Submission to the

SENATE LEGAL AND CONSTITUTIONAL COMMITTEE INQUIRY INTO THE ADMINISTRATION AND OPERATION OF THE *MIGRATION ACT 1958*

August 2005

Contact:

UnitingJustice Australia

Rev. Elenie Poulos
National Director

PO Box A2266
Sydney South NSW 1235
Phone (02) 8267 4239
FAX (02) 8267 4222
Email: unitingjustice@nat.uca.org.au

Hotham Mission

Grant Mitchell
Project Coordinator

Asylum Seeker Project
Hotham Mission
2/579 Queensberry Street
North Melbourne Vic 3051
Phone (03) 93268343
Email asp@sub.net.au

INTRODUCTION

The Uniting Church in Australia, through its agencies UnitingJustice Australia and Hotham Mission, welcomes the opportunity to comment on the administration and operation of the *Migration Act 1958*.

The Uniting Church in Australia seeks to bear witness to God's call for the continuing renewal and reconciliation of all creation[1] through its worship, service and advocacy, and in partnership with other Christian churches. Part of the witness of the Uniting Church in Australia is to challenge the structures that create and perpetuate inhospitality, injustice and division at all levels: individual, state, national and international.

In the Christian tradition of providing hospitality to strangers and expressing in word and deed God's compassion and love for all who are uprooted and dispossessed, the Uniting Church in Australia has been providing services to asylum seekers and refugees in the community and in detention for many years. The Uniting Church provides direct services to refugees and asylum seekers through its network of congregations, employees, lay people and community service agencies. Through our ministers, lay and ordained, who provide ministry to the asylum seekers in detention centres and through our work with asylum seekers and refugees settling into the community, we have first-hand knowledge of the consequences of Government policies.

In July 2002, the Uniting Church released its *Policy Paper on Asylum Seekers, Refugees, and Humanitarian Entrants* which outlines key principles that we believe should underpin Australia's policies, legislation, and practices. These principles reflect the Church's belief in the inherent dignity of all people and our commitment to work for justice.

The Uniting Church advocates for a just response to the needs of refugees that recognises Australia's responsibilities as a wealthy global citizen, upholds the human rights and safety of all people, is culturally sensitive, and is based on just and humane treatment, including non-discriminatory practices and accountable transparent processes.

To the least of his society Jesus offered hope, hope in this world and eternal hope. The Uniting Church will continue to call for changes so that the least in our country, the marginalised and dispossessed, may discover the hope of a world that is just and true.

In its Statement to the Nation at its inauguration in 1977, the Uniting Church pledged

> "to hope and work for a nation whose goals are not guided by self interest alone, but by concern for persons everywhere – the family of the One God – the God made known in Jesus of Nazareth (John 10:38) the one who gave his life for others."

In this spirit, the Uniting Church offers its submission to the inquiry into the administration and operation of the *Migration Act*.

[1] *Basis of Union*, paragraph 1

TABLE OF CONTENTS

LIST OF RECOMMENDATIONS

This submission will deal with only five aspects of the *Migration Act 1958* and its administration and operation: Section 417, the development of a destitution policy through visas without rights and entitlements, the June 2005 Amendments to the Act, the Health Requirement as it affects refugees and compliance practices and procedures.

The following recommendations must be read in the light of the Uniting Church's stated commitments to a policy which, among other things:

- seeks an end to the system of arbitrary and mandatory detention for asylum seekers;
- fulfils our obligations under relevant human rights treaties and instruments, especially the Universal Declaration of Human Rights, the Convention and Protocol Relating to the Status of Refugees, the Convention on the Rights of the Child and the Covenant on Civil and Political Rights;
- does not discriminate in the treatment of asylum seekers on the basis of their movements prior to their application for protection or resettlement being made;
- provides full access to settlement support, public services and social security for all asylum seekers, refugees and humanitarian entrants;
- accords asylum seekers full legal rights and protection; and
- is accountable and transparent.[2]

Recommendations on 417 Ministerial Power

1. That Australia implement a system of Complementary Protection within the Onshore Program

2. That, in the absence of a system of Complementary Protection, the Section 417 power:

    a) allow for Ministerial intervention following the primary (departmental) decision
    b) include a requirement to consider all requests
    c) be split into: intervention in the public interest (general) and intervention in the public interest (humanitarian)
    d) be held accountable to guidelines for the exercise of ministerial discretion in the public interest (humanitarian) that include:
        - codification of Australia's obligations and responsibilities under international human rights treaties; and
        - guidelines for intervention in response to unique or exceptional humanitarian cases including those relating to threats to personal security, human rights, and health; change in circumstances since a protection visa application was made, and humanitarian cases where connection to Australia is the primary consideration
    e) require that the applicant be informed, in writing, of the decision made and the reason for intervening, or not intervening, with reference to relevant sections of the guidelines

[2] These policy principles and more are described in the Policy Paper, *Asylum Seekers, Refugees and Humanitarian Entrants*, Uniting Church in Australia, 22 July 2002

f) require that the statement presented to Parliament sets out the reasons for the Minister's decision that intervention was in the public interest, with reference to relevant sections of the guidelines.

3. That asylum seekers requesting the Minister's intervention, or whose case is referred to the Minister, be given the opportunity to resubmit their claim against relevant criteria in the guidelines, with sufficient information provided by the department, and with access to legal and other assistance required.

4. That asylum seekers residing in the community, who approach the Minister under Section 417, be granted work rights and eligibility for Medicare and be entitled to support under the Asylum Seeker Assistance Scheme.

5. That health and character checks be undertaken on arrival or at an early stage in the process.

Recommendations on Destitute Asylum Seekers in the Community

6. Basic human services should not be refused to any person, regardless of their citizen status. Asylum seekers should have work rights and access to ASAS and Medicare throughout their visa application process, from lodging to final outcome.

7. In line with the new addition to the legislation that "the Parliament affirms as a principle that a minor shall only be detained as a measure of last resort", asylum seeker children should be adequately provided for upon their release into the community.

8. The arbitrary 45-day rule should be revoked.

Recommendations on Issues Pertaining to Recent Amendments to the Act

9. The Minister's new non-compellable powers to grant visas and to assign residential determinations should be amended to take into account the Act's statement of intent, "a minor shall only be detained as a measure of last resort". The Minister should be compelled to use these powers to fulfil the intent of the Act. The Act should be amended to the effect that:

    a) the Minister must consider the cases of all minor children
    b) the Minister must be compelled to justify to the Parliament her decision not to grant a residence determination or visa to any minor child whose case she has considered.

10. As it stands, concentration in the Minister's hands of power to make residential determinations and visa grants to minor children is contrary to the intent of the Act. In order to rectify this, an administrative process and review should replace the discretionary power and all children and their families should be living in the community on bridging visas with entitlements while their cases are determined.

Recommendation on the Health Requirement

11. Repeal criteria 4007 (1) (c) of the health requirement for Refugees (including Women at Risk and In-Country Special Humanitarian visas), to ensure that refugees will be accepted for resettlement according to need, rather than anticipated costs to the public health system

Recommendations on Compliance Practices and Procedures

The Uniting Church agrees with the Palmer Report Recommendations 3.1, 7.1, 7.4 and 8.3 which are most relevant to the Compliance Unit, in relation to urgent improvements in oversight, case management structure, database and training programs and makes the following additional recommendations:

12. The power to detain should not be a discretionary power but a thorough administrative decision-making process based on evidence of unlawful status, with scope to rectify status due to unforseen circumstances. Section 189 of the Act should be amended accordingly.

13. Persons suspected of being unlawful should have ample opportunity, prior to being detained, to prove their lawful status, to be ensured access to legal representation, and be provided with a reason for their detention or removal in writing.

14. Compliance guidelines should be revised and developed which address and clarify:

    a) the process for the renewal of bridging visas, including a system of review
    b) the grounds for revocation of visa and the move to detain, including a standardisation of the use of warrants
    c) the provision in writing to the client of the reasons for the decision to detain, revoke or not renew a bridging visa
    d) the provision of an opportunity for suspected unlawful non-citizens to prove their lawful status prior to being detained.

REMOVAL

The Uniting Church supports the Palmer Report recommendation 8.3, particularly in developing a briefing program to assess the reason behind a removal, and responsibilities associated with removals. We would further recommend:

15. The development of clear guidelines to support the assessment of removal and associated responsibilities including an exploration of the Canadian practice of *"pre-removal assessment"* to ensure protection from refoulement, and that all removals are appropriate (there are no remaining humanitarian or welfare concerns).

16. An end to the practice of detaining prior to removal unless there are proven security and character issues.

17. The development of more flexible bridging visa arrangements and non-detention-based repatriation assistance which can be offered to all refused asylum seekers, as outlined in recent IOM repatriation programs.

18. The development and implementation of new training programs for Compliance staff and management, and other sections of the Department, which include the opportunity for experienced agencies like the Victorian Foundation for the Survivors of Torture, Hotham Mission, and the Red Cross, to provide input and training on sensitive issues related to persons seeking protection. These include trauma, gender, culture, child protection, and mental, physical and welfare issues.

CASE MANAGEMENT

19. Onshore Protection to be responsible for the coordination and management of all asylum seekers cases, including oversight and intervention planning, and the prioritisation of the most vulnerable cases.

20. The development and implementation of a thorough and appropriate case management system for all asylum seekers based on a social work model where the role of the caseworker is to:

- ensure early intervention and thorough risk and needs assessment
- ensure appropriate care provision for vulnerable persons
- provide information to the Compliance, OP and Detention units to assist with decision-making and assisting in intervention planning
- support and prepare individuals for possible immigration outcomes, including detention and removal.

ADDITIONAL RECOMMENDATIONS

The Uniting Church believes it is fundamental that Compliance improve how it works with vulnerable persons, including asylum seekers, torture survivors, women and children at risk, and individuals with health issues. We feel that in addition to the Palmer Report recommendations, other changes to Compliance procedures and practices are required including:

21. Improved systems of supervision, debriefing and training to reduce staff turn-over and improve staff morale.

22. Improved systems, management and use of the database to allow for better tracking and management of cases, including between Departmental units, and external bodies such as the Minister's Office and the Refugee Review Tribunal.

23. Better communication with community groups in order to share critical information on issues such as welfare, income assessment, ability to travel, factors relating to any risk to abscond, medical issues (medication being taken, mental health) and other relevant issues.

24. Cross-cultural training and standard use of interpreters.

Overview of Section 417 Power

Under Section 417 of the *Migration Act*, the Minister for Immigration has the power to substitute a more favourable decision than that of the Refugee Review Tribunal (RRT) and grant a (any) visa to the applicant, if the Minister considers that it is in the public interest.

The Section 417 power is:

- Discretionary: it is a personal decision of the Minister.
- Non-compellable: the Minister does not have a duty to consider whether to exercise the power, even when the applicant makes a direct request.
- Non-apellable: the decision can't be reviewed by a court or by another decision maker.

Other than the requirement that the Minister consider it to be in the public interest, the *Migration Act* does not provide direction on appropriate exercise of the power. The *Ministerial Guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under s345, 351, 391, 417, 454 of the* Migration Act 1958 (MSI 225: Ruddock, 1999) (the guidelines) outline the circumstances in which the Minister may consider exercising public interest powers. Those specifically relating to intervention on humanitarian grounds include:

Humanitarian: international obligations

Circumstances which may bring Australia's obligations under the International Convention Against Torture (CAT); the Convention on the Rights of the Child (CROC); and the International Covenant on Civil and Political Rights (ICCPR) into consideration.[3]

Humanitarian

Circumstances or personal characteristics that provide a sound basis for a significant threat to a person's personal security, human rights, or human dignity on return to their country of origin.[4]

The age of the person[5], and the health and psychological state of the person.[6]

Connections to Australia

The length of time the person has been present in Australia and their level of integration into the Australian community[7] and strong compassionate circumstances where failure to recognise them would result in irreparable harm and continuing hardship to an Australian family unit or an Australian citizen[8].

[3] Guidelines 4.2.2, 4.2.3, & 4.2.4
[4] Guideline 4.2.1
[5] Guideline 4.2.11
[6] Guideline 4.2.12
[7] Guideline 4.2.10
[8] Guideline 4.2.8

Distortion of Ministerial Discretion

Ministerial discretion is an appropriate power where its purpose is to intervene in the public interest in exceptional cases. However, perceptions of injustice in the onshore protection program for refugees, and in the processes of DIMIA and the RRT, have distorted ministerial discretion. We believe that failings in Australia's onshore protection program have affected the perceptions of, number of requests for, and use of the Section 417 discretionary power.

The minimalist interpretation of the definition of a refugee under the Refugee Convention and Protocol combined with the failure of the RRT to act as an independent and reliable body that both does, and is perceived to, conduct fair and proper merits review of departmental decisions, has resulted in widespread community dissatisfaction with the system for assessing refugee claims. The system is not widely perceived to be just. This perceived lack of justice is exacerbated by the emphasis, in the broader program, on deterring people from accessing the onshore protection system. In this policy environment, reform of application processing and review rarely considers human rights and our obligations to asylum seekers, but rather focuses on the resources that asylum seekers use in having their protection claim assessed.

These failings, combined with efforts to limit judicial scrutiny, have resulted in a widespread view that an appeal to the RRT does little to guarantee the applicant a fair, thorough, and independent examination of the claim. This has resulted in ministerial discretion being over-emphasised by asylum seekers and their supporters in the determination process. Though substitution of a more favourable decision by the Minister does not imply a wrong decision by the RRT, nor that the person granted a visa is considered to be a Convention refugee, many protection claimants and their supporters equate ministerial intervention under section 417 with a grant of refugee status to the person, and with an implied failing of the RRT to make the right decision. Increasingly, public perception is that the power is used to grant visas to refugees where Australia's onshore protection program has failed them. The most recent amendments to the *Migration Act* (*Migration Amendment (Detention Arrangements) Bill 2005*), relying as heavily as they do on the exercise of ministerial discretion, only exacerbates this problem (see pages 20-22).

Reform vs Requests

Though a reformed intervention power is recommended in this submission, it should be noted that redress of the distorted importance of the discretionary power will not occur until there is increased confidence in DIMIA and the RRT's decision making process and until the onshore program is, and is perceived to be, just.

The extent of the existing discretionary powers over vulnerable asylum seekers restricts discussions about the powers. Refugee advocates need to call for the Minister's personal intervention in individual cases so are conscious that any public criticism they make could have adverse impacts on individuals they are seeking to assist.[9]

[9] Human Rights Council of Australia, It's broke and it needs fixing: The Case for Reforming Administration of Refugees and Asylum Seekers Programs (draft discussion paper), available at: http://www.hrca.org.au/dimia%20changes.htm.

Given the failings of our current onshore protection program, excessive use of ministerial discretion is currently indispensable for Australia to respond humanely and justly to asylum seekers. This leads refugee advocates to seek expansion of the use of ministerial discretionary power - in relation to the 417 power and other powers.

These appeals to the Minister should not, however, be taken as a sign of support for ministerial discretion to take on such an overwhelming role in humanitarian decision-making. These requests are made because the injustices of Australia's asylum seeker policies leave refugee advocates with little choice other than to appeal to the Minister to exercise personal power.

The Need for Complementary Protection

Non-refugee protection or humanitarian claims, with obligations arising from Australia's commitments under international treaties, are not tested in the determination and review of onshore protection visas. Under the current application process, those who seek Australia's protection for humanitarian/non-refugee Convention reasons must lodge a claim for a protection visa against the criteria of the Convention refugee definition. Noting that in recent years Government has sought reform to reduce the number of inappropriate refugee applications, this creates unnecessary duplication of work for DIMIA and an additional workload for the RRT. The RRT's time is being wasted in a process that forces non-refugee protection claimants to seek merits review, based on refugee convention-related criteria, of a non-convention claim.

A non-compellable power that lacks predictability, accountability, and transparency is not appropriate for assessment of routine (predictable) claims such as those arising from obligations under international treaties. These cases are not obscure or exceptional – they are a known and predictable outcome of Australia's ratification of international human rights treaties. The ministerial discretionary power is not sufficient to ensure Australia meets its international obligations. Asylum seekers with non-refugee convention protection needs require a consistently applied test of their case against a set of clearly defined obligations arising from international treaties.

A system of complementary protection is the best alternative. In brief, this would include assessment of cases against non-refugee protection, non-refoulement, and other humanitarian obligations arising from international treaties at the primary stage of an onshore protection visa claim and the introduction of a humanitarian visa with criteria for grant based on these obligations or amendment of existing onshore protection visas to include criteria for grant based on a "de-facto" refugee status.

Expanding the criteria by which DIMIA and RRT can judge protection needs would allow a thorough, transparent and more manageable system than the existing 417 category, which is not an ideal process, nor the best use of the Minister's time. Incorporation of these claims into the existing DIMIA and RRT determination process would be equally as cost-effective and time-effective, as assessment of humanitarian claims through section 417 already forces people with non-refugee convention claims to go through the lengthy process of DIMIA determination and RRT review.

Any concern that implementing a complementary system would "open the floodgates" is unfounded. Leaving aside that Australia's primary concern should be the human rights of asylum seekers and our obligations to them, the main factors that trigger large flows of asylum seekers are pressures in countries of origin (war, oppression etc), not pull factors in country of destination. Most people fleeing are oblivious to the asylum mechanisms in developed nations. They are just responding to immediate fears.

A system of complementary protection would help ensure that all protection needs are fully explored and that Australia does not breach its non-refoulement obligations, nor our other international obligations.

The 417 powers would operate more appropriately if a complementary protection system was introduced into the onshore protection program as this would help limit the use of the powers to obscure or exceptional cases for which they are appropriate.

Appropriateness of the Power

Our concerns about the Section 417 power are outlined below.

Non-compellable nature of the power

The Minister is not compelled to consider a request for intervention or a case referred to him/her. Allowing the Minister to deny the basic right to put a case forward means that ministerial discretion cannot be taken seriously as an adequate process for testing humanitarian claims. To grant a power with no binding duty to consider its exercise jettisons the concepts of public interest and humanitarian obligations. Where provision is made for ministerial discretionary power, the duty to consider requests and referrals should be part of its provision.

Lack of transparency in decision-making

There is no clarity about how and why certain decisions are made by the Minister. This is a result of the lack of transparency in decision-making, including the inadequate explanation given for favourable Ministerial decisions.

It is unclear, for applicants and advocates, on what grounds the minister does decide to intervene in a particular case and how and why these decisions are made. Of the cases in which Hotham Mission was involved where the Minister did intervene the advising letter did not indicate on what grounds the decision had been made. The Minister is required to present Parliament with a statement that sets out the reasons for the Minister's decision[10] however, the opposition has said that "…the document gives no details which would enable a proper analysis… a standard form of words is used in each one in relation to the reasons for decision".[11]

[10] *Migration Act 1958*, Section 417(4)
[11] Ferguson, L. 28 May 2003: Ruddock Must Answer Questions Over Visa: ALP News Statements, Australian Labor Party, available at: http://www.alp.org.au

Likewise, no explanation is given in cases where the Minister does not intervene. As the Minister's decision is often the final decision on whether is person is to stay in Australia or not, failure to give some reason as to why a person does not invoke Australia's protection or humanitarian obligation means that people do not feel they have had a fair hearing or that they are indeed not in need of protection and thus safe to return home. It should be a part of Australia's duty of care to asylum seekers that we ensure they have an understanding of whether or not they invoke our protection obligations. It is important that asylum seekers have all the information as to why they have been refused. Allowing asylum seekers to feel that their entire case has been heard and that a definitive decision looking at all our obligations has been made will assist and facilitate a more humane process of return.

All persons requesting or referred for ministerial intervention on their visa application should receive notice, in writing, of the decision made by the Minister and the reason for the decision.

Applicants are not always advised that a decision has been made

Whilst the guidelines say that every person whose case is bought to the Minister's attention will be advised of the decision, whether it is a decision to refuse to consider exercising the power or a decision following consideration of exercise of the power[12], in Hotham Mission's experience, this is not always the case. Applicants often do not receive confirmation of the Minister's decision - which instead is sent to the migration agent or a person who has written in support of the applicant. This has meant that applicants are not always informed of decisions - which is crucial as those not granted a visa are given 28 days to depart the country.

No accountability in assessment of claims invoking our international obligations

For those seeking ministerial intervention for humanitarian reasons, there is no formal decision made on a person's humanitarian status[13]. The question of whether claims with humanitarian merit are adequately assessed is crucial. The current process does not give any assurance that this occurs, in part due to the non-compellable nature of the power, combined with a lack of binding criteria in relation to international obligations against which Ministerial decisions can be measured and held accountable. If ministerial intervention continues to be used to assess cases that may invoke our obligations under international treaties, there is a need for mechanisms to ensure a consistent application of the guidelines, and the guidelines themselves must be expanded to clearly and adequately detail Australia's humanitarian, protection, and non-refoulement obligations under these treaties. Applicants also need to be enabled to explicitly outline their case for humanitarian protection against these guidelines as the claim made against criteria for refugee protection may not be adequate and can not be assumed to contain sufficient relevant information to assess a non-refugee convention claim.

Unnecessary delays for asylum seekers

[12] Guideline 6.9

[13] Though grant of a humanitarian visa may imply that the decision was based on humanitarian need, the discretionary power allows a visa to be granted when its criteria has not been met.

For asylum seekers Hotham Mission has worked with who have had non-refugee protection needs, the 417 power was the first time they could put forward their case for assessment on appropriate grounds. This is unnecessary and costly, and also leaves asylum seekers in the community with no rights or entitlements. Hotham was involved in Somalian, Palestinian and Iranian cases where the individuals were found by the Minister to have protection or humanitarian needs and subsequently issued a Temporary Humanitarian Visa. These cases unnecessarily drag on through refugee processing and RRT review instead of being heard on humanitarian grounds at or following the primary stage (which could have been undertaken earlier).

> *CASE STUDY*
> *A Somalian mother of two young boys, who was at first detained and later released into the community on a BVE for psychological grounds with no right to income support or Medicare. The case was compelling but, as the Minister could not intervene until after an RRT decision, the mother had to wait a further year with no entitlements before being able to lodge a 417 application. Following this, despite the Department of Immigration indicating to the woman's lawyer that she would be granted a visa under the Minister's discretionary powers, it took more than six months before a visa was granted. The woman and her children were without any income support during this period. The time delay was due to the amount of time taken to complete health and character checks.*

Use of Section 417 Discretionary Power

The lack of transparency in how decisions are made makes it difficult to assess the Minister's use of the power, or to comment on what criteria are used to make the decision. Notwithstanding this, the following observations are drawn from experiences of the church in assisting asylum seekers[14]. The submission made by UnitingJustice Australia and Hotham Mission to the Select Committee on Ministerial Discretion in Migration Matters, August 2003 (on which this section is based), outlined our concerns at that time. They included:

- connections to Australia being given more importance than humanitarian concerns
- similar cases resulting in different outcomes
- the Minister failing to intervene in cases of serious humanitarian concern
- lack of status, rights and access to support for people awaiting 417 decisions which included inadequate access to legal support for the preparation of 417 requests

We have had little evidence to suggest that much has changed although the time frame required for this submission has been too short to allow us to gather more recent case information.

We would, however, like to raise your attention to the impact a change of Minister has on the decision making process under section 417 in terms of the two stage nature, i.e. stage

[14] By 2003 Hotham Mission had, for the past 7 years, been working with asylum seekers on Bridging Visa E, most of whom are awaiting, or have awaited, a decision under the Minister's discretionary 417 powers. The Mission worked with over 300 people in this situation. Of the 111 cases the project worked with in previous 2 years, totalling 203 asylum seekers, 37 of these cases had a final immigration outcome by 2003, a total of 33%. 22 cases had been refused by the Minister, while 7 cases were approved by the Minister. The RRT approved the remaining cases. No asylum seeker had absconded.

1 (checks), stage 2 (final decision). Hotham Mission has been involved in five complex cases which have been caught between Ministerial changeovers, where differing decisions have been made. Ministers have later agreed to revise cases, yet no decision has been made.

In these cases, checks were undertaken but subsequently refused by the new Minister, who then agreed to re-consider the case on hearing personally about it, but who failed to as yet make a decision. These cases have now dragged on for many years. Hotham Mission feels that for consistency in decision making, it would seem appropriate that due to the two-stage nature of the 417 process, that prior to handing over the portfolio, the outgoing Minister should be able to make a decision on the cases in stage 1, pending a positive outcome on all checks. Alternatively, we would feel it would be appropriate that first stage 417 cases are listed as part of the portfolio handover to ensure the new Minister is aware of and across the cases.

DESTITUTION POLICY

At its 9th Assembly in 2000, the Uniting Church resolved

> *to express its concern to the Australian government at the current practice of releasing refugees into urban and rural areas with inappropriate supports and resources, and with unsatisfactory notification of services within the placement area.*

The Uniting Church and its agencies continue to advocate for the provision of basic material support to refugees and asylum seekers. We are concerned that all community-based asylum seekers should have access to basic human services. It is imperative that the immigration program be administered in an impartial manner, taking into account the fundamental need for basic human rights like food and shelter. We are extremely troubled by the withdrawal of these very basic and necessary human services from certain asylum seekers. It is unacceptable that asylum seekers should be treated differently as to their basic human needs, dependent only on the type of visa they have obtained.

Bridging Visa E

The Bridging Visa Class E (BVE) is targeted towards asylum seekers who have not applied for a substantive visa within an arbitrary 45 days of their arrival in the Australian migration zone, and who are either awaiting an appeal decision of their status through lawful avenues, including through judicial review and ministerial discretion, or arranging their departure from Australia. Typically, these vulnerable people are denied working rights and access to the income support scheme administered through the Australian Red Cross as a result of their BVE status. Additionally, without a valid tax file number these asylum seekers are unable to access the Medicare scheme and are cut off from access to fundamental and necessary health and medical services.

As such these people are often unable to support their basic living requirements, except by means of the goodwill of charitable and benevolent organisations. They are provided for by community organisations including the Uniting Church, and not by the Australian government. Our submission in this matter is supported by a body of evidence drawn from the practical experiences of dedicated Uniting Church organisations.

Hotham Mission's Asylum Seeker Project, an agency under Uniting Church auspices, works with around 250 asylum seekers who have no rights or entitlements. With four full time staff and many volunteers, the project seeks to provide a comprehensive range of support to BVE recipients who have no other means of supporting themselves. This includes casework, housing, outreach program, advocacy, a Basic Living Assistance Program monthly cash payment, referrals to legal, medical and other services. In addition, the organisation runs a number of support groups for asylum seekers, including a Mother's Group, a Youth Group and a Men's Group. It also runs a LinkUp program where volunteers are matched with isolated asylum seekers who have no other friends. These groups provide social contact and support, and an outlet for people without the means for recreation and unable to engage in even unpaid work. Hotham's experience is extensive and it provides support across a breadth of physical, psychological and social needs.

In 2003, Hotham Mission's report into the conditions of living for Bridging Visa E recipients found that BVE recipients, as distinct from other groups of asylum seekers in the Australian community:

> were found to live in abject poverty with virtually no mainstream supports available to them**.** The impact of these issues, coupled with the long waiting period and the prolonged passivity of this group, included high levels of anxiety, depression, mental health issues and a general reduction in overall health and nutrition. High levels of family breakdown, including separation and divorce, were also recorded. The impact of the Bridging Visa E category was felt particularly by single mothers and young asylum seekers[15].

Effectively, the BVE creates certain asylum seekers as a disadvantaged group. Its function arbitrarily withdraws state support for the basic needs of certain human beings. Problems experienced by these at-risk groups were compounded by the lack of routine medical care available to expectant mothers, children, victims of torture and trauma, and people with mental illness[16]. Doctors would refuse to treat asylum seekers on learning that they had no valid Medicare card. Pharmacists would routinely charge full price on PBS-funded medicines, keeping basic medical care out of reach for many people with no independent means and no right to earn legitimate income.[17]

The 2003 report found that the services provided by Hotham Mission were integral to the ongoing wellbeing of the asylum seekers involved. In particular, the casework approach adopted by Hotham contributed significantly to both the welfare circumstances and the final outcome determinations for the asylum seekers. Of the BVE recipients supported by Hotham Mission, 43% of those who received a final decision on their status were approved for either a Temporary Protection Visa (TPV) or a Protection Visa (PV), vindicating their claims of genuine refugee status[18]. Without the advocacy and support offered by Hotham Mission and other benevolent organisations, these people would have been unable to pursue their lawful rights to appeal and to gain a final determination of their status.

The use of the BVE amounts to an alarming practice of making asylum seekers destitute and reliant on short-supply, short-term assistance. The frequent use of the BVE in cases where asylum seekers are seeking review of the decision to refuse a substantive visa ensures that while asylum seekers are accessing the sanctioned legal avenues available to them to enable them to remain in Australia, they are often unable to support themselves and their families. The Uniting Church strongly submits that this is unacceptable. It is a breach of Australia's obligations under several international treaties, including the UN Convention on the Rights of the Child (CROC), and the Convention relating to the Status of Refugees (Refugee Convention). CROC ensures that all children have the right to survival; to develop to the fullest; and to participate fully in family, cultural and social life. The Refugee Convention ensures that all refugees lawfully staying in Australia must have not less favourable access to basic human services as Australian citizens. The conditions of both of these Conventions are flouted by the operation of the BVE; the welfare of children is necessarily compromised by their denial of access to healthcare and by their parents' inability to earn income or access welfare.

[15] Hotham Mission, "Welfare issues and immigration outcomes for asylum seekers on Bridging Visa E" November 2003, p. 4
[16] ibid, p. 18
[17] ibid, p. 21
[18] ibid, p. 29

The impact on public and personal health

The 1997/8 regulation changes that removed the right to Medicare at the 417 stage and introduced the 45 day rule, in our view, are problematic and of serious concern to many groups working with asylum seekers, particularly asylum seeker children with chronic health issues denied Medicare. Discussions with the Department of Human Services (DHS) Melbourne and the various health monitoring groups for refugee and asylum seekers, such as Refugee and Asylum Seeker Health Network, have identified the main groups of concern as Medicare ineligible PV/417 applicants and New Zealand Refugee Migrants.

COMMUNICABLE DISEASES

Hotham Mission was contacted by DHS in April 2005. The DHS wanted details of health concerns for BVE holders who were denied the right to work and Medicare. Apparently the authority in NSW was concerned about this issue and the impact on State health services and had contacted DHS for details.

DHS had discovered that there are at least 35 known cases of BVE holders in Victoria who are HIV+. This was discovered through their sexual health clinics and the State register of communicable diseases, managed through the BBV/STI Program-Communicable Diseases Section.

While some were possibly overseas students, DHS did not rule out that some could be asylum seekers. Thus while not all of these cases will be of concern to Onshore Protection, unlike other communicable diseases, Hepatitis C and HIV treatment are Federal programs and can only be accessed with a Medicare card and through a public hospital. The Commonwealth in January 2002 changed its policy, limiting free treatment for HIV only for Medicare eligible through the PBS' Highly Specialised Drugs Program (HSDP). The cost for non-Medicare holders would be far too expensive for any BVE holder denied the right to work or income support.

EARLY HEALTH ASSESSMENTS FOR PROTECTION VISA APPLICANTS

Given the DIMIA requirement that PV applicants are now required to undergo early health assessments, we want to raise the issue of what will occur to individuals found to have either private or public health concerns.

Of particular concern are PV applicants who, due to the 45 day rule, are Medicare-ineligible, those who may not be eligible for the Asylum Seeker Assistance Scheme (ASAS), or whose case may be post-RRT. From our understanding of ASAS eligibility, it cannot be assumed that having a private or public health issue will ensure eligibility to the program, and thus the General Health Scheme.

A number of additional concerns about the Early Health Assessment are the lack of clarity for clients about the process, what may occur for those found to have health concerns and the lack of usage of interpreters by Health Services Australia. We are, therefore, not convinced that either the applicant nor the Red Cross will be informed or necessarily aware of the outcome of the health checks and thus know to apply for the ASAS program.

The onus will be on DIMIA to ensure any applicant found to have health issues of concern is informed of the option to apply.

The question remains, however, what will occur for those ineligible for both Medicare and the General Health Scheme?

The Removal Pending Bridging Visa

The trend to using basic human services as a bargaining chip was only reinforced by the introduction of the Removal Pending Bridging Visa (RPBV). As of May 2005, asylum seekers in detention centres have been able to apply for the RPBV on receipt of an invitation from the Minister. This visa gives asylum seekers who would otherwise be housed in immigration detention the right to live in the community, to work and to access healthcare benefits and income support under the ASAS scheme. These benefits are given pending the asylum seeker's cooperation with extradition attempts at an unforeseen time in the future.

While the RPBV is a relatively recent initiative of DIMIA, there have already been substantial concerns as to the effect of its operation on the lawful appeals process. Access to the basic services mentioned above is dependent on a person's cooperation in facilitating their removal from Australia; it is unclear exactly what this cooperation entails. Detainees are reportedly being asked to sign statements prior to their release from detention, which lay out the conditions of the RPBV as follows:

> **The holder:**
> (a) must do everything possible to facilitate his or her removal from Australia;
> (b) must not attempt to obstruct efforts to arrange and effect his or her removal from Australia.

The Uniting Church is concerned that this cooperation may well entail a guarantee not to undertake a further appeals process, in return for a release from often damaging and long-term confinement in a detention centre. While further changes to the regulations have ensured that the involvement of the applicant in an appeals process will not by itself impede their removal from Australia, this guarantee has only shortened the options for those people who accept the offer of this visa, without guaranteeing that pursuing an appeals process will not be considered as breaching the conditions under which the visa was awarded. As such, if the asylum seeker chose to undertake to appeal their status in a court or tribunal, their visa status could be revoked at the decision of the Minister under the current phrasing of the regulations.

Another significant concern is the short time period in which the asylum seeker must consider and accept the visa. An applicant has only a seven-day period from the time of invitation by the minister in which to accept or refuse the offer of the visa, at which point the offer is withdrawn. This time period is arguably too short to give applicants real time to weigh up the consequences of accepting such an offer, and a decision made in this short timeframe may not prove to be ultimately beneficial and may be influenced by the often detrimental surroundings of the detention centre.

In making asylum seekers' ability to support themselves in the community a bargaining chip, DIMIA has degraded the status of certain human rights from inalienable to dependent on the prevailing departmental mood. In effect, while the BVE penalises applicants who are typically attempting to access their appeal opportunities, the RPBV seemingly rewards asylum seekers who are willing to forgo a further appeals process in return for a release from detention.

THE JUNE 2005 AMENDMENTS

Despite the passage of the *Migration Amendment (Detention Arrangements) Bill 2005* in June, the Parliament-envisaged system of mandatory detention remains inequitable and top-heavy. Rather than proscribing transparent and accountable procedures for the award of visas, the new amendments choose to give the Minister extraordinary powers of discretion. The most recent amendments suggest a further impulse towards concentration of power in the hands of the Minister, without setting in place stringent and transparent measures of public accountability.

The Uniting Church acknowledges the significance of Section 197AB which, for the first time, takes account of the importance of considering individual characteristics and needs within the detainee population, such as age, gender, health. We believe that these changes to the Act stand as a clear basis for further policy change in various areas of the Department's operation to better take account of people's individual needs and situations.

However, we are concerned by the operation of the two new, non-compellable powers granted to the Minister. These powers include the ability to grant any kind of visa to any person "if she thinks it is in the public interest to do so", and to grant specific persons a community-based detention determination on an individual basis, again taking into account "the public interest". These decisions must then be tabled to Parliament, presumably to hold the Minister accountable to the public for decisions which bring new people into the community. However, the issue of public accountability and "the public interest" does not appear to encompass the minister's justifying why, in any case she has considered, she may have chosen not to grant a visa to a particular individual.

Additionally, the notion that the Minister might make a decision based on what she "thinks" is in the public interest, and needs only to justify these thoughts in the event that they lead to certain outcomes, is unacceptable. Considering the new imperative inscribed in the legislation, and the widespread reliance on ministerial powers of intervention we believe it is essential to hold the Minister accountable for her decisions in relation to granting visas. This would necessarily include a review process making accountable:

- the Minister's interpretation of "the public interest",
- the process leading to a decision not to grant a visa in a particular case; and
- the Minister's reasons for not reviewing a particular case at all, especially as regards the case of a minor child.

The exception to this is in the case of asylum seekers who have been in detention for over two years' duration, whose cases are reviewed by the Ombudsman and his recommendations tabled in Parliament. In these cases, and these cases alone, the Ombudsman has been empowered to recommend courses of action to the Minister, which, in line with the non-compellable nature of her intercessory powers, she is under no formal obligation to undertake. The Ombudsman has the power to determine what constitutes fair and reasonable practice in the case of these long-term detainees. Presumably in these cases public scrutiny will be brought to bear upon the Minister's conception of "the public interest", should she choose to act other than according to the recommendations. However, the legislation provides no explicit requirement for the Minister to be accountable to either the public or to the Parliament for any decision not to follow the Ombudsman's recommendations.

Minor Children in Detention

While the concept of mandatory detention is upheld by the most recent changes to the act, the *form* of detention has come under considerable scrutiny. The Act's new statement of intent specifically notes that minor children "shall only be detained as a measure of last resort", with the proviso that such a statement is not intended to reflect on the new practice of community detention. While Subsection 5(1) of the Act makes it clear that an asylum seeker in receipt of a Ministerial residence determination is still covered by the umbrella of "immigration detention", the statement of intent seeks to differentiate community residence detention from the incarceration model currently in place.

On close examination the statement of intent regarding children is devious. While much has been made of the intent for a more humane form of immigration detention proffered by the changed legislation, little attention has been drawn to the fact that the statement of intent is in practice contradicted by the obligations imposed by the Act both on individual immigration officers and on the Minister.

While the statement of intent refers to a "last resort" scenario for the detention of minor children, Section 189 of the Act maintains the mandatory detention principle as the fundamental cornerstone of the system. The Act compels immigration officials to detain all people reasonably suspected of being unlawful non-citizens, including those asylum seekers who have landed in territories excised from the migration zone. Those people detained outside of the migration zone cannot make a valid visa application, although the Minister may grant a visa if she determines it to be in the public interest to do so.[19] While the recent changes to the Act have broadened the scope and form of detention to include community determinations, these determinations may only be granted by the Minister. Indeed the act states quite specifically that the discretionary Ministerial power may not be delegated – Section 197AF states that "The power to make, vary or revoke a residence determination may only be exercised by the Minister personally". As such, an immigration officer who reasonably suspects that any minor child is an unlawful non-citizen has an obligation to take that minor child into a custodial form of immigration detention. Detention of minor children is thus of necessity a first resort and a front line strategy, and not "a measure of last resort".

The Minister's powers of discretion are designed to both concentrate power for visa decisions and confine their scope. As it stands, the legislation's clear statement of intent, "that Parliament affirms as a principle that a minor shall only be detained as a measure of last resort", has no power to compel the Minister to grant a minor child either a visa or a community-based detention. In addition, should the Minister choose to reject a minor child's application for a visa, the Act does not require her to subject her decision to parliamentary scrutiny. Indeed, the Minister is not compelled even to consider a minor child's case, or to justify to Parliament why she chose not to consider such a case.

However a matter for real concern is that despite these new, absolute and non-compellable powers, the Minister is not empowered to carry out the intent of the act by releasing all minor children as a group of asylum seekers from custodial detention. The Minister's extraordinary power is limited precisely by the fact that she may not delegate

[19] Coombs, M. "Excisions from the Migration Zone – Policy and Practice" Parliamentary Library Research Note No. 42, March 2004, Dept of Parliamentary Services

any aspect of the decision, or make a general residence determination for minors. Subsection 197AB(2) of the Act states:

> A residence determination must:
> (a) specify the person or persons covered by the determination by name, not by description of a class of persons

The Minister must individually and personally determine all cases, and the Department is not empowered to provide a community detention option for any cases that the Minister has not reviewed, regardless of the broad intent of the Act. Equally, there is no apparent measure in place to hold the Minister accountable for her decision not to grant a community detention place to a minor child.

Residential determinations are publicly posed as being an alternative to “real” detention, designed to fulfil the Act’s promise of bringing children out of the damaging environment of detention centres and into a community and family atmosphere. While we would welcome a more humane method of administering the detention of asylum seekers, the Uniting Church has significant concerns that the current form of the Act leaves it powerless to fulfil its stated intent. This situation should be remedied immediately.

THE HEALTH REQUIREMENT

The Uniting Church understands that the Australian Government is committed to offering a Humanitarian Program that helps those in greatest need of resettlement. However, there are a number of barriers to meeting this objective. The Uniting Church has identified the public interest test *health requirement*, as a barrier to access to resettlement for refugees with disabilities or who have HIV/AIDS and therefore as a priority area for reform.

The *health requirement* is the term commonly used to refer to the public interest test relating to the potential health threats and costs of diseases or conditions suffered by a visa applicant. Under the *health requirement* an applicant must meet criteria including that they are free from tuberculosis; free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and that they:

> *do not have a disease or condition where they are likely to require health care or community services where the provision of the health care or community services relating to the disease or condition would be likely to result in a significant cost to the Australian community or prejudice the access of an Australian citizen or permanent resident to health care or community services;*[20]

Under the Regulations, the Minister may waive *criteria 4007 (1) (c)* (italicised above) relating to the costs and access to health care and community services in Australia. The waiver can only be exercised if the applicant satisfies all other criteria for the grant of the visa and the Minister is satisfied that the granting of the visa would be unlikely to result in *undue* cost to the Australian community or *undue* prejudice to access to health care or community services of an Australian citizen or permanent resident.[21] As a waiver, the power to decide whether a person with a disease or condition that could result in a significant cost will be admitted into Australia is discretionary and therefore lacks consistency, accountability, and justice in the decisions made. Australia commonly rejects applications for resettlement on health grounds, including because a person has a disability or because they have HIV/AIDS.

The idea that refugees with complex health needs place a burden on the Australian community that is outside what is reasonable for a resettlement nation to spend or provide in support of refugees goes against both the spirit of developed nations resettlement programs and the Australian Government's specific commitment to help those "most in need".

Discrimination Against Refugees with Disabilities

The *Migration Act* and any regulations made under the Act are exempted from the *Disability Discrimination Act*. This means that the human rights and anti-discrimination standards relating to disability that have been enshrined in Australia are not applied in our dealings with people seeking to migrate from overseas. Visas can be rejected on the basis of a person's disability. The expense of medical treatment and specialised equipment

[20] Migration Regulations 1994, Schedule 4 Public interest criteria and related provisions, Part 1, Section 4007(1)
[21] Migration Regulations 1994, Schedule 4 Public interest criteria and related provisions, Part 1, Section 4007(2)

required to meet the special needs of a person with a disability makes the health requirement difficult to pass.

In the resettlement process, disabled refugees are frequently discriminated against. In addition, when one family member is denied permanent resident status on medical grounds, the entire family is denied. In extreme cases, families leave disabled members behind so the rest of the family may be resettled.

Many refugees became disabled as the result of a violent encounter. Factors that can cause debilitating impairments include: individual genetic makeup, conflict-related (intentional and accidental) injuries (including from land-mines), malnutrition, both infectious and non-infectious diseases, cultural or religious rites and practices, the refugee experience itself, emotional trauma associated with conflict and displacement, and the ageing process.

Refugees with disabilities are an especially vulnerable group in need of special attention. It has been estimated that there are between 2.5 and 3.7 million disabled refugees and internally displaced persons. In refugee camps, refugees with disabilities are often the last to receive food, water, and care. They are often viewed as a burden to be left behind. Displaced people with disabilities face challenges in finding safety, in activities of daily life, in discrimination on several fronts including education, access to services and rehabilitation; and are in some cases more vulnerable to physical attack. Gender and age can compound discrimination.

Case Study: Amputees from Sierra Leone

The Uniting Church is concerned that amputees from the conflict in Sierra Leone are being excluded from Australia's offshore program, as a result of the *health requirement.* Under Australia's public interest tests, amputees would generally require discretionary intervention in order to *not be excluded* from the Refugee intake. The Uniting Church believes that amputees from the conflict in Sierra Leone are some of those in greatest need of resettlement, and that this barrier must be removed. The conflict in Sierra Leone was characterised by systematic and widespread perpetration of gross human rights abuses against the civilian population. The rebels deliberately targeted civilians. The people of Sierra Leone had their limbs hacked off with machetes, eyes gouged out with knives, hands smashed with hammers, and bodies burned with boiling water. Women and girls were systematically sexually abused, and children abducted by the hundreds.[22]

Sierra Leone, situated on the Gulf of Guinea in Western Africa, is one of the poorest countries in the world. The country is recovering from a decade-long civil war (1991-2001) and severe humanitarian crisis. Since the civil war was declared over in January 2002, the internal situation has improved. However, the deep rooted issues that gave rise to the conflict—endemic corruption, weak rule of law, crushing poverty, and the inequitable distribution of the country's vast natural resources—remain largely unaddressed by the government.[23] Sierra Leone still has refugees remaining in neighbouring Guinea and Liberia and internally displaced people who have not been successfully reintegrated (the majority of refugees who fled during the civil war have returned to Sierra Leone or been

[22] Human Rights Watch, *Sierra Leone: Getting Away with Murder, Mutilation, Rape*, July 1999 Vol.11 No 3(A)
[23] Human Rights Watch, *Essential Background: Overview of Human Rights issues in Sierra Leone,* 26 January 2004

reintegrated locally). Amputees are amongst the most vulnerable of these refugees, in an already highly vulnerable refugee community. The Uniting Church believes that Australia is well placed to respond to the needs of amputees. Australia possesses a robust public health care system.

HIV/AIDS

Apart from a limited number of exceptions, most refugees who are identified as having HIV/AIDS are also excluded from Australia's offshore program because of the *health requirement.* This exclusion is of particular concern for many refugee women at risk. Sexual violence is endemic in conflict situations and in refugee camps and settlements. Women who are raped and then discover they have HIV/AIDS are dealt a further trauma when told they will often not be considered for resettlement by some countries because of this. The level of risk experienced by these women increases as they are often stigmatised and then ostracised from their communities not only because of their experiences of sexual violence but because they have HIV/AIDS. Medical facilities in camps are limited and in most cases refugees are not able to access the specialised treatment they require. These women and their families are among the most vulnerable groups in need of resettlement yet they are often those who miss out.

COMPLIANCE PRACTICES AND PROCEDURES

The Uniting Church in Australia, as a direct service provider to asylum seekers on various forms of bridging visas, has extensive experience on the procedures, policies and practices of DIMIA's Compliance Unit. Hotham Mission has undertaken to work constructively with DIMIA in all of the Mission's cases. However, through this work we have discovered systemic problems within the management and accountability structure of the department and a lack of adequate communication between units.

Hotham Mission has expressed a willingness to assist DIMIA in its restructuring, based on its extensive experience and community connections in working with asylum seekers. The Uniting Church believes an important component of any change of culture within DIMIA is more contact, liaison, consultation and partnership with community and welfare agencies working with groups directly affected by government policy.

The following information aims to further contribute to issues only touched on in the Palmer Inquiry, as well as to provide constructive comments and recommendations in relation to this Inquiry into the *Migration Act*. We believe these comments and recommendations are also critical for the Minister of Immigration's independent review of the arrangements and structures in the compliance and detention divisions, as well as for the Change Management Task Force organised by the new Secretary of the Department.

DIMIA's Compliance Units are the State-based units responsible for:

- ensuring holders of Australian temporary visas comply with set conditions;
- renewing certain temporary visas; and
- facilitating the detention and removal of unlawful non-citizens.

There has been increasing public concern around the practice and procedures of DIMIA's Compliance Units, highlighted in the Palmer Inquiry and the current inquiry by the Commonwealth Ombudsman into the 201 cases of possible wrongful detention.

Hotham Mission has for the past eight years worked with hundreds of asylum seekers on bridging visas in the community. The agency has had extensive contact with the Compliance Units in both Dandenong and the Melbourne city office, with the staff's two social workers attending Compliance with asylum seekers on average three times per week.

The following information is based on this first hand experience of Compliance practice, plus additional meetings, telephone conversations and documented client experiences. For the purpose of this submission, and the privacy of the clients involved, case studies shall provide no identifying features of the asylum seeker. If further case details are required, we ask that this be provided 'in-camera'.

Hotham Mission's concern with Compliance practice focuses particularly on the Unit's work with vulnerable persons seeking Australia's protection. These persons have sought Australia's protection by the lodging of a protection visa application and in some cases have later sought a humanitarian response from the Minister of Immigration under Section 417 of the *Migration Act*. This group includes:

- torture and trauma survivors
- individuals with physical and mental health concerns
- unaccompanied minors and the elderly
- single mothers
- children at risk
- women at risk

Our key areas of concern are about:

- procedural issues – staffing structure, decision-making and communication;
- issues of practice; and
- the impact of these practices on welfare.

Procedural Issues

Compliance Unit staffing structure

Hotham Mission's reflections on Compliance Unit management and staffing structure are based on observations made in the course of our experience of Compliance practice in relation to particular cases, not on any study of the details of the actual structure.

Hotham Mission's contact with DIMIA Compliance staff has included:

- Compliance Officer Counter Staff
- Compliance Management (State-based)
- Onshore Compliance (Central Office)

Apart from high level positions, most DIMIA staff are required to frequently change their roles within the Department. This is particularly so in the Compliance Unit, with some staff in the Unit as little as 3-6 months. It has been argued that the high turn-over is to ensure staff become skilled in various parts of the Department, however, we find that this approach lowers the quality of service and heightens the possibility of mistakes being made. This is made worse by the lack of training, inadequate handover and oversight as highlighted in the Palmer Report.

Compliance work is highly stressful, and Hotham Mission has been concerned about the lack of adequate training, debriefing and supervision of staff. Following comments from various Compliance counter staff, and observations over the years, we have found that staff morale in Compliance Units seems quite low. This often presents in the form of frustration and unnecessary harsh treatment of clients as outlined in later sections. We have observed that the "personal" or "friendly" staff have struggled in the position, and tend to be moved out of the Unit faster than others. Our concerns seem to have been confirmed by a recent DIMIA advertisement for contracted staff to provide Compliance work in Melbourne. The usual practice has been to employ existing DIMIA staff in this area.

The high turn over of staff creates a number of problems, particularly as the Department does not run its Compliance Units with a standard case-management structure. Although cases may be divided internally for oversight, the actual practice in working with and overseeing cases is based on a duty structure. Counter staff, therefore, provide what is in

effect a drop-in service, clients having to see whoever is working on the counter at the time. The effects of this system are discussed in more detail on pages 33-34.

Oversight and discretionary decision-making

Hotham Mission's experiences support the Palmer Report findings regarding the serious shortcomings in the case-management and decision-making structure of the Compliance Unit. Our concerns include:

- the inability of the Department to allocate cases to an ongoing assigned Officer
- a lack of a capacity to ensure proper handover of detailed and complex case history
- the high level of discretionary decision-making in relation to decisions to detain as well as the revocation and renewal of bridging visas
- a lack of oversight, accountability and adequate communication

The DIMIA State-based Compliance staff have a high degree of autonomy and discretion in a range of decision-making areas, in relation to the issuance, renewal or revocation of bridging visas. Hotham Mission has serious concerns with the lack of oversight and line management of Compliance staff decision-making, particularly given the discretionary powers to detain under Section 189 of the *Migration Act*.

Throughout Hotham Mission's close contact with Compliance over the past few years in hundreds of cases, we have found that there is no clear structure in terms of accountability, oversight and communication in decisions to detain. We have noted cases where relevant sections of the Department have not been contacted or made aware of the move to detain. This has included cases involving the Ministerial Intervention and Onshore Protection Units, and included senior DIMIA Compliance staff in the State and Central Offices. We are aware that approval should be sought for an "assisted removal" process, and so can only assume that the decision to detain is left to the discretion of the Officer.

We are deeply concerned by the discretionary decision-making capacity of relatively untrained, unsupervised Officers in short-term placements. While the Palmer Report indicates that the power to detain should be left to trained staff, we believe this alone does not address the core issues of concern with discretionary decision-making.

Asylum seekers on bridging visas are very vulnerable, with various restrictions and conditions placed on their right to remain in the community. While we argue that this group should have the full rights and entitlements as clearly defined in our international obligations[24], they should also have guidelines on their rights in relation to lawful status, the renewal of bridging visas, and the basis for any need to be detained.

Under current practice, however, apart from suspecting a person as being unlawful, it remains unclear what guidelines are employed and the exact basis on which Compliance staff make a decision to detain.

[24] Including rights in relation to detention as the last resort, non-refoulement, welfare support and specific rights for children while awaiting a decision (ICCPR, CROC).

Communication

Hotham Mission is also concerned about what we have observed as systemic problems in relation to communication between various units of the Department, reporting and filing processes within Compliance, and the lack of communication with relevant parties.

Our concerns with communication include:

- inadequacy or poor use of the database
- lack of communication between Compliance and DIMIA Units/Minister's Office
- lack of communication between the RRT and the judiciary
- lack of communication within Compliance
- lack of communication with relevant community representatives
- lack of communication with clients

DIMIA DATABASE

The Palmer Report raised serious concerns about the computer database used by DIMIA to manage cases. Hotham Mission remains unclear about exactly how the system works and has experienced multiple incidences of conflicting advice from different officers looking at the same system, and the failure of information provided to be entered into the system.

We remain unsure if information provided to a Compliance Officer is entered in to the system as standard practice, or filed as hard copy only. It seems that there are various responses – in some cases repeated attempts to inform Compliance about health or other concerns receive different responses from different Officers. Previously raised concerns submitted to the Compliance Officer are often unable to be found on the system.

It is unclear whether notes or issues of concern are placed on a central system and easily accessible by Officers, or whether they are difficult to find and/or access.

We are also unclear about whether there is a designated time frame or limit placed on entering information about a Section 417 request or judicial review into the Compliance database.

LACK OF COMMUNICATION BETWEEN COMPLIANCE, THE MINISTER'S OFFICE AND DIMIA UNITS

Our experience leads us to conclude that there is no streamlined mechanism enabling the information on any one case to be shared by a number of levels and units of the Department. This is noted particularly in relation to urgent cases requiring Compliance decision-making on bridging visa extensions and in relation to requests to the Minister under Section 417 of the *Migration Act*:

In some cases Compliance will not be aware a 417 request has been lodged. It appears that the current system makes it difficult for Compliance staff to distinguish between separate or subsequent 417 requests to the Minister. Our experience has been that if a client has had a previous Ministerial refusal then the Compliance Officer can sometimes misinterpret that refusal as being related to the most recent submission and make decisions accordingly.

In cases of 417 requests we have also experienced a significant time lag in the notification to Compliance staff of a Minister's move to consider a second or further request.

We are also uncertain about how submissions relating to complex cases made to the Minister by supporting agencies are managed, recorded, and disseminated amongst DIMIA Compliance staff.

These issues are very serious. If Compliance does not have full and correct information before them, it may

- assume the person is now unlawful and move to detain; or
- provide a bridging visa only on the basis of making arrangements to depart Australia

These problems also occur in relation to the submission of cases before other bodies, particularly cases in various judicial phases. While it may be understandable that it would take time for DIMIA to be aware of cases submitted to external bodies, clear protocols are lacking for clients in relation to what information they should provide to DIMIA Compliance when reporting or seeking a visa renewal. Because of these concerns, Hotham Mission now advises clients to take with them their latest requests to the Minister or court details when they report. In addition, we spend considerable time and resources in following up cases with Compliance staff.

LACK OF COMMUNICATION WITHIN COMPLIANCE

As already described, we have concerns about communication within the Compliance Unit itself. This becomes especially problematic considering the "duty" nature of Compliance practice and the lack of accountability and clear reporting requirements for Officers.

While it is easier for city-based Compliance Officers to communicate with the Melbourne office managers, we have found the Dandenong Compliance Unit's communication with the city office seriously deficient.

Hotham Mission recently experienced the unannounced arrival at one of our properties of Dandenong Compliance intended to wrongfully detain our client. This experience indicated to Hotham Mission that Compliance Managers seemed to be unaware of the move by their staff to detain (the decision had obviously been made by the Officers themselves), and there had been no cross-checking of the computer system or hard file to confirm the client's status before implementing direct actions.

In relation to internal office communication, clients attending Compliance without the support of a community representative have reported that, in some cases, counter staff have failed to seek advice from Officers or management who have previously dealt with their case. This is of concern in cases which present multiple complexities and where clarity is needed before a particular decision is made.

LACK OF COMMUNICATION WITH CLIENTS

For some years, the Uniting Church has been concerned that DIMIA is often unaware of a range of welfare and legal circumstances affecting people seeking protection in Australia. Unlike many other countries with asylum processes where the authorities have ongoing contact and direct service provision to people seeking their protection, Australia does not.

DIMIA's Onshore Protection program is responsible for people seeking protection in Australia, however, apart from the primary assessment of a person's refugee status, the Department will often not have contact with the applicant for many years until the person approaches the Minister under Section 417 and the case comes before the Ministerial Intervention Unit and Compliance. This situation is common in the cases of asylum seekers undertaking judicial appeals and who are not eligible for ASAS.

Hotham Mission works with a number of asylum seekers for whom DIMIA has no current capacity to ascertain their health or welfare status. In most cases, the 417 request will be the first time that DIMIA will be aware of any outstanding concerns for individuals or families. As highlighted earlier, we are concerned that there is no standard requirement for Compliance Officers to be aware of the basis of Ministerial requests, and any relevant concerns that may affect Compliance in their work.

Of further concern, is the nature of Compliance interaction and communication with clients. Compliance interaction with clients is extremely limited. Compliance has indicated to Hotham Mission that their primary issue is the client "maintaining contact" with the Unit. While that may be the case, the degree of discretionary decision-making available to the Officers and the impact of those decisions on clients, warrants a far more detailed and comprehensive communication and assessment of clients' circumstances.

Most Officers are very new to the Unit, and seem to have no training or background in basic social welfare assessment procedures. We have been concerned that Compliance staff make no distinction between regular temporary migrant compliance issues, and those facing people seeking Australia's protection to whom various obligations must be triggered.

While Hotham Mission has worked with some very efficient and professional Compliance staff and management, our general observations of Compliance counter staff over the past five years include:

- no adequate risk or needs assessment processes
- compliance staff questioning focused only on issues of lawful status
- circumstantial information and issues that may affect departure arrangements not requested or considered, such as health, financial situation or children.
- unhelpful and abrupt communication techniques
- lack of respect for privacy of client, i.e. raising a client's history at the open counter
- not using interpreters when needed, and in some cases using other family members or children for this purpose.
- lack of cross-cultural, gender and protection-based training of staff
- No capacity for a proper recording of information received from the client, thus different Officers asking the same questions every time a client reports.

The lack of assessment, information gathering and appropriate communication processes, mean that Compliance staff, we would argue, have little capacity to determine a person's risk to abscond or ability to make arrangements to depart Australia, and to be able to make decisions accordingly. Instead, Compliance tend to make a range of assumptions in relation to clients which are not based on sound information and knowledge of the client. This in turn affects the quality of decision-making.

LACK OF COMMUNICATION WITH RELEVANT LEGAL AND COMMUNITY REPRESENTATIVES/ GROUPS

Based on the above concerns, the Uniting Church would argue that DIMIA contact with the relevant organisation working with the client is crucial. This may include the legal representative, and with client consent, welfare agency or health provider. Unfortunately this is not always the case. We have been very concerned that decisions to detain or to not renew bridging visas have been made in some cases without confirming aspects of the case with the client's legal representatives.

In response to concerns about the high degree of unpredictability in case outcomes caused by the discretionary nature of the Compliance Unit, Hotham Mission was advised by the Department to develop good communication and relations with DIMIA Compliance. While this has assisted in a number of cases, we find this to be inappropriate and unfair for clients not connected to agencies such as Hotham Mission for advocacy assistance. The Compliance structure and decision-making process should be clear and fair for all, regardless of advocacy support available.

DIMIA has stated that they have a duty of care to all people being detained and that appropriate care needs can be determined at the point of detention. The Palmer report questions this assertion. Equally, Hotham Mission questions the capacity for Compliance to make such an assertion based on the fact that they do not have all the relevant information before them. Hotham Mission has thus worked to ensure Compliance has sufficient information relevant to the complex cases of our clients.

In December 2004, Hotham Mission approached DIMIA Compliance management in Melbourne to assist in the improved management of approximately 10 cases involving physical/mental health issues including cases of torture and vulnerable families. We were heartened by the sincerity of management's commitment to assist in these cases, however, despite good intentions, and as a result of the structural problems which exist, we have seen no major improvement in the management of these cases. Despite DIMIA having case details and informing us that we would be advised in relation to any Compliance interventions with these cases, we have continued to experience the same problems including:

- case officers (counter staff) unaware of the vulnerabilities of these cases
- multiple Officers working on the one case offering different advice
- intervention taking place without our knowledge
- management unaware of the intervention approaches of Compliance Officers
- ongoing lack of sensitivity in Compliance work with these cases.

Because of Hotham Mission's experience on these issues and lack of confidence in the current system, we invest considerable time and resources in ensuring Compliance are aware of all the issues at hand, reducing our capacity to provide important welfare work with our remaining clients.

Compliance Practice

Compliance Officers

Hotham Mission has been alarmed at the unprofessional, disjointed and insensitive approach of some officers. Hotham Mission staff and clients are consistently given differing information from counter Compliance officers in relation to the same case. For example:

- Different advice on what is required of the client in relation to when they must next report, or renew their bridging visa (i.e. which day they become unlawful), leaving a client feeling vulnerable and scared. Some Officers advise clients to come the day before the visa expires, others that they should come the day the visa has expired, i.e. when they are unlawful. Hotham Mission has had no success in its attempts to gain DIMIA clarification on appropriate practice.
- In one case, a Hotham Mission social worker accompanied a single mother who was given three conflicting pieces of advice by three different staff – all of whom were apparently looking at the same system.
- Clients are often not informed about what is required of them in relation to Compliance conditions. For example, there is uncertainty around what documentation Compliance needs to see and when, e.g. one Officer has said that a Bridging Visa E cannot be granted without sighting a passport. Some clients do not have passports.
- Hotham Mission requests to see the same Compliance officer for certain sensitive cases have been refused.
- Interpreting services are not always used.
- Despite attempts to submit detailed information in writing, Hotham Mission staff have been required to go over the same issues with a different counter staff almost every visit.
- Inappropriate and insensitive actions of Compliance staff, such as not respecting client privacy. On a number of occasions, clients have been informed of ministerial refusal at a counter in a busy waiting room.

Reporting practices

In relation to the requirements of the client to report and “maintain contact” with Compliance, this remains a purely discretionary response of the Unit. There are no guidelines in relation to what may constitute appropriate reporting, and no reasons given to the client for decisions taken. Arbitrary changes can be made about reporting requirements at any time by any individual Compliance Officer. Apart from general requests to counter staff, the process to be followed for a review of conditions or reporting remains unclear.

Hotham Mission has been disturbed that sensitivities involving children and women experiencing domestic violence are often not taken into account. For example, a mother recently separated from her husband who is currently on a restraining order, was asked to report at the same time as the husband.

Single mothers often struggle to meet the reporting conditions and are not given appropriate consideration. Families and people living compliantly in the community for

many years also find the process demeaning to their self worth and not based on an actual assessment of their flight or other risks.

Off-site practices

Hotham Mission has only had experience of off-site Compliance practice on two occasions, both involving the Dandenong Compliance Unit.

One instance was a raid in which one of our clients was detained. This case is currently being investigated by the Commonwealth Ombudsman in relation to the 201 cases of possible wrongful detention.

The other case involves Compliance arriving unannounced at a Hotham Mission managed church property in an apparent move to detain a single mother with three children who was lawful at the time. This case is currently being investigated by the Minister's Office.

While we would prefer not to disclose further issues of these cases as investigations are being undertaken, we can comment on a number of concerns in relation to off-site practices:

- clients have not been given an opportunity to prove their lawful status
- inconsistent practices in relation to the use of warrants
- instances when Officers have not attempted to contact legal representatives prior to making moves to detain
- no requirement for compulsory database and hard file cross-checking prior to intervention
- Officers intervention actions not being overseen by Compliance Management.

Impact on the Welfare of Asylum Seekers

Asylum seekers in the community are a particularly vulnerable group. They live with daily uncertainty about their future and often with the effects of previous trauma. Sensitivity and consistency is required when working with them. Hotham Mission believes current Compliance practices create unnecessary burdens and anxieties for this group of people.

Particularly vulnerable cases involving children and health concerns

Compliance seems to lack the capacity to manage complex cases involving children at risk or people suffering serious mental or physical health problems.

Hotham Mission is particularly concerned about the following experiences:

- Compliance has not had details of the existence of children within the family unit who have been born since the primary decision, even in cases where, despite numerous attempts, the system has failed to recognise these children
- Compliance has not requested information about or been aware of issues involving child protection, domestic violence or other problems which place children at risk
- The current protection visa application process creates a number of problems for children born in Australia, as well as for other family members lodging PV

applications after the primary applicant. The process creates 'split-applications' and has lead to a range of concerns for families, as listed below.

- No standard, streamlined procedure exists to create separate individual cases from an already existing family case, as well as compliance requirements in relation to domestic violence. Such a process should include the capacity to unite split family applications to represent changes in family composition.

Hotham Mission has had to intervene in a number of circumstances over the past few years where we believe Compliance has not acted appropriately in relation to children in vulnerable situations, or has not had the correct information pertaining to the family unit. The Case Studies below describe some of these cases.

CASE STUDY 1

The asylum-seeker father of a child born after the primary decision in 2002, provided details to the RRT verifying the birth of the child, including the birth certificate. The RRT advised that the child should be put on a separate application to the parents. When the parents' case later moved to the Minister under Section 417, the family approached the Compliance office to renew the bridging visa. Compliance indicated that they had no record of the child on their system. When he later showed the birth certificate and the child's case file number, they identified the child, but failed to put the child on the same case as the family before the Minister. When the father next reported he was told his child was unlawful and that the Department would act to remove the child. The father suffered terrible shock and confusion before the Compliance Officer later said, "OK, OK, we will sort it out". No apology was given.

CASE STUDY 2

A child on a separate application was found to be a refugee. The child was the primary applicant and the mother was on the same application. However, the father was on a separate application. Despite guidelines on the derivative status of immediate family members of refugees, the Minister did not intervene and Compliance moved to facilitate a removal of the man. Despite attempts to expedite the father's return to Australia, he remains in a precarious situation in the country of origin.

CASE STUDY 3

A young Australian-born child faces the prospect of being without either parent after Compliance moved to remove the child's father, the primary carer. The Australian mother suffers a mental illness. The family are being forced to consider one of two scenarios: 1) The Australian child being uprooted and departing for the refugee-producing country with both parents (and the mother's health being placed at risk); or 2) The father being removed from Australia and having to leave the child with the mother, possibly leading to child protection concerns.

CASE STUDY 4

A woman was informed by Compliance that she had received a new negative high court decision that would affect the granting of a new bridging visa. This was not the case, as the woman's case was before the Minister.

It was subsequently discovered that despite notification being given of a situation of domestic violence leading to family breakdwon, and the lawyer separating the woman's case from the court appeal, Compliance had not separated the case in their files, thus giving the impression the woman was unlawful.

General health issues

A number of concerns have emerged in relation to physical and mental health:

- Compliance not asking questions in relation to health and medications, which may affect the process to detain or remove a person.
- Compliance not taking into account health issues raised by client or agency, leading to situations that may put the clients health at risk. In one example, despite Compliance staff twice being informed of the client's history of severe asthma and trouble breathing, the line of questioning continued to the point that an ambulance had to be called to the Compliance office. The client was subsequently hospitalised for more than 24 hours.
- The issue of whether information pertaining to a medical, mental health or other unique circumstances issue in a Section 417 is made available to Compliance for removal or compliance purposes
- Lack of clarity with regards to whether Compliance has a process to ensure community-based removals are medically fit to travel, for example, in cases where medical services are involved, or in work cover cases?

CASE STUDY 5

After receiving a Ministerial rejection at which point her mental and physical health deteriorated. In particular her severe asthma became worse and she expressed suicidal ideation. Due to concerns for her mental health, the social worker involved organized a psychiatric assessment through Foundation House.

The social worker contacted DIMIA's Ministerial Unit prior to the client attending Compliance in order to make the Department aware of the client's fragile and unpredictable mental state. The Ministerial Unit suggested a specific Compliance officer who was experienced, and whom the social worker assumed would be sensitive to the client's mental health issues. The worker spoke to the Compliance Officer prior to attending Compliance with the client to make him aware of the concerns in relation to the client.

On attending the interview, the Compliance Officer took issue with the fact that the client had lost her passport and had lodged a second 417, stating that he found it difficult to believe that the client was making preparations to leave the country. He said he might need a bond lodged for security even though the client offered to report frequently. The worker sought to clarify what amount may be required for a bond. The Officer did not state a specific amount saying that each case was assessed individually. The worker at that point also referred to numerous Doctor's reports outlining the client's mental and physical health issues documented in the second Ministerial application.

The client was asked to return to Compliance the next day showing evidence that she was making preparations to leave the country. She took in an itinerary showing flight bookings and a fax to the Embassy requesting forms to be sent for a replacement passport. After much discussion, the Compliance Officer said he needed a $10,000 bond to be lodged by 5pm that day. The client only had $2000 available and as she could not pay $10,000 or access the money by 5pm, the Compliance Officer stated he would detain the mother and separate her from her children. The Hotham Mission social worker present indicated Child Protection would need to be notified.

The client started to become extremely distressed and agitated. The Compliance Manager was brought in to talk to the client but she became very scared thinking that she was going to be detained. She started to scream and became uncontrollable. An ambulance was called as she had difficulty breathing and started to show symptoms of an asthma attack. The client was then hospitalised.

Subsequently, a bridging visa was issued on the grounds of making preparations to leave the country, however, the approach taken appeared to unnecessarily escalate the situation rather than diffuse the level of distress faced by this vulnerable client. Hotham Mission had concerns around the client's ongoing mental and physical health. Despite an attempt to inform DIMIA of these issues in order to assist in any decision making process around the family, it remained unclear as to whether there was a procedure to assess the client's mental or physical condition in terms of compliance or return requirements

Torture survivors and individuals with mental health issues

Attending compliance is often a traumatic experience for asylum seekers, particularly those with previous experiences of arbitrary detention and torture. Hotham Mission has repeatedly requested that torture survivors and those with mental health concerns be able to see the same Compliance Officer, and for pre-arranged meeting times to be made where possible.

CASE STUDY 6

A Middle Eastern family who face serious ongoing mental health issues, made a second section 417 request at the end of 2003. While lodging a second section 417 does not warrant the issue of a Bridging Visa, Hotham Mission together with the Victorian Foundation for Survivors of Torture, made an assessment which deemed this family to be at risk of self-harm if detained. The assessment of risk was particularly significant in the light of the two children aged 4 and 9. While the family was preparing their letter to the Minister, Hotham Mission together with Foundation House contacted DIMIA Compliance and Investigations to inform them of the assessed risks associated with detaining this family.

DIMIA Compliance took on board the information provided and decided to issue a bridging visa. The visa, however, was only granted on a month-by-

month basis. The act of returning to Compliance each month has been difficult for the clients and as the stress worsens their mental health symptoms. What has been particularly hard for the family however, is that many times when they have reported to renew their visas, they have had to deal with a different Compliance Officer who has not been briefed on the particulars of this family's case or circumstance. This has sometimes led to harsh questioning, threatening to detain the family, and often long anxious waits of over two hours before the situation is clarified and the bridging visa issued. A Compliance Officer who knows the overall circumstances of this case and who could oversee visa renewals would seem to be a more appropriate response to vulnerable cases and lessen the burden of these visits.

Financial considerations

Asylum seekers approaching the Minister under Section 417 are generally denied the right to work, income support and Medicare. Hotham Mission's clients face abject poverty, debt, and are totally dependent on charity for their survival. Hotham Mission is concerned with the length of time taken for Ministerial decisions and the welfare impact this places on clients.

These lack of entitlements affect both the general welfare and wellbeing of the client, but we would argue also impact on the government objectives of voluntary repatriation of refused asylum seekers.

- Many asylum seekers have no funds to pay for the travel cards required to fulfil their reporting requirements. To assist our clients, Hotham Mission currently spends more than $11,000 per year for Metcards, ensuring clients can 'maintain contact' with Compliance.
- These asylum seekers in addition, have no ability to self-fund return[25], with the alternative being detention pending removal. Hotham Mission has spent more than $40,000 over the past 4 years keeping clients out of detention by paying for airfares.
- Currently Compliance does not assist community-based individuals with any departure arrangement costs, such as passport renewals or visa applications.
- It remains unclear to Hotham Mission what the policy is, and at what point a person is required to sign a document stating they will return before a certain date and/or pay a bond before a bridging visa can be issued. This has occurred in a number of cases, but not for others.

CASE STUDY 7
A young Sri Lankan needed to renew his Bridging Visa E. He had made a second appeal to the Minister. Under these circumstances he could be detained. Hotham Mission accompanied the man to Compliance where we were taken into a small room. The woman who had been dealing with him at the counter and her manager were in the room. They informed the

[25] Reasons for individuals' inability to self-fund their repatriation is highlighted in the Hotham Mission research, "Welfare issues and immigration outcomes for asylum seekers on Bridging Visa E" November, 2003, but includes lack of income due to the Bridging Visa E status, high level of debt**,** and more than 50% of clients having no relatives in Australia to assist them financially.

asylum seeker that, if he wished to avoid detention, he should return in 3 to 4 days with someone who was willing to pay a bond of $10,000.

The asylum seeker was shocked and tried to point out that it was a ridiculous request because he would simply not be able to come up with the money. Eventually, the amount was reduced to $2,000 or $3,000, which would have placed him in serious debt.

CASE STUDY 8
Recently, a client withdrew his case from the Federal Court and decided to return to Sri Lanka to be with his wife and child who had returned in December 2003. This man had spent a short period in detention after breaching his bridging visa requirements by working. Friends had paid a bond of $7,000 to secure his release. Since that time, he lived in church-based housing and was reliant on charity. On organising his departure, he explored with his Compliance Officer the possibility of DIMIA assisting with payment of the airfare.

However, the Officer told him that DIMIA can only pay for the ticket if he is detained in an "assisted removal" context and if he spent a period in detention this might result in the forfeiture of his bond, as he would be in breach of the conditions of his bond. He did not want to risk the bond, which he owed to his friends. He was not able to access the bond until he left the country and struggled to find the funds for his airfare. Not having family in Australia, and already being in debt to his friends, he became reliant on church connections and Hotham Mission to raise the funds, which put financial pressure on the agency which is already under-resourced and lacking in funds.

Removal Issues

Hotham Mission has achieved positive outcomes working with asylum seekers at the final stages, particularly our high percentage of refused clients voluntarily repatriating, 85%, and our low absconding rate.[26] Increasingly however, this work has become more difficult because of the lack of clarity and consistency around procedures at the point of return and the intersection of a range of return and compliance issues. Hotham Mission has identified two primary issues in this regard:

- The capacity for individuals voluntarily repatriating to be financially assisted by the government both in terms of return travel and repatriation assistance whilst still lawful (i.e. not detained). Hotham Mission simply no longer has the funds to pay airfares.
- The procedures for agencies to raise cases with Compliance or the Ministerial Intervention Unit where there may be unique circumstances affecting removal, eg. humanitarian concerns relating to a Section 417 submission, medical or other issues affecting ability to travel.

We are also concerned with the following questions:

[26] "Welfare issues and immigration outcomes for asylum seekers on bridging visa E", Hotham Mission Asylum Seeker Project, November 2003

Payment of repatriation assistance:

- What discretionary repatriation funds are available to voluntary returnees?
- In what circumstances does DIMIA organise formal repatriation packages and in-country arrangements with suitable bodies, such as IOM?
- Is this a discretionary Compliance decision or is there a standard policy?

Return of a bond:

- At what point is a bond returned?
- How is money returned to individuals with no overseas bank account?
- Could the bond be released earlier to cover return flights, or could DIMIA access costs of return from the overall bond amount through a signed consent with the person/s returning?
- What happens to the bond of a person who has been released on a bond, and then re-detained for return purposes (but not for breaching their BV), i.e. is their bond forfeited?

Availability of superannuation:

- Can returnees access their superannuation funds?
- Can these funds be used to pay return costs?

Work Cover returnees:

- Are returnees able to continue to receive Work Cover on return?
- Are returnees able to await removal until a decision is made on compensation?

The need to detain pending removal

Hotham Mission believes current compliance practice means that DIMIA Compliance Officers are ill-equipped to make the complex decisions expected of them. Inexperienced workers are granted too much discretionary power to detain under section 186 of the *Migration Act*. Instead, focus should be given to improving administrative decision-making practices, developing clear guidelines, improving training, and developing more options and flexibility for working with asylum seekers at the final stages.

Hotham Mission is also concerned about the assumption to detain pending removal. Hotham Mission's experience in its more than eight years in working with hundreds of asylum seekers is that in most cases, detention is not necessary to ensure asylum seekers comply with expulsion orders. We believe there are a range of alternatives and options for DIMIA and the Compliance Unit to ensure that government objectives of properly implemented immigration outcomes. We believe detention should always be a last resort, for both children and adults.

Background to the Recommendations

The Uniting Church agrees with the Palmer Report Recommendations 3.1, 7.1, 7.4 and 8.3 which are most relevant to the Compliance Unit, in relation to urgent improvements in oversight, case management structure, database and training programs.

POWER TO DETAIN

However, while the Palmer Report cites concerns with the "exceptional, even extraordinary powers" of Compliance Officers to detain and remove, it stops at proposing changes to the *Migration Act*. The Uniting Church view Section 189 of the *Migration Act* with concern, namely the requirement of an Officer to detain on reasonable suspicion. The power to detain should not be a discretionary power but based on a thorough administrative decision-making process based on evidence of unlawful status. In addition, this power does not allow the opportunity to rectify the status of a person who has become unlawful for reasons outside of their control.

In addition, the 24-hour review proposed by Palmer in Recommendation 7.4 is not sufficient, and will not prevent the possibilities of wrongful detention cases occurring in the future. Persons suspected of being unlawful should have ample opportunity prior to being detained to prove their lawful status, to be ensured access to legal representation, and be provided with a reason for their detention or removal in writing.

While there will always be elements of the Compliance process that may require discretionary decision-making, certain elements should be within appropriate administrative decision-making procedures, based on clear guidelines on eligibility. In particular this should include:

- Expansion and further clarity in the guidelines for the renewal of bridging visas, with a review capacity
- Clear guidelines on the grounds for revocation and the move to detain, including a standardization of the use of warrants
- Providing in writing to the client the reasons for the decision to detain, revoke or non renewal of a bridging visa
- Providing a suspected unlawful non-citizen with an opportunity to prove their lawful status prior to being detained.

REMOVAL

The Uniting Church agrees with recommendation 8.3, particularly in developing a briefing program to assess the reason behind a removal, and responsibilities associated with removals. We would ask that clear guidelines be developed in this regard, including an exploration of the Canadian practice of "pre-removal assessment" to ensure all removals are appropriate and that no refoulement, humanitarian or welfare concerns are present.

The key question that needs to be asked, and clearly has not currently been asked is: Can departure from Australia be facilitated without the use of detention? We would argue, based on our extensive experience, that departure can be facilitated without detention. There is however, a very strong assumption within DIMIA to detain pending removal. This is evident in the lack of community-based voluntary repatriation programs to facilitate removals more easily from the Compliance office. Apart from the recent offer to East Timorese asylum seekers, all refused community based asylum seekers have faced detention pending removal through the "assisted removal" process.

We argue that Compliance officers require more options when working with people facing departure from Australia. This should include more flexible bridging visa arrangements and non-detention-based repatriation assistance offered to all refused asylum seekers, as

outlined in recent IOM repatriation programs. These programs, together with a thorough casework structure, as outlined in the following section, will reduce the need to move to detain, by adequately assessing the risk to abscond and more effectively working to prepare for departure from Australia.

In addition, we propose that new training programs for Compliance staff and management, and other sections of the Department, should include the opportunity for experienced agencies like the Victorian Foundation for the Survivors of Torture, Hotham Mission, and the Red Cross, to provide input and training on sensitive issues related to persons seeking protection, e.g. trauma, gender, cultural, child protection, mental, physical and welfare issues.

CASE MANAGEMENT

A clear accountability and oversight structure is required within the Department to approve all moves to detain and remove, including cross-checking of database, hard-file material, appropriate documentation and approval of intervention techniques to be utilised.

In addition, the high staff turn-over and the Duty system do not provide a consistent and appropriate response in relation to the decision-making responsibilities. Compliance case management requires a three tier approach:

- Duty system (counter staff) for reporting only
- Compliance Officer allocation for managing cases and approving visa renewals
- Compliance Management oversight in relation to revocation, detention and removal

However, Hotham Mission argues that for the Department to have a more thorough and appropriate case management of asylum seekers, social work practice is required. The role of this caseworker is to:

- ensure early intervention and thorough risk and needs assessment
- ensure appropriate care provision for vulnerable persons
- provide information to the Compliance, OP and Detention units to assist with decision-making and assisting in intervention planning
- support and prepare individuals for possible immigration outcomes, including detention and removal

This "caseworker" role is particularly important for individuals in detention or at risk of being detained and removed. Hotham Mission believes that a social and welfare worker role with the capacity to provide DIMIA with assessment and intervention plans, would have assisted the cases of Vivian Solon and Cornelia Rau, where physical and mental health concerns were prevalent. Furthermore, we believe this role and work is beneficial to government, community and the asylum seeker. Hotham Mission's casework response has contributed to high levels of voluntary repatriation and low levels of absconding, while ensuring high levels of care to vulnerable persons. (See Appendix: Working with asylum seekers - Casework)

In this regard, Hotham Mission believes that the Onshore Protection unit should have more responsibility in overseeing and coordinating the care needs of asylum seekers in the community, throughout the determination process from PV application to an S417

decision. However, we are unconvinced that either Onshore Protection or Compliance has the capacity, ability or skill-base to provide the basis of social work support as required. DIMIA has, over the past 10-15 years, effectively outsourced all its direct service and contact with reception and settlement. DIMIA neither provides direct social or welfare work to its clients nor, to our knowledge, have social workers been employed in recent years.

Hotham Mission proposes that external social workers be available both to people in detention and those at risk of being detained for a thorough psycho-social assessment and ongoing casework where required. Early intervention as well as need and risk assessments undertaken by a welfare or health professional, should occur for all asylum seekers, for people in the community, for those in detention, those in compliance situations, particularly people facing possible detention or removal. Red Cross is an ideal agency to provide this role, being:

- a nationally-based agency currently working within every detention centre in Australia, and federally-funded to work with certain asylum seekers in the community
- recently federally-funded to provide case coordination for release from detention facilities of families under the new community care arrangements.

ADDITIONAL RECOMMENDATIONS

The Uniting Church believes it is fundamental that Compliance improve its ways in working with vulnerable persons, including asylum seekers, torture survivors, women and children at risk, and individuals with health issues. We feel that in addition to Palmer's recommendations, other changes to Compliance procedures and practices are required in this regard, including:

- Reduced levels of staff turn-over and increased staff morale by improving supervision, debriefing and training.
- Communication – Database improvements to include better tracking and management of cases, including between Departmental units, and external bodies such as the Minister's Office and the Refugee Review Tribunal.
- Improved communication with community groups, in order for information provision on issues such as welfare, income assessment, ability to travel, making of arrangements, factors relating to any risk to abscond, medical issues (medication being taken, mental health) and other relevant issues.
- Cross-cultural training and standard use of interpreters.
- Increased role of Onshore Protection in the care and oversight of people seeking refugee and humanitarian protection in Australia; including prioritization and better case management of vulnerable cases, including those listed above.
- Welfare entitlements, such as the right to work and Medicare, linked to all asylum seekers on bridging visas.