



**A Just Australia analysis of:  
Senate Inquiry in the Administration and operation of the *Migration Act 1958*  
March 2006**

Prepared by Kate Gauthier, AJA National Co-ordinator

**Reading notes:**

We have provided a summary of the key refugee and asylum seeker issues, keeping them organised by the Inquiries numbered recommendations. You will find the **recommendation**, followed by report details and in some cases followed by AJA Notes where we felt some clarification was necessary.

**Forward by A Just Australia**

The 2006 Senate Inquiry into the Migration Act is another valuable report on immigration in Australia. The inquiry primarily focused on refugee and asylum seeker issues – not because this is the majority of work performed by the Department of Immigration, but because this is the most contentious area of immigration policy. The department put forward evidence showing the vast number of visa and citizenship applications they process annually, arguing that refugee and asylum seeker issues are only a very small part of their workload and should not be the primary focus of an inquiry. This is true, but as an argument to deflect attention from this area of policy it holds no weight. Surely if there is this much attention on such a small portion of their work, it shows that they are consistently getting it wrong, and that conscientious Australians will continue to work until the policies are fixed.

In any case, the claim that all other areas of immigration are working smoothly is wrong. When I was working in the electorate office of a federal politician the majority issue that people called up to complain about or receive help with, was applications to the Department of Immigration. One important issue was that if an Australian citizen married someone from overseas, the partner had to leave the country to have the visa application finalised. This can take 6-18 months. For some who had arrived on a business visa, got married and then years later the business visa expired, this meant separating children from their parent. Applications to the Minister to have this offshore processing waived invariably went unheeded no matter how heart-wrenching the circumstances of the family. For these Australians, the wheels of bureaucracy ground slowly and without heed for individual circumstances.

## **Executive Summary of recommendations**

The Inquiry made some excellent suggestions for how the asylum seeking process could be made more fair and reasonable. There are many methods and practices used by DIMA during the refugee determination process to ensure that as few people as possible are successful in their claims. This is a very important distinction – the current process is not designed to find out who is a genuine refugee. It is designed to find as few refugees as possible.

The major recommendations are these:

- The Migration Act needs an overhaul by an independent body to establish “an immigration regime that is fair, transparent and legally defensible as well as more concise and comprehensible.”
- The asylum seeking process (refugee status determination or RSD) should be open and transparent to asylum seekers. They should be made aware of what they need to do, given the opportunity to be interviewed, granted independent legal advice, allowed to refute any adverse information if they feel it to be incorrect, and allowed to have their cases reviewed in court.
- Visa decision makers should have increased training in refugee issues and the law – particularly in procedural fairness.
- Oversight of refugee status determination should be independent, transparent and accountable, up to and including Ministerial actions.
- Detention centres should be independently monitored, with adequate complaints investigation.
- Introduction of Complementary Protection Visa for those who are in need of protection for reasons other than identified in the Refugees Convention.
- A pre removal risk assessment should be conducted, assessing a persons risk on return, as well as ability to reintegrate depending upon individual circumstances such as mental health and country security.
- Post removal monitoring to ensure Australia’s removal and refugee determination processes are working.
- Detention should be limited to health and security screening, with judicial review if longer than 90 days.
- Bridging Visa E holders should be granted work rights, and no asylum seeking child should be left destitute.

## **RECOMMENDATIONS** Made by the Senate Inquiry

### **Recommendation 1 – Inquiry Authority**

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

### Report details

1.34 However, notwithstanding the clear involvement of the Minister’s office in the affair, the terms of reference for the Comrie inquiry clearly excluded the Minister and her staff from any investigation.

### AJA Notes

Palmer report found serious problems with the corporate culture of DIMIA. People were likely to cut corners to maintain performance measures, based on pressure from above. Neither the Palmer or Comrie inquiries were authorized to investigate all the way up to the Minister's office. Given that policy directions come from the Minister and the Minister holds ultimate responsibility for the department, it is difficult to see how an investigation can be properly carried out in such a manner.

### **Recommendation 2 – tabled documents to have sufficient information**

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

### Report details

2.38 ... In September 2005, the Government introduced the Migration and Ombudsman Legislation Amendment Bill 2005 to, among other things, introduce 90 day processing time limits for the determination of protection visa applications and for the completion of reviews by the Refugee Review Tribunal (RRT).

2.40 Another issue is the time at which the 90 day period starts. The committee understands that the commencement of the 90 day period is to be prescribed by regulations under the new provisions. Draft regulations, which have been published, deal with the commencement dates for various categories of protection visas. For example, the 90 day period for certain visa types would only commence after 30 months has expired, unless the Minister has specified a shorter period at her discretion.

### AJA Notes

This 30 month + 90 day time limit as noted above is for Temporary Protection Visa (TPV) renewals. So a person must have held a TPV for 30 months before the 90 day time limit is effective on any new visa applications.

We were unable to find reports tabled in parliament regarding visa applications taking longer than 90 days, so were unable to make an assessment of the quality of Ministerial reporting on this matter.

A related issue is the Ombudsman's reports into people held in detention longer than 2 years and Ministerial responses are tabled in the Senate. <http://www.comb.gov.au/> However, the Minister's responses are written in very general terms. It would be helpful if more detail were added. For example, the Minister's response to report no 003/05 states that this person did not meet guidelines for referral to the Minister for intervention under s417. It would be helpful if the Minister indicated why the case did not meet guidelines. While privacy is a consideration, the Ombudsman's reports contain quite specific information, so the Minister giving this detail would be no greater invasion of privacy than already occurs.

Additionally, where the Minister indicates ongoing issues to be resolved, there appears to be no mechanism for follow-up reports from the Minister regarding action

taken on cases, merely a report on the current situation. Certainly a report on the finalization of cases would be necessary for complete parliamentary scrutiny of protection visa applications.

### **Recommendation 3 – Give notice and reasons for negative decision**

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

#### Report details

2.54 It was put to the committee that provision of more information (for example, on the relevant application forms) and an opportunity for applicants to put forward their case at an interview could improve the quality of decision-making:

As there is no requirement to give reasons for refusals of offshore applications under Migration Act, rejections regularly include only a photocopy of the visa criteria with a mark next to the supposedly unmet criteria. . . Many members of refugee communities in Australia are accustomed to receiving such rejection notifications for their relatives overseas. They respond by lodging repeat applications without being aware of how further information could advance their cases. Given that offshore humanitarian visa classes attract a large volume of applicants, it would assist with fair and quick processing if application forms and procedures were more comprehensive and referred to the visa criteria. It would expedite the fair processing of offshore visas if applicants were asked to submit supporting information and were interviewed.

#### AJA Notes

This would allow for applicants who have not understood the process to provide necessary information to the decision maker, which would reduce the number of incorrect visa refusals which need a merits review by the RRT. Please note that there are significant visa refusal overturn rates by the RRT. This process should be one which catches anomalies rather than being a necessary part of the refugee status determination process. Please see information on RRT overturn rates in pages 6-10 of AJA's submission to the inquiry via

<http://www.ajaustralia.com/resource.php?act=attache&id=162>

### **Recommendation 4 – applicants should be interviewed for visa**

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

#### Report details

2.53 A particular concern was that paper based decision-making disadvantages those applicants who are from a non-English speaking background and who may not have received assistance with their applications. The NSW Legal Aid Commission noted that offshore or unrepresented applicants regularly provide cursory answers or fail to submit supporting statements. The Commission also pointed out that onshore applications may be refused even though the applicant has advised that key documents are being obtained and/or translated, or that a comprehensive statement is being completed. It argued that this, coupled with DIMA's failure to seek or await further information, meant:

. offshore humanitarian visa applicants are often refused without interview or written request for further information. . Similarly, onshore applicants for protection visas are rarely

interviewed or asked to comment on adverse information, and decisions can be made soon after application.

**Recommendation 5 – offshore visa information to be broadened**

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

**Recommendation 6 – more interpreter training**

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

**Recommendation 7 – monitor interpreter quality**

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

**Recommendation 8 – review Migration Act to make it more transparent and fair**

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

**Recommendation 9 – review of Migration Act undertaken by legal reform commission**

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

**Recommendation 10 – Migration Series Instructions to comply with Migration Act**

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

Report details on recommendations 8-10

2.88 It was suggested that, because of the legislation's increasing complexity, decision-makers now relied more on departmental policy documents and guidelines than the legislation itself to determine claims. As the LIV stated:

It is the experience of LIV members practising in the area of migration law that migration policy, as set out in the Procedures Advice Manual (PAM), which can be narrower than the Migration Regulations, is applied more readily than the law by DIMA decision makers. The complexity of the migration scheme is such that many decision makers, at both the DIMA and Tribunal level, are now reading and applying policy in preference to the wording of the Migration Regulations.

2.89 The LIV expressed the following concern with this practice:

While it is accepted that policy is necessary to assist decision makers, it should not restrict them in their primary duty to make lawful decisions under the Migration Act. . There are [also] a number of examples where the policy provisions, as set out in PAM and the Migration Series Instruction (MSI), are in conflict or severely restrict the meaning of the Migration Regulations. This means that many applications though lawful, are less likely to be successful.

#### AJA notes

Given the number of changes to the Migration Act since 1958, as well as various regulations, Migration Series Instructions (MSIs) and Procedures Advice Manuals (PAM), it seems high time that a thorough review and re-write was undertaken. With regards refugee and humanitarian issues, there have been significant changes in customary interpretations of international law and Australia's obligations under those laws. Australia's Migration Act should be updated to reflect our current international obligations. A good start would be to implement complementary protection visas, and ensure that the Convention Against Torture provisions were enacted into our domestic laws.

#### **Recommendation 11 – review case management approach**

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

#### AJA Notes

The case-management approach is only in its trial stage. DIMA have hired a 9 person multidisciplinary team (NSW) as well as people in Melbourne and a new team starting in Brisbane. They are not decision makers or advocates but have stated their role is to be facilitators. They are referred cases of people who are not coping with their unusual or complex situations whilst applying for visas. They can recommend people for the community care pilot if the people need extra support, and they meet with people prior to leaving detention centres to make sure they have places to go, etc. While this program is still in the very small trial phase, and research has not been conducted from external bodies on clients' experiences, it does appear that the program is being put in place in good faith and will have positive effects. It will be interesting to see the effects and whether or not the program is more broadly applied, but it is still too early to assess.

#### **Recommendation 12 – review training of officers processing Permanent Visas**

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

#### **Recommendation 13 – training to be provided by new DIMA college**

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

## **Recommendation 14 – regular ANAO audits of protection visa processing**

2.115 The committee recommends that the Australian National Audit Office (ANAO) commit to a series of rolling audits to provide assurance that humanitarian and non-humanitarian visa applications are being correctly processed and assessed.

### Report details on recommendations 12-14

2.77 Ms Marion Le, a migration agent, emphasised the lack of cultural training and awareness of many DIMA officers in her evidence to the committee:

...many DIMA officers 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.

2.92 Staff turnover within DIMA and the consequent need to ensure case officers understand both the applicable law and how to deal appropriately with specific groups of people was also raised by the NSW Legal Aid Commission:

Dealing with protection visa applicants is quite different from dealing with student visa applicants, so they need special training. That used to occur in the past. People who were refugee advocates, people like us and people like the Refugee Advice and Casework Service, would go and give training sessions to new DIMA case officers as they went into the onshore protection strand. That has not happened for a long time.

2.93 Similar concerns over the inadequacy of knowledge and training within DIMA were raised during the committee's inquiry in 2000. The committee at that time recognised that it is crucial that decision-makers have the necessary skills, knowledge and ability and the necessary personal attributes to perform the decision-making function. The committee therefore recommended that primary decision-makers have additional specialist training, both before and during their tenure and that training be obtained from a cross-section of sources, including the legal profession, European judicial specialists and other government and non-government organisations.

### AJA notes on recommendations 12-14

From the turnover rates of the RRT of DIMA decision makers protection visa refusals, it is quite clear there is a systemic failure to properly assess protection needs at the primary stage. Palmer and Comrie reports showed a corporate culture that is adversarial towards asylum seekers. Without independent oversight of DIMA reforms, it will be impossible to assess their success.

Additionally, an ANAO audit will only look at the quality of decisions based upon the evidence the decision maker had to hand. But what about also looking at the quality of our information gathering techniques? Monitoring of return failed asylum seekers would greatly add to this audit of the quality of protection determination. Without checking to see if rejected people are indeed safe once they return them, how can Australia know that our information gathering and analysis is working in refugee status determinations?

## **Recommendation 15 – ‘Dob-in’ information to be treated with caution**

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

**Recommendation 16 – DIMA quality indicators to include quality of decisions as well as quantity.**

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

Report details

2.146 The Palmer Report's recent and well publicised finding of 'deep seated cultural and attitudinal problems within DIMA' was cited as a reason for the above. The Palmer Report's findings were concerned primarily with compliance and immigration detention cases. However, the Palmer Report did note that:

Although the Inquiry was not called on to examine the corporate culture of DIMA as a whole, the concern of some commentators is that the control motivated culture evident in compliance and detention might now be dominant. This would need to be carefully dealt with as an integral part of the proposed implementation strategy for the reforms that are essential to the initiatives that the Inquiry [that is, the Palmer Inquiry] proposes.

2.147 A similar view was expressed by witnesses and submitters to this inquiry who advised the committee that, in their experience, the cultural and attitudinal problems in DIMA's compliance and detention areas that the Palmer Report had identified were endemic across that department.

AJA Notes

It is quite obvious that even before the infamous statement of “we will decide who comes to this country and the manner in which they come” that onshore asylum seekers - particularly boat arrivals - were viewed negatively by the Government. It is naive to say this attitude would not have filtered down to departmental officers, who would allow this view to affect their judgment on decision making. Without adequate oversight of the quality of decisions, including public reporting of those indicators, it is impossible to judge how well DIMA are doing their job. If DIMA believe that the decisions are of high quality, then allowing for a full and frank appraisal of those decisions will do much to restore public confidence.

**Recommendation 17 – legal representation at primary interviews**

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

**Recommendation 18 – duty solicitor for all detained people**

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

**Recommendation 19 – advise detainees of right to legal help**

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

Report details on recommendations 17,18,19

A recommendation was not made on the IAAAS ( Q; what do the initials stand for? Best to spell out the full name) in this section. But dealt with later in recommendation 29, however many issues were raised regarding this program. See sections 2.164 to 2.182

2.189 Witnesses and submissions highlighted the consequences for detainees of a lack of a statutory guarantee of legal advice and representation. The Refugee Advocacy Service of South Australia (RASSA), for example, advised the committee that according to detainees, DIMA does not advise asylum seekers of their right to obtain legal advice:

This effectively means that detainees only learn that legal assistance is available to them by word of mouth through other detainees or community people who visit the detention centre to provide support to asylum seekers. The result of this is that detainees who are not aware of their right to obtain legal advice because of cultural or language barriers, lack of education or mental illness, are left to fend for themselves unless they learn that they are required to *ask* for legal assistance before DIMA will allow it.

2.214 DIMA's response to concerns about the level of assistance provided at arrival or entry to Australia was to reiterate that persons assessed as *prima facie* engaging Australia's protection obligations following an entry interview at the border will be provided with assistance in preparing and lodging a protection visa application under the IAAAS. It also noted that persons refused immigration clearance at the border and placed in immigration detention can also access the protection visa process at any time after the entry interview while they remain in immigration detention in Australia, if new information or claims are made. It referred the committee to statutory obligations under the Migration Act which require immigration officers to provide application forms for a visa upon request and to provide reasonable facilities for the person to access legal advice should they ask for this.

#### AJA Notes

Sections 2.180 to 2.214 details evidence to show that this response does not show the full picture of how this policy effects individual cases.

The issue of advice of legal rights is especially important for the initial screening process, where people can be screened out on arrival and removed within the week – before lawyers or anyone is even aware of their presence in Australia. I have added a lengthy summary of the screening process at the end of this document.

#### **Recommendation 20 – review funding levels for RRT & MRT**

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

#### **Recommendation 21 – extensions for RRT & MRT applications**

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

**Recommendation 22 – legal representation at RRT & MRT**

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

**Recommendation 23 – Legal aid for migration cases**

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

**Recommendation 24 – RRT to provide information used in decision-making**

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

AJA notes:

The Canadian system has decision makers required to provide all information upon which decisions are based to applicants. Where national security is an issue with the confidentiality of information, a summary is required to allow the applicant to refute any false information. A system whereby decisions can be made with information that may not be disproved by the applicant is hardly fair.

**Recommendation 25 – RRT develop guidelines on credibility**

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

**Recommendation 26 – RRT & MRT included in new training initiatives**

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

**Recommendation 27 – RRT develop guidelines on medical and mental health reports**

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

**Recommendation 28 – RRT sit as panel of three as well as single**

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

**Recommendation 29 – IAAAS provided to Ministerial Intervention stage**

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

**Recommendation 30 – Applicants to receive copy of departmental Ministerial Intervention submission**

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

**Recommendation 31 – extensions of work rights and medicare**

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

**Recommendation 32 – greater parliamentary scrutiny of Ministerial Intervention**

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

**Recommendation 33 – complementary protection**

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

**Recommendation 34 – investigate use of detainee labour**

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

**Recommendation 35 – review detention punishment programmes**

6.34 The committee recommends that the use of behavioural management techniques and restrictive detention be re-examined as part of the government's proposed review of the immigration detention contract. The committee further recommends that

HREOC and the Royal Australia and New Zealand College of Psychiatrists and other stakeholders be consulted during the process.

**Recommendation 36 – close management units**

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

AJA notes

Management units were also used as punishment, although all documentation refers to monitoring people for their own safety. Some people were kept in there for many weeks in isolation. If someone was that at risk of self-harm, they should have been sent to a mental health facility.

**Recommendation 37 – use of separation detention regulated by law**

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

AJA notes

The punishment regime refers to the Red One compound used in Baxter for the 'behaviour modification regime'. This was the compound where Cornelia Rau was kept as her mental health issues were deemed to be a behavioural issue that could be corrected with appropriate punishment and rewards. People are kept in this compound for a few weeks, with increasing (?? Is this correct or is it decreasing??) access to telephones, visits and time allowed outside their small rooms. The legal framework under which a private company is allowed to administer imprisonment within administrative detention has never been fully detailed despite many questions on notice on this issue.

**Recommendation 38 – review detention complaints procedures**

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

AJA notes

We have not heard of any complaints by detainees, particularly allegations of assault, being upheld. It is difficult to believe that not one single complaint has been found to be valid.

**Recommendation 39 – allow HREOC statutory right to inspect detention centres**

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

**Recommendation 40 – regular visits by HREOC and Ombudsman**

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

**Recommendation 41 – ensure access to detainees meets international standards**

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

**Recommendation 42 – Migration Act ensure detainees rights to legal, medical and religious visitors**

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

**Recommendation 43 – prohibit restrictions of legal and other visitors for punishment reasons**

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

**Recommendation 44 – charge for detention only when detainee acted in bad faith**

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

**Recommendation 45 – detention 90 days only for initial screening, and checks of identity, health and security.**

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

**Recommendation 46 – Detention longer than 90 days reviewed by Federal Magistrate**

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

**Recommendation 47 – Bridging Visas to allow health, welfare, income support**

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

**Recommendation 48 – Detention services by Commonwealth not private providers**

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

**Recommendation 49 – detention contract include recommendations of recent reports**

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

**Recommendation 50 – detainees rights enshrined in regulations**

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

AJA notes

Convicted criminals have the minimum standards on imprisonment guaranteed by regulations and monitoring processes, yet asylum seekers who have not been charged or convicted of any crime have no such rights when detained. Given that the department previously argued that conditions at Woomera, Curtin and Port Hedland facilities were adequate, despite reports by visiting bodies such as HREOC, UN Working Group on Arbitrary Detention ( I think that it is the title ) and senate committees stating conditions were unacceptable, it is hard to allow that there is no need for a monitoring body independent of the Department.

**Recommendation 51 – independent monitoring of detention centres and contracts**

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

**Recommendation 52 – TPVs: abolish 7 day rule and allow for permanent residency**

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

**Recommendation 53 –Bridging Visa E workrights**

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

**Recommendation 54 – Bridging visa extend 45 day rule**

8.70 The committee recommends that if the Commonwealth Government rejects the proposal that all Bridging Visa holders have work rights, the Committee recommends

that the current '45 day rule' be doubled to 90 days to give people more time to apply for a protection visa.

**Recommendation 55 – review resettlement programmes**

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

**Recommendation 56 – pre-removal risk assessment to ensure non-refoulement**

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

AJA notes:

The Canadian program works very well. For details on this program please email [kate@ajustaustralia.com](mailto:kate@ajustaustralia.com)

**Recommendation 57 – notice for removals**

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

**Recommendation 58 – no s501 cancellations for people 10years+ residency**

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

**Recommendation 59 – monitoring post-removal to ensure non-refoulement**

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

AJA notes:

See *Deported to Danger* by the Edmund Rice centre. This recommendation has been made several times by the Senate, particularly in Sancturay under review. A Govt response that pops up all over the place is:

Where it is assessed as part of the protection determination process that there is no real chance of persecution of the applicant on return, Australia is not responsible for the future well-being of that person in the home land merely because at some stage they spent time in Australia.

Budget Estimates Hearing in May 2005, DIMIA stated that the Department was not aware of any cases where an asylum seeker had been removed in breach of protection

obligations under Refugees Convention, the Convention Against Torture, or the ICCPR. However in case of CAT/C/22/D/120/1998, a failed asylum argued to the UN he should not be removed as it would be a breach of the Convention Against Torture (CAT). . The Committee Against Torture found that to return him would be a breach of CAT as he was at risk of torture. Australia allowed him to reapply for protection and again found that he was not a refugee and refused a visa. At which point the man gave up and left Australia, to whereabouts and fate unknown.

#### **Recommendation 60 – ensure welfare protection for removals**

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

#### **Recommendation 61 – student visa breaches**

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

#### **Recommendation 62 – Student visas**

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

#### **AJA notes on Screening processes.**

The screening process is particularly important for unauthorised arrivals, either boat or plane arrivals. On arrival they are given a screening interview by DIMIA officers. They are asked to identify themselves and describe how they travelled to Australia. They are asked why they came and if there is anything they wish to tell the Australian authorities about their country of origin. The officer does not specifically ask if they are seeking asylum and is not required to advise the person of his or her rights, such as the right to apply for a visa or the right to legal assistance. The onus is on the asylum seeker to make unambiguous statements invoking Australia's obligations under the Refugee Convention. Even so, the Australian National Audit Office found that of four screening interviews reviewed, one had relevant information that was not included in the written summary upon which the screening decision was based .

If unauthorised arrivals are found to have a prima facie case for protection they are 'screened in' to the RSD process, informed of their right to apply for a protection visa and granted migration agents to assist with the application process. If they are screened out, they are not given an opportunity to apply for a visa nor informed of their right to do so, and are not given any legal assistance unless they ask for a specific lawyer by name. Clearly this is against article 17 (1) of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* which grants that people should be given legal advice if they are detained.

If the person does not apply for a substantive visa within 2 working days of arriving in Australia, not having been informed that this is exactly what they have to do, they become unlawful and can be removed.<sup>i</sup>

Until a person is screened in, they are kept in separation detention so that they are not 'coached' in their interviews or given advice by other detained people on their rights. They are allowed to write one letter home to inform them of their location, but are not allowed a telephone, newspaper or radio, so they can receive no legal advice or briefings on their rights.<sup>ii</sup> There have been many allegations of boat arrival asylum seekers being kept in separation detention who did ask to apply for asylum, and asked for a lawyer, but both requests were ignored and so denied.

Table 2.2		Entry of boat people into the formal refugee determination process			
Year of arrival	Entering refugee process		Not entering refugee process		Total
	n	%	n	%	
1989-90	242	99.6	1	0.4	243
1990-91	152	88.4	20	11.6	172
1991-92	68	100.0	–	–	68
1992-93	71	40.8	113	61.4	184
1993-94	199	100.0	–	–	199
1994-95	162	14.8	935	85.2	1,097
1995-96	61(a)	10.4	528	89.6	589

HREOC *Those Who've Come Across The Seas*. P31

This table shows that the policy change to people not being granted access to legal advice during the screening process, a policy that was introduced in mid 1994<sup>iii</sup>, has had a significant impact on the numbers of people who are formally assessed for refugee status.

### Unaccompanied minors and screening

The screening policy is particularly contentious when it comes to unaccompanied minors. They are not granted any special considerations under the Migration Act, and are interviewed in the same manner as an adult. This includes not being granted legal or migration advice during the initial screening interview.

Between the period of 1 July 1999 and 30 June 2003, according to DIMA an average of 91.2% of unaccompanied children in detention were found to be refugees, compared to an average of 93% of accompanied children for the same period.<sup>iv</sup> There can be no reason to assume that unaccompanied children have fewer protection needs, so these numbers show that an additional 5 unaccompanied children were returned home without the protection visas they would have received, had they parents or advocates working on their cases for them.

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<sup>i</sup> *A Sanctuary Under Review* para 10.2

<sup>ii</sup> ACM, Policy 2.7, Separation Detention, Issue 2, 5 February 2002, para 5.4-5.6, cited in HREOC *A Last Resort, National Inquiry into Children in Immigration Detention*

<sup>iii</sup> HREOC *For those who came across the seas* p31

<sup>iv</sup> Human Rights and Equal Opportunity Commission, 2004 *A Last Resort. National Inquiry into Children in Immigration Detention*. Pg66&71