. It is a knee-jerk reaction. Every time there is a perception that someone has got away with something, it is done away with—for example, the close ties visa was done away with on 1 July. I do not think that helps. It does not foster Australia's needs, it is very costly and it creates uncertainty. Whether it is wholesale change or not, I would prefer to not have to deal with seven volumes of Butterworths in order for me to be abreast of what both the legal and the policy implications are at any given instance. I think it is unwieldy and unworkable. We are competing with the tax act.

Mr Rodan—I think that a wholesale look at the Migration Act, regulations and policy is needed now. Sixteen or 17 years ago, the Cape committee in relation to immigration policies came into being—I think under Senator Ray's tutelage at that time—and came out with a comprehensive report. After that report, there were comprehensive changes to migration and a codification of migration laws took place. There was a reflection, I think in 1993, which caused the 1994 reform act, but since then there has been no wholesale reflection as to what is happening within the migration department, with the migration rules or with the act. I know it is a very sensitive time now because we have to look at our border security and a number of other issues relating to national interest, but I do think it is the time for a very wholesale inquiry into the operation of the Migration Act and the way in which we can reform it. As Maria said, there are seven or eight volumes of material. No migration agent without a law degree would understand how to go through those particular volumes, and that includes two-thirds of the

people out there giving advice. It is time to have a studied look at the operation of migration policy, immigration itself and citizenship. It is very much needed.

Ms Jockel—I would like to make a number of comments. There are a number of ways that this very rigid system of law could be perhaps liberalised. Section 48 could allow for people to make a further application—for example, in the event that for some reason they have been unsuccessful in their application and there has been a change of circumstances whereby they could make a further application. This is something that was alluded to earlier. Schedule 3 could be amended so that the extremely harsh deadlines were not so draconian. For example, in the student visa regime, if you do not get a new visa application in within 28 days you are statute barred. You have no legal redress, save and except going through the Migration Review Tribunal to the minister. If you have been late in lodging your application because of some other delay in some other part of the department that has been processing some other application of yours, which was subsequently refused, you have lost the opportunity to lodge a new student visa and therefore you are in a sort of no-man's-land. What is the point of that? Can't there be some fall-back position whereby some of the time limits that are so rigid could be moderated? There may be some benefits to Australia, particularly at the current time when we are chasing and wanting more international students to come to Australia.

There was the earlier comment too with regard to the number of foreign students who are here in Australia. We have over 250,000 foreign students in Australia who, according to Minister Nelson, generated $7.5 billion for the Australian economy in 2004. Only 13,000 of those students were successful in getting permanent residency at the conclusion of their studies, yet the minister has indicated that, in this year, the skilled migration program will represent 97,000 of the total component because of our dramatic need for skilled migrants.

Do we want to liberalise the student visa program so that we enable more of our students to be eligible for permanent residency? Do we want to take Bob Birrell's view, which is to make it harder? Why should we make it harder? We are competing with the US, Canada and England for the same international students, and we are competing with the offshore campuses which are now being developed in Asia. If we lose this source of revenue, we are going to suffer as a nation. There are ways that this system could be moderated if you wanted to retain its fundamental structure. It certainly had thousands of man-hours put into creating it, but there are things that have to be done away with because they are just too rigid and prescriptive.

Senator BARTLETT—I have a question for you in your capacity as a committee member of the Law Institute. We hear of the problem of unmeritorious migration cases clogging up the courts and the suggestion that, to some extent, this is due to dodgy migration lawyers or agents encouraging these unmeritorious claims. Firstly, can I clarify with you: is any lawyer who does that breaching the code of practice or the code of ethics of the profession by encouraging people to lodge unmeritorious claims? Is there already scope for lodging complaints against people engaging in that type of behaviour? Are you aware of any such complaints?

Ms Jockel—It is our view that a lot of the problems in this system come about because, predominantly, the people who practise in it have no legal training whatsoever. There are 3,200 registered migration agents and only 700-odd have any form of legal qualification. We lawyers are subject to dual regulation—through both the Migration Agents Registration Authority and our state law societies. We have legal practising certificates and all these other ancillary

mechanisms which put us at risk if we are going to be vexatious or do something which is untoward.

It is our view that a lot of the problems in the system are simply because, through the guise of regulation, we have a mechanism of deregulation. Virtually anyone can be a migration agent, so I think that there is a real concern. The Law Council and the Law Institute of Victoria and the Immigration Lawyers Association have said to DIMIA that they need to consider whether the Migration Institute of Australia, as a professional association predominantly representing non-lawyer migration agents, should have entered into a deed of arrangement with the Commonwealth of Australia to take on the role of the Migration Agents Registration Authority and then basically corner the marketplace, including prescribing what CLE or CPD that I as a specialist lawyer can undertake, because they are the only body that is able to prescribe it. That is one concern.

The other concern is this: we basically have a system of law which says that—and I am talking as a lawyer, not as a migration agent—if I believe that you have a reasonably good case then I should represent you. Whether it has merit or not is something that ought to be judicially determined, assuming that I am acting with professional integrity, competence and knowledge. What is happening is that DIMIA are casting aspersions—and I am only talking about lawyers—with respect to the legal advice that they give to clients and are asking us to, in effect, de facto veto ourselves at the risk of being labelled vexatious. There is a whole mechanism, the migration agents' integrity act, whereby we can be labelled as 'vexatious' if we put forward a claim which may not in fact be effective.

There have been a number of cases where, at the highest level of the courts, two judges have reached diametrically opposite conclusions with regard to similar fact situations. Is the case unmeritorious in that instance? I think we have to be very careful about value laden terms as regards merit, because, like the word 'integrity'—'maintaining the integrity of the system'—it is really a buzz word for a lot of other things and agendas which I do not think are serving Australia's needs.

Mr Rodan—There is something in the code of conduct about that as well.

Senator BARTLETT—One of the measures that was taken quite some time back—I think in 1998 or 1999—which seemed to be driven by this apprehension that if you let lawyers near people then they will coach them in what to say and help people get through who might otherwise not get through was ensuring that people did not have an automatic right to legal assistance in detention centres; they had to formally request it. I think I am getting that roughly correct. I wonder if you have a view about what the practical consequence of that was, perhaps trying to leave aside the principle or otherwise. Part of the suggestion is that what it has meant is that people just put in claims that are badly worded and not properly done and all that means is that it takes years and a lot of time and cost. They finally get proper advice and get the proper thing put in and then they get their visa anyway. Is that a fair assessment? Are measures like that actually counterproductive—if we made people get decent assistance right at the start, we would save a lot of people a lot of hassle and cost?

Ms Jockel—That is fundamentally what both the Law Institute and the Law Council of Australia would say. If you have credible practitioners who are accountable—and I would like to think that the legal industry by and large is; there are bad examples in every industry—

Senator BARTLETT—Except politicians!

Ms Jockel—But I am talking about lawyers. If people are given proper advice early in the piece then hopefully it will minimise inappropriate applications being made rather than maximising them. At the moment I think what is happening is that a lot of people are just floundering. I think the complexity of the law is making it very difficult for someone to decide what really has merit. You have to be very erudite with regard to how this system works to make an informed judgment. Often, with regard to privative clause provisions et cetera, you have to seek the advice of counsel, often senior counsel, and even they cannot agree what the law is. We have created a labyrinth of rules which are extremely difficult. When you talk about merit, I am really very concerned about that because I find that is a tainted word. But I am certainly pro more legal assistance being given to people at the appropriate time, which is early in the piece so that they can get some real guidance as to what their rights and obligations are and then hopefully not proceed with something if there is no merit—using that term.

Mr Rodan—There used to be legal aid—I think up until 1997—for refugee claimants and some other family claims. But I think that was abolished in mid-1997. What happened then was that the immigration department started up the immigration advice system—the IAAAS. That meant that a number of firms got contracts, whether they were migration agents only or whether they were lawyers or whatever. They would go to detention camps around Australia or they would be able to service some of the people in detention here. That meant that only a few people got the contracts. It meant of course that the people who wanted legal aid did not have access to a great number of lawyers—which they still do not have access to. I would think that a much fairer system would be that legal aid be restored so that proper access could be given to these people for legal advice.

That could mean that the legal aid commissions are the ones that get the opportunity to be funded in that regard, because then this can be supervised by the Attorney General's Department and so forth. It may be an opportunity for private practitioners to move into the area again, especially with protection visas. There could be other opportunities and better ways of doing things which would assist you in that regard.

Senator BARTLETT—You made a point about Australia's system being more complex and time consuming than that of other migrant-friendly countries. I know you have already referred to that in terms of the complexity of our act. I have always found it a bit hard to precisely compare the systems of different countries but, for those of us who do support an increased migrant intake—whether it is temporary entrants and not just permanent migrants—are there any specific things beyond trying to reduce the rigidity and complexity that you could point to?

Ms Jockel—There are 135 visa categories and six bridging visa categories for a start. That is just black-letter law. Then, as I said, there is this plethora of policy advice guidelines. It is written in legalese. It is an extremely difficult piece of legislation to unravel—it is like putting a jigsaw puzzle together. Once you get it right, it is actually quite a lot of fun, if you have the stamina to keep up with it. It is very time consuming. Any system of law which is so complex

must make it very hard for a good decision maker to know that they are making the right decision. In fairness to DIMIA, the Palmer report has recognised the very difficult competing balances of compliance and detention in the context of the current very strong government policy et cetera.

So let us review these visa categories. At the moment, for example, we need to simplify the student visa category. On 1 July 2001, one visa category was done away with and now we have seven student visa categories. They are tinkered with at the edges all the time. There was a very interesting case where a student, who actually had skills that Australia needed, was told that they were not eligible to have residency given to them because they did not meet regulation 572. The question was whether their qualifications were really going to help them with regard to their proposed career offshore et cetera.

It is a very prescriptive piece of legislation, which I understand DIMIA will now be doing away with. So review the number of visa categories. Do you need that many? Do you need such a prescriptive system? Do you need so much policy overlay? It is an enormous amount of intervention which curtails your case officers. Give people a lot more training. Have a bit more certainty in the law. All of these things will hopefully make for a better understanding of how the system operates. Have greater accountability. I do not know what to do other than doing away with this and starting again.

Senator BARTLETT—You may possibly like to take my next question on notice. On page 17 of your submission you mention a number of cases where people were not granted protection visas because they were Jewish and deemed to have a right to seek asylum in Israel. That rings a bell for me but I am not sure where that is at with status of law et cetera. Perhaps on notice, I was wondering whether you could provide the committee with a bit more detail about some of those cases—removing identifiers, if you like. I am interested in where that is at as a point of law. It is in section 5.5.5 of your submission—'Safe third countries'. Could you give us a bit more detail on that down the track?

Mr Rodan—Okay.

CHAIR—Do you think simplification or review of the act should be done by the Australian Law Reform Commission—an independent body—or should we have a royal commission?

Ms Jockel—I think that there needs to be an enormous amount of dialogue so that all the stakeholders are able to have input. We really have not considered what the best regulatory mechanism for Australia is. I would like to see a more cooperative approach whereby we could understand that immigration is fundamental to Australia. Without it we will not survive, either on a population basis or on a global level. There are lots of push-pull dynamics. There are security issues. There is skilled labour. There is a need for international students. There is a need for family migration, because one in four Australians were born overseas, after all. Frankly, I have not considered what the best approach would be, but, if we were to have some consultative approach whereby the stakeholders were able to have some input, then maybe we could reach some sort of consensus. We all have to take ownership of this process, because it affects all of us fundamentally.

CHAIR—My question to you is: who should do that? Who should conduct it? Can we get there without a royal commission?

Mr Rodan—Yes, absolutely.

Ms Jockel—Yes, I think so. I think there is a lot of goodwill, and I think DIMIA are going through a lot of cultural and structural change. Perhaps it could be suggested to DIMIA that this is an opportunity for them not only to review their client services charter and their own structure but, in conjunction with a number of stakeholders, to review those parts of the act which are just too rigid and are counterproductive to the goals that Australia is trying to achieve.

Mr Rodan—I would think of something not so grand as the Cape inquiry. If you were going to have some kind of inquiry, I would want the immigration department to be fully involved, as well as us. It may have to take some time.

Mr Thornton—At the risk of having an argument with my colleagues, I take a slightly different attitude to this question. The law that we have now is very good in many ways, in my opinion. The problem that I see in it is that it falls down because it is too rigid. There is no way to avoid some very harsh, unjust results the way things are right now. You have a certain amount of certainty in the law because it is all there. If you like to study it hard enough and you keep up with the changes, there is a lot of certainty in the law. But, if you miss a deadline, if you get wrong advice or if you do not understand the law, you can finish up in a very bad situation. You can be turfed out of the country, you can have your children taken out of school and you can have enormous expense, nervous upset and worry. That is where the fault lies, in my view. It is not the law itself; the policy and the law we can live with. I do not think they are too bad. It is the way there is no relief when things go wrong.

Senator NETTLE—Thank you for your submission. I particularly appreciate the comments in the Law Council's submission about the provisions given to the Ombudsman to review people in detention for two years being in no way a replacement for a judicial review. I think that is an important contribution to make. We heard from the Law Society of South Australia yesterday and I was quite interested to hear their comment that half of the members of the bar in South Australia are doing pro bono work for refugees. That gave me an indication of the need, as you say, for finding ways through the labyrinth to provide the relief that Mr Thornton talked about. Do you have any idea about the number of people in the bar in Victoria who might me doing that kind of work?

Ms Jockel—It is a lot.

Mr Rodan—There is a specific pro bono scheme with the Federal Court, wherein the registrar refers an unrepresented person to a barrister. That barrister will given an opinion as to whether that case has any merit in it. If it does, it will then be sent off to a solicitor. I have had a number of those cases where we have gone ahead. We have even sometimes counselled them not to go ahead because of the cost or because there are other ways of doing things. The Law Institute has a pro bono scheme in that regard too that can assist. That scheme is connected with the bar and PILCH, the Public Interest Law Clearing House. There are quite a number of young barristers, not so young barristers, young lawyers and not so young lawyers who are doing it, but I could

not give you a number. But it is quite a strong percentage. I think they have a lot of heart and a lot of soul about them, and they should all be congratulated.

CHAIR—It was put to us earlier today that this is a government that has an immigration policy that mistreats people in order to deter other people from behaving in a particular way. Yesterday in Adelaide we heard that there are cultural problems in DIMIA, that there is a culture of concealment and cover-up. We heard comments such as the following yesterday: 'a cumbersome, inefficient and ineffective system'; 'a toxic environment'; 'mental health services are in crisis at Baxter'. A good analogy was given yesterday that building more sporting fields at Baxter or changing the entrance is just like equipping the ambulance at the bottom of the cliff but no substantial changes being made to ensure that people do not fall off the cliff. I accept what you say about further consultation and the goodwill of the government, but I have to ask: do you seriously believe that is going to change substantively in the coming months or years?

Ms Jockel—With the government having control of both houses of parliament, absolutely not. There is this concern about security issues. Whilst we continue to harp on about security, without appropriate leadership we are not going to enable those officers within DIMIA to do their jobs as effectively as they can. It is my perception that there is no doubt that, at times, certain people have been dealt with very punitively and that an attitude of mind has been taken on by the decision maker—there has been a certain mind-set. I think this is really because there has been a culture where this sort of behaviour has been seen as appropriate. With the appointment of Andrew Metcalfe, my understanding is that the Palmer report has caused many difficulties for the department, and of course that is only the tip of the iceberg. It has decided to do something about it. Time will tell whether there will be any material changes or whether we will just have a nice talkfest and do a nice client services charter. They say that democracy is ever vigilant; I guess we all have to be ever vigilant. This is an opportunity to start the debate. Certainly it is time to review this whole legislative mechanism in conjunction with the review of the culture, the structure and the processes of the department itself.

I am happy to come back to you. The Law Institute and the Law Council can consider whether there are some recommendations we would like to put on how we should move forward on this piece of legislation and how it could better accommodate Australia's needs and balance the competing interests. I just was not able to do it for you today.

CHAIR—I understand that. We would probably invite you to do that. We would welcome that further assistance in a supplementary submission.

Mr Rodan—In September 2001 some nine pieces of legislation went through parliament in a very hasty period of time. There was an election campaign at that time, and a number of deceptions occurred. I think that gave people who work in the department a feel that 'up top' seemed to be invincible: if up top do not have to answer questions and if up top do not have to concern themselves about various issues, why should we? That is the culture that has permeated right down to the bottom. You have the poor compliance officer who says: 'Okay, I can do this. I can tough this out. I can make this decision.' But he or she makes the decision based on the wrong information. They make the decision because they think it is something they can be proud of. These are things that have permeated mostly since September 2001. It is not the parliamentarians' fault and it is not the immigration department's fault; it is just the way things went. But we have to stop it.

Senator PARRY—May I say that the government does not control the Senate. It happens to have the majority on the floors of both houses. Thank you.

Ms Jockel—That is very pleasing to hear.

CHAIR—We have not seen any evidence contrary to that since 1 July.

Senator NETTLE—I think you are taking on board a couple of questions on notice and I will put one on notice also. In your submission at section 5.10.3 you talk about ways in which the MSI, the Migration Series Instructions, are contrary to the migration regulations. If you are able to provide examples of that that would be helpful for the committee, I think.

Ms Jockel—On that point, a number of courts have held that the MSIs must be given effect unless there is a very cogent reason not to. Recently there have been a number of cases in both the Federal Magistrates Court and the Federal Court to say that you have still got to exercise your fact-finding determination and that you are not guided by what is policy. So perhaps the pendulum has swung a little bit more towards not giving them as much effect. Let us see.

CHAIR—Ms Jockel, Mr Rodan and Mr Thornton, I thank you very much for your two submissions and your evidence today and for making yourselves available and taking the time to appear before the committee. It is much appreciated. I would also like to place on record my thanks to all witnesses who were here today and to the people who have stayed in the public gallery listening.

Committee adjourned at 4.36 pm