"Inquiry into the administration and operation of the Migration Act 1958"

Submission to the
Senate Legal and Constitutional Committee
of the Parliament of Australia

A submission by the members and National Executive of
The Migration Institute of Australia Limited
August 2005

THE MIGRATION INSTITUTE OF AUSTRALIA LIMITED ("MIA")

The Migration Institute of Australia Limited ("MIA") is the peak association providing excellent service advocating the benefits of migration and advancing the standing of the migration profession – leading professionalism in the migration field.

The MIA is the peak body representing the professional interests of its more than 1,100 (registered migration agent and corporate membership) members throughout Australia.

The MIA is perhaps better known to the Parliament for the exercise of its public responsibilities as the Migration Agents Registration Authority (MARA), under an Instrument of appointment by the Minister for Immigration, Multiculturalism and Indigenous Affairs.

This submission is written to the Parliament in MIA's representation role as the professional body, and in no way is the submission provided in MIA's capacity as the profession regulator.

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INTRODUCTION

There are many parts of the Migration Act as it currently operates and under which regulations, procedures and policy are made, that the MIA endorses and supports.

However, the MIA has the perception of an ad-hoc approach to amendments to the Act which have been undertaken in at least the last two decades. It is certainly timely for there to be a simplification and consolidation of the Act as it currently appears while taking account of some serious concerns we have. More than two decades ago, the Act had more certainty and stability in the manner in which it was administered and considered at both departmental and political levels. MIA members wish a return to that operating environment.

It is instructive at this time to remind ourselves as an Australian community that the provisions of the Migration Act are many times the last ditch stand for the opportunity for justice as it applies to an individual applicant. Yet the judicial review of administrative decisions under the Act is restricted. Why is this so?

MIA members also seek from any review of the Act, a more balanced, impartial and fairer assessment and decision making process for all visa applicants. We wish for a restoration in emphasis on the significance of the Australian community interest in the way the Act is administered. We submit to this enquiry that the Act as it currently operates lacks this emphasis.

In addition to the above general remarks, we submit the following views and recommendations on behalf of our members:

SPECIFIC MATTERS

1. Section 4: We are concerned that the object of the Act (S4) as it is currently being administered, is not fairly and properly representing the national interest of **all** (our emphasis) Australians. The Act clearly states that this should be so. It appears increasingly clear to our members and the community at large, that in recent times this is not being done. For example some Australians are discriminated against in their opportunities to sponsor applications being made (S3A (5) such as spouse applications at some Australian missions overseas.

We recommend that more emphasis be placed on the significance of S4 of the Act in all areas where regulations, procedure advice or instructions are published. The national interest should be considered in positive terms and that national interest is best served by trying to find ways to help people as well as for example to protect Australia's borders. Where discretion is available in decision making, all DIMIA officers should continue to be mindful of the national interest.

2. Section 5: There is a range of interpretation issues in S5, which are unfair, and not in line with normal government (Local State and Federal) and commercial standards and norms. An example here is the term "working day" and the extent to which "days of grace" are not allowed in late lodgment situations. Another example is the rigidity that is applied to the test of "functional" English ability. Many people in our community are economically and socially, highly productive, but would not pass a "functional English" test. This is of major concern to the MIA, because the test being applied is no longer as relevant to the community as it was two decades ago. We recommend a thorough review re-write of all interpretation matters in Section 5.

3. Section 27: This section should be urgently reviewed in its meaning and intent, given that States and Territories of the Commonwealth are now directly involved in the administration of this Act to a considerable extent (regional migration/visa initiatives). There is no current right of review under the Act for decisions made by the many state and regional authorities, in an ever increasing range of visa applications and related sponsorship applications. MIA appreciates the

regional settlement policy imperative, however, the Act specifically excludes the States and Regions in the way it currently operates.

4. Section 34. There is an important community need to introduce new dates to the absorbed person provisions and also to adjust the wording to cope more adequately with "innocent illegal" minor children. The MIA believes these changes to be in the national interest (note S4), and simple to achieve. For example, April 1984 could be amended to April 1990; and an amendment to incorporate minor children (becoming unlawful), would not damage the national interest (subject to police checks). A person who became illegal in 1990 has been here now for more than 15 years. Given the cost of parent migration an unlawful child who was innocent of their parent's decision to overstay, should not be seen as a "cost threat" to our welfare system. Again, the community interest is paramount. The national (community) interest may not be best served by insisting such a person be forced to leave Australia if they have otherwise been of good character. Any person who has been here for 15 years by any reasonable measure is absorbed into our community.

5. Section 37: Bridging visas are a major concern when it comes to granting work rights especially during protracted delays such as often occurs during Review or Ministerial Intervention.

There are currently asylum seekers and others holding such visas who do not have access to work rights, Medicare and ASAS, and otherwise have no independent means of support. This can include those who have been released from detention, those who have fallen under the 45 day rule and those appealing decisions or appealing to the Minister for the first time.

The way in which DIMIA interprets this section of the Act in policy terms is to provide the strongest possible incentive for people to leave Australia. The repercussions of this policy are well documented. People are subjected to homelessness, illness and extreme poverty; children are denied education and basic health care. In many cases such people cannot access legal services on a pro bono basis as these services are already stretched to the limit.

The MIA recommends that those on Bridging visas (including Bridging visa E) be granted work rights and that this be written into the act in such a way as that a decision maker be required to state why such rights should not be granted in the community interest.

A community interest/economic hardship clause should be inserted so as to give certainty. To not do so conflicts with S4

6. Section 45: There is a clear and fundamental right in the Act to make an application for a visa at an Australian Mission overseas or a DIMIA office in Australia. S45 currently places no restriction on such an application being made at these places. In the national interest there should always be a fundamental right (elodgment or otherwise), of all people whether Australian citizens, residents or temporary residents together with foreign nationals to deal directly with an Australian Mission or DIMIA office. There must not be a delegated commercialisation of this process (eg as has happened recently in India and South Africa). The Act must specifically preclude this. MIA feels strongly about this. It may be acceptable to provide a commercial lodgment service in some countries/cities where no Australian mission operates, but not so as to exclude a visa applicant or their Australian citizen sponsor, access to an Australian mission or DIMIA office.

Another example of S45 not being administered correctly lies in the arrangements between DIMIA and the Government of Iran. This government has appointed agents to process and lodge working holiday maker applications and DIMIA through the Australian Embassy Tehran will only accept applications lodged through such “agents” Unfortunately these “agents” appear to be telling their client applicants (who pay the agents A$1500) that their working holiday visa is a guarantee of conversion to permanent residence after arrival in Australia. That is another example of what happens when the right to lodge an application directly with an Australian

mission overseas is over ridden by local arrangements.

A second matter pertaining to the operation of S45 is the way in which it is administered where same sex partners are concerned. Currently, same sex partners cannot apply for a permanent visa to enable migration as a couple. Australian citizens, permanent residents and eligible New Zealand citizens can sponsor their partner for an Interdependency visa. However migrants cannot apply to bring their same sex partner under any other permanent visa category. They must go through a convoluted and bureaucratically wasteful procedure, post arrival of the principal applicant.

The impact of this is a significant negative for many skilled migrants seeking to settle in Australia with their partners. It would be fair to say this is also a significant remaining discrimination in what is supposed to a totally non-discriminatory immigration policy. Regulation 1.15A which is the operative piece of legislation under S45 should be amended to include same sex partners in the definition of de-facto spouse. The current method of admitting same sex partners under the Interdependency provisions, assessing them under the same criteria as de-facto spouse, but failing to admit them in any other area of the Act is farcical and counter productive when seeking to attract highly skilled migrants and students.

7. Section 53: MIA submits that information provided by a visa applicant on a passenger arrival card is valid information under S52. For example, in the case of a provisional spouse visa holder, a passenger card arrival record is a notification of current address in Australia. There are known cases where such visa holders have had their visas cancelled, innocently presuming that DIMIA knew where they were by virtue of supplied passenger card information.

8. Section 48: MIA feels that S48 provisions where they affect the rights of Australian sponsors are excessive and in conflict with the national interest (S4). For example an application for a Protection Visa should not preclude a subsequent application for a partner or employment visa where changed circumstances are genuine and the community interest is well served. There is a need to redefine "substantive visa". Administration of Section 48 is a core issue related to the introductory remarks in this submission.

10. Section 52: As per 6 above, communication must be allowed directly with DIMIA under all circumstances.

11. Section 57: This section details the obligation to present to visa applicants adverse or other information supplied by a third party, which may affect a decision to grant a visa. Section 52 (2) (a) allows for such information to be given to the applicant in a manner that the Minister considers appropriate. This is being interpreted in policy terms in such a way that, for example, there is an insistence that adverse medical information concerning a visa applicant only be communicated through a medical professional of that applicant’s choice. This section of the Act is out of date and out of keeping with the rights of the individual in general legal terms in Australia.

The MIA believes the Act needs to be amended to ensure an applicant or their appointed agent has an unequivocal right to receive information directly. S 57 should be further amended to make it clear that the reasons for a rejection on health or character grounds must be explained in detail to the visa applicant. HSA must be made to explain why (in detail) the potential or prospective cost to the community is prohibitive. Under current general law an individual has the right to access medical records (including medical reasons for rejection),or instruct their solicitor or agent to do so. There is no justification for a departure from this system in the Migration Act.

12. Section 95: MIA believes the operation of the "pool" system is outmoded, outdated and unfair for applicants required to pay a relatively significant fee with little or no chance of receiving a visa. Applicants actually drawn from the "pool" are historically extremely rare. The pool arrangements should be removed from the Act, and more attention should be paid to raising or lowering the

pass mark to manage skilled migrant intakes. Taking this step will also simplify the points test arrangements.

13.S351 and S417: These two sections of the Act deal with Ministerial Discretion powers. Despite a recent and comprehensive Senate inquiry, Ministerial Discretion continues to remain a process shrouded in mystery and controversy.

The MIA advocates the retention of Ministerial Discretion as a necessary and basic ministerial power. Yet the very seriousness of the situation facing the majority of people seeking the Minister's intervention to grant visas in the **public interest** (our emphasis), requires absolute trust in the government of the day that such a power is at the very least not politicised or even suggested as so.

Recent decisions relating to Ministerial Discretion (in particular decisions which have separated parents from their natural children), have left MIA perplexed, given the public interest foundations behind these powers. It appears to MIA members that they can no longer rely on MSI guidelines written under the provisions of these sections of the Act as reliable for properly and professionally advising and acting for applicants in these circumstances.

The MIA asks this enquiry why the recommendations from the Senate Select Committee on Ministerial Discretion in Migration Matters have not been decided on or acted upon?

In addition the MIA recommends to this inquiry that the Act be amended to allow the power to be delegated by the Minister to decision makers at State Director level, as is the case with the power to waive Schedule 3 requirements where spouse applicants are illegally in Australia. This would go some way in de-politicising the intervention powers and providing more consistency overall.

14.Section 501: This section concerning refusal or cancellation of visas on character grounds is a fundamental part of the Act, which again has fallen out of date, is too prescriptive and has no provisions in the way relevant policy is written concerning the public interest concepts of personal reform and rehabilitation. MIA believes the concept of rehabilitation should be written into the act itself to give certainty of meaning.

A major consideration here is the number of long term Australian residents who have had their visa cancelled under Section 501 following 12 month prison sentences (often suspended), for crimes the wider community would consider to be minor in nature. This has resulted in the deportation or detention pending deportation of people who have lived the majority of their lives in Australia and who have families and close ties here.

The MIA considers the separation of families should only occur in the most exceptional circumstances and only in those rare situations requiring the protection of the wider Australian community from the likelihood of serious threat or harm where such threats are clear and present.

Section 501 also impacts on those applying for a visa for the first time. In particular S501 (6) (ii) is of serious general concern to the MIA. The words "past and present general conduct" allow consideration and interpretation of a wide range of matters that are not material to the visa application. While the MSI (which is not binding), urges decision makers to take into account relevant circumstances of a particular case including rehabilitation and good conduct, the Act itself precludes any consideration of the age of past convictions or conduct or the circumstances in which they took place. There is no recognition of the term "spent conviction" written into the Act.

The MIA has solid anecdotal evidence that there are clear discrepancies amongst overseas missions when decision makers are assessing visas under this part of the Act. For example, due to the fact that there are no time limits written into this section, overstaying a visa for 1 month, 5 years or 10 years beforehand, can have serious repercussions for people applying for a partner

migration, sponsored by an Australian citizen.

The MIA also has concerns about the way Section 501 can impact on people with psychiatric disabilities. S501(7) (e) states that a person has a substantial criminal record if…"the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity and as a result the person has been detained in a facility or institution".

This wording is clearly out of step with Australia's non-discriminatory policies in relation to people with disabilities. Once again this section makes no reference to the amount of time a person has been detained or how long ago such detention occurred. For example, how can a person who spent 4 months in an institution or "facility" 5 years ago be deemed to have a substantial criminal record?

In summary terms the MIA recommends that limitation provisions be placed upon past or present conduct in Section 501.

15. Sections 275 to 332. These sections concern Migration Agents and immigration assistance. As such they deal with the Registered Migration Agents and the operation of the Migration Agents Registration Authority. There are approximately 3100 currently registered migration agents within Australia and overseas who assist clients under the provisions of a strict enforceable code of conduct which is written into this part of the Act.

It is well known that in the migration advice community including DIMIA that there are thousands of so called "education agents" and overseas unregistered migration agents who are giving immigration assistance. A review of the operation of the MARA in 2001 made strong recommendations to do something about these major breaches of the Immigration Act. Yet education agents and a great many overseas immigration agents continue to provide assistance to clients in a totally unregulated environment. Further, they are not being prosecuted and insufficient investigative resources are being devoted to administering these parts of the Act.

In this period the registered (regulated) migration advice profession in Australia has undergone considerable, sometimes painful, but very positive change. A reading of the code of conduct for registered agents makes it clear that domestic registered agents have to operate in a highly regulated environment. At the same time unregistered overseas agents and education agents are not registered. They do not pay fees to DIMIA and have no mandatory code of conduct written into law by which they have to abide.

Unregistered agents including education agents soliciting students from overseas for universities continue to provide visa assistance; consequently continue to be in breach of these parts of the act; and continue to have unfettered access to DIMIA at all levels.

MIA has repeatedly sought with DIMIA and successive Ministers to enforce the provisions of the Act where such practices are occurring. Some of the unethical behaviour and exploitation of clients by such unregistered people has been well documented across a wide range of the media.

Current DIMIA plans are to give these people a new ID number which will is similar to that given to Registered Migration Agents, so that they may access DIMIA for their clients. Yet there is still no regulation of unregistered agents, no legally enforceable code of conduct for them, and no fees to pay DIMIA. An Australian Registered Migration Agent spends up to $6000 per year in direct costs including statutory fees to MARA, insurance and compulsory continuing education costs, just to remain registered. An Australian registered agent is subject to a well developed and serious complaints handling system where serious misbehavior may cause them to have their registration (practicing license) cancelled.

Unregistered overseas agents and domestic education agents face none of these requirements, yet DIMIA intends to allow them to continue to operate alongside Australian registered agents.

We put the obvious questions to this inquiry: Where is the justice and equity in allowing this situation to continue? And in doing so, how can DIMIA be said to be acting in the interests of all Australians (S4)? Are they really suggesting the majority of our community agree that, having done so much through the MARA to successfully regulate our profession, Registered Migration Agents should be treated in such a shabby fashion? Is the solution perhaps to do away with these parts of the Act altogether so that everyone is treated equally? We in the MIA would not agree. The MIA believes the great majority of our community would concur that all individuals giving any form of visa assistance under the Act should be registered in the same way, and be treated no differently.

DETENTION AND DEPORTATION

While not wishing to make specific comments and recommendations about these parts of the Act, the MIA wishes to note some more general concerns.

The Migration Act incorporates wide-ranging powers and responsibilities within Sections 176 to 274. There has been considerable attention given to these parts of the Act in recent years in the media and in parliamentary and other public debate. The MIA has always taken an apolitical approach to these issues and has only sought to promote debate on immigration issues in the general public/community interest.

The MIA and its members share growing community concern that these parts of the Act are not being administered fairly and in the community interest. In our view the Australian community does not wish to see minor children placed in detention, nor do we believe it in the National Interest to detain indefinitely people who have become stateless since their initial detention. There must be better ways of dealing with people in these situations. For example, there are limitations on representation, and agent access difficulties when people are detained, threatened with detention, or are being deported.

It is noteworthy that very recent enquiries and public announcements by the current Minister and the government as a whole appear to be addressing some of these issues. We strongly recommend in the community interest that this process of change and reform continue.

CONCLUSION

The Migration Institute of Australia Limited puts the above submissions to this Senate inquiry with the objective of continuing to advocate for reform of the Migration Act in the interests of our members, their clients and importantly, the National Interest. The membership of the MIA collectively holds a wealth of practical knowledge as to how this Act is administered and how it affects the day to day lives of a great many Australians. There should be a greater effort made by those responsible for the administration of this Act to understand how it impacts on day to day lives in our community in contemporary Australia. The MIA and its members would be pleased to help facilitate that better understanding.

The Migration Institute of Australia Limited

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