Inquiry into the Administration and Operation of the Migration Act 1958

This submission deals with two problems related to removal and deportation within the Committee's terms of reference (a) and (b).

1) The lack of independent review of removal actions by the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA).

2) The practice since 1999 by DIMIA and its Ministers of cancelling the visas of long-term residents without citizenship who are convicted of criminal offences, making them unlawful non-citizens liable to removal.

1) The Removal System

Deportation is an active decision by the government of a country to send a non-citizen away from that country. The onus of proof is on the government to show an independent authority, generally a Tribunal, Magistrate or Court, that the right person is being sent away and on lawful grounds.

Removal under section 198 of the Migration Act, on the other hand, is an automatic process; once set in train it must be carried out as soon as practicable. Previously this process applied only to non-citizens who arrived without authorization at Australia's borders, were detained and then "turned around". Since the Migration Reform Act of 1992 (effective from 1/9/1994) removal has applied more broadly to encompass people who have entered the country. Now the onus is on the individual to show that he or she has a valid visa or visa application. Removal follows from failure to do so, or after a person's applications and appeal opportunities are exhausted. There is no requirement for independent review of removal actions themselves.

The wrongful removal of the Australian citizen Vivian Alvarez Solon and the attempted removal of the permanent resident Cornelia Rau, neither of whom was in a position to produce a visa, visa application or proof of citizenship, demonstrate that the removal system needs changing. Mick Palmer's Inquiry into these cases highlights the importance of independent review of removal actions. Palmer is critical of the attitude he found in DIMIA that "the power to remove from Australia a person reasonably suspected of being an unlawful non-citizen 'does not require a decision' because it is required by the Act" (p.195).

In moving away from deliberate decision-making on deportations subject to independent scrutiny, the removal system has lost contact with the body of law that enunciated the conditions for lawfully deporting somebody. David Corlett has recently reported on arrangements to remove refused asylum seekers to Vietnam although they had never been to that country. These arrangements were not carried out but one of the individuals concerned, Mr M. Al-Khateeb, a Palestinian, was removed to Thailand. (David Corlett 2005 *Following Them Home: The Fate of Returned Asylum Seekers*, pages 150-153, 180).

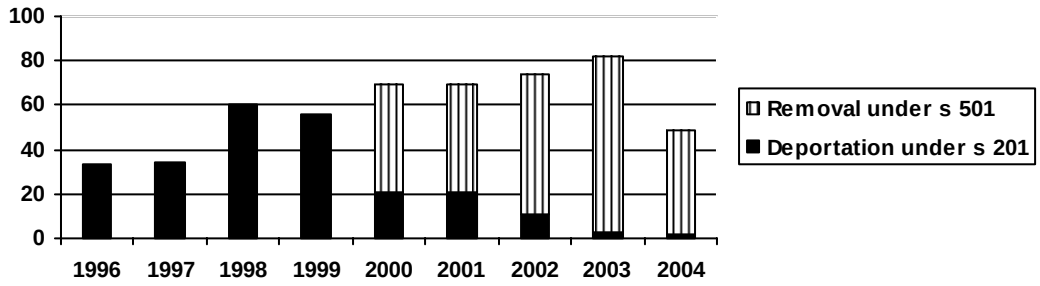
I submit that there should be an independent check by the Federal Magistrates Court of removal orders. Courts have a heavy migration caseload and successive governments have been concerned to reduce this. Nonetheless sending someone away

is a grave action that demands careful checking. The check should be of the person's identity, fitness to travel, and the existence of permissions both from transit countries and the person's country of citizenship.

2) Extension of the Removal System to Criminal Deportations

There continue to be provisions in the Migration Act 1958 for the deportation of non-citizens convicted of a criminal offence and sentenced to imprisonment for one year or more (section 201). However since the introduction of the strengthened character and conduct provisions into the Migration Act (section 501, effective 1/6/1999) it has become the practice by DIMIA and its Ministers to deal with convicted non-citizens by cancelling their visas on character and conduct grounds, turning them into unlawful non-citizens and making them liable to removal. This is now becoming a new area of contention between the executive and the courts (please see citations of Nystrom and Ayan cases below). It is making permanent residents liable to removal on the basis of criminal convictions.

Table showing the application of the removal process to criminal deportations after introduction of the strengthened character test



Sources: Department of Immigration and Multicultural and Indigenous Affairs *Protecting/Managing the Border: Immigration Compliance*. 1999 and 2004. Additional Estimates Hearing 15/2/2005. Question Taken on Notice (Senator Bartlett), Immigration and Multicultural and Indigenous Affairs Portfolio.

Whilst the criterion relating to criminal convictions is the same – one year's imprisonment or more - there is a crucial difference between the deportation provisions of section 201 and the character and conduct test in section 501. Under the deportation law a non-citizen cannot be deported after being lawfully resident in Australia for more than ten years, except in very exceptional circumstances. Under the character and conduct test there is no time limit. Furthermore the official decision-making Direction No. 21 on cancelling visas under section 501 relegates to a subsidiary role factors related to long-term residence, such as hardship and disruption to the non-citizen's family (Direction No.21 and Migration Series Instruction MSI-254, 2001).

These changes have led to long-term residents of Australia who have not taken out citizenship facing visa cancellation and removal. A person subject to this section is not protected from removal despite the fact that he or she may:

- have lived in Australia virtually all of his or her life
- have children and other dependants who are Australian citizens
- have served his or her time in prison.

Two Judges in the Federal Court of Australia have recently been extremely critical of the use of section 501. This was in the case of Stefan Nystrom, who was born in Sweden while his mother, an immigrant to Australia, was there on a visit. Nystrom came to Australia with his mother when he was 27 days old and grew up entirely in Australia without taking out citizenship. His visa was cancelled on character and conduct grounds in August 2004, aged 30, following a serious criminal conviction. (Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 121) Among others there is also the case of Tayfun Ayan who arrived as a six month old, grew up in Australia and had his visa cancelled aged 25 years following repeat convictions for theft of goods and property totalling $30,000 (Andrew West 20/07/2003 'Kicked out after a lifetime in Australia' *Sydney Morning Herald* http://www.smh.com.au/articles/2003/07/19/1058545628971.html).

In the case of Ayan, the Full Federal Court dismissed his appeal despite expressing sympathy for him and noting "that in every respect, except citizenship, he is an Australian" (Ayan v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 7 & 139.) In Nystrom's case Justices Moore and Gyles stated that "This is yet another disturbing application of s 501 of the Migration Act … [which] suggests that administration of this aspect of the Act may have lost its way". Nystrom's appeal was upheld and the matter remitted to the Minister for Immigration. The Court also ordered that Nystrom be released from immigration detention in its decision on 1st July 2005.

I believe that the two Judges are correct. Section 501 is principally about *refusing* visa applications by individuals seeking to enter Australia. It should not be used to achieve the deportation of Australian residents convicted of criminal offences. I submit that there should be an immediate moratorium on all removal actions arising from this application of section 501 and that in the future DIMIA and its Ministers should revert to applying section 201.

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