SOUTH BRISBANE IMMIGRATION & COMMUNITY LEGAL SERVICE INC.

CENTRO COMUNITARIO PER L'IMMIGRAZIONE E LA CONSULENZA LEGALE
SERVICIO COMUNITARIO DE ASISTENCIA LEGAL E INMIGRACIÓN
PANGMAMAMAYANG PAGLILINGKOD SA IMIGRASYON AT BATAS
DỊCH VỤ DI TRÚ VÀ CỘNG ĐỒNG LUẬT PHÁP
GÖÇ İŞLERİ VE TOPLUM HUKUK HİZMETİ
ادارة الاهجره للخدمات القانونية للمجتمع
南布里斯本移民及社區法律服務處

8 August 2005

Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Email legcon.sen@aph.gov.au

Dear Committee

Inquiry into the administration and operation of the Migration Act 1958

Thank you for the opportunity to make a submission to this Inquiry.

The South Brisbane Immigration and Community Legal Service is an independent not-for-profit organization specializing in refugee and immigration law. It is the only agency in Queensland that provides free legal assistance in this area and has a significant volunteer base. Legal Aid Queensland does not provide immigration legal assistance. SBICLS takes on genuine cases of people most disadvantaged and in need, and provides legal representation before the Department of Immigration, the Migration and Refugee Review Tribunals, and works with pro bono lawyers to take cases of public interest to judicial review. SBICLS holds phone and drop-in advice sessions and undertakes community legal education and law reform projects where resources permit.

We believe there is need for broad reform to promote a fairer and more compassionate immigration legal system in Australia. Events such as the Rau and Alvarez/Solon cases, along with apparently many other cases referred through the Palmer inquiry, plus ongoing concerns about harsh treatment by the immigration system, have led to a growing recognition within government and the community for change.

Given the huge demand for our services we do not have resources to provide a comprehensive review of *Migration Act* issues the subject of the Inquiry. We have had time only to select a few matters. There are many issues left untouched or not given detailed analysis due to lack of resources.

Our submission to the Inquiry are detailed below.

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SUMMARY OF RECOMMENDATIONS

Recommendation 1
Immigration law be simplified and significantly reformed. Decision guidelines should be made more accessible to the general public.

Recommendation 2
A person who has become an Australia permanent resident as a juvenile and become part of the Australian community should not be subject to cancellation under s501 *Migration Act* on character grounds. The 10 year rule under s200 should apply and s202 covers where a person may be deported on security grounds.

Recommendation 3
Immigration detention cases should be subject to regular judicial or other independent scrutiny, initially within a month and then on a quarterly basis.

Recommendation 4
A properly resourced duty lawyer system should be available to enable people detained by immigration officials to have immediate access to independent and sufficiently resourced legal advice. Section 256 MA should be amended.

Recommendation 5
Review on compassionate and humanitarian grounds by the Minister should be allowed at earlier parts of the process rather than only after an MRT or RRT refusal.

Recommendation 6
The 45-day rule should be abolished. Failing this, there should be a discretion to allow work rights to a protection visa holder where there is good reason why the protection visa was not lodged within 45 days and there are compelling circumstances to grant work rights.

Recommendation 7
The harsh Temporary Protection Visa regime should be abolished. However if the Government is to continue to keep the TPV regime, then at the least:

- TPV holders should be able to bring their spouse and dependent children to join them once they have been accepted as refugees.
- DIMIA should respond quickly to a pattern of RRT overturns and be more open to changing narrow interpretations of what is a refugee. DIMIA should be given power to provide for a form of 'complementary protection' in humanitarian cases which may not strictly fit the definition of refugee.

Recommendation 8
The '7-day rule' for temporary protection visas should be abandoned. Failing this, applicants subject to the 7-day rule should be able to sponsor immediate family.

Recommendation 9
A discretion should be included in the regulations to allow for the five year ban on women-at-risk visa holders from sponsoring their spouse to be waived in exceptional circumstances.

Recommendation 10
Time should run from actual rather than deemed notification. This was taken up by the Government in the current version of the *Migration Litigation Reform Bill 2005* and it would be inconsistent to not apply this to other MA decisions. There are immense injustices possible where a person misses a time line.

Further, there should be discretion to allow an extension of the timelines in compelling circumstances similar to that give to the courts in the *Migration Litigation Reform Bill* 2005. This allows an extra 56 days after the 28 day period from actual notification.

Recommendation 11
DIMIA decision-making and time limits for responding to visa cancellation in immigration detention (Reg 2.46) should be increased from the current '5 minutes'.

Recommendation 12
Changes should be made to cater for 'innocent illegals' following the amendments of 1 July 2005.

Recommendation 13
Interdependent partners of people obtaining visas should be able to be included as secondary applicants as being part of the family unit.

Recommendation 14
It would require substantial work to map in detail and coordinate the experiences and concerns of community workers in the immigration area. Resources should be provided to the sector to properly coordinate law reform strategy during this time of significant change following the Palmer Inquiry.

Recommendation 15
DIMIA should continue to develop closer relationships with the community legal sector through regular consultation.

DETAIL OF RECOMMENDATIONS

1. Law should be simplified

Immigration law is enormously complex. While guidance is needed through regulation to give a measure of certainty to decisions there should be effort made to simplify the Act and Regulations.

Recommendation 1

Immigration law be simplified and significantly reformed. Decision guidelines should be made more accessible to the general public.

2. Harsh exercise of power to cancel permanent visas on character grounds.

Long-term residents who have arrived in Australia as young children and have not taken up citizenship, are having their permanent resident visas cancelled under s501 *Migration Act* 1958 (MA) on character grounds. This results in extreme hardship as they are permanently banned from returning to Australia.

We have two cases of males brought to Australia at ages 1 and 4, now being fathers in their 30's and 40's, facing being torn away from their families. Their crimes were serious, but not heinous. These decisions were made by the previous Minister for Immigration personally. The effect of a decision to personally cancel visas on character grounds make it impossible to seek merits review of that decisions through the AAT (if the visa is cancelled by a delegate of the Minister merits review is available – s 500 MA). The Minister using s501 in this way avoids independent scrutiny by the AAT.

Section 201 MA targets the deportation power towards people in Australia who have been in Australia as permanent residents for less than 10 years and is a more appropriate vehicle in such cases. IN our experience s501 is being used far more than the s201 power.

The Full Court of the Federal Court majority (Justices Moore and Gyles) in a recent case of *Nystrom v MIMIA* (2005) FCAFC 121 noted the inappropriate use of the s501 power and suggested that administration of this aspect of the MA may have lost its way.:

> 1. He is only an 'alien' by the barest of threads. However, if the decision under challenge here stands he will be deported to Sweden and permanently banished from Australia. That result causes us a similar sense of disquiet to that expressed by Spender J in *Shaw v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 106, particularly at [2]–[5] and Sackville and Allsop JJ in *Ayan v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 126 FCR 152 at [1] and [64]–[79] respectively. It suggests that administration of this aspect of the Act may have lost its way.

The Full Court majority noted the need for change:

> 26. What is more, it is timely for there to be a review by the Minister of the proper approach to matters such as this. That would be very likely to yield a different result in this case. In our opinion, it is difficult to envisage the bona fide use of s 501 to cancel the permanent absorbed person visa of a person of over 30 years of age who has spent all of his life in Australia, has all of his relevant family in Australia by reason of criminal conduct in Australia so

> leading to his deportation to Sweden and permanent banishment from Australia.
>
> 27 The first issue requiring reconsideration is the use of s 501 in circumstances where the directly relevant substantive section (s 201) is not applicable. Section 501 should not be used to circumvent the limitations in s 201. Apart from anything else, to do so is to retrospectively disadvantage permanent visa holders who happen to be non-citizens.
>
> 29 It is one thing to say that the responsibility to determine who should be allowed to enter or to remain in Australia in the interests of the Australian community ultimately lies with the discretion of the responsible minister. That has little to do with the permanent banishment of an absorbed member of the Australian community with no relevant ties elsewhere. The appellant has indeed behaved badly, but no worse than many of his age who have also lived as members of the Australian community all their lives but who happen to be citizens. The difference is the barest of technicalities. It is the chance result of an accident of birth, the inaction of the appellant's parents and some contestable High Court decisions. Apart from the dire punishment of the individual involved, it presumes that Australia can export its problems elsewhere.

Nystrom highlights growing concern about cases where a person, who has lived here virtually all their lives and is part of the Australian community, faces permanent banishment. It is an additional punishment to the sentence already served. Non-citizens 'grown up' in Australia with no link to another country should not have their permanent visa cancelled except in the most extreme of examples.

Section 501 applies to all non-citizens. Many people do not take up citizenship because of inadvertence, ignorance or because they are unwilling to swear allegiance to the British monarch and would prefer to wait for Australia to become a truly independent republic. These people should not be penalized for this.

The Joint Standing Committee on Migration in 1998 examined the issue and 'resolved to maintain the ten year limit on liability for deportation for juveniles (immigrants who arrive in Australia under the age of 18) as an appropriate balance between the need to protect the community and the obligation Australia accepts for very young immigrants'. The Section 201 'ten year rule' rests on the premise that after ten years of residency, non-citizens have become part of the Australian community and this should be recognised even if they commit a serious offence. (http://www.aph.gov.au/house/committee/mig/report/criminal_deportation/criminaldeportation.pdf)

Recommendation 2

A person who has become an Australia permanent resident as a juvenile and become part of the Australian community should not be subject to cancellation under s501 on character grounds. The 10 year rule under s200 should apply and s202 covers where a person may be deported on security grounds.

3. Detention should have proper scrutiny.

Section 196 of the *Migration Act* gives massive power to DIMIA by preventing release, *even by a court,* unless a visa has been granted. This power should have proper scrutiny. The power to detain must have checks similar to that when a

person is detained in criminal matters. Given the cases of Cornelia Rau and others, and the adverse findings about detention contractors, the Department should be extremely cautious about detaining people and should welcome further scrutiny. We understand that prior to the 1994 changes that regular judicial scrutiny was available in some cases of detention.

Whilst recent softening of the approach and review by the Commonwealth Ombudsman is welcome we submit that further change is required.

Recommendation 3

Detention cases should be subject to regular judicial or other independent scrutiny, initially within a month and then on a quarterly basis.

4. Provision of legal assistance to all detainees

A properly resourced duty lawyer system should be available for all immigration detainees. 'Protection of individual liberty' are the first words of the Palmer Inquiry. Access to competent, ethical, adequately resourced legal assistance is fundamental to this.

There is no duty under law (only in procedures) to advise a person they can seek legal assistance. Officers are required only to advise of timelines that exist for lodging visas (s194-196) but do not have to advise that the detained person can get a lawyer, nor provide access to that lawyer.

Currently the right to a lawyer is only available if an immigration detainee requests it (s256), so if the person has a mental or physical illness or is confused or has language, cultural or other trauma issues, they won't be in a position to request legal advice or be assertive if their requests are ignored. There are many difficult cases and as the law is extremely complex and the consequences critical, legal advice is vital.

People detained under immigration law as suspected non-citizens, without competent and timely legal assistance, may not get an opportunity to have their immigration case considered properly, meet tight and inflexible time limits prescribed by immigration law, or to obtain their release. The consequences are extremely serious – a person may continue to be detained, or be deported, face bans from ever returning to Australia, lose right to permanent residence and be torn away from their families. In protection visa cases, they may face persecution and death on return to their home country.

Cornelia Rau did not get access to a migration lawyer or agent. An experienced lawyer may have been able to challenge her detention or get Ms Rau to open up about her identity. While Ms Rau's case was extremely difficult given her use of different names, legal assistance would have given her an independent voice to advocate for her. A legal advocate could have asked DIMIA probing questions, explored options and given Ms Rau a pillar on which to challenge the structures keeping her incarcerated, which she appeared to so mistrust. Having a well trained adequately resourced legal advocate may have greatly assisted Ms Rau, or any person who, like her, has a mental illness and is in immigration detention.

A duty lawyer system is particularly needed given the effect of timelines. For example, S195 MA allows a detainee 2 (+5) working days to apply for a visa. After

this a detainee may only apply for a Bridging or Protection visa. Without access to timely and sound advice the time limits in s195 may encourage protection visa applications because other visa options have not been explored within the strict limits prescribed. People who have had their options explained by an independent advocate are more likely to accept their situation and be clear on their options. Independent adequately resourced legal aid style of duty lawyer would not encourage protection visas as there is no financial incentive to do so.

The Palmer report cited 'General lack of understanding by DIMIA Officers of their legislative responsibilities under the Act'. Competent migration lawyers or agents would be able to keep officers accountable. Even if massive cultural change takes place within the Department, there will always be need to have these independent checks given the extremely serious consequences for the people involved. We commend the Inquiry recommendations for deep cultural change within the administration and see this as a good first step. However we believe its recommendations missed some vital issues, including detainees' access to lawyers

Recommendation 4

A properly resourced duty lawyer system should be available to enable people detained by immigration officials to have immediate access to independent and sufficiently resourced legal advice.

5. Humanitarian consideration earlier in process

Immigration laws promote delays and hardship where they only allow review on compassionate and humanitarian grounds by the Minister after an MRT or RRT refusal, rather than at earlier parts of the process.

This would apply where a person does not fit the strict refugee definition but has compelling humanitarian concerns.

Further, in cases such as many going through the temporary protection process, where DIMIA takes a very narrow interpretation of 'refugee', a humanitarian pathway early in the process would provide a permanent solution for people deserving of protection while keeping the temporary protection regime intact.

Recommendation 5

Review on compassionate and humanitarian grounds by the Minister should be allowed at earlier parts of the process rather than only after an MRT or RRT refusal.

6. Amend the '45 day rule'

The harsh '45 day rule' where work rights are not granted if a protection visa is lodged more than 45 days after arrival means applicants must survive for lengthy periods without access to Medicare or means to meet basic needs other than community support.

Recommendation 6

The 45-day rule should be abolished. Failing this, there should be a discretion to allow work rights to a protection visa holder where there is good reason why the protection visa was not lodged within 45 days and there are compelling circumstances to grant work rights.

7. Temporary refugee regime should be changed

Once a person is a refugee they should be provided durable protection in any country that can afford it. Australia is one of the most affluent countries in the world and the notion of 'temporary refugees' should be discarded. This regime has prompted a significant diminishing in the protection offered to refugees by Australia. It has led to extreme hardship and the costs in human and economic terms are immense.

The new temporary protection visa scheme has not worked. An illustration of this is Afghani and Iraqi refugees who have been the main groups processed under the regime since it commenced. The DIMIA position, that a durable solution exists for returning refugees in Afghanistan and Iraq after 3 years, has lacked moral and factual justification. There has been a staggeringly high rate of overturns by the RRT (eg around 90%+ for Afghan and Iraqi cases) of DIMIA decisions at the initial stage (of getting the first TPV) and at the further protection visa stage (after 30 months from first TPV). This has resulted in years of unnecessary and extreme human hardship and economic cost. If a person was accepted for permanent settlement once it had been conclusively proved they are refugees then these issues would not arise.

Recommendation 7

The harsh Temporary Protection Visa regime should be abolished. However if the Government is to continue to keep the TPV regime, then at the least:

- TPV holders should be able to bring their spouse and dependent children to join them once they have been accepted as refugees.
- DIMIA should respond quickly to a pattern of RRT overturns and be more open to changing narrow interpretations of what is a refugee. DIMIA should be given power to provide for a form of 'complementary protection' in humanitarian cases which may not strictly fit the definition of refugee.

8. Abandon or amend harsh '7-day rule'

The '7-day rule' for protection visa applicants where protection is refused if it could have been applied for in another country works harshly as it continues uncertainty and does not offer a durable solution for people who have been proven to be refugees.

The result of the 7 day rule may mean that refugees are eligible for continual temporary visas and never be eligible for family reunion. Even if the Minister eventually allows a permanent visa (eg via exercise of discretion in Reg 866.215(2)) the delays may mean that the refugees spouse and children have become lost or have died in the ensuing period.

Recommendation 8

The '7-day rule' for temporary protection visas should be abandoned. Failing this, applicants subject to the 7-day rule should be able to sponsor immediate family.

9. Discretion for woman-at-risk visa holder sponsoring spouse

A 'woman at risk' visa is a permanent humanitarian visa granted overseas to women who are without a male relative to protect them. A woman with such a visa in Australia cannot sponsor as a spouse under the family migration program or propose her spouse for an 'immediate family' humanitarian visa for 5 years unless the relationship had been declared to Immigration before the grant of the visa. In some cases where a woman has lost her husband feared killed in war or in hiding

from persecution, she may be reluctant to mention him to immigration officials when being interviewed because of fear of telling authorities or trauma from the separation. A discretion should be included in the regulations to allow for the five years limit to be waived in exceptional circumstances.

Recommendation 9

A discretion should be included in the regulations to allow for the five year ban on women-at-risk visa holders from sponsoring their spouse to be waived in exceptional circumstances.

10. Discard inflexible timelines

The MA sets inflexible timelines for review of decisions to the MRT and RRT. Where time limits are missed, this prohibits merits review of DIMIA decisions and then to Minister.

Further, the effect of missing rigid timelines may be to force applications to the courts, placing further burdens upon that system.

The Department complies rigidly with notice provisions even where it is proved the applicant did not receive the decision. In one case a TPV holder missed the RRT review period as the DIMIA decision was not delivered to his address. The client had been living at the same address for at least 3 years. The Department considered it was unable to vacate the decision even though there was proof the letter was sent to a mail centre in a different State and seemingly never returned to the Department. It took us several months to extract information from DIMA concerning the notification. The client was permitted by the Minister to lodge a second application under s48B to start the process again. A decision to grant a permanent protection visa was made urgently by the Department after this, however this situation should not have arisen.

Recommendation 10

Time should run from actual rather than deemed notification. This was taken up by the Government in the current version of the *Migration Litigation Reform Bill 2005* and it would be inconsistent to not apply this to other MA decisions. There are immense injustices possible where a person misses a time line.

Further, there should be discretion to allow an extension of the timelines in compelling circumstances similar to that give to the courts in the *Migration Litigation Reform Bill* 2005. This allows an extra 56 days after the 28 day period from actual notification.

11. Immigration Clearance

There is a lack of transparency for decisions made in immigration clearance, such as airport turnarounds. Our legal service has only once been contacted by DIMIA regarding a person in immigration clearance requiring legal advice regarding a protection visas. This was very recently in the post-Palmer period. This may be because Sydney and Melbourne are the two major gateways to Australia, and most turnarounds would occur there. However there is little transparency and harsh time limits apply in immigration clearance. For example, Regulation 2.46 gives a person 5 minutes' to say why their visa should not be cancelled. This is insufficient time to properly respond.

Recommendation 11
DIMIA decision-making and time limits for responding to visa cancellation in immigration detention (Reg 2.46) should be increased from the current '5 minutes'.

12. 'Innocent Illegals'
The changes of 1 July 2005 to the close ties visa act harshly on so-called 'innocent illegals' (people prior to turning 18 who spent most of their formative years in Australia) and some amendments are required.
Recommendation 12
Changes should be made to cater for 'innocent illegals' following the amendments of 1 July 2005.

13. Interdependent partners as secondary applicants
Currently interdependent partners of people obtaining visas should be able to be included as secondary applicants as being part of the family unit.
Recommendation 13
Interdependent partners of people obtaining visas should be able to be included as secondary applicants as being part of the family unit.

14 Resources needed to detail concerns
Legal advocates working within the community sector are exposed on a daily basis to many of the shortcomings of migration laws and policies. They are not motivated by profit or a need for more clients but rather a quest for fair and transparent justice for people in need. Their insights and experience are crucial and now that the recognition for substantial change has been recognized by the Government and the Department we consider resources should be provided to properly coordinate and detail the concerns of community legal advocates.

It would require substantial work to map in detail and coordinate the concerns of Community legal workers and resources should be provided to properly coordinate law reform strategy during the time of significant change following the Palmer Inquiry.
Recommendation 14
It would require substantial work to map in detail and coordinate the experiences and concerns of community workers in the immigration area. Resources should be provided to the sector to properly coordinate law reform strategy during this time of significant change following the Palmer Inquiry.

15. Consultation
The Department has recently begun a broader process of consultation about law reform issues with workers in the community and this is applauded. The Department should continue to develop its recent more inclusive consultation process with the community sector.
Recommendation 15
DIMIA should continue to develop closer relationships with the community legal sector through regular consultation.