
COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

# SENATE

## LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

**Reference: Administration and operation of the Migration Act 1958**

WEDNESDAY, 28 SEPTEMBER 2005

SYDNEY

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**SENATE**

**LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE**

**Wednesday, 28 September 2005**

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

**Substitute members:** Senator Parry for Senator Fierravanti-Wells

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

**Senators in attendance:** Senators Crossin, Kirk, 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 9.00 am**

**ACTING CHAIR (Senator Kirk)**—This is the third hearing of the Senate Legal and Constitutional References Committee's inquiry into the administration and operation of the Migration Act 1958. The inquiry was referred to the committee by the Senate on 21 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 inquiry's terms of reference require the committee to consider the administration and operation of the Migration Act, 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 health care, including mental health care, 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 are reminded of the notes they received relating to parliamentary privilege and the protection of official witnesses. Further copies are available from the secretariat. Witnesses are also reminded that the giving of false or 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 request 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.

[9.02 am]

**BITEL, Mr David, President, Refugee Council of Australia**

**ACTING CHAIR**—I welcome Mr David Bitel from the Refugee Council of Australia. You have lodged submission No. 148 with the committee. Do you wish to make any amendments or alterations to that submission?

**Mr Bitel**—No.

**ACTING CHAIR**—I invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to ask you questions.

**Mr Bitel**—Thank you. Can I start with an apology for Margaret Piper, who is the Executive Director of the Refugee Council and who is currently in Geneva participating in ExCom, the executive committee meetings of the United Nations High Commission for Refugees. The premeetings started this week and the main activity starts next week. We are regular participants in that as members of the government delegation. It is a pity that she could not be here because she is the primary author, as you can imagine, of the submission which is before you. So at the outset, whilst of course as President I am the person responsible for the submission and the head of the organisation, there may be matters of a technical nature which I may have to take on notice if questions are asked and if I have liberty to respond through consultation with Margaret after her return.

I will not go into a summary of the Refugee Council, as I am sure it is well known to you. It is the peak body in Australia representing the interests of refugees. Our aims, objectives, mission statement and activities are well summarised on the web site of the council, in its annual reports and in the numerous documents which we publish and send to senators from time to time. We remain a resource that is available to senators and members should they have any questions at any stage in relation to the particular areas that are within the concern of the council. I do not propose to go through the submission that is already before you, but I will highlight one particular issue and then thread out a couple of issues which I think need to be further considered.

We forwarded as part of the submission a paper on complementary protection which had been worked on by the National Council of Churches and Amnesty International. I can indicate that we are looking at updating that, and there has been a working group earlier this year. It is considered that the absence of a complementary protection regime in Australia other than the quite frankly inadequate provisions of section 417 insofar as they relate to failed asylum seekers—there are other complementary sections dealing with other mechanisms to get to the minister—does not represent the best practice for complementary protection.

It is perhaps important for you to be aware of my understanding that one of the primary issues which is going to be considered at EXCOM this year is the issue of complementary protection and that some draft recommendations have been circulated. EXCOM will hopefully be coming out with some further work or recommendations which, of course, are not binding on states party

to the convention but which nevertheless carry considerable weight in terms of their application. Given Australia's significant role in EXCOM and the activities of the United Nations High Commission for Refugees, I think they should be given considerable weight. Perhaps when Margaret returns we will know what EXCOM has formally resolved. If we may be given the liberty, we will send further material to you in that area as it becomes available. Presumably the secretariat to the committee will also be making inquiries.

Changes have been foreshadowed to the Australian Citizenship Act. I am not aware that they have been implemented. I do not think there is a bill yet before the parliament. This discussion arose subsequent to the preparation of our submission. It is something that the council would feel concerned about insofar as the changes impact on refugees. People who have been granted protection in Australia and consequentially become permanent residents want to get on with their lives. Whilst I cannot give you a statistic, I would think that the uptake of citizenship amongst former refugees is very high and significantly high as a proportion of other applicants for citizenship.

I think the extension of the period from two to three years, as has been foreshadowed, has the potential to impact adversely on the psychological wellbeing of many refugees who see Australia as their new life and who wish to participate as fully as possible in the national make-up of this country and who are denied that ability by not being full citizens. Whilst to a skilled migrant or a family migrant an extra year may not be particularly significant, it is particularly significant for refugees. I would be asking that, when that issue is the subject of discussion in parliament, the particular concerns and interests of refugees be taken into consideration. As a suggestion, maybe there could be an alternative approach to citizenship where refugees who are permanent residents can still get the benefit of applying for citizenship after two years and be an exception to the three-year rule. Obviously, one of the published primary reasons for the change is the issue of terrorism and the public debate in relation to that. It is our submission that that really would not apply in relation to refugees, who are after all the victims of human rights violations and the people who have fled that situation. That is one point I wanted to raise.

The second point that I wanted to stress—and I am sure it will be raised by other submissions to the committee—is the impact of the 45-day rule on asylum seekers. Whilst the council is a policy body and not a service delivery organisation, we have many members who do provide direct support and assistance to asylum seekers. The 45-day rule is a rule whereby, if a person makes a claim for protection having been in Australia for more than 45 days in the preceding 12 months, they are ineligible throughout the whole period of the processing of their protection application to be granted permission to work and consequently access to Medicare benefits in particular. That wreaks extraordinary personal, emotional and financial havoc on people who are caught up in that situation. All of us who see asylum seekers are emotionally very uncomfortable with having to deal with the plight that these people are in and the penury that the law forces them into.

The plea relates to not only asylum seekers but also refugees. I have recently been acting in a case—I do not now speak as the Refugee Council; I am a specialist immigration lawyer with a refugee practice, and so I have some particular knowledge of the area—where a fellow made a protection application in 1998 or 1999, having been here for a period prior to that, and was denied the right to work for essentially six years. His protection application was finally approved by the Refugee Review Tribunal in May this year. He is a human wreck—that is about the only

way one can describe it—as a consequence of the inability to work and the loss of self-respect that that has enforced on him. He is now essentially confined to an institution. It is going to take 12 months for us to work through trying to bring him back, if it is possible, to the human existence that we would hope he would get. Whilst I do not place all the blame on the 45-day rule, it is certainly a significant element in the problems which this young man has had to suffer. Now that is only one case. All of us know of multiple cases of women with children who are essentially living in refuges or on the streets because of the severity of the rule and its impact, because of the harshness and the fact that there is no discretion vested in case officers. That is an issue which I would ask you to take up.

Another issue which the council has been concerned about is the temporary protection visa regime. We have made submissions about that, but one impact which I do not think has had much publicity relates to a particular regulation, regulation 866.222A. That regulation provides that, where an applicant for a protection visa who has been found to be a refugee has been convicted of an offence which carries a maximum penalty of imprisonment for at least 12 months, then that applicant cannot be granted a permanent protection visa but only a temporary protection visa. It is a particularly harsh regulation. Whilst it is obviously intended to deal with issues of criminality, by tying it in to the penalty that could be imposed, rather than the penalty which is imposed, it impacts very severely on people.

Just by way of one case example, I am aware of a young guy who was approved as a refugee but whilst out partying with some mates had some ecstasy tablets. He was charged with possession of ecstasy tablets for personal use, was convicted and was placed on a good behaviour bond. But because the offence carries a maximum penalty of more than 12 months imprisonment he is now not able to be granted permanent protection. He gets a temporary protection visa for three years. His circumstances will not change. He will be able to get the benefit of permanent protection some time hence—assuming there are no further criminal activities, and why should there be—but in the meantime he has all the limitations imposed on his life that flow from the temporary protection visa regime.

It is a particular stinger which I think requires a revisit in terms of legislative change. If the TPV regime goes, then of course that particular regulation would go—and remember there remains section 501, which deals with character issues generally. I do not see the need for the imposition of this additional subregulation, given the general character regulation which exists. There is also the regulation under article 1F of the convention, which is incorporated into domestic law, which enables people to be denied where they have committed serious crimes against humanity and the like.

A third point that I want to stress is the failure in the regulations to address the issue of the torture convention and to provide any regulatory regime in Australia for people to make applications for visas where they fear torture. They can make an application for refugee status under the refugee convention but sometimes there are differences. It is a lacuna which for some years we have been calling for legislative change to overcome. It has not happened.

This brings me to another point—a current issue which I do not think is made reference to here—concerning the failure to provide a visa regime for people who have made complaints to the Human Rights Committee or other international committees. We saw just recently a fellow who reportedly had such a complaint whom the department removed and then had to bring back

from Singapore, Dubai or one such country following orders which were made. Again, the absence of a formal bridging visa facility for such people creates a legal limbo where departmental compliance officers have an obligation to remove people who do not hold valid visas when clearly the person should be allowed to stay in Australia until all appropriate and lawful review applications and channels have been exhausted.

I think there is a failure to adequately consider the department's gender guidelines when many assessments are made. It was interesting to read reports of the new justice to the High Court. One of the two decisions which was reported as perhaps an indication of where she might stand on issues was a decision—and I do not remember the case reference—where she expressed concerns and set aside a decision of the Refugee Review Tribunal which had misapplied the law in relation to persecution where a woman had been raped. This is just one of many areas where I think there are well-developed gender guidelines which cover a range of different issues relating to protection but there is not proper application of them.

The penultimate point I would make is that, while there are a range of offshore visa categories for refugee and humanitarian reasons in the 200 subclass of the regulations, there is nothing comparable for onshore. One thinks in particular of the women at risk category where there are 500 or 600 places which are, to Australia's credit, regularly filled. We were a leader in that area. Whilst the gender guidelines have some relevance to that under the social group category, perhaps consideration could be given to an onshore women at risk category as well.

My final point is to make a statement, which is perhaps a little beyond the ambit of this inquiry, expressing concern about the demonisation of refugees. To come back to what I said at the outset, by definition refugees fear persecution or are the victims of persecution. Many of those who have come in recent years have fled from persecution in countries where terrorist regimes are in existence. The demonisation of refugees which has taken place has led many people who are in fact refugees to be bracketed with the very terrorists that they have fled. I make that salutary warning in the context of the current terrorist debate.

There are a lot of other issues, one of which is a concern about the quality of decision making, in particular by the RRT, and I am happy to answer questions about that. In my firm we have acted for the fellow I spoke about previously. He had three cases heard before the RRT, and the final one was approved on the papers. The first two applications were refused in what I professionally consider to be appalling decisions. The second decision was remitted by consent by the department after an appeal was filed to the Federal Court within 28 days, which I think indicates the poor quality of the decision. He was then found to be a refugee on the papers.

How many other people are there in that category around the country? I am personally aware through my own practice of at least 20 people who, following judicial review, have been granted refugee status. It leads to serious questions about the approach which is taken by the RRT in its decision making in relation to asylum applicants. It requires the strongest consideration. If it were not for the High Court case S157, which I am sure you are aware of and which I can claim the honour of having been the solicitor on the record for, these people would have just been returned and Australia would have been in breach of its obligations under the refugee convention. It is as simple as that.

**ACTING CHAIR**—Thank you very much, Mr Bitel. At this point I might mention that our chair, Senator Crossin, has now arrived.

**Senator CROSSIN**—My apologies.

**ACTING CHAIR**—Thank you very much, Mr Bitel, for your submission. You raised quite a few points that have not been raised by other witnesses, so that was most useful to us. On the matter of the RRT that you ended on—I have an interest in that area—you referred to what you consider to be their poor decision making. What do you think it is that contributes to that? We know that most of these people are not legally trained. Quite often they are on short-term contracts and there is the potential for renewal of their contracts at the end, so there might be some consideration given to what the government might want in relation to outcomes. I wonder if you could give us your view in relation to that.

**Mr Bitel**—All of those things have impacted adversely, together with a range of other issues. I might indicate that I am the Secretary-General of the International Commission of Jurists, and you are hearing later this morning from our assistant secretary, Nick McNally. One of the issues which the ICJ has raised in its submission—in greater detail than the Refugee Council—has been the quality of decision making at the RRT. So, because I represent the ICJ on the Refugee Council, I would adopt the ICJ's submission for the council as well.

To answer the question directly: firstly, many of the members of the RRT are appointed from DFAT. There is a general view that DFAT views are the be-all and end-all of what is going on. With all due respect to DFAT officers, the quality of their decision making or their ability to access information is limited and may or may not be affected by other considerations such as the quality of their country reporting. When those country reports are taken at face value by RRT members, one has to have questions. When country reports which are clearly out of date by many years are taken at face value as indicative of a current situation, one has to have concerns. There have been numerous learned articles published looking at decisions of the tribunal and comparing the decision making of the tribunal here with the decision making in other countries, and serious discrepancies arise. I can refer some of those articles to the secretariat if you are interested.

The selective quoting of source material by some RRT members is essentially dishonest. I do not accuse all RRT members. Obviously there are many members who are dedicated, committed members and who take seriously their function of committing an inquiry to determine whether or not a person has made a valid protection claim. But there are some who do not. As I said, there is evidence of dishonest and selective misquoting of the sources—and there are articles which have been published which have analysed this—and several members of the RRT have been found to be biased by the Federal Court. In particular, one RRT member had to resign because of a statement on his web site in which he made comments that were generally adverse about asylum claimants. There is also a culture amongst many RRT members that all applicants from particular groups are liars. It may well be the case that many applicants from particular groups are liars, but in this area—as in any area—you cannot make stereotypical conclusions.

I deal a lot with Bangladeshi applicants. About 12 years ago DFAT published a report, one paragraph of which says, 'It is the view of this post and other posts in Bangladesh that nearly 100 per cent of claims made by applicants are based on false documentation', or words to that

effect. That comment, which if anything is stereotypical and which has recently been the subject of adverse comment by the Federal Court in a particular case, has been used frequently by RRT members to say: 'Look, you have given us the following documents. We know that in Bangladesh you can get any document. Therefore we do not believe your documents.' There is a non sequitur in that argument.

That approach—that everybody who comes to them is a liar and a cheat—leads to the issue of credibility as a device by which the RRT refuses a large number of applicants. It is very difficult to overturn a credibility finding where you have an inquisitorial tribunal making findings of fact, because that is the role of the tribunal member. There were a series of tribunal members who used the subterfuge of credibility as a means to destroy many applicants' claims. There cannot be anything more soul destroying to a person who has suffered torture or persecution than to be told, 'You are telling a lie,' where that finding is based not on a detailed analysis of the person's history following an extended and extensive inquiry but on a somewhat peremptory inquiry, which might last for a couple of hours, by a person who does not have the expertise to make findings, who sits as a single member of the tribunal and who has absolute power. I think in many cases that power has gone to the person's head.

Another problem is that tribunal members for inevitable reasons suffer burnout. I query whether 10-year or 12-year terms of appointment are wise in that particular jurisdiction. I was pleased that the amendments took place merging the two tribunals. We make our comments only in respect of the RRT because the Refugee Council deals only with refugees. But the cross-vesting will lead to a cross-fertilisation of approach, if the RRT stays. The ICJ in its submission has called for the replacement of the RRT by a different mechanism, and I would endorse that.

**ACTING CHAIR**—Do you have a view as to whether or not the role of the RRT should be moved to, say, the AAT or to the Federal Magistrates Service? I have understood what you were saying about the incompetence, if we can say that, in many instances. Do you think that is as a result of their lack of tenure? You mentioned that 12 years may be too long and they suffer burnout. Is it a matter of just looking at the process of appointment and the terms of appointment of these individuals—and also perhaps their qualifications—or is it a matter of looking at constituting three-member tribunals?

**Mr Bitel**—I have a personal view. I cannot say it is the view of the Refugee Council. We have discussed this issue but we have not come up with a settled final decision on it, and that is why I do not respond as President of the Refugee Council to that question. My personal view is that the decision as to whether or not a person is a refugee is such an important decision. It is the same as a decision as to whether or not a person has committed a serious criminal offence but the consequence of getting it wrong is that a person will be returned to persecution and Australia will be in breach of its international obligations—and I put the first first.

I am aware of at least one case, which I have mentioned in previous parliamentary hearings, of a person I acted for who was a Filipino. He made a claim in the early 1990s for protection and was refused, the general approach being that Filipinos cannot be refugees. He went back to the Philippines and was executed within three months, together with his three-year-old son, by the very people that he said he feared. He was a COMELEC officer—COMELEC is the equivalent of the Australian Electoral Commission in the Philippines—who had exposed some corrupt conduct by some local politicians, and he was executed by them. That happened many years ago.

That is just one case I know of personally because I acted in that case, but there are others, I am sure.

With that background and given the importance of the determination, it is my view that the inquisitorial system—because it is not well understood in Australia; it is not part of our legal system—ought to be replaced. Some years ago I made a personal submission to Minister Ruddock that in fact it be replaced by the federal magistracy, and that is where I would like to see determinations end up. I know there is a cost consideration and I understand that there may be a constitutional question involved but, subject to those serious issues being resolved, I think the appropriate place for a determination of something so important is a federal magistrate. They would conduct a proper judicial inquiry.

There is a concern about extended appeals, but that has largely been addressed by changes which have taken place in the last few years. If you have a decision from a federal magistrate, then it seems to me that you have an appeal only on a question of law to the full court, and you can introduce some form of leave provision—or the court itself can introduce a leave provision, as indeed the courts have essentially done by requiring significant paper documentation to support appeals—which would remove the unmeritorious appeals that have historically been clogging up the courts. If we cannot move to that system then I think the New Zealand system works well. There the tribunal sits essentially as a panel of three. They have extended hearings. I am aware of cases going on for days. To me, that gives the cases the dignity that the investigation of the claim deserves.

**Senator PARRY**—Firstly, yesterday we received a submission concerning the complementary protection issue so there is no need for us to quiz you on that supplementary aspect of your submission. I want to take you back to your opening statement about regulation 866.222A—the 12-month issue. Do you see that as more of an issue of someone actually serving 12 months rather than the offence being deemed to carry a penalty of 12 months or more?

**Mr Bitel**—Yes, that is what I intended, as I said in the example that I gave of the fellow who had been placed on some form of community service or good behaviour bond with no criminal record. But because the maximum penalty in the state legislation is severe and one can understand why there can be a range of penalties which courts have the power—

**Senator PARRY**—So simply a minor reworking of that to make it someone who has actually served 12 months.

**Mr Bitel**—Not necessarily served even. It would be where the penalty imposed—

**Senator PARRY**—Was 12 months, whether they were released on probation earlier?

**Mr Bitel**—Yes.

**Senator PARRY**—Okay. Because parliamentarians have a similar condition—of we are convicted of an offence for 12 months or more, we are disqualified from holding office, so it is a similar provision across many other areas. The other issue you raised concerned citizenship—you said the conversion rate was very high.

**Mr Bitel**—If I may correct you, it was my feeling that it probably would be very high. When one analyses the statistics and you see the large number of, for example, Vietnamese or people who come from countries from which there have historically been large refugee intakes, it is an assumption. I have not seen any actual figures on it.

**Senator PARRY**—You pre-empted my question. So there is no hard and fast data there?

**Mr Bitel**—I am not aware of any. I assume the department might be able to give that to you.

**Senator PARRY**—I was going to ask, anecdotally then, do you know of any particular groups and do you have a view as to why this is occurring—why the conversion rate is high?

**Mr Bitel**—It is only a gut feeling. Personally, I come from a postwar European Jewish refugee background myself. But the fact is that people see the country where they have come from as their past life and they want to get on with a new life. Australia is their new life. It is my fervent belief that the best Australians are refugees because their bridges back home are gone. Australia is the future. One only has to look at the huge percentage of former refugees that make up the top business structure of this country to see the commitment that many former refugees have brought to this country. That is anecdotal I know. I do not have formal empirical evidence. I do not know whether studies have been done, but it is possible that they have.

**Senator PARRY**—Finally, since the Palmer report was handed down and some changes have been implemented by the minister, I know it is early days, but have you seen and can you highlight any improvements?

**Mr Bitel**—The council issued a press release in which we applauded the changes. We do not believe they go far enough but we certainly applauded the changes. We strongly commended the members—Mr Georgiou and others, who were responsible in large part—for their activities in getting that change. It was what many of us had been pleading for for years. To see it actually happen was great.

Remember, of course, that not all people detained are asylum seekers or failed asylum seekers. Because of the mandatory provisions in the Migration Act across the board, many people who are detained are those who were illegally out there in the community and for whom the issue of making a protection claim is totally irrelevant. The council has an alternative detention model, which has been developed over many years—I am not sure whether it was forwarded to the secretariat, but I can arrange for it to be sent—and that is where the council would like to see us moving.

**Senator NETTLE**—I am sorry I missed the beginning of your submission. It sounds as though you were talking about section 501 or section 201.

**Mr Bitel**—I was raising the issue of a particular subregulation where a person has been found to be a refugee but cannot be granted permanent protection because he or she has been sentenced for an offence which carries a penalty of at least 12 months imprisonment, even though no imprisonment is imposed. I suggested that parliament needed to reconsider that subregulation and that section 501 has such broad powers in relation to character that the section is possibly

redundant in any event. But I also prefaced it by saying that the council is opposed to the TPV regime.

**Senator NETTLE**—Thank you for your submission. I think it is really important to continue to point out the United Nations conventions that Australia is in breach of, and your submission does that. So I thank you for continuing to do that work. You mentioned the case of an asylum seeker who was returned to Australia from Dubai at a time when there was a United Nations Human Rights Committee interim order on his deportation. I am perfectly happy for you take this question on notice—I have asked the department and I am awaiting a response from them—whether or not this is the first instance of the Australian government not complying with an interim order from the Human Rights Committee. To my understanding, it is. Could you take on notice whether that is the first instance? The reason I ask that question is that some United Nations conventions are consistently ignored by the government. The issue of interim orders to stop the deportation of an asylum seeker whose case is before the Human Rights Committee had not occurred, to my knowledge, until this instance. If you or anyone else at the Refugee Council know of, or are able to provide us with, other instances of this occurring, that would be helpful. I am awaiting an answer from DIMIA but, due to the possibility that I may not receive an answer, it would be helpful to the committee if others could inform us of any other instances.

**Mr Bitel**—I cannot tell you offhand of any cases. Certainly there have been published cases of people who have been removed contrary to orders of the Federal Court and who have had to be returned. Many years ago, I was involved in the case of an Iranian. We obtained an order from Justice Lockhart of the Federal Court directing that that person not be removed. The department proceeded to ignore that order—to the embarrassment of the case officer when he was called before the judge the following Monday. It was only through some herculean efforts of physically getting the Registrar of the Federal Court, who lived in Penrith, to come to the city, open up the registry on a Saturday night, stamp a document and get it taken to the airport that the plane was stopped on the tarmac and the person was brought back. This was because the department were not prepared to accept a senior barrister's—it was actually a silk's—undertaking to them that an order had been made. That was many years ago. But I do not know that the culture has necessarily changed, because there have been reports of similar sorts of things happening.

**Senator NETTLE**—We have had evidence to the committee of similar Federal Court orders not being accepted by DIMIA.

**Mr Bitel**—When a judge of the Federal Court says to an immigration officer, 'This is Justice Lockhart on the phone, and I have just signed an order to restrain the removal of this individual,' and the departmental officer essentially says to the judge, 'I want to see it in writing before I am going to action it,' I would have thought that was contemptuous of the court.

**Senator NETTLE**—Just going back to section 501—I do not know if you have already raised this; stop me if you did—we have talked previously in the committee about an instance of an individual who is a convention refugee, accepted through the UNHCR program, and who is caught under section 501 because they have been sentenced for more than 12 months. They have been in a detention centre in Sydney for several years now, with a removal for deportation order on them. Would you like to comment on that in the context of UN conventions? We have accepted somebody and then they have been caught under section 501. That person has a deportation removal order on them from the minister. The only option available is ministerial

discretion, as is often the case. It is at the minister's discretion whether or not we break the convention by returning someone who has been accepted as a convention refugee.

**Mr Bitel**—I have heard similar sorts of cases. In the criminal deportation area, one commonly hears of cases involving people, particularly from Vietnam, who have come to Australia as refugees, as minors in earlier years, who have then got themselves caught up in serious criminal activity and in respect of whom deportation orders have been signed following section 501 orders or decisions. In my mind, that certainly does enliven the question as to whether Australia is in breach of its obligations, because there has been no change in country situation in Vietnam in terms of the refugee convention.

To answer your question, though, I cannot give you a settled, learned opinion as to whether Australia is in breach of its obligations. My gut reaction is that Australia may well be, but then other considerations may come into play such as the effluxion of time and the cessation provisions under the convention. My understanding is that 1F of the convention applies only in respect of serious misconduct which predated the person's entry into Australia. So there is an exception in the convention to people who have serious criminal conduct. Again, a classic case from many years ago involved one of Pinochet's torturers who managed to make it to Australia and then sought refugee status on the basis that he was afraid to go back to Chile because he would have a problem. Clearly, he was excluded from the convention as, indeed, have some of the Afghan torturers and the Iranian torturers during the Shah's regime. Article 1F of the convention covers that situation, but I am not sure that it covers the situation in relation to people whose criminal conduct has occurred in Australia post the granting of their protection. I do not know the answer. If you are hearing at some stage from an academic who specialises in the refugee area, such as Dr Crock or Dr Charlesworth, they may know the answer to that question.

**Senator NETTLE**—That helps to clarify it. The instance that I am talking about is where the criminal activity is subsequent to their arrival in Australia and that is how they get caught under section 501. They are an Iranian convention refugee, and the circumstances in Iran have obviously not substantially changed.

**Mr Bitel**—They could have been caught under 501 for a failure to disclose previous misconduct as well.

**Senator NETTLE**—This was an example of someone being caught under section 501 because of their criminal activity. It is an interesting example of how the convention is applied subsequently. The other question I would ask you to take on notice is this: you mentioned in your submission the issue of well publicised accounts of the use of chemical restraint during removal. We have not had subsequent witnesses about that issue. It is something that I and others have raised several times with the department of immigration, and the response we get from the department is that the Australian government's policy is not to use chemical restraint. It is a difficult discussion to subsequently have, because the information I have is from detainees and the department has not accepted that information from detainees as evidence of the use of chemical restraint. If you are able to take that on notice and provide us with more information about the use of chemical restraint, from detainees or others, that will be helpful in our discussions with the department.

**Mr Bitel**—Sure. I mentioned before you came in that Margaret Piper, our executive director, is currently overseas at EXCOM. She would be the person who would more properly be able to answer that question, but it will be some weeks before she returns.

**Senator NETTLE**—That is fine.

**Senator PARRY**—I feel that it is unfair to leave open on the record a comment about the judge calling a DIMIA officer and the DIMIA officer wanting something in writing. Forgetting the circumstances, we should allow a bit of latitude. Obviously, anyone can ring up anyone and say, 'I want someone to stop the deportation.' Verification of who is calling and things like that are very important in the process, so I feel that we need to have the record clear about that. That is just one, probably more flippant, example, really.

**Mr Bitel**—No, it was not intended as flippant. It was intended in the context of the issue of removals about which I was asked, but I prefaced it by saying that that particular case happened many years ago—over 20 years ago—so it should be seen in that context.

**Senator PARRY**—Nevertheless, verification is important.

**Mr Bitel**—I do understand that—of course it is. Verification is crucial but saving a life is also crucial.

**Senator PARRY**—True.

**Mr Bitel**—If it is a question of a day's delay just to see whether—and this was a Saturday night—it would go before the Federal Court on the Monday morning, I am not sure that anyone would have been particularly disadvantaged by that fellow being sent back to Villawood to await Monday for confirmation that the case was before His Honour. One other issue that is important—and we probably do not have time to go into it now—is the question of airport turnarounds. There is the Pacific solution and there are the excision policies which have been well publicised, but not much attention has been given to airport turnarounds, which departmental officers have been using for many years, essentially to prevent people from making protection claims.

**CHAIR (Senator Crossin)**—Mr Bitel, this week witnesses have claimed that there are cultural problems in DIMIA—that there is a culture of concealment and cover-up. We have heard that it is a cumbersome, inefficient and ineffective system. Mr Palmer himself found that many of the DIMIA officers who were interviewed and who had used the detention powers under section 189 of the act had little understanding of what, in legal terms, constitutes reasonable suspicion when applying it to a factual situation. In fact, we have heard very little that is positive about DIMIA this week, I have to say. I noticed this morning on Sky News that facts have come to light about the Bakhtiyari family. I do not want to go into the merits of the case, but I would be interested in your comments about the culture in DIMIA. I have been trying this week to get a handle on how it is that it takes so many years to come to a conclusion about people and how in some cases, as in this morning's news, they get it so wrong.

**Mr Bitel**—Before you came in, I gave the example of a client of mine who was a Bangladeshi. He had to go before the RRT three times before he was found to be a refugee.

When the case came before the third member of the RRT, that member made the decision on the papers, without even a hearing. With the two previous tribunal members, in my view—if one reads the decisions—the first approached the case with a blinkered approach, basically ignoring the country information, and then made a decision. The second member made an even more extraordinary decision. This particular applicant—and obviously I am not going to give details—had a range of problems, some of which were psychiatric. During the course of the hearing the member said, 'I accept that you will be vulnerable and that you will have a problem if you go back to your country; get me an up-to-date medical report which confirms that. I will adjourn the hearing; if it is favourable, that is the end.' The report was obtained and, without reconvening, he refused. It was the most extraordinary decision I have ever seen.

**CHAIR**—Is this a case for legal representation?

**Mr Bitel**—We appealed to the Federal Court again—a second time. As I said before, the case was remitted by consent within 28 days. It was unheard of. When it went back to the tribunal, the registrar said, 'This is the fastest remittal I've ever seen.' That is the quality of the decision making that is coming out of the RRT. The departmental decision making is even worse. The departmental decision making in the refugee area is predicated on a culture that all applicants are liars. I am not saying that all officers follow this approach, and I do not want to be making grand statements which suggest that everybody is like that. It would be wrong to do so; there are a lot of very fine, dedicated, hardworking, committed people in the department. One sees them, in particular, in the settlement area. You are not addressing the issues of settlement, but the people in the settlement parts of the department are really fine folk and they need to be praised. It is when they get into those areas of compliance and refugee determination that some people develop what I suppose one could call almost a power complex. Given that they have unfettered control, they have extraordinary powers. The compliance people have more powers than the police. They are nowhere near as well educated—and I do not have to repeat what Palmer said—in the way in which they conduct their activities. In the past they have been protected by the knowledge that they have essential impunity, and, of course, the people will be removed so the problem of their misconduct will not come to light.

In terms of the departmental officers, the quality of decision making at the primary level is appalling in a large number of cases; it is sloppy. I mentioned before the issues of referring to out-of-date country information, referring to country information which is taken out of context and ignoring significant parts of people's claims to mould a decision which has clearly been prefabricated. How is it possible for a person to have a refugee claim refused without an interview? It is just impossible, and yet it happens daily in the vast majority of cases. You might approve somebody without an interview, but how can you refuse somebody, where you say, 'We don't believe you're telling the truth,' when you have not even interviewed them and asked them any questions? The problem is that that level of decision making is in fact shielded because it is not subject to judicial review and the appeal to the RRT is an appeal de novo, so it enables the case officers to get away with sloppy decision making.

**CHAIR**—My last question relates to page 8 of your submission. You talk about Canada's pre-removal assessment tool, how it works. Can you very briefly—

**Mr Bitel**—I am sorry, that is something which is knowledge particular to Margaret Piper. Can that be a question I take on notice for her to respond to?

**CHAIR**—Sure. There is only one line here that says we should look at it, with a web site link.

**Mr Bitel**—So you want more information in relation to the Canadian bit?

**CHAIR**—Yes.

**Mr Bitel**—Sure.

**CHAIR**—I would like her brief views about why she believes it would be beneficial. Mr Bitel, we have come to the end of our questioning. Thank you very much for making yourself available today to appear before the committee. We appreciate the time you have provided to us.

**Mr Bitel**—I hope I have been helpful in my comments.

**CHAIR**—Thank you very much.

[10.03 am]

**HICKIE, Professor Ian, Clinical Adviser to the Mental Health Council of Australia**

**ROSENBERG, Mr Sebastian, Deputy Chief Executive, Mental Health Council of Australia**

**CHAIR**—I welcome representatives from the Mental Health Council of Australia. Do you have any comments on the capacity in which you appear?

**Prof. Hickie**—I am Professor of Psychiatry at the University of Sydney and a board member of the Mental Health Council of Australia.

**CHAIR**—We have received your submission, which for our purposes is numbered 222. Before I invite you to make an opening statement, do you have any amendments or changes that you wanted to make to that submission?

**Prof. Hickie**—No.

**CHAIR**—If you want to provide us with a short opening statement, we will then go to questions.

**Mr Rosenberg**—Thank you very much for the opportunity to appear today on behalf of the Mental Health Council. I think the submission puts together evidence fairly generally that the detention environment is not an appropriate setting for mental health service provision. The council has been very active to ensure that the mental health needs of detainees are appropriately addressed. The council has contributed fairly fulsomely to the deliberations of the Palmer and Comrie reports. Some of the results of that work are shown now in some of the recommendations of the Palmer inquiry. The last thing we need to mention by way of opening is that the Mental Health Council is very aware of the long-term consequences of the failure to provide good mental health service to detainees, because a high proportion of detainees are eventually released into the community and if their mental health needs have not been adequately met the consequences and costs to the community in the long term are extremely high. That is not a situation which is beneficial either for them or for the community that receives them.

**Prof. Hickie**—There are only two other issues that I would like to raise. Firstly, in Australia we have agreed national standards for the provision of mental health care which are applied by client states and jurisdictions elsewhere. We would expect those to be applied by the Commonwealth in situations where it has people in detention. Secondly, the adverse effects on people and their mental health care are likely to be ongoing. Most people will come to reside in the Australian community and one would expect that often the adverse effects on their health will continue, so there is the issue of adequate provision and the recognition of detention as a risk factor as to adverse mental health. The failure to provide adequate services and adequately scrutinised services may well have impacts that extend beyond the detention environment with the ongoing provision of health care for those persons who come to reside in Australia.

**CHAIR**—Thank you for your comments. We will now go to questions. Some of the submissions that we have received and some of the people that we have heard from this week have actually labelled mental health services in detention centres as poor, unresponsive and appalling. In fact, on Monday one witness went so far as to say that they believed the mental health services were actually in crisis. To what extent do you believe that mental health treatment in detention centres does not actually appear to concern itself with patients' ongoing needs? It almost seems as though people in detention have to reach such an extreme level of mental illness before anything is actioned that there is no base care for people who are at risk.

**Prof. Hickie**—The council's submission makes it clear that it considers that the whole standard of the environment and the standard of all of the range of health services—from protecting against mental health problems to the provision of primary care services and the provision of specialist services—need to continuously take account of the issues that you have raised. It appears, from the evidence and reports that we have received and from specific case situations, as if those needs are frequently ignored. It appears that consideration has not been given in terms of the total environment—firstly, as to whether a person should be in detention or not, since detention is likely to be a risk factor as to mental health problems, given that it is often a high-risk population that is coming into detention—and then as to all levels of the training of staff, the physical facilities, early recognition of problems, early intervention and the use of treatment facilities external to the actual detention environment. On all of the key issues, what you would expect to have in a proactive approach to good mental health and good mental health management seems to have been ignored, so that the mental health of detainees has not appeared to be a priority and many of the situations and processes that have come into place are therefore considerable risk factors as to ill health from a mental health perspective.

**Mr Rosenberg**—I will add to that. The philosophy which underpins good mental health is a recovery focus, to focus on long-term recovery. That is an extremely difficult philosophy to imbue in services which are provided in that setting.

**CHAIR**—The Australian National Audit Office handed down a report into the management of detention centre contracts this year. It talks about the contract between DIMIA and GSL. It says:

> ... the Contract does not adequately specify key responsibilities that are to be met, either by DIMIA or GSL. In particular, clear and consistent definitions are not provided for health standards that are central to detainee welfare.

Is one of the key failures in the current system that there is no clear delineation between where the contract starts and where DIMIA's responsibilities end?

**Prof. Hickie**—This is an issue that the council has commented on elsewhere, that, from our point of view, there are duty of care issues: that DIMIA has a principal duty of care for people under its detention system and it should seek to meet the national standards for health care, particularly as to mental health care, that apply and that it cannot get out of that duty of care by simply employing a third party to provide those services. Secondly, any health care professional that works in those environments has a duty of care to provide adequate services, so they cannot simply say it is somebody else's responsibility.

Thirdly, in all other situations in Australia where prison systems are run by the states and territories, there are independent bodies which oversee health care and particularly mental health

care. Needless to say, this is an extremely difficult environment. It is difficult for anyone in a prison anywhere in terms of mental health needs and the commonly accepted standard is then of independent provision of services and independent audit by members of professions and members of the community about the adequacy of those services. The potential to do harm through incarceration or abuse within an institutional environment is large and so we have a national standard, which is really an international standard, of duty of care by the person who principally has the person in detention. We have a duty of care by the health care providers and independent review by independent authorities of the adequacy of the ongoing provision of those services.

**CHAIR**—And you do not believe that they are being met in the current detention situation?

**Prof. Hickie**—In the situation that has been the work environment for the last decade we cannot see evidence of any of those key factors—of DIMIA retaining the principal duty of care for the health and welfare, instead attempting to pass it to a third party; of the health care professionals being employed seeing through their own individual duty of care; or of independent scrutiny by members of the appropriate professions and members of the community to prevent abuse of those circumstances and guarantee that the health care standards are those that would be accepted elsewhere in the community.

**CHAIR**—The New South Wales government have provided us with a very good submission—I am not sure whether you have had a chance to look at it. They talk about the increased cost-shifting and the responsibility for providing the services and assistance to migrants and refugees that is being pushed onto state governments and community groups. Is that something that you can comment on? Do you agree with that? Do you think there is a need for greater federal funding or at long last perhaps a state, territory and Commonwealth agreement about this issue?

**Prof. Hickie**—I think we have seen evidence in Queensland, New South Wales and South Australia of real tension between the DIMIA run systems and the state systems and people being volleyed backwards and forwards between the different systems. Because the mental health system is generally underfunded in Australia as well, there is a great deal of reluctance for anyone to take on the ongoing duty of care and continuity of care. State systems are very quickly providing crisis assessment or, where forced to under various legal provisions, providing assessment or treatment but quickly wanting to transfer the person back to the federal jurisdiction.

On the federal side, it appears to us that the standards of mental health care have not been applied in an appropriate way so there is a lack of confidence in adequate health care within those federally funded systems. So from our point of view, either the federal government has to fund the adequate service itself and set up the appropriate mechanisms or enter into appropriate and well-funded agreements with the states. At the moment we have no confidence that either will provide what would be a nationally agreed standard of care.

**Senator NETTLE**—Thank you for your submission. I want to ask you about the capacity for people within detention centres to provide quality mental health care services. Perhaps I will read to you a statement that we have received on several occasions back from the Department of

Immigration when we have asked them about how mental health needs are provided in that environment. The statement says:

> The Department's practice is to follow the advice of the treating health professionals in regard to the treatment and location of a detainee, except where this is precluded by law eg if the advice is contrary to the provisions of the *Migration Act*.

So the response from the department is that they will follow the advice of the treating health professionals unless it is in contradiction of the Migration Act. What challenges can you see that presenting for mental health professionals operating in that environment? Secondly, another conversation that we have had with department officials is about getting a second opinion, getting an independent medical professional in. We have had some discussion already with a range of health professionals who have sought access to detention centres to get that advice. In the past DIMIA has commented to us on those issues, saying that they seek the primary medical advice from the treating ongoing health workers but that people are entitled to get independent advice and that most regularly—and this is the advice we have had as well—that occurs in a legal setting where a lawyer brings in a medical professional to provide a different opinion for a bridging visa seeker or whatever the court case may be. The medical professionals that we have had before the committee have said that they did not get access to the medical records of the detainees. When they went in as an independent health professional they were not able to get access to those medical records provided by DIMIA. And that is what DIMIA said to us as well when we asked them those questions. Can you comment on the challenges of providing the care where the Migration Act takes primacy in that environment? Also, could you comment on the issue of getting second opinions or independent assessments and the dealings that you as a council or your members have had and your capacity to provide that second opinion in the way that it is currently processed through the department?

**Prof. Hickie**—On the first issue, we try to emphasise that the primary duty of care lies with DIMIA to provide an environment that promotes good mental health and protects against the onset of mental illness. It is not simply an issue of seeking advice from a health professional and taking that advice. We would argue that the primary duty of care is to provide an environment which protects health and recognises signs of illness and seeks to treat that. When a health professional then becomes involved in providing advice, it depends how they are asked to provide that advice—that is, within what environment and what they are commenting on. That may include access to records in the first place, along with adequate assessment and adequate discussion with other staff about behaviour that has been noted.

The issue of a health professional conducting an adequate assessment in those situations is a very important issue in the first place. Clearly, if a health professional then makes a recommendation about a particular person, that is important. The council say in their submission that, if the person is found to have a mental illness, we think they should immediately be treated in an environment that gives them a maximum change of recovery and that that is just not possible within the current set of environments. You need an appropriate health care facility to maximise the chance of recovery.

Across the range there really has been inadequate attention given to the issues of protecting mental health and providing the appropriate services, even when they are recommended. With regard to determinations about what might be the other provisions of the Migration Act, the

health professionals are often not involved in those sets of decisions. They are trying to make an individual assessment and they are often influenced by what they are told are the possibilities of the person moving, which are not just up to the individual health professional. There are examples in South Australia of debate between DIMIA and the local state services about availability of services. A health professional can say, 'I think this person should be in a hospital,' but that does not necessarily result in a person moving to a hospital or another environment. That is not decided by the individual health professional; it is decided by the system.

When those things happen, they tend to have an effect on the future advice that those health professionals give on an ongoing basis. We think that those health professionals themselves should be independent and we would argue that they have a duty of care to see that services are provided. There is a danger with consultant health professionals that they simply make recommendations but do not take responsibility, or do not see themselves as having a responsibility, for seeing those actions put into place. We think that is a failing in many of these consultant-like systems and is contrary to the primary duty of care that health professionals would accept in other environments. Their business is not simply to give advice but also to see that, as best as is possible, that advice is put into action. That does not seem to have been a characteristic of the health services, including some of the mental health services, in the current system.

On the second issue, it is standard practice in mental health to seek independent opinions. We are less able to rely on X-rays and blood tests and other independent markers of illness or nonillness and the current state of illness, so the use of second and third opinions about somebody's psychiatric status is a standard practice in mental health in trying to reach an understanding. In complex situations—and the refugee situation is often complex—issues of culture, language and understanding of behaviour are often even more complex. Making culturally appropriate assessments, using second opinions and making sure that you have understood what the behaviour may be about would be standard practice in other areas.

We would see the use of independent medical assessment and independent health assessment, outside of the legal environment, as being good practice in those areas. That should frequently be the case and not just be the exceptional case in legal circumstances. If you were running a system of good practice, you would frequently use more than one health care provider. You would look for people with cultural and linguistic expertise and, where there were issues that were poorly understood or contentious, you would frequently use independent experts who had expertise in the particular areas that were relevant to try to arrive at the best possible opinion. I think that in good mental health practice that is a standard characteristic. Again, we have seen little evidence of that reported to us by members of the council.

Obviously there needs to be access to the full range of information that is available. You raised an issue about access to medical records and other information that is available. Access to other staff to interview and to other people who have observed the person's behaviour—perhaps even access to other detainees who can report on a person's behaviour—is important because the observation of behaviour over time is the most accurate way of arriving at a psychiatric diagnosis.

**Senator NETTLE**—When I have asked questions of DIMIA in this committee previously, the answers have been along the lines of, 'Yes, people have the right to a second opinion,' and that normally in the community the second health professional will speak with the first health professional and be able to get that information and access to documents. The difficulty is that the health professionals who have appeared before the committee have said that they did not have access to those detainees' records. Perhaps you answered my question when you said that, if the people with responsibility for the first health professionals were also allowing for a second health professional to access those records, that would remove the problem of second opinion people coming in. The examples that DIMIA have given us of second opinion people coming in are only through court cases. I do not know of other examples where the responsibility of the department has been to get second opinions. Perhaps you know of circumstance where those opinions have been sought. I have asked questions of DIMIA and will continue to ask those questions to find out whether they can provide us with any example in which they have sought a second opinion for a detainee in a detention centre.

**Prof. Hickie**—In reality, in most of the examples we have been presented with, people have struggled to get a reasonable first assessment—the recording of adequate information and access to records and to professionals who have spent time with people to observe their behaviour et cetera—let alone adequate second opinions for medical purposes, which should be the primary goal. It should not require a legal review. Psychiatric assessments in legal settings are often extremely difficult. There is another level of complication when there are legal issues at stake. If you were running a good practice or best practice system from a health care perspective, you would be doing everything you could to have the maximum of information available to those health care providers who are making assessments, since that is really what you are adding up when you are working as a mental health professional. You are looking at the observations that others have made in addition to the observations you make yourself.

**Mr Rosenberg**—And, of course, in a legal setting, if people fear for the outcome, they may be less likely to be forthcoming about their condition, their circumstances, how they are feeling and so on.

**Senator NETTLE**—My next question relates to something you have mentioned already, which is those people who are now living in the community and were previously in detention and the difficulties there. We have heard some evidence already about people, particularly on temporary protection visas, who are waiting for a final determination on whether they can have permanent residency. Do you have any experience that you would care to share with us of providing services to those people in the community?

**Prof. Hickie**—Yes, we have had evidence from a range of health care providers in Australia who continue to provide services for those people who have levels of anxiety and distress throughout the whole temporary protection visa environment that are higher than in the Australian community generally. They are in a situation of unresolved difficulty, and that has adverse effects on their mental health. So those people appear to be using services at a higher rate and appear to be expressing distress at a higher rate. I think that a common belief in the legal system is that often, when the legal situation is sorted out, the mental health problem will go away—it is only of the context of the current difficulty. We have evidence from, in a sense, the whole workers compensation environment, traumatic injury environments and other environments that the mental health problems which commence in these legal environments do

not go away once the legal impediment has gone away. Often one sets in train processes which continue.

There is a misbelief in the legal system that, if the person wins the case or is allowed to stay, the mental health problem will go away. All the psychiatric research evidence suggests the opposite: once the problem has started it is highly likely to continue, even if the case is resolved in favour of the person. You set up a situation with people at risk; you expose them to a risk factor; they develop an illness; the illness develops a life of its own. Quite contrary to much legal and community belief, the problem then continues, requires health care and has an impact on that person's capacity to work and be productive in the community long after the legal situation is resolved.

**Mr Rosenberg**—You have a situation where access to mental health services for the general community is becoming increasingly difficult and problematic. For this particular, more marginalised group of people in crisis or with significant problems it is all the more acute and in proportion to their need, if you like. It is a difficult problem.

**Senator NETTLE**—We have heard that comment in relation to the difficulty of juggling state mental health services—people who have the most severe cases of mental illness having to take priority—and the consequences of that. A number of people have given evidence about psychiatrists providing pro bono services to detainees. Do you have any comment on the impact of mental health professionals providing those services pro bono? We frequently see that, because there are not enough mental health services, mental health professionals in the community are put in the difficult situation of having to decide whether they give a bed to a detainee or give it to someone else and then provide pro bono services to the detainee. That is some of the evidence we have had. Are you aware of a similar experience?

**Prof. Hickie**—There are a very small number of people who have particular expertise in this area, and many of those have given generously of their own time. There is real pressure on all aspects of the mental health system in Australia—the primary care aspects and the specialist aspects. Many of our colleagues are providing these services because otherwise no service would be provided. Because of the economic situation of many of these people, they are doing it on a pro bono basis. It is a very fragile system. It is a totally inadequate ongoing system of care that relies on a small number of individuals continuing that care—otherwise, there would largely be no care. I think it is important to say that this is often at a critical stage of people's lives. They are often young people. In some cases in the past it has been children in families in certain kinds of environments where the ongoing effects of no care are likely to be extremely significant and in no sense transitory.

**Senator NETTLE**—And there is no accountability for pro bono care.

**Prof. Hickie**—You have raised a very important point. When people are doing this as a pro bono service, in terms of having adequate standards, adequate review and ensuring continuity of care, it is a high-risk system. It is certainly a high-risk system for discontinuity and very episodic care, and also it is not easily reviewed in terms of its adequacy.

**Senator PARRY**—Is the shortage of professionals in your field in the state system, in private practice or across the board?

**Prof. Hickie**—It is across the board. There are a series of Commonwealth health reports and other reports about the inadequate number of mental health professionals, across the board, in Australia. With increasing recognition of mental health problems in the community and increasing problems amongst young people in particular, we are short on health care professionals, psychiatrists and nurses. A lot of work is done by general practitioners in Australia, and their capacity to participate is also limited by work force pressures. We have inadequate access to psychology services under both federal and state funding systems in Australia. We are a poorly resourced nation for health care providers in this area for the regular population. If you come into that situation and you are disadvantaged by economics, language or culture—by complex difficulties—and you do not necessarily have a disorder that demands immediate public attention because it causes a public nuisance or threat in some way, then your chances of receiving no care are high. For example, in Australia only 38 per cent of people with mental health problems receive a service in a twelve-month period. That compares with about 80 per cent of people with other physical health problems. So the coverage is about half what it is for common physical health problems, when you start as a regular member of the community. We have a particular set of difficulties on top of a wider national problem which the Senate is addressing through another inquiry.

**Senator PARRY**—Yes. We will not go there. At recommendation 1 on page 5 of your submission, you say:

If a person is found to be mentally ill, he or she must be removed from detention to an appropriate place of treatment.

What do you regard as an appropriate place of treatment?

**Prof. Hickie**—A place that has in place principles of health care delivery. That may be a hospital or it may be a community based system where there is an accountable system of health care which is committed to maintaining nationally agreed standards and promoting recovery, as my colleague Mr Rosenberg has discussed. So it can be hospital or community based, but it is a health care system.

**Senator PARRY**—Would you regard the primary source of that appropriate place of treatment being a state facility?

**Prof. Hickie**—It can be a state facility. In most situations in Australia, the hospital side of the mental health system is run by the states. Although there are other facilities, at times the Commonwealth—for example, through Veterans' Affairs—uses private hospital systems which are, in fact, not run by the state but by contract, and there are community and primary care based systems. If the federal government decided to look at the range of situations it could enter into purchaser arrangements with, there is a range of facilities available in private, state government and primary care or community environments.

**Mr Rosenberg**—Speaking about the work force and also about the location of treatment, it is worth mentioning that the physical location of detention settings is obviously a considerable disincentive to health professionals attending. When you have an aggregation of health professionals in major metropolitan areas, such as there is with the shortages, it is very difficult to attract people to provide care in the locales.

**Senator KIRK**—Thank you very much, gentlemen, for your submission. We have been advised in the last few days that the minister intends to upgrade Baxter detention facility, I think along the lines of putting in a new sportsground and entrance and making changes to the visitors centre and accommodation compounds. She claims that this will make the place more positive for detainees, with the implication being that perhaps there will be less mental illness in the detention centre and that, if people are feeling more positive about their environment, it might prevent acts of self-harm and the like that we unfortunately have seen in the past few years. I wonder if you might comment on the observation made by the minister in relation to that issue.

**Prof. Hickie**—The council's view is that any physical environment of detention should be set up in such a way that it minimises other harm, but on its own the upgrade is likely to be grossly inadequate. The issues that are at stake here from a psychological point of view are the length of detention, the situation we have discussed and the risks that people come in with. Simple attention to some of these very simplistic aspects of the physical environment is unlikely to have a major effect on issues related to self-harm.

**Senator KIRK**—I think that is probably right. As you say, it is not so much the physical environment but rather the circumstances in which people find themselves.

**Mr Rosenberg**—And the circumstances of their arrival and what has happened to them, of course.

**Prof. Hickie**—As expressed in our submission, we feel that the much more fundamental aspect is a system of health care. That system of health care must meet nationally agreed standards of independence and of quality and it must integrate with the ongoing health care environment. Simple changes to the physical environment do not seem to us to address those issues.

**Mr Rosenberg**—I think the point—and it is also taken up in Palmer's report—is not only that there are standards and that they are applied but also that they are transparent. It must be possible for these standards to be independently assessed regularly.

**Senator KIRK**—That was the second question that I wanted to go to. You mentioned the standards that are applicable in relation to the prison system and that you see potential for the same sorts of standards to be incorporated into detention. We have heard from a number of witnesses about the difficulties that they have not only with the physical location of the detention centres, as you have mentioned, but also in getting into the detention centres. It is not simply a matter of a person making a request that they see somebody from the outside; we understand that it is only when lawyers involve psychiatrists and other mental health professionals that they are even able to visit the facility. As I understand it, that is quite different to what happens in the prison system. I wonder if you could elaborate a bit more for us about what happens in the prison system and how you might see the same sort of model being adopted in immigration detention centres.

**Prof. Hickie**—All of our health care systems in our state run prisons are under these systems basically of health care standards, standards of accountability and, particularly in the prison environment, independent review of those situations. So they are frequently having independent community and professional visitors into the environment, including the review of cases and

including people who are in those environments being able to directly petition those community visitors or professional groups to look at aspects of the environment, medication use, the use of seclusion or their individual case—aspects of the environment or aspects of their individual case. This is a common way of protecting against abuse in those environments or a decline in standards over time in those environments.

It is well established in our state prison systems that these health care standards apply, particularly in relation to mental health, where it may be particularly likely that there are systems of abuse or where claims may be made that need to be tested professionally or by independent systems. I think what we have seen happen here is that a federal system has grown up in isolation from centuries of practice within the state systems of how you run such systems and try to maintain a reasonable level of accountability and community surveillance of practices within those health care environments. Most states work to having a health care environment within their custodial environment.

**Senator KIRK**—I understand that the independent body that you refer to is selected by the various colleges and the AMA. Is that correct? Is the independent body a standing panel or committee?

**Mr Rosenberg**—My understanding is that the responsibility to form that panel has fallen to the Commonwealth ombudsman. The council has been involved very initially in discussions about forming that kind of panel and what would need to be done and so on. It certainly will have that kind of multidisciplinary nature to try to provide that independent assessment.

**Senator KIRK**—At the state level how does it work? You are referring to the Commonwealth level, aren't you?

**Mr Rosenberg**—Yes, I was.

**Prof. Hickie**—At state level most states have an independent authority where they recruit members of the health professions. They typically recruit members of the legal profession and community representatives. They take into account that these are difficult environments for the potential breach of human rights. That is important, and the issue of community standards is important as well. Typically, the bodies at a state level have representation from all three groups—health professionals, particularly psychiatrists, psychologists and nurses as to the clinical state; the legal profession as to the rights issues that are potentially involved; and then members of the community, who act as a reasonable person test for what both the lawyers and the doctors are saying about adequate provision of care.

**Mr Rosenberg**—That is through things like the official visitor schemes and so on.

**Prof. Hickie**—The Mental Health Review Tribunal and other schemes run to oversee these programs. They too struggle with many of the issues of adequate service care, but they are independent bodies to those that run the custodial environment.

**Senator KIRK**—That is the critical issue, isn't it—the independence, essentially?

**Prof. Hickie**—Yes, and they bring in the national standards for service care in specialist environments. They have an independent set of standards that are agreed nationally by all health ministers which they are working to. They are attempting to see the application of those standards in these difficult environments.

**Senator KIRK**—There have been some concerns, I think, in relation to the IDAG. If there is not true independence from the minister or the department then you wonder about the actual effectiveness of that body. But it seems to me from what you are suggesting that this independent body would be actually chosen from within the professions themselves rather than by the minister. Is that correct?

**Prof. Hickie**—What happens with most of the tribunals that work at a state level is that they are administered by state governments. After advertisement and discussion, people apply and their credentials are looked at, then they are selected to work within those particular environments. Psychiatrists within that environment would be required to be members of the Royal Australian and New Zealand College of Psychiatrists and have appropriate accreditation et cetera. They are then selected for their individual expertise. I must say that, in the detention environment, this is important. There are people who have particular expertise in some cultural assessments or some of the issues that particularly apply in this area that may not be shared by the profession as a whole. So you are looking for people with real expertise in the area to work and give advice in these particular settings. Most states have well worked-out processes for the adequate selection of appropriately qualified persons who will bring the most current available evidence and expertise to the area and apply that to their health professionals, lawyers and community representatives.

**Senator KIRK**—That could be readily adopted at the Commonwealth level, from what you are saying?

**Prof. Hickie**—Yes.

**Mr Rosenberg**—Recommendation 6.11 of Palmer really pertains. It describes the ombudsman's intention or obligation now to put in place the multidisciplinary panel that we are talking about.

**Senator KIRK**—You said that you had had some discussions with the ombudsman?

**Mr Rosenberg**—Very initially, yes.

**CHAIR**—Thank you both for your submission and for taking the time to come and appear before the committee this morning. We greatly appreciate it.

**Proceedings suspended from 10.38 am to 10.57 am**

**CRANITCH, Ms Maya, Board Member, Asylum Seekers Centre**

**DOMICELJ, Ms Tamara, Coordinator, Asylum Seekers Centre**

**CHAIR**—Welcome. You have sent us a submission and we have numbered it 201 for our records. Before I ask you to make an opening statement, do you want to make any amendments or changes to your submission?

**Ms Cranitch**—No, thank you.

**CHAIR**—If you would like to start with an opening statement, we will then go to questions.

**Ms Domicelj**—I would like to thank the committee for the opportunity to participate in this inquiry. As set out in our written submission, we are an independent non-government organisation working to provide a welcoming environment and front-line support to community based asylum seekers residing in New South Wales. To that end, we offer case management involving social work support and assistance in securing emergency accommodation, emergency financial assistance and legal advice; and a health care program which includes on site primary health care, subsidised pharmaceuticals, referrals to a pro bono network of dental, trauma counselling and other specialist practitioners, and advocacy in trying to secure fee waivers on emergency procedures in hospitals. We also have an educational and recreational program, and we provide nutritious meals to asylum seekers four days a week.

Over our 12 years of operation, we have assisted close to 3,000 adult and child asylum seekers. We have a current case load of around 180 individuals, over 90 per cent of whom are Medicare, work and Centrelink ineligible because of the bridging visa which they hold. Amongst our client group, that is predominantly a bridging visa E. While some of our clients are periodically eligible for the DIMIA funded Asylum Seeker Assistance Scheme, our clients are in the main destitute and utterly dependent on charity and community supporters for their basic housing, health and nutritional needs. Many have spent periods of time in immigration detention, often for several years, and some have been awaiting a final determination on their claims for many years—up to a decade in a couple of cases.

Our paramount concern is the devastating impact of the widespread and often very protracted denial of the right to work and corresponding Medicare ineligibility which, along with ineligibility for government funded welfare and a ban on voluntary work and formal adult study, are the standard features of the bridging visa E. In our experience, the typical consequences of these conditions are acute poverty, homelessness, poor nutrition, deteriorating health, relationship breakdown, corroded self-esteem, skills attrition, severe depression and often suicidal ideation.

Unsurprisingly, the BVE—which, as you would know, is primarily targeted towards asylum seekers who lodge their application for protection over 45 days post arrival and/or seek judicial review of a decision or the exercise of ministerial discretion—has assumed a punitive dimension in the minds of most of our clients and their supporters. We would contend that there are many legitimate reasons why asylum seekers may lodge their claims for protection over 45 days post

arrival and, as such, we would reject the implicit supposition that late lodgment automatically renders the validity of a claim less credible.

We also maintain that the act of seeking exercise of ministerial discretion to grant protection on humanitarian grounds under section 417 of the Migration Act is legitimate. Given that under the current determination procedures the minister provides the only opportunity for asylum seekers to have the validity of any non-refugee convention based protection claims—including statelessness, notably—assessed, it does not seem remarkable to us that many of our clients have endured a lengthy and arduous appeals process in anticipation of having a fuller consideration of their claims at that stage of the process.

In our experience, many who are ultimately determined not to require Australia's protection at the ministerial level or earlier are so debilitated by the harsh circumstances they have endured during the extensive appeals process that they are extremely ill-equipped financially, physically and psychologically to cope with the challenges and practicalities of departure. This situation could be avoided were an earlier administrative assessment of non-convention based claims available.

We therefore strongly recommend that full work rights and Medicare eligibility be granted to all asylum seekers irrespective of the date of lodgment of their application for a protection visa, including those seeking exercise of ministerial discretion on humanitarian grounds. We also recommend that mechanisms be introduced for earlier administrative assessment of humanitarian protection claims falling outside the scope of the refugee convention.

We hold other concerns relating to inconsistent and intimidatory compliance practices, to the release of detainees without adequate supports, and the issue of the level of duty of care held by DIMIA in that regard, and to conditions attached to the removal pending bridging visa. We have outlined these other concerns in our written submission. We also acknowledge that in recent times considerable steps have been taken towards redress of longstanding problems, and I guess I would note there the residence determination matters and also the stipulation of three-month time frames for DIMIA and RRT decisions.

The vision of the Asylum Seekers Centre is that all on-shore asylum seekers be afforded a dignified, meaningful and safe existence in Australia pending the fair, transparent and expeditious resolution of their claims for protection. The observations and recommendations contained in our submission are underpinned by that aspiration and grounded in the myriad challenges we have faced in seeking to meet the critical psychosocial and primary health needs of a highly marginalised population. Given the scope of our mandate, our input is confined to issues encompassed within term of reference A of this inquiry. Thank you.

**CHAIR**—Ms Cranitch, do you want to say something?

**Ms Cranitch**—Not at this point.

**CHAIR**—Ms Domicelj, the objective of your centre seems pretty basic. You might well have heard me ask this question of the previous witness: how can it be that we get to a situation where we have numerous reports—the Palmer report is the latest one and the Australian National Audit Office was another one this year—and it just seems to take so long and we get people to such a

poor state of mental and physical health in the meantime? Is it because of the culture in DIMIA? Is it because we have a minister who is perceived to have a hands-off attitude towards the portfolio? Is it the complexity of the act? Is it all three?

**Ms Domicelj**—I could refer to several factors that we would have observed, culminating in the lengthy time frames for assessment. On one front, I would say that the matter of people having to step through a very lengthy appeals process prior to having any claims assessed that are not refugee convention based is critical in that regard, because, were there opportunities for those claims to be assessed at an earlier administrative period, they would not need to trawl through the various prior stages before being able to approach the minister.

**CHAIR**—So the process is taking too long, essentially?

**Ms Domicelj**—In many cases. We have several clients at the moment who have lodged a section 417 and been waiting for over two years—in some cases, close to three years—without word. During that time, they are living in complete limbo. They have absolutely no way of knowing whether their claims are even going to be considered.

**CHAIR**—Do you know where in the process those claims are at? Are they with the ministerial intervention unit or sitting in a box in Minister Vanstone's office somewhere?

**Ms Domicelj**—I do not think that I could generalise about that. In various cases, we have been given the opportunity through the ministerial intervention unit to request that particular cases be expedited on the basis of mental health concerns that we hold about the person in question. That has generally foreshortened the time frame.

**CHAIR**—Do you get a response when you request that?

**Ms Domicelj**—Yes. The time frames are not necessarily commensurate with what is appropriate for their mental health circumstances but, yes, it has been taken on board. When we have expressed real concerns about suicidal ideation in somebody who has been waiting a considerable period of time, their matters have been fast-tracked. I suppose all of that suggests that a lot of the hold-up is in the MIU, but I am afraid I am not in a position to say.

I suppose there would be issues to do with the level of training and competence of case officers. I do not think that we are particularly equipped to comment on that. We do not provide legal advice. We are not migration agents. We refer people to lawyers and migration agents and then assist them with their other welfare issues while they are awaiting an outcome. Certainly, I think there is scope for additional training. I think there is scope for greater transparency. Over time we have experienced a range of different attitudes from the various ministers who have been in a position to exercise discretion under section 417.

**CHAIR**—Is ministerial intervention used more as a safety net for refugees rather than in exceptional circumstances? Do you think there should be some sort of legal appeal on ministerial decisions?

**Ms Domicelj**—To answer the second question: yes. I think having non-compellable, non-reviewable, non-accountable ministerial discretion is a serious flaw in the system in terms of

natural justice. The impact on many who are rejected after several years without reasons for the decision can be devastating. To answer the first question: given that we do not provide legal assistance to our clients, I am loath to generalise. I would say that, certainly, amongst many of our clients who have sought exercise of ministerial discretion, it would relate to matters that fall outside the scope of the refugee convention.

It is a final option for people who are not content that they have had a satisfactory outcome through the tribunal and courts, but at this stage it also offers the only opportunity for people to have non-convention based claims for protection assessed. We certainly have clients at the moment who are stateless and who are potentially eligible for a removal pending bridging visa, but there have been various delays in that process and it is not an outcome that is going to provide them with any permanent resolution of their situation. Exercise of ministerial discretion is simply the only recourse they have. I would venture to say that the majority of our clients who are appealing to the minister are doing so because they have genuine humanitarian claims that may not be accommodated within the refugee convention.

**CHAIR**—You say that you provide meals to people at the centre four times a week. How many people are you talking about at each time?

**Ms Domicelj**—Sittings vary a lot. I would say that on our clinic day, which is Monday, we would have five times the number of people coming in for lunches as on the other days. Up to about 20 and sometimes as few as five would eat on any normal day.

**Ms Cranitch**—I would like to point out that this happens in a very small terrace house and it is all staffed by volunteers. There are volunteers who come and bring the meals.

**CHAIR**—That was my next question: how are you funded to do that?

**Ms Cranitch**—With great difficulty. We have to look at every dollar 16 times before we spend it and we basically live from month to month. We have a very small amount of donations that are consistent but the rest of it we have to raise.

**Ms Domicelj**—We receive no state or federal government funding.

**Ms Cranitch**—We have something like 80 volunteers on our books who do something for the centre.

**CHAIR**—So how do you exist? Are you salaried? What about operational costs, like electricity? Are they just paid for by fundraising?

**Ms Domicelj**—We approach philanthropic foundations as well, so we have a couple of short-term grants which are project specific. We had a family support project which was funded through a foundation recently. We are bringing on a volunteers coordinator and that is through philanthropic foundation funding.

**Ms Cranitch**—It is very much hand to mouth. We have religious organisations who provide the building and a basic core of funding which only just covers the cost of salaries—and not all

the salaries. We are paying our staff just about the going rate. It is quite a difficult operation to keep the centre open. It requires a lot of effort.

**CHAIR**—I have one last question on the interaction between GSL and DIMIA when it comes to the management of the detention centres. Have you had any experience of buck-passing where there is no clear delineation between where the contract starts and DIMIA's responsibility continues?

**Ms Domicelj**—I am afraid I would consider that to be outside our area of expertise because we do not do work within detention centres. Obviously there have been occasions when our clients have been taken in to Villawood and in those cases we have liaised directly with a DIMIA case officer, rather than with any GSL official.

**CHAIR**—Do you see any shortcomings or flaws in the federal government's funding assistance for refugees post detention?

**Ms Domicelj**—Absolutely. Could I clarify that by refugees you mean asylum seekers post detention?

**CHAIR**—Or asylum seekers in general.

**Ms Domicelj**—I do, absolutely. We currently see a lot of asylum seekers who have been released from detention on a bridging visa E, often on the basis of their acute mental health concerns and often on a bond. They are released into a situation where they are utterly ill equipped to be self-reliant, partly because of the extent of their trauma and partly also because—

**CHAIR**—Compounded by the fact that they were in detention, I suppose.

**Ms Domicelj**—Yes, completely. But also because they are not able to work, are not necessarily eligible for the Asylum Seeker Assistance Scheme and are not eligible for any form of welfare support. They fall into that category that we would describe as destitute—they have absolutely no way to survive in the community. I would draw a real distinction between that and the residence determination conditions that are being set up currently under the community detention model, where, in effect, detainees relocated to a community setting retain the same duty of care that DIMIA held within the IDC setting. All their basic subsistence needs are being met and they are allocated a case worker.

Given that we are not directly involved in providing those services—we are seeing a couple of them now for the social and educational aspects of the work that we do—I am not really in a position to comment on the details and how effective a model it is proving to be. But certainly the standards of care provided to that population are completely disparate to those provided to people who are actually released from detention and provided with no support whatsoever. I think that is a real question in terms of where DIMIA's duty of care stops and starts. My understanding is that people are only able to be released once the minister has approved a care plan, but the strength of the care plan is not the concern of the department. If that falls apart within 30 seconds of somebody being released, there is no recourse.

An issue which we have been raising consistently without any outcome over some time is that people are often released without a single contact number, without money to make a phone call, often on a Friday afternoon and sometimes in the rain. We had a man who came to our centre after he had been sleeping out for over two weeks at Central Station, without a word of English, after having spent over two years in detention. He made his way to us eventually. He actually managed to find himself a migration agent who made the referral. What we have been asking for some time is that people upon release at least be provided with a list of names and numbers of charitable organisations that they can approach for help. I am at a loss to understand why, in the six months of asking, that has not been possible. It has been raised with me that it is not necessarily DIMIA's role to suggest that people approach particular agencies. My point has been that it is information that is on the public record. It is a shorthand version of the *White Pages* directory.

So, yes, certainly we have grave concerns in that area and also obviously in relation to the mental health issues. You would have been hearing a huge amount in relation to mental health. As set out in our submission, a lot of our clients have extremely complex and critical mental health needs which are, certainly in terms of how they report to us, largely attributable to their very debilitating circumstances out in the community. For people who, for over eight years, have not been in a position to care for themselves or their families, the fallout is absolutely tremendous. Certainly what we hear from the clinicians we refer them to is that it is extremely challenging to treat mental health symptoms when salient contributing factors have absolutely no prospect of abatement.

**Ms Cranitch**—To add to that, one of the other aspects of the mental health and the general health issue is pharmaceuticals, which are expensive and not available on a subsidised basis. One of the issues that we as a board are sometimes presented with is: where do we apportion this very small amount of money? Do we give it to the diabetic, do we give it to the epileptic or do we give it to the person with severe depression? Not that we are making that final decision on individual cases. How do we work out how we give that pharmaceutical? Pharmaceutical benefits become very significant in treatment—if we can get the treatment in the first place.

**CHAIR**—With the care plan that you mentioned, is there any requirement for DIMIA to have a care plan for detainees on release?

**Ms Domicelj**—I understand that to be the case, but I do not see them routinely.

**CHAIR**—Does a detainee walk out through the gates with this care plan in their hand or is it in a file in Canberra somewhere?

**Ms Domicelj**—That is a whole area that I really feel I cannot comment on because I am not on the cutting edge for that. I know that it is a matter that has been raised in the context of the care plans that are being developed for residence determination. In the case of residence determination, I understand that care plans are held by DIMIA by the—

**CHAIR**—Case officers?

**Ms Domicelj**—Yes, by DIMIA case officers, but also by the agencies which have been subcontracted to provide the case management services.

**CHAIR**—How often would the people that you come in contact with have contact with their case manager, who may then monitor the care plan?

**Ms Domicelj**—Never. We have not had that experience.

**Senator PARRY**—I have just one question. I want to test the veracity of your claim, to support your claim. How do you determine who is destitute, who needs financial or, in this case, charitable assistance? Is there any possibility of anyone rorting your generosity? That is probably the best way I can phrase it. How do you test?

**Ms Domicelj**—We do not apply any assets or means tests for providing the kind of support that we provide. But then we do not actually provide emergency financial assistance. That is not part of our brief. We refer people to other providers. So we will make assessments on the basis of the stage of a person's claim—for instance, whether they might be eligible for the Asylum Seeker Assistance Scheme, in which case we would refer them to the Red Cross. There is another network, called the Bridge for Asylum Seekers Foundation, that raises money specifically to provide bridging visa E holders with a basic living allowance.

**Senator PARRY**—I am more interested in coming back to what you do. You have provided figures; I think you indicated that you currently have about 80 people on your case load.

**Ms Domicelj**—180.

**Senator PARRY**—Sorry, 180. How do you determine that they are people who you will look after? What evidence is produced?

**Ms Domicelj**—Our criterion for assisting people is that they are a community based asylum seeker. That is our starting point. Our case management is the portal to our other services. We will do an initial assessment and in that we will assess issues to do with their income requirements, physical and psychological health and the rest of it. Then we will refer and support accordingly.

**Senator PARRY**—But for those who need shelter and food, how do you determine that they are in genuine need?

**Ms Domicelj**—I suppose we do not do any rigorous testing, other than going with a face-value claim where those circumstances would seem to bear it out. Certainly, a lot of people approach us who are in a crisis situation in terms of accommodation, and they will often arrive with their backpack and be wet after sleeping out. I do not think that we provide people with sufficient material support to warrant any kind of rorting in that sense. We are often a bit of an end-point referral for other agencies who do not know what to do with somebody. We will often have people come to us when they have exhausted other options.

**Ms Cranitch**—We are the only agency in Sydney that has this array of services, this total picture. There are other places that offer part services but not the total package.

**Senator PARRY**—Are you satisfied that you would not be getting Australian citizens who are homeless utilising your facilities?

**Ms Domicelj**—I will clarify on that front. We absolutely corroborate that they are an asylum seeker. We have copies of the visa that they have been issued, their application, an RRT decision—we hold all of that information on file. So we can be very confident about that.

**Senator KIRK**—Thank you very much for your submission and for the excellent work you do. I notice that at page 6 of your submission you refer to the fact that you have had some complaints about intimidatory tactics being used by DIMIA compliance officers during late-night home visits. You mention two asylum seeker families with whom you work. Having regard for privacy issues, could you give us some more information on that? Are these one-off examples or do you have evidence of this happening on a fairly regular basis?

**Ms Domicelj**—I would not go so far as to say it is regular, but we have recorded on our database other instances of similar home visits. I am not in a position to provide a great deal more detail than was provided in the written submission. What was reported to us was that there were late-evening visits. In both cases, two compliance officers first came to the door—I think in both cases they were women—and they were followed into the premises by four men. In both cases, six people turned up and the style of questioning was reported to us as being extremely intimidating. In both cases, there were small children who were extremely distressed. On both occasions, they stayed there for upwards of 45 minutes. In both cases, the questions related to how that family was surviving in the community. I suppose there was an implicit threat that, if they were in any way breaching their bridging visa, which did not permit them to work, they would be detained. The point I have raised on that front with DIMIA is that all of our clients are in that situation. It is a good question. Where is the logic? How can people survive? On both occasions, the matter was fairly swiftly resolved. In one case there was a DIMIA error. In the other case there was a mix-up about a particular reporting date, which was the fault of the person's lawyer, but it was easily resolved.

**CHAIR**—I suppose that in both cases they sent flowers and chocolates and apologised profusely.

**Ms Domicelj**—No. In neither case were they interested in hearing a great deal about the level of trauma associated with that experience. In both cases we referred the families for trauma counselling. In one instance, one of the children had a complete re-emergence of some quite severe post-traumatic stress symptomatology. It was very much a case of knocks on the door late at night and the children waking up, and that resonated very much with their pre-arrival experiences.

**Senator KIRK**—You mention that these matters were resolved. I am wondering what the process is for that. Obviously, these families report this to you and then you contact DIMIA. Is a formal complaint lodged or is it just a phone call?

**Ms Domicelj**—I probably ought not to have used the word 'resolved'. I meant that the families have decided not to pursue the matter further and there has been no recurrence. I had extensive discussions with senior members of compliance and the New South Wales state onshore protection section. Both families requested that we please not provide their names and details. There has not been a recurrence, but 'resolved' was certainly the wrong word to use.

**Ms Cranitch**—We constantly get requests from the press to, for example, open discussions about this situation. Our clients almost never agree to do this, and we do not like to expose them either. There is a pattern of reluctance and an inability to even use the few systems there are, because of the fear involved.

**Senator KIRK**—Especially when you are relying on a section 417 intervention.

**Ms Cranitch**—Exactly. So we operate very much as a closed book as far as those things go.

**Senator NETTLE**—Thank you for your submission and the work you do. I am sorry that the situation is such that you have do it. You mentioned some concerns about the removal pending bridging visa and I want to ask you to expand on those issues. You mentioned the lack of certainty but I want to hear what your concerns are about that bridging visa.

**Ms Domicelj**—The core issues relate to the lack of a time frame for the visa to evolve into some kind of permanent resolution. The removal pending bridging visa essentially replicates the limbo that people may have been experiencing in their indefinite detention situation on the outside, with Medicare and work entitlements. It is still a limbo. The people that we are working with who have been advised that they are most probably eligible for the visa but are still waiting on an offer three months down the track have told me that they cannot bear the prospect of being in yet another limbo. In one case there is a situation where there is a family offshore that has not be seen for some time and will not be able to be sponsored under an RPBV arrangement, so fundamentally it relates to that. Clearly, in a material sense people will be better off if they are out in the community—as these clients of ours are, on a bridging visa E, having been released on habeas corpus grounds—but ultimately that is not enough. On a mental health front, the people I am thinking of at the moment have reached a level of desperation where I do not know if they could really withstand that level of ongoing uncertainty regarding their future prospects.

**Senator NETTLE**—You mentioned that some people have had indications that they might be offered a removal pending bridging visa. Has that been indicated to them by DIMIA or by their migration agents?

**Ms Domicelj**—By DIMIA, in writing.

**Senator NETTLE**—So DIMIA has written to them to say, 'You may be offered a removal pending bridging visa. Wait and you may receive another letter which is the invitation'?

**Ms Domicelj**—DIMIA has written seeking an expression of interest in having DIMIA consider whether they may be eligible for the visa. In the discussions I have had with DIMIA around that it was made very clear to me that, aside from the fact that they were in the community rather than in detention, they were eligible. It seems that, over and above the few people—I believe it was seven—who were mentioned in the ministerial announcement, there has been a political imperative to process detainees ahead of asylum seekers who are already in the community and who are considered to be likely candidates for the RPBV.

**Senator NETTLE**—So the people who got the letter from DIMIA asking, 'Are you interested in us inviting you to take one?' were people living in the community?

**Ms Domicelj**—Yes, which is the full scope of the people whom we work with. My understanding is that over 50 people within IDCs have been issued RPBVs now and that many more are being considered for them. I am not aware of anybody out in the community having been issued an RPBV, but I could be wrong on that.

**Ms Cranitch**—There is a lot more of a spotlight on people in detention than on the people we work with who are out in the community. Their situation is equally dire.

**Senator NETTLE**—So none of the people whom you work with have been offered a removal pending bridging visa?

**Ms Domicelj**—No. I suppose what the offer is is a bit of a moot point.

**Senator NETTLE**—So nobody has got a second letter? If the first letter said, 'Are you interested in being offered one?' nobody has got a second letter?

**Ms Domicelj**—No. That is right.

**Senator NETTLE**—I am trying to find out how this is working. That is why I asked the department and why I am getting more information from you—which I appreciate—about how it might be working. Another issue that you mentioned was your conversations with DIMIA to seek to expedite people's 417 applications when there are mental health issues involved. Have those conversations been initiated by DIMIA or by you?

**Ms Domicelj**—I would say there has been a mutual understanding.

**Ms Cranitch**—Who rings who?

**Ms Domicelj**—I have rung in the first instance but with the understanding that that is an acceptable practice.

**Senator NETTLE**—I was just checking. Other people who have appeared before the committee have said, 'DIMIA came and asked us if we could help this person get their case through.' I was just seeing if that was the case.

**Ms Domicelj**—We have not had that experience.

**Senator NETTLE**—Going back to the people who you were saying have received that first letter about a removal pending bridging visa, what was the status of those people? I am trying to work out whether there were people who were on a bridging visa E—so they did not have access to Centrelink or Medicare—who were subsequently asked in a letter: 'Do you want a removal pending bridging visa?' which would give them those entitlements. Is that the group of people we are talking about?

**Ms Domicelj**—Yes, it is.

**Senator NETTLE**—You mentioned people being released on bridging visa E and also on a bond. Are you talking about two separate groups of people or are you saying that people on bridging visa E have been required to pay a bond in order to get that bridging visa?

**Ms Domicelj**—Yes, they have. Not all of them. I understand that some have not. Some pay a $10,000 bond for their release.

**Senator NETTLE**—Are you aware of any procedure that DIMIA is following to determine which people get offered a bridging visa E without a $10,000 bond and which people get it with a $10,000 bond?

**Ms Domicelj**—I am not, but I would be interested to know more. Sorry to deviate a little, but one of the issues that has been really gratifying with the residence determination process has been that a number of agencies have been invited to participate in discussions about how that might take effect and the details of it. We have been in a position to make particular recommendations that have been taken up—for instance, the lack of 24-hour surveillance et cetera. One of the issues has also been that we have been calling for consistent standards across Australia on how residence determination operates and the entitlements that people have. I and others have noted in meetings with DIMIA recently that it would be tremendous if those same consistent approaches could be applied to BVE releases. What we tend to hear via word of mouth, through chatting with counterparts in other states, is that there appears to be no consistency whatsoever.

**Senator NETTLE**—In bridging visa E or in residence determinations?

**Ms Domicelj**—In bridging visa E releases. It appears that in some cases DIMIA does provide some kind of financial assistance. In some cases people are reasonably well set up when they are released. In other cases, such as that of the gentleman I mentioned earlier, they are released without money and English into the night.

**Senator NETTLE**—Have you seen a consistency in the way the residence determinations are being offered across the country?

**Ms Domicelj**—I think it is very much a process in development; it is evolving. But, certainly in the discussions about how it would operate, that was very much what was being taken on board by DIMIA—that the consistency of approach was really paramount.

**Senator NETTLE**—Thanks. I appreciate your comments about the difficulties that seeing others being released create for those on bridging visa E. That is the nature of ad hoc decision making.

**Ms Domicelj**—Yes. Certainly a lot of people whom we work with have rued the fact that they were released from detention into conditions that were far harsher than those experienced by people who were still in detention but on the outside.

**Senator NETTLE**—You have outlined in your submission some of the difficulties involved in trying to have people's hospital fees waived retrospectively or in finding pro bono operators. We have had psychiatrists and lawyers appearing before the committee to talk about the pro

bono work that they offer, and clearly that is also occurring in the welfare sector and in the health sector with what you are trying to do. Thank you for sharing those stories with us. If you want to give us any more information about the challenges you face, that would be helpful for us in understanding the current way that the system operates. It requires people like you in order for the humanity to be brought into it. If you want to provide us with any more of that kind of information, feel free.

**Ms Cranitch**—I think any volunteer organisation has all the various difficulties of attracting and keeping the right people. But there are other issues. Just to give you an example, the requirement for workers compensation, for public liability, has suddenly skyrocketed. We are on the same scale as the parole board. So we have suddenly had to find extra money. So there are those sorts of issues but there are also the issues around maintaining a volunteer organisation in an area which is not fashionable. Because the situation is so complicated for asylum seekers, nobody can really understand the regulations. People can understand people in detention. They are locked up but our people have all these different kinds of difficulties, and so somebody off the street generally will always ask us, 'How do you know they're real asylum seekers?' or, 'How do you know they're real refugees?' So there are difficulties about funding.

**Ms Domicelj**—Can I clarify: was that specifically a question in relation to health issues?

**Senator NETTLE**—It was general. I appreciate your submission because it gave us a lot of information about the difficulty in trying to get a hospital to backdate things. I had not worked it through to understand that a bridging visa E meant that asylum seekers were not only denied work rights but also denied the opportunity to volunteer in an organisation such as your own because they would then be subject to breaches of their visas. Thank you for pointing that out because it is a clear difficulty.

**Ms Domicelj**—On the health front, I would say that is a critical area for us. In fact there are no consistent standards either in public health systems or in private health systems for that matter around what occurs when somebody presents without a Medicare card.

**Ms Cranitch**—We have several pregnant ladies.

**Ms Domicelj**—What we end up trying to do is to raise levels of understanding at senior levels within the health system about the harsh realities faced by our clients. Just last week we had somebody who was turned away after a renal ultrasound had been indicated for her three-week-old baby because she did not have a Medicare card and she was unable to pay up front. She was turned away. Obviously, in that instance we go to the CEO of the hospital in question and ask for that situation to be overturned. In the worst-case scenario, what we will try to do is to negotiate a payment plan so that people can pay for a labour room or whatever over a period of time. But we have vastly different experiences in different sections of the health system and often it is about an individual and their personal inclination. If they are not there on the day, then it can fall through.

**Ms Cranitch**—And it is case by case. Every case we get has to be negotiated. It is the same thing with getting children into schools. That is another problem area because you have to approach the school, do the arrangements and so on. There is no pathway that is simple.

**Ms Domicelj**—It is really across the board as well. Sydney is facing a crisis in emergency accommodation as it is but, for our clients who are homeless, the refuges in the main will not accept people who are not permanent residents, so there are blockages almost everywhere they go. They relate to everything: dental health, mental health, primary health, education—the lot.

**CHAIR**—I will just ask one last question before you go. Some of the submissions have highlighted the changing profile of our refugee intake, with more refugees being settled from Africa. They have suggested that, because of the complicated problems that these people present, there needs to be a whole-of-government approach or a better, more holistic approach to their care. Do you have any specific dealings with people in that situation?

**Ms Cranitch**—I do.

**Ms Domicelj**—Within the Asylum Seekers Centre context, we certainly do. We have a number of clients from African countries, and there is obviously a lot of diversity within that group as well. But the majority of our clients are not from African countries. If I were to tell you the top 10 countries of our clients, there would not be an African country amongst them. But we do, and there are certainly particular complexities that we see at the asylum seeker level, which obviously precedes resettlement, and some particularly horrific stories are raised with us.

**CHAIR**—Stories about their treatment here in this country, do you mean?

**Ms Domicelj**—People often arrive with very horrific prearrival stories.

**Ms Cranitch**—I am currently working with refugees from Africa who have humanitarian visas. There is a level of torture, plus the fact that they are emerging communities—that is another issue. There is not the support, because there are no established community bases. Everyone is starting from—

**CHAIR**—Yes, that is true. We were just saying that there seems to be a large congregation sent to Tasmania, and we certainly have quite a big community being established in Darwin.

**Ms Cranitch**—Yes, they are being sent all around the country.

**CHAIR**—That would make it harder for them to have a network of their own.

**Ms Cranitch**—But those people are different from our people because our people do not have humanitarian visas and they do not have the same access. Even with all those accesses there are difficulties, but it is a different population.

**CHAIR**—It is not as difficult. Thank you both for your submission and for making yourselves available today to appear before the committee.

**Ms Cranitch**—Thank you for the opportunity.

[11.48 am]

**McNALLY, Mr Nicholas, Honorary Treasurer, International Commission of Jurists (Australian Section)**

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

**Mr McNally**—I am also a solicitor and a practitioner in immigration litigation, specialising mainly in Refugee Review Tribunal matters but also in the judicial review side of things and in some aspects of ministerial intervention.

**CHAIR**—The commission has sent us a submission, which we have numbered No. 115 for our records. Before I invite you to make an opening statement, do you need to make any amendments or alterations to that submission?

**Mr McNally**—No.

**CHAIR**—If you would like to provide us with an opening statement, after you have finished we will go to questions.

**Mr McNally**—Thank you. The ICJ's submission focused on three discrete areas in the administration and operation of the Migration Act. First, we focused on the operation of the two migration related review tribunals—the MRT and the RRT—in both their structure and procedures. In many respects, the ICJ hold significant concerns about the maintenance of the rule of law and proper checks and balances on administrative action. Second, we also addressed in our submission the specific question of access to judicial review for migration tribunal matters. The third aspect related to the increase in application of the minister's personal discretions to intervene in matters throughout the process. Much of that has been expanded in the submission but I can briefly summarise key areas that we are concerned about.

In relation to the tribunals, as I said before my particular expertise is in the RRT but procedurally and structurally they are very similar. Some of the key problems or difficulties we have in relation to the structure of the tribunals are that, unlike the AAT, for example, or even the courts, the members are appointed by the Minister for Immigration and Multicultural and Indigenous Affairs. In many cases, they are employed on maximum term contracts, which means there is the option of reappointment by the minister for immigration at the end of their term. Given that the tribunals are set up as quasi judicial bodies designed to review decisions of delegates of the minister, a structure whereby that minister has the ability to not reappoint particular members is, in our view, a matter of concern when considering the level of actual independence of the tribunal. That is addressed in more detail in our submission but that is a key area of concern.

The infrastructure, recording equipment, furniture and those sorts of items are all assets of the department of immigration. An applicant, particularly an asylum seeker in a situation where the outcome of the fact-finding exercise is critical, often doubts—and sometimes I have cause to

doubt it myself—the level of independence that tribunal members are able to exercise or feel free to exercise in those cases. When you have particular regard to the fact that merits review to the courts has been removed by the privative clause in section 474, then these tribunals are the last tribunals of fact in these visa applications. There is no scope for appeal on an error of fact, even if that error, through subsequent information, becomes clear—say, the identity of a person or their country of origin. The only recourse a person has then in relation to errors of fact is the ministerial powers under section 417 or 351.

Structurally, in terms of independence, we have great concerns for the tribunals procedurally. There is no right to legal representation. You are allowed to sit in and take notes but you are not allowed to ask witnesses questions. You are able to suggest that a certain question be asked by the member, but it is entirely up to them as to whether they choose to ask it. One gets a distinct sense, in the RRT in particular, that the entire proceedings really take the form of cross-examination of the asylum seeker. In circumstances where that is done in a language other than their own, with no opportunity to re-examine to clear up confusion or errors that may have occurred during cross-examination, the result that ensues from that style of proceedings is one where we have significant concern about actually making correct conclusions of fact. Given that there is no appeal of that, it is particularly problematic. I have some case examples of procedural unfairness which we can perhaps explore during question time.

There are no real rules of admissibility of evidence. If the tribunal regards it as relevant to its inquiry, it is admissible. Certainly it is open to the tribunal to determine what weight to give to certain evidence, but often an applicant who has given their evidence under oath, in person before the tribunal, is confronted with information from unidentified sources which would seem to contradict an aspect of the person's evidence. Yet the witness who provides either information or an opinion is often not identified. Their expertise or their qualifications to express an opinion are not disclosed.

For example, often you will receive a letter from the tribunal under section 42A, a letter whereby they notify the applicant of adverse information. You are left unable to rebut or examine this information in any meaningful way, yet it is used even if it is inconsistent with the evidence of an applicant. It is often used as a basis on which to conclude, as a finding of fact, that its weight outweighs the sworn testimony of the person and that their credibility is doubtful. Therefore their whole claim fails, and that is it. Credibility is a finding of fact in relation to which there is no access to judicial review, so that is particularly problematic. That comes from the whole structure of the tribunal.

The ICJ's position is that the MRT and the RRT ought to be abolished. They do not work as a reliable fact-finding exercise. All of their powers and roles should be transferred to the AAT, which is similar but has an independent structure. Its members are appointed by the Attorney-General, not by the minister for immigration, and it has the right to representation and the power to question witnesses who are put forward against someone. Our position is that that would be an appropriate solution. The AAT has its own access to judicial review on ordinary error of law. The other aspects have been expanded on in the submission. Unless you would like me to address those now, we could move to questions.

**CHAIR**—It is whatever you would like to do, Mr McNally. If you want to keep going that would be fine.

**Mr McNally**—The next aspect of our case is judicial review. At the moment section 474 of the Migration Act says:

(1) A privative clause decision:

(a) is final and conclusive; and

(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

That was an attempt to completely oust the jurisdiction of the courts and to remove any form of judicial oversight of this administrative action. As you know, some exceptions to that have been found by the High Court and an applicant can now appeal to the courts on the basis of jurisdictional error of law, which takes it outside the scope of that section, but that is a very narrow window of opportunity through which a person can seek judicial review of a tribunal decision. When you look at that in conjunction with the aspects of the tribunals that I have already mentioned, you see that window is way too narrow, in our submission, and there really ought to be full merits review to the courts, where the courts effectively hear de novo and make rulings on questions of fact as well as law. It is only with that that the injustices or anomalies that may arise through the procedures in the tribunals can be addressed.

There are some concerns about caseload in the courts and concerns that that would give rise to a massive increase in immigration litigation. But you can still have in place, at least in the courts below the High Court, procedural thresholds whereby issues are fleshed out at an early opportunity and directions are given which are required to be strictly complied with which can separate the chaff from the hay early on so that there is not a whole bunch of unmeritorious appeals heading through to trial. There are some mechanisms that the state courts often use to control caseload.

The third aspect is the ministerial power to intervene. Given what I have said about the tribunals and what we have said about the very narrow window of access to judicial review, in many cases all a visa applicant has left to them is an appeal to the minister personally to exercise her power, usually under section 417, or under section 351 for the MRT. The purpose of those discretions is to have a residual ability to correct injustices or anomalies that may have occurred through the procedures or to allow people to reapply if circumstances change. We have had a lot of cases involving Nepalese people who had been rejected at an earlier level. When the royal coup took place in February, everything changed and a number of people are seeking permission to lodge fresh applications because of those circumstances.

The existence of that power is important. The difficulty is that many of the discretions do not have guidelines available to applicants. There is no requirement to provide reasons in relation to decisions, and they are not enacted or enlivened until after a person has been through the tribunal process. Often you get an asylum seeker who cannot fit within the criteria of the refugee convention—for instance, on the grounds of political opinion, race, religion and those sorts of issues—but who nevertheless would have a genuine humanitarian concern if they were required to return. That is a common example of where the minister's power under section 417 would be activated. But the person who seeks advice at an early stage after lodging the application has to

be told that they cannot access the minister through section 417 until they roll their arm over and go through the process in the RRT and lose. So the third aspect on ministerial interventions, other than clear, transparent guidelines and publication of reasons, is that a party ought to be able to access the minister following a departmental decision, and not necessarily a tribunal decision. That would cut out a lot of waste in the tribunals, in my view, and would allow a quicker determination of a person's application to stay.

One thing we did not address in our submissions is the question of immigration detention. There has been a lot of information floating around about that, including the Palmer report. From a rule of law angle, the key aspect we would like to see in relation to those decisions is the incorporation of a discretion in section 189 of the act. At the moment, if an officer suspects on reasonable grounds that a person is an unlawful noncitizen, the wording of the section is that they 'must' detain them. What that creates in practice, certainly in my experience, is that it tends to happen as soon as the suspicion is there. Once a person is detained, follow-up inquiries and further examination about what led to the suspicion seem to stop until that person can engage the services of an advocate who seeks to remove the suspicion about whether they were lawful. So there is that, but there must be a discretion with appropriate guidelines injected into section 189 so that the field officers can make a judgment, having regard to the circumstances, as to whether detention at that instant is required or whether further inquiries should be made.

The second aspect of this part of it is that the granting of bridging visas to people in detention is applied in a fairly inconsistent way. People you think have a very good chance and very good reasons as to why they should be let out are not; others who you think perhaps would be unlikely to get a bridging visa do get one. Then there is the imposition of $10,000 or $20,000 bonds which most people would have zero ability to pay. We need more consistency and perhaps more transparency in that process, given that we are dealing with people's liberty. That is all I would say at this stage.

**Senator KIRK**—Thank you very much for your submission, Mr McNally. I was interested in the views you had in relation to shifting the jurisdiction of the RRT and MRT to the AAT and appreciate the reasons for you saying what you said. I tend to agree. If the jurisdictions were to remain with the RRT, I wondered whether there could just be changes to the structure and processes of the RRT that would overcome the current difficulties. I guess I am thinking along the lines of a similar structure, process and appointment process to the AAT. I wonder how you see that. In other words, can it be fixed by bandaids, by some structural changes or is it your view that both bodies have to be completely abolished and it is only the AAT that can properly fulfil this function?

**Mr McNally**—No. The point we made in our submission is that it would be preferable that it all go to the AAT. It is already there and it has its own guidelines and everything. But the problems with the MRT and the RRT could be addressed with reform to those tribunals. That would include appointment by the Attorney-General to the positions of membership. The AAT at the moment should have no prospect for reappointment for temporary appointments. There is a need for temporary appointments. Caseloads and the like make it often a necessary practical measure. But there should be no opportunity for that person to feel that their reappointment is somehow going to be affected by the decisions that they make. That would need to occur as well.

The right to representation would need to be introduced. My view is that an adversarial style of tribunal, as the AAT is, would be the better option. At least it should be done in an inquisitorial style, where there is no representation by the minister but where the representative of the applicant actually has the right to ask questions of witnesses and where there are some rules of evidence, rather than just generalised relevance. But in answer to your question, it is possible. It would be a massive overhaul, but it is possible to leave them in place and change them.

**Senator KIRK**—We have been told that often, or maybe just sometimes, appointments to the RRT are for as little as 18 months. Is that your understanding as well? Is that a very common appointment?

**Mr McNally**—I do not have the figures in terms of how many are for what period. But I had an understanding that two years was a period that has existed and that there is always the option of reappointment at the end of that period.

**Senator KIRK**—Would your preference be, say, for appointments of seven years without the possibility of reappointment?

**Mr McNally**—It is a specialist tribunal. You would like to see some retention of the knowledge that members gain. The issue is not so much the length of the terms but more about the prospects of reappointment at the conclusion of them. Particularly with the RRT, refugee law has become so incredibly complicated through various High Court and Federal Court challenges that a two-year appointment probably is a bit short. It is a specialist tribunal where the members need to understand the special circumstances of the law they have to determine. It is more reappointment than term that we are concerned about, though.

**Senator KIRK**—Do you have a view as well about whether the tribunal should be constituted as a single member sitting on the tribunal or would a three-person tribunal improve the decision making and the process?

**Mr McNally**—It is not something we have addressed in our submission. It is difficult to answer. If the procedures are in place I guess one could have some confidence in the single member process. I know that the AAT sometimes has multiple members and often a medical member for Comcare matters. There are some members whose approach to RRT matters is seen to be overly cynical and problematic. I guess that after you are there for a while perhaps a level of cynicism develops. Without judicial oversight it can fester. Having multiple members may eliminate any problems you may have with a particular member. That is not really a structural thing; it is probably just a bonus that would arise from that. Strictly legally and rule-of-law speaking, it is probably not necessary if you do have an impartial tribunal.

**Senator NETTLE**—Thank you for your submission and your comments throughout the submission about the need to inject natural justice into the way in which the processes occur. We have had other submissions about the ways in which some justice could be injected into the Migration Act generally. You made some comments about your capacity to suggest questions to RRT members. Just so that I understand, is that only if you are a migration agent? You can be in there if you are a lawyer. If you are a migration agent you can make a suggestion, but it is up to the RRT?

**Mr McNally**—You have to be a lawyer and a migration agent. You have to be a migration agent, and a lot of lawyers like me are also migration agents. That is correct. Family members are allowed to sit at the back as support, but they are not allowed to address the tribunal.

**Senator NETTLE**—We have had a lot of submissions about adverse statements being made from undisclosed people. We have had some submissions which talk about whether or not the applicant got access to those adverse statements. I note that you talked about a letter being sent informing someone that an adverse statement had been made about them. Can you tell us whether people as a matter of course get access to those adverse statements and what process they need to go through in order to get them?

**Mr McNally**—In terms of the provision of information, at the moment it is really section 44A that determines that. If there is information before the tribunal that the tribunal regards as a reason or part of a reason to affirm the department's refusal then they are required to issue a letter under that section to the applicant disclosing the information, explaining why it is relevant and inviting them to respond. But what happens—and I have a case example I can give you—is that you are not given the actual documents. You are not given the exchange of correspondence that may have given rise to this information. You are not given full texts of documents. As a lawyer in a court, if someone seizes upon a paragraph of a document to defeat my case, I would ordinarily look at the document as a whole to ascertain the proper context and see if there was anything else in the remainder of the document which may rebut or perhaps qualify to some extent the interpretation that has been given to the extract.

That in my view is proper natural justice—the proper right to reply to adverse information. But the tribunal is legally correct: it is not obliged to give you that document of that evidence. It can just paraphrase it in a letter or provide it to you under section 424A, saying, 'We have information that suggests X', where that conclusion may not even be what is in the piece of information. So you do not have an opportunity to examine the reasoning process that led to the statement that that information means that conclusion.

One example I can give you came up just last week. It is a case involving a Turkish Kurd. His claim was on the basis that he worked for a leading human rights organisation in Turkey. He came to the adverse interest of authorities. His evidence at the hearing was that he was not a formal, paid-up member of the organisation, but he helped out regularly and routinely over a number of years with organising demonstrations, leaflets and that sort of thing. That was the basis of his case. We contacted the organisation and they had no knowledge of Mr X being a member of the organisation. To explaining the relevance, they said that that suggested his claim on the basis of involvement with the organisation was false and invited a response.

We wrote back and said, 'How do you respond to that? There is no first-hand account of questions that were asked and the responses that were given. There is no identification of the source of this information. We're certainly not given an opportunity to question those witnesses, and that is problematic.' We asked for the documents. We got a response where the tribunal said they were not bound to provide the documents and were not going to do so—I assume it was email correspondence—but it explained the chain. The letter actually said the tribunal contacted a lawyer at the Australian Consulate in Ankara. That lawyer spoke to someone else, who spoke to someone in the organisation, who accessed some unidentified records—we do not know

whether it was a computer database or an exercise book in the drawer—and we were told, 'Your client is not known as a member of the organisation.'

Our response was, first of all, he never claimed to be a member. He assisted them for a number of years, so that corroborates his evidence, if anything. But we were presented with that scenario, where we do not know what the DFAT officer told person A and what specific questions were put. We do not know who person A was and what exchange happened with person B or who person B was and what records he accessed. There are no first person accounts—the way you would ordinarily call a witness in a quasi-judicial procedure. Sure, it is admissible because there are no rules of evidence, but it is a question of weight. That is a process of Chinese whispers, where it is impossible to really examine and rebut not only the truth of the statements of fact but the qualifications of questions of opinion that were also included in there. Who were the opinion givers, and how were they experts? Yet that was presented as unquestionable truth that says, 'Your guy's a liar'—and he gave evidence under oath in person to the tribunal. That is an example—and that is completely anathema to the rule of law and to any proper understanding of natural justice and due process. That is the sort of thing that goes on.

**Senator NETTLE**—Thank you for giving that example. It is a good way to explain it to us. In your submission, you talk about section 501. We have had some comment about this, particularly in relation to individuals—permanent residents—who did not get their citizenship form in for whatever reason and then found themselves detained for several years as a result of section 501. I wondered if you had any views on the implications of section 501 for delivering justice for somebody who has served their time, on the consequences of that section and on the way in which it is used. I do not know if you have any examples or experience, but I just noticed you had it in there.

**Mr McNally**—We do not object to the existence of section 501 and the ability to cancel visas on character grounds. General conduct can also be relevant to section 501. Someone's immigration history—they may have overstayed—usually calls into question whether they are of good character. Your question relates to people who have been convicted of offences and have served time; is that right?

**Senator NETTLE**—We heard evidence yesterday about Scott Parkin whose visa was cancelled under section 501. We have had evidence about people who have been sentenced for more than 12 months, have not served that period but have been caught under this. I suppose there is a range of different ways in which section 501 is used.

**Mr McNally**—That is right. There is a reasonably adequate process in terms of having to provide a notice with details and under section 501(1)—refusals or cancellations, where there is a discretion—there is an opportunity to respond and you can review that in the AAT. That is not too bad as a procedure but you end up with a situation where there is double punishment for an offence. Someone has done their time and yet they are further penalised as a result of the immigration implications once they are released. That is one of the public interest considerations that should be taken into account in the discretion not to cancel.

The case of Parkin was particularly problematic because it was on the basis of undisclosable information. That is permitted for national security reasons. There were all sorts of questions asked about that. There are aspects of the character system that are not reviewable. The minister

has the power to certify that a certain person is a threat to national security and can cancel without the issuing of a notice and the provision of natural justice. The act specifically says that the rules of natural justice do not apply. There is some scope to seek further ministerial intervention to overturn that, but it is very uncertain.

In my view, Section 501 is not one of the more problematic aspects of the system because most of the time you get a notice and you get access to the AAT with proper access to ordinary error of law process from that into the courts. It is those parts of the act where natural justice does not apply that create a problem, and when information is not disclosed how do you respond to that? How do you deal with that? You cannot, really.

**Senator NETTLE**—We heard evidence from an academic yesterday. His submission was that section 201 should be used rather than section 501. He showed us graphs about the way in which the government has increased the use of section 501 and reduced the use of section 201.

**CHAIR**—Can I ask you about the powers to detain? You made a comment about that previously. Would you recommend the introduction of a discretion in the power to detain, and should there be a threshold that is applied, as police apply currently?

**Mr McNally**—We certainly support the addition of a discretion in section 189. As I said before, at the moment if they suspect a person is unlawful they are compelled to detain them. Often, in conversations with case officers in the field you detect that the approach is, 'We will detain them for now and if you can prove what you are saying or if information comes to light that would convince us that the person is lawful then we can let them out later.' That really is not an adequate way of handling the liberty of people. I have a case where an Australian citizen and his three-year-old citizen child were detained over a weekend because at a residence they suspected that he was not who he said he was. He was detained on a Friday, despite showing drivers licence identification that showed who he was. There may well have been reasonable grounds to suspect at the scene that he was not who he said he was and therefore might be unlawful, but there was no follow-up inquiry done following the detention to further explore that.

**CHAIR**—Where was this person detained?

**Mr McNally**—Villawood; he was detained in Sydney.

**CHAIR**—Is he still there or was he released?

**Mr McNally**—We intervened and provided his citizenship documents—his passports and the like—and proved that he was a citizen. They were then released three days later. There are intricacies of that case that I will not bore you with. It is arguable that the initial detention was reasonable, but the guidelines really ought to incorporate a duty on the part of the detaining officers to follow up and explore their suspicion rather than just getting to the point of detention and then leaving it up to the detainee to prove otherwise.

**CHAIR**—Is the case you have just cited one of the 200 cases being investigated by Comrie?

**Mr McNally**—I saw a newspaper report that said it had been referred. I have not received any form of communication; nor has my client, but it may well be. It is also being litigated in the Supreme Court.

**CHAIR**—You are acting for this person and you do not know if Comrie is investigating this person's claim?

**Mr McNally**—We certainly have not been contacted.

**Senator NETTLE**—When did the detention occur?

**Mr McNally**—November 2002.

**CHAIR**—Some of the submissions have claimed that the Commonwealth government, in contesting applications for review and appeals, has failed to act as a model litigator, as required by the Commonwealth legal services guidelines. Are they concerns that you share? Do you think the guidelines should be reviewed?

**Mr McNally**—I do not have a difficulty with the guidelines. The litigation work for the minister and the tribunals, who we usually also join, is split up between about four private law firms and the AGS. Each of those legal service providers seems to approach the matters in a different way. Some are more aggressive litigants than others. One thing that really should be explored is early resolution of the matter. That does not seem to happen. Cases seem to settle a couple of days out from a hearing that took 18 months to get to, despite the fact that nothing has changed since the original document was filed. As a model litigant, serious consideration of early resolution should be given. Some of the legal service providers are better than others at doing that. There does not seem to be consistency. Other than exploration of early resolution, the ICJ does not have a difficulty with the way in which litigation is conducted. There seems to be a degree of flexibility and accommodation, at least when applicants are represented. I am not sure what happens when they are not.

Early resolution, in an adversarial litigation sense, can mean, 'Let's just respond to what they have claimed.' Often the self-represented litigants will file an application in the court that just has no merit, that does not plead error of law at all. Often they attempt to get merits review in the courts. They cannot do that at the moment. Early resolution at this stage appears to be approached on the basis of , 'Will they win based on their pleadings?' Often the answer is no. Perhaps a more holistic approach of: 'Let's have a look at the decision. Are there any errors that ought to be addressed? If they get representation later they will probably come up anyway. Let's settle it now, even though they do not know why they should win.' I think that could be increased.

**CHAIR**—We do not have any more questions. Mr McNally, thank you very much for your time today and for making yourself available to appear before the committee; it is appreciated.

**Proceedings suspended from 12.31 pm to 2.03 pm**

**BRITT, Sister Mary Eveleen, Volunteer Researcher, Edmund Rice Centre**

**LEAVEY, Sister Margaret Carmel, Volunteer Researcher, Edmund Rice Centre**

**CHAIR**—I welcome our next witnesses, from the Edmund Rice Centre. We have received your submission and numbered it 151. Are there any amendments or alterations you would like to make to that submission?

**Sister Leavey**—There is one minor alteration to page 6. Question 4 should read not 'detention policies' but 'deportation policies'.

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

**Sister Leavey**—I would like to thank you, first of all, for the opportunity to make this submission. The Edmund Rice Centre project began in September 2002, when we were able to assemble some volunteer researchers and a number of interviewers. The original question of the project was 'What is happening to Australia's deported asylum seekers?', and we were prompted at that stage by our contact with a number of rejected asylum seekers, especially in Africa and Iraq. The aims of the project from the beginning were to record as accurately and as professionally as possible the record for Australian history. But, at the same time, we had two major concerns: (1) that we would preserve the safety of the asylum seekers and respect their anonymity and confidentiality as promised in the interview schedule, which is at the back of the report that you have; and (2) that we would maintain with the Department of Immigration and Multicultural and Indigenous Affairs a cordial, cooperative, 'dialogical' and non-adversarial approach, because of the stringent ethical requirement of the Edmund Rice Centre. This was in accordance with their mission statement.

The original question, as I have said, was: what has happened to Australia's rejected asylum seekers? This original question spanned out into five questions. The first was: has the Australian government or its agencies sent rejected asylum seekers to places of danger? 'Places of danger' means that the respondents have no proper identity papers, they are in prison, they are subject to torture, they are unable to work, they have to live in hiding, they fear persecution because of religion or ethnicity, they are in a war zone or they are subject to threats from police. The second question was: has Australia or its agencies increased the dangers to rejected asylum seekers by sending incriminating evidence about them to overseas authorities? The third question was: in managing removals, has the Australian government or its agencies encouraged asylum seekers to obtain false papers and become associated with corruption? The fourth question was: is the manner of conducting asylum seeker removals consistent with Australia's legal obligations? And the fifth question was: is the manner of conducting asylum seeker removals consistent with Australia's traditional values?

The answer to the first three questions is an overwhelming yes: Australia has deported people to danger, it has increased the dangers to asylum seekers by sending incriminating evidence and it or its agencies have become involved with false papers and corruption. The evidence in the report for the answers to the first question is from page 26 onwards. The answers to the second question are on page 37 onwards. The answers to the third question are on page 38. The answers

to the fourth question are on page 40 onwards, and the fifth question is on page 46 onwards. Our evidence shows that the Australian government or its agencies—such as ACM, GSL, IOM and especially P&I—have sent or attempted to send people to dangerous places. At the back of our submission to you there is a two-page table. In that, there is an account of all the 40 interviews that we undertook.

On the three codes there—S, NS and S?—a person is deemed to be safe when they have proper identity papers, they are free and they are able to work. They may be not safe, as I have indicated already. They are in a doubtful situation if they are in an immigration detention centre, if they are applying for refugee status in a First World country, if they are worried about their safety because of their past political activity or having to bribe police to maintain safety on a tourist visa. So we have those three codes. Then we have a special code for Nauru, where some people were deported from Christmas Island. Researchers have coded Nauru as not safe—as a place dangerous to the psychological health of detainees because of reports we have of isolation, lack of access to lawyers, flawed translations of interpreters, extreme heat, insufficient fresh water and pressure on them to return to Afghanistan with threats of chemical injection.

In the table here we can say that 35 of the people were in danger immediately on arrival in the country. The evidence is quite overwhelming for that. But of the five who were safe, two were able to resist deportation altogether through the intervention of friends. One was a Zimbabwean man whose father had founded, with others, the Movement for Democratic Change, and he had seen his father murdered. Yet, after two years in this country—at five o'clock at the end of two years—he received notice from Canberra that they had a fortnight to leave country and to return to Zimbabwe. He was able to get a visa through friends who got him to New Zealand, and he has now applied for protection in New Zealand.

The other man was an Iraqi man whose grandfather had been found in a mass grave because of his opposition to the Baath Party. He was threatened with deportation as well, and he was able to get a visa. The other three who were safe on arrival were not safe after arrival. When we say that five are safe, in fact none of them are safe all the time, either on arrival or after arrival. So it is not even as good an outcome as sometimes the press has reported.

As well as this we looked briefly at the processing and assessment of the claims for visas. Our project found evidence of professional incompetence of department of immigration officials and immigration detention staff. There was a profound recognition of the lottery aspect of the RRT decisions—and there are some very moving accounts of this in the study. There are also profound examples of the limitations of the RRT and the ignorance and misinformation about conditions in Afghanistan, Iraq, Iran, Zimbabwe, Sri Lanka, et cetera. The countries we chose to send our interviewers to were countries of high risk. We interviewed people from 11 countries, including Angola, Rwanda, Nigeria, Zimbabwe, the Congo, the Sudan, Afghanistan, Iraq, Iran and Sri Lanka. In all of these we have accurate information.

With regard to our relationship with the department of immigration, we have maintained fairly good relationships, despite the fact that the present minister suggested to the *Age* that we have unsubstantiated allegations masquerading as fact. That is not the opinion of the middle management of the department of immigration, with whom over the years we have had cordial and cooperative relationships.

Finally, with regard to detention, our study found evidence of harsh and demeaning conditions with the punitive use of isolation. We found the treatment of asylum seekers as prisoners and the use of handcuffs. We found carelessness in the loss of crucial documents, which really put asylum seekers in great hazard. We found threats and use of chemical injections, we found lack of adequate health care and we found long-term physical and psychological effects of detention, especially with 10 people of the 40 that we are now in contact with. I will now hand over to Sister Britt.

**Sister Britt**—I would like to make some initial remarks about the refugee policy and its implementation, which create the context for the deportation experience. The current refugee policy appears to be dictated by a domestic political agenda and not by a recognition of universal fundamental human rights and the obligation to safeguard them. Some of the fundamental human rights enshrined in the Universal Declaration of Human Rights of 1948 have particular relevance to the situation of refugees and asylum seekers—for instance, the right to life, liberty and security of person; equality before the law; presumption of innocence; the right to nationality; and the right to seek asylum.

The people we interviewed fled from their homelands because one or more of those fundamental rights were denied them. They exercised their right to seek asylum in a country where they believed that their right to life, liberty and security of person would be respected. In fact, here they were not accorded presumption of innocence; they were taken into mandatory detention, where many of them endured physical and psychological hardship. They and their companions in detention were constantly denigrated by the government as being illegal, in contradiction of the UDHR and the refugee convention of 1951 and its protocol of 1967.

It seems to us that the Pacific solution and the excision of some Australian islands from the migration zone were strategies to prevent asylum seekers setting foot in Australia, where their claims on the government would have been stronger. The seven-day rule also tampered with the asylum seekers' rights, denying their right to protection here if they had not taken all possible steps to claim protection in some other country on their way to Australia—even if to do so had been, as it was for many of them, manifestly impossible.

I am afraid that I see these strategies as an abrogation of the government's responsibilities to not only asylum seekers but also the Australian people and the international community. I would say that unreviewable mandatory detention and the use of commercial companies in a situation demanding sensitive attention to human rights would attract the same criticism. People in our study did experience, while in detention, the deficiencies and abuses which have drawn severe, well-documented criticism from members of the legal and medical professions. That the government has chosen to disregard these first-hand professional reports is cause for both amazement and alarm. One wonders what it says about the values and standards the government expects from its institutions and its agents.

Some of the people we interviewed are stateless, and being stateless leaves people without recourse to establish even fundamental human rights. Australia has ratified the two conventions of 1954 and 1973 which attempted to rectify this human rights vacuum. The deportation of these people, however, would indicate that these conventions which address their specific needs and rights were not taken into account in assessing their claims.

I would like to raise the issue of accountability, because awareness of the Australian experiences of the people we interviewed and the reality of their situations really prompts this question. I submit that the government is responsible, and therefore accountable—not only for the policy but for its implementation at every level—for what happens in the RRT, which the government established to serve its purpose and whose sitting members it appoints. The government is accountable for what happens day to day in detention centres, where management and staff are its hired agents. It is also accountable for the quality of the processes by which appeals for asylum are assessed, which would include the qualifications, the appropriate experience and the skills of people who are appointed as sitting members of the RRT.

We have met people whose lives are in ruins after deportation. But, as some of them said in interviews about other aspects of their experience, Australia does not care. The issue of refoulement came up during the 2000 Senate inquiry, which recommended that a system of informal monitoring of the results of deportation be established to test whether we were in fact meeting our obligations to people seeking our protection. The principle of non-refoulement, which safeguards asylum seekers against being returned to the situation from which they fled, is part of customary international law, and it binds all states, even those who have not signed the conventions which Australia has signed and ratified. The disturbing question of refoulement is again raised by our research. Has Australia been engaged in refoulement in breach of international law? We believe, at least with regard to the 40 people we interviewed, that the government has a case to answer in relation to that principle. Our recommendations for reform of the current situation are included at the end of the submission. Should I leave you to find them, or would you like me to run through them?

**CHAIR**—No, we all have a copy of your submission and of the study. I will start with the study. On page 2 of the executive summary you say:

It is clear that the danger was exacerbated by documents issued under Australian authority.

You go on to say:

Some of this paperwork was confiscated on arrival or had a short expiry date. Some was declared to be false and of no use.

Are you suggesting there that documents issued under the Australian authority were in fact false?

**Sister Leavey**—Yes.

**CHAIR**—I am assuming DIMIA is the Australian authority you are referring to.

**Sister Leavey**—It is either DIMIA itself or the agent. For instance, P&I certainly issued the Angolan man, whose name we can now use—Matuse Calado, who was deported by P&I—with papers to the Congo, though he does not speak French and his family is not there. He was shrewd enough at Johannesburg to ask to see the Angolan ambassador, who determined that he was Angolan. But he had been given papers. Amnesty International could not say whether or not they were issued directly by DIMIA or whether DIMIA handed him over to P&I. That is certainly an example. There are other examples of a false passport, and there are photos of this in the book. There are a number of false papers.

**CHAIR**—So there are a number of instances where the Australian government, or agents on its behalf, deport people with documents that are false, of little relevance or of little benefit to the deportee?

**Sister Leavey**—That is right. If you look at the end of page 28, you will see that it is particularly true of the deportation of the stateless Bedoons, who were sent to Damascus. Their nationality was often given as Kuwaiti, but that, in fact, is not true. On page 29 are tickets to Kuwait purchased by the department of immigration in Canberra, and then there is a certificate which is valid only for one-way travel. The man to whom it was issued could not use it beyond about three weeks at the time he was there. So there is a good deal of evidence there. We have been careful. The Federal Police and the department of immigration have taken those papers and looked at them quite carefully, and negotiation is still going on about them. They confiscated the false passport but have since returned it.

**CHAIR**—You have raised this with the minister?

**Sister Leavey**—We raised it with the minister some years ago. It received a great deal of public press when the interim report came out in October 2003. It had worldwide coverage then. The 2004 interviews did not include anybody from Damascus.

**CHAIR**—What has been the response of the department and the minister to these revelations?

**Sister Leavey**—One would have to say that there has been a certain evasion and obfuscation. We were invited to Canberra after the final report was launched in Geneva in October last year. The members of the team who were in Geneva were invited to go to Canberra by one man from the department who said, 'You must see X.' When we got to Canberra and saw X, he said, 'No, you should have been seeing Y.' That was the man who recommended we see X. It was that kind of thing. When we got there, the five of us met five members of the department and a member of the Federal Police.

**Sister Britt**—On that occasion, the principal representative of the department had not read the report.

**Sister Leavey**—They had the report before it was launched in Geneva both in 2003 and 2004. It was part of our contract that we would always give the information to the department before it was launched publicly.

**CHAIR**—This is an astonishing claim. You have not had the minister say to you, 'This is outrageous and I will immediately act upon it. Come in and have a cup of tea and we'll talk about how I can improve the situation'?

**Sister Leavey**—No.

**Sister Britt**—No.

**CHAIR**—So you have been sent from pillar to post inside the department without it being addressed seriously. Is that what you are telling us?

**Sister Leavey**—Yes. We personally have not had to deal with the media on this issue, although we have had interviews. I was interviewed by the BBC World Service. The interviewer was very concerned about this issue. He said, 'This is a criminal offence, Sister Leavey, that your government has committed.' He was very concerned about the criminal offence but not at all concerned about the fact that we had put a man in an enormous amount of danger by giving him a false passport to start with and then returning him again on the same false passport. That received a great deal of world coverage in October 2003, but it has not really translated into a great deal of effective response. It has been the director of Edmund Rice who has had to deal with those questions. Our main responsibility has been with getting an accurate analysis of the 40 interviews.

**CHAIR**—You also put to us that, when you made these claims and got a lot of publicity, middle management within DIMIA agreed with your findings. Was that a private agreement with you? Was any letter sent to you about it?

**Sister Leavey**—No, it has always been in personal contacts with the director of the Edmund Rice Centre, Phil Glendenning. He would normally have been here today but he is in Dubai.

**CHAIR**—You are saying, though, that the minister has not agreed with your findings—that the minister has repudiated them publicly?

**Sister Leavey**—Yes.

**CHAIR**—Are you putting to us that we have a situation where middle managers in DIMIA would confer with you and tell you that there is an issue here—

**Sister Britt**—That seems to be the case.

**CHAIR**—but the minister does not have that view?

**Sister Leavey**—That is right. That is certainly the case. We have heard that again and again. As late as a couple of weeks ago there were two people from the department at the Edmund Rice Centre saying just that. They know that the Edmund Rice project is here to stay and that we support everything that is in this report as being accurate as far as we know from the reports of the people we interviewed.

**CHAIR**—I have to say you have taken my breath away. What do you believe is the situation now with people who are deported? We put them on a plane and there is no monitoring process whatsoever.

**Sister Britt**—No, there is no monitoring.

**Sister Leavey**—We should say though that the department of immigration, as well as the media, are very keen to interview the people that we interviewed. While we needed to substantiate what we have said, we are vulnerable in one sense: because we assured them of confidentiality, and anonymity if necessary, we could not give names and addresses. But we are now negotiating with the department, and certainly with the four people who have been granted

permanent asylum in other First World countries—one of whom was given permanent asylum within three months of being deported.

**CHAIR**—Which country was that?

**Sister Leavey**—One is the United Kingdom. One of the Bedoons from Kuwait is in Canada and the other two are in New Zealand.

**CHAIR**—So those people's claims were denied in this country, despite all the processes they went through. We put them on a plane and sent them somewhere, and they have found refugee status in another Commonwealth country. Is that what you are telling us?

**Sister Leavey**—That is right. There are still three others. We have not had reports that their permanent refugee status has been granted but we are expecting that it will be.

**CHAIR**—On Monday in Adelaide we heard that there were cultural problems in DIMIA—concealment and cover-up—that DIMIA only acted when they were threatened with any legal action and that the system was cumbersome, inefficient and ineffective. What is your response to that claim?

**Sister Britt**—I think our experience would suggest that that claim is accurate. There are examples even in the report of lack of knowledge and of ignorance, for instance, in the RRT. The RRT obviously is an agent of DIMIA. It is not always possible for us to know where a particular decision was made, whether by a public servant in DIMIA or at the RRT. Sometimes it is clear; sometimes it is not. Certainly, at least in anecdotal evidence, there is a suggestion that there is lack of knowledge in some cases actually in DIMIA and certainly in RRT.

**Sister Leavey**—But we also have the example of the simple denial that chemical injections have taken place.

**CHAIR**—In countries where people have been deported, you mean?

**Sister Leavey**—They have actually happened in Australia. It happened with an ex-ACM guard. On page 49 of our report, *Deported to danger*, there is a quite horrifying description of a chemical injection. The head of the department denied that this was true and said that, because this was not true, he doubted the credibility of the whole report. Yet it was obvious in the 2000 inquiry, *A sanctuary under review*, that the question had been raised about chemical injection and the reply is recorded in *Hansard* that the department is looking into this question. In fact, we have five recorded instances of people being chemically injected and yet the department, through a man who I could name, said that this did not happen.

**CHAIR**—Julian Burnside put to us in Melbourne yesterday that there was a deliberative government policy, he believed, of mistreating people as a means of deterring other people from behaving in a particular way. What is your response to that claim from Julian Burnside?

**Sister Leavey**—I would have to think fairly hard about that. I think it is possibly true, and I have heard Julian say that. The very punitive culture that exists in the department, in the immigration detention centres, would suggest that that is the case. We are relying on the reports

of very vulnerable people who have been deported. While we tried to substantiate as accurately as we could all the reports that they gave us, that is all the information that we have. We had opportunities to see them in the countries where they were deported, except in the obvious cases: we could not go to Baghdad and we could not interview directly the Afghans who were in hiding; we had to do those by email. But we were able to see the others and to hear their reports of the behaviour in the detention centres, and I think that would support what Julian says.

**Sister Britt**—On page 8 of the submission there is a quotation from one of the people that we interviewed about his deportation. He mentions his fear of the ACM boss. In visiting the detention centre, I have heard the same kind of comment made by other detainees about the cruelty of X or Y and the fact that the behaviour of staff deters other detainees from being anything but very compliant.

**CHAIR**—Canada's immigration system has a pre-removal risk assessment built into it. Do you think there should be some consideration given to Australia introducing such a scheme?

**Sister Leavey**—It is not a question that I have looked at seriously. Obviously we would look at any alternative arrangement for our rather draconian behaviours with regard to rejected asylum seekers. What is particularly disturbing to us and was most disturbing in the interviews is interviewing youngsters who came here at 16 as unaccompanied minors and who were broken. They had never been to school, they had never had a job and now they are just wandering the world looking for some other place. Two of them are in South Africa with thousands and thousands of other refugees, speaking with a different accent and in great danger. Anything that would allow some more serious account of the stories of the Rwandan lad and the Sudanese lad would obviously be a more just system. I am not totally aware of the Canadian system.

**Sister Britt**—At the mention of Canada, I was not exactly sure of your question. One of the suggestions that is made in the report and that has been made by others to improve our policy would be to introduce what is called 'complementary protection'. Complementary protection means taking account of the fact that the definition of 'refugee' in the 1951 convention was drawn up at that precise time after the Second World War to cope with a situation that existed then, and now there are reasons which are not specifically allowed for in that convention—serious reasons which make people in need of the protection that a refugee would be given but which do not fit the convention definition. Canada has apparently taken the line of a broader interpretation of the 1951 convention; we have taken a narrow one. The alternative that has been suggested is complementary protection, drawing up another set of circumstances, perhaps, which demand protection. We have heard that the European Union is looking at that as a possibility to improve the situation.

**CHAIR**—We have had the Senate inquiry's 2000 report *A Sanctuary under review* and the Palmer report. The National Audit Office has looked at the management of detention centres and this will be another report. Do you see any major changes occurring in the administration of this area?

**Sister Leavey**—We have been wondering how many reports are needed to show the inherent danger of what is happening with our whole detention policy. It seems to be totally impossible to convince the government—either side of government—about the legal obligations that they have undertaken, not to mention the humanitarian obligations that we have to other human beings. We

are not terribly confident that this inquiry will make any difference. In the end, it is about the people working at the grassroots level and the gradual change in the Australian community. I think there has been quite a dramatic change in the understanding of the issues. Once people have some idea of what is happening behind the razor wire and the detention centres, or what has happened to our rejected asylum seekers—once people know or come into contact with asylum seekers—their whole attitude changes. That has happened since we began this report, but I am not confident that even within the next five years great improvements will happen. Sister Britt, I do not know how you feel about that.

**Sister Britt**—The changes that have been introduced in recent months seem to be purely cosmetic. For instance, a great deal was made a couple of weeks ago about the minister snipping some wire at Villawood. We happened to be there that morning and we wondered exactly what was going to happen. We could see that some of the huge rolls of razor wire were going to be taken away. A week later, we went back. All the razor wire had gone from stage 2 and 3, but there was no attempt—or intention, apparently—to move it from stage 1. As well as that, in recent months a more comfortable shelter for visitors has been provided at Villawood, and some shelters, pathways and so on inside the detention centre have been arranged. When we went back a week after the snipping of the wire, we were able to just walk in instead of going through two locked gates before getting to the building you have to go through to be tagged, stamped and whatnot. But this makes no difference whatsoever to the people who are detained. It is improvements for the visitors.

**Sister Leavey**—It is cosmetic.

**Sister Britt**—It really makes no difference to what is happening on the other side of the wire. One of the big concerns that a lot of us have about this whole situation is not only what is happening to the detainees, the asylum seekers—and I realise of course that not all the people still in detention, at Villawood anyway, which is the centre I know, are, strictly speaking, asylum seekers—but what is happening to the Australian community, not just at the level of public opinion but at the government and higher public service level to standards of behaviour and the sorts of values that will build social capital, stability and harmony in the community. What is happening to us?

Amnesty International and STARTTS put on a conference some weeks ago, after those two remarkable academics at Deakin suggested that torture is all right sometimes. I understand that someone at Harvard was saying the same thing. That was a very interesting conference. I will quote for you only one thing: a question from the floor, after we heard what the philosophers had to say. The person from the floor said, 'What has happened to us that this question could even be raised?' That is the same sort of response that I would make: what has happened to us when we have been prepared to disregard the human needs and rights of so many people? Last year—it may have been earlier—Minister Ruddock publicly said, 'What happens to people after they have left Australia is not our concern.' It is my concern and it is the concern of thousands of Australians because it has to do with the way we have treated these people.

Robert Manne in *Quarterly Essay* No. 13 talked about the politics of indifference. Carmen Lawrence picked that up too in the correspondence section of that same issue. Indifference to the needs and rights of others is not a sign of a just civilization. At the end of the report itself we have made the statement that, if the human rights of one person—just one—are denied or

ignored, the human rights of all of us are put in jeopardy. There is cause for alarm about what is happening to Australia as well as what is happening to the people we have sent away or the people to whom we have denied protection.

**Senator PARRY**—I want to go back through the report and ask a couple of questions. The report was completed in 2004.

**Sister Leavey**—Yes.

**Senator PARRY**—Was there an interim report released prior to that 2004 report?

**Sister Leavey**—Yes, in 2003.

**Senator PARRY**—Has this report or the interim report been scrutinised by any other committee? Has anyone given evidence to any committee, authority or inquiry concerning the contents?

**Sister Leavey**—No.

**Senator PARRY**—So this is the first time that this report has had a public airing, if you like?

**Sister Leavey**—It was aired in Geneva, but we have not appeared before.

**Senator PARRY**—So the report has been tabled in other jurisdictions, either in this country or elsewhere?

**Sister Leavey**—It has not been tabled.

**Senator PARRY**—It has not been tabled here in Australia?

**Sister Leavey**—Copies were sent to parliamentarians in both 2003 and 2004, to the heads of the various political parties.

**Senator PARRY**—So it has been circulated, but the document has not been tested for accuracy or in any material way—it has just been circulated. Is that correct?

**Sister Leavey**—Yes.

**Senator PARRY**—Concerning the methodology in relation to the 40 people who were interviewed, how were the 40 selected?

**Sister Leavey**—We relied, first of all, on our knowledge as sisters of the Dominican order, which is a worldwide organisation. We had contacts which were quite useful in South Africa, Sri Lanka, Iraq, Pakistan and even Afghanistan. It was generally through refugee advocates who gave us a pool of names. We asked the advocates to contact them. We had to get written permission from everybody who took part in the study. I had a list of maybe 64 or 65 names to

start with. We were very lucky to get 41 interviews in the end. We have a further 10 interviews, but the situations were too dangerous for the people, so we did not even try to include them.

**Senator PARRY**—Can I just stop you there. I want to get this very clear, certainly in our minds, and on the record. The 65 names that were forwarded to you through your advocates in other countries, do you know if the advocates approached the people who became your interviewees or did they approach the advocates? Do you know which way that occurred?

**Sister Leavey**—I think it might vary from case to case. Regarding the cases that I knew of, when I was given the name of the Zimbabwean couple, for instance, their supporters in Australia asked them if they would take part in a study. They agreed, but I had to have a written agreement from them. Sometimes a written agreement was not possible; it had to be a verbal agreement by phone. But it was always that the advocates asked them if they would take part, and then, in order for them to take part, I or the Edmund Rice interviewers had to contact with them to ask their permission, because that is part of the quite stringent ethics committee provisions.

**Senator PARRY**—Did you personally speak with every person contained within the document?

**Sister Leavey**—Not personally; I was responsible for 14 of the interviews. Altogether we had 10 interviews and generally two interviewers present, one speaking and one recording. The obvious cases where this was not possible were the Afghans and the Iraqi in a war zone in Baghdad. They were done by internet.

**Senator PARRY**—So the interview questionnaire on pages 57, 58 and 59 was taken to one of the 40 with two interviewers present.

**Sister Leavey**—Always two people.

**Senator PARRY**—Then the questions were gone through by the interviewer.

**Sister Leavey**—Sometimes with an interpreter. In the refugee camps in Damascus there was always an interpreter. We had contact with the interpreter ahead of time and he had been an active advocate. He acted as an interpreter for a few of them, for sure.

**Senator PARRY**—From that point on, the document was returned to a central location, presumably to you.

**Sister Leavey**—That is right. Those who conducted the interview were asked to record their interviews there and then if they could, but because of the dangers that was not always possible. They were asked to record and type them on the night of the interview and then they were sent to me. The men did the interviews in Damascus, Sri Lanka, Iraq and Iran.

**Senator PARRY**—Assuming the document is returned untampered—and we just have to assume that—has there been any checking of the validity of the comments in the documents by any third party or has any supporting material accompanied those documents to verify the content in particular?

**Sister Leavey**—I am not too sure what the question means.

**Senator PARRY**—Is there any independent evidence apart from the interviewers who obtained information from the interviewees? You have either one or two interviewees together with interviewers. Is there any additional evidence that corroborates or supports that material? Basically, someone has asked a set of questions which have been responded to. The answers may or may not have been true. Is there any way of supporting the truthfulness of those answers?

**Sister Leavey**—The men would say that in the cases in Damascus, where they had ample opportunity to see the conditions in which people existed, they were able to check. They cannot check the truthfulness of what people say. People say something and we check back with them to ask, 'Is this what you said?' While we have accurate information on that, we cannot be sure that what they said is in fact the case. This is what they believe to be the case, and we have no more reason to believe that they are untruthful than the various other people who attack the information.

**Senator PARRY**—That is a good point. Earlier you said that you have to rely on very vulnerable people who have been deported.

**Sister Leavey**—Indeed.

**Senator PARRY**—So there may be added reasons for them to colour or exaggerate their story. We have to accept that that is a possibility without any external evidence to the contrary.

**Sister Leavey**—That is a real possibility, but the other possibility is that the department which is responsible can also be capable of obfuscation, evasion or straight-out untruthfulness.

**Senator PARRY**—I want to get to that. On page 39, at plate 5, there is mention of a former detainee with a false passport that he says was given to him by immigration officials. That was discussed earlier and Senator Crossin asked some questions about that. I think you indicated, and correct me if I am wrong, that the matter had been reported to the Australian Federal Police.

**Sister Leavey**—Yes. The Australian Federal Police actually took that false passport away.

**Senator PARRY**—So they still have possession of that false passport?

**Sister Leavey**—No, they have returned it to us. I think it is still in abeyance. I think it is still under investigation.

**Senator PARRY**—I suppose if that were significant evidence they would have kept that. If there is an investigation under way, have they given any reason or any explanation as to what the result of that investigation is or what the progress of that investigation would be?

**Sister Leavey**—I would have to check that with the director. This was a matter that he handled with the Federal Police. The researchers generally did not speak to the immigration department or the Federal Police, except on that day in Canberra.

**Senator PARRY**—I am sorry to pressure you with these questions—

**Sister Leavey**—Not at all—

**Senator PARRY**—but obviously the document has been presented to and tabled with us today, so we need to ascertain more about the document. Can we give you that question on notice concerning the result so far or what advice has been received by the director from the Australian Federal Police?

**Sister Leavey**—Yes.

**Senator PARRY**—If that could come back to the secretariat that would be really appreciated.

**Sister Leavey**—I shall do that. In fact, the director will be home tomorrow, so I can check that with him then. So I send it to Mr Walsh?

**Senator PARRY**—Yes, thank you. I want to continue as to any other authorities you may have reported this to. Have you reported any of these matters concerning DIMIA staff to ombudsmen? You have mentioned that you have had communication or discussion—or at least the director has—with the minister. Are there any other external parties that you may have reported this matter and the contents of this document to?

**Sister Leavey**—The document has been fairly well distributed, certainly in Australia, through refugee associations et cetera—groups like Amnesty and Oxfam. We certainly have not spoken to an ombudsman.

**Sister Britt**—I am assuming this as to the director. It would certainly have been my assumption that this is DIMIA's business and that to present them with this report is inviting them to respond to it. We would have perhaps thought that we would be going behind their back if we sent it to an ombudsman.

**Senator PARRY**—Thank you very much for that. It is important to get some of those things clarified. In the interests of time I will not ask any further questions.

**Senator NETTLE**—Thank you for appearing before us today and for the hard work that you have done on the project. I think it is important, given the recommendations that have been made before that there be some independent monitoring, that when a non-government organisation does that independent monitoring it is acknowledged—so thank you for doing that. I have one thing that I want to mention. I refer to the comments that were just made about a potentially ongoing Australian Federal Police investigation. I think it is important that we do not leave on the record a suggestion that the documents that have been returned to you have been returned for any reason. If it is an ongoing investigation, I think it is important that we do not make comments about the validity or otherwise of the documents that have been returned to you. It is important that we do not leave that on the record.

I suppose I am asking you for help on the issue of chemical restraint. I think you were here previously when I talked about this, and we know about the responses that we have received from DIMIA when they have been presented with examples of chemical restraint. If you did have any more information, particularly any more recent information, about chemical restraint, I am sure the committee would be happy to hear about that, because we will have a subsequent

opportunity to discuss this issue with DIMIA next week. I know what is in the report and we have put, as you have, what is in the report to DIMIA in the past and have been stifled as to the response and how far we have been able to go. If there is anything more that you would like to provide to the committee that we could ask DIMIA about when we see them next week, that would be welcome.

**Sister Leavey**—Could I take that on notice?

**Senator NETTLE**—Yes. If you are not able to provide further information, that is fine.

**Sister Leavey**—I am not aware of any, but I am not a regular visitor to the detention centres in the way that Sister Mary is. We were mainly concerned with rejected asylum seekers; we were not mainly concerned with what else is going on. We can comment on the detention centres only through the reports that we have had of their treatment before they were deported. As I said, there were five references from people who had seen what happens to resistors, and the man who recorded that he had seen another man injected, given a false passport and so on. But we will take that on notice.

**Senator NETTLE**—That would be great, thanks. On the issue of chemical restraint, you talked about conversations that you had had with middle management from DIMIA in which they had agreed with information that was in the report. Was there anyone from DIMIA that you had conversations with that agreed with the chemical restraint aspect of the report?

**Sister Britt**—I do not have any information about that. But we were not privy to the conversations between the DIMIA representative and the director. They always came to Phil, and he has not mentioned to us, I think, anything about chemical restraint. But we can take that on notice as well.

**Senator NETTLE**—That would be great.

**CHAIR**—I thank you both for your submission, for the work of the Edmund Rice centre and for making yourselves available to appear before the committee today. We certainly appreciate your time.

**Sister Britt**—Thank you.

**Sister Leavey**—Thank you for the opportunity.

[3.04 pm]

**BIOK, Ms Elizabeth Mary, Legal Officer, Civil Litigation Section, Legal Aid Commission of New South Wales**

**GEROGIANNIS, Mr Bill, Legal Officer, Government Law Unit, Civil Litigation Section, Legal Aid Commission of New South Wales**

**CHAIR**—Welcome. The submission from the Legal Aid Commission of New South Wales is with the committee and for our recording purposes we have numbered it 166. Before we begin the evidence today, do you have any amendments or alterations that you need to make to that submission?

**Ms Biok**—No.

**CHAIR**—I invite you to make a short opening statement. When you have done that, we will go to questions.

**Ms Biok**—Firstly, we would like to thank you for the opportunity to come here and discuss our concerns about the processing done by the Department of Immigration and Multicultural and Indigenous Affairs. It is not the first time that we have appeared before the legal and constitutional committee. Some of our concerns remain the same; some have varied over time.

I would like to discuss the nature of decision making by case officers of the Department of Immigration and Multicultural and Indigenous Affairs. My No. 1 concern, and the concern of many applicants, is that decision making appears to be quite arbitrary and inconsistent. It is almost as if applicants feel that their case depends not on the quality of their application but on who the decision maker is.

Two key aspects come out again and again when looking at the nature of decision making. Firstly, there is the denial of procedural fairness or natural justice. Given the complex nature of immigration law in Australia, especially for people applying for protection visas, there seems to be very little opportunity for people to give a full and detailed statement of their claims and for those claims to be analysed and tested.

The jurisprudence relating to refugee law in Australia and internationally would indicate that it is a very complex area of law. We have international refugee law, we have Australian definitions in the Migration Act and we have our own case law. It is a very complex area, and yet most of the applicants are people who do not speak English, who do not have legal representation and who are confused and often traumatised. When you put them into a situation where they get very little opportunity to be able to discuss their claims and to add orally to the documents they have put there, it creates a very unfair system.

It is our experience that most asylum seekers are not interviewed before they get their decision from the Department of Immigration and Multicultural and Indigenous Affairs. That means that most of them are refused without an interview. This is especially concerning when we are talking

about applicants from refugee-producing countries—for example, people who come from Burma and people who come from the Democratic Republic of the Congo. These are countries that everybody knows have terrible human rights records and many refugees from these countries have been accepted throughout the world, yet often these people are not interviewed by the DIMIA case officers.

There are also people who come from special groups. I am thinking of two clients of mine who are trafficked women and who are very vulnerable. Their cases are very particular and very individualised. They were not given any opportunity to discuss their history and their fears with a case officer before being refused.

There is also concern among the temporary protection visa holders about being interviewed or not being interviewed. At first they were told that everybody would be interviewed for their permanent protection visa. Then they were told by case officers that this was stopping. There are now all sorts of rumours spreading through the Iraqi community. People are not sure what this means. If the interviewing has stopped, it would be good if such information could be sent out officially so that rumours do not run riot among very vulnerable communities.

Another matter of concern for us is the selective use of country information. There is a lot of country information that immigration officers can use. There is also a lot of country information which applicants put before the case officers. Two things become very clear. Firstly, decision makers do not seem to use that country information to get background knowledge on the cultural, political and social norms in that country. It would seem with the amount of information that is available on, let us say, Burma that a case officer might get some understanding of the difficulties a person would face before they actually did an assessment of somebody's application. Too often, that does not seem to happen. There seems to be a real culture among onshore protection officers of looking for information which can be used to reject an application and forgetting about the rest. That is too often what we see.

We see that two or three lines in, let us say, a US Department of State report on a country that has a very bad human rights record will be selected as a reason to refuse somebody, yet the very information that talks about human rights violations and about people similar to the applicant is ignored. Similarly, in our office we have acted for quite a few people who are Roman Catholics from China. The information that is used against them is information from 1999—six years ago. Things have changed since then. That seems to be the culture that exists.

Information is used very selectively or the time of the decision is used very selectively. For example, I have a client who comes from an area which is refugee producing. She has had her application lodged for 10 months now. Only two weeks after the peace accord was signed—a peace accord which is not tested, not known and has months to go—she was refused. There was no interview, no nothing. These sorts of things are happening. That would indicate that there is a real culture which is very much saying, 'Let's get the decision made, let's not make sure that we are basing it on what is just and fair and let's not make sure that we give people a chance to address some of the concerns.'

We are also very concerned that there seem to be quite serious delays in processing. This occurs even after somebody has had one of the few interviews. It is not unusual for someone to go before the case officer and be interviewed, the interview to appear to be favourable and then

everything to just seem to slip into a black hole. When you ring the case officer and say, 'It has now been three or four months since the interview—what has happened,' they say, 'That application has gone to Canberra.' What does that mean? Does it mean that somebody in Canberra is overlooking the case? Does it mean that it has gone for a security check? We understand the need for security checks, but when this delay goes on, in some cases for a year or longer, this creates concern amongst the applicants. It is very difficult to explain to people why some people are getting approved quickly and others are not. It is all leading to this culture of randomness that makes applicants feel very vulnerable and uncertain.

There are a lot of criticisms that no doubt you are hearing about onshore processing, especially in the protection visa area. We also have concerns with offshore processing and what appears to be quite random decision making there, especially in relation to spouse visas and humanitarian offshore visas. A lot of spouse visas are refused without a lot of interview process on the basis that the relationship does not appear to be genuine, yet, at the Migration Review Tribunal, the set-aside rate for spouse visas is over 60 per cent and has been so for a number of years.

We are also concerned that, in processing in offshore posts, there often appear to be breaches of confidentiality. One thing that I find especially concerning is that people's refugee claims are being used in assessments by the offshore post for other areas. In our submission we refer to case studies. One case is that of a spouse who was asked about her husband's political record in a country where that political record could lead her and her children to real danger. Another case was an assessment of somebody's financial needs and whether they could apply for asylum seeker financial assistance, which sent somebody to ask questions in their home country and of members of the family. These things are breaches of confidentiality of refugee processing. They really should not happen.

There are real concerns that, when people get their decisions from the offshore posts, the decision is cursory. For humanitarian applicants it is a photocopy of the criteria with a tick in a box. People do not know why their husbands, wives, parents or children have been refused. Given that a lot of these people are separated from their families for a long time, they feel an incredible responsibility for their family. In order to explain why they cannot come, it is not enough that they just get a photocopied sheet with a tick. They should be given some real reasons why these people do not meet the set criteria. Our concern would be that decision making, both onshore and offshore, is about performance indicators. It is about getting a decision made. It is not about finding whether these claims are valid and it is not about giving people procedural fairness.

**CHAIR**—Thank you. Mr Gerogiannis, did you want to add anything?

**Mr Gerogiannis**—Just briefly and following on from what has been said, we have put in our submission that we believe that the level of funding, either legal aid funding or other government funded advice and application assistance to disadvantaged members of the community, is very inadequate. Our position is that we can only contribute to the integrity of the system that we have been speaking about if people can understand their rights and are able to present their claims effectively. This is especially important in a system which emphasises paper based applications, which has prescriptive requirements that need to be addressed and which is in an environment, increasingly in the protection visa regime, where people are not interviewed. If people are required to put in claims that are substantially paper based and they have no

assistance to do that, that militates against the claims being put forward and against a proper consideration of the claims.

At the moment, most free primary and merit review representation in the community is available through the Immigration Advice and Application Assistance Scheme, the IAAAS, which is funded by the department of immigration to tenderers who have tendered to provide services pursuant to that contract. The Legal Aid Commission of New South Wales is one of those successful tenderers. There are no free government funded services to represent people who have meritorious cases who have had their visas cancelled, and that includes people who have had their permanent residence cancelled. There is no free representation service available for people who face criminal deportation. There is no free representation available to refugees who wish to sponsor their immediate family from overseas. If there is a judicial review matter where the person has been refused by either the MRT or the RRT, under current legal aid guidelines even in a meritorious case that person has to demonstrate that the issue in their case is a matter for which there is a difference of judicial opinion.

That leads to a situation where meritorious cases cannot be assisted by legal aid. It may be a non-controversial legal issue and the mistake has been made by the RRT or the MRT, yet those people are forced either to find pro bono assistance or to scrape up the funds to fund a Federal Court or a Federal Magistrates Court application. They are the sorts of things that we feel are lacking in the current funding system and that impact upon the integrity of the system in a situation where, as we have said, there is often an arbitrary nature to the way that applications are processed.

**Senator NETTLE**—I will go on from where you finished off on the issue of groups of people for whom there is no capacity to access free legal representation. Am I correct in saying that another grouping of those people would be those who have yet to have their asylum claim determined but who are living in the community? I understand the IAAAS is for people in detention. In the current political climate, we are seeing more people who are in the community; they are sometimes in detention, sometimes not in detention. What is their capacity to get legal advice?

**Mr Gerogiannis**—There are two categories of disadvantaged people who can get assistance under the IAAAS. All detainees who have protection visa applications are given assistance under the IAAAS. If you are in the community, you have to demonstrate that you are disadvantaged. That generally means financial disadvantage and possibly a combination of other things, including not speaking English, torture and trauma.

The problem with the community aspect of it is that the numbers are quite limited. According to the department's publication in relation to the IAAAS for the year 2002-03, Australia wide about 450 people in the community were assisted with either their primary application or their merit review application under the IAAAS. There are 450-odd people, Australia wide, in a system where not only initial protection visa applications are being made but also further protection visa applications are being made by those who have been recognised and granted a temporary protection visa. That is just not adequate in our eyes.

**Senator NETTLE**—There are many things that you could suggest to change that situation. What suggestions would you make about people being able to find out about the scheme? Some

submissions have talked about giving people a list of their legal rights at the time they either enter, or come out of, a detention centre. We have had suggestions about advertising within detention centres. It is a separate question, but I would be interested in your response. Some comment has been made to the committee about the varying levels of awareness people in detention centres have of their ability to access the IAAAS. I am open to you for suggestions in this area.

**Ms Biok**—I think the best suggestion is the situation that it used to be. Previously, a duty solicitor from the Legal Aid Commission was at Villawood Detention Centre every Wednesday. A sheet would be filled up and somebody would indicate who would be seeing the solicitor, at which times and whether a telephone interpreter was required. Anybody who was in detention could then see the legal aid solicitor in relation to an immigration matter. A lot of these people were not asylum seekers. They were overstayers who might have been able to make a family application, or they might have been people who wanted to finalise a right they had in Australia before they were deported—perhaps somebody had some wages that they could claim—but, largely, they were people who wanted to make an immigration application. They knew a duty solicitor was there every Wednesday and that was a way for them to get information. We would go with various leaflets and have the interpreters lined up. It was quite an effective scheme.

**Senator NETTLE**—In the current situation, somebody needs to ask for a lawyer in order to get access to that lawyer—that was raised in the Cornelia Rau case, for example. Did those people need to ask to see you in order to see the duty solicitor?

**Ms Biok**—Yes, they had to have seen the social worker.

**Mr Gerogiannis**—At Villawood in the old days—it was a bit more relaxed then than it is now—there used to be signs around the place saying: 'Legal aid lawyer attending every Wednesday. See such and such to organise an appointment.' That would happen. It is very hit and miss at the moment. If people in the detention centre are talking to someone who has spoken to legal aid before, they might get to us. We should emphasise that we are talking about not just the Legal Aid Commission but also other legal aid type services such as the Refugee Advice and Case Work Service and the Immigration Advice and Rights Centre. They all generally provide free assistance and advice.

Under the IAAAS there is no free advice service to detainees. The advice component of the IAAAS applies only to disadvantaged members of the community; there is no funding of advice services in detention. It does provide all detainees who have an asylum claim with a free migration agent or lawyer to assist them with their protection visa application.

**Senator PARRY**—On page 29, point 8 of your summary of recommendations states:

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

We are going there tomorrow. How many rooms are there?

**Mr Gerogiannis**—The figures are in this submission. For stages 2 and 3, there is a demountable in stage 2 with four interview rooms. One interview room is permanently set aside

for onshore protection interviews and is not accessible to anybody other than the onshore protection team, even if it is not being used. There is another room that is generally used by the removals team, so that leaves two dedicated rooms for legal advisers, which you need to book. If it is available at the time that you need it, fine; if not, you have to organise another time. And we have been told that if there is any situation—for example, there is a DIMIA round-up and DIMIA require the rooms—they get priority even though you have booked it. Just last week, in stage 1, where there is only one proper interview room, a colleague of ours started an interview with an asylum seeker and was told that she had to vacate the room because DIMIA required it. She had to vacate the room. Another room was rounded up for her, but it took some time and the continuity of the interview had to be interrupted. In a centre with that many detainees, to have two dedicated rooms in stage 2 for stages 2 and 3 and one proper interviewing room in stage 1 seems to us to be totally inadequate.

**Ms Biok**—And we need to look at those facilities in the context of the limited time that we have to lodge a protection visa application for a detainee. From the time somebody is referred to us and we accept it, we have got seven days in which to complete an application, which means two or three visits to Villawood. So if you get yourself out to Villawood with the aim of spending four or five hours there getting the bulk of the application done, and then you find the room is not available, it becomes very difficult to reorganise everything to get back there and to get it done in the time frame.

**Senator PARRY**—So there are the two dedicated legal interview rooms and then there is the demountable. This is where it gets confusing—with stages 2 and 3. There are another four rooms coming online in stage 3? No, that is not correct.

**Mr Gerogiannis**—No, that one demountable is for stages 2 and 3. It is located in stage 2 but it is for detainees in stages 2 and 3 and Lima compound.

**Senator PARRY**—There are not six rooms; four rooms are currently available. And they are constantly in use?

**Mr Gerogiannis**—You might get lucky and find that there is one not being used but, generally, if you do not book it is very difficult to get into the room. As I said, one room is exclusively for onshore protection, and that will not be opened under any circumstances. I have tried when the other rooms have been full.

**Senator PARRY**—I have just a minor issue on recommendation 1(b) on page 27, which says:

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

Are you suggesting there that the UNHCR handbook is relatively complex, and have you had experience with the handbook?

**Ms Biok**—I have got it here. It is not complex, but the criteria are complex, and dealing with applicants can often be difficult. We have a broad international law definition with a lot of terms that often need to be teased out. There are certain criteria that need to be addressed in an interview situation, and that just does not happen. It can often be basic things. For example, if

there is a couple then the case officer should make sure that the wife has an opportunity to address her claims, if she has any, and that she is given that opportunity individually. That often just does not happen. There needs to be some training so that case officers understand the law and also the way of dealing with specific groups of people. Dealing with protection visa applicants is quite different from dealing with student visa applicants, so they need special training. That used to occur in the past. People who were refugee advocates, people like us and people like the Refugee Advice and Casework Service, would go and give training sessions to new DIMIA case officers as they went into the onshore protection strand. That has not happened for a long time.

**Senator PARRY**—Is there also scope, then, for the UNHCR handbook to be simplified, to have an explanatory memorandum to come with it or something of that nature?

**Ms Biok**—Certainly. You could certainly do an annotated version of the handbook.

**CHAIR**—Can I just go back to some of the comments you made earlier about members of the RRT perhaps not informing themselves of the country situation prior to listening to claims?

**Ms Biok**—I was referring to DIMIA case officers, actually.

**CHAIR**—Would it be both, do you think? Is that your experience?

**Ms Biok**—No. RRT members are more in tune with country information. They tend to spend more time. It was mainly DIMIA primary case officers that I was referring to.

**CHAIR**—It was put to us this morning that some of the country information is, in fact, out of date when it is given to people. Have you found that that is the situation?

**Ms Biok**—Certainly. A lot of it is out of date, and people will rely on events that occurred in the past and ignore things that have happened quite recently.

**CHAIR**—In your experience with the RRT and the MRT, do you think the system needs a complete overhaul or abolishing? Are there changes you would make to the system?

**Ms Biok**—I do not think it should be abolished. It is good to have merits review, given that judicial review is so limited now. We need a merits review tribunal.

**CHAIR**—Do you think there should be judicial review that complements it?

**Ms Biok**—Perhaps it needs some overhauling. Part of the problem might be that RRT members are also performance driven. It is about getting out a decision quickly rather than taking the time. There is a lot of variation in RRT members. That is the problem.

**CHAIR**—It has been put to us that perhaps the process should be taken over by the Administrative Appeals Tribunal or even the Federal Magistrates Court.

**Ms Biok**—It is always a great comparison when you look at the procedure of the AAT in comparison to what happens at the RRT.

**CHAIR**—Why is that? Is the RRT inferior?

**Ms Biok**—Yes, without a doubt. It has no rules of procedure.

**Mr Gerogiannis**—We have suggested to committees in the past that some serious consideration ought to be given to making the RRT a multimember tribunal rather than a single-member tribunal. Our reasons for suggesting that are the sheer complexity of refugee law, the difficult experiences that applicants invariably bring before the tribunal and the inevitable sense of pressure that the members feel in terms of deciding, in many cases, somebody's future—their life. We feel that multimember tribunals, two-member or three-member tribunals, sometimes may spread that pressure around and allow for a fairer and more comprehensive assessment of a person's claim.

Whether that is possible or not, and how it would fit in with trying to get a quick and efficient decision are things that need to be balanced. But we certainly feel that there is a wide variation between different members of a tribunal, which is inevitable. It may be that a multimember tribunal would tend to even out different sorts of members and different ways of thinking. There would be a more collegiate sort of atmosphere on the tribunal, with collective decision making rather than a single person making the decision. We generally support non-adversarial merits review. The AAT certainly works very well, but the numbers that it deals with are far fewer than the MRT or the RRT. It is adversarial; we therefore come back to the question of legal representation for people in an adversarial setting as opposed to a non-adversarial setting. These things all need to be taken into account. We have not really directly turned our minds to the question of whether or not that system ought to be abolished, but those things certainly could be taken into account.

**Ms Biok**—There is a provision in the Migration Act that if a complex issue of refugee law arises then the principal member of the RRT can refer it to a three-member panel: two people from the AAT and the principal member of the RRT. That has been in the act since 1991 and to my knowledge it has been used once. To me it seems quite difficult that the provision is there to deal with some of these very complex issues and yet the tribunal is reluctant to use it.

**CHAIR**—Some submissions have referred to complaints of physical and mental abuse of detainees, and of course some of those cases may have involved your clients. Have you come across any instances of those cases?

**Ms Biok**—Certainly, there are a lot of examples of people who have been mentally abused. Many of the temporary protection visa holders who are now going through the second stage of processing in applying for permanent protection visas are real victims of mental abuse. These are people who are in Woomera and Port Hedland. Somebody I saw quite recently at the Villawood Detention Centre, after spending five years in detention, was told that he was to be released and was asked to sign a form. He was not fully aware of what the form was and signed it. He realised later that it was for his deportation. He was put on a plane from Baxter to Sydney, held at the airport in Sydney and then put on another plane, thinking, 'Well, I'm going to face certain death when I get off eventually in my country of nationality.'

While waiting at the airport, in transit to his country of nationality, he was approached by the Australian Consul General, who said: 'You're lucky. The lawyers who have been lobbying for

you have written to the United Nations High Commissioner for Human Rights and have some information to support you. Do you want to go back to Australia and try again?' He was then brought back to Australia and I saw him within 24 hours of his return here. He did not know where he was or why he was back here. He just knew that he had been saved from what he thought was his definite death on return—and it was a return to a very nasty country. That, to me, is real mental torture.

**CHAIR**—Do you think this committee needs to look at providing detainees with a complaints mechanism?

**Ms Biok**—Certainly. Those complaints range across not only the psychological aspects but also the physical conditions of certain areas of detention that some detainees have to remain in.

**CHAIR**—On that issue, what about the deliberate obstruction and provision of misinformation by officials? Should there be a mechanism for detainees to put in some sort of complaint when they feel that is happening?

**Mr Gerogiannis**—Yes.

**Ms Biok**—Yes, I think so. In addition, an area that should be able to be addressed by complaints is where applicants feel they have been misinformed about what documents they have to lodge or how quickly they have to lodge them, when some problem has occurred with their primary processing.

**CHAIR**—Ms Biok, in your opening statement you referred to women who have been trafficked. We have asked many questions about this issue in the Senate and it has been raised time and time again. In fact, I think I have asked questions about it in estimates. We have been led to believe that such women would be afforded more, better and safer protection as a result of all the publicity that this issue has received, particularly since Nicola Roxon raised it with a number of women in Victoria. Are you putting to us that women who present themselves as being refugees, because they have been trafficked into this country, can be refused that status without even being interviewed?

**Ms Biok**—I certainly am. I can go one step further and say that those who have been refused protection are trafficked women who have put in protection claims on the basis that they have assisted the Australian Federal Police with identification of the traffickers.

**CHAIR**—We have been given assurances in the Senate by the minister that this would not happen.

**Ms Biok**—I am happy to discuss it with you later, if you wish.

**CHAIR**—The Senate sits next week; we might have to retest those assurances. Senator Parry, I might be giving you a leg up there about a question in question time. That is quite disturbing. A number of us within my party have raised this—and I am sure it has been raised within Senator Nettle's party—particularly in the light of work done in Victoria by Nicola Roxon. On the record, I am absolutely certain that the minister has given us a guarantee and reassured us that those women would be afforded quite a favourable hearing. But now to discover that some of

them have put in a claim for refugee status that has been determined without even interviewing them—

**Ms Biok**—That was after extensive preparation of a statement that detailed the conditions of the trafficking to Australia, their slavery in Australia and the assistance they have given.

**CHAIR**—After they have assisted the Australian Federal Police, they have been sent back to the place.

**Ms Biok**—No. They are still here but on appeal to the RRT.

**CHAIR**—But they may well be facing deportation whence they came.

**Ms Biok**—As we are on that issue, I would just add that these trafficked women are not entitled to work rights in Australia because they do not come within the 45-day rule. For a short period, they were on asylum seekers' financial assistance, through the Red Cross. Now they are at the tribunal, there is no financial assistance for them. We are finding them as much charitable help as we possibly can, as they are sleeping on somebody's lounge room floor. It is really very difficult for them.

**Senator PARRY**—This is of great concern. If these women have identified the traffickers, have the traffickers been charged or prosecuted? Have they appeared before a court?

**Ms Biok**—The problem appears to be—a few trafficked women have come through legal aid and we are also linked with an NGO that deals with a few trafficked women—that the test for the Commonwealth DPP to decide whether there is enough evidence to mount a prosecution is quite high. In providing background evidence, these women will come forward and give a lot of evidence, identify photos and take people to specific places. But the Director of Public Prosecutions, for various reasons, will consider that there is not enough evidence to mount a full prosecution. That is when the assistance seems to stop. That is when these women no longer get an entitlement to Centrelink benefits or any other government assistance.

**Senator PARRY**—Is that because they refuse to give evidence?

**Ms Biok**—No, they agree to give evidence. It is because the DPP decides it does not want to mount a trial.

**CHAIR**—So the investigation hits a brick wall and suddenly the women, in a sense, are punished for that.

**Ms Biok**—Basically, yes. They are removed from assistance. If they wish to continue and think about a protection visa application, they are brought to an NGO that provides them with assistance. It is through that NGO that they have come to us.

**Senator PARRY**—Has it been independently verified by the Australian Federal Police and reported back to you that they have participated or assisted in investigations, or are you relying totally on client information?

**Ms Biok**—No. We are reliant on the NGO that assists the Federal Police.

**CHAIR**—Thank you very much for your evidence and for making available the time to appear before the committee this afternoon.

**Proceedings suspended from 3.42 pm to 3.55 pm**

**HITCHCOCK, Mr Neil Evan, Fellow, Founding Member, Former New South Wales President and Former National Executive Member, Migration Institute of Australia**

**MAWSON, Mr David, Chief Executive Officer, Migration Institute of Australia**

**VAN GALEN DICKIE, Ms Marianne, Member, Migration Institute of Australia**

**CHAIR**—Welcome. Your submission has been lodged with us and, for people who may wish to cross-reference in future times, we have numbered it 144. Do you want to make any amendments or additions to that submission before you give an opening statement?

**Mr Mawson**—Not at this time.

**CHAIR**—Please proceed with your opening statement and when you are finished we will go to questions.

**Mr Mawson**—The MIA is the peak association providing excellent service, advocating the benefits of migration and advancing the standing of the migration profession. The MIA thanks the committee for the opportunity to appear today. I will now hand over to Mr Hitchcock, who will be handling the opening statement today.

**Mr Hitchcock**—The MIA, which I will refer to as 'the institute', has currently more than 1,300 members. It is really the active part of the migration advice profession in Australia. We have a wealth of experience and knowledge, which has been developed over many years. The institute has been going for a very long time. We play a vital role in assisting clients to deal with an ever-increasing complexity in Australia's migration legislation and policy. It should be remembered that this inquiry relates more directly to the operation of the Migration Act. However, it is important to note that the act is the driver of migration regulations, the migration series instructions, the procedure advice manuals and ministerial directions. As such, there is a very large volume of material and guidance to officers that rests on and is driven by the Migration Act. It is fair to say that over the last couple of decades that particular process has led to a greatly increased level of complexity in the way the act is administered in Australia.

It would require a major and detailed review of all that material over several years to really delve into and seek ways to improve the real day-to-day operations of the act, but, given the terms of reference for this inquiry, we have rather focused in our submissions on the broader issues that are contained in the act as a stand-alone document. The MIA would be pleased to continue to contribute its knowledge to any ongoing review process. As a professional body we see it as our role to make this particular contribution on a regular basis.

In concluding these opening remarks, there are two broad issues we would like to emphasise. The first is section 4 of the act, which says what the purpose of the act is. The act was written in 1958. It is therefore somewhere between 40 and 50 years old. It was written in a postwar era, when the control of the entry of noncitizens to Australia was a very different thing to the control of the entry of noncitizens to Australia nowadays. The enshrining principle of the original act was to control entry.

About 20 years ago I was a policy officer of the department in Canberra. I then left the department and went into our practice. I remember that at that time there was census material that said that 47.5 per cent of Australians were either born overseas or children of at least one parent born overseas. I believe that percentage has increased. It may no longer be relevant that the purpose of the act be enshrined only in controlling entry. Perhaps it is time that we as a nation look to the act to be administered in a way that contributes to the benefit of Australians and the national interest so that it is not just a control mechanism. We think that that is very important. If such a public interest criterion were enshrined in section 4 of the act, it would mean that some of the difficulties that arise in the way the act is administered in more contemporary times might be overcome, because officers would then be reminded of that particular purpose of the act as well as the control purpose. That is the first broad issue.

Secondly, on behalf of our members, we wish to make it as clear as we possibly can that we are unhappy about the lack of regulation of so-called education agents and unregistered immigration agents. A lot of hard work has been done to regulate, manage and make more professional the migration advice industry and those who participate in it. That includes some people from the department who have an active working relationship with members of our institute. We have mentioned that to a reasonable extent in our submission and explained some of the reasons that we are unhappy about that. It may be that some progress is being made in that direction, but we feel strongly, as an institute, that we have achieved a lot in improving the standing, calibre and knowledge in our profession and the way our profession assists clients. We feel uncomfortable indeed that education agents and unregistered agents within or outside Australia are, in effect, in breach of that particular part of the act that says that, in order to give assistance, you must be registered. They are my opening remarks. Thank you for the opportunity to make them.

**Senator NETTLE**—Could you expand on two parts of your submission. One is the part that deals with discrimination of same-sex couples. That is not something that we have had mentioned to us to date in the inquiry. Could you expand for us what the consequences of the current discrimination are and what suggestions you would make to remove that discrimination?

**Mr Hitchcock**—To put it in simple terms and to use a very current example, there is a major push by the department and the minister to run expos overseas for skilled migrants. A skilled migrant must then apply under a thing called the points test, which you have no doubt heard about, and have that application assessed. If a skilled migrant is in a same-sex or, to use departmental jargon, 'interdependent' relationship, that person cannot be included in the principal applicant's application for migration. Of course you can include a heterosexual married or de facto partner, but you cannot include a partner out of a single-sex relationship. Therefore, that person must land in Australia, attain residence, show that they are usually resident in Australia and then sponsor their same-sex partner. That same-sex partner, once onshore, must then apply to change from a temporary visa to a permanent visa on the basis of that relationship. There are examples where maybe both of them are skilled. In fact, it is very common that both partners in that relationship are highly skilled and both would qualify under the points test.

To keep the couple together—because you cannot include one partner in the other person's application—you have to do two applications or you have to bring in the other partner on a, for example, 457 temporary resident visa sponsored by an employer, so you can keep the couple together because there must be in continuity in relationship. So you end up doing three

applications where it is very common in most developed economies in the world that a single sex relationship, for a wide variety of purposes at law, is accepted. I understand from my colleague here that Australia is an exception—that our Migration Act is not administered in that way and the only other part of Australian legislation, I understand, that does not recognise same sex relationships is the tax act. So we think, again, it is an example of an enshrined principle in section 4, as well as the particular section it relates to, that should be changed. I can remember we were making a move to at least allow entry in that convoluted way for same sex partners when I left the department about 20 years ago. That is an example of how such people are discriminated against in what is supposed to be a totally non-discriminatory policy.

**Senator NETTLE**—Does anyone else want to comment on that?

**Ms Van Galen Dickie**—Neil has talked about permanent visas but it works for temporary visas as well. If you are applying for a skilled temporary visa into Australia you cannot bring a same sex partner. These people, demographically, are usually high-income and very well qualified but they are choosing not to come to Australia because they cannot bring their partners with them. The only part of the Migration Act that actually recognises same sex partners is in the couples: if you bring a partner on a visa and then they are called interdependent. So it is recognised in one part and then specifically discounted all the way through the act in all other areas.

**Senator NETTLE**—In your submission you talk about section 501 and the way that is administered. Do you see the difficulty as the actual section itself or the way it is administered? How would you change section 501 to deliver the changes that you want to achieve?

**Mr Hitchcock**—Section 501 and the ministerial directions, which is a policy document that says how section 501 is to the administered, tend to leave aside that a person can have a period of years where they have reformed whatever bad behaviour there was and that some of the bad behaviour might have even been innocent. But it is a situation where perhaps the term 'a spent conviction' should be used. It is a fundamental part of the process of law that a conviction after 10 years—in this state anyway—is considered to be a spent conviction. If that is the way our community operates why could that not be included in section 501 so that somebody who has reformed is a public or community benefit, and we go back to section 4. If somebody has reformed and they have paid their debt to society, whatever that particular debt is, they should be treated like any of the rest of us, and in that sense it should be written into section 501 that there should be some community benefit recognition. Perhaps the best way of doing it is simply to write in words about the acceptability of a spent conviction. There may be other ways of doing it but when we put submissions forward about section 501 we refer to spent convictions as a community norm, but it is not enshrined in the act.

**Senator NETTLE**—We had a witness who gave evidence yesterday about section 501 and was comparing it to section 201 of the act in the way it was used. He showed us some graphs which showed the way in which the use of section 201 has been decreasing and the use of section 501 has been increasing, and when answering this question he thought the main difference was that 10-year limit. His recommendation to us was that section 501 should be abolished and that the government should revert to using section 201. Would you like to comment on that proposal?

**Mr Hitchcock**—I have always focused in practice on section 501. I am sure my colleague here has as well. So my day-to-day, in practice knowledge of 201 is not there. However, to give you another example of the importance of trying to get some recognition of people who have reformed or people who did something wrong 10, 15 or 16 years ago, it is not uncommon for an application to be rejected on the one type of character ground, such as somebody rejected because there was a charge against them for being an accessory to a marijuana related drug charge, the right of review appeal to the relevant tribunal has the rejection overturned because of reform and then the minister rejects a second time. I have a particular case at the moment, where 12 years ago, a person lost a passport which was fraudulently used by another person. It was held against them and they were rejected a second time. So by building in and giving certainty to the concept of reform and the spent conviction issue, it gives people who may have done something wrong in the past when they were young and silly an opportunity to be able to convince the department that they have truly reformed. We find it very sad. If those offences had occurred two or three years ago, they are not the sort of cases we ordinarily are very happy to act in, but when somebody has been treated like that under this act it is actually quite sad.

**Ms Van Galen Dickie**—Can I just clarify, section 501 is the character provision where you cancel or refuse a visa. Section 201 is what you deport people under. Your witness is right. There is a discrepancy there.

**Senator NETTLE**—Yes. He was putting a case that the government had stopped using section 201—

**Ms Van Galen Dickie**—Because it is harder.

**Senator NETTLE**—and begun using section 501.

**Ms Van Galen Dickie**—Yes, because they will cancel your visa and then they will deport you because you do not have a visa. Yes, it is harder. And the character provisions are really strict. We drew attention in our submission to the one where you are actually ill. You are considered to have a substantial criminal record if the person has been acquitted on the grounds of unsoundness of mind or insanity and as a result has been detained in a facility or institution. That includes a residential drug rehabilitation scheme or a residential program for the mentally ill. There is no time limit on that. So somebody who was ill a long time ago, and acquitted of an offence because of their illness, still has a substantial criminal record under the Migration Act.

**Senator PARRY**—Just to clarify. Mr Hitchcock, a moment ago when answering a question from Senator Nettle about reformed bad behaviour, you said some bad behaviour could be innocent. Is that just phraseology?

**Mr Hitchcock**—I am saying, using the example of a person who lost a passport which was fraudulently used, the client has never had an opportunity to argue the case that they acted innocently, that they did genuinely lose the passport. So the department held a view that, because another person fraudulently used it, the passport holder is therefore in the wrong, that they lent it or gave it to the individual rather than that they did accidentally lose it. There should surely be an opportunity to argue the case that the person who lost the passport acted innocently.

**Senator PARRY**—But surely the person who lost the passport would not be prosecuted. There would be no prima facie case unless there was evidence that it was passed over knowingly.

**Mr Hitchcock**—With respect to the department, they do lots of good things, the department has the power to make such a decision.

**Senator PARRY**—Correct me if I am wrong, but under section 501 are we not talking about criminal offences and not migration offences?

**Ms Van Galen Dickie**—Both. It is about criminal offences but section 501 says:

... a person does not pass the character test if:

… … …

(b) the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; ...

So it is not that you are involved in it yourself.

**Senator PARRY**—Thank you, you have clarified that.

**Mr Hitchcock**—Section 501 is also used when a 20-year-old working holiday maker overstayed a working holiday visa or was caught working beyond the three-month limit in some mild, marginal way 10 years ago. They were young, they made a mistake, they apologised and expressed remorse but they are still rejectable and they very commonly get rejected.

**Senator PARRY**—Thank you.

**CHAIR**—You raise concerns in your submission about section 45 of the act and in particular the commercialisation of visa processes in India and South Africa. Can you elaborate on that and tell us what your concerns are?

**Mr Hitchcock**—I understand that it is in India as well. I was interested to read in the department's submission the quite staggering numbers about their activities. They processed 22 million visa applications last year. In an effort to try to streamline processing they have contracted out to commercial organisations the lodgement of applications, the payment of fees, the lodgement of any supplementary documents, the submission of passports, the submission of medicals and the submission of police checks. There is an active encouragement that you must lodge with that commercial organisation. You are actively discouraged from having access to the Australian high commission. I do not see anywhere in the act that power to make a commercial arrangement about something that is a fairly fundamental process of lodging an application. I certainly cannot see it in section 45, which is the most relevant section.

There are two issues there. I respect the fact that the department has a processing issue and limited resources. There is also the worry that no person, in particular an Australian citizen or an Australian permanent resident, should be discouraged from dealing directly with an Australian

mission overseas. Finally, it increases the risk that somebody in a commercial organisation might do something wrong—may disclose the private information of an applicant. The department has significantly less control over a contracted organisation—I guess there are some notable examples of that—than they do over their own staff and their own locally engaged staff.

**CHAIR**—Talk to me a bit about the example of section 45 not being administered correctly in the arrangements between DIMIA and the government of Iran. You mention that in your submission.

**Mr Hitchcock**—Yes, we received anecdotal information from one of our members that that process was occurring. We have put it in there to indicate an example of what might happen or what is happening. If you require further information, with respect, I would ask that the institute be able to take it on notice. It may be that the member would not want to make any more information available. We would have to ask.

**CHAIR**—So instead of lodging their application directly with the Australian mission overseas, they have to—

**Mr Hitchcock**—You must lodge through an agent. The agent charges a fee. You can see from the information, which I believe to be fairly reliable, that the agent has an unfettered advisory role. It is another example of unregistered practice.

**CHAIR**—How is the Commonwealth enforcing any standards of conduct with not only these foreign migration agents but unregistered foreign migration agents?

**Mr Hitchcock**—A foreign registered migration agent comes under the provisions of the act. An unregistered migration agent at this point in time operating offshore does not. It is an issue that the department is addressing. It is just an example to show what can happen with this commercialisation, because these agencies charge a fee. The South African operation involves I think a 135 rand fee in order to lodge anything with their office. It then gets couriered to the Australian high commission.

**CHAIR**—How does the Commonwealth then actually enforce any standards of assessment or compliance by these migration agents?

**Mr Hitchcock**—One would presume that there is a contract and the contract would have compliance provisions.

**Mr Mawson**—Within the regulatory scheme for migration agents, there are a number of migration agents operating overseas. Those agents to be registered with the regulatory scheme must comply with a particular code of conduct. They are subject to complaints processing, if there are any complaints made of them. They are subject to the same audit processes that apply to agents operating onshore. Any agent who becomes registered, whether they come from Australia or overseas, has to meet a certain entry standard. Those processes are all part of giving consumer protection, which is one of the issues that the institute has. We seek further consumer protection for applicants, whether they be onshore, offshore or using a registered agent, who are subject to the same rules across the world within the Australian context.

**CHAIR**—The submission from the Community Relations Commission For a multicultural NSW—submission No. 232—is fairly comprehensive. It says that the New South Wales government have expressed concern at the apparent lack of an appropriate response framework to prevent unlawful or exploitative conduct by migration agents registered under the act. Do think the existing regulatory framework for migration agents is adequate? If not, where do you think the changes ought to be?

**Mr Mawson**—The current scheme has some weaknesses. However, as of 1 July this year, the scheme—which is self-funded; it does not take government money—increased the fees, which are subject to government control. That money is being used to further the education of consumers. It is also being used to bolster the complaint processing procedures. There have been some delays in the processing of complaints. The volume of complaints has remained constant but the processing throughput has certainly increased.

I do not have the numbers off the top of my head, but there have certainly been a large number of agents who have been found to be acting outside of the legislation and have been sanctioned. Those sanctions have been expanded. They were expanded last year to include a number of educative processes. Where an agent is found not to have been amenable to the educative process, they have their licence revoked. Once they have their licence revoked, we have anecdotal evidence that says that the simple fact that an agent has a sanction against them on the register—which many people from around the world look at on the web—whether it be a caution or a suspension, does have an immediate impact on their revenue stream. That is what people are looking at and that is what we would be seeking to—

**CHAIR**—Are you putting to us that, because a number of migration agents have been sanctioned or activity has been enhanced since 1 July, the framework or guidelines are adequate? Are they actually catching—if that is the right word—migration agents who are not acting appropriately?

**Mr Mawson**—Where the regulatory process is operating, the guidelines are adequate. The education requirements to get a licence to be a registered agent are currently in the process of being upgraded to a graduate certificate. There are a number of other requirements which are of a much higher standard than they were previously. There have been a number of significant achievements in taking many of the few unscrupulous agents out of the system. There has been a lot of work done there. There are still some unscrupulous ones. The regulatory side continues to go down that path to identify them, based on people making a complaint. That is part of the issue and part of the consumer education—that some of that extra money is being used to assist people to understand how to make a complaint and to make them more comfortable about making a complaint.

**CHAIR**—I thank the three of you for not only the submission but also your time and availability this afternoon to meet with the committee. It is much appreciated.

[4.26 pm]

**EVERSON, Ms Naleya, Researcher, A Just Australia**

**GAUTHIER, Ms Kate, National Coordinator, A Just Australia**

**HIGHFIELD, Mrs Trish Margaret, Advocate**

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

**Mrs Highfield**—I am an advocate for children in detention and have been for the last seven years.

**CHAIR**—The submission you have lodged with us for our purposes is numbered 184. Do you have any amendments or alterations to that submission?

**Ms Gauthier**—No amendments at this point.

**CHAIR**—I invite you to make an opening statement and then we will go to questions when you are finished.

**Ms Gauthier**—I would like to start off with a question for the committee: are there any of you faced with threats to your safety, dangers to the safety of your family and your children; with no queues to join in your country to seek protection, who would let a visa, a little piece of paper, stand in between you and the safety of your children? There is not one person amongst us who would not think of the safety of their family first and foremost. We would all save ourselves no matter what we had to do. Asylum seekers are people who tragically had to face that very situation and most of them eventually get refugee status in Australia. So we know that the clear majority of them are genuine and have not lied simply to exercise their rights under the human rights conventions that Australia has signed up to.

We have all heard the following statement a number of times: we decide who comes here and the manner in which they come. Indeed, by signing the refugee convention we did decide who could come here and the manner in which they could come. We said, 'If you are in danger, we will help you. If you make it here, we have boundless plains to share.' The immigration department's own statistics show that most of the people who came here by boat did exactly what we would do: they fled to safety. So when thinking about the application of the Migration Act with regard to asylum seekers and refugees, do not think about it in terms of asylum seekers who seek to exploit our generosity; think about it in terms of people who did exactly what you would do faced with the same choices.

I speak to you today with two voices: the voice of the refugee sector—experts from welfare agencies, NGOs and lobby groups of which A Just Australia is a part; and, just as importantly, I speak with the voice of the 12,000 ordinary Australian men and women who support our organisation and our campaign for a more just Australia—people who have said that this is not

good enough, people who have said like me that these policies are not just wrong; they are offensive. They offend the Australian sense of decency and fair play. They offend the history of this country in defending human rights and they offend our hopes for the kind of community we hope to pass on to our children.

Detention is an important issue when the conditions we keep people in are clearly inhumane and have been documented as breaking international rights standards. But of equal importance is the determination process for refugee visas—that is, the permanent outcome for asylum seekers. Do they get a visa or do they get sent back home? If we get that wrong they get sent back to persecution, imprisonment and in some cases they disappear or possibly are killed.

While it is important to monitor how we treat people during the process, do not get sidetracked or distracted by the issue of whether or not to detain. This visa issue is more complex and more difficult to solve. That is because of the very structure—the very culture—of the department that determines refugee status. There is overwhelming evidence that the processing of refugee related visas is so fatally flawed as to be entirely untrustworthy. There is evidence that the department has taken an adversarial stance against asylum seekers and applied the Migration Act in view of that negative stance instead of fairly and without prejudice. No case shows this quite as clearly as the case of the seven-year-old girl who was deported away from her father—an act that had no basis in international law and involved no application to the Family Court of Australia. Are you comfortable with a department that, with no lawful basis, takes a little girl away from her father without a chance to say goodbye, most probably never to see him again?

I would like to thank you for asking us to appear before the committee to give our views and I would also like to thank the Senate for conducting this inquiry in the first place. The Migration Act and the way it is administered are contentious issues of great importance to the debate on human rights and community values in Australia. However, I am unsure as to what the outcomes of this inquiry will be. Evidence has been presented for a number of years that asylum seeker policy—a particular focus of this inquiry—has failed in a number of areas. How many more such inquiries and hearings do we have to sit through before real changes are implemented? I mean changes more significant than giving an ambassadorship as a reward to the person who oversaw the department throughout this period of incredible failure.

It is time to stop trawling through this period of bad history and finding sticks with which to beat our political opponents. It is time to start fixing things. The solutions have already been proposed and can be put into place right now. All it takes is the political will to do it. This committee can be a part of that force for positive change. Focus on finding solutions, on moving forward and on finding better ways of doing things so that the crimes of locking up children, separating families and sending people crazy with despair never happen again. Much of the Migration Act is not just ineffective legislation or inadvertent policy failure; it is about how we as a nation legally responded to vulnerable people who came to us seeking help. That response so far has been at best inadequate and at worst inhumane.

**Ms Everson**—Before we answer questions, there are some issues which came up in questions from the committee to other witnesses today and in evidence given by the ICJ and Legal Aid representatives in relation to processing, as well as some other issues in relation to detention which are additional to our written submission. There are some points I would like to make. The

first one, in relation to the processing of asylum seeker application claims, is the adversarial nature of both of the primary stages of application processing. It is difficult to pin down, but it is fairly evident, certainly from the stories of the people who are going through the process and from some of the cases which are exposed through judicial review.

I worked as a migration agent last year and there is one case in particular I want to make some points about. By the time I represented the applicants, the case was at the Refugee Review Tribunal for the third time after two remittals from the Federal Court—I think the second one was from the full Federal Court. Unusually, in this case the judges of the full court of the Federal Court, apart from addressing the judicially reviewable errors, also addressed the particular findings of the tribunal which were not necessarily relevant to judicial review. They went through this decision fairly systematically and rejected the reasoning behind the tribunal members' decision. When it came back to the tribunal, although the member did accept them as refugees, it was on new grounds which were completely separate from the previous claims. In its written decision, the reasoning of the tribunal was exactly the same as in the previous decision, which had been thoroughly negated as illogical by the Federal Court.

There were two issues in this case. One was the disregard for the weight of the Federal Court justices' decision. We have made an additional submission on the treatment of psychological evidence and the effect of psychological illness on the way that applicants give evidence during the process, which is a significant issue. The second issue was the way that they dealt with a report by a psychiatrist which was submitted in relation to one of the claims; in the decision it was not even referred to. In fact, issues which had been specifically addressed by the psychiatrist were found against the applicants, while ignoring in totality the evidence which had been given.

This is fairly anecdotal, I know, but it does highlight what is a significant problem and I think it is fairly fundamental to the problems associated with the initial stages of processing. It is adversarial. We are not talking about an independent inquisitorial process. It is the same with the primary stage as well. One example is of a member of the department, I understand a decision maker who spoke on ABC television, who was deidentified. He did say that there was a quota system. Decision makers were expected to accept and reject a certain number of people and decide a number of cases in a certain time or they did not stay in that position. Evidence has come up from time to time from individuals in relation to this. Again, it is difficult to pin down. But I do not think it should be underestimated in terms of the administration of the sections of the act which deal with decision making.

In relation to judicial review and the department's litigation section, I am aware of a number of cases where the department have waited until the last moment in cases where the application made by the asylum seeker was fairly well substantiated and likely to succeed, I guess. They have waited until the day of the hearing to withdraw and sign consent orders. One in particular also relates to 417 and addresses a number of issues. A woman and her family were refused by the RRT. All claims were accepted that she would fear persecution, that she would probably be killed, but it was not within conventional grounds, or they believed so at the time. It was in fact later overturned. I am not sure whether anyone is aware of the issues with women and domestic violence, but it was decided in a case in the High Court called Khawar. The RRT recommended in relation to this case that the minister consider granting a visa under section 417, which I understand is fairly unusual. They do not often do that, and they did in this case. It was

apparently totally ignored. It was not until two years later, when she found a way to appeal the decision, even though it was out of time, that they finally backed down. On the day of the hearing it took about five months until it was finally going to court. Since the decision in the High Court it was quite clear that the RRT's decision was wrong on the matter of refugee law. But it did take, until the day of the hearing, five months later—and after about 3½ years in detention—for them to say, 'Whoops, yes, we're going to give you a visa.'

In relation to detention, we did refer in our submission to a case called S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs. I would like to draw your attention to that case, although we have not submitted the full text of the decision, just referred to it. It does have quite a lot of evidence in relation to departmental procedure on health. The final point I want to make quickly is in relation to section 273 of the act, which allows regulations to be made governing the way detention is administered. I think that that is a great solution and it is an available solution. I do not see why it should not be implemented. In fact, there has been much comment that regulation should be made which would prevent a lot of the abuses which have occurred in the system. Thank you.

**Senator KIRK**—Thank you for your submission. At the outset, I know it has been referred to us before, but do you have a citation for the case of S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs?

**Ms Everson**—Sorry, I only have a medium neutral citation with me.

**CHAIR**—It is here.

**Senator KIRK**—We have it. I thought I would look at it because you suggested it was worth looking at. You seem to suggest in your submission that one of the possible reasons for the inconsistency, and the like, in the RRT process is the strain that is being placed on the members as a consequence of the various amendments to the Migration Act. Is that what you primarily attribute their inconsistent decision making to or is it other factors, such as structural factors, that cause it?

**Ms Gauthier**—There are a variety of factors, including the constant updating of and changes to the regulations under which they are making their decisions. One of the main reasons there are so many inconsistent decisions is that the use of country information is not properly regulated. So the information under which each individual person in various tribunals around the country is making their decisions is different. Because you do not have a sufficient internal review process of the tribunal's decisions, and it is a single member panel, you are going to get inconsistencies.

There are a whole variety of factors. There are different levels of training for people. Because you have single member panels, people are allowed to bring their preconceived ideas to bear on cases. There are people who have been there for quite a while and people who are relatively new. So there is a whole variety of reasons why there is inconsistent decision making.

**Senator KIRK**—In relation to the country information, you said that different people use different information. How is it that they access this information? Is it provided to them by the department? I would also be interested to know how people such as you manage to access this same country information. Perhaps you cannot do so; how does it work?

**Ms Everson**—As the representatives of Legal Aid submitted, the use of country information is fairly selective, often in favour of the decision that they think is the right one. There are discrepancies in relation to specific things that different country information talks about—for example, the UK Home Office might have different advice or knowledge about some group in Afghanistan and what they do. The information that the tribunal use comes from various bodies. One particular source that they use is reports from the Department of Foreign Affairs and Trade. I think advocates do not have access to that database but some of it does become available. Other information is available on the internet, such as decisions from the Canada refugee board, and obviously most of the information from the US State Department is on line.

The major sources of country information which are used quite regularly are the US State Department and DFAT. There have been quite a lot of problems with the accuracy of DFAT information. It some cases it seems to be biased in relation to a political position on a situation in particular country. The situation of Christians in Iran is a good example of where DFAT information was used for a long time which had a very flimsy basis and which was later proved wrong.

**CHAIR**—What was that example?

**Ms Everson**—It related to the persecution of Christians in Iran. There was a DFAT report which was based on an interview with one person from some church. He said that Christians were not persecuted in Iran, on the basis of which a great number of decisions were made in relation to Christians in Iran. Later a member of that church was executed but DFAT were still using the information. So advocates and migration agents had to submit the information that a member of the church, which was saying that it was all fine, had actually being executed. So the information is not always reliable and sometimes they use information which is quite old until new information is brought to their attention by migration agents. They do not always go out and look for the most up-to-date information, I believe.

**Senator KIRK**—That is extraordinary, especially if you indicate that different members are looking at different information and sourcing it from different places. I would have thought that the information might not be 100 per cent up to date but at least everyone would be using the same information. That would be a good start.

**Ms Everson**—It is largely decisions on Iran and Afghanistan that I have looked at and I have not seen many where they use completely conflicting country information. But, as I said before, they seem to choose the information that suits the position they have come to, even where other information might be available on the issue.

**Senator KIRK**—It would be better if there were an independent sourcing of this information, it would seem.

**Ms Everson**—Yes.

**Ms Gauthier**—Certainly, one of the problems is that, when new country information comes out, they then do not review decisions they made recently using the old information. That is where with a lot of cases, say, from Afghanistan there has been the problem of the high rate of rejections and then reappraisals. Some of those, having been through the process in previous

months, were at different stages and were caught by the reappraisals. It was not until they forced their cases to be reopened—unfortunately by some of them going on a hunger strike and bringing themselves to the notice of the public—that they were reassessed. Instead, the department should have been proactive and said, 'We are aware of this new information; we are aware of cases where we made incorrect decisions because at the time we did not have up-to-date information.' But they did not take that proactive step.

**Senator KIRK**—As has been said, the onus is on the applicant to take the action.

**Ms Gauthier**—Exactly.

**CHAIR**—You are suggesting that, if the situation changes in a country, that does not automatically trigger a response in DIMIA to review or reassess cases?

**Ms Gauthier**—No, it does not. It is entirely up to the individual applicant. Many people in detention come to the notice of legal advocates, so they are more likely to get assistance. Someone living in the community on a bridging visa is not necessarily going to come to anyone's notice to be informed that there is new information with which they can reapply for a visa.

**Ms Everson**—The only process by which they can reapply—which you possibly understand—is under ministerial discretion pursuant to 48B of the act. There have been cases regarding groups of people where new information has been available and it has taken over a year and some effort on the part of advocates to convince the minister—I understand it is a fairly lengthy process anyway and perhaps can be credited partly to that—that the situation in that country has changed.

**Ms Gauthier**—A couple of cases come to mind with Afghanistan. As you may be aware, there has been a lot of difficulty determining national status—whether someone comes from Afghanistan or is Hazarah from Pakistan. A number of people who were in detention for quite a number of years were rejected by both case officers and the Refugee Review Tribunal saying, 'We do not believe that you are from Afghanistan or that you have spent time in Pakistan.' These people had gone through their judicial review and the situation in Afghanistan had changed to allow us to deport them there, but they were found to have no papers identifying that they came from that country.

Australia gave $100,000 to the Afghan interim government to set up an ID checking unit in Afghanistan, which would send people into the mountains. That ID checking unit found, I believe, that four of these people did indeed come from Afghanistan. So the government was fully prepared to deport them back to a country where we had said that they had not come from in order to reject their refugee claim. It was up to advocates to go to court to halt the deportation proceedings and say, 'Hang on a sec. Either they are from Afghanistan and are refugees, or they are not refugees and they are not from Afghanistan and why are you deporting them to that country?

**Ms Everson**—Perhaps I could give another quick example. A big failure in country information occurred with Iraqis who had spent some time in Syria. A couple of years ago, a number of Iraqis arrived and were accepted as refugees from Iraq as they would be persecuted in

that country, but they were refused protection visas on the basis that they could return to Syria. When the department tried to return them to Syria, it became evident that Syria would have nothing to do with them—and that was what these people had claimed. It was something like three years later that actions were taken in court where people were released for a short time, until the High Court overturned the ruling and said that they could not be removed. These people sat in detention for another three years because the department had the wrong information on which it made the decision that they could return to Syria. Obviously, wrong country information can have devastating effects and there is no process for a decision to be changed if new information becomes available.

**Senator KIRK**—So there can be no review on the merits of the facts of the case.

**Senator NETTLE**—Thank you for your submission. I have lots of questions on bits and pieces of what you have said and which I am not quite sure about so I will start at the top. Ms Everson, you were talking about an independent psychiatric assessment in the Refugee Review Tribunal and I have written down that I thought you said that that assessment had not been accepted by the tribunal and in fact it had been used against the applicant.

**Ms Everson**—I am sorry, could you repeat the last part of the question?

**Senator NETTLE**—You were talking about a psychiatric assessment that had been submitted to the Refugee Review Tribunal.

**Ms Everson**—Yes.

**Senator NETTLE**—I thought that you said that the information in the assessment had been used as part of an argument against the applicant receiving a favourable decision.

**Ms Everson**—No, I am sorry; perhaps I was not clear. There was an assessment which supported the claim. The tribunal ignored that assessment and made findings which were directly in contradiction with the finding of that assessment, which was an expert opinion. The findings made by the tribunal were to refuse the claim, whereas the assessment which had been submitted, and which the tribunal ignored, substantiated, from an expert point of view, the person's mental state in relation to their experiences. Is that clear?

**Senator NETTLE**—Was that an example of the RRT rejecting a psychiatric assessment?

**Ms Everson**—Yes, they ignored it, basically.

**Senator NETTLE**—Sorry, I was not clear about that. There was another case that you were talking about where the RRT recommended a 417. I am sorry, I did not get all that you said. You said that something was granted. Was a 417 granted on the day of the trial?

**Ms Everson**—Yes, I understand that consent orders were made to drop the application because a 417 was granted. It was not remitted; it was just that a 417 was granted. They were clearly refugees. On the day of the hearing—in fact I think it was on the court steps—the government solicitors spoke to their counsel and told them she was getting a 417.

**Senator NETTLE**—What time period before hand had the RRT recommended that the minister use her discretion?

**Ms Everson**—It was something like 2½ years earlier.

**Senator NETTLE**—Then on the day of the trial—

**Ms Everson**—She did not lodge an application in the court in relation to the RRT decision because there was some doubt and it had not been finally decided in court whether people out of time could make applications in relation to RRT decisions. The case of S157 in the High Court decided that they could.

**Ms Gauthier**—She was also a very vulnerable single mother of three children, one of whom had cerebral palsy. This child remained in detention with cerebral palsy and with no adequate medical health care for an additional 2½ years because the government did not act in time. The government knew that this woman was a refugee and that her children should have been granted status, and they withdrew their case against her in court on the day of the hearing.

**Ms Everson**—Further to that, it is also quite clear from their withdrawing that it was because of the precedent that the case would set. It was a very strong case. It was stronger than the case which has been decided in the High Court in relation to women being able to be considered as a social group in a country—whereas the Khawar case had only decided that in relation to women suffering domestic violence. This was a case which seemed as though it would establish a broader precedent than had been previously established.

The woman had also made, I think, between seven and nine written requests to the minister to exercise 417. The minister was fully aware and there had been submissions from the disability advocacy counsel in Sydney. I am sure they were fairly well on notice about this family. The Department for Community Development—the equivalent of DOCS, in Western Australia—had also recommended the release, some two years earlier, of the mother and the children.

**Senator NETTLE**—You also gave an example about the identity unit in Afghanistan, which I did not quite understand clearly.

**Ms Gauthier**—Yes, the ID checking unit.

**Senator NETTLE**—Were you talking about people being deported to Afghanistan or to Pakistan?

**Ms Gauthier**—To Afghanistan. When they went through the refugee determination process they were found not to be from Afghanistan. However, when it came time to deport those people the government spent $100,000 setting up the ID checking unit. It found that some of these people did indeed come from Afghanistan, verified their stories and then put into play the process of deporting them. It did not occur to anybody to halt proceedings and say: 'Hang on—they were telling the truth the whole way along. They are from Afghanistan.' It took the deportees' lawyers to halt the deportation proceedings in court. Those people have since been granted refugee status, but had it not been for the quick-acting lawyers, we would have deported them back to Afghanistan.

**Senator NETTLE**—That makes sense. Well, it does not make sense, but I understand the situation you have described!

**Ms Gauthier**—The story makes sense; the process does not make sense.

**Senator NETTLE**—In your submission you talk about the excision of parts of Australia from the migration zone. What repercussions of the excisions have you experienced in the work that you are doing?

**Ms Gauthier**—For any future onshore asylum seeker boat arrivals we have essentially created, through the excisions, a mandatory Pacific solution. It will be conducted, presumably, on Christmas Island, which is excised, in the detention centre that they are upgrading at the moment. We have removed anybody's ability to make any kind of legal appeals. The difficulty—and again we have found this with Nauru—is that there is no access for medical specialists to go there. They will be able to keep human rights advocates out. They will be able to keep lawyers out. It will be very difficult to gain access to these people to make sure that they are being treated humanely.

On a broad level, I am absolutely astounded that the government would do something like the excision. It is a backdoor method of dodging our responsibilities under the refugee convention. I would suggest that if the government do not want to adhere to the responsibilities that we have signed up to, they should withdraw from the convention. That is essentially what they are doing with this excision. We are saying that we are going to remain signatory to that convention but that we are going to remove any possibility that we will ever have to live up to it. That does not live up to the history that Australia has had in being a party to drafting the major human rights standards that we all work towards and that we all work with. Certainly, any new arrivals will be kept offshore. They will not have legal access or medical help. Advocates will not be able to get to them. I feel it will be a very dire situation for them and their rights.

**Senator NETTLE**—You also talked about the case of a gentleman whose seven-year-old daughter was removed whilst he was in the management unit at Baxter.

**Ms Gauthier**—Yes.

**Senator NETTLE**—Again, reading about it, I was confused. Can you help me to understand what the government's argument was for the removal of the child?

**Ms Everson**—I will summarise it. The girl had been in the custody of her father since the time she arrived in Australia, which was something over three years prior to when she was removed. Apparently, the mother did gain a court order in Iran. This came up. Apparently there was a copy of it in Federal Court proceedings subsequently—after her removal in relation to duty of care. The court order had apparently, according to counsel in that case, expired three weeks prior to when they removed the child. I do not know whether that was their justification for her removal. I cannot see how, under Australian law or international law, an order from an Iranian court that the other parent have custody where the parent who had custody of the child at the time had had custody since she was two—and custody in Australia—could apply. It clearly circumvented all processes.

The major question for us, apart from the inhumanity of tearing a child away without telling the father, is where did they have the power to do it? The department do not have power to make decisions about which parent should be granted custody, which is essentially what they did. The father clearly had custody of the child. If he had been asked he could have provided evidence of a court order, which we later got a copy of, from when the child was two when he was granted custody. They gave him no notice. They made every attempt to conceal, and were effective in concealing, from him the fact they were going to remove this seven-year-old child from him. It was quite extraordinary. There are two questions. Why on earth would they favour one parent against another and where on earth did they think they got the power from? It is a clear indication of the arbitrary and absolute power they think they have.

The reason we have asked Trish Highfield to give evidence with us is that she had contact with that child prior to her removal, when she was quite a support, and after her removal. She can give evidence of that experience.

**Mrs Highfield**—Thank you for the opportunity to speak. I gave evidence in 2001 to the Senate Foreign Affairs, Defence and Trade subcommittee on human rights on children in detention and the HREOC report. I also gave evidence to the Palmer inquiry. As an early childhood professional, if I saw the same level of suffering and distress in the children in my service that I have seen over seven years as an advocate for children in detention and I failed to make mandatory notifications—I am a mandatory reporter—then under the law of this land I would be prosecuted. Yet I have made notifications for children in detention and they have gone nowhere. I have not been able to keep children physically and emotionally safe. This is what I needed to say as a member of a social justice and early childhood group, Defence for Children International, and ANCORW, the Australian National Committee on Refugee Women.

In my efforts to keep Massoumeh physically and emotionally safe during this time I failed that child. As someone who has worked for 30 years with children it is not a very nice feeling to have to live with. If you can bear with me I will go through the chronology of what happened. I had been in contact with Massoumeh for a year, having been introduced to her by Naleya. Naleya had said that this little one needed some help and support. So I regularly rang that child, usually every Friday. I rang at our usually appointed time and I found a highly distressed child at the end of the phone. She was very traumatised and she was not herself. She had already been suffering greatly in there.

I asked her what was wrong. I could sense something was terribly wrong. She said, 'My daddy is sleeping. He has not been eating for many days now.' I said, 'Are you eating, are you going out and getting fresh air and playing with other children?' She became very angry. She said, 'I know about fresh air, I know about playing with other children but I have to look after my daddy.' I said to her, 'Are you eating? You must go to the dining room for food.' I immediately conjured up this image of a child holed up in a room with a father who was on a hunger strike. I could hear him speaking loudly in the background. I said, 'Please, darling, put your daddy on. I can hear him speaking. He is awake now. Can I speak to him?' She said, 'He is not awake. He is sleeping. He is talking when he is sleeping. It frightens me.'

She was holed up in a room for 10 days with food being brought her—a little seven-year-old child—and she was with a father who I assumed was delirious. That is what it sounded like to me. My husband, John Highfield, who was also very close to that child, took the phone and

heard the same thing. We panicked. I talked to Massoumeh for a long time to try to calm her and to reassure her, in my mind realising that I had to get help really fast. I was already in contact with the FAYS team, the crisis team that went into Baxter. I had already been speaking to them at length about Massoumeh. She had an ongoing problem with chronic constipation, which caused her agony. She was a little girl suffering so much. I rang Steve Davis at the department of immigration, whom I had had ongoing discussions with about children in detention. I said, 'This is what is happening: he needs to be hospitalised and she needs psychological support now.' Instead of those things happening for that child, they sent in the team to remove her father violently. She jumped on the back of guards to try to stop them. He was treated very brutally. She was put into medical. An eyewitness, another female detainee, told other advocates that she was outside the room begging little Massoumeh to come out to try to save her from what was happening, but Massoumeh was trying to protect the father she loved, who she knew was very ill. They dragged him to management.

I was not able to speak to her for a couple of days. When I finally did, she was in medical. She had the most shocking cold. She could hardly speak. She was already ill, she was suffering the trauma of the violent separation from her father, and he was banged-up in management—it was so painful. I notified child protection. It was so hard to help that little child. When I rang I could not make contact with her again. I went back to child protection and they said that whenever she needed to speak to me and I needed to speak to her we could make contact. Greg and Trina Wallace—management at Baxter—blocked that. I did not know what was happening to little Massoumeh. I am not someone that will be stopped. I have tried to keep children safe in detention and it has been a living nightmare. As senators, you need to know what it has been like to try to help little children. Through the HREOC report we now all know of the shocking damage done to these children. I will never forgive his government. I will never forgive John Howard, Phillip Ruddock and those in a position of power who remained silent while these children suffered. And suffer they have.

Finally, after screaming and yelling, Trina Wallace finally allowed me to speak to little Massoumeh. She was so traumatised. All she would answer to me was, 'Yep' or 'Nope'. She was terribly worried about her father. That child was deported without father and child ever being allowed to say goodbye or to hold each other one last time. He had been her sole carer for those years. We could not find her. I rang everyone. Finally, I rang Steve Davis and he got back to me at eight o'clock that night. He said, 'All I can do is read you a press release: mother and child have been reunited in Iran.' I contacted the father, who was in management, and he was a broken man. I said to him, 'Please, can I have your wife's phone number? Will she speak to me? Will she allow me to speak to Massoumeh?' I rang the mother, who had very little English. I tried to explain who I was. She said, 'My daughter speak your name. Please, you speak with my daughter.' I spoke to little Massoumeh, who was so traumatised she could hardly speak. She was with a mother she hardly knew. I said, 'My darling, we did not know where you were.' I felt like I had abandoned that child. John and I had a very close, loving relationship with her, which continues to this day; I have the same with her mother and her father, who is very ill.

I said to Massoumeh: 'My darling, we did not know where you were. We were so worried about you. We did not know where they had taken you.' She said, 'Trish, they told me it was a secret. I couldn't tell anyone.' That is the language of paedophiles! How can people in a position of having a duty of care to children do this to children? If it was to be done—and I am not here to argue the legal implications of this—why couldn't it be done differently? Why couldn't it be

done humanely? Why couldn't that mother have been brought to Australia for mother and child to get to know each other again and form an attachment, a relationship, and why couldn't that child have been allowed to say goodbye to the father she loved, the father she tried to protect and who loved her? Is that too much to ask of a civilised society? I no longer believe this is a civilised country. Civilised countries do not cage children in detention until they lose their minds. We have had children as young as 10 and eight in detention centres with nooses around their necks, such has been their despair in these shocking camps.

Little Massoumeh took so long to form an attachment to her mother. I regularly made phone calls and so did my husband, and we still do. Her mother said to me, 'I cannot understand this child. She is so damaged. She does not know how to play with other children. Please, Trish, can you get me some psychological help?' Zachary Steel, one of the heroes of the whole shocking state that has happened in detention in our country, the man who has done so much to help people—thank God for Zachary—organised psychological advice from this end for that little child. We are deporting children to countries with no infrastructure, no mental health support services and no-one who understands the damage done by detention. There are so many that we have just thrown away after years of being locked up, and no-one will ever know what becomes of them. But I know about little Massoumeh and I know what she is going through. It took many months for her to even settle down.

An Iranian-Australian, a beautiful friend, went to visit there. She had lunch with Massoumeh and her mother after many months. She said: 'They were sitting at the lunch table. Suddenly Massoumeh stared into the distance and said, "Is it day time? Or is it night time?" and her mother wept.' So disturbed was this little girl. I finally felt there was some relief in sight for that little girl when she said to me one day when she was a little more cheerful: 'Trish, today mummy and I went swimming. Do you know what we did? We had underwater kisses.' That was the first time that I felt maybe she is going to be okay; she is building a relationship with this mother. I will never forget that day.

Massoumeh is at school now. She is beginning to form friendships. But let me tell you another thing. The very first night that I spoke to her, that first conversation, after asking about her daddy, do you know the second thing she said to me? 'Trish, tell Keely and Amanda that I'll never be coming back.' She told me that with such urgency. Keely and Amanda were two little children at the school she had finally been released to attend in Port Augusta. She said: 'Tell them I'll never be coming back. They'll wonder where I am and what happened to me.'

The moral development of children in our community has been compromised by this policy. I have given talks over the past three years to children in schools all over New South Wales. I have had children coming up to me, weeping, saying, 'How could they do this to children just like us?' Members of my Social Justice in Early Childhood Group—we are talking about four- and five-year-old children—at the time of the Woomera riots, were saying, 'Will they do that to me? Will they come and get me? Will they lock me up behind the razor wire like that?' It is not just these children that we have punished; it is our own.

As little as three weeks ago Massoumeh's mother said to me that she calls her 'Matin' now. I had a nice conversation with Massoumeh and so did John. She was happy. She had some cousins staying with her. I said to her mum, 'We had a lovely chat. She's relaxing now. She's beginning to heal.' But I know deep in my heart and in my mind that there is so much that will recur

forever for that child. Her mum said, 'Yes, Trish, she's getting better. But I need your help. There are still days when she stares into nothingness. She looks so sad. She looks like a very old woman.' Her mother said, 'I don't know what she's thinking about. I don't know what's in her head. I don't know what happened to her.' She said, 'It's now time for me to find out. I need you to send me all of the material about what happens to children in your country in detention. It will make me sad.' I said, 'Fariba, it will make you weep. I am really sorry to have to send this to you.' She said, 'But, Trish, I need to know. She's my child and I need to know what she suffered.'

**CHAIR**—Mrs Highfield, can you tell us where that little girl's father is now? Is he still in detention?

**Mrs Highfield**—He was kept in isolation for about a month, or it may have been six weeks, after she was deported. I am sorry, I do not have all my documents with me. I was not aware that I was going to have this opportunity today—thank you very much for giving it to me. He was then taken to Maribyrnong. He was in Maribyrnong for a long time. He was released about six weeks ago. He is living with an advocate who has been a wonderful support to him in Melbourne. He is still suffering terribly because of all the medication—the medication that they are all always on. If you visit a detention centre, you can smell the medication.

**CHAIR**—Thank you very much for telling us of your experience. I appreciate how difficult it is for you to be here today to tell us that story. It is on the public record now, so perhaps you can take some comfort in the fact that it is in the federal parliament's *Hansard*, which will be available for everybody in this country and everyone internationally to read.

**Mrs Highfield**—Thank you very much for the opportunity.

**Ms Gauthier**—I would like to go back quickly to the question raised before about the excision and how that will affect people. If any more children arrive, this is what will happen. The Migration Act has been changed and says that the detention of children is a measure of last resort, but the Migration Act does not apply to those people who land in the excised zones. Any child who comes here now will experience what happened to Massoumeh—that is, being in detention and being deported unlawfully. That is going to happen again. We need to repeal all the excisions. We need to make sure that, if anybody arrives here and requests asylum, their legal rights and their human rights are covered. We need to make sure that kids are no longer treated in this way. If we do not repeal the excisions, that is exactly what is going to happen.

**CHAIR**—We note what you are saying, but you would know that legislation and those regulations came before the Senate many times before 30 June and they were not enacted.

**Ms Gauthier**—Yes.

**CHAIR**—All that has happened since 1 July. I have Christmas Island and the Cocos Islands in my electorate. I am from the Northern Territory. I appreciate the great work that A Just Australia does but, just to give you a snapshot of what is on Christmas Island at the moment, there are currently enough demountables to house 300 asylum seekers. There was a temporary camp there that the Vietnamese were in. There are enough demountables to hold 300 people, who, I am assuming, will live in them while they build the detention centre. There are 160 single units that

have been constructed to house people like the GSL staff, and there is a cleared area on Christmas Island, probably about the size of three or four football fields, where the detention centre will be built. It is due to house 400 people when it is finished.

Also, in Darwin on the corner of the Stuart Highway and Amy Johnson Avenue, there are rows and rows of demountables with fencing around them. The barbed wire fence has been taken from the top and put at the bottom in recent years. They also are able to hold 400 people. To this day, not one person has been housed in them. I have never, on behalf of the Labor Party, been able to get this government to articulate what it intends to do once the centre on Christmas Island has been completed.

**Ms Gauthier**—There is nothing much more to add to that. It is an open question: why do we need all of these facilities? Why do we keep building these detention centres when all the indications, all the research, has shown that this is a failed policy? It has failed economically. It is economic irrationalism to spend this amount of money detaining people. It does not deter people from coming to Australia and it is unconstitutional as a policy to do that anyway. The welfare outcomes are appalling. So I am completely at a loss to find any rational explanation.

**CHAIR**—Have you noticed any changes—insignificant or substantial—since the Palmer report was handed down?

**Ms Everson**—I am sure you all heard about the competition for a new slogan. The department had a competition for a new slogan to present a new image—a friendly, cultural image—to Australia.

**CHAIR**—We do know that there are a few changes being made to the Baxter sporting facility and a new entrance.

**Ms Everson**—Isn't that to do with it being used for the Army? Apparently they said they were going to use Baxter as an Army site.

**Ms Gauthier**—The question is not whether or not the conditions inside the fences are more humane. The question is about keeping people inside the fences at all. The process is so arbitrary and of such an indeterminate period of time that any conditions in which you detain people are going to be inhumane.

**CHAIR**—That is why I asked if you have seen any notable changes. Palmer makes some very damning comments about the culture of the department. With all due respect, it has only been a couple of months since that report was handed down but are you starting to notice a change at all?

**Ms Gauthier**—There are some NGO-DIMIA meetings that we attend every six weeks and there has been some indication from the RRT that they are going through and looking at their processes and trying to find ways to make them more consistent. My personal view is that the whole system has been set up for so long that any changes are going to be tinkering around the edges. The department itself should consider the fact that refugee determination is not a migration issue and perhaps it should not be handled by the department of immigration. It is a human rights issue and perhaps we should put it in the hands of our human rights commission.

**CHAIR**—Who goes to these regular meetings and what do you talk about?

**Ms Gauthier**—Actually, not a lot happens. I fail to see any significant change on a policy level. They are attended by state level DIMIA managers and an RRT manager and, on the NGO side, groups like Amnesty International, A Just Australia, Refugee Advice and Casework Service, and the Asylum Seeker Resource Centre. It is really state based issues that we talk about.

**CHAIR**—So a lot of these issues would have been brought to DIMIA's attention.

**Ms Gauthier**—Yes, individual things such as gaining access to detention centres for advocates, certain things happening in detention centres, the kids having trouble going to excursions, questions of what the new policy is on the seven-day rule and things like that.

**CHAIR**—Do you feel they get addressed when you raise these issues?

**Ms Gauthier**—They get answered, which is very different to being addressed.

**CHAIR**—Yes. We do not have any more questions.

**Mrs Highfield**—Could I just add something?

**CHAIR**—Yes.

**Mrs Highfield**—Earlier, with the evidence about the report *Deported to danger*, the committee was asking—I think it was you, Senator Parry—if there was any corroborating evidence out there. Certainly the book by Dave Corlett, *Following Them Home*, corroborates that evidence, and Dave Corlett actually met Massoumeh and her mother. He did not write about them, but he certainly met them. His book corroborates a lot of the evidence in the report *Deported to danger*.

You also asked if there had been any change. I am with a group of advocates that has had a meeting with Bob Correll from DIMIA, and we are having another meeting with Bob Correll in about a month. My husband and I were speaking with a detainee in Villawood on Thursday night who has been in a very bad psychological state. He had been detained for over five years in Curtin and Baxter and now Villawood. We were so deeply distressed on Thursday night at his mental state—he could hardly speak and was very ill—that, on Friday morning before I went to work, I rang Bob Correll's office and he came out from a meeting and spoke to me. I stated the situation with that young man and I said that something has to happen today—not tomorrow, today—because we feared for his life.

In the meeting I had with Bob Correll exactly a week ago, I said to him that many of us have had instances—and I have had them with children—where children have rung up to say goodbye to us. A young boy in Villawood had rung up and said goodbye because he was intending to take his life. I had nowhere to go with that information but to Zachary Steel, and Zachary Steel actually saved that child's life and those of many other children. I think—I hope—Bob Correll understood that when I rang him on the Friday morning, and he rang me—

**CHAIR**—Can you tell us who Zachary Steel is? Is he a psychologist or a psychiatrist?

**Ms Everson**—He is a clinical psychologist.

**CHAIR**—I see. He is somebody you work with here in Sydney, is he?

**Ms Gauthier**—Yes. We put his paper on the psychological evidence at refugee determination status in as an additional submission, which I think was No. 186.

**Senator NETTLE**—He is from the University of New South Wales.

**Mrs Highfield**—And he received a human rights award for his extraordinary work.

**CHAIR**—So that gentleman you alerted the department to—what has happened since? Is this last Thursday you are talking about?

**Mrs Highfield**—Yes, and Bob Correll rang me at work. I had spoken to the young man on Thursday night, I rang Bob Correll on Friday morning and he rang me at 2.30 on Friday afternoon to say that the minister was signing off on a humanitarian visa for that young man. I hope that this will continue, because we have all been in a position where we have known people who were so serious about suicide. If I could just add one more thing—and I really do need to—

**CHAIR**—Just before you do that, could I just ask you a question?

**Mrs Highfield**—Sure.

**CHAIR**—The evidence you are putting to us today is that, when the situation gets that bad for detainees, the only way you can get respite for those people is to ring the deputy secretary of the federal department?

**Mrs Highfield**—That is only something that has happened in the last few weeks because I yell and scream—

**CHAIR**—But, other than that, advocates have nowhere to go. When things get desperate, you have to ring the deputy secretary?

**Mrs Highfield**—When things get desperate, people have had nowhere to go. For a long time I had Dr John Nation's mobile number, which I got through clandestine means.

**Ms Everson**—That first secretary thing is a really clear example. They wait. Someone had to take it to court to get these two very ill people to hospital. It was a battle, and the department fought it.

**CHAIR**—Yes, we have heard recurring stories of that in evidence this week.

**Mrs Highfield**—On behalf of all of us who have been working all these years as advocates, I would like to say that, without the extraordinary professional help, courage and personal kindness of Zachary Steel, Dr Michael Dudley, Dr Louise Newman, Dr Bijou Blick, Dr John Jureidini and Dr Sarah Mares, we would have dead children. That is not hyperbole. We would have dead children in detention. I went to the locked ward of Glenside Psychiatric Hospital last

year and saw a mother who was broken down to the point where she was mute and could no longer walk, and I saw her damaged, frightened little children.

A psychologist was employed by the department of immigration to, I believe, discredit the work of Dr Louise Newman and Zachary Steel. He was paid $30,000 plus GST, and he has no track record of work in the department of immigration. Sorry, I am not sure about the department of immigration, but he has no track record of publishing papers on detention or the damage caused by detention; I believe his background is in insurance. All that money was paid to him to discredit two people who have international reputations and extraordinary reputations in this country for their work. I would like that put on the record. I was disgusted, because Zachary Steel saved the life of one boy I know. I know Dr Louise Newman and her extraordinary work, and Dr Michael Dudley and Dr John Jureidini have done the same.

**CHAIR**—We do not have any other questions. I thank you for the submission from A Just Australia and for making yourself available to appear before the committee this afternoon. It is much appreciated.

**Mrs Highfield**—Thank you very much for the opportunity and for your patience.

**CHAIR**—I thank witnesses who have given evidence before the committee today.

**Committee adjourned at 5.32 pm**