Submission to the Senate Legal and Constitutional Committee Inquiry into the administration and operation of the Migration Act

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Introduction

This submission focuses on the first term of reference of the Senate Legal and Constitutional Committee Inquiry into the administration and operation of the Migration Act. In particular, this submission focuses on the administration and operation of the detention and removal powers of the Migration Act 1958 (Cth) ('**MA**').

The Cornelia Rau and Vivian Solon cases highlight the failure of the Department of Immigration and Multicultural and Indigenous Affairs ('**DIMIA**') to properly administer the detention and removal powers found in the MA. According to Mick Palmer, the head of the government initiated inquiry into the detention of Cornelia Rau, this is a result of inadequate training, insufficient internal controls, lack of management oversight and review, a failure of co-ordination between Federal, State and non-government agencies, as well as a culture within the compliance and detention sections of DIMIA that is 'overly self-protective and defensive'.[ii]

The Palmer Report unearthed what has laid stagnant on the surface of earlier public inquiries into the operation of the MA: an attitude within government that the powers to detain and remove unlawful non-citizens are wide and unfettered. This attitude is evident in the way in which the detention and removal powers in the MA are often exercised without due regard or concern for the individual subject to those powers. This position is

unlikely to change, even if, as inquiry head Mick Palmer recommended, effective personnel and cultural change takes place within DIMIA. This submission explores why this may be so and considers options for the future.

A legislative framework that imposes few conditions on the exercise of the powers to detain and remove

The legislative framework encourages the attitude that the detention and removal powers are relatively unconstrained. The detention (s 189) and removal (s 198) powers in the MA are expressed in a language that is intended to remove an officer's initiative and discretion when dealing with a person falling within or purporting to fall within the relevant sections. Sections 189 and 198 impose a mandatory duty on officers to detain or remove an unlawful non-citizen. In the exercise of these powers the officer is not legally required to have regard to such matters as: the age of the detainee (*Re Woolley; Ex parte Applicants M276/2003* (2004) 210 ALR 369); the duration (*Al-Kateb v Godwin* (2004) 208 ALR 124) or condition (*Behrooz v Secretary of DIMIA* (2004) 208 ALR 271) of detention; the possible effects of detention on the mental or physical health of the detainee; nor, under s 198, whether a person is to face certain death or torture on removal to another country (*NATB v MIMIA* (2003) 133 FCR 506), or the possibility that removal from Australia would cause a person's mental disease or disorder to deteriorate (*WAJZ v MIMIA (No 2)* (2004) 84 ALD 655).

The *Migration Amendment (Detention Arrangements) Act 2005* (Cth), passed in response to back bencher pressure, does not alter this position. Newly inserted s 4AA does not impose any duty on officers to consider the age of a detainee, merely stating that

Parliament affirms as a 'principle' 'that a minor shall only be detained as a measure of last resort.' Furthermore, under ss 195A(4) and 197AE, the Minister is under no legal duty to consider whether to exercise any of her new powers for shortening the duration of detention, namely, the grant of a visa to a detainee and the order of an alternative residence determination. Likewise, under the new s 486O(4) the Minister is not required to follow the recommendation of the Commonwealth Ombudsman recommending the release of a detainee into the community.

The fact that officers are not legally required to have regard to such factors as the age of detainees, the duration and conditions of detention, the affect of detention on the individual detainee, nor the consequences of a removal order, when exercising their powers under s 189 and s 198 affects the general approach of officers to those few matters they are required to take into account. The detention of Cornelia Rau and the removal of Vivian Solon are examples of where an ingrained belief in the unconstrained nature of the detention and removal powers led to a lax application of those powers to persons who were not unlawful non-citizens and therefore not within the scope of those powers. It is also apparent in the recent High Court case of *Ruddock v Taylor* [2005] HCA 48, where, for the purposes of denying its obligation to pay compensation for false imprisonment, the Commonwealth successfully argued that it does not matter that a person detained under s 189 was not in fact an unlawful non-citizen, so long as the suspicion that he or she was, was reasonably held.

An officer deciding whether to detain a person also has the security of knowing that the practical responsibility of holding a person in detention resides in the current detention service contract provider, Global Solutions Limited (Australia) Pty Ltd (**'GSL'**). As

expressed by one legal service provider to the recent Senate Legal and Constitutional References Committee's Inquiry into the Administration and Operation of the MA:

> It has been the experience of RASSA [Refugee Advocacy Service of South Australia Inc] that DIMIA officers, and in particular those in management positions at the Detention centres, have tried to hide behind the veil that the company which has been contracted to run the Detention centres is responsible for all matters concerning detention under the Migration Act. DIMIA has used this excuse to try and escape its responsibilities under the Migration Act and not to be accountable for its role in relation to detention.[iii]

Instead of ensuring the professionalism and quality of services to detainees, repeated audits by the Australian National Audit Office and now the Palmer Inquiry confirm that the detention service contracts between the Commonwealth and Australasian Correctional Management and the current service provider, GSL, have engendered the abrogation of the Commonwealth's duty of care to detainees.[iv] Therefore, although Gleeson CJ in *Behrooz v Secretary, DIMIA* (2004) 208 ALR 271, [21] recently reminded officers that they owed a duty of care to detainees, the reliance on outsourcing has clouded the duties of those responsible for administering detention centres.

The capacity of a Commonwealth officer to disregard the consequences of detention and removal for an individual and his or her family is further increased by the difficulty detainee's face in obtaining independent legal advice. Aside from the geographical location of the detention centres, DIMIA has typically embraced a strict interpretation of the negative duty found in s 256 MA, which requires an officer to provide access to legal advice to a detainee *only* 'at the request of the person in immigration detention'. For example, the Commonwealth adopted a strict interpretation of s 256 in order to deny that DIMIA officers breached due process when they refused legal advisers access to Sino-

Vietnamese detainees until after the retrospectively inserted cut-off time for a valid visa application.[v] Similar barriers to the provision of effective legal assistance to detainees have been noted in recent submissions to the Senate Legal and Constitutional References Committee's Inquiry into the Administration and Operation of the MA.[vi1] Therefore, officer's exercising the detention and removal powers have had the additional buffer of a detainee population generally uncertain of Australian law and unable to obtain legal advice explaining it.

The amendments introduced in the wake of the *MV Tampa* in September 2001 reinforced this state of affairs. For example, s 198A precludes the necessity for an officer to assess whether an excised offshore person 'taken' to a 'declared country' engages Australia's protection obligations under the *Convention relating to the Status of Refugees*. Boat people are also subject to being 'detained' or 'taken' to 'a place outside Australia' under s 245F(9)(b), which does not contain any requirement that an officer consider whether the person engages Australia's protection obligations. The newly inserted s 7A MA even goes so far as to recognize an existing executive power, independent of statute, to 'eject' 'persons' crossing the border. This section has no statutory limitations whatsoever - on its face it could apply to persons who are unlawful non-citizens, non-citizens, refugees, permanent residents, or even citizens.[vii]

The legislation is equally uncertain on what consequences flow for those 'excised offshore persons' who are detained at the new detention centre on Christmas Island. 'Excised offshore persons' means unlawful non-citizens who arrive at an excised offshore place, which now, after previously failed attempts to broaden the definition,

includes all islands north of Carnarvon, Mackay and Darwin.[viii] Excised offshore persons are detained but not permitted to apply for a visa unless the Minister (under s 46A) thinks it is in the public interest to let them do so. For those who cannot be removed presumably they remain in detention indefinitely unless the Minister permits them to apply for a visa. Those who are taken to a 'declared country' are declared publicly and in court proceedings to no longer be the responsibility of the Commonwealth, despite being subject to administrative arrangements and agreements between the Commonwealth and Nauru, the Commonwealth and the International Organization for Migration, the Nauru Police Force, Australian Protective Services, and Chubb Security.[ix]

Thus, the detention and removal powers found in the MA are subject to few conditions. Moreover, the consequences for the individual when engaged are vague, undefined, but extreme. These ‘extraordinary powers’, as the Palmer Inquiry labeled them, are triggered by legal status (or, in the case of s 189, the mere suspicion of status), regardless of the attributes or characteristics of the individual concerned, or the likely consequences that the exercise of those powers may have for that person. It is unlikely that the Palmer recommendations of personnel and cultural change within DIMIA will have much impact on how these powers are exercised whilst the legislative scheme confirms officers’ attitudes that these powers are relatively wide and unfettered. This observation is further backed up the executive’s understanding that it is the sole and proper authority for the exercise of these powers.

The executive's assumption of authority

Underlying the current approach of DIMIA to the detention and removal provisions of the MA is the understanding that the executive is best placed to exercise these powers, with ultimate responsibility to Parliament. As Mary Crock observes:

> If immigration control was recognised as an incident of state sovereignty and a prerogative of government, the politicians' understanding was (and still is) that control should be exercised by the executive arm of government and not by the courts.[x]

This executive bias is reinforced by repeated legislative amendments designed to restrict judicial review of decisions made under the MA, e.g. the *Migration Reform Act 1992* (Cth), the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth), the *Migration Amendment (Duration of Detention) Act 2003* (Cth), and the Migration Litigation Reform Bill 2005. The same rationale underlies the *Migration Legislation Detention Act 2005* (Cth), which ensures that the Minister's decisions not to consider whether to exercise the powers to grant a visa to a detainee or to make a residence determination are not susceptible to judicial review. On current authority this is so because the powers are carefully framed so that the Minister is under no duty to consider whether to exercise the powers.[xi]

The assumption underlying these recent amendments, and similar provisions in the MA, e.g. ss 46A and 46B MA, is that the executive should exercise the powers with ultimate responsibility to Parliament. In lieu of judicial review, therefore, ss 197AG and 195A(6) require that the Minister table before Parliament information outlining any residence determination or grant of a visa to a detainee. The inclusion of such a tabling regime into the MA does not indicate, as it would suggest on its face, a healthy regard for

parliamentary debate over the exercise of the Minister's personal powers under the MA. On the contrary, in practice few details are provided to Parliament upon which to base a debate - on the doubtful assumption that Parliament has the time or inclination to review and debate each individual exercise of the Minister's personal, non-compellable powers under the MA. Moreover, there is no requirement on the Minister to table any non-consideration of the exercise of the powers. These powers are designed primarily to replace judicial review with a nominal appeal to responsible government.

At the base of the personal, non-compellable powers of the Minister, as well as the amendments restricting judicial review under the MA, is the belief that what is being dealt with here is a 'national power' or 'sovereign right' for which the executive is ultimately answerable to Parliament and the electorate. It can be found expressed in the pre-administrative law reform era case of *Salemi v MacKellar [No 2]* (1977) 137 CLR 396, dealing with the then deportation power under s 18 MA. Barwick CJ stated in that case (at 403):

> We are not here dealing with the administration of a statute or statutory instrument which on its proper construction involves judicially recognizable limitations upon the discretion confided to the body or official. We are dealing with the exercise of a fundamental national power exercisable according to government policy, for which ultimately there is responsibility to the Parliament.

In a similar fashion, in response to the arrival of the *MV Tampa* in August 2001, the Prime Minister, John Howard, declared during his Second Reading Speech to the introduction of the Border Protection Bill 2001:

> The protection of our sovereignty, including Australia's sovereign right to determine who shall enter Australia, is a matter for the Australian government and this parliament.

> Consequently, sections 4, 8 and 9 ensure that a direction under section 4, and actions taken as a consequence of that direction, will not be able to be challenged in any court in Australia.[xii]

At the same time, the Prime Minister's reference to the role of parliament was belied by the government's actions in excluding and expelling the refugees on the *MV Tampa* independent of statutory authority. French J in the majority in the Full Federal Court case of *Ruddock v Vadarlis* (2001) 110 FCR 491, [193] accepted the government's argument that the executive, absent statutory extinguishment or abridgement, had the power to exclude non-citizens. The insertion of s 7A into the MA in September 2001 purportedly gave effect to the government's understanding. Section 7A states that the provisions of the MA do not prevent 'the exercise of any executive power of the Commonwealth to protect Australia's borders, including, where necessary, by ejecting persons who have crossed those borders.'

The government has also relied on its executive authority to enter agreements with Nauru, PNG and the International Organisation for Migration in order to detain unlawful non-citizens offshore. Any attempt to seek judicial review of the detention of detainees on Nauru or PNG in Australian courts has been resisted. For example, in the Victorian Supreme Court the Commonwealth pleaded the act of state doctrine as a bar to the judicial review of the lawfulness of the detention of persons on Nauru by Commonwealth officers (*Ali v The Commonwealth* [2004] VSC 6 (Unreported, Bongiorno J, 23 January 2004). The cumulative effect of these developments, as noted by Savitri Taylor, is that '[a]t the border, the Australian government conduct is mostly ungoverned by statute and, therefore, almost ungovernable by the courts.'[xiii]

Likewise, the executive bias in the administration of the detention power is apparent in the fact that DIMIA has eschewed the making of regulations under s 273 to govern the operation of detention centres in favour of policy documents (the Immigration Detention Standards) and contracts with the detention service providers. The Federal Court described this approach as necessarily resulting in uncertainty as to what powers and obligations apply to those responsible for the operation of detention centres.[xiv] Moreover, the Palmer Inquiry and Australian National Audit Office reports highlight that the recognition of the Commonwealth's duty of care to detainees in these instruments has failed to create an environment in which either detainees or DIMIA officers and GSL personnel understand the Commonwealth's duty of care to detainees. Arguably, it has also tended to have the effect of insulating the administration of detention centres from judicial scrutiny.

Thus, the executive asserts its authority to detain and remove aliens independent of the courts *and* parliamentary authority. In his study of the Crown's prerogative in the 1920s, H V Evatt observed that reference to responsible government had tended to obscure the true source of executive authority in the United Kingdom and Australia.[xv] Arguably, the undertones of responsible government in the MA and the speeches of the Prime Minister and other members of government offer a flimsy veil for the assumption of a wide executive authority in this area. As a result, Commonwealth officers operate within a legislative framework in which few conditions attach to the exercise of the detention and removal powers, and within a wider administrative framework in which the executive asserts that it is the principal arbiter of the proper exercise of powers of detention and exclusion/expulsion.

Conclusion: Changing attitudes

It is unlikely that personnel, procedural or cultural change within DIMIA, as recommended in the Palmer Report, will alone shake the preconception, as outlined above, that the detention and removal powers in the MA are broad and unencumbered. If attitudes are to change and the way in which the detention and removal provisions are administered is to change, a shift in government policy is required that would, at least, in the absence of the abolition of mandatory detention, see the detention and removal powers subject to legally enforceable and ongoing obligations that are amenable to judicial review.

These would require officers when exercising the detention and removal powers to take into account clearly defined factors such as the age of detainees, the duration and conditions of detention, the impact of detention on the mental and physical well-being of individual detainees and on their families, and the effects of removal (including a form of complementary protection). These duties could incorporate an unambiguous statement of the Commonwealth's duty of care to detainees. This would require a move away from the government's reliance on policy documents and the contracts with the detention service provider, GSL, toward a clear and enforceable statutory duty of care. Moreover, the government policy of maintaining undefined and non-statutory powers, especially in its processing of refugee claims offshore, should be abandoned and brought within a simplified and clear detention and removal regime under the MA.

The effect of such changes would be to place clear and precise obligations toward unlawful non-citizens at the forefront of the decision-making process. On the other hand,

cultural change as envisaged by the Palmer Report, is required in tandem with these amendments to the statutory regime so that the application of the statutory conditions and standards do not themselves become a means of further entrenching a 'self-protective' and 'defensive' culture hostile to external oversight, as seems to be the case with codes for visa decisions and merits review under the MA,[xvi] or that precludes those officers who show genuine concern for the well-being of the individual before them from exercising a beneficial initiative and discretion.

References

[i] Griffith Law School.
[ii] *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*. Report. July 2005. Commonwealth of Australia, Main Findings 2, 3, 4, 6, 9, 12, 13, 15, 17, 18, 19, 28, 29.
[iii] Refugee Advocacy Service of South Australia, Inc. *Submission to the Inquiry into the Administration and Operation of the Migration Act 1958*, Submission No 51, Senate Legal and Constitutional References Committee, Inquiry into the Administration and Operation of the Migration Act 1958, 5.
[iv] Australian National Audit Office, *Management of the Detention Centre Contracts – Part B: Department of Immigration and Multicultural and Indigenous Affairs.* Audit Report No.1, ANAO, Canberra, 2005–06.
[v] *Wu Yu Fang v Minister for Immigration & Ethnic Affairs* (1996) 64 FCR 245.
[vi] Submission No 51, above n ii, 3.
[vii] See further: A Francis, *Submission to the Inquiry into Migration Zone Excision*, Submission No 26, Senate Legal and Constitutional Committee, Inquiry into Migration Zone Excision.
[viii] *Migration Amendment Regulations 2005 (No. 6)* SLI 171.
[ix] Statement of Principles between Nauru and Australia dated 10 September 2001; First Administrative Arrangement between Nauru and Australia dated 10 September 2001; Memorandum of Understanding between Nauru and Australia dated 9 December 2002 (replaced by MOU dated 25 February 2004); Protocol Between the Nauru Police Force, the International Organisation for Migration and the Australian

Protective Service dated 15 October 2001; *ALHMWU v Chubb Protective Services* [2002] QIRComm 1 (8 January 2002); 169 QGIG 103; *ALHMWU v Chubb Protective Services (No. 2)* [2002] QIRComm 42 (20 March 2002); 169 QGIG 258; *Efu v Chubb Protective Services* [2003] QIRComm 291 (1 May 2003); 173 QGIG 146.

[x] Mary Crock, 'Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law' (2004) 26 *Sydney Law Review* 51, 54.

[xi] *Minister for Immigration & Multicultural & Indigenous Affairs, Re; Ex parte Applicants S134/2002* (2003) 211 CLR 441 [48] (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ). See also: Ibid [100] (Gaudron and Kirby JJ); *Bedlington v Chong* (1998) 87 FCR 75; *Morato v Minister for Immigration, Local Government & Ethnic Affairs* (No 2) (1992) 39 FCR 401.

[xi] *Behrooz v Secretary, DIMIA* (2004) 208 ALR 271, [21] (Gleeson CJ).

[xii] Commonwealth of Australia, Parliamentary Debates, House of Representatives, Official Hansard, No. 13, 2001, Wednesday, 29 August 2001, 30569.

[xiii] Savitri Taylor, 'Sovereign power at the border' (2005) 16 *Public Law Review* 55, 75-76.

[xiv] *Secretary, DIMIA v Mastipour* [2004] FCA FC 93 [17] (Selway J).

[xv] H V Evatt, *The Royal Prerogative* (Law Book Company Ltd, Sydney, 1987) 35.

[xvi] See further: Angus Francis, *Submission to the Inquiry into the Provisions of the Migration Legislation Amendment (Procedural Fairness) Bill 2002*, Submission No 14, Senate Legal and Constitutional Committee Inquiry into the Provisions of the Migration Legislation Amendment (Procedural Fairness) Bill 2002.