



**Submission to the Senate Legal and Constitutional References Committee on
Inquiry into the administration and operation of the Migration Act 1958**

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1 Introduction

The terms of reference of this inquiry range from the broad ‘administration and operation of the Migration Act 1958’ to a focus upon the exercise of detention and deportation powers. As there have been a number of recent reports in relation to the latter, including the Report on the *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, July 2005 (‘the Palmer Report’), it is not intended to traverse familiar ground except where comment is appropriate. Rather this Submission concentrates upon the scope of the Migration Act and the powers in relation to detention. It is submitted that it is time for a major overhaul of the scope and focus of the Migration Act. This Submission also deals with exercise of powers of removal and deportation, with a focus on section 501 of the Act.

The thrust of this submission is that there is a risk of serious breaches of human rights protection in this context. As the Committee will be aware, this conclusion is supported by other reports and decisions of international committees on Australia’s system of mandatory detention.¹ Relevant standards include the ICCPR, Article 9(1) (freedom from arbitrary detention), Article 10 (the right to be treated with humanity whilst in detention), Article 7 (freedom from degrading treatment). These latter standards are particularly pertinent to persons with symptoms of mental illness which is exacerbated by long-term detention.

In relation to asylum seekers and refugees, UNHCR ExCom Conclusion 44 states that the circumstances in which it may be necessary to detain such persons include:

- To verify identity,
- To determine elements of a claim,
- To deal with cases where such persons have destroyed vital documents,
- To protect national security or public order.

The UNHCR has stated that the above are the minimum guidelines and that the use of detention in the case of asylum seekers and refugees is:

¹ Eg *A (name deleted) v Australia* (Communication 560/1993, UN Doc CCPR/C/59/D/560/1993, 30 April 1997); *C v Australia* (Communication 900/2000, UN Doc CCPR/C/76/D/900/1999, 13 November 2002).

- Inherently undesirable,
- Especially for the vulnerable, and
- Should be used only as a last resort and on exceptional grounds.

In the case of persons detained for the purpose of removal or deportation, the ICCPR, Article 9(4) (lawfulness of the detention to be reviewed) is relevant as well as other human rights standards such as the right to respect of family life.

2 Submission

(a) the administration and operation of the Migration Act 1958, its regulations and guidelines by the Minister for Immigration and Multicultural and Indigenous Affairs and the Department of Immigration and Multicultural and Indigenous Affairs, with particular reference to the processing and assessment of visa applications, migration detention and the deportation of people from Australia

2.1 The administration and operation of the Migration Act 1958

The Palmer Report in Chapter 7 discusses the ‘Culture, structure and operations’ of the Department of Immigration. It suggests (p160) that

[T]here are serious problems with the handling of immigration cases. These stem from a deep-seated culture and attitudes and a failure of executive leadership in the compliance and detention areas.

My submission is that the ‘deep-seated culture and attitudes’ are embedded in the Migration Act itself and reflected in many of its provisions and hence in its administration and operation. In my view, recent controversies surrounding the exercise of detention and deportation powers suggest that it is time for a major overhaul of the scope and focus of the Migration Act.

The Migration Act in its current form (more than 600 provisions and nearly 600 pages in printed length) arose from substantial amendments dating from the period 1989 onwards and numerous subsequent piecemeal amendments. It has not been subject to a major overhaul or review since that time. It has been amended from time to time to insert provisions to deal with new crises (eg Subdivision AJ of Division 3 of Part 2 deals with Temporary safe haven visas.) It should be noted for example that the Act contains provisions numbered from sections 91A – 91X.

The purpose of the 1989 amendments was to replace the old entry permits with a system of control of entry into Australia by visas, and to codify migration policy. However in the process of so doing the Minister for Immigration was given a substantial amount of discretionary powers under the Act in relation to visas. Moreover some key terms in the Act are not clearly defined. This has led to a lot of litigation, which has not resulted in clarity. I therefore suggest that it is time for a major overhaul of the scope and focus.

This has been achieved in Canada recently. The model of that legislation would be useful.

The Canadian Immigration and Refugee Protection Act 2002 (IRPA) is drafted as 'framework legislation' with fixed principles in each part of the Act. It articulates key principles for the immigration and refugee protection programmes, including fundamental rights and freedoms. For example, it clarifies that persons can be arrested and detained for three principal reasons: identity, flight risk or danger to the public. It also sets out the human rights framework for refugee protection and incorporates it into the legislation. By contrast many provisions in the Migration Act apply to asylum seekers and refugees and other 'alien' persons without distinction.

To illustrate the 'key' problems with the Migration Act 1958, I first point to several important overriding features.

2.1.1 The scope and purpose of the Act: the 'aliens' power

Since the decision in *Lim v MILGEA* (1992) 176 CLR 1 (following the decision of *O'Keefe v Calwell* (1949) 77 CLR 261) it has been accepted that the constitutional basis or source of power for the Act, is the 'naturalisation and aliens' head of power (Constitution s51(xix) – note that the naturalisation aspect has had little impact upon interpretation of the power) rather than the 'immigration and emigration' head (Constitution s51(xxvii)). The significance of this is that prior to 1949 there were some indications that the use of the immigration and emigration head could lead to a broader interpretation of the scope of the power. **The emphasis of the current Act is upon the control of 'aliens'**. This is reflected in the preamble to the Act which states that it is:

An Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.

However, there is no definition of 'alien' in the Act and the term is not used in the Act. Rather the Act provides for a system of entry by visas and a distinction between 'citizens' and 'non-citizens' (and arising from that, between lawful and non-lawful non-citizens). It provides the power to regulate 'in the national interest', the coming into and presence in Australia of non-citizens (section 4(1)) and for the removal or deportation of non-citizens whose presence in Australia 'is not permitted' by the Act. In section 5 non-citizen is defined as a person who is not an Australian citizen. The term 'citizen' is not defined. For example, there is no cross reference to the Australia Citizenship Act 1948.

The term 'alien' has been interpreted by the courts to mean a person who is not a citizen. This accords with section 4 of the Migration Act. However, there is a long-standing split in the High Court as to the meaning of the terms 'alien' and 'citizen' in the context of the exercise of powers under the Migration Act. There is one view that the meaning of an 'alien' is for the court to define under the Constitution. According to this view 'alien' is a constitutional concept which does not simply equate to 'non-citizen'. That is, the 'citizen-alien' dichotomy is 'false'. On this view, broad concepts of allegiance, and

membership of the community determine whether a person is an 'alien' or a non-alien non-citizen.

The view of a current majority of the High Court is consistent with *Pochi v Macphee* (1982) 151 CLR 101 in which it was held that Parliament can treat as an alien any person born outside Australia whose parents were not Australian and who is not naturalised. This view was adopted (with modification) by a majority of the High Court in *Shaw v Minister for Immigration* (2003) 203 ALR 143. However at other times the High Court differently constituted has accepted **the falseness of the 'citizen-alien' dichotomy**.

These cases have been decided in the context of the reach of powers of cancellation of visas and deportation. The current majority High Court view is reflected in the practice of the Department of Immigration. Basically any person who cannot establish that they are an Australian citizen is classed as an 'alien', to whom different standards apply. For example, in the 1998 report of the Joint Standing Committee on Migration *Deportation of Non-Citizen Criminals* which examined Australia's criminal deportation arrangements, it is clear that a premise of the recommendations is that alien 'non-citizens' can be treated differently to citizens simply because of their status as aliens. This was extended to mentally ill non-citizens. The pervading tone of that report (which led to the amendments to section 501 referred to below) is the lack of responsibility to anyone who is not a citizen.

The Migration Act concentrates upon the control of 'aliens', rather than upon the government's responsibilities towards persons within Australia's territory, and the rights of such persons.

2.1.2 Detention and the aliens power

The **uncertain scope of the aliens power** is also manifested in the split in the current High Court on the scope and basis of the power of immigration detention.

The starting point is the decision in *Lim v MILGEO* (1992) 176 CLR 1 which established that a non-punitive system of administrative detention was a valid exercise of the aliens power as it was not inconsistent with Chapter III of the Constitution. In that case it was emphasised by a majority of the judges that so long as the detention was 'reasonably necessary' to that system of administration, it was within power.

However, following on from the controversial decision in *Al Kateb v Godwin* (2004) 79 ALD 233 (6 August 2004) in which a narrow majority of the High Court (4:3) said that indefinite detention was within power, the authority of *Lim* and the 'reasonably necessary' limitation has been questioned. In *Al Kateb* the majority extended the *Lim* reasoning to accept that a system of administrative detention can validly have the purpose of segregating persons from the Australian community. In *Re Woolley and Another; ex parte M276 \ 2003* (2004) 80 ALD 1, McHugh J argues strongly on the authority of *Al Kateb* that the 'reasonably necessary' limitation is no longer good law. He argues for a

broad purposive approach to the interpretation of the scope of the aliens power. The effect of this is to unsettle the authority of *Lim*. It is unclear what limits of the *Lim* are.

It is fundamentally unacceptable that the limits of the powers set out in the Migration Act are defined by reference to a constitutional head of power, the limits of which are itself uncertain. As the discussion of sections 189 and 196 below illustrate, the Act does not contain clear statements of principles to guide the exercise of powers.

2.1.3 Discretions

Another important feature of the Act is that it contains a number of **personal ministerial discretions** which have been established to be non-delegable, non-reviewable and non-compellable (see *Minister for Immigration v Ozmanian* (1996) 71 FCR 1; *Bedlington v Chong* (1997) 50 ALD 673). These discretions include section 48(B) (discretion to apply for a further protection visa), sections 351 and 417 (substitution of more favourable decision of the Migration Review or Refugee Review Tribunals).²

The presence of section 65 in the Act emphasises the central role of the Minister in decisions to grant or refuse a visa. This overriding provision makes it clear that all decisions to grant or refuse a visa under the Act are subject to the Minister's satisfaction. This includes satisfaction that the health and public interest criteria are met. The effect of this is that the Minister's satisfaction is regarded as a condition precedent to all decisions concerning visas. Sometimes this has been held to be to the exclusion of other criteria (such as fairness – *Minister for Immigration v Eshetu* (1999) 197 CLR 611) and relevant considerations (*Re Minister ex parte S134 \ 02* (2003) 71 ALD 545; *Minister for Immigration v SGLB* (2004) 78 ALD 224).

2.2 Migration detention

The critical provisions are sections 189, 196, and 198 which are contained in Part 2 of the Migration Act dealing with 'Control of arrival and presence of non-citizens'. Division 7 of Part 2, which contains sections 189 and 196, deals with 'Detention of unlawful non-citizens' – those without visas. Division 8 of Part 2, which contains section 198, deals with 'Removal of unlawful non-citizens'.

Section 189 provides that, if an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person.

Section 196, dealing with the period of detention, provides that an unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is either:

- removed from Australia under section 198 or 199; or

² Section 417 has been subject to a critical report by the Senate Select Committee on Ministerial Discretion in Migration Matters (March 2004).

- deported under section 200; or
- granted a visa.

Although section 189 applies theoretically to all non-citizens who arrive without a visa ('unlawful' non-citizens as distinct from 'lawful' non-citizens who arrive with a visa), in practice it is used selectively. When Australia experienced a number of spontaneous arrivals by boat it was used effectively to discriminate against the 'boat people' who were subject to the mandatory detention regime. Persons who arrived on a visa and overstayed were generally granted a bridging visas and allowed to live in the community. The number of boat arrivals has decreased dramatically since 2002. In the report of the Department of Immigration, *Managing the Border: Immigration Compliance 2003-2004 edition*, Chapter 4 it is stated that in 2003-04 there were only 82 unauthorised boat arrivals on 3 boats. Such persons are subject to the mandatory detention regime – mostly in the Christmas Island facility.

According to the Department of Immigration as at 11 July 2005 there were 817 persons in detention facilities in Australia (<http://www.immi.gov.au/detention/facilities.htm> accessed 11/7/05). Fact Sheet 82 states that these persons fall into three categories:

- Those who arrived in Australia without a visa (this would include 'boat people' and foreign fishers)
- Persons who have overstayed their visas, or
- Persons who have had their visas cancelled (see discussion of section 501 below).

However no break down is given of the numbers in each of these categories. In *Managing the Border*, Chapter 5 it is estimated that about 51,000 overstayed their visas at 30 June 2004. Of those most (85.5%) were on visitors visas. In the Palmer Report (p160) it is stated that the Department of Immigration locates over 55,000 suspected unlawful non-citizens each year and detains only about 20-25% of them.

2.2.1 Issues in relation to section 189

'Exercising the power to deprive someone of their liberty brings with it significant responsibilities' (the Palmer Report, p21)

This section provides that, if an officer '*knows or reasonably suspects*' that a person in the migration zone is an unlawful non-citizen, the officer must detain the person.

As the above statistics suggest, there is considerable discretion exercised in relation to this power. Only about 20-25% of suspected unlawful non-citizens are detained annually. This provision is discussed extensively in the Palmer Report at 3.1.1 (pp21-29). In the Report it is suggested that the section has been viewed as a mandatory provision in this context, because of the presence of the word 'must'. It is argued in the Report that the power operates in a mandatory way only *after* the formation of a reasonable suspicion, which must be a *continuing* reasonable suspicion.

However the government argues that the obligation to detain continues until the occurrence of one of the events referred to in section 196 (see above). Indeed this was one of the bases upon which the majority decided *Al-Kateb* referred to above. **In the government's view section 189 contains a continuing mandatory discretion which is only concerned with the person's status as described in section 196.** As numerous reports and decisions of international committees have now pointed out the effect of sections 189 and 196 read together is to create a mandatory, non-reviewable system of detention which arguably breaches the right to freedom from arbitrary detention. (ICCPR, Article 9(1)) This consequence of the reading of sections 189 and 196 together is also confirmed by decisions in which it has been held that the harsh conditions of detention (*Behrooz v Secretary, Department of Immigration* (2004) 79 ALD 176), or the fact that the children are detained in contravention of international human rights standards (*Re Woolley*), does not affect the legality of the detention regime. However other decisions concerned with the civil liability of the Secretary of the Department of Immigration suggest that the continuance of the detention is subject to a discretion and wrongful exercise may lead to liability (eg *Secretary, Department of Immigration v Mastipour* (2004) 207 ALR 83; *S v Secretary, Department of Immigration* [2005] FCA 549).

Thus there are two main views about section 189. The first is that the power operates in a mandatory way only *after* the formation of a reasonable suspicion, which must be a *continuing* reasonable suspicion. The second (the government's view) is that sections 189 and 196 read together create a mandatory continuing obligation. As I have pointed out before, overall the decisions and views expressed about section 189 are context-driven and ambiguous.³ Section 189 may operate as a defence to a detention but it does not negate the responsibility of the Department of Immigration to monitor the continuing need for detention and the circumstances of detention.

The meaning of section 189 is discussed by Peter Prince.⁴ As does the Palmer Report, Prince relies upon the decision in *Goldie v Commonwealth* (2002) 188 ALR 708 for an interpretation of section 189. In *Goldie* the Full Court of the Federal Court found that an officer lacked the 'reasonable suspicion' required by section 189. Mr Goldie was taken into immigration detention for a period of three days as the result of a computer error which incorrectly indicated that he had no current visa. This action followed from the (erroneous) view formed by an officer in charge of the Compliance Section of the Department of Immigration in Perth. The Full Court found an absence of sufficient search or enquiry to make the formation of the suspicion justifiable on objective examination. In this case it was accepted that the officer had to form a reasonable view when acting under section 189.

As Peter Prince points out (at p9) the facts of *Goldie* are distinguishable from Cornelia Rau's case. In that case there was no issue of identity as in Cornelia Rau's case. The issue simply was whether Mr Goldie had a valid visa. As the Palmer Report recognises

³ See S Kneebone, 'Before the High Court: *Ruddock and Others v Taylor*' (2005) 27 Sydney Law Review 143 at 160-162.

⁴ P Prince, 'The detention of Cornelia Rau: legal issues' (Parliamentary Library, Research Brief no 14, 31 March 2005).

(p25), most cases of detention are straightforward and do not involve an issue of identity; most detainees are granted a bridging visa. Thus the predominant issue is what justifies a *continuing* detention in some instances but not others. **Other than the events referred to in section 196, the Migration Act contains no guidance as to what justifies continuing detention.**

*Migration Series Instruction (MSI) 321: Detention of Unlawful Non-Citizens*⁵ discussed by Prince (p14) refers to the need for objective evidence to justify a reasonable suspicion about a person's status. As Prince points out, MSI 321 is not 'wholly consistent' with *Goldie*. Moreover, it does not provide guidance for officials on the different standards for initial and on going detention. As to ongoing detention, Prince suggests that there is no justification if a person is a lawful non-citizen *in fact* – that in these circumstances it is not sufficient to have a 'reasonable suspicion'. He refers to *Migration Series Instruction (MSI) 234: General Detention Procedures*⁶ which requires regular reviews of ongoing detention. However the Rau case suggests that this MSI does not provide sufficient guidance as to when a review is required and what constitutes a proper review.

Recommendation 3.4 of the Palmer Report recommends the creation of an Identity and Immigration Status Group to:

- Review the continuing validity of 'reasonable suspicion' at least once a month,
- Make inquiries to establish the identity and immigration status of unidentified detainees,
- Report monthly to executive management on 'the reason why' the person is still being detained, and the expected date of resolution.

However, the essential problem with section 189 of the Act is that it contains no guidance on how to distinguish between categories of persons for its operation. It is unclear why and how distinctions are made. This Recommendation needs a framework in which to operate.

2.3 Removal and Deportation of people from Australia

The Act distinguishes between removals and deportations. The **removal** powers apply to 'unlawful non-citizens' (Part 2, Division 8 of the Migration Act).

Section 189 provides in part:

- (1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.
- (6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

⁵ DIMIA, *Migration Series Instruction (MSI) 321: Detention of Unlawful Non-Citizens*, current at 23\12\2004, para 2.1.1.

⁶ DIMIA, *Migration Series Instruction (MSI) 234: General Detention Procedures* current at 23\12\04 para 7.1.

- (a) the non-citizen is a detainee; and
- (b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and
- (c) the grant of the visa has been refused and the application has been finally determined; and
- (d) the non-citizen has not made another valid application ..."

Both sub-sections (1) and (6) applied in the case of Mr A [REDACTED] who was 'stateless'. As the High Court explained in that case, removal is not necessarily limited to removal to an unlawful non-citizen's country of nationality. However, it does not include simply ejecting a person physically from Australian territory, and therefore, in a given case, may require international co-operation which is sometimes impossible to obtain. One of the consequences of Australia's policy of mandatory detention is that there are a number of long term detainees who are stateless asylum seekers. Recently the Minister for Immigration has opened the way for a solution by making the new Return Pending Bridging Visa available (as in the case of Mr Qasim).⁷

2.3.1 Section 198, the Refugees Convention and the non-refoulement obligation

One consequence of the 'minimalist' way in which the Refugees Convention is incorporated into the Migration Act, it that there is an ambiguity as to whether the *non-refoulement* obligation (the obligation to not return a person to a place where they might be tortured or persecuted) operates in relation to section 198.⁸

The issue in *M38 / 2002 v Minister for Immigration* (2003) 199 ALR 290) was whether the 'duty' (as it was described) imposed upon an 'officer' to remove an 'unlawful non-citizen' 'as soon as reasonably practicable' under section 198(6) of the Migration Act after all avenues to obtain a visa have been exhausted was constrained by the *non-refoulement* obligation in Art 33. A Full Court of the Federal Court decided that it was contrary to the scheme of the Act to require an officer to consider this obligation. The appellant in this case came from Iran and claimed to have a well-founded fear of persecution if he was returned. He had exhausted all legal avenues, having unsuccessfully sought judicial review of the primary decision at first instance, and having had his application to make a fresh application for a protection visa rejected (section 48B). He had also unsuccessfully sought to have the Minister exercise his discretion in his favour under section 417 of the Act. On 12 December 2003 the High Court refused special leave to appeal so the Full Court decision is *M38 / 2002* stands as the authoritative decision on this issue.

⁷ According to a newspaper report, 21 people are eligible for this visa. The Minister has a discretion to invite a person to apply for the visa.

⁸ S Kneebone, 'What we *Have* Done With the Refugees Convention' (2005) 22 *Law in Context* 83-119.

There was also some inconclusive discussion in *M38/2002* and subsequent decisions to the Convention against Torture. However as a result of the High Court refusal, it is unclear what weight can be attached to this Convention when section 198 is being exercised. Together with the *non-refoulement* principle, the prohibition against torture is a fundamental standard.

Although under the Act section 198(6) is the final administrative discretion, nevertheless if the applicant can substantiate a claim to be at risk of *refoulement* with fresh evidence this should be considered. By contrast with the Canadian IRPA 2002 which clearly sets out the *non-refoulement* principle and the Convention against Torture in the legislation, and provides a safety net Pre-Removal Risk Assessment (PPRA), the status of these principles under the Migration Act is ambiguous. Arguably a pre-removal procedure is called for.⁹

2.3.2 *The Criminal Deportation Power and the character cancellation provisions*

The Criminal Deportation Power (the CDP) and other deportation powers are contained in Part 2, Division 9 of the Migration Act. Recently, following a battle between the executive and the courts and tribunals over the implementation of the CDP policy, the Department of Immigration has abandoned the use of the CDP in favour of the powers to cancel visas on character grounds (which triggers the exercise of the **removal** powers). See sections 501, 501A-J. The current section 501 arises from amendments made to the Migration Act in 1998 and 2001. The Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Acts substantially enhanced the powers of the Minister. This legislation followed a long battle between the Minister and the Administrative Appeals Tribunal (AAT) (and the courts) over the application and scope of the CDP. (See *Minister for Immigration v Gunner* (1998) 84 FCR 400.)

There is evidence that the current section 501 is being used as a form of ‘disguised’ deportation to bypass the specific power in section 201 of the Act – the Criminal Deportation Power (CDP)– which authorises the deportation of ‘non-citizens’¹⁰ who have been in Australia for less than 10 years who are convicted of a crime and sentenced to one year or more. The use of section 501 (the ‘character test’ power) in lieu of section 201 (the CDP) is significant because of several important differences between the powers:

- The CDP in section 201 assumes that a person is ‘integrated’ into the community after a period of 10 years. The section 501 power is being used in some instances to remove persons who have extensive ties with Australia. For example in *Shaw v Minister for Immigration* (2003) 203 ALR 143, it was held by a narrow majority

⁹ See Edmund Rice Centre, *Deported to Danger: A study of Australia’s Treatment of 40 Rejected Asylum Seekers* (September 2004).

¹⁰ The DIMIA Annual Report for 2001-2002 states that all new cases involving non-citizen criminals were ‘considered for visa cancellation under section 501’. In that period 66 non-citizens were removed following visa cancellations under that power (48 in 2000-2001) and 137 visas were cancelled on character grounds (104 on 2000-2001). No deportation orders were served for 2001-2002 (20 in 2000-2001). In 2003-2004, 60 removals were made under section 501 (*Managing the Border*, p83) and none under the CDP.

of the High Court that a man born in Britain who migrated to Australia in 1974 at the age of two years was an ‘alien’ whose permanent entry visa could be cancelled because of his ‘substantial criminal record’ (section 501(2) of the Migration Act).

- The CDP applies to persons who have been sentenced to a term of imprisonment of not less than one year, whereas the ‘character test’ in section 501 applies to persons whose behaviour ranges from breach of immigration laws (overstay of a visa) to serious crimes.¹¹
- Decisions under sections 201 and 501 are reviewable by the AAT. However the section 501 power is subject to personal intervention by the Minister (sections 501A, B). The exercise such discretion is unreviewable and not subject to rules of procedural fairness.
- There are significant differences between the content of the policy directions which govern the exercise of these discretions. For example, the CDP identifies a range of personal considerations relating to family unity whereas the section 501 Policy Direction 17 is substantially limited to consideration of the ‘expectations of the Australian community’.

This situation raises human rights and other legal concerns including the following:

- Whether section 501 is being used to remove persons who have substantial ties with Australia, thereby interfering with a right to respect of family life.
- Whether section 501 is effectively discriminating against non-citizens by imposing an extra penalty in the case of convicted criminals.
- Whether section 501 which requires the Minister to be satisfied that the cancellation is ‘in the national interest’ (section 501(3)), is being applied with consistent and fair standards.
- The accountability of the Minister in the exercise of the personal discretions under sections 501A, B.

3 Concluding comments

The thrust of this submission is that there are grave problems with the administration and operation of the Migration Act 1958 which arise from its lack of guidance on basic principles, objectives, and definitions. Instead the Act has a strong emphasis on control of ‘aliens’ – a term which is of uncertain meaning – and upon the personal and unreviewable discretions of the Minister. In particular there are no references to human rights standards and ambiguous incorporation of standards such as the *non-refoulement* obligation.

After numerous reports with a similar focus it is time to take action and to revisit the Migration Act for the reasons contained in this submission.

¹¹ In March 2003 it was reported that a British astronomer working in Australia was threatened with removal after painting a ‘No War’ slogan on the Sydney Opera House. Xinhau News Agency, March 25, 2003 p10008084h4044