COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

Reference: Administration and operation of the Migration Act 1958

FRIDAY, 7 OCTOBER 2005

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SENATE

LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

Friday, 7 October 2005

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

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

Senators in attendance: Senators Bartlett, Crossin, Fierravanti-Wells, Joyce, Kirk, Ludwig and Nettle

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 9.01 am

COLLAREDA, Ms Rebecca Anne, Acting Director, Performance Audit Services Group, Australian National Audit Office

LACK, Mr Steven William, Executive Director, Australian National Audit Office

MEERT, Mr John, Group Executive Director, Performance Audit Group, Australian National Audit Office

WATSON, Mr Gregory John, Senior Director, Australian National Audit Office

CHAIR (Senator Crossin)—This is the fifth hearing of the Senate Legal and Constitutional References Committee 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 terms of reference for the inquiry have been advertised and are on the committee's web site. Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses, further copies of which are available from us. 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 in camera evidence.

I welcome representatives from the National Audit Office. The Audit Office has lodged a submission which, for our purposes, is numbered 99. Do you wish to make any changes or additions to the submission, or do you have any supplementary material you want to give to us?

Mr Meert—No.

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

Mr Meert—Because the submission was based on four recent audit reports, if the committee wishes, we have a short summary handout which may be of use; it is a summary of our submission, highlighting the key points.

CHAIR—Thank you. That would be very useful.

Mr Meert—The four audits we referred to in our submission identify a number of key elements relating to administration by DIMIA. It is important to understand that the Audit Office was really reviewing DIMIA's administration of legislation and policy. The key areas we reflect on in those reports relate to the department's ability to monitor and report on its operations. For example, there is a lack of definition, a lack of measurement and poor record keeping, especially in the last report, on lawful, appropriate, humane, effective or efficient detention. In the report, we also talk about costings, the routine reporting on costing variations, the pricing of the contract and poor efficiency measurements. A constant theme throughout these reports is

DIMIA's risk management. We believe DIMIA has room to improve its systems for risk management and risk assessment. We identify areas of improvement in relation to its asset management. In contract B we talk about the poor identification of the ownership of assets and poor asset management record keeping.

When we deal with contract management we talk about the lack of clarification of who is responsible for what activities between DIMIA and the contractor; lack of clarity and consistency in some of the definitions used; again, poor performance monitoring; shortcomings in the terms and conditions attached to insurance liability—again, monitoring contract performance is really on an exception basis rather than on a proactive basis, so it reacts to events—and the discretion that is provided within the agency with respect to its reporting. Our reports have a consistency through them and a message about the quality of its administration. We are happy to answer any questions that the committee might want to ask us.

CHAIR—In your brochure entitled *Management of the detention centre contracts—part B*, you say:

An audit of the tender, evaluation and contract negotiation processes is in progress and it is expected that this report will be tabled separately, later in 2005.

Where is that at?

Mr Meert—We have sent the department and the people involved what we call issue papers where we identify the key issues coming out of the report. Both the department and the individuals under natural justice will have the opportunity to comment on that and then we will draft a draft report which will go under our legislation to the department to comment on. We are probably still a couple of months away from tabling that, but it deals specifically with the tendering arrangements.

Senator BARTLETT—The overarching issue I have in regard to the work you have done over a few years with audits—I am trying to get through all the audit speak, if you will pardon the expression—is that a lot of the same problems keep coming up and tend to get a response saying 'recommendations accepted.' But the same problems keep coming up. I know ultimately it is not your responsibility, but from our perspective as legislators and overseers of government activities, firstly, am I reading it unfairly in that my perception is that the same sorts of problems seem to keep appearing? Secondly, what sorts of extra things can be done to try and make sure that this time around there is the sort of overhaul that seems to be needed?

Mr Meert—From our perspective, DIMIA went through a change when it was responding to people like boat people coming in where you are in a responsive environment to one where you are now post 9-11 in a new environment. You have to be more in a proactive operation than a reactive arrangement. I think one of the challenges for DIMIA is to have a different response pattern. A lot of the issues that come up in our reports, as I say, go back to fundamental good business administration—things like record keeping, which we are fairly critical of in the department. While they sound reasonably bureaucratic they are actually very important in that sort of environment, so it is really wanting to do that. I know the new secretary has talked about changing the culture in the organisation. I think that is an important issue. It is inculcating that

good corporate governance through the organisation and driving it from the top and then inculcating it within the organisation.

Senator BARTLETT—Changing the culture sounds very nice but beyond going to work casual on Friday, incense sticks and stuff like that, which may all be very nice, what are the actual legislative or other specific administrative changes that are needed to do that? Culture, in my view, is driven as much by the policies that people have got to implement as by legislation and procedures. Are there other specific things? I guess you have made a lot of recommendations, but do you think that they will be sufficient to overcome the shoddy record keeping, for one? Regardless of what the policy is, they have got to administer it.

Mr Meert—I think the legislation is there. If you look at the legislation within a bureaucracy like DIMIA, you not only have the specific immigration legislation but you also have the Financial Management Act and the Archives Act. So there is plenty of legislation that exists which drives the behaviour within the Commonwealth, including the Public Service Act in terms of the behaviour of public servants. I think there is legislation for its administration. It is really just an issue of complying with it if you are tendering out following due process or if you are setting up a contract taking proper approach to put in place performance measures. Performance measures are, again, a very difficult environment. They say that in their response to our part B. Without talking about whether you can or cannot measure in a quantitative fashion, you do have to develop measures, for example. Otherwise you will not be able to say whether or not you are delivering what you are supposed to deliver. So it is just hard work putting in place accountability mechanisms to give you the assurance that people at each level through the organisation are doing what they are supposed to be doing.

Senator BARTLETT—In the political arena there has obviously been a lot of focus on unauthorised arrivals, visa breaches and those sorts of things. At its height I think there were 4,000 or so boat arrivals in a year, and various people are unlawful for other reasons—depending what you read, 50,000 or so. You were talking about the broader task of the immigration department, particularly in the context of your comment about 9-11 and that debate. I think last year we had something like 16 million movements into and out of the country. I know you are currently looking at advanced passenger processing. If we are really talking about a department that is tasked with doing the sorts of checks that are necessary for everybody coming into the country—which is literally millions, in and out all the time—are you confident that just on a record-keeping basis that is actually being done as adequately as it should be?

Mr Meert—I think it is no secret that our reports are critical of the quality of record keeping by the department. So I would not be confident. Anything we audit we will audit against both the legislation and their own standards. It is important to set yourself some standards if you accept an error rate. It is a bit like the audits we have done on Centrelink. We ask: 'What is your acceptable error rate? Do you accept that there is an error rate? If you do, what is it?' Then we measure against it and report against it. If you do not accept an error rate then you have to put in place an administrative process to ensure that you do not. Again, because I come from an audit perspective, I just say, 'What are the rules and what processes have you put in place to provide that assurance?' We go in. We do not set the rules. We audit against those. We are finding that there is room to improve the rules, the standards, the targets and then the measures. It sounds bureaucratic. As you mentioned, it might be in audit speak. But in the end it is critical because it

is what gives you the basis to measure how you are or you are not delivering against your program objectives. These are fairly key and critical elements that we are talking about.

Senator BARTLETT—Can I just ask you two final questions. The first is about your current assessments—auditing the advanced passenger processing in particular, which is the area that, as I understand it, deals with people applying through electronic travel authorities, people from overseas coming in and basically doing such checks as are necessary. That is millions of people, as I mentioned before, coming in and out. Does your assessment include whether or not it is adequate from a security standpoint? Obviously you do not set the rules about what those are, but are you assessing the adequacy of whether or not that obligation is met through the APP?

Mr Lack—You would be aware that we are part way through that audit looking at advanced passenger processing. The Advance Passenger Processing Program has two objectives. One is to facilitate entry and the other is to provide more security at the border. We are working our way through that audit at the moment. We also have another audit planned, which we envisage starting around this time next year, that will look at the movement alert list. That is the database that DIMIA has that is crucial for them with regard to people with a criminal record or other security issues that they might be interested in. The objective of the audit is to see how that arrangement is working from DIMIA from the perspective of facilitating entry and also security at the border. The fundamental issue of the integrity of their movement alert list will be something that we will look at about this time next year.

Senator BARTLETT—The final question I have goes to the range of work you have done and if you need to do more. We saw yesterday the tabling of the report into the Vivian Solon Alvarez case. That is one case. It is not for us in our role to judge it but obviously we can draw lessons from it. That case alone showed some pretty extraordinarily sloppy administration—the absence of email records for over year, files just sitting in pigeonholes for six months. That was for somebody who was obviously not a threat. It makes you wonder what the case is with people who may be a threat and there is an alert somewhere stuck to a notice board behind a toilet door for six months or something. From the various audits you have done—you have looked at asylum seekers, you have look at family migration, you have looked at detention centre contracts, you are looking at advanced passenger processing—if we have a real problem with record keeping across the department, isn't it time for a department-wide audit just of that basic administrative competence?

Mr Meert—You could, but from my perspective most of our audits have that theme through it. I do not know whether it would add any value for us to do a specific audit on record keeping. I think our message is: your record keeping is not up to scratch.

Mr Lack—When we provided you with a list of relevant audits that we had completed and tabled recently, we were unaware that the Comrie report would be available before this hearing. There is an audit that the committee might find useful that looks at onshore compliance. It is report No. 2, 2004-05. It is one that we did not provide you with as part of our submission. It looks at unauthorised noncitizens. There are a couple of findings in that report which reflect the themes that Mr Meert has spoken about. One is that DIMIA has what it calls an overstayer file. The raw count for overstayers is about 90,000. DIMIA itself knows that the error rate on that overstayer file is about a third. They do some sampling techniques to get what they call an estimate of overstayers in Australia to bring it down to 60,000 a year.

So, in terms of a theme related to the accuracy of their information systems, they themselves recognise that one-third of the records in the overstayer file are inaccurate. That affects a couple of things. It affects their compliance activity if their compliance officers are using a database where one in three records is incorrect. It also affects their ability to match with data, for example, from the Australian Taxation Office. This audit also talked a little bit about compliance operations. Mr Meert has mentioned that one of the issues that is a theme in the audits that we do in Immigration is how they approach risk management. In that audit we found that DIMIA's New South Wales office actually had a good approach and was profiling and targeting specific industry and labour market groups. Other DIMIA state offices were relying on what they would call tip-offs from the community—for example, about overstayers working illegally in Australia. One of the things we found was that they had about 3,000 to 5,000 databases across the country, which were just localised spreadsheets, looking at this tip-off information, which they were not able to aggregate into a centralised view. The committee might find that an additional useful reference.

Senator FIERRAVANTI-WELLS—I would just like to take you to a couple of things. In your submission, you talk about a compliance test on page 6. Could you take me through that? You paint a very negative picture in what you have said, but in some of those figures it appears that things like key documents on file are at 100 per cent. Am I reading that correctly? Could you take me through that.

Mr Lack—The audit that you are looking at is No. 56 of 2003-04, which was looking at asylum seekers. DIMIA is probably doing better in this area than in a lot of other areas. It looks at protection visas; it is on the humanitarian side of the department. We found in this audit that overall the documentation was reasonably sound. The training that was provided to officers was reasonably sound. I think there was an issue from regional officers that they thought that the frequency of training was not perhaps as appropriate as they might like. In our opinion, the reason for DIMIA's better performance on asylum seekers was that, up front, they had recognised that this was a high-risk area. They tend to use more experienced and senior staff in making decisions and the training tends to be better. In fact, it is an example, in the four audits that we provided you with, where they have done better than in the other audits.

Senator FIERRAVANTI-WELLS—In other words, perhaps the rather negative picture previously painted ought to be qualified. Certainly, on your records, there is evidence that it is not as negative as he has painted it.

Mr Lack—This audit is one that we did in 2003-04. It is an example where DIMIA, unlike in the other areas we looked at, have thought about the risks and addressed those risks. Our opinion reflects that, yes, we think this is a soundly managed program. The only caveat to that was that there is a recommendation in there that says that DIMIA should think about trying to measure how long it takes them to get visa information overseas.

Senator FIERRAVANTI-WELLS—Noting that that is dependent on the responses received from foreign governments.

Mr Lack—That is right. They have a timeliness indicator that says something like, 'We will process visa applications within 90 days—

Senator FIERRAVANTI-WELLS—Yes, I am aware of that.

Mr Lack—But that is subject to them being able to get that information from overseas posts and information from other countries. Our suggestion was, 'Yes, we understand that is not within your immediate control, but you might want to think about trying to identify any common causes in those delays that might help expedite timeliness in the future.' That was the main caveat, the main recommendation, for this audit.

Senator FIERRAVANTI-WELLS—I have just come in. Does that mean you have done audits on every section of DIMIA?

Mr Lack—No.

Senator FIERRAVANTI-WELLS—So you have only done audits on some sections of DIMIA?

Mr Lack—That is right.

Senator FIERRAVANTI-WELLS—What proportion of the department do you think you have done audits on?

Mr Lack—In any year, we would be doing two to three audits in the department of immigration.

Senator FIERRAVANTI-WELLS—How long have you been doing these audits on similar situations—asylum seekers, for example? How long have you been doing audits where you can compare apples with apples?

Mr Meert—We have been doing audits in DIMIA for years—since we have been doing performance audits.

Senator FIERRAVANTI-WELLS—I am asking whether you have gone back and looked at the progress of certain processes through DIMIA over the last, say, 10 to 15 years. You are painting a very negative picture. I am asking whether you have gone back and looked at the origin of some of these provisions, looked at their operations at their origin and looked at how they are operating now.

Mr Meert—There are a couple of things I would not mind clarifying. Yes, I made a general comment about the documentation, which is what I thought the question was about. My comments are based on the audits we have conducted. As with any major organisation, be it DIMIA or Centrelink, the Audit Office is only able to ever do a proportion of the work undertaken by these agencies. We do not set the standards; we do not set the policy; we do not set the legislation. The audit methodology we adopt is to just review against any standards, targets, policies or legislation that exists. So when we go into an organisation like DIMIA we just take the legislation plus their policies. Mr Lack's comment about their standards is an example. If you set targets, then you may not be able to meet those targets for very good reasons, but our point is that you should monitor them. Audits are a review at a point in time, so you can

draw some lessons by going through our audit reports over the last decade. You can see some similarities, but we have not gone through and asked, 'What have you done over 10 years?'

Senator FIERRAVANTI-WELLS—What do you think has been the impact, in a general sense, of the increased litigation that the department is meeting, particularly, as you say, on the department's record keeping?

Mr Meert—Again, as an auditor, my comment to that is that you have a duty of care to record and to meet your obligations both under the Archives Act plus the Public Service Act—which I think even Dr Shergold has noted. All public servants have a duty of care in that, whether or not litigation is an issue. The Commonwealth has a responsibility. If, because you keep proper records, you argue that that might cause you to lose a case in court, I do not think that is the role of the Commonwealth. The role of the Commonwealth would be to maintain appropriate records, and I have heard that argument run.

Senator FIERRAVANTI-WELLS—The gist of my question is: do you think that the increase in litigation that the department has met over recent years has contributed to what you assert is a lack of record keeping and procedures not having been met—in other words, higher priorities in other areas?

Mr Meert—I would not like to speculate on the motives. I have no evidence for it. I have not tested it.

Senator FIERRAVANTI-WELLS—I have more questions.

CHAIR—All right. We have to share our time with everyone else.

Senator FIERRAVANTI-WELLS—I appreciate that. I had a look at the previous transcript and I noticed that the bulk of the questioning last time was by other senators, so perhaps I can have an indulgence with some witnesses. The Audit Office made some comments in its report about the tendering for the detention centres. Could you tell me a little bit about where you perceive there to be difficulties with those contracts?

Mr Meert—Could I clarify your question. Are you talking about the tendering process or the contracts?

Senator FIERRAVANTI-WELLS—I am. I have two questions. One is about the tendering process with the contracts. You also made some reference to risk management and the sorts of obligations and that you feel that those contracts perhaps do not cover the Commonwealth's risk as much as you perceive they ought to. Could you comment on that?

Mr Meert—I cannot really discuss the tendering one at the moment because we are part way through an audit of the tendering process. We are currently going through providing both the department and individual members with a set of issues that are coming out of our preliminary findings, and that is under natural justice and our legislation. We are in a process of developing a report on that, which we will table in a couple of months. So I do not think we are in a position to discuss the tender.

On the contract itself, you would be aware that we have now done two audits: part A and part B. I will deal with part B, which is the second contract. If you look at the key findings in that report, you will see that they go a little bit to my opening statement. The summary which is in that little brochure on report No. 1 identifies a host of issues that we, in our audit speak, would recommend the department improve. They revolve around monitoring and reporting. Again, we spoke about lack of definition, a lack of measurement and poor record keeping to do with what constitutes lawful, appropriate, humane or efficient detention.

We mentioned poor costing systems with no routine reporting on cost variations to the contract. We mentioned poor efficiency measures. We spoke about a risk management system. We also talked about poor identification of ownership of assets and poor asset records. We identified a number of issues to do with management of the contract itself, relating to poor identification and clarity about who is responsible for what under the contract. We mentioned the definitions again lacking in clarity and consistency, poor contract performance monitoring and shortcomings in the terms and conditions attached to the insurance liability. We talked about the fact that contract performance measuring and monitoring is really only on an exception basis, not on a proactive basis, and about the high level of discretion in internal reporting. They are some dot points of what we summarised in the brochure coming out of detention contract B. We identified a number of issues that we think could be improved with respect to managing the detention contract.

Senator FIERRAVANTI-WELLS—Just on the tendering—

CHAIR—Senator Fierravanti-Wells, I am sorry, but I am chairing here. I understand your comments about questions from your colleague in other cities two weeks ago. I place on the record that that is because your colleague chose not to ask questions, so we spread the time amongst other parties. But there are four parties here and we have only 45 minutes per witness. The way I run committee hearings is that, depending on the length of the opening statement, we give other parties around five to 10 minutes each. So, if you could make this your absolute last question, I will need to go to the Greens and Senator Kirk.

Senator FIERRAVANTI-WELLS—I only have a couple of other questions. Mr Meert, you mentioned the tender process. I know that you cannot make any comments but, just out of interest, how many potential contractors for the detention centre contracts are there in this area?

Mr Meert—I would not know.

Senator FIERRAVANTI-WELLS—So you have just looked at the process; you have not looked at that?

Mr Meert—No. We know how many people tendered but not how many potential tenderers there are. Some people might be potential tenderers and choose not to tender. Potential tenderers are a matter of a point in time when you issue a tender. But, if you are asking whether it is a restricted field, of course it is.

Senator KIRK—Thank you very much for your submission. I understand that DIMIA responded to your audit report on the detention services contract and that they said you had failed to appreciate the complexity of the immigration detention environment. They argued that

service standards cannot be assessed just in quantitative terms and I understand that this was their main criticism of your report. I would like you to tell us what your response is to that. Was that a fair comment? Is the process you are engaged in quantitative by definition, in fact?

Mr Meert—We did not recommend that DIMIA just use quantitative measures. We have accepted for decades—since program budgeting came in—that there are qualitative measures. What we are really saying—the message in the report—is that you should set yourself realistic measures to measure your performance. It is a complex business, but that does not mean you should not measure it. If you do not measure it, you do not know whether you are going well or not. So we are not saying, 'Develop one measure, and it has to be quantitative.' We are saying, 'You have to set a suite of measures to let you know how well you are going.'

Senator KIRK—In so far as measures are laid down currently, are those measures primarily quantitative or qualitative or a mixture of both?

Mr Meert—They are both.

Mr Lack—We did something relatively straightforward in this audit—we just looked at the immigration detention standards the department had put in place. In other places, including in the report, DIMIA call those contractual arrangements and the standards, 'outcome focused'—those are their words. The standards are written as outcomes. We simply looked at those and said, 'If they are the standards you have chosen, we would expect you to be able to measure those.'

Of course, it is extremely difficult to measure outcome standards for health, for example. But we said, 'These are the ones you have chosen. Can you show us how you have measured those?' Of course, it is very difficult. Hence their response—that is, that at the end of the day what they do actually needs to be flexible. But that leaves a gap, if you like. In our opinion, using standards that are not able to be quantified and that have an exception based approach to monitoring leaves a gap that means that really DIMIA is unable to report on the performance of the service provider.

Senator KIRK—Essentially what you are saying is that, no matter what the standards are, whatever they are set at, these standards are not being met adequately—or are not being monitored to the extent they ought to be. That is the impression I got from the submission.

Mr Lack—Certainly not monitored—but, in our opinion, because DIMIA is unable to assess against them, it is unable to report to stakeholders about what the performance of the service provider actually is.

Senator KIRK—Yes. I just have one more question. In relation to the follow-up processes that you people engage in, it is often the case that DIMIA does accept your recommendations: they say they accept them, but is there any follow-up you people conduct or is it then just a matter of conducting the next audit, which in a sense is a start again look at a particular area—or do you look to see whether or not DIMIA has in fact implemented your recommendations?

Mr Meert—We can conduct follow-up reports, and we do at times. A lot of our monitoring and follow-ups also comes through committees—the Joint Committee of Public Accounts and

Audit, for example, when they conduct follow-ups will regularly ask the agency to explain how well it has implemented findings.

Senator KIRK—Do you think that is an adequate oversight of the implementation of recommendations or should there perhaps be another independent body that performs that role?

Mr Meert—I would not like to talk on behalf of the joint committee of public accounts. In the end, again, the accountability rests with the agency—it is up to the agency to make sure that it does implement findings if it says it is going to.

Senator NETTLE—I have a question about your audits of the Refugee Review Tribunal and the Migration Review Tribunal. As a part of this inquiry, we have heard many comments about the rigour of decision making within the Refugee Review Tribunal in particular. We have also heard comments about the structure of the tribunal but, essentially, they go to the rigour of the decision making. Is that an issue that you will be looking at in your audit of the Refugee Review Tribunal?

Mr Meert—We would not have commented on the structure of the Refugee Review Tribunal because, again, that is out of our control.

Senator NETTLE—What about the rigour of decision-making by the tribunal? Is that something that you would look at?

Mr Meert—Not in terms of a judicial decision. What we can look at is the administration. Again, the auditing can look at the administration but could not look at a judicial review, whether or not a review makes the right decision.

Senator NETTLE—I was not questioning that. The sorts of comments we have had in this inquiry have been about the way in which decisions are made—what pieces of information are accepted by tribunal members, how tribunal members make their decisions and whether they are consistent or not. Are those the sorts of things you would be looking at in the audit?

Mr Lack—As Mr Meert said, we will be looking at whether or not the tribunals are following their own processes. At the end of the day, we will not be revisiting cases and trying to come up with a view on cases. It will be about whether the MRT and RRT are following their own procedures.

Senator NETTLE—Their act says they do not have to follow natural justice, so you will be able to see whether or not they are. What prompts the audit for those two? Is their something that prompts it or are they just next on the list?

Mr Meert—Within our resource base, every year we go through a forward-planning process. We identify key themes within the public sector. We also look at things such as a risk materiality—previous areas that we have covered or their internal audit or external reviews have covered. We try and find out the key areas where our limited resources can add the most value. At the most, we can pick a couple of topics a year that we can review or audit.

Senator NETTLE—So this came up as one of the areas that needed auditing?

Mr Meert—Yes. For example, detention B was a natural follow-up review coming out of detention A. One audit might identify some areas which we think are worth looking at.

Senator NETTLE—My last question is about the follow-up that you do. You may have already answered this; I am sorry but I came in late. There is a range of audits for which you have pointed out flaws. Who does that follow-up to see whether the recommendations have been implemented by DIMIA?

Mr Lack—Following on from Mr Meert's explanation of our strategic planning process, about this time of the year we begin to think about our program for the following financial year. In the case of Immigration, we would be thinking about the risks that we see in the business and in that portfolio. For example, going back to previous questions from senators earlier on, in our mind we see one of the risks the increasing importance of border security as opposed to, perhaps, nation building, which might have been a previous objective for the department. So perhaps we will be moving our resources into those areas that look at border security. At the same time, we will be looking at previous audits with an understanding of the coverage that we have had across the department. With that in view, we would be looking at recommendations.

We would have some idea, from our attendance at audit committee meetings in Immigration, about how assiduously they were following up certain recommendations. We might then pick on one or two recommendations from previous audits to follow up on. We also make a judgment internally about, as John mentioned, the skills and resources we have to do particular audits. In some cases, following up on one recommendation can be a little more straightforward than a greenfield audit; therefore, there might be some newer people in the audit office and that might be a good use of that resource. They are some of the things that we juggle when we are thinking about our forward program.

Senator NETTLE—So next year you will be looking at whether DIMIA has implemented your recommendations in previous audits?

Mr Meert—We could not really say because it depends on the broader program that we look at. I would not like the committee to think that we have a large follow-up program. We do not do a lot of follow-up audits. We do not have the capacity. The Audit Office conducts reviews and then reports to parliament. In the end, the agency has its own internal responsibility to the parliament to make sure it conducts its business appropriately. So, in a sense, a follow-up process comes both through the parliamentary committee reviews, including through its own departmental estimates, and also internally. The audit committees of these departments have to review all audit committee recommendations and track whether or not the recommendations have been implemented. So there is a process internally where they do follow whether or not they have implemented ANAO and parliamentary committee recommendations.

CHAIR—This audit that was done actually looked at how well any lessons have been learned from the first contract for management of the detention centres. Have you found any such problems? The contracts have changed. Is there any consistency about the way in which those contracts are handled given the constant change and nature of the contracts?

Mr Lack—Can I just clarify that you are talking about part B?

CHAIR—Yes, I am.

Mr Lack—Just by way of explanation, when we embarked on part A we were looking at the contract as it was then with Australasian Correctional Management, ACM. We found quite a number of shortcomings in that audit. As part of the planning process, we indicated to DIMIA that we would like to look at the next contract, which we know today is with Global Solutions Limited, GSL. Their key response to part A was that our findings and recommendations would be accounted for in the new contract. So we said we would like to do an audit of the contract with GSL with the caveat that they were back to back, so we did not have an expectation that they would have followed through entirely on all of our recommendations, simply because of the lack of time. As John said earlier, the shortcomings still exist. There are issues around risk management—not documenting and treating risks—and contract management. As I said, it remains an outcomes focused contract, which we do not have any inherent difficulties with. It is just that, because of the way they have structured that, they cannot measure against those outcome standards. The monitoring remains exception based and is reliant upon identifying incidents. The definition of an 'incident' is unclear.

CHAIR—Yes, I saw that.

Mr Lack—John has talked about the financial reporting. In the reports that the DIMIA executive get, there remains a gap. They do not separate out the administration costs against other overhead costs, so it is difficult for DIMIA to see what it is actually costing in terms of administration and running the contracts. The issue of asset management remains. We identified in our report that there was confusion as to who owned particular assets. That remained in the transition from ACM to GSL. Basically, assets were incorrectly shown to be Commonwealth when in fact they were not. So there are a lot of common findings between the current contract and the previous one.

CHAIR—I understand that in this current contract the government has covered the insurance liability of GSL. Is that correct?

Mr Lack—To clarify again, we are at the moment in the tendering audit—Mr Meert mentioned that we are part way through. We are looking in more detail at the liability indemnity insurance arrangements in the contract with GSL. The work that we are doing in part C will tell you why the contract looks the way it does. Part B goes through the structure of the contract and a number of key clauses. While it has not actually been tested, the legal advice that we have indicates that—for example, there is a particular clause in there that was designed to put a cap on the service provider's liability to do with detainee damage. The way that it is written and its interaction with other clauses led us to the view that it overrides some other clauses and there is a risk that it broadens the cap to any claim.

CHAIR—In part C that you are now looking for, it is my understanding that GSL did not provide for insurance liability, which is why the government has covered that, but other tenderers in this contract had their insurance liability as part of their contract.

Mr Lack—That is something that we are looking at in part C. It is an issue that we have not covered in the tabled report part B.

CHAIR—Are there any preliminary comments that you can give us about that?

Mr Lack—As Mr Meert mentioned, that is something that we are working our way through with the department. We have sent issue papers to them and we are scheduled to have an exit interview next week. Again, as Mr Meert mentioned, after that natural justice process we will write a section 19 proposed report and get the final comments from the agency. Hopefully that will be tabled before December.

Senator JOYCE—I am interested in talking to you as an accountant looking across the table at other auditors. With your statistical analysis, can you quickly touch base with the size of your sample and the sort of sample test that you take? As an auditor, I know it is hard when people sometimes want you to be a philosopher rather than an auditor and come up with some sort of philosophical interpretation when really what you have is a set of standards that are given to you and then you have to make a decision. I want to look at the size of your test, the sort of tolerance that you put on those tests and if there is any regression analysis that goes into how you come up with that.

I acknowledge that, when people come up with a decision that something is good, bad or indifferent, it is completely subjective. Are you looking at a day, month or year? What are you comparing it against? What do you mean by the word 'poor'? You are trying to compare science with a subjective position. I am interested in your comments on that. I note that you have said that there are problems with new people coming into the job—greenfield audit type issues; the quantitative terms of it. I want to look at your sample and whether you think that the sample is thorough enough to come up with a value judgment of what you are coming up with.

Mr Lack—I can use a couple of examples—two of the audits that we have referred to in our submission. We spoke briefly about one, which was asylum seekers. The other looked at aspects of family migration. Those audits have what we would call an element of compliance testing associated with them. For asylum seekers, we chose to look at a sample of 209 applications out of 3,077. For family migration, we took a sample of 208, but I am not sure exactly what the total population was. That was a stratified random sample, and I think that allowed us to talk, in a statistical sense, from the sample to the population. As I said, those two audits had a compliance focus—and a good example was previously raised by the senator at page 31 of the asylum seekers audit—where you can see from the sample how we have gone through and looked at various aspects that we would have expected to see around the document, for example. At the other end of the spectrum—for example, the detention centre audits—it is not really a case of taking a sample. As Mr Meert mentioned earlier, we would be looking at either what was prescribed in legislation or the FMA Act or, in the case of the tendering audit, the Commonwealth procurement guidelines. We would simply look at the what the guideline was and test whether the department had done its arrangements against that particular guideline.

Senator JOYCE—Did that guideline come up with a prescription of what is poor and what is good? From what you just mentioned, the size of your sample sounded like eight or nine per cent of the total, if my maths are correct. Is there any prescription of what is poor, what is good, what is bad and what is indifferent?

Mr Meert—One answer to that is, if you talk about social welfare provision, the agencies should really determine that level—what the tolerance level is, for example, for error rates. You

should set your own tolerance level. I think we have at other times talked about Centrelink and their error rates, and they set a degree of errors that they can create which is acceptable, and we will audit against that. So we try not to set rates. However, if it is a compliance issue with legislation, then, as you would know, in terms of developing a contract you either comply with the finance management act or you do not.

Senator JOYCE—So it would be fair to say that you can never really say something is poor, good or bad—it is a subjective thing. I can say the word 'poor' means one thing, but it could mean something completely different to somebody else.

Mr Meert—As auditors, based on the standards which we comply with and based on the evidence we have, we can form opinions as to whether the agency is complying. Compliance is clearly black and white. On those other issues, we can say we formed the opinion based on the sample size that we have collected. It does not always have to be a statistically valid sample size, and quite often we will use the Australian Bureau of Statistics to come and provide us with a valid sample size to form an opinion.

Senator JOYCE—Do you feel uncomfortable having to make subjective statements? Are you more comfortable staying with the quantitative analysis?

Mr Meert—It depends on your topic when you say 'make subjective statements'. We do not make statements we feel we do not have the evidence for.

CHAIR—I thank the witnesses for their submission and for taking the time to appear before the committee today.

[10.02 am]

LE, Mrs Marion Rose, OAM, Private capacity

BRUHNS, Ms Claire, Volunteer, Marion Le Consultancy

CHAIR—Welcome. Ms Bruhns, are you intending to provide evidence as well this morning?

Ms Bruhns—I will be assisting Marion.

Ms Le—Claire will be looking after my files. I am appearing in my capacity as a registered migration agent and advocate.

CHAIR—Ms Le, you have sent a submission to us which we have numbered 211. Before I invite you to make an opening statement, do you have any changes or additions to make to that submission?

Ms Le—Not really, except that I should say that, time having moved on, the minister has taken some steps in regard to the remaining Kosovo cases. As far as I know, everyone is now undergoing health checks and final clearance checks awaiting the minister's final intervention after she has received those.

CHAIR—That is an update on your submission?

Ms Le—Yes, it is an update on the submission.

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

Ms Le—I really welcome the opportunity to be here today. Thank you all very much for this opportunity. I think it is an important place for me to be at this period in time when there is so much emphasis on what is going on in the department of immigration and the attitude that pervades the culture of that department. One of the issues that I would like to bring out and address clearly is that, as senators, you must be concerned with the quality and accuracy of information that is provided to any minister in this government or any senator in this parliament. We should all be concerned with that.

I would like to address the quality and accuracy of information that is being provided by public servants to the minister, to the departmental heads and to other associated agencies, including ASIO and overseas posts. For example, what is the nature of ambassadorial briefings? How accurate are they? And how much can the minister—whichever minister; the one of today, next year or the years after—rely on the information that he or she has been given? I would say that at the moment Amanda Vanstone simply cannot and has not been able to rely on that information.

We also need to look at the source of the information that is being given to the department—for example, at where they are getting dob-ins. We need to ask what they actually do about

information that comes across their bows. Do they put it on the file, leave it there and accept it or do they go off and treat it seriously and start to investigate? I would say that they do not do that at all. They leave it on files, and it pervades the culture of the file from that point on and takes on a life of its own, often with horrendous results, as we have seen in the case of Vivian Solon Alvarez. Right from the beginning, someone made an assumption about her and it seems to have gone on.

I would also like to raise again the lack of cultural training and awareness of many DIMIA officers. They lack formal qualifications and training. I would say that very few departmental officers who are dealing with refugees have any knowledge of the history, the culture or the countries from which those people come. They do an interview with them and there is often total ignorance on the part of the interviewing officer as to what situation these people have come from or, as I say, the historical context from which they have come.

My conclusion, after the last 30 years of working with, for and against the department, is that in the last few years it has developed a culture of denial, suspicion and active destruction of human beings. When I was reading through the transcripts of the South Australian evidence that you heard in Adelaide, I noted that the one word that comes out all the time and pervades the evidence given is the word 'cruel'. I have been reduced to tears many times by the cruelty of officers of the department of immigration. It absolutely defies belief that people can be that cruel to another human being.

I note too that the new secretary has made public statements, and those public statements are to be applauded. But the cooperation even now at some levels of the department is still marked—and will be for many months to come, I suspect—by the same culture of suspicion and secrecy. We have difficulty getting files under FOI. We find ambassadors overseas being refused access or being told, 'We could give you more information but it is classified information.' How classified is it when you give an ambassador briefings overseas, expecting him to make some representations on behalf of the government and people of Australia, yet some lower departmental officer says, 'We can't give you that information; it's classified'?

The interaction between the department of immigration and the department of foreign affairs from the department of immigration's point of view is abysmal. There is a culture of lies, cover-up and deliberate misinformation to the department of foreign affairs. Obviously that is something that should concern the minister there.

I would say too that unfortunately this minister's reactions—and I can sympathise with her—have often been defensive rather than investigative. When something is put to her, she becomes defensive and takes it personally. I personally do not see that that is the way we should be addressing issues. Policy issues should be addressed as policy issues. You would notice that I have consistently not called for the sacking of the minister. I think that is a very superficial approach to what is going on here. But the concerns that Amanda Vanstone obviously must have now should be the concerns of us all. What is the information that she is being given, where is it coming from and where are the flaws in that process? It comes back down to management procedure.

I think there has always been, in a sense, a culture of otherness, a culture that is adversarial rather than cooperative. Andrew Metcalfe is trying to turn that around by focusing on the fact

that we are dealing with people, and not just pieces of paper that are floating across desks; he is trying to turn it around. Inside the department there are some very wonderful people who over the last few years have been almost destroyed by some of the work they have had to do and some of the things they have seen going on. They are applauding the fact that the Solon and Rau cases are in the limelight—in the media—because people who have voiced concerns have been silenced, and that has been a problem.

Cooperation at some levels of the department has been wonderful. I have been the person dealing with the Nauru cases, and the cooperation I have had from people like Mr John Oakley, who has been in charge of Nauru, has been terrific—extraordinary—in that we have had to do a very sensitive balancing act all the time between policy and what is going on on the ground in Nauru and here. We have had cooperation from a freedom of information section that is vastly under-resourced. I think you have had evidence about the difficulties that Adelaide people are having with getting documents through FOI. We have had problems where, two years later, we still have not received files. I know from talking to those people—my office has dealings with them every day and I think we are the people who put the most requests in—that they are vastly under-resourced. There is stress and there is a huge turnover of very capable officers there. Again, that needs to be addressed by putting in more resources. The cooperation I have had with many of the case officers dealing with the onshore caseload—and I am specifically talking about the Sydney office—has also been very good. So it is not all dismal and abysmal; there are some very positive things going on.

On that note, while we are focusing on the department—and there have been a lot of negative things—I want to read an email I received yesterday, which was actually sent to the *Courier-Mail*. I do not know whether it has been published today, but I think it is worth quoting. It is from Frederika Steen, a retired DIMIA officer who served in the department from 1984 to 2001. She writes:

There's no excuses for what happened to Vivian Alvarez, or to Cornelia Rau and so many others. I'm still waiting for the substantial compensation payment for these Australian women victims of a system which treated them without respect and dignity. The potential cost of compensation will surely focus the mind of the PM.

The Immigration Department was not always like this. I proudly served it for 18 years. Like a fish that rots from the head down, the culture change in DIMIA has everything to do with the harsh and inhumane asylum policy introduced by this Government. If you can lock up innocent men, women and little children fleeing persecution and in conditions that destroy their life and their minds, it is an easy step to trash the human rights of others caught up in a compliance and detention system without proper checks and balances.

Change inhumane policies and public servants can get back to decent and compassionate practices.

I think that says it is well as I can.

CHAIR—You were contacted by the government to process the people on Nauru, were you not?

Mrs Le—I wish that were the case. In actual fact, the department of immigration has never paid me a cent for any of the work I have done. It has been funded basically out of my own pocket, with some assistance from community groups who paid for my first airfare to Nauru, and

I have been there three times. My first airfare was funded, I think, partially. The first time, I took an interpreter whom I employed. The airfares for that trip were funded by community people.

CHAIR—So you went to Nauru on your own, as a migration agent, to process people there? Is that correct?

Mrs Le—It is a bit of an involved story. Nobody was allowed access to Nauru—no legal representatives. But, at the time of the hunger strike, which was occurring there in December 2003, I was working behind the scenes trying to persuade the department and the minister—I was working together with the UNHCR, in a way, behind the scenes—to try to do something about resolving the issue of Nauru. At the time of the hunger strikes, some ill-advised people in Australia were cheering those people on. I was out there saying that I never condoned hunger strikes. If this was going to continue, people could not expect the government to do anything about them. If I were the minister for immigration I would not be having this kind of blackmail, as it could be seen, held over me. You could not expect anything from the minister if you continued with this.

At that point, unknown to me—although we thought it was going to happen—Amanda Vanstone announced that the case load on Nauru would be reviewed. She advised people to listen to the words of their representative, Mrs Marion Le. I did not know that I was their legal representative, but, since the minister said I was, she could hardly deny me access to Nauru. That is how it all started. But I have not received a penny of funding from the department. I have to be very honest—in the last few weeks I have become very tired of fixing up the messes of the department of immigration and having to beg people to intervene in situations that, as I have said, defy belief, actually, for cruelty.

CHAIR—During our week's hearings we heard comments such as that the department only seems to act on cases or take them seriously when they are threatened with legal action. Also, we have seen in the case of Cornelia Rau that a family member—her sister—had to continually push and push the issue. In the case of Vivian Solon, her ex-husband, as I understand, Mr Young had to continually push and push the issue. What is your response? You obviously must be aware of that. You as a migration agent perhaps need to continually hound the department, I suppose, before any action is taken. Yet, at the same time, these people are almost demonised. I think you said in your opening statement that you voice your concerns and you are silent. How is it that we have got to a culture in a department that will not even listen seriously to family members or where people become frightened to continually push a case or have to threaten to go to court before the department takes them seriously?

Mrs Le—As you were talking, a lot of cases floated into my mind because it is not an isolated incident. I will say, though, that obviously lots of cases every year do go through without people having to threaten, but it is not isolated—you have to keep banging on the doors. I have given evidence before here in a section 417 inquiry that you often went to the previous minister, Phillip Ruddock, and he would listen because he had a very good grasp himself—an excellent grasp; second to none—of the Migration Act, which is a difficult act for anyone to either administer or understand. But we are looking at family members who keep bashing on doors and saying, 'Look at the treatment that is being given to my family.' On Nauru at the moment we have two young men. One of them was an unaccompanied minor when he arrived there. He is still there. The other was I think just 19 when he arrived. They are now in their early twenties—21 or 22.

One of them has been reduced to incidents of self-harm—very severe self-harm, where he has tried to kill himself—many times.

CHAIR—Yet most of the people on Nauru, I understand, have now been determined to be genuine refugees. Is that correct?

Mrs Le—Yes, that is correct. When I started there, in December 2003, there were 284 people there. There are 27 now. Those 27 are all still under review. They are still being processed. I believe that all of the Afghan case load should be brought here immediately as refugees. They were refugees when they arrived; they remain refugees. Of the Iraqi case load, the two young men I am talking about specifically have family members here in Australia. In one case the brother is someone who came here under the offshore refugee program. He was judged to be a refugee and he is living here in Australia. He has written letter after letter. He is a highly articulate person.

CHAIR—So does he need the front page of the *Australian* before the department will do something about it?

Mrs Le—I think so. That is the big problem.

CHAIR—Why have we got to that stage?

Mrs Le—There are systems that we have to follow. We all have to act within systems, and sometimes people fall through the cracks in those systems. But I myself cannot see how you can ever deteriorate to a point where you just become blatantly cruel. In that case, there are two complete families here who are willing to look after those young men, one of whom was a child when he arrived, and yet they are totally ignored. When I went and started to talk to them and look at their stories, I heard the horrendous story of how, in one young man's case, his mother was executed with four bullets because of the fact that her other sons had left. As I say, one of them is in Australia as a refugee. And we expect a kid of 17 to survive that.

And then there are the sorts of questions that he is asked. Let me bring this case to you. This is one of the most horrendous of these cases. This is a kid who was born in 1984. My son was born in 1985, so when I look at that boy, I see my son. As a mother, I see my son. This is, by the way, one of the very many reports that I have sent on individual cases to the department. As I say, only 27 people are there left there. You will see that Bob Illingworth was asked a question by, I think, Senator Bartlett in the estimates committee. Bob Illingworth of the department was asked how those case loads are going. He said, 'We are still waiting on submissions and we're still looking at submissions by a community advocate.' That community advocate is me. What am I doing? I am providing the review, free of charge, for the department of immigration to get their act together and get it right. I have never come out and said that before, but that is what has happened. I am the review person doing it for nothing and they wait and we put it together, Claire and I. Claire works in my office on a pro bono basis, and some nights she is there overnight. They are waiting for us to put this information, and we are still waiting in this case.

Let me read you something. This was the first interview with the kid when he first arrived. This is from my submission. What I find most offensive about this interview is that the applicant, still legally a child, was repeating again and again that he did not want to join a group

that might force him to kill innocent people, and the interviewer was totally unsympathetic to his situation. I am particularly concerned about comments like, 'What's the problem? Why is that a problem?' when the applicant was saying he believed he would be asked to kill innocent people. The boy said, 'People didn't do anything. Why should I want to kill them?'

I also consider the following two comments totally inappropriate statements to make to any unaccompanied minor, let alone a young asylum seeker: 'Why insult the party when you know you will be executed?' and 'The law of your country permits execution for your offence, so you are escaping from the law.' This is a boy, a kid, saying, 'If I had joined that particular party in Iraq, I would have been expected to kill innocent people,' and the interviewer says, 'Well, that's your law. Why didn't you do it?' The boy tried to say that the group he did not want to join was a group of boys who are trained to do things like, believe it or not, bite off the heads of live chooks. That is one of the things they are trained to do. And the woman is saying, 'If that's what the training is, why don't you just go ahead and do the training? It's just like Boy Scouts. Here in Australia, people join the Boy Scouts.' Believe me, that is what this interviewer was saying.

We went in and found that in fact what that boy was saying at 17 was absolutely correct. Saddam's kids army trained to play dirty. A source said:

After the 1991 Persian Gulf War, Saddam's security police began forcing boys as young as 6 from their families and into intensive boot camps. There, they are beaten, forced to kill animals and indoctrinated with Baath Party propaganda.

A 17-year-old kid said, 'I don't want to do that,' and the interviewer—ignorant, stupid, nasty, cruel—said, 'Why not? That's the law of your country.' We got that from Immigration files which we had to fight to get for over 2½ years. Why is this boy at the last? Because we could not hold of his documents. I do not blame some of those people wanting it to hit the light of day. I am putting all these things in the archives of the National Library. One day someone will research them and history will tell this government what they have done. That boy is still on Nauru, and that is a disgrace to us all.

CHAIR—Ms Le, perhaps—

Mrs Le—Sorry, but I do get upset. I have looked at that kid.

CHAIR—Please do not apologise for your evidence, Mrs Le, but, in order to save us time, you could provide that document to us as a confidential supplementary submission.

Mrs Le—It does not need to be confidential. I have the permission of this young man's family and from that young boy himself to provide you with anything you want about this situation.

CHAIR—If you like to provide that as a submission to us, we could take it.

Senator JOYCE—Thank you, Mrs Le. I understand the emotion you have about this issue, but my job here is to check the veracity of some of the statements you just made. In your opening statement you talked about 'total ignorance of the interviewing officer' of the country from which the person comes—that is, absolutely no knowledge at all. Do you stand by that statement?

Mrs Le—I think that we can nitpick about total ignorance. Probably—often—the person can spell the name of the country. They may even know that it is somewhere in the Middle East. But I have been a teacher for over 30 years. I am trained to look at what children do or do not know. When I am talking about total ignorance, if you want to nitpick on that issue, that is fine, but I think we should be dealing with a lot of other things. I will withdraw and say 'almost total ignorance'.

Senator JOYCE—That is different from total ignorance. One is an emotive statement—

Mrs Le—We can nitpick, Senator, or we can deal with the real substantive issues.

Senator JOYCE—and what we have to remove from this is the emotive statements and get the facts back in there.

Mrs Le—I am sorry, but I cannot really divorce myself when I am sitting looking at a boy who has been treated like that, when I am sitting looking at a boy who was in Baxter and is now in Glenside. I think Claire O'Connor raised his case. I am a mother as well as a researcher and academic. I am sorry: you might be able to divorce your emotions; I cannot.

Senator JOYCE—I try to get to the facts and divide fact from emotion, because emotion is not factual. Statements that are obviously wrong, which formed part of your opening statement, call into doubt further statements that follow on. You also said that the minister is apparently not aware of the full facts of the department. There is almost an implication there that the government is not in control of the department. It sounds like a job for the ADF—we should be sending someone in—because there is obviously another force that is governing the country. Do you stand by the statement that you believe that you believe that the minister is not aware of what is going on in her department?

Mrs Le—I do not see how she possibly could be aware of everything that is going on in her department. It is a huge department; it is extremely diverse.

Senator JOYCE—And you believe that there is an implied direction by somebody somewhere to do that?

Mrs Le—To do what?

Senator JOYCE—To not avail her of the facts, to not keep her properly informed.

Mrs Le—I think you are extrapolating from something I said and giving it a meaning and a life that I did not mean. I am trying to say that often things are going on inside the department. The minister is not being informed correctly by her department. That is very clear from the Solon report at the very least. People were not passing information that they had at their fingertips to senior officers, thence the minister is not being informed either. That has to be of concern to all of us, surely.

Senator JOYCE—So who is responsible for not informing the minister?

Mrs Le—It comes to whoever the relevant officer is who should be telling the person above him. It is just a total managerial process.

Senator JOYCE—Do you think that is some person's own decision or do you think that there is some other force—another culture—in the background? Do you think there is another form of government or something that directs it?

Senator FIERRAVANTI-WELLS—You made the allegation. Name people. You say you have 30 years experience dealing with the government. Why do you not name people?

Mrs Le—I said I have 30 years experience of teaching—

CHAIR—Senator Fierravanti-Wells, we need to be careful about naming of witnesses—

Senator FIERRAVANTI-WELLS—No. This woman has made serious allegations, Senator. She tells us she has 30 years experience. She tells us that she has been dealing with the department. She has made serious allegations about a so-called withholding of information. This is serious. If she is making these sorts of allegations, she can put her money where her mouth is and tell us who it is that is not, allegedly, informing the minister. That is my point.

Senator JOYCE—Ms Le, you can see the inference I get that there is a subculture that has some direction to it. If it is happening, it is almost treason. We would all be all ears and eyes if we can prove that.

Senator BARTLETT—Read the report that was tabled yesterday.

Senator JOYCE—We keep on talking about the Cornelia Rau and Vivian Solon cases. They have received a lot of attention. There is no excuse for them and no one would ever put up a reason that they are excusable, but we are talking about two cases out of a population of 20 million people in Australia.

Mrs Le—I think I made the point that this culture does not exist all through the department. I even said that I have had a lot of cooperation from people within the department. There is no question about the fact that there are some extremely good officers there, but Andrew Metcalfe himself has admitted that there is a need to change the culture there. If you are asking me to provide you with information, I am treating you, the senators here, with respect. You are elected representatives of the people of Australia, including me. I am trying to say to you that, if I were to ever get to the position of being a minister in this government, I would want to make sure that the information I am being given is accurate. That is a statement of fact that I would have hoped would say to you that I am coming here today to say there are some very serious levels of concern with the amount and accuracy of information that is being provided to ministers of this government. That is not an attack on the minister, as such; it is an attack—if it is an attack—on the process that is being adopted within some sections of the Public Service. In this case, we are focusing primarily on the department of immigration.

If I am saying that, believe me, I can back things with fact. I may get emotional about those facts, because there are many of us who work in this area day by day and deal with the facts. We then try to put those facts to the department of immigration. If you are asking for facts, as

Senator Bartlett said a minute ago, you need to read the report on the Solon case. I have not had a chance to read the whole lot; my computer kept conking out last night trying to download it all. We need to look at those things seriously and say: we can apologise; the minister can apologise; the secretary of the department can apologise; all the people all the way along can apologise, but the damage that has been done in the interim to the children of Vivian Solon is something that probably none of us can measure. We need to make sure that we move on from there and look at making sure that this never happens again.

Senator JOYCE—I agree—I am not making excuses. Not for one moment do I ever doubt the genuineness of your emotion—I am separating the emotions from the facts—nor am I casting the aspersion that your emotion is something completely personal for you and not justified from your own personal paradigm. But I am dividing the emotions from the fact. I noted your statements on border control. You believe that we cannot have an open door policy. Is that correct?

Mrs Le—Absolutely.

Senator JOYCE—However, you also believe that we cannot have separation of families and that children should never be detained. If a family comes in with children, what do we do with them if they are not supposed to be here?

Mrs Le—I think the Prime Minister has already made some steps in that regard. He has also voiced his concern about that. It is coming from the Prime Minister down. I applaud that. Obviously, that is an approach that we should be taking. We can detain people when they first arrive if necessary to find out who they are, but beyond that we should not be detaining. I have been around for too long and I am getting too old now to say over and over again that there has been a deterioration in this policy. My husband came by boat many years ago—in 1977. At that period of time when I first got involved with Vietnamese refugees, nobody was detained. He was detained for I think eight days in Darwin while they ascertained who these people were and who had actually brought the boat here that he came on. It was a big boat—a very famous boat. But not one of those women or children on that boat—there were 183 people—with the exception of the main crew, which included my husband, were kept in Darwin. The rest of them were flown to Westbridge hostel. We now know that as Villawood Detention Centre—a high security jail.

Senator JOYCE—I have stayed there.

Mrs Le—It is quite different. You have stayed in Villawood?

Senator JOYCE—I was billeted there back when I was playing football.

CHAIR—It looks a bit different now.

Mrs Le—It is very different.

Senator JOYCE—What I am getting at—and I am just posing the question—is that someone might arrive that you have serious concerns about. You may think they are an opportunist, that they are lying to you and that they have not been telling the truth—they said they were from Afghanistan but they are possibly from Pakistan, and you cannot quite make the story out. There

are children and adults. What are we to do? You can go down the English example, let them out and you will never see them again or you have to detain them until you can verify where the truth lies. In the case of some of these people, just lately, after having long assertions about a certain fact being correct and that they were from a certain place—this is from the front page of the *Australian* again—we have found out that they lied.

Mrs Le—I am sorry, I am not—

Senator JOYCE—I am referring to the Bakhtiyari case.

Mrs Le—If we want to go into the Bakhtiyaris, I could tell you a number of things about the Bakhtiyaris. I am thinking I might in the next few days publish the real story of Ali Bakhtiyari. I would say again that we have two boys here. One of them now is 16 and the other is 14. They came here near 2000. We are talking about kids who are now out there saying, 'Mea culpa, mea culpa,'—little kids who we locked up. When I saw them, one of them had slashed his arms. He was trying to kill himself. We should not be locking up children. When those kids came here, what did they know about anything? Kids only know what they are told. Their mother was told by the people smuggler, one assumes, to say that she came from the village that her husband came from—it would make things simpler. In actual fact, she came from Daoud in Afghanistan. Ali Bakhtiyari told me that very early on. He said: 'I don't know why she said she came from my village. Why did my wife lie?' I said, 'Because I presume she was told to do that by the people smugglers.'

Senator JOYCE—People influenced her to lie, apparently. People advised her to lie.

Mrs Le—The people smugglers—

Senator JOYCE—There were people who told her to lie because it could exploit the system.

CHAIR—Senator Joyce, we need to let the witness finish.

Senator JOYCE—I have one last thing. I hear the case you gave about the child. It was completely correct. Obviously, on the issue with the Baathist party, there is no doubt about that Saddam Hussein—he was a bad man, wasn't he. Lucky we got rid of him!

Senator BARTLETT—Lucky we locked up his victims for four years!

CHAIR—Mrs Le, did you want to add something to your comments?

Mrs Le—We have raised the Bakhtiyaris. This is the level of 'dob in,' as I call it, that happened at the beginning. This is from the file about the boat. It is an attachment to an email with the heading 'Intel Advice' and it numbers various boats. I will name the person, since you asked. It was sent by Terence Johnson to Heather Penhaligon on 22 March 2001 at 1648 hours. It said:

Afghans and Pakistanis identified on Urangan, Virginia ... boats based on information collected during a visit to Woomera on 5 to 12 March 2001.

You will see in my copy that all names are deleted except for the people I was asking about, but it does not delete the case manager. So, again, Vincent Tysoe—

CHAIR—I am sorry to interrupt you, but we would appreciate it if you would not name names.

Mrs Le—That is fine with me; it is just that Senator Joyce asked for names and whether I had the facts.

Senator JOYCE—I asked for a clarification of the facts; I did not ask for names.

Mrs Le—All right. We have a list here of informants. Informant 1 said about Rakiya Bakhtiyari:

Afghan. Husband is a Pakistani who came on an earlier boat and has a visa—travelling with brother-in-law.

That level of information from intel says from day one that she is Afghan but that her husband is Pakistani and that she, by implication, is travelling with her brother-in-law. From that, someone decided that another person on that boat called Mohib Suwari, must be the brother-in-law because he looked a little bit like Ali Bakhtiyari. As a result of that, Mohib Suwari was arrested and with his children was taken from Tasmania and thrown into Baxter detention centre. In order for him to prove that he was not Ali Bakhtiyari's brother, I had to go all the way to Afghanistan. What was the real information here? A family was picked up and it cost $30,000 to fly them in a highly traumatising air lift from Tasmania to Baxter on the basis of this information. Do you know what it was? It was a blatant mistake. Firstly, if we just take the factual mistake, Rakiya was actually travelling with her brother. She was travelling with the brother-in-law of Ali Bakhtiyari; not with her brother-in-law. That is a mistake there. The other thing was that right from the beginning, the informant, whoever that person was, said she was Afghani and that Ali was Pakistani. I can assure you that Ali Bakhtiyari is not Pakistani. But it went from that tiny little 'dob in' on day one to affect another family and sent me to Afghanistan.

Senator JOYCE—The point I am making is that the two Bakhtiyari boys have now admitted that they lied and that their lie was influenced and inspired by those around them in order to get an advantage as regards immigration.

Mrs Le—Excuse me, Senator, I do not think the Bakhtiyari boys were ever asked about anything in any court at any time. If they said something like, 'We came straight from Afghanistan,' they are seemingly now saying that their father travelled into Iran and Pakistan first. That is absolutely the truth. Ali Bakhtiyari has told me that story and nobody ever asked him about that in great depth. Those boys are under age, Senator. They were never asked questions in a court of law. If they said, 'We are from Afghanistan'—because that is where they are from—and did not bother to say, 'Yes, we fled and were living for some time moving around in a very itinerant, disruptive way,' then so be it; they are kids.

Senator JOYCE—The problem I have is with the people who advised the Bakhtiyari boys—

Mrs Le—That was not me.

Senator JOYCE—that this would assist their case.

Mrs Le—I do not think that ever happened. I do not believe for one moment that anyone helping the Bakhtiyaris told them to lie. I do not believe that. Not one lawyer, migration agent, or anyone trying to deal with them, would have told them to lie. I certainly told Ali all the time to try to sort out the problems which had arisen. When they found that Rakiya was there that early, she was still in detention. Did someone, in all compassion, tell her husband that his wife and children had arrived there? No, it took Mazar Ali jumping on the razor wire in Woomera to let the Australian public know what had gone on. As I think Senator Crossin's question was: how many times does someone have to get on to the front page of a newspaper to allow families to know that they are going to get some kind of recourse to justice or even basic humanity?

Senator NETTLE—Thank you for your evidence. I want to ask you about dob-ins. You have talked a bit about the effect of dob-ins. Do you have an idea of how widespread they are? The examples that you have given us so far are of the department taking dob-ins as fact. Is that a standard or regular procedure—dob-ins being taken as fact?

Mrs Le—Unfortunately, they are often totally taken as fact. I think I quoted in my submission the case of the Bitanis. It defies belief. This family has never been to Sydney, someone walks into an office in Sydney, gives a mobile phone number—which did not work—refuses to give his name and defames them. He defames a young woman by saying that she is defrauding the government, saying she is living with a person who is really her mother. One would think, I would have thought, that if that kind of information were being given to a departmental officer in Sydney it would be pretty serious information, because it was saying here is a couple who are defrauding the government, who are claiming one identity when in actual fact there is another. But, worse than that, it was saying that we have another woman who is living with them in Adelaide who is doing the same thing. She has given another name and she is now before the RRT under that so-called 'false name'. She is really the mother of this other woman. That is very serious, is it not?

If it were me, I would be saying, 'Investigate it straight away. Call both parties in. If necessary, get a DNA test. If they are defrauding the government, if they are lying, cheating, wasting our time and our money—taxpayers' money—in the courts, then charge them.' It carries a fine, as I always tell people: 'You can go to jail for between 12 and 20 years if you lie. Do not lie. Tell the truth for whatever reason and then let me, as your agent, sort it out. Tell the truth.' But do the department treat her like? No, they do not. They say, 'Okay, here's a dob-in. We'll leave it on the file and when we come to do a ministerial intervention we will put that dob-in unchanged in the ministerial and away it will go to the minister.' It says: 'Back there in'—whenever it was—'2000 we got this dob-in and therefore, Minister, this is the reason why you should reject these people for your intervention.'

Later on when we who have been fighting for five years to find out what the dob-in is get it we produce statutory declarations we say, 'Yes, she'll have a DNA'. The other woman is beside herself, because she is actually a very well known world famous psychiatrist and she says, 'Everyone knows who I am. Search me on the internet.' Do the department acknowledge that? Do they apologise? No, they do not. They then decide that Majlinda and Alban Bitani are someone else. They decide to do some more things because 'We can't have got that dob-in wrong; they must be hiding something,' so they are now wasting taxpayers' money. They say,

'We will throw him into detention.' They say—I have just been reading it again today—'We threw Mr Bitani into detention a few months ago. Do you know why? Because we did an interview with him and he gave inconsistent answers.' The department went out in November 2004 and searched the Bitani home, because we had managed to prove that the dob-in was wrong. So in 2004 they searched his house and during that time they took away a few documents; they took away three photographs.

They decided to interview Mr Bitani in April 2005, and the allegations of a false identity were put to him. In response, Mr Bitani denied changing his identity. However, he provided no plausible explanation for the inconsistency between the departmental evidence and his claims. I want you to listen to this: as a result of this interview in which he could not provide proper responses to what they were putting to him, Mr Bitani was detained on 5 April 2005 by Adelaide compliance. I might add that at the moment Mr and Mrs Bitani are in Calvary Hospital, where she is giving birth. I just dropped her there before I came here. Mr Bitani is still in community detention. The Department of Immigration and Multicultural and Indigenous Affairs—as a result of an interview they had with him where he could not explain certain things—put him in detention.

Let me tell you what that was. They took away two photographs. The one that they found the most worrying was a photograph of little Gracy Bitani, four years of age, blowing out the candles on a birthday cake. Alongside her in that photograph were her mother, Valbona Kola and another woman. It did not have anything on the back except that it said this is a birthday party and Gracy is blowing out the candles. There were 25 candles. So they said, 'Obviously this was her mother's birthday, but information received by the department is that Mrs Bitani is not 25; she is 31.' I am serious about this. They then asked Mr Bitani, 'Do you know when this occasion occurred?' He said, 'I have no idea. Obviously it was some lunch party or something with my wife. I don't know anything about it.' They said, 'Obviously you are lying, because the person who your wife is supposed to be—Eliona—would have been 25, so therefore you are lying to the department.' His visa was cancelled and he was put into detention.

It took us six weeks before we finally managed to get a copy of that photograph. I asked him, 'What is this photograph that they talked about?' He said, 'I don't know. It was ...' and he named people at a party. So I asked Majlinda, 'Whose party would it be?' She said, 'I have no idea unless I see the photo.' When we got the photograph, she said, 'Oh, that is so and so's party.' I rang up the girl whose party it was and she produced a statutory declaration within a day that said, 'That is my birthday party.' I then rang up the other girl in the photograph—the one I have not identified—and asked, 'Do you remember this?' She said, 'I have photos from being at that party myself. I will send you copies.' They threw a man in detention on that kind of flimsy evidence. He is now out; he is in community detention here in Canberra, but that is the level we are talking about.

With the Kolas, I can go on and on forever and I am more than happy to.

CHAIR—Mrs Le, we do have limited time.

Mrs Le—Yes, okay. But that is the level of so-called evidence. First of all a dob-in in Sydney and later on a photograph which Mr Bitani says, 'I know nothing about,'—and they did not even ask Mrs Bitani about it.

Senator NETTLE—Have you seen any changes since the Palmer report, legislative change or, in particular, the Ombudsman's investigations into long-term detainees and how they are working?

Mrs Le—That is an interesting question. I voiced concerns quite early on that by saying that we have to have yet another level of bureaucracy investigating what is going on in long-term detention or anything else, we were going to make more work for everybody in the long run. In the last week I have received three requests from the Ombudsman's office to provide them with information about three of my clients. I brought one of these requests with me.

The senior investigation officer of the immigration detention team of the Commonwealth Ombudsman sent me an email—one of three—in respect to a client which says, 'We have met this person who is now in Glenside at Adelaide and he told us you are his migration agent. We'd like to provide you with this opportunity to tell us anything you think may be relevant in our assessment of his circumstances. You are welcome to do so by return email or by telephoning me on the number below. We understand the minister has intervened under section 48B. Can you tell us about the case and whether there is any progress? Do you have a copy of Dr Jon Jureidini's report of 29 June 2005? Do you have any other information about his medical circumstances?' and so on.

I did the section 48B application to the minister. The minister is actively, as I understand it, considering it at the moment. Now I have the Ombudsman writing and asking if I can provide information that they obviously have not been able to receive from the department so they now fall back on the migration agent for. This is another pro bono case. Most of my detention ones are. I felt like Claire O'Connor when I read her evidence. We are doing this pro bono. We are stretched to the limit, and the Ombudsman's office is obviously stretched to the limit as well.

We also have a DIMIA report here that came to hand yesterday, which is a report to the Ombudsman on, strangely enough, that same person. It came into our hands because I had requested his file under FOI. It is unfortunately full of inaccuracies. That is the report going from DIMIA to the Ombudsman. It is full of inaccuracies, and it states, under the Management/medical issues heading:

As per the agreement between the Commonwealth Ombudsman, the department and GSL made on 10 August 2005, a medical summary report will be sent separately in the near future.

We have the medical summary report. So we have it but the Ombudsman does not, so the Ombudsman has to write to us and ask us for it. Increasingly I am feeling I am an outpost of the Department of Immigration and Multicultural and Indigenous Affairs.

In this case there is a very important issue with this gentleman. He is one of the cases, which I did not realise until I read Claire O'Connor's evidence, that she was saying she took to the court and they decided to transfer him. I wrote a letter when I saw him in Glenside. I did not know Claire was doing that case. He is another young boy who came as an unaccompanied minor. He is now about 22 years old. Last time I saw him he was drugged up to his eyeballs in Baxter. I took one look at him and he can hardly talk now. I said, 'Oh sweetheart, what have they done to you?' I left Baxter that night; I could not stand it. One day in Baxter last time was enough for me, seeing the kids I had dealt with over four years reduced to nothing. And I do not apologise

for being emotional about that. That is the destruction of fine young human beings, even if they are Pakistanis—which they are not.

Let me tell you a bit more about him, because this should be of great concern to all of us. This young kid came in, and when he came in they went through a whole series of questions about whether or not he is an Afghani. He said he was an Afghani. Someone dobbed him in and said he might be an Iranian. Somebody else said he might be a Pakistani. So we have gone through the list. At various times he was said to be Iranian and he was offered a return. This is all guesswork. But the most serious thing is that, right from the beginning, his first medical report said that he is a hepatitis B carrier and he is a public health concern. That was on the original document. It says, 'Hep B; notifiable disease. The CDC contact number is ...' So the first medical report said, 'Hep B carrier; public health concern; send it off.'

Later on, the report that went to the Ombudsman said that he is hep C positive, but he is hep B positive. He is in Glenside now. They say he will never recover. I think Claire O'Connor talked to you about people who will never recover. That boy is beyond recovery in my opinion too. I am not a medico, but he is hearing voices; he is totally schizophrenic. Of grave concern to us all should be that that very first medical report was ignored, and he was working in the kitchens in Woomera and Baxter.

CHAIR—Mrs Le, I am going to ask the remaining senators to give us one question each. I ask you to keep your answers brief. If anyone else has other questions they want to ask, we will have to put them on notice, because it is 11 o'clock. It has come to my attention that at three o'clock yesterday afternoon the ABC apologised to the Bakhtiyaris for the misuse of the word. Apparently the boy said 'It was caused by our lawyers' rather than 'it was caused by our lies'. So I just wanted to correct the public record.

Mrs Le—Thank you.

CHAIR—Senator Bartlett, I am only going to let you have one question. I would ask you to keep your answer brief, Mrs Le.

Senator BARTLETT—By way of introduction, I am loathe to give you guys more work. We have had a suggestion from Senator Fierravanti-Wells that you should name names. I do not think that is a constructive way to go for our committee, because we do not want to be targeting people. But I do think providing material that reinforces that these are factually based claims is useful. If you are able to provide that to the committee, we can address what to publish and what not to publish, with some examples. That would be useful.

My understanding is that you are the only person that has been allowed into Nauru to work on the cases of literally hundreds of people, and literally hundreds of those have all been granted visas of one form or another. From a previous inquiry into ministerial discretion, I think you were identified as the person that had the highest percentage of what one might call successful requests for ministerial intervention, where you asked the minister to intervene in particular cases. With that degree of history, plus the 20 years et cetera of involvement in immigration issues, for our guidance as a committee—even though you have identified some things in your submission—are there any specific legislative changes, as opposed to just political pressure

about getting our act together, that you think would assist in reducing some of the problems that you have identified?

Mrs Le—A policy of mandatory detention, of indefinite detention, is obviously going to bring harm to people who have it imposed upon them. We need to look at that. We need to set time limits for detention. As Senator Joyce said, I do not agree with open-border policy. If we are going to detain people, though, it should be for a very short space of time. That is the major change I would like to see in the act. I also think that the whole ridiculous notion that we can excise certain places from Australia is a fiction. I said that before in a hearing in the Senate. That is just a notional fiction. In actual fact we cannot abrogate our responsibilities like that. I think that is very clear over Nauru. I might mention Lombok. Australia is still funding people to be kept there. That is a pretty well-kept secret, I think. We do not hear too much about Lombok. I would like to see Lombok brought more to the public and to the minister. Again, we have family members of people here in Australia detained there. I would like to see those kinds of policy areas addressed and addressed with a sensible, commonsense approach.

The other area of major concern to all of us—and I see this has been brought to you before—is the TPVs, the temporary protection visas. It is such a destructive policy to give people temporary protection visas, not to allow them to really get on with their lives, to move on and to have family reunion. In those three areas particularly I think we need very quick legislative change.

Senator FIERRAVANTI-WELLS—I thought you said you had been involved for 30 years. Is it 20 years or 30 years, just as a point of clarification before I ask my question?

Mrs Le—It probably is 30. I was a teacher as well.

Senator FIERRAVANTI-WELLS—Obviously over those 30 years you would have overseen the introduction of detention, not by this government but by a previous government. So you would have had occasion to deal with detention cases over many years under a previous regime. But you have obviously isolated this government as particularly negative in that respect. Perhaps you might provide this information subsequently. You have obviously dealt with many cases over the years, and what I would like to know is how many of your cases were ultimately deported from Australia? I am not asking for names. I am asking for just a general analysis. I would also be interested to know, in relation to your experience with detention over the years, whether the main reason people have been kept in detention longer has been occasioned by misinformation provided as a direct consequence from the detainees themselves and additionally delayed by legal proceedings they have instigated, falsely or rightly. I am happy for you to provide that in writing. I appreciate the comments that you have made in relation to three or four specific cases, but I would really like you to give us a more global picture of your experience over the years, perhaps a more analytical and statistical picture rather than what I think was a much more emotive one given to the committee today.

Mrs Le—Senator, as far as I am aware, not one of my cases has ever been deported.

Senator FIERRAVANTI-WELLS—If you could still provide the information—

Mrs Le—That is the information. I have dealt with 56—

Senator FIERRAVANTI-WELLS—You have obviously had a number of cases over many years. I have asked you to give some statistical substance to some of the information you have provided today, and I formally ask you to provide that on notice.

Senator KIRK—I want to ask you about the section 417 process that you have alluded to on a few occasions. I think I heard it said by Senator Bartlett that you have had a fairly high success rate in that regard. I notice from your submission that you have some serious concerns about the information being passed to the minister in this process, and whether the minister is in fact even making the decisions about the matters that she considers. You seem to suggest that the officers determine not only what information is put before the minister but also whether the request should even go to the minister. Would you outline for us more detail on that. It seems to me to be quite a serious matter if the minister is meant to be exercising her discretion yet some of the matters are not even being brought to her attention. Would you elaborate a bit more for us on that.

Mrs Le—Yes. I do not think it is just this minister; it is also the procedures by which the cases go to the ministerial intervention unit. Often before they get that far, they go back to the original case officer first. I did comment on that at an earlier inquiry and gave some case-specific examples of where information was wrongly given or not looked at. The case officer who rejected it in the first place looks at it again and then says, 'No, it should not go for ministerial intervention.'

On a positive note, given the change in attitude towards the detention regime lately, we have seen that cases such as section 48B requests and section 417s from people in detention have been going through at quite a fast rate and that the minister has been approving a lot more of those detention cases, and of course she did that with Nauru. Obviously there is a need to look at cases, and so she has been doing that. My concern is that so many cases now have to go to the minister. There is no way that any minister, any one person—as I was trying to say before, it is not that I am putting this on the minister at all—is capable of looking at the numbers of cases across the board that must be now coming to her. Yet she is the person being asked to take the rap. She is the one whose name is out there and who is being asked to resign. As I opened, I said that as senators you—and we—should all be concerned that the senator does not have to take the rap for administrative errors or misinformation that is being put there. If some people thought I was saying, 'That's the fault of the minister,' I am really saying that it is the process. If you are getting so many cases going to the minister for intervention, there is something wrong with the system.

Senator KIRK—My question to you is: how do you think that system could be improved?

Mrs Le—You have to start from the bottom and do the first interviews correctly. I welcome what Andrew Metcalfe said about putting in more people to train staff so that when someone, say, fronts up to their first boatload of Afghans they are not ignorant of who a Hazara is. I did not know who a Hazara was when I first dealt with them. I had to go on a very fast and informative learning curve.

We have to get it right at the beginning. We have to have a positive attitude to the person sitting in front of us and not an attitude of suspecting that they are all coming here to lie and cheat and try to get their way through for some kind of reward. I have never seen that attitude

from a person who has gotten off a rickety old boat. We have to get it right there. If we can train those initial case officers, then we will cut out a lot of long-term procedures. Then the RRT can wind down a little bit, because hopefully they will not have to do the major work that they are being called upon to do at the moment.

Then we can properly look at cases that might not strictly fall into convention cases—if that is all we are talking about here, and we seem to always focus on them, although there is a vast number of other migration cases out there that also go to the minister for ministerial intervention. If you are looking at procedures as you go along, why not do them all together? For example, you may have a person who will fall under the convention on torture. But at the moment, we are looking at the convention related claims and saying, 'They're not fitting into that,' so then they go to the minister for an intervention. When they come back, some of the people may be lucky enough to have someone who is going to put up a case against the convention on torture. But it is prolonging the process. If we tried to look at them all together as it is going along, the procedure would be much better and we would save a lot of suffering.

We particularly found this to be the case on Nauru. On the files there were statements like, 'This person's case could fall under CAT'—the convention against torture—or, 'This one needs to be looked at under ICCPR.' But nothing happened. When we said: 'Wait a minute: this guy's had a torture problem that you've said was obvious right from day one. Why hasn't it been looked at?' The answer was, 'We look at it at the end of the process when we're about to deport someone.' Clearly, we can fast track that a bit. The policy in the last few years has come from public statements from—and I have to say this—Philip Ruddock, who many people know has been a good friend to me over many years before he got to be the minister. From the time Philip Ruddock started accusing people of doing all these kinds of things, inside the department there developed the culture of us being expected to reject; us being expected to provide the minister with a reason to reject. That is dishonest, and it is not really what Philip Ruddock would have thought was appropriate, either—I am sure he would not think that to be appropriate. But, unfortunately, when we open our mouths and say things, those things have repercussions that may be unexpected.

CHAIR—Thank you very much, Mrs Le, for your evidence this morning and for taking the time to appear before the committee. We appreciate that. Are you happy to take questions from us on notice?

Mrs Le—Yes, that is okay.

Proceedings suspended from 11.14 am to 11.25 am

PEACE, Mr Brendan, Associate Legal Officer, United Nations High Commissioner for Refugees

WRIGHT, Mr David Neill, Regional Representative, United Nations High Commissioner for Refugees

CHAIR—I welcome the representatives from the United Nations High Commissioner for Refugees. You have lodged a submission with us, which we have numbered 74 for our purposes. Do you wish to make any changes or amendments to that, or to make a supplementary submission?

Mr Wright—No.

CHAIR—Then I invite you to make a short opening statement. At the end of that we will go to questions.

Mr Wright—I thank the committee for the opportunity to appear before it today. With the committee's approval, I will start with some general comments. UNHCR's submission responds to part a. of the inquiry's terms of reference only, since that part relates directly to UNHCR's international mandate. Part a. concerns the administration and operation of the Migration Act 1958 and its regulations and guidelines by the minister and the department, with particular reference to the processing and assessment of visa applications, migration detention and the deportation of people from Australia.

UNHCR, as an international organisation, values its relationship in support of the Australian government and believes that the relationship is currently being strengthened through expanded dialogue and cooperation between DIMIA and UNHCR. The objective of such a strengthened relationship should be progress towards the common international and national objective of ensuring fair protection outcomes for refugees and others in need of international protection. Accordingly, in its submission to the committee, my office has sought to identify specific issues which could result in the national Migration Act and regulations being administered and implemented in a way more consistent with international standards and best practice.

UNHCR has concerns that some aspects of Australia's national protection system fall short of international standards and best practice, and these are a matter of record. Mandatory detention, the temporary protection and temporary humanitarian visa regimes and the so-called seven-day rule form the matters of concern raised in our submission. These three concerns have all been raised by UNHCR with previous parliamentary committees. It is UNHCR's opinion that to responsibly correct these shortcomings in Australia's otherwise generally strong arrangements for the national protection of refugees would require legislative change, rather than merely changes to the way in which the act and regulations are administered and operate. Nonetheless, I should add that while these aspects of the Australian system remain in place their adverse impact on refugees and asylum seekers can be and often is mitigated by sensible and humane use of the existing discretionary powers.

Importantly, it is UNHCR's opinion that this can be achieved without undermining Australia's national security interests or its legitimate interest in preventing abuse of its national protection arrangements. The fact that asylum seekers and refugees have most often fled oppressive regimes or persecution by non-state actors may fuel the security concerns of states, but there are robust processes in place, including country of origin information provided by UNHCR, to allow a fair and timely determination of who is genuinely in need of international protection.

So, short of legislative change, to improve the consistency in the administration of the relevant discretionary powers UNHCR feels that more appropriate guidelines need to be developed, or existing guidelines amended, to provide the necessary guidance to DIMIA officers. In this regard, UNHCR remains ready to work with the government to develop progressive and innovative new measures to meet current protection challenges faced by Australia. Given that UNHCR's concerns with some aspects of Australian law are already on the record, and rather than looking backwards and focusing on areas of disagreement, UNHCR has in its submission to this committee sought to look forward to identifying opportunities for narrowing differences within the current legal framework and national practices established by the government.

UNHCR is encouraged by recent discussions and exchanges with DIMIA in relation to institutionalising the dialogue and cooperation between DIMIA and UNHCR at all levels. From UNHCR's perspective, we hope that these discussions will, in the short term, lead to a constructive engagement in relation to ways in which the act and regulations can be improved so as to better afford national protection to refugees within the true spirit of the international refugee protection regime.

CHAIR—Mr Peace, do you have any comments you would like to add?

Mr Peace—No, I do not have anything to add.

Senator KIRK—On page 2 of your submission you say that there are some aspects of Australia's protection arrangements that do not meet international standards and best practices, and you mention that you have made submissions to various committees and the government on a number of other occasions in relation to this issue. I wonder if you could briefly outline for us where in particular you see Australia's protection arrangements falling short of international standards and best practices.

Mr Wright—On the first issue of detention, UNHCR believes that detention of asylum seekers and refugees is inherently undesirable. Since they have already been through persecution and have suffered, they should not be subjected to further persecution or suffering. There are, however, exceptions in the detention guidelines provided by UNHCR to states. These exceptions are, firstly, to verify the identity of the individual; secondly, to conduct a preliminary interview for refugee status determination; thirdly, where travel or identity documents have been destroyed; and, fourthly, to protect national security and public order. Given that there are some exceptions, we feel that to detain people for any extended period of time is avoidable and unnecessary. That has been our position in the past and you will find that in our previous submissions.

On the issue of temporary protection visas and temporary humanitarian visas, if I cast my mind back to when temporary protection—in that terminology—was first considered, the intent

of temporary protection was to deal with mass influx situations, not individuals or small numbers of arrivals. Our concerns about the existing laws on temporary protection visas and temporary humanitarian visas are that they deny an entitlement to family reunion, they provide no right to re-enter Australia if they leave and that they are not eligible to receive convention travel documents.

With regard to the seven-day rule, which is the third area raised in our concerns, our concerns about it are also on record. Our first concern is that it creates a potential for rolling temporary protection visas. Therefore, there is no solution for the persons who are considered to fall under the seven-day rule. There is no family reunion, no re-entry into Australia and they are ineligible for convention travel documents. The second is that there is an overly broad interpretation of what is effective protection by other states. The third and final one is the reference to the presence of an UNHCR office in a country providing the availability of effective protection. I put it to you that, if a person is passing into Indonesia, in their desperate situation they probably will not know that there is an UNHCR office in Jakarta, let alone avail themselves of its opportunity to undertake refugee status determination on behalf of the government of Indonesia. As one example, UNHCR's position remains that the presence of a UNHCR office does not afford any form of effective protection. It is there to support the government of that country and only that government can afford effective protection.

Senator KIRK—We are here to look at the Migration Act and how it may be improved. I noticed in your submission that you suggested that, even though many of our laws do not reflect international standards and best practice, if you look at the powers conferred under the act there is some potential at least for them to be administered and exercised in such a way that international standards and best practice are better reflected. I hope that is a synopsis of what you said in your submission. I wonder if you could elaborate on the how the act may be administered in order to at least mitigate any adverse impacts on refugees and asylum seekers.

Mr Wright—I hesitate to repeat much of what Marion Le said in the earlier session and, in the interests of brevity, I just say that of course the first instance determination is all-important if you want to avoid future embarrassment. The better the quality and information sharing that takes place during and after that first instance determination the better the system will function as a whole. So the guidelines that are provided to those members of the Australian authorities charged with undertaking that first instance determination, and the guidelines that are provided to assist them to make determinations further downstream, are extremely important in the effectiveness of the system.

If the guidelines can be strengthened, short of a change to the law that prevents our concerns from being the case, then they will indeed result in fewer situations of further suffering and fewer errors. In some countries this has been recognised to the extent that in the United Kingdom, as one example—and I am saying this as an international rather than a national—they have paid to have UNHCR posts working with the government authorities on that first instance determination so that there is a shared responsibility and a strengthening of the first instance determination. I am suggesting to the committee today that, short of changing the law, improving the guidelines and the performance of the process is a good way of reducing the potential for further suffering or errors.

Senator KIRK—With the guidelines, are you suggesting a revisit or a rewrite with perhaps the assistance of a body such as UNHCR?

Mr Wright—Exactly. That is an offer that we have made. We have been asked already to assist with training of DIMIA staff. We have done that in the past and we will do it again, starting at the end of this month. We welcome this dialogue that we hope will lead to a detailed analysis of the existing guidelines to identify areas in which they might be improved.

Senator JOYCE—UNHCR is obviously a structure which is incorporated under the United Nations. I have some queries for the record. Is Rwanda a member of the United Nations?

Mr Wright—I would have to get back to you on that one. There are 191 member states of the United Nations.

Senator JOYCE—So Rwanda would be and Zimbabwe would also be in the United Nations, wouldn't it?

Mr Wright—I suspect it would.

Senator JOYCE—Sudan?

Mr Wright—There are about 15 or 16 countries that are not.

Senator JOYCE—Sudan would be there—

Mr Wright—Yes.

Senator JOYCE—and Sierra Leone and Iran?

Mr Wright—I presume so, yes.

Senator JOYCE—How about Turkmenistan?

Mr Wright—Off the top of my head, I cannot tell you.

Senator JOYCE—They are countries which hardly have outstanding records on human rights. In fact, you would have to say that some people could make the assertion that they hold the majority in the policy sway of the United Nations, especially with all of the African countries involved. Some of them have very dubious human rights records. That would be an assertion that is made by some, would you say?

Mr Wright—I am trying to follow the relevance of the line of argument.

Senator JOYCE—Just for the record, I am just showing the people in Australia the structure of the UN and who is involved with it. It is a wide and encompassing group of a range of countries, isn't it?

Mr Wright—It is indeed—191 of them. They met recently at the summit, including Australia.

Senator JOYCE—For the record, I am just letting the people of Australia know that countries like Sudan, which currently persecutes large numbers of its own population, Rwanda, which has had an absolutely appalling record, Sierra Leone, Iran, which is developing a nuclear bomb, and Turkmenistan, which is one of the last Stalinist countries on earth, are all part of this benevolent body called the United Nations. Are there any other countries that you are aware of that also have problems complying with this issue of detention? Can you name any other countries or is it just Australia?

Mr Wright—I understand now where you are going. The United Nations member states are seeking a common objective. In order for peer pressure—do not forget that it is a collection of states—to have an effect, you have to have all of the states around the table. You cannot exclude them because they do or do not have a bad human rights track record. Nevertheless, with regard to refugee law and the practice of refugee law, in this region there are only two practising resettlement countries—Australia and New Zealand—and about six other countries in the regional office's area of responsibility who have ratified the 1951 convention relating to refugees.

Senator JOYCE—I will just clarify that. There are only two resettlement countries in the whole UN?

Mr Wright—No, in the Asia-Pacific region.

Senator JOYCE—Are there any other countries that you are aware of that are falling short of these regulations?

Mr Wright—Many countries are falling short of these regulations.

Senator JOYCE—Could you name any?

Mr Wright—I do not see the value of doing that. What we do provide is best practice from other states where they are seeking to apply the international law to the full.

Senator JOYCE—So we are not up to best practice—you could say that?

Mr Wright—You are just short of best practice in the three areas that I have described.

Senator JOYCE—Just short of best practice?

Mr Wright—As my submission I think clearly states.

Senator JOYCE—Is China up to best practice, to your knowledge?

Mr Wright—No, at this stage it is not.

Senator BARTLETT—Is China a signatory?

Mr Wright—Yes, it is. It is an executive committee member.

Senator JOYCE—What about Japan?

Mr Wright—It is an executive committee member and it has flaws in its system as well.

Senator JOYCE—It has flaws as well? I am doing this off the top of my head. What about the United States?

Mr Wright—They have flaws with their system.

Senator JOYCE—They have problems as well. So there are quite a few countries out there with problems?

Mr Wright—Yes.

Senator JOYCE—And we are one of them?

Mr Wright—Correct. The bar is set by states, though. If you are implying that somehow the UNHCR sets an impossibly high bar, I would remind you that the bar is actually set by states, including Australia.

Senator JOYCE—But you could set the bar high without any intention of ever even considering jumping over it—you could set it at such a level. Some people could say that the bar on a lot of issues is set at a level which none of the participating members would have any intention whatsoever of jumping over. That would be a fair statement? I could go to the voting record of a lot of these members and find that they have voted for things that they have an absolutely appalling record on themselves.

Mr Wright—From personal experience I can agree with that. But in relation to the subject of this committee, which is here to examine the operation and administration of the Migration Act here in Australia, I do not quite see the relevance of the international community's failure to respond in Rwanda in 1994—I personally was there during the genocide—or that it is a benchmark that we should be pleased with; rather, it is one that we should try and avoid in the future.

Senator JOYCE—Australia sent troops into Rwanda and we are very aware of the problems there. We are very obligated to those people who served over there. Who determines the audit process? Which committee determines the standards for that?

Mr Wright—The states collectively have endorsed an international law under the 1951 convention and 1967 protocols. The executive committee of the United Nations High Commissioner for Refugees, which is in session this week in Geneva—its annual session takes place in the first week of October every year—determines how the refugee law should be best implemented. The executive committee conclusions that come from those meetings are adhered to by most states that are member states of the United Nations High Commissioner for Refugees executive committee.

Senator JOYCE—Can you give me any examples of people who are on that committee?

Mr Wright—There are some 64 member states. I would be happy to provide you with a list of all of them.

Senator JOYCE—So it is a wide-ranging group?

Mr Wright—Absolutely.

Senator JOYCE—Would it be fair to say a lot of people within that group would probably not be within a bull's roar of complying with some of these conditions themselves?

Mr Wright—It is, by necessity, a mixture of states which are countries of origin of refugees, countries of asylum for refugees, countries of resettlement for refugees and some who have no refugees at all on their territory but are still seeking to adhere to international refugee law.

Senator JOYCE—I heard you talk about the United Kingdom experience. Has the United Kingdom got any problems at the moment with people who are potentially illegal immigrants not turning up to be deported, not turning up for interviews or basically just disappearing into the abyss once they arrive in England? Would that be something that is happening in England or the United Kingdom at the moment?

Mr Wright—Yes, that would be something that is happening in England at the moment, and they are seeking to address that issue too. I brought one example of how the asylum and refugee standards and processes in the United Kingdom were amended recently because I felt it was relevant to part a. of the terms of reference of this committee. I am not going to comment on the migration issues.

Senator JOYCE—So, in the United Kingdom, these people just turn up, disappear into society and are never seen again?

Mr Wright—Actually, more go to France than anywhere else in the world. Seventy-six per cent of the world's asylum seekers in the first six months of this year went to Europe, 23 per cent went to America and Canada and one per cent came to Australia and New Zealand, in generic terms.

Senator JOYCE—Many turn up in Spain, just making their way across from North Africa. It is a bit beyond a joke really, isn't it? You have people running up and down beaches while boats turn up and there is not a lot that they can do about it really, is there?

Mr Wright—They are trying.

Senator JOYCE—You could almost say, ultimately, if it keeps going that way, it will lead to a state of social dislocation because you have an uncontrolled group in society that, for all intents and purposes, nobody knows are there.

Mr Wright—I would be pleased to hear from the Australian government any constructive suggestions on how to improve the control of the population flow and still leave space for asylum seekers who have the right and the need to gain protection.

Senator JOYCE—What I am saying is that it is hard to differentiate between the two.

Mr Wright—It is increasingly hard for states and that is one of the reasons UNHCR has offices around the world, to support states and to try to develop new law, because the 1951 convention and 1967 protocol, whilst they remain valid, do not cover all the situations. They particularly do not cover those persons who are found not to be in need of international refugee protection and yet cannot be returned to their own country because there is a conflict going on there. We have been developing in the executive committee this week in Geneva with member states, including your own, concepts of complementary protection—how to deal with these persons who fall outside refugee law but still come under the covenant, under the ICCPR, in terms of not returning to their own country where they might be killed or persecuted.

Senator JOYCE—But would you say there is a problem of a large range of people just arriving in Europe uninvited, unannounced and without any really good reason except the economic opportunity that they see in Europe?

Mr Wright—Yes, that is happening. I do not dispute that there is migration in the world, but whether it is considered negative or positive is the real issue.

Senator JOYCE—You could make an assertion that one group of people which does not comply with the laws are exploiting another group which is endeavouring to comply with the laws.

Mr Wright—I think, if we were to take the approach that 99 out of every 100 people were unwanted, unwelcome, illegal migrants and therefore the standards used to deal with them should apply to the remaining one per cent who are in desperate need of protection, it would be a sadder world.

Senator NETTLE—We had a witness who appeared before the committee in Sydney who talked about Australia's acceptance of refugees who have HIV or a disability in the offshore humanitarian program. She was from the Uniting Church, which is seeking to research Australia's record with regard to taking refugees in the offshore program. She said she had had a conversation with somebody from UNHCR. We do not have the transcript yet, so I cannot remember exactly who it was and whether it was in Australia or elsewhere. She reported that, in the conversation that she had had with the person from UNHCR, they had said that the UNHCR did not refer cases of people who had HIV or a disability to Australia because they knew that they would not get through the DIMIA process. Are you aware of that being the case?

Mr Wright—It is an important issue. UNHCR does not do the medical screening that some states demand prior to resettlement refugees travelling. That is normally done by those states themselves in order to protect themselves from the influx of diseases. My understanding of the law here—and I am sure that Mr Peace will correct me if I am wrong—is that the law allows refugees with HIV-AIDS and other disabilities to enter Australia. But the practice tends to prevent them, because there is a financial ceiling set. If the estimate is that the cost of providing

them with medical support after they arrive in Australia exceeds that financial ceiling then they are not allowed to enter. That is my understanding at the moment. The law—and we are here today to discuss the act and its implementation—is open to allowing HIV-AIDS and disability cases to enter.

Senator NETTLE—But you are saying the practice does not.

Mr Wright—The practice is preventing them.

Senator NETTLE—Are you aware of any refugees with HIV or a disability that Australia has accepted?

Mr Wright—I do not have detailed statistics.

Senator FIERRAVANTI-WELLS—I have some comments on your statement. In paragraph 8 you talk about the resettlement quota. Has some work been done on comparing the determination of refugee status under UNHCR criteria with those people who perhaps have been deemed by UNHCR not to be refugees but who subsequently, under a judicial system in Australia, have been successful under more generous descriptions and have been otherwise determined? Do you see the gist of my point? Have you done any comparison on that?

Mr Wright—I think there are several issues in there. On the question of resettlement and the definition of what the quota should be, the determination on the quota is a government decision. UNHCR annually makes recommendations about which of the world's 9.2 million refugees this year are most in need of resettlement to a third country because they cannot return to their own country and they are not living in acceptable conditions in an asylum country. So we make, if you like, referrals. For 6,000 of that 13,000 case load we make referrals. The majority of the time, the Australian government will listen to our expertise because we have people who are working with those refugee case loads around the world who are best placed to determine which of them are most vulnerable and need resettlement. This is a solution, I might add, for less than half a per cent of the world's refugees. Only 40,000 resettlements were done last year worldwide. It is a very small part of the solution. The preferred solution is always a return to their country of origin. The second alternative would be integration into the country of asylum, into society there. The third would be this one.

Senator FIERRAVANTI-WELLS—The difficulty I have is that in Australia we are seeing people who do not go through the proper procedures of the UNHCR. I understand that you are the international body that is responsible for this, so one would assume that the people who come under your umbrella would be those who have been determined to be and deemed to have a priority. I have a difficulty in hearing what you have to say when people have come to Australia who are illegal and who have not been determined by UNHCR but who pretend and want the same degree of protection.

Mr Wright—I am trying to clarify the extent to which a resettlement refugee has already been determined by another country or by UNHCR to be a refugee before they are considered under the quota each year. Nevertheless, the asylum seekers are determined on arrival in a country. In the case of Australia, that is not the role of UNHCR. In most countries it is not the role of UNHCR. We are here to supervise and provide guidance and support to governments, but it is

the government that can offer a solution, not UNHCR. UNHCR might, exceptionally, in some countries, undertake refugee status determination on behalf of a government, at the request of that government, with the government agreeing that whatever the determination was—positive or negative—they would act accordingly after the determination had been done. In the case of Australia, we do not do refugee status determination.

Senator FIERRAVANTI-WELLS—I appreciate that, but surely, as the body responsible for refugees who have been properly determined, your highest priority would be to ensure that those refugees are settled in preference to other, illegal asylum seekers.

Mr Wright—Absolutely. That is the same the world over.

Senator FIERRAVANTI-WELLS—I appreciate that.

Mr Wright—The longer they have been displaced, the more important it is to find a solution for them. The protracted refugee situation is something that we have been quite successful in reducing in the past few years.

Senator FIERRAVANTI-WELLS—I want to ask you about the comments you made about detention policy. As you can appreciate, the detention policy in Australia was introduced by a previous government. Have you in the past examined the detention policy of other governments or have you just focused on detention under this government?

Mr Wright—We look at detention where it is applying to asylum seekers, refugees and persons of UNHCR's mandated concern globally. There is only one nationality of individuals who might not fall under our mandate and that is the Palestinian refugee; otherwise, we look at it globally and we deal with states with regard to any detention practices that we feel are appropriate or inappropriate.

Senator FIERRAVANTI-WELLS—Have you in the past made comments or raised concerns about detention under previous governments in Australia? Or is it just recently?

Mr Wright—We have made previous submissions. These are a matter of record and they are listed in the footnote. I think the last one was in 2002.

Senator FIERRAVANTI-WELLS—So, notwithstanding that we had a detention policy before this government came to power, you have not deemed fit to raise issues about your concerns about detention policy?

Mr Wright—We have raised them. We have raised them in the past and we have raised them again in this submission.

Senator FIERRAVANTI-WELLS—But you have just said to me that the footnote talks about 2002.

Mr Wright—That is right. That is the last time we raised a submission on detention.

Senator FIERRAVANTI-WELLS—That was the last time, but it is not the only time?

Mr Wright—That is right. It is also a question of when we are asked to do so.

Senator FIERRAVANTI-WELLS—Could you provide to this committee previous papers or concerns that you have raised, going back to the early eighties or when the period of detention was first—

Mr Wright—We will certainly do that research.

Senator FIERRAVANTI-WELLS—Thank you. Also, I want to take you to the question of the exceptional circumstances. You list the exceptional circumstances for detention to verify identity, to conduct preliminary interview et cetera. As part of that process, is information sought from UNHCR to assist in determining the identity? Does UNHCR have a process, as I think you were saying before, of first instance determination? Do you have a role in that?

Mr Wright—If we are asked by a government to take a role in that, we will do so. The last time we did that on behalf of the Australian government was for part of the Nauru case load. But we have not done so since and have not been asked to do so since.

Senator FIERRAVANTI-WELLS—Would you agree that the primary reasons for people being in detention fall mostly within those exceptional circumstances?

Mr Wright—One would have to do an analysis. I also mention—if I can just draw to your attention once again—that the length of detention is very important. These exceptions were designed to guide states on what exceptions might be needed in the short term, but also under the overall caveat of not extending the period of detention.

Senator FIERRAVANTI-WELLS—So you would agree with me that verifying the identity of a person is very important?

Mr Wright—Absolutely.

Senator FIERRAVANTI-WELLS—Do you agree with me that these delays are often a result of the difficulty of soliciting information from foreign governments?

Mr Wright—Yes. We also offer support to the government of Australia to deal with those individual cases, to provide them with country of origin information and to seek to validate the identity of the individuals.

Senator FIERRAVANTI-WELLS—What is your turnaround time for assisting in relation to information? Don't you, too, have to go back to your source?

Mr Wright—We have 124 offices in countries around the world. Let us say a refugee came from the Kakuma camp in Kenya where we have staff permanently based and who keep records of all the people in the camp: we might be able to have a very quick turnaround time. If, on the other hand, the refugee came from an area distant from the nearest UNHCR office or had not previously been known to an UNHCR office, the turnaround time would be longer. It is very difficult to give you a fixed answer. We do not have a constant turnaround time on these issues. And I repeat: it is only when we are asked to do so.

Senator FIERRAVANTI-WELLS—I appreciate that, but you would agree with me that often, irrespective of whether you do it, whether the Australian government seeks your assistance to do it or whether the Australian government does it directly, in many instances the turnaround time in seeking information is quite long?

Mr Wright—Correct.

Senator FIERRAVANTI-WELLS—In the end, if there are instances where the turnaround time in the legitimate verification of an asylum seeker's identity takes a lot longer than anticipated, what is your solution for dealing with that? Do you simply let people out into the community, not knowing who they are?

Mr Wright—We will be happy to share with the committee copies of the detention guidelines that UNHCR have published. UNHCR are also doing a global study into detention practices, and we will be concluding that this year and that will be shared automatically with the Australian government. But I come back to the point that I made earlier: when somebody has been through persecution and has had to flee, even if that is yet to be determined—

Senator FIERRAVANTI-WELLS—When somebody 'alleges' they have been through—

Mr Wright—Alleges they have been through persecution—when they do arrive, if it is necessary to verify their identity and it is going to take a long time, there are alternatives to prison-like conditions. That is why I welcome some of the changes that were made to the Migration Act this year because they put people into the community rather than in prison-like conditions. That again is part of the detention guidelines that UNHCR offers to states, to choose whether or not they practise.

CHAIR—We will need to wind up soon.

Senator FIERRAVANTI-WELLS—I have only three or four more questions.

CHAIR—You might have to put those on notice.

Senator JOYCE—If they going into the community, do they ever come out?

Senator FIERRAVANTI-WELLS—Senator Joyce makes the point that, if they go into the community, do they ever come out. I have a couple more specific questions about turnaround times that I want to explore a little more and also about the criteria. I will put those on notice.

Senator BARTLETT—Can I clarify if the UNHCR guidelines, whether they are on detention or whatever else, are adopted collectively by countries, including Australia? They are not things that the UNHCR bureaucracy think up and say, 'This is what you have to do.' Is that right?

Mr Wright—That is right.

Senator BARTLETT—One of the themes of some of the questions today is that you have refugees in camps for long periods trying to resettle and you have asylum seekers in a country such as Australia who are alleging persecution and seeking protection. Do the guidelines that

have been adopted by UNHCR member states, including Australia, differentiate between those two types of refugees in saying that priority should be given to one group over the other?

Mr Wright—No, they do not differentiate. First of all, one has to establish the circumstances of the individual before any differentiation could be done. Under the guidelines, you are expected to treat all asylum seekers, or all those who claim to seek asylum, equally to start off with.

Senator BARTLETT—And if they are determined to be in need of protection—a refugee—there is no differentiation in what then happens to them depending on which countries they had travelled through, how long they had been in particular places or anything like that?

Mr Wright—There are many questions that were raised in the early part of this millennium about those persons who had failed to obtain asylum in first countries of asylum rather than second or third countries of asylum. The issue remains that, when they arrive at a particular border, that country has an obligation, whether they have or have not previously been determined. If it can be established that they have previously been determined, then other rules under the 1951 convention and the 1967 protocol apply. So there is a concern about how you deal with 'secondary movement'—which is the term we use—and how that phenomenon is even more complicated by the mixing of genuine asylum seekers with illegal migrants, particularly if they have been smuggled or trafficked in some cases. There are many debates going on in that issue. There is no definitive law beyond the refugee convention on how to deal with this mixed case load, including those who are secondary movers. But best practice—and Australia is very active in defining best practice, not only here but in the region and internationally—is something that we try to share with governments to encourage a move towards international norms.

Senator BARTLETT—I think everybody, whatever their view on how best to do it, would acknowledge that addressing the protection of refugees is a difficult issue. Is it fair to say that, in amongst all of these different guidelines, conventions, protocols et cetera, the central or core aim is to ensure that countries that sign up to this do not send people back to situations of danger and persecution?

Mr Wright—It is not necessarily the central or core aim; it is a clear prerequisite under article 33 of the 1951 refugee convention not to refoule—not to send refugees back into situations where they would be at further risk of persecution or death.

Senator BARTLETT—If a country were seen to be doing that, it would be a fairly fundamental breach as opposed to something like—

Mr Wright—Certainly that is one of the principles that we believe actually goes beyond practice. It has become something that we would expect states that have not acceded to the refugee convention to abide by.

Senator BARTLETT—You mentioned before that the best goal is for people to go back to their homeland, the second best goal is viable integration into where they then are and the third best goal is resettlement to somewhere secure. Is that a reasonable summary of what you said?

Mr Wright—Yes.

Senator BARTLETT—Is it a core business of the UNHCR globally to increase the number of countries that offer resettlement of refugees, as Australia has of course done, and increase the number of resettlement places that they offer?

Mr Wright—Yes, though there is a limit. It has been our strategy to use resettlement more strategically since the 2001 global consultations on international protection. It forms part of our initiative called 'convention plus'. It is something which the Australian government has adhered to and strongly supported, and it repeated that support at the executive committee meeting this week. There is a limit, however, which is how you ensure voluntariness—that all the individuals who are selected for resettlement are going voluntarily to a third country. The resources required to ensure voluntariness exceed UNHCR's available resources, so at the moment in any year we could probably get as many as 100,000 places for resettlement offered, but we would not be able to fill more than 30,000 or 40,000. We are seeking to expand that every year.

Senator BARTLETT—I think it would be fair to say that current and previous Australian governments have played quite a positive role in promoting that part of the solution. In the current situation, what is Australia doing that is helping promote that agenda? Is there anything we as a nation are doing that is actually counterproductive to that agenda?

Mr Wright—No, on the contrary. UNHCR has publicly and repeatedly praised Australia's contribution in the international protection debate and its role in providing resettlement opportunities. It has been extremely active in Asia, Africa and Europe—in international and regional fora—as co-chair of the Bali process, as an active member of the Asia-Pacific consultations and in many other ways.

Senator BARTLETT—Finally, with regard to Nauru, I know you had a direct role in the assessment of initial refugees and asylum seekers there. Could you give us an indication of what sort of role you currently have, formal or less formal, inasmuch as you are able to?

Mr Wright—Inasmuch as we have a residual responsibility for the engagement that we undertook in 2001, there are some nine Iraqis still on the island of Nauru who were determined by UNHCR in the early part of this century not to be refugees. Of course, we monitor the overall situation, the work of the Republic of Nauru and the government of Australia with regard to resolving the situation of those who are there, but we have no formal role at this stage. We did that determination at the request of the government of Australia.

Senator BARTLETT—The nine Iraqis would have been those who arrived on the *Manoora*, I guess, right at the start?

Mr Wright—Yes. The case loads were divided up by boat load, so we got one boat load, I think.

Senator BARTLETT—That was the very first. Accepting that you have done that assessment, we have it on the record from DIMIA officers at estimates hearings that it is still not tenable for those Iraqis who have been found not to be refugees to return to Iraq at present, so they are still detained. Regarding the issue of complementary protection that you touched on, can you have a role in trying to find a complementary protection outcome for people who do not fit

within the convention, such as these people, and cannot return in the foreseeable future so that they do not just stay in limbo in detention?

Mr Wright—Yes, we can and we provide advice on what solutions might be offered. In this particular case, I think it is important to draw to this committee's attention, as we have done to DIMIA, that the country of origin information on Iraq has just been changed and the three northern protectorates in Iraq have been deemed locations where people might safely return if that is where they originally and habitually resided. Nevertheless, the centre and southern parts of Iraq are still considered too dangerous for countries to be considering returning those found not to be in need of international refugee protection. So there have been some changes. There is some signal of small progress, I hope.

CHAIR—I have a couple of questions that I want to ask you. During our hearings two weeks ago we heard that of those who were released into the community, to the knowledge of witnesses—we asked quite a number of them the question—no-one has actually absconded. Would that be your experience?

Mr Wright—This is a huge issue. It is a very important issue. Different countries are presently looking at different systems for dealing with controls of those persons who are in the process of determination that vary from electronic tagging to reporting requirements to detention in the community to detention in prison-like conditions in different countries around the world. The study that I mentioned to you earlier that has been conducted by UNHCR and will report this year will share with all those states best practices or practices—not necessarily best practices—from different countries so that we can move towards an international standard of best practice.

CHAIR—Do you think this government respects the UNHCR?

Mr Wright—That is a very difficult question. I am not sure. On a personal level, I feel that there has been some progress in developing a better dialogue with the government in the past year. I believe that there was a very rough period of time where there was very little respect in the earlier part of this century, but some progress has been made since then. I see it as part of my role to ensure that progress continues to develop.

CHAIR—This century?

Mr Wright—It could be decades, centuries—whatever you like.

CHAIR—So since 2000 then, in other words?

Mr Wright—Since the difficult period in 2001—let me put it that way.

CHAIR—Senator Nettle has a last question and then we will wrap up.

Senator NETTLE—Can you tell us the status of the asylum seekers who were pushed back from Australia under Operation Relex and are now living in Indonesia in IOM camps, particularly those who have relatives in Australia? If you want to take it on notice, that is okay.

Mr Wright—I would prefer to take that on notice. It is outside my personal office area of responsibility. It comes under the responsibility of our regional office in Jakarta. I can tell you that they are there. I can tell you that it is a continued area of concern for UNHCR.

Senator NETTLE—I will put it on notice and give it to the secretariat.

CHAIR—Thank you very much for your submission and for making yourselves available to appear before us today. It is appreciated.

[12.17 pm]

LENEHAN, Mr Craig Lindsay, Deputy Director, Legal Services, Human Rights and Equal Opportunity Commission

LESNIE, Ms Vanessa, Senior Policy Officer, Human Rights Unit, Human Rights and Equal Opportunity Commission

VON DOUSSA, Mr John, QC, President, Human Rights and Equal Opportunity Commission

CHAIR—I welcome the witnesses from the Human Rights and Equal Opportunity Commission. You have lodged a submission with us, which we have numbered 199 for our purposes. Do you wish to make any alterations or amendments to that submission?

Mr von Doussa—We have no amendments.

CHAIR—I invite you to make an opening statement. At the end of that we will go to questions.

Mr von Doussa—We thank the committee for inviting us to appear before this inquiry. The Human Rights and Equal Opportunity Commission has undertaken extensive work in relation to the human rights issues arising from the Migration Act. That work has taken many forms, including four major reports dealing with broad systemic issues, numerous reports for parliament prepared pursuant to the commission's function of inquiring into individual complaints of human rights violations and annual visits to all immigration detention facilities by the Human Rights Commissioner.

The terms of reference for this inquiry are very broad, and I will confine myself to just a few points in this opening statement. First, I congratulate the government on the recent changes to Australia's migration regime, particularly the amendments made by the Migration Amendment (Detention Arrangements) Act 2005. A significant feature of that act is that it confers upon the minister additional flexible powers to grant visas and to specify alternative detention arrangements. However, in our view these amendments do not go far enough. In particular, they do not create enforceable rights and depend entirely upon an exercise of ministerial discretion which is neither reviewable nor compellable. The commission considers that, as a consequence, Australia is not meeting its obligation to provide effective remedies for violations of human rights, particularly the right not to be arbitrarily detained. The commission considers that those obligations are best met by providing that the ongoing appropriateness of detention be periodically reviewed by a court empowered to order release.

Australian courts are currently only empowered to review the lawfulness of detention in habeas corpus and administrative review proceedings. They currently have no power to consider whether detention is in fact necessary and proportionate to the particular circumstances. The nature of the mandatory detention regime means that in almost all cases, for example those involving exceptional circumstances such as the Cornelia Rau matter, a court will be required to

conclude that the detention is lawful. This is an arid exercise which, according to the human rights committee, involves a breach of Australia's international obligations under the International Covenant on Civil and Political Rights. Judges should, just as they do in criminal bail matters, be empowered to consider the substantive reasons that justify the detention of a particular person and, if appropriate, be empowered to release the person on bail, subject to conditions if necessary. We should recall that in this area we are not dealing with people charged with criminal offences.

I would also like to stress that the amendments do nothing to alter the power of the Commonwealth to subject a person to so-called indefinite detention under the Migration Act. Detention of this nature has arisen where a person is unable to be removed from Australia. The commission has intervened in a number of matters before the courts to argue that such detention is unlawful by reason of constitutional and legislative limitations. By a four-three majority the High Court ultimately held that such detention is in fact permissible under the Constitution in the terms of the Migration Act. The Migration Amendment (Detention Arrangements) Act 2005 does not alter that position. A nation with a proud history of human rights like Australia should not permit such a law to remain on its statute books.

The commission has also sought to draw the committee's attention to some broad structural issues arising from the assessment process. Those concerns arise from the narrow and technical definitions which apply to protection visas. Those provisions are based upon the refugees convention, which requires Australia not to return people to states in which they are at risk of certain defined forms of persecution. People who do not fall within those provisions may still be at risk of serious harm and even death if they are removed from Australia. International instruments, such as the convention against torture and the International Covenant on Civil and Political Rights, oblige Australia to avoid returning people to states where they face such abuses of their human rights. However, if they do not meet the requirements of the Migration Act, those people must hope that the minister exercises a non-compellable, non-reviewable discretion to grant them a visa. We consider this to be an inadequate mechanism for protecting the rights involved.

I would like to conclude by referring to a matter raised by many of the other participants in this inquiry and also by the commission—that is, access to legal advice. The Migration Act requires that assistance be made available to detainees if a written request is made for such advice. However, there is no obligation on the department to provide such assistance if people do not know to ask for it. The commission has found, in one of its reports to parliament, that the department's policy of not advising people of their rights to legal advice is a violation of article 10 of the International Covenant on Civil and Political Rights. On a practical level, the department's approach and other obstacles to legal representation, such as inadequate funding, are leading to poorly prepared applications and, ultimately, to unmeritorious proceedings before the courts. There has been an unfortunate tendency to blame legal representatives for problems which really arise from some of the characteristics of the migration system. When truly fundamental rights are in issue, such as the right to liberty, people should be entitled to sound, ongoing representation, and they should be told of that entitlement.

Senator NETTLE—Thank you for the work that you do. As part of this committee inquiry we visited Villawood, where they are building a new residential housing project. I know that HREOC has been critical of residential housing projects in the *A last resort?* report. Do you have

any concerns about the new residential housing project? Also, do you think that residence determinations, whereby children are held in detention in the community, are a durable solution?

Mr von Doussa—I will ask Ms Lesnie to answer that because she was closely involved in the last resort inquiry.

Ms Lesnie—As for the new facilities at Villawood, the Human Rights Commissioner is planning to visit Villawood shortly—so we have not seen the new facilities. The problems that we found in *A last resort?* really related to restriction of movement. There was a time when residential housing projects were seen as an alternative to detention and what we have said in the report is that it is an alternative form of detention. When you have a situation where families are deprived of freedom of movement you have detention, albeit in better conditions than inside a detention facility itself.

In terms of the residence determinations, I guess we cannot really comment yet because we are not exactly sure what they are. If those residence determinations are truly a de facto form of visa—so that you can do anything you would otherwise do under a visa—then I guess that might address the detention problem. But at the moment it is phrased so that residence determinations are an exception to the definition of detention and that raises some concerns as to whether or not it will turn into a form of detention itself. We certainly have not seen any guidelines as to what a residence determination would look like so we cannot really figure out whether it would be detention or not in practice.

Senator JOYCE—I hear your wish that the court have a more encompassing role in detention matters. Don't you see this as usurping the power of the department of immigration and wouldn't you say that there is a clear case that the Australian people wish those powers to remain with the legislature rather than the judiciary?

Mr von Doussa—It is important to remember that we are detaining people who are not convicted of any offence. It is a form of punitive imposition upon them and historically that is the power that has been exercised by the judiciary. Prior to 1992 people who were taken into immigration detention on their arrival in Australia were being released on bail by judges and, as far as I am aware, there was no occasion when anyone did not turn up in consequence of that having happened. A court would have the same general jurisdictions, we envisage, as they have in bail matters now. You look at the circumstances of a case and if there is some reason to think that the person is a security risk or is going to disappear, they do not get bail unless it is possible to impose conditions upon them that would limit that risk. It would not be an automatic matter of walking out the door simply because you applied; there would be a consideration of the facts and circumstances.

Senator JOYCE—You cannot have them involved with just one section of the court; you have to involve them with all sections of the court—the Administrative Appeals Tribunal or an appeal to the High Court or wherever they wish to go. Do you feel that you have the capacity to deal with that? If we had a large influx of potentials, as they would be then, rather than refugees' litigants, do you feel you have the capacity to manage that? Are there any delays currently in the court system that struggle with the workload or is everything up to scratch and goes through on time?

Mr von Doussa—I am not in a position to give you statistics on that. My information is general also. But there are tens of thousands of people going through criminal courts around Australia almost on a weekly, if not a daily, basis. They get priority and are dealt with. Bail applications are not matters that are tending to hold up courts and they are dealt with without delay.

Senator JOYCE—So you believe there is capacity there. You brought the Cornelia Rau reference up and we keep on hearing about Cornelia Rau and Vivian Solon. As much as those two cases are obnoxious, they are two cases in 20 million. You have a greater chance of being eaten by a shark or a crocodile or struck by lightning than of being illegally deported, and even in those two cases there was a remedy. I want to go back to the issue about not deporting someone back to a country where they are under threat. Potentially we could have a case where a vast number of people in southern Sudan could turn up and you would have an inability to deport them, whether they were Tutsis or Hutus from Rwanda. You would have literally hundreds of thousands of them turning up and they would have a just case to remain in Australia. That would be correct, wouldn't it?

Mr von Doussa—Yes, if they fulfil the definitions of refugee. Australia has entered into an obligation under the refugees convention to give them protection.

Senator JOYCE—So it is potentially likely or possible that you could have 700,000 Tutsis turn up and you could not deport them?

Mr von Doussa—I am unable to comment on the practicalities of that.

Senator JOYCE—But it is possible?

Mr von Doussa—You could have quite a number of people turn up, and Australia has an existing obligation, under international law and its own treaties, to consider whether they are refugees. But that is not quite the point that we are trying to make in the submission. The point is that at the moment the Migration Act deals with this refoulement provision primarily as one dealing with refugees, so if you are not a refugee you can be deported. The point that I think needs to be understood is that there are other people who are not refugees who have real fears of serious harm or death if they are sent back. To take an example, Australia is dealing with the problem of trafficked women and children. If a trafficked woman who would not come within the definition of refugee is sent back to the country from which she has been trafficked, in many instances there is a high likelihood that that person will be dealt with by the traffickers quite seriously—probably killed. What we are saying is there ought to be some mechanism which is compellable and reviewable in the legislation which would enable that sort of case to be dealt with.

Senator JOYCE—I can bring you to another case. I am glad that you brought up the traffic in women as maybe sex slaves could come into this. A lot of those people, when they arrive in Australia, arrive, surprisingly enough, illegally and work illegally. If they had gone through the proper channels then they would not have been put in a position of being vulnerable, being in a position of working in an institution—a brothel—and being subjugated to all of the deprivations that they get subjugated to. The way those people actually come in is generally illegal.

Mr von Doussa—The notion of being trafficked is you are brought in on a non-voluntary basis. The examples you give me I think sound like people who have come involuntarily.

Senator JOYCE—Thanks for that.

CHAIR—Mr von Doussa, can I raise with you something about trafficking women. We heard in Sydney that there are two women who have been caught up in that horrible saga and have actually assisted the police—the Australian Federal Police—but for actually going to the Australian Federal Police their thanks has been that they are now in detention. Do you get involved in those sorts of cases of people facing deportation and whatever horror awaits them when they are returned?

Mr von Doussa—We have been concerned not on an individual basis as to cases but as to the general question of trafficking. Commissioner Pru Goward has done a lot of work in that area and, indeed, there is a major international conference coming up in November on the very topic. It is that sort of case which lies behind the concern we are expressing here. From what one reads in the papers, not all these people that do help the police get visas at the end of the day. It is only a very few that do. The others are, as you say, kept in detention for a period of time, then deported. They are facing, one understands, a pretty uncertain future—a very frightening one—when they get home and it is only this sort of general discretion, non compellable and non reviewable, of the minister at the moment that might save those people from that fate. Our submission is that there should be a better remedy.

CHAIR—We have had many calls for an independent body to look at the situation in detention centres. It would monitor what is happening in detention centres. We have also had calls for an independent committee that would actually make an assessment before a person is deported, to assess whether the deportation would ensure that that person is not put at risk when they are deported. Do you support any of those calls to have more independent scrutiny or oversight of certain areas of immigration?

Mr von Doussa—I think our submission is generally along those lines. There ought to be some additional procedure beyond that which there presently is, a procedure which can be compelled—in other words, a person can require that it be fulfilled—and a procedure that has some review mechanisms at the end. Whether you set up a new tribunal or whether you adopt some of the other procedures, if the exercise were compelled to be done by the department, with reviews thereafter, that might be sufficient. The problem is that at the moment there is no compulsion.

Senator KIRK—Thank you very much for your submission. I notice that your submission refers to quite a number of complaints made about immigration detention, which have been investigated and substantiated by HREOC. I assume you have reported that to the government. What was the government's response to that, if any?

Mr von Doussa—Each of those we referred to in our submission are tabled, published reports. They only get reported if we find that the allegation is substantiated.

Mr Lenehan—The reports are available on our web site. The responses from the department and or the government in each case have been different. In some cases they have accepted the

recommendations and findings made, and in others they have not. I am not sure that I can generalise beyond that.

Senator KIRK—I am wondering how these complaints are brought to your attention. Is it by individuals and then an investigation process occurs?

Mr Lenehan—Yes. There is a statutory mechanism under our act whereby a person can complain to the commission and the commission then inquires into that complaint.

Mr von Doussa—I would like to add to that. One of the reports involves five asylum seekers who were complaining about their lengthy detention and separation detention—that is, a form of detention in which they are cut off from the wider world; there is no press, no television and no contact. We reported on that and found that there was a breach of human rights and made recommendations. That report was very favourably received, I thought, by the department. They conferred with us, and we discussed a number of options that could be put in place to improve the situation. My understanding is that many of those recommendations were carried out.

Senator KIRK—It seems that you played a very important and significant role there, and that is good to know.

Senator FIERRAVANTI-WELLS—I was going to say 'judge', Mr von Doussa, but that is what I think your previous profession was, and I think I had the pleasure of appearing before you at some stage in South Australia. In paragraph 2, under 'Immigration detention—consistency of the overall scheme with Australia's human rights obligations', where you talk about children in detention, I would like your comments in relation to the separation of children in detention. I think a legitimate concern out there is that there are people who may use their children as a means. They come out and they do have children and, if there is an automatic right to go out into the community because they have children, it is not unreasonable to assume that people may use that as a way of being let out into the community. Have you balanced the rights of the child to stay with their parents as opposed to being separated from their parents? Or are you simply saying that if they do have children they should be allowed into the community, irrespective?

Mr von Doussa—I will ask Ms Lesnie to give you the details, but I think we are saying that if there are children they should be in the community. That is the primary consideration.

Senator FIERRAVANTI-WELLS—Are you advocating that they be separated from their parents?

Mr von Doussa—No.

Senator FIERRAVANTI-WELLS—You are saying that if they do have children they should be out in the community, irrespective of the merits or otherwise, what their identity problems are or anything else?

Mr von Doussa—I think it is better if Ms Lesnie answers that.

Ms Lesnie—What we are saying is that where you have children—or anyone for that matter, but in the case of your question children—those children and their parents should, in our view,

go before a court and that court should assess whether those children and that family are best kept in detention or in the community. What we have said in our submission at page 3 is that the sorts of principles that a court should look at include that there should be a presumption for children to be out of detention. But a court should also take into account the principles of family unity, special protection for unaccompanied children and the best interests of the child. What we are saying is not that it be automatic but that a court be required to review it, to review it promptly and to take those principles into account in coming to its decision.

Senator FIERRAVANTI-WELLS—You talked about bail. Who goes surety in a situation of that nature? Assuming that you extend the bail provisions to a person or family who comes, who gives surety? Do you envisage that such a bail application would attract appeal rights perhaps all the way to the High Court? Given that we do have instances in the system where migration litigants have taken cases, often futile cases, all the way up to the High Court, surely this would really be opening up another situation? Could you answer that in the context of the current work load that the Federal Court and the Federal Magistrates Court has, which has increased as a consequence of what you termed previously as often non-meritorious litigation?

Mr von Doussa—Coming back to the bail applications, sureties are sometimes required. I recollect that they were sometimes imposed in letting asylum seekers out prior to the 1992 amendments. But they are not always required. You would seek a surety if there was some risk of a person disappearing or there was some other risk that you were trying to protect against. If upon an analysis it was thought that there was such a risk and that a surety was necessary, one would be asked for. If it was not forthcoming, the person would not get bail.

The sorts of people who were going surety—and I had my concerns about them doing it, but they did and I do not think any of them came unstuck—were people in the general community who were taking some interest in the wellbeing of these people. They were just the ordinary person in the street who had met or come in contact with these people through a church or through some other welfare agency. They were aware of them, had met them and were prepared to take them under their wing. In one instance I remember, the person actually took them back to their house and provided accommodation for them to get them out of the detention situation.

So far as appeals are concerned, I guess it would follow as a matter of course that there would be some appeal rights. They could be limited by legislation, but in the ordinary course there would be appeal rights. I do not think they would get to the High Court very often. I can think of only one or two bail matters that have got to the High Court in the 20 years or longer that I have been involved with the law, and they were very exceptional cases. The general rule is that you get one appeal in bail matters and that is it.

You also asked me about the capacity of the courts to deal with those things. I do not think there is any problem about the capacity. Bail cases and habeas corpus type matters have always been given priority in the courts. I think the courts would absorb all of that without great difficulty.

Senator FIERRAVANTI-WELLS—So you envisage that they would be applications brought before either the Federal Court or the Federal Magistrates Court, bearing in mind that a great majority of those courts' jurisdiction is already dealing with migration matters—picking up the point that you have made—many of which are not meritorious?

Mr von Doussa—Some of which are not meritorious. There is another factor which has not been mentioned. If you have a statutory right to bail or a statutory right to do something else, you do not have to exercise it in every case because the department, recognising that that is what is going to happen if they do not bring their mind to bear on the topic, will bring their mind to bear. If there is an opportunity to let people out on bail, there will also be corresponding provisions which enable the minister to release people on some sort of visa or under some other conditions. If the case looked as though it was one that would succeed in a bail application, there is every probability that the department would let them out first.

If you had this statutory protection at the end of the road, those who are administering the scheme are likely to recognise that statutory end and exercise their discretion in a way that makes it unnecessary to go that far. I would envisage that, if there were a right to be let out, most people would be let out by the department upon a review of the situation. It would only be the borderline cases that would ever go the full distance with someone else being asked to review them.

Senator FIERRAVANTI-WELLS—I beg to differ. You made some comments about the High Court decision. You obviously do not agree with the High Court decision.

Mr von Doussa—It is not only me who does not agree with it. The Human Rights Committee in Geneva has given a decision saying that Australia is in breach of its obligations under article 9 of the ICCPR by—

Senator FIERRAVANTI-WELLS—But we do have a High Court that has determined, and determined properly, that this is so. What you are saying is—

Mr von Doussa—I am saying that the High Court has determined that the domestic law says one thing and the international community has determined that the law of Australia should say something else if it were to comply with the convention.

Senator FIERRAVANTI-WELLS—But my understanding is that domestic law does prevail. We keep hearing this, but we do have a High Court that has made this determination.

Mr von Doussa—But it also said that you should not keep people indefinitely in detention and deplored the fact that that was the result of the decision.

Senator FIERRAVANTI-WELLS—I think that every person that appeared, certainly this morning, talked about exceptional circumstances and where that detention rightly comes within those exceptional circumstances. No-one is denying that people should not be kept in detention. Given that the majority, or what appears to be the majority, of cases, certainly that I saw in my 20-year experience with the Australian Government Solicitor doing quite a bit of DIMIA work, in relation to it were under exceptional circumstances. So in the end we seem to be getting this big picture. The majority of the cases that are being dealt with are under exceptional circumstances.

Mr von Doussa—Al-Kateb and the other cases that went to the High Court were not in that category. They knew who these people were. That was the problem. The country they came from would not take them back.

Senator FIERRAVANTI-WELLS—But you would agree with me that the cases that have received some notoriety are the exception rather than the rule or the majority of cases. If you look at the bigger picture of the number of immigration cases that are currently in the court system or currently dealt with by the department, we are only talking, proportionately speaking, about a small number of cases.

Mr von Doussa—Yes, we are, but they are individuals and they are locked up for a very long period of time.

Senator FIERRAVANTI-WELLS—I appreciate that, but you would agree that, in the bigger picture of a country of 20 million people and in the bigger picture of the number of cases that are dealt with by the immigration department, the number of cases that have been sensationalised, if I can describe them in that way, is a very limited number.

Mr von Doussa—That is a matter of judgment.

Senator BARTLETT—There are two points in your submission that I want to go to. The first is the issue of deportation. As you note in your submission, we have an obligation under the law not to deport people who are deemed to fit under the refugee convention. We also have an obligation under the international law, although not codified in Australian law, and a range of other conventions, including the conventions against torture, not to send people back to situations where they face persecution. I would hope that most Australians and certainly senators would argue that we have a moral obligation not to send anybody back—even maybe 700,000 Tutsis—to face death if that is the consequence. There has been evidence, including that presented to this committee, that we have done just that as a nation. It may be a small number of people but they are still human beings. Are you in a position to comment on some of the allegations and evidence that have been supplied? Certainly the Edmund Rice Centre has done quite a lot of research and work. I know that a book was recently published, which was I think called *Following Them Home*. I cannot remember the author off the top of my head, which is fairly poor.

Senator NETTLE—It was David Corlett.

Senator BARTLETT—Thank you. It also made similar sorts of allegations. Are you in a position to comment on that?

Mr von Doussa—We are in possession of no information that would help you on that. Some of the difficulties that would face us—and we have looked at whether we should be trying to follow up—are, firstly, privacy considerations, which means that we cannot find out who has been sent back. We cannot get names. Secondly, even if we could get names, perhaps from friends in the community or something, there is a real risk that, by making inquiries, you are going to make the position worse for those people. Indeed, our counterparts in other parts of the world have suggested that we do not make those sorts of inquiries. We would have to do it at a fairly formal level. That is the difficulty.

Senator BARTLETT—For you as a body?

Mr von Doussa—Yes.

Senator BARTLETT—Have you looked at and examined any of the evidence that has been provided for your own information?

Mr von Doussa—We have not had the occasion to collect such evidence. We have not had a complaint or anything like that.

Senator BARTLETT—Following on from that, for the benefit of the committee and to specify the specifics of your role as an organisation, you are not some sort of loose NGO bunch of ratbags out to bring down the government; you have a specific role under law and are resourced and appointed by government to do that and you are able to undertake—I use an ombudsman term; I do not know whether it is correct—an own-motion investigation?

Mr von Doussa—Yes, we can, into either a specific instance or a systemic, wider situation, if we perceive one to exist.

Senator BARTLETT—You do not have any legal auspice over areas outside Australia; I think there was an issue with Nauru.

Mr von Doussa—There is a difference of opinion between us and the government as to whether we have jurisdiction over Nauru, but there has been no occasion for us to test it.

Senator BARTLETT—Was there some issue with the commissioner running the children in detention inquiry about not being able to go to Nauru?

Ms Lesnie—That is actually covered in the report. There was correspondence between the human rights commission and DIMIA. We asked for assistance to go to the Nauru facility and the advice from DIMIA was that there was no jurisdiction for us to go there. We had different legal advice and there was an exchange of letters about legal advice. Time went on and it ended up not being feasible to go to Nauru, so the issue was never fully resolved.

Senator BARTLETT—I will just ask about the other aspect which, I suppose, links to making sure that we do not send people back to face death, persecution or torture. You have outlined, as you have in previous inquiries, the process that is followed for people who fall outside the refugee convention, but most people fall under the convention against torture, being the one that might be most immediately understandable to people. You continue to maintain the view, as your submission states, that the current system we have—which relies totally on the discretionary power of the minister in those cases—is inadequate. For the record, that is not so much a criticism of the capability of any individual minister; it is more that human nature means that administrative errors might occur and it is not an adequate safeguard to protect against that obligation.

Mr von Doussa—That is entirely correct. Our view is that, to provide an adequate remedy, which is the requirement of the convention, you need to have something that a person can insist on taking advantage of.

Senator BARTLETT—Even from the point of view of administrative efficiency and equality in meeting obligations, would that be best addressed by incorporating the CAT and other measures in the Migration Act in the same way that currently the refugee convention is?

Mr von Doussa—I do not know whether you would need to do that. I suppose you would have to make reference to the wider grounds, but there needs to be a procedure whereby somebody can apply for an exercise of that discretion, knowing that it will then be exercised. At the moment, people make an application and low down in the system someone might decide that it is not going forward to the minister, and that is it.

Senator BARTLETT—So making it compellable?

Mr von Doussa—Compellable and then, in accordance with the ordinary procedures of the act, reviewable thereafter once there is a decision.

Senator JOYCE—Going back to the case of Al-Kateb v Godwin, the presiding justices were McHugh, Hayne, Callinan, Heydon and Gleeson. Justice Kirby was the only one dissenting in that case. Is that correct?

Mr Lenehan—No, justices Gleeson, Kirby and Gummow were in dissent, so it was a 4-3 majority.

Senator JOYCE—For the record—you obviously know this—cabinet appoints High Court judges on the recommendation of the Attorney-General. That is correct, isn't it?

Mr von Doussa—I understand that to be the case.

Senator JOYCE—So there is a greater connection between the Australian people and the representation on the High Court than between the Australian people and a representation on some international court in Geneva. That would be a fair assertion, wouldn't it?

Mr von Doussa—Australia has only a very limited involvement in appointing people who are on the human rights committee. That is correct. There is an Australian on it at the moment.

Senator JOYCE—I would say that the vast majority of people in Australia might find it objectionable that a court in Geneva to which they have no real input, no real representation or no real connection should have some form of supremacy over our own High Court. They might find it an affront that some people might suggest that a court in Geneva holds a supremacy of rights over Australia's own High Court—unless we do not have any faith in ourselves as a nation that we are just and moral and can come up with proper decisions.

Mr von Doussa—Australia has entered into conventions which have certain provisions in them and what has happened is an exercise of those provisions. It is a matter of judgment whether or not you think that is right.

Senator BARTLETT—To clarify that questioning, the determination of the High Court, by the narrowest possible majority, was that the Migration Act was constitutional with regard to indefinite detention. They did not actually make a ruling on whether or not it breached our international obligations.

Mr von Doussa—No, they did not.

Senator BARTLETT—The role of international bodies, as well as your role, is to provide an opinion under law on whether or not, separate from that, we are breaching our international obligations. Is that correct?

Mr von Doussa—That is correct.

Senator JOYCE—But the job of the court is to interpret the legislation, which is determined by the parliament, which is determined by the Australian people. It is a pretty basic principle of government. I think we should stick with it.

Senator BARTLETT—Yes, along with the principle that the Australian government signs up to international conventions. This body is determined by that law. It is appointed by the parliament to pass opinion on whether we are meeting those conventions.

CHAIR—Mr von Doussa and your representatives, thank you very much for your submission and for taking the time to appear before the committee today. It is much appreciated.

Mr von Doussa—Thank you very much.

Senator NETTLE—For the record, Senator Fierravanti-Wells mentioned that all senators support detention. It is worth putting on the record that the Greens and the Democrats do not support mandatory detention.

Senator FIERRAVANTI-WELLS—Did I say that all senators support detention? I am sorry, that is not what I—

Senator NETTLE—Yes. I just thought I would correct that.

[12.58 pm]

MASRI, Mr George Michael, Acting Senior Assistant Ombudsman, Commonwealth Ombudsman

McMILLAN, Professor John Denison, Commonwealth Ombudsman

CHAIR—Welcome. You have lodged a submission with us that we have numbered 196. I am certain that members of the committee have also received a copy of your report into the inquiry into the circumstances of the Vivian Alvarez matter, which was tabled yesterday. Do you wish to make any amendments or alterations to your submission before you begin?

Prof. McMillan—No, I do not.

CHAIR—I invite you to make a short opening statement. When you have finished we will go to questions.

Prof. McMillan—I shall make a very short opening statement because I am aware of the range of issues that this inquiry covers. Essentially, the Commonwealth Ombudsman has had a role for the 28 years of its existence of handling complaints about immigration matters. As our submission indicates, we have had roughly 900 complaints per year, mostly about visa matters, detention matters and then some other general immigration matters such as freedom of information and the like.

However, in recent times the office has had a substantial enhancement of its role in immigration matters, and this has been in three directions. Firstly, the parliament, by amendments to the Migration Act, conferred a new role upon the Ombudsman of reviewing the circumstances of any person who has been held in immigration detention for two years and then reviewing the detention at six-monthly intervals if the person remains in detention. That function has already commenced. Secondly, the government requested my office to take over the investigation, firstly of the inquiry into Vivian Alvarez's removal from Australia and, subsequently, of another 201 cases in the same position and, subsequent to that, of another 20 cases. We have a separate inquiry into those now. There are about 220 different matters that may raise issues of the kind explored in the Cornelia Rau and Vivian Alvarez inquiries. Thirdly, because of amendment of the Migration Act, the Ombudsman has separately been titled as the Immigration Ombudsman.

We have recently put forward a proposal to government for developing the immigration oversight function. We have proposed that we will enhance our role in four areas: firstly, in looking at detention health, taking up some of the recommendations in the Palmer report; secondly, in having a more intensive focus on oversighting detention matters generally; thirdly, in having a more intensive focus on compliance issues; and, fourthly, in having an enhanced complaint-handling function as well. So that is the Immigration Ombudsman role that is currently being developed, and yesterday the minister announced that, to enable the office to perform that Immigration Ombudsman role, the government has agreed to extra funding of $12.8 million over four years. That is in addition to the roughly $5 million over a two-year period that

had also been allocated for the detention review function and the review of the 200 cases. So, as you can see, there has been a substantial enhancement of the functions of the office in relation to immigration.

Finally, I should say that there is one aspect of our function that remains very much the same—and that is, that the office still retains its essential function of commenting upon, providing advice to and making recommendations to government. That is, the office does not have determinative powers in relation to decisions made by the department or the minister. I would not propose any change to that, but that is an essential feature of the Ombudsman function. I think I will leave my opening comments at that level.

CHAIR—We will go to questions. Perhaps if I advise committee members that we have about 10 minutes each. Despite the number of questions you ask, that will make sure you get home before dinnertime, Professor McMillan, or else I think we will have you here all afternoon.

Prof. McMillan—Thank you for breaking into your lunch hour.

CHAIR—Senator Fierravanti-Wells.

Senator FIERRAVANTI-WELLS—I will wait until the end, if you do not mind. I am going to stay on now until the end, so that is not a problem.

CHAIR—So you are happy to wait. All right.

Senator KIRK—Thank you very much for your submission, gentlemen. You mentioned the 220 cases or thereabouts that are still before your office. I wonder if you could give us an update on progress in relation to them. Of course, the report on the Alvarez matter having been made public yesterday, I am assuming that process is over. Where are you at with the investigation in relation to the other 200-odd?

Prof. McMillan—The first challenge, I might say, for my office in this and the other areas has been the simple operational one of creating a new team overnight, finding office space and the like. That has taken quite a lot of time over the last month, but we do have a team that is currently exploring those 200 cases. Mr Comrie and one of the staff who was working with him have joined that team, and it has been supplemented by I think about three or four other staff—some from internal transfers and some who have since been recruited.

We are at the stage where we have done an initial analysis of all the 200 cases and we have divided them into eight separate groups. They raise different issues. For example, in some of the cases it seems as though it was a data issue. That is, a person had been held in detention because the correct data had not been conveyed to the person making the detention decision. In other cases, for example, there has been a mental health issue. It is possible that somebody was kept in detention for longer than should have occurred because a mental health condition meant that correct information had not been elicited from the person—a bit like the Cornelia Rau case. There is a group of other cases which flow on, for example, from a decision in the case called Srey, where people had been kept in detention because the department had not fully digested the impact of another Federal Court decision that had occurred some time before.

They are just examples of some of the different kinds of issues that are arising. At the moment we are concentrating on two groups. They are the group of cases that raise the mental health issues and the group of cases that raise the data issues.

Senator KIRK—About how many of those 220 cases are encompassed within those two groups that you have just identified?

Prof. McMillan—I might say this is of the 201 cases. We only got the additional 20 the other day and we have got to factor those in. Of the 201, about 50 of them raise the data issues and, on our present analysis, 11 raise the mental health issues. In some cases, the detention that is in dispute was for less than a day. In one case, though, it was up to 1,272 days. We are going through the simplicity and complexity of these cases. The estimate, given the present funding, is that it could take the office two years to work through this group of cases. But one should bear in mind, for example, the length of time it took just to complete the inquiries into the Cornelia Rau and the Vivian Alvarez cases. In each case there was a team of four or five people working on a single case. It is a complex, sensitive and difficult area that we are working through.

Senator KIRK—Without going into detail, most of us can understand what the mental health issues may be that you are referring to. But when you speak of data, is this just record keeping? Is it perhaps like the case of Alvarez, where there was a difficulty identifying her by way of her name? Is it country information? It could be a whole bunch of things.

Prof. McMillan—My colleague George Masri may want to add to this, but the kinds of problems are, for example, that DIMIA records have not been up to date, that there was incorrect information recorded about a person's visa conditions or that the information was conflicting. One of the complaints made in the Vivian Alvarez report is that the information systems in the department of immigration were siloed. There were different information systems for different purposes and they did not always speak easily to each other. George, do you want to add anything?

Mr Masri—I think you have covered the range. There is certainly a broad range of data issues which I think, as the ombudsman mentioned, was referred to in both recent reports of Alvarez and Rau. They are the sorts of issues we are confronting.

Senator KIRK—Still on the question of resourcing, you mentioned that there are approximately four people working on the Alvarez and Rau cases separately and that you now have approximately four people assigned to try to get through these 200-odd cases. As you say, that is clearly going to have implications for the period of time it is going to take to resolve each of these cases—bearing in mind that each of them are individuals who would no doubt like an outcome. In terms of resources, realistically, if we are going to try to get through these 200-odd cases within the next six months or so, what kind of resource impact would that have?

Prof. McMillan—The four people who are doing it at the moment are the start of the team. How many extra are we proposing to appoint to that team?

Mr Masri—There are the additional ones that came from the Neil Comrie team. They will be joining the others and we are physically relocating the two teams this week and next week. We are still looking at an additional 2 on top of the ones from the Neil Comrie team and our people

who have been involved in the assessment of these 201 cases. All told, it may well be about six, seven or eight. I do not have the figures right now.

Prof. McMillan—We are confident that not all 200 cases will take the same amount of time and have the same degree of difficulty as the Rau and Alvarez cases. It is for that reason that we have separated them into eight separate groups. Clearly, it is premature to make a firm prediction about how long it will take to complete the investigation of all 220 cases.

Senator KIRK—There was a media report concerning a Federal Court decision that got some press coverage yesterday—Nystrom, I think was the name of the individual, versus the minister. The media suggested that your office is investigating whether DIMIA or others acted legally when deporting long-term residents such as Mr Nystrom. I wondered if that media report is correct?

Prof. McMillan—Yes, it is. Independent of the Federal Court decision on Nystrom, I decided to commence an own-motion investigation into the issue of criminal deportation. There is a draft report which has been completed and is currently sitting on my desk which I hope will be going to the department within the next week or two. The reason we commenced the own-motion investigation is because we had received a number of complaints from people who were in detention. The general picture is that these are people who were Australian residents. Some of them came to Australia many years ago, while some came as young people. Some were even unaware that they were not Australian citizens, because they had simply grown up in Australia. Then a decision was made by the minister under section 501 of the Migration Act that, after conviction of an offence, a person failed the good character test in that section and should be removed from Australia.

The complaints to our office have, again, illustrated the complexity and sensitivity of the different issues that arise. As I have indicated, sometimes these are people who really have grown up in Australia. Most of them are people who have completed the term of imprisonment for the offence committed in Australia and their removal to another country raises distinct issues. Often they are people with close family and other connections. Sometimes the country to which their citizenship belongs is a country that no longer exists or they may be a country that the person has never visited and in which they are not proficient in the language or culture. Sometimes that results in the person being in detention for quite a long period in Australia while these issues are addressed, reviewed and so on. Indeed, some of the people within this group come within our two-year detention review. Because of the range of issues we decided that it was an appropriate topic for an own-motion investigation. I should add that there is one major restriction—the Ombudsman has no jurisdiction to investigate decisions of the minister. But, nevertheless, we have been able to investigate the general picture. Again, I will not foreshadow what the recommendations are, because the draft is on my desk and I may well vary it, and, under our act, it has to go to the department for comment before we make any adverse public comment.

Senator KIRK—I understand that a report is going to the minister, but you mentioned that there were numerous complaints. How many complaints were there, and will you attempt to resolve them separately from the process of presenting the own-motion report to the minister?

Prof. McMillan—Each of the complaints is investigated individually but that can depend on the nature of the issue that has arisen. If the person's complaint is simply: 'I don't want to be removed from Australia,' there is little we can do in investigating that matter because it is a ministerial decision. If the person's complaint is: 'I've been transferred to the Baxter detention facility, but I've spent my life in Perth. My family and friends are in Perth and they cannot visit me,' then we can investigate why the person was transferred there and whether it would be better or worse if they were in a somewhat more cramped detention facility in Perth. So we do investigate the individual issues that people raise. There is a steady but small stream, but I do not have the exact number.

Mr Masri—In recent times we have had a half dozen or so 501 visa cancellations for long-term residents. In the context of the own-motion investigation, I think we have looked at about 36 departmental files and cases in that situation. The Nystrom matter raises an issue which is a subset of the 501 visa cancellations. The issue, under which Nystrom falls, concerns a person who was here prior to 1984, was deemed to be an absorbed person and had not left Australia between 1984 and 1994. In that context, they were entitled to a transitional visa, and therefore the minister should not have cancelled the visa under section 501. There are some cases in our own motion which came within the Nystrom context. Two of those cases were subsequently subject to release from detention, and the department is investigating some others that may well come under the Nystrom matter.

Senator KIRK—You said that the power you now have to review individuals who have been in detention for a period of greater than two years has now commenced. When did that power begin?

Prof. McMillan—That function has now been in operation for approximately three months. The function commenced on the day on which the legislation was assented to. The stage we have reached is that there are at present about 200 people who are subject to this reporting requirement. It starts with the department preparing the report to the Ombudsman and then the Ombudsman undertaking an individual assessment and preparing a report and any recommendations the Ombudsman wishes to make to the minister. The minister then has to table in the parliament an abridged version of the Ombudsman's report and her response to it. Roughly 200 people are subject to that reporting requirement at the moment. On the latest statistics, we have received 121 reports from the department in the three-month period. By Monday, there should be the first 12 reports by me to the minister and then perhaps another 20 within the next week or so after that. In discharging that function, we have already interviewed 35 people in detention at Baxter and Villawood and established contact with a number of others. Many of the people have been released from detention while this function had been under way, but are nevertheless subject to the reporting requirements in the first phase.

Senator KIRK—Thank you; I will leave it there.

CHAIR—Recommendation 6 of Mr Comrie's report says:

Further, all staff at DIMIA should be reminded of the need for great care in the spelling ...

In living memory has an ombudsman's report gone to that level?

Prof. McMillan—Yes, we deal with the minor and the major. This is a good example of how simple administrative matters can become dramatically important in protecting people's rights and interests. There are 11 different spellings or descriptions given to Ms Alvarez and staff in the agency were not fully trained in using the computer and other checking systems to take account of the possibility of error because somebody goes under different names or because a name can be spelt differently.

CHAIR—We often talk about the tip of the iceberg—other phrases from your report talk about a 'flawed organisational culture', visa provisions being 'manipulated' and 'insufficient attention'. There is not a page in this report where there is not a pretty major criticism of the department. In your view is this one of the more damning reports that the Ombudsman would have produced about a Commonwealth department?

Prof. McMillan—Yes, I think you would probably have to say that it is about the most damning report that has been prepared. The current Secretary of the Department of Immigration and Multicultural and Indigenous Affairs is reported in the *Financial Review* as having said of the report on the Cornelia Rau matter that he had never seen a report on a government department quite like that one and that it had had lessons for not only his own department but for every department. One would have to say the same of the report into the Alvarez matter. In some respects that report raises even more worrying matters because it involved the removal of an Australian citizen. The events occurred over a period of four years, so it was not simply an isolated or uncharacteristic problem. The report also recommended that the department investigate disciplinary action against three officials.

CHAIR—When this issue was first being investigated, I understand that on the ABC's *AM* program back in August you stated that you had all the powers of a royal commission. Do you still stand by that statement?

Prof. McMillan—Yes, we do have all the powers of a royal commission. What I was referring to there is that the Ombudsman has the power to require the production of information or documents from any person and not just Commonwealth officials. We can require the production of documents, we can enter premises and we can extend immunity to any witness. That is subject to the jurisdiction of the Ombudsman Act. As I have indicated, the Ombudsman has no jurisdiction to investigate, say, a decision by a minister—but that is no different from the situation of a royal commission, that it keep within its terms of reference. Within our jurisdictional—our statutory—terms of reference we have the statutory powers equivalent to those of a royal commission.

CHAIR—You have no jurisdiction to look at the decisions of a minister; do you have the power to investigate actions of the minister or actions that happen in the minister's office?

Prof. McMillan—Yes, we do. The Ombudsman has always interpreted that limitation narrowly. It precludes the Ombudsman from investigating the personal decision-making actions of the minister but the Ombudsman has always claimed—and this is not now contested—jurisdiction to investigate advice given to a minister and action taken to implement the decision of a minister. The Ombudsman can also make comments and recommendations about legislation and policy and that enables matters to be extended broadly. As to investigating decisions made by officers within the minister's office, I would have to say that is an issue that is not formally

resolved. There is a very complex definition of 'jurisdiction'. For example, some of the people in a minister's office are often public servants who are on transfer and we would clearly claim jurisdiction to investigate their actions.

CHAIR—Why is it not resolved? Is it not resolved because of political appointments in the minister's office?

Mr McMillan—No, it is not resolved because it has never really come to a head. Most of our jurisdictional issues have never been an obstacle. When you have only the power to make a recommendation, it enables you often to overstep the jurisdictional limits on a consensual basis with those who are being examined. So it has never come to a head in the sense that either party has gone to a court to get a definitive ruling on where the jurisdiction starts and ends.

CHAIR—I want to take you to a matter that may possibly be unresolved in this report. When the minister's chief of staff received an email from Mr Young, who is Ms Alvarez's ex-husband I believe, it was 16 days before the department was notified and then a further 10 days before it became public. You make mention in this report of Mr Young contacting the minister's office but your investigation seems to stop there. Why is that? Did you look at why it was that at least 16 to 26 days had elapsed, when the minister's office had had this email from Mr Young and, I think, even personally interviewed Mr Young, but nothing was then done?

Mr McMillan—Could I take that question on notice and provide a written response? The reason is, as the report explains, the inquiry had been substantially undertaken by Mr Comrie at a time when the government requested me to take it over. Although I became involved in the investigation, there were some issues that had been explored and resolved of which I know nothing at this stage and that is an example. If I may, I will find out and respond.

CHAIR—Did you formally investigate the actions in the minister's office in the course of this report?

Mr McMillan—My understanding is that was not done but again I will take that on notice.

CHAIR—Could you also provide us with the reason you did not? As I said there is mention in your report that Mr Young had emailed the office and there is evidence in your report that that email sat in that office for a period of time. It seems to me that there is still another chapter of this report missing.

Mr McMillan—Again, I will take it on notice and provide a definitive response but I was thinking it might have been to do with the terms of reference. As I said that was a part of the inquiry undertaken by Mr Comrie before I became involved and he had decided the aspects to explore with that part. I will find out and respond.

CHAIR—The department did not make use of Mr Young, the excuse being that he was not the next of kin. Did the fact worry you or Mr Comrie at all in the investigation that this person was still so concerned about Ms Alvarez that they contacted the minister's office, but it sat up there?

Prof. McMillan—Both the Palmer and Comrie reports have highlighted a growing problem that privacy concerns, perceived or actual, are becoming an obstacle to the flow of information within government and are impeding good administration. It is a matter that I have adverted to in my forthcoming annual report and I addressed it in a public talk I gave last night. Both of these reports made the point that the issue would at least have been resolved earlier had privacy not been raised as an obstacle—in one case to the circulation of a photograph of Ms Rau, and in the other case to the disclosure to Mr Young of the department's knowledge.

It is an issue that I have raised myself with this department in discussions and quarterly reports. We found that privacy concerns raised by the department were impeding our investigations and making them more protracted. In response, there has been a recent amendment proposed to the Ombudsman Act to enable departments to provide information to the Ombudsman without concern about breach of the Privacy Act. I think this committee of the parliament, in its recent report on the Privacy Act, also had a chapter on obstacles. The Wheeler report on airport security the other day raised similar issues about privacy being an obstacle to the circulation of information. I think there is a general issue of concern there.

CHAIR—I am just trying to find the section in the report where you mentioned this. In dot point 31, which outlines the chronology, it says:

Vivian's unlawful removal in 2001 was eventually acknowledged officially only because of the continued inquiries by Robert Young, who brought the matter to the attention of the Minister's office ...

Prof. McMillan—Yes.

CHAIR—Yet, if I look at the back of the report I see that nobody in the minister's office, was interviewed. Nobody in the minister's office is on the list of witnesses that were interviewed. My question to you is: why did you get to dot point 31 and stop the inquiry? Why did Mr Comrie stop there? He did not say, 'Gosh, I have the power ...' Why did he not then go and talk to people in the minister's office? That is my question.

Prof. McMillan—Again, I am going to have to give the presently unhelpful answer and say I will take it on notice and provide a written response.

CHAIR—I have one last question. Was your office or Mr Comrie's office aware of which individuals, agencies or organisations Ms Alvarez was taking legal action against, while you were conducting the inquiry?

Prof. McMillan—I am not aware of that. I have had general discussions about the matter which Mr Comrie and he has not informed me of any knowledge he has of legal proceedings of any kind against other people.

CHAIR—Do you need to take that on notice?

Prof. McMillan—Yes, I will take that on notice. I am just conveying that I know nothing of any legal proceedings but I will make inquiries and find out if he, or the staff who were working for him at that stage and who are now working for me, have any such knowledge.

Senator BARTLETT—In your submission you say that over the past five years the DIMIA area has accounted for five to six per cent of complaints made to your office and that the numbers peaked at 1,100 complaints during 2001-02 and the following year. Does that mean there were 1,100 complaints just on DIMIA matters?

Prof. McMillan—Yes, that is correct.

Senator BARTLETT—Just a bit further down you said:

Complaints about migration issues continue to form the largest category.

Is that in terms of a break-up by departments?

Prof. McMillan—Yes, migration issues were the largest category of the DIMIA complaints. The largest number of complaints we receive are against Centrelink, and at the moment the second-largest is against the Child Support Agency. Perhaps I can add to that. Because of the profile that the office has in this area now, the number of immigration complaints has been increasing. During a couple of months recently, we were receiving increases of 30 per cent to 70 per cent. Our estimate is that over the next year we will probably receive about 1,500 DIMIA-related complaints.

Senator BARTLETT—One of things I want to establish, or at least get a picture of, is how new these problems are. As you said, it is hard to think of a more damning report than what we had tabled yesterday—albeit tabled by someone who was not the minister. The broader issues that are raised in there about record keeping, competence and those sorts of things seem to have come up a number of times. Looking at one of the reports from earlier this year, you noted the particular person Mr Z. There were pretty strong criticisms about absence of formal and documented procedures, and even absence of documents in certain circumstances. It is a bit hard to give a definitive answer, I guess, but how many times have these sorts of issues been raised in the past and clearly not been adequately dealt with if they are still current, even with that report you tabled earlier this year?

Prof. McMillan—As a general response, nearly all of the problems of administration that are highlighted in the Alvarez and the Rau reports have been raised in the past. The Ombudsman's office, prior to my time, did an own-motion investigation, for example, on the conditions in detention centres. The human rights commission did a report a year or so ago on children in detention. As our annual report indicates every year, there are problem areas such as record keeping; lack of clarity in memoranda of understanding between Commonwealth and state authorities; and issues about the adequacy of medical and health diagnoses in detention centres, particularly the regularity of visits by mental health professionals. So, yes, all of the issues and problems—compliance, missing notebooks about compliance officers, people who are fully cognisant of the legislation, privacy as an inappropriate obstacle to the circulation of information—have been raised at one time or another.

Senator BARTLETT—So in that sense to say that Rau and Solon, or Alvarez, are isolated cases would not be accurate; they are two extreme cases of a problem that has been raised many times before.

Prof. McMillan—Yes. They have focused attention. The department and the government have both accepted this and allocated over $100 million for an upgrade in most areas of departmental operation—training, structure, IT and so on.

Senator BARTLETT—We can all make our policy points about how that has happened. In a broader non-partisan role as a parliament, what ways are there to ensure that at least this time around the concerns that have been raised are followed through? Are there other specific changes to parliamentary oversight procedures or the legislation itself that may assist so that we are not all back here in five years time having the same conversation?

Prof. McMillan—These cases raise an interesting conundrum. The department of immigration is probably about the most oversighted, reviewed and scrutinised agency in the history of Commonwealth administration. There has been a higher volume of litigation. There are more reports by the Ombudsman, the human rights commission and the Audit Office. There have been regular visits by parliamentary committees to detention centres. There are other bodies like the Independent Detention Advisory Group. The department is not wanting for lack of external oversight and scrutiny, and yet the problems exposed in these two reports occurred and—as the department accepts and as my comments indicated—they were not isolated or uncharacteristic but emblematic of larger problems.

It does pose the question of how you ensure fundamental and sustained cultural change within an organisation. I do not think there are any easy answers; it is probably a large case study for public administration as much as anything. My view is that there are a few essential requirements. One is clearly strong leadership and political commitment within the agency to make the change. There have been announcements to that effect—the department has accepted that to initiate, imbed and sustain this change there needs to be a complete restructuring of the department and the appointment of a different management group in the department. The government has accepted that there should be an independent oversight body dedicated to the task and properly resourced to undertake it. That is the role my office is undertaking. It is a concern to us that, though we have been reviewing it for 28 years, these things happened. It is now part of our responsibility, with the new role and the enhanced funding, to ensure that reports of this kind need never be written again.

Senator BARTLETT—I will just go to that point. As an independent oversight body I assume you get adequate resources to do that job properly. However, as you mentioned, you have had an oversight role, the human rights commission has an oversight role, IDAG has an oversight role and parliamentary committees and international human rights committees have oversight roles, but still the problems have continued to a large degree and, some could argue, have become worse. Does it ultimately come down to the fact that that is democracy and, if the government stuffs up enough, people can vote them out or are their fundamental problems in the law itself that mean the ultimate power for fixing things always rests with the people who are making the mistakes, so you always have that built-in, natural human circumstance to get defensive about? There is a lot of independent oversight. You will be the oversight body, but you still cannot direct anything to happen. It is still going to be up to the government and department of the day to agree to fix their own mistakes. Should we be looking at some form of amendment to the Migration Act itself? The detention area that has been pointed to in both these reports—there was detention involved in the Solon case—is where public servants can determine to imprison a person based on an opinion, and there is no mechanism to challenge that. Do we need

to start finding some mechanism to require action to happen rather than just continually recommending?

Prof. McMillan—There have been commitments to wholesale change in the department at both the political and the departmental level. When the issue is revisited in six to 12 months we will be in a better position to assess what significance one attaches to that. The lesson that arises from the last few months is that there is need for change across the board. Firstly, one cannot underrate the importance of a political commitment to change. That has been the trigger for the wholesale change. I think there is clearly a need for legislative clarification and amendment in some ways. One of the problems that we have identified in the past and that these reports bring to the fore is that many of the discretionary powers in the Migration Act have been taken away and many of the safety net discretions have gone. Perhaps in an attempt to limit the impact of judicial and tribunal review, there was a tightening up of provisions. Many officers in the department read the act on the basis that, once there were reasonable grounds for a person to be taken into detention, they could only be released in very narrow circumstances—deportation, grant of a visa or, I think, removal from Australia. The reports question that and suggest that it would be better to have either differently worded provisions or at least a better understanding of them.

The government announced yesterday that, for example, it needs a new college located within the department for training. It is not enough to have just one-off half-day or one-day training courses for officers. There needs to be a coordinated approach by the creation of a new college of training within the department. I think those examples illustrate the breadth. A point I have made is that I think there is also room for argument that the volume of judicial and tribunal oversight was in fact part of the problem rather than the solution. There is certainly the experience in my office that the agenda of the department was so focused on dealing with litigation that it was harder for our office to get priority for our investigations and to raise some of the complaints that we were raising. Sometimes an attitude had developed within the department that, in light of the litigation it experienced, compliance with the law was all you could expect and that the arguments about administrative style and practice could wait for another day. At the moment there is a recognition that all of those matters have to change, and hopefully events over the next months and years will show that that program of cultural and organisational change is effective.

Senator NETTLE—I just want to check that I wrote down something correctly. When you were talking about the 201 cases, did you say that one person had been wrongly detained for 1,272 days?

Prof. McMillan—One of the persons whose case is being reviewed was in detention for 1,272 days. The purpose of our inquiry is to examine whether any or all of that period was a period of wrongful detention.

Senator NETTLE—Over 3½ years is an extraordinarily long period of time to be in this particular group of people. Is there any more information that you can provide?

Prof. McMillan—No, I cannot give any more information at this stage. All I can say is that when the matter is explored it will be the subject of a public report.

Senator NETTLE—Thank you. At this stage do you know whether there are any other instances of Australian citizens being removed in that package of 201 cases?

Prof. McMillan—I have asked the question and the unofficial oral answer I have always been given is that the removal of Ms Alvarez is the only known case of removal of an Australian citizen.

Senator NETTLE—Okay. Going to the Alvarez report, in the second-last paragraph on page 31 you talk about the culture of DIMIA being motivated by imperatives associated with the removal of unlawful noncitizens and that officers failed to take into account basic human rights obligations characteristic of that. Do you have any sense from the staff that were interviewed about where they felt those imperatives were coming from?

Prof. McMillan—The report addresses that in a sense. It stems initially from section 198 of the Migration Act, which provides that if a person is an unlawful noncitizen then they shall be removed as soon as reasonably practicable. The view was that reasonably practicable meant that if the person can be removed and an aeroplane is available they should be. As the Alvarez report points out, some of the key performance indicators devised at a management level, according to which officers worked, ensured that they tried to meet that. Some of the officers interviewed by Mr Comrie said that they indeed thought that the hasty removal of Ms Alvarez was an exercise in good performance rather than an exercise in defective administrative performance. So it starts from the act and flows down through the department.

Senator NETTLE—So, as to that imperative that is being referred to, it is perhaps that section of the act forming the imperative?

Prof. McMillan—Yes.

Senator NETTLE—In the next paragraph on that page you say that some officers who were interviewed said that they thought they would be criticised for pursuing welfare related matters instead of focusing on the key performance indicators for removal. I just wanted to invite you to expand on that.

Prof. McMillan—That is the same view. The view was that the welfare matters are not comprehended by the phrase 'reasonably practicable', that 'reasonably practicable' limits the range of relevant criteria and that a separate inquiry into welfare matters does not come properly within the scope of that.

Senator NETTLE—Thank you for the comment about what people being interviewed thought about the speedy removal of Ms Alvarez. I find that astounding, but thank you for contributing that. How did you find the level of cooperation that you had with DIMIA and access to materials in the production of the Alvarez report?

Prof. McMillan—I have always found in our complaint investigation and in my involvement in this case that at the end of the day we have always had the cooperation of the department in conducting an investigation. In the past I have made the point to the department that sometimes the cooperation is at the price of many issues being raised—jurisdictional, privacy obstacles and so on. I think it is fair to say, though, that in the last three months my view is that there has been

a distinct improvement in the level of cooperation between the department and my office. There is a willingness to listen to issues we raise and to find a sensible and quick remedy to problems.

Senator NETTLE—Did the terms of reference provided for the inquiry in any way limit the investigations that your team wanted to do on this issue?

Prof. McMillan—I will take that on notice and ask Mr Comrie and his team whether at any point they sought clarification. That has never been brought to my attention, but I will ask that question.

Senator NETTLE—With relation to the three officers from DIMIA pointed to in the report—we understand that one of those officers has subsequently retired and therefore will be no longer subject to the investigation—

Prof. McMillan—I have heard that only through the media, I might say.

Senator NETTLE—Yes. The minister has said that, if the other officers also resigned or retired for any reason, they would no longer be the subject of any investigation. I just wondered if there was any concern from the Ombudsman about such action resulting in there not being an investigation.

Prof. McMillan—That is where we come up against something of a jurisdictional obstacle. The Ombudsman does not have jurisdiction over personnel employment matters. The Ombudsman Act includes a mechanism in section 8(10) which says that, if the Ombudsman thinks there is a reason for doing so, he can draw to the attention of the head of an agency any issues of a personnel or disciplinary kind. My view is that my statutory role is to draw the personnel matters to the attention of the department. I no longer have a continuing role. They sometimes tell me what has happened, but, if it is felt that the department has gone soft, that is a matter that has to be taken up in another forum.

Senator NETTLE—With the cases that you were looking at of people who have been in detention for over two years, earlier today a witness who appeared before us, Marion Le, read out part of a letter that she had received from you—it must be that one of her clients is one of those people—in which she was being asked for additional information, presumably for your report and recommendation. It was information that she had already given to DIMIA. I just wanted to ask you if you had had any difficulties in getting the information that you needed from DIMIA. She implied that perhaps you had had some difficulty, but it was not clear in the part of the letter that she read to us.

Prof. McMillan—Without knowing the details of that individual case, it has certainly been my experience in conducting this new detention review role that we have had strong cooperation from the department. There has been a willingness to provide us with whatever information we have asked, such as access to officials and centres. Ultimately, we can use our statutory powers if there is any resistance, but there has been no need to do so.

We made a decision that for natural justice and general fairness reasons we should individually contact each person whose case was subject to review and invite them to make a submission or provide information. Quite a lot of the information they provide us is a duplicate

of the information we already have, but it is part of the natural justice process that you invite the person to put it in their own terms.

Senator NETTLE—You might also be interested to know that, because Mrs Le had put in an FOI request, she had a copy of the DIMIA document that had been provided to you as part of your investigation. She said there were factual errors in that document. I cannot do anything about that, but I just thought I would let you know about it.

Prof. McMillan—Whenever that is said by someone, I always invite them to draw it to my attention and we can take whatever actions are appropriate.

Senator NETTLE—In relation to the own-motion investigation you are conducting on section 501, is there a time frame for when the report will be made public? You said that it was going to the department.

Prof. McMillan—As I said, the draft is on my desk. I can say now that the daft will need some rewriting, if only because it is too long. I hope to have that rewriting process completed and to do a personal review of it myself within the next couple of weeks. Normally, the draft then goes to the department, and we ask the department to respond within 28 days of getting it. Assuming that no major rewrite is required after that, we then provide, under the provisions of the act, a copy to the department and the minister. Usually within a few days we publish it on our web site. Looking at that, I suppose it would be a minimum of two months—and hopefully not much longer—before a report is completed and published.

Senator NETTLE—Quite a bit of evidence has been put to this committee about section 501. Glen Nicholls, an academic from Swinburne university, has also talked to the committee about it. His suggestion was that section 501 should not be used, but rather the department and the minister should revert to using section 201, in which there is a 10-year time limit. I notice that you have put that in as a recommendation. I invite you to comment on that, and also on the other comment put to us that section 501 was originally being used for people who were on temporary visas and that it is now being used for people on permanent visas.

Prof. McMillan—Can I just say at this stage that the matter of whether a resident being convicted of criminal offences should be treated as a section 201 or 501 is one of the central issues addressed in the report.

Senator FIERRAVANTI-WELLS—Could I take you to page 1 of your submission—a letter to the committee dated August—in which you say that DIMIA accounts for five to six per cent of the complaints to your office. You also say that the number of complaints reached a peak of 1,100 and that it is now just under 900. How many of those complaints—and, if you do not know this, please take it on notice—also have legal proceedings or some form of legal procedure on foot?

Prof. McMillan—I will have to take it on notice, unless my colleague knows the answer.

Senator FIERRAVANTI-WELLS—Secondly, is there some sort of pattern? Do complaints to the Ombudsman form part of a broader package, such that people taking some sort of legal action go to the Ombudsman as well for completeness?

Prof. McMillan—My general response—and Mr Masri may want to comment on this issue as well—is that there is no pattern. Every imaginable pattern is illustrated. Sometimes people complain to only the Ombudsman; sometimes they complain to everybody. There is no pattern.

Senator FIERRAVANTI-WELLS—Under the heading of 'Visa cancellations', you say, 'We have received several complaints'. How many is several? Two?

Mr Masri—As I mentioned earlier in the context, I think, of relatively recent complaints in relation to 501, we do not have the exact number. I can provide it to you later. There were about half a dozen or so.

Senator FIERRAVANTI-WELLS—That is fine. I am happy for you to take it on notice. I want information and statistics on the number of complaints, what they were about et cetera.

Prof. McMillan—Our database system breaks it down very well, so we will provide that.

Senator FIERRAVANTI-WELLS—Thank you. Under the heading 'Migration agents regulation', you say:

We have received some complaints from migration agents which have raised some concerns about the way in which MARA investigates some complaints ...

You then make the following point:

Whilst MARA is separate from DIMIA, given the important role migration agents play, it is essential for its administrative processes to be effective and fair.

Is the strictness or stringency of those inquiries due to the fact that there are considerable complaints about the way migration agents conduct themselves? I would appreciate it if you would provide me with some information about the number and the sorts of complaints which could show me the pattern of those complaints in relation to the conduct of migration agents.

Prof. McMillan—My own experience of one was an isolated case, but we can certainly provide you with some general information.

Mr Masri—The complaints that we receive are generally from migration agents. The context of complaints that individual people might have about migration agents is that MARA is the agency that individuals complain to.

Senator FIERRAVANTI-WELLS—I see: that is where they go to complain. Going now to some of the comments that you made this morning, do you now know the time that the person spent in detention in each of the 200 cases that were referred to you?

Prof. McMillan—Yes. We have been given the details on each individual case.

Senator FIERRAVANTI-WELLS—Can you provide information on the time that each person has been in detention?

Prof. McMillan—Given there are 200, would it be acceptable if we provide a breakdown showing, say, 50 of them were detained for one to three days et cetera, rather than provide a list showing each case?

Senator FIERRAVANTI-WELLS—That is fine if it would be easier. I just want to get a better picture. There seems to be a general impression that a mass of people were kept in detention for such a long period of time. I am picking up the point that you are talking about people who were in detention, and you are now investigating the wrongfulness or otherwise of that detention.

Prof. McMillan—Yes. It is important to know whether the majority experienced detention of one day, rather than 1,270, or if it was in the middle.

Senator FIERRAVANTI-WELLS—Exactly. Do you agree that the reference of those cases to you was for completeness; in other words, that at the time of the referral these were people who had been kept in detention and therefore, for completeness, the referral was made to you of all 200?

Prof. McMillan—Correct. And one should not make any assumptions at this stage that there was any wrongful detention or wrongful administration in any of those cases. Yes, they have been referred for completeness.

Senator FIERRAVANTI-WELLS—So, when you look at the Rau and Alvarez cases in that context, would you agree that they are probably more extreme and more sensationalised but are not necessarily reflective of what the—

Prof. McMillan—That is right. It is premature to pass any judgment on whether or not any of the other 100-odd cases bear the same characteristics.

Senator FIERRAVANTI-WELLS—When you look at the broader number of complaints in the context of the statistics that you previously agreed to provide to me, I would appreciate it if you could look at this in that context as well. So, in effect, Rau and Alvarez represent a very small number or gender of complaints.

Prof. McMillan—Yes.

Senator FIERRAVANTI-WELLS—Thank you. A question was put to you about reviewing the decisions of the minister. There is other Commonwealth legislation in place for the reviewing of decisions et cetera.

Prof. McMillan—The decisions of the minister are subject to judicial review and selected decisions of the minister are subject to review by the Administrative Appeals Tribunal.

Senator FIERRAVANTI-WELLS—Exactly. Do you feel that you have sufficient jurisdiction?

Prof. McMillan—Yes. I have never claimed, either as Ombudsman or previously as an academic commenting on the area, that the Ombudsman should have jurisdiction over

ministerial decisions. It is appropriate that decisions of the minister should be subject to judicial and sometimes tribunal review. But otherwise the parliamentary forum is the more appropriate forum for ministerial accountability, and so I would not suggest that the Ombudsman have any broader jurisdiction.

Senator FIERRAVANTI-WELLS—Questions were put to you about the review of conduct of staff in the minister's office or people working in ministers' offices. You said that it has been an issue in the past. Are there specific instances where that has arisen?

Prof. McMillan—Yes. I have discussed it with my legal officer, although only in general terms, and he has indicated that there have been cases. None spring to mind. But I can check on that.

Senator FIERRAVANTI-WELLS—I would appreciate it if you could go back over some period of time. You said earlier that you have been reviewing DIMIA for 28 years. I appreciate that probably your records do not go back very far. But I would appreciate it if you could look at whether those kinds of instances did arise in governments other than this one and advise of that.

Prof. McMillan—Yes.

Senator FIERRAVANTI-WELLS—You mentioned privacy concerns and privacy obstacles. Did I understand correctly that you have made certain submissions in relation to possible changes to that?

Prof. McMillan—As you say, I have drawn attention to it in my annual report that is coming down soon. In a talk I gave last night to a public seminar organised by the Australian Institute of Administrative Law and in one I gave a couple of weeks ago in a forum called the FOI Practitioners Forum, I raised the issue of my general concern as Ombudsman about privacy concerns, real or imagined, being an obstacle to the flow of information and good administration.

Senator FIERRAVANTI-WELLS—Do you perceive that protecting a right to privacy in some of these cases may in the end have been detrimental or an impediment?

Prof. McMillan—Yes. Often when people raise the privacy objection there is a genuine concern that they do not want to be in breach of any privacy laws. We have a very active privacy regime in Australia. Sometimes the consequence has been that problems have been resolved less quickly and less easily. That has been the experience of my own office—that some of our investigations into administrative problems could have been completed a lot more quickly had there not been a privacy obstacle. For that reason, we requested an amendment to the Ombudsman Act to clarify that an agency would not be in breach of the Privacy Act. The parliament might have enacted that change by now.

Senator FIERRAVANTI-WELLS—You said that nearly all complaints have been raised in the past. How far back in the past? You talked about complaints coming to the Ombudsman in relation to issues pertaining to detention. Do these complaints about detention go back prior to 1996?

Prof. McMillan—I will have to check on it. The detention centres have been around for a while. But until recently the population in the detention centres was mainly made up of people who had overstayed their visas and who were being removed. We would get some complaints. But it has become a more complex issue in recent times because of the people who arrived by boat and were subject to mandatory detention. Secondly, there were people falling into the section 501 criminal deportation category, some of whom have been there for a long time. It has become a more complex issue in recent times.

Senator FIERRAVANTI-WELLS—I appreciate that, but in the past there were instances where the population in detention centres was much higher than it perhaps is now. I would like you, if you could, to go back and look at your records, particularly as to those times when the population in the detention centres was quite high, because I would like to be able to make a comparative assessment of the situation.

Prof. McMillan—I will examine our statistics.

Senator FIERRAVANTI-WELLS—Thank you. When you look at the bigger picture of the broad Australian population of 20 million people and you look at these two instances of Alvarez and Rau, is it fair to say that, while these are, in the bigger picture of what we are talking about, most unfortunate cases, nevertheless these two incidents have received, in your words, an 'extreme'—and certainly a much more sensationalised—response? However, they are, in the bigger picture of things, still two individual cases, given the bigger picture of what the migration department deals with and given the flow-through of that department's work.

Prof. McMillan—Yes. In fact, we make that point every year in our annual report, not in relation to departments generally, that the complaints that we receive are only ever a fraction of the number of transactions in which the department is engaged each year. One could say the same about Immigration or any department: that the complaints that we receive are a fraction—say, 0.01 or 0.02 per cent. So the faults that we find are not necessarily representative of the general standard of decision making. All we can say is that, firstly, the individual complaints illustrate the impact that government decision making can have on individuals in individual cases and, secondly, the complaints are sometimes a window on a larger picture but we are unable to paint that larger picture.

Senator FIERRAVANTI-WELLS—Certainly, but you do have statistics on complaints—the number of complaints, complaints dealt with et cetera?

Prof. McMillan—Yes.

Senator FIERRAVANTI-WELLS—You say that you report those in your annual reports and your statistics would be able to assist with statistics in relation to those complaints?

Prof. McMillan—Yes.

Senator FIERRAVANTI-WELLS—You said that you have been reviewing DIMIA for 28 years?

Prof. McMillan—Yes.

Senator FIERRAVANTI-WELLS—Would it be too much to ask about statistics on complaints over that period of time?

Prof. McMillan—We maintain the statistics for all of that period, so I will get together what we do have and provide it.

Senator FIERRAVANTI-WELLS—Thank you. You mentioned the removal of judicial review. Judicial review was removed to a more codified system, if I can put it in those broad terms. Do you think that some of the excesses in relation to judicial review occasioned those changes so that the new codified system, if I can put it in those terms, has led to a much more proscriptive framework? Do you have any comments in relation to that? You can see the point I am trying to get at. We have moved to a much more codified system which has its own inherent aspects.

Prof. McMillan—I can draw attention to one example that is covered in our last annual report, the one for 2003-04, and I have written about it in my former career as an academic. If we go back about 12 or 13 years, there was a section in the Migration Act that said a visa could be granted on compassionate and humanitarian grounds. That was what I would call a general safety net discretion to deal with unexpected circumstances. It became the subject of extensive judicial review with the result that the section was repealed and in its place there was a whole range of much more specific categories. I have said that I thought that was unfortunate, because complaints to my office showed that often there were unexpected situations where there was ready agreement by the department that a person had unwittingly lost their visa or where people were unwittingly unable to apply for a visa in Australia. There was no discretion within the legislation to provide one and they would have to go home—back to another country—apply and come back. We put up a submission to the department, which is referred to in our annual report, that there was a need for legislative amendment to correct some of those problems. The department accepted that. I think that is illustrative of what I think has been a broader problem: that sometimes when you get a large volume of review in any area there is a danger that the safety net discretions, which often attract review, are removed and ultimately those subject to the administration of an agency are worse off as a result.

Senator FIERRAVANTI-WELLS—Well, you would agree that in the 1980s in particular those excessive cases—I do not know if you were involved. I withdraw that question because I am not sure what your awareness is of the extent of that judicial review, the exercise of that discretion and how in some cases it was perceived to be extremely excessive. I do not know if you have any comments on that.

Prof. McMillan—Actually, I have written some previous academic articles criticising the volume of judicial review.

Senator FIERRAVANTI-WELLS—Thank you.

CHAIR—Professor McMillan, I have two questions I want to end with. Concerns have been raised that the Migration Act is too complex, is imprecise, and fails to provide appropriate guidance to those who are using and administering it. Is changing the act one of the ways in which the culture can be changed? I think the quote you raised earlier was about starting from

the top down. If the act was a bit more explicit and was not as complex or ambiguous, would that provide some assistance?

Prof. McMillan—Again it is a large issue. If we go back 20 years, the Migration Act essentially had two provisions: the minister had a discretion to allow somebody into Australia; the minister had a discretion to remove somebody from Australia. The act was about 28 pages and it has now grown to about 500 pages. There is an advantage in specificity, but there are unexpected problems all the time. There was a High Court decision two or three months ago—I think it was called something like 'SAAP'—that illustrated perfectly the unintended consequences of specific legislation. My own personal preference is generally for less prescriptive legislation supplemented by policy manuals that are public and properly resourced ombudsmen and tribunals to undertake review.

CHAIR—Lastly, we have heard a lot about an independent body that would look at removal risks and assessment of those risks. Canada's immigration legislation, for example, requires an independent pre-removal risk assessment based on humanitarian grounds. In this country, would something like that assist and go some way to stopping situations such as the Alvarez case? We have heard Senator Joyce say today, 'Oh, but it's only two cases.' I would have thought in a country like Australia one case is an embarrassment.

Prof. McMillan—Clearly there is a need for some checking mechanism. One of the issues exposed by these reports is that departments—and this is across the board—often have extensive coercive powers to arrest people, to remove them from the country, to confiscate their property and to enter their property. It is important then to have some checking mechanism. Those powers, I might say, are often exercised at very low levels by officers who are trained not to think independently about the facts. As Mr von Doussa indicated earlier, in some areas there are checking mechanisms. In the past, a person taken into detention had to be brought before a magistrate—that check has gone.

I think there is a need for a mechanism, but I think, firstly, the department should have its own internal checking mechanism, and it intends to do it. Secondly, my office in its immigration ombudsman role will be trying to discharge that role in part. One of the proposals we have in mind is to do regular audits and monitoring on detention and removal cases. That means we will not look at every case, but if we do a regular periodic sample audit of those decisions and that supplements a proper internal checking system within an agency then I would like to think that that is as good a system as you can design without the need for building some larger structure that will be more costly and more protracted in doing that review.

CHAIR—I thank you both for your submission and for taking the time to appear before the committee today. It is appreciated.

Prof. McMillan—Thank you for the opportunity.

CHAIR—I would like to thank other witnesses who have given evidence before the committee today.

Committee adjourned at 2.20 pm