INTERNATIONAL COMMISSION OF JURISTS

AUSTRALIAN SECTION

GPO BOX 173
SYDNEY NSW 2001
telephone +61 2 9286 8700
facsimile +61 2 9283 3323
email sec-gen@icj-aust.org.au
web www.icj-aust.org.au

29 July 2005

Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600

SUBMISSION TO THE INQUIRY INTO THE ADMINISTRATION & OPERATION OF THE MIGRATION ACT 1958

1. Introduction

1.1 The International Commission of Jurists (Australian Section) - **ASICJ** - is pleased to have this opportunity to make submissions to the Committee's inquiry into the administration and operation of the Migration Act 1958.

1.2 Recently there has been much focus on policy and practices of the Department of Immigration and Multicultural and Indigenous Affairs (**DIMIA**), particularly with regards to immigration detention. No doubt, many of the submissions the Committee will receive will deal with matters that were recently reported on and which are currently being investigated by Mr Mick Palmer AO APM.

1.3 In these submissions, ASICJ focuses on other aspects of the migration regime in Australia that have received less attention in the public domain in recent times, and which raise significant concerns for the rule of law in Australia:

- review tribunals – MRT & RRT
- judicial review
- Minister's discretionary powers

2. Review Tribunals - MRT & RRT

2.1 ASICJ has serious concerns about the rule of law in relation to the structure and procedures in the two merits review tribunals established under the Migration Act - the Refugee Review

Tribunal (**RRT**) and the Migration Review Tribunal (**MRT**).

2.2 ***Structure & Independence***

2.3 The review tribunals are constituted by Members who are appointed from time to time by the Minister for Immigration and Multicultural and Indigenous Affairs (**the Minister**). There are full-time Members, and part-time Members, and there is no security of tenure for them. They do not have to be, and often are not, legally qualified.

2.4 A number of tribunal Members are employed on maximum term contracts, but are eligible for re-appointment at the Minister's discretion. It is not satisfactory in terms of the independence of the review tribunals that the Minister who determines appointment and re-appointment of tribunal Members, is also the Minister responsible for administering DIMIA, whose decisions are under review by the tribunal. It is a classic example of a structure whereby the purportedly independent tribunals could be subjected to powerful political pressure from the Minister whose departmental delegates are being called into question in the review cases. It is reasonable to fear that review tribunal Members may feel indirect, if not direct, pressure to provide decisions that please the Minister, and which could not be seen to be contrary to government policy. There is a reasonable apprehension of bias and lack of independence as a result of this structure.

2.5 Further, concerns about the independence of the review tribunals are reinforced when one notes that many tribunal Members are ex-DIMIA officers, promoted by the Minister through the ranks of the public service. Further, if a visa applicant takes the tribunal and the Minster to court over a tribunal decision, the tribunals engage the same lawyer as the Minister to represent both parties in the proceedings.

2.6 ASICJ sees no reason why Members of review tribunals could not be appointed in the same manner as other judicial and quasi-judicial officers, including those in the Administrative Appeals Tribunal (**AAT**), whereby it is the Attorney-General who makes the decision on appointment, in a process completely separated and independent of the Minister for Immigration.

2.7 ASICJ has long opposed structures whereby judicial and quasi-judicial officers are appointed for maximum term contracts but who have the chance of re-appointment at the end of that term. It is appreciated that temporary Members and judges are sometimes necessary for practical purposes, however, ASICJ's position is that whenever that occurs, such officers should not be eligible for more than a single term of appointment.

2.8 ***Procedures***

2.9 The RRT and MRT are inquisitorial tribunals at which the Minister or DIMIA are not present, and where the visa applicant is not entitled to have legal or other representation[1]. This is to be contrasted with the AAT which conducts hearings in an adversarial style of proceedings much like an Australian court, where all parties are represented and where all parties may question witnesses. There is also is a right of

[1] sections 366A and 427 of the Migration Act

appeal from the AAT to the Federal Court of Australia based on ordinary administrative law principles[2]. The is not available from the RRT or the MRT.

2.10 ASICJ does not object to inquisitorial tribunals per se, however, due to the very nature of the RRT and the MRT, and the lack of the right to representation, the hearings before the RRT and MRT often take the form of cross-examination by the Member of the witnesses (including the visa applicant), and very little more. There is no right for the visa applicant to have a lawyer or other representative undertake re-examination, and if the Tribunal identifies other witnesses and sources of information, there is no entitlement to test that adverse evidence through the applicant's cross-examination of those other witnesses. Their hearsay statements, often only in writing, are admitted without any real challenge or testing, and they are often preferred to the applicant's own evidence.

2.11 Standard cross-examination techniques are employed by Members at the hearings in relation to visa applicants, and much like in court proceedings, witnesses can become confused or upset when faced with co-ordinated, strategised and direct challenges to various aspects of their case, including their credibility. Usually, this all takes place in a language other than their own, and through the use of interpreters of mixed competence.

2.12 It is a fundamental tenet of legal practice that in order to obtain a full and proper understanding of a witness' evidence, there must be the opportunity to re-examine the witness following a session of cross-examination so that errors that may be perceived following a thorough cross-examination, or misunderstandings of the applicant's evidence that may arise, can be clarified or otherwise cleared up.

2.13 The combination of all of these factors, coupled with the fact that the review tribunals are not bound "by technicalities, legal forms or rules of evidence"[3] and the fact that common law principles of natural justice are removed and replaced by an inferior codified form[4], the ASICJ has serious concerns about the correctness and reliability of decisions made by review tribunals. There is no right of appeal to a court if the review tribunal clearly makes errors of fact. The tribunals are the final arbiters of fact; there is no access to merits review of a decision of the MRT or RRT.

2.14 Since section 474 was introduced removing the right of appeal from a tribunal on the basis of erroneous findings of fact, the tribunals have developed a fixation on the question of credibility of visa applicants, and many case are now rejected on the basis of adverse findings of fact in this regard. These findings are usually made after vigorous cross-examination of applicants in the manner outlined above, and they are almost appeal proof as a result of the privative clause provisions in section 474 of the Migration Act. In many cases, adverse credibility findings are made as a result of relatively minor inconsistencies in an applicant's evidence. It is hardly surprising that in many cases (if not most of them), there will be some inconsistencies or lack of precision in some of the evidence before the tribunals. This is particularly so in refugee matters where many applicants have limited education and for whom presenting a complicated refugee case would be a formidable task, even if it were in their own language.

2.15 There is, in effect, a complete lack of effective judicial oversight or other suitable accountability mechanisms for cases that have been rejected on findings of fact.

[2] and under the Administrative Decisions (Judicial Review) Act 1977
[3] Sections 353 and 420 of the Migration Act
[4] Sections 357A and 422B of the Migration Act

2.16 ***Summary* - review tribunals - MRT & RRT**

2.17 ASICJ's view is that the structure and procedures of the RRT and the MRT, set up under the Migration Act, are not such that can provide confidence in the ability of the review tribunals to impartially, independently and effectively determine the facts of a case. Only through a right to representation, the right to question witnesses against them, and through judicial officers who are not potentially subjected to Ministerial political pressure, can any confidence in the outcome of these tribunals be had. Given the gravity of the decisions being made by these tribunals, which very often have life-changing implications for the applicant (and in refugee cases, potentially life-threatening implication) the present structure and procedures are inadequate and inappropriate.

2.18 It is ASICJ's view that the MRT and the RRT should either be abolished (with the case load and jurisdiction being transferred to the AAT) or they should be modified such that their structure and procedures, and access to judicial review, are the same as is presently applicable to cases in the AAT. Members of the tribunals should only be appointed by the Attorney-General, and there should be no temporary appointments following which there is any eligibility for re-appointment as a Member.

3. Judicial Review

3.1 ASICJ's concerns about the structure and procedures in the MRT and RRT are heightened by the fact that Section 474 of the Migration Act removes general access to judicial review of the administrative decisions of the tribunals. The privative clause provisions in Section 474 provides that a decision under the Migration Act, including a decision of a review tribunal:

> " *a. is final and conclusive; and*
> *b. must not be challenged, appealed against, reviewed, quashed or called into question in any court; and*
> *c. is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.* "

3.2 Except for the limited ground of "jurisdictional error of law", decisions of the MRT and RRT are immune from judicial review or oversight under ordinary administrative law principles. This represents a serious departure from the Westminster system of government whereby the judiciary played an important role in providing reliable checks and balances on administrative action. That role of the judicial arm of government with regards to migration matters has been largely abolished by the privative clause provisions.

3.3 The High Court construed Section 474 in 2003[5] and determined that the federal courts do have jurisdiction to set aside a decision of a review tribunal if the tribunal committed "jurisdictional error of law" in respect of its decision. Unlike decisions of the AAT, decisions from the MRT and RRT cannot be appealed on ordinary error of law and administrative law principles. Further, there is no access to merits review in the courts for error of fact by the tribunals, and this is particularly concerning when one has regard to ASICJ's submissions above in relation to the MRT and RRT.

3.4 Refugee law in Australia has become an extraordinarily complicated area of specialised legal skill, as the Courts have construed the migration legislation and international law

[5] *Plaintiff S157/2002 v. Commonwealth* (2003) 195 ALR 24

through many appeals of tribunal and departmental decisions. The complexity of refugee law, which many lawyers find difficult to grasp, let alone asylum seekers, renders even more unsatisfactory the provisions of the Migration Act that prohibit legal representation in the review tribunals.

3.5 Only through full judicial oversight of review tribunal decisions can one have real confidence in the outcomes of the tribunals. ASICJ sees that the only way to achieve this is to reinstate merits review in the federal courts. Otherwise, potential miscarriages of justice that flow from the structure and procedures in the tribunals will inevitably continue to occur.

3.6 As a less satisfactory alternative to full merits review in the courts, policy makers should at least permits judicial review on the basis of ordinary error of law and in particular, under accepted principles of administrative law, and under the Administrative Decisions (Judicial Review) Act 1977. This is the situation in the AAT.

3.7 With full judicial oversight, one is likely to see a trend whereby the quality of decision making in the review tribunals would improve over time. With that outcome, the number of appeals in the courts would surely decrease.

4. Minister's Discretionary Powers

4.1 ASICJ considers that the use of discretionary ministerial powers has resulted in uncertainties and procedural inconsistencies. There has been a vast increase in the range and scope of ministerial powers over the last six years whereby the Minister is empowered to intervene in many stages of the determination process. Accordingly, there has been a multiplication of requests to the Minister asking for personal intervention which naturally has resulted in the increased workload for the Ministerial Intervention Unit.

4.2 The Minister's discretionary powers may be categorised as follows.

4.3 *Substitution powers*

4.4 The Minister has the power to substitute a more favourable decision following merits review in the administrative tribunals under the following provisions of the Migration Act:

- Section 351 - Substitution of a decision of the MRT;
- Section 391 - Substitution of a decision of the AAT in relation to an MRT-reviewable decision;
- Section 417 - Substitution of a decision of the RRT;
- Section 454 - Substitution of a decision of the AAT in relation to an RRT-reviewable decision;
- Section 501J - Substitution of a decision by the AAT.

4.5 The Minister may consider using these powers if it is in the public interest to do so and is not limited to the decision that the review tribunal may have made. This may have the unfortunate result whereby the Minister's intervention results in a grant of a visa which is vastly different to that applied for. ASICJ is aware of an applicant from East Timor who applied to the Minister for humanitarian intervention after being in Australia for over

seven years. While her close family members were granted permanent residence visas, she was granted only a temporary student visa.

4.6 Similarly, it is concerning that some asylum seekers who request humanitarian intervention on the basis of life-threatening illnesses, are granted temporary medical treatment visas rather than permanent residence visas.

4.7 Anomalies are created because ministerial discretionary powers can only be accessed following merits review in the relevant administrative tribunal, but there are many situations in which genuine humanitarian concerns arise during DIMIA level processing. Case officers may become aware of significant public interest concerns yet are unable to recommend that an application be referred to the Ministerial Intervention Unit. For example, persons in vulnerable situations and holding genuine fears, but who do not meet all the legal criteria under the Refugees Convention, are required to apply for inevitably unsuccessful merits review in the RRT merely to obtain the refusal that activates the section 417 ministerial powers, rather than being able to directly access the ministerial powers without that process.

4.8 ASICJ considers that there should be scope for DIMIA delegates and legal representatives to bring exceptional cases to the Minister's attention without the intermediate step of merits review tribunals.

4.9 ASICJ is concerned that a request to the Minister to exercise her/his powers is not considered to come within the normal scope of decision making under the Migration Act. The ministerial guidelines for use of the substitution powers in Migration Series Instruction No. 225 indicates that a request to the Minister is not an application for a visa and "unless the request leads to the grant of a bridging visa, such a request has no effect on the removal provisions". Therefore, a request to the Minister does not come under the Code of Procedure as outlined in Migration Act Part 2 Division 3 subdivision AB. These provisions provide an important guideline for the applicant to determine if she/he can make a valid visa application and what the proper procedure to follow is. The provisions also specify how an applicant is to be notified of the decision and that a negative decision must include reasons for refusal.

4.10 It is a shortcoming in ministerial decision making, and a person seeking ministerial intervention is seriously disadvantaged by not being afforded the same rights. A person asking for public interest or humanitarian consideration should be informed of the correct procedure for making such a request, should have the opportunity to comment on adverse information, and should be informed of the reasons for any refusal.

4.11 ASICJ recommends that the ministerial power to substitute a more favourable decision should be reviewed to permit at least the following:

- ministerial intervention following DIMIA decision making,
- procedural guidelines for applicants be developed, and
- negative decisions to include reasons.

4.12 ***The power to intervene in application processing***

4.13 The Minister also has a number of discretionary powers which permit her/him to shorten statutory time limits or to permit applicants to lodge further visa applications where otherwise prohibited. These powers include:

- Section 48B by which the Minister may permit a protection visa applicant who has been refused to lodge a further protection visa application, and
- Section 91K which permits holders of safe haven visas to lodge an application for a permanent residence visa in Australia.

4.14 Further, Schedule 2 of the Migration Regulations at clauses 866.228 and 866.228A permit the Minister to shorten the period that a temporary protection visa (**TPV**) holder must wait prior to re-assessment of their protection visa claims. Ordinarily, a protection visa holder is required to wait for 30 months before they can be re-assessed for a permanent protection visa. Further, if the Minister considers it in the public interest to do so, she may permit that a further application to be re-assessed at any time.

4.15 Refugee advocates have commented to ASICJ that many requests have been made to the current Minister for her to shorten the period because of exceptional circumstances relating to individual applicants, especially those with serious mental health problems. However, anecdotal evidence indicates that the Minister has not intervened favourably to allow the assessment of a protection visa application to be expedited. The problem facing TPV holders is that while the Minister has extensive powers to vary normal processing requirements, there are no guidelines indicating what the Minister will regard as public interest factors for doing so.

4.16 Similarly, there are a variety of situations which may lead to a protection visa applicant requesting permission to lodge a second application after the first was refused. For example, the applicant may not have been properly advised of the DIMIA refusal especially through the negligence of a migration agent and will have missed time limits for appeal to the RRT. Alternatively, significant changes may have occurred in the country of feared persecution which increase the risk of harm for the applicant. Further, the applicant may have engaged in political, religious or social activities since the refusal that may have increased the risk of persecution if forced to return to her/his source country.

4.17 Again there are no guidelines on what the Minister will consider in determining whether to permit a second application for a protection visa.

4.18 As a result, requests for the Minister to vary normal processing requirements may come from a variety of visa applicants including TPV holders and persons who have new vital information to put before refugee determination officers. It is essential that there are guidelines which identify the public interest factors that would be considered in relation to the Minister's power to vary procedural requirements. Under the principles of administrative decision making, all applicants have the right to expect that decision making will proceed according to standardised decision making processes with clear guidelines and consistency.

4.19 ***Visa cancellation powers***

4.20 Amendments to the Migration Act in 1999 gave the Minister discretionary power to refuse an application for a visa or cancel a visa on the grounds of character. The character test as outlined in section 501(6) of the Migration Act covers not only the visa holders' criminal actions but also general conduct and associations with other persons.

4.21 ASICJ has been advised that there are many incidents where persons who are long term residents of Australia have had their permanent residence cancelled because of past criminal conduct. Often the person is nearing the end of a term of imprisonment when they are advised that a deportation order will ensue. If this decision has been made under the Minister's personal power in s. 501(3), there are no rights of judicial or tribunal review at all. It is a breach of fundamental administrative law principles that such important decisions impacting on a person's right to continuing residing with their family and in their established community can be revoked without an opportunity to address adverse information and to be heard on the issue. It is fundamental natural justice.

4.22 ***Summary - Minister's discretionary powers***

4.23 ASICJ considers that the range of ministerial powers has been increased over recent years to attempt to resolve difficulties and gaps in the determination process, thereby moderating rigid decision making. Too often visa criteria have become unduly complex and are strictly applied by departmental officers or review tribunal members. Anomalies have occurred as a result of single member review tribunals and unanticipated consequences of legislative changes. Ministerial powers have been developed to allow public interest humanitarian considerations to re-enter migration processing.

4.24 However, this beneficial aim has been thwarted by the range of ministerial powers which now operate without guidelines and without the protections of due process. ASICJ considers that it would be better that the decision making process provided more natural justice protections, more transparency, and that applicants were better informed of the criteria against which they were to be assessed.

4.25 As the recent report from Mr Mick Palmer AO APM has indicated, a culture of rigid and forceful decision making has emerged in DIMIA which is used against vulnerable applicants. Rather than the expansion of ministerial discretionary powers, ASICJ suggests that the determination process has to be modified. Reliance on ministerial discretionary powers can perpetuate a defective process of decision making which is too closely linked to political processes rather than rule of law protections. It is essential that persons affected by ministerial discretion are afforded natural justice. The minimum standards must be clear and consistent decision making, the right to be heard and reasons for refusals being given.

5. Conclusions

5.1 These submissions have identified deficiencies in the process of applying for visas at the DIMIA level in relation to primary visa applications, the review tribunal level in their merits review of visa refusals and cancellations, and then at the ministerial level in terms of her/his personal discretions to intervene. The entire system represents an extraordinarily daunting process for a visa applicant to undertake, where it often seems from the very outset that the process and structures have been set up to defeat them.

5.2 ASICJ's view is that a massive overhaul of the MRT and the RRT is required (if not abolition), increased access to judicial review, and more clarity and transparency of the ministerial discretion process is required in order for society to have confidence in the reliability and consistency of the administration and operation of the Migration Act.

5.3 We thank the Committee for this opportunity to make submissions in relation to the matter before it and would be pleased to provide further assistance by way of verbal evidence at any hearings that may be held by the Committee into this matter.

Yours faithfully
International Commission of Jurists
(Australian Section)

Nicholas McNally	**and**	**Elizabeth Biok**
Treasurer		Member of the Council

This submission has been authorised at the Presidential level of ASICJ by The Hon John Dowd AO QC.