**SENATE INQUIRY**
**INTO ADMINISTRATION OF THE *MIGRATION ACT* 1958 AND REGULATIONS**

**By Anthony Krohn**

TO :

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**Terms of reference of the inquiry:**

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;

b. the activities and involvement of the Department of Foreign Affairs and Trade and any other government agencies in processes surrounding the deportation of people from Australia;

c. the adequacy of healthcare, including mental healthcare, and other services and assistance provided to people in immigration detention;

d. the outsourcing of management and service provision at immigration detention centres; and

e. any related matters.

**Note : The following submission addresses some points only of the terms of reference. It is not a comprehensive study of the Act and its operation.**

## I: *THE MIGRATION ACT* 1958

This submission contains some brief observations on aspects of the *Migration Act* 1958 ("the Act") and its administration.

1. It is an important provision that "*the object of this Act is to regulate, in the national interests, the coming into, and presence in, Australia of non-citizens"* (section 4(1).

### A: Discretion

2. A notable aspect of the entire legislative scheme concerning immigration is that to a very large extent there is a complex interlocking of rigid provisions such that if a criterion is met or not met then consequences must follow without discretion. To the extent that consistency in decision making is an object, the minimising of discretion is understandable. But in some instances, for example the regime for mandatory cancellation of student visas or the automatic cancellation of student visas (*cf.* e.g. section 116, section 119, section 137J, 137K of the Act), the elimination of discretion can and does at times result in harsh and oppressive decisions.

### B: Natural justice

3. Part 2, Division 3, Sub-division AB is headed "Code of Procedure for dealing fairly, efficiently and quickly with visa applications". Within that sub-division, section 51A states "*this Subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with."* This provision means that it is possible and it does occur that the minister or her delegate may determine some applications for visas, e.g. protection visas, and may reject an application, even on grounds of credibility, without affording an interview. This can and does mean that some decisions of the Minister or delegate are poorly and unfairly made.

**C: Definition of persecution; assessment of protection claims**

4. Section 91R of the Act makes provision for the interpretation of the term "persecution" in the definition of a refugee incorporated by reference in section 36 of the Act. In practice it happens not uncommonly that decisions are made by delegates of the Minister or by single members of the Refugee Review Tribunal that certain conduct does not amount to persecution. Such a finding is commonly regarded by the Courts as a non-reviewable finding of fact, although there may be some doubt about how far it is a mixed question of fact and law. Nevertheless it is the case that some decisions refusing protection visas are of concern because they are too often reached after concluding that e.g. repeated short detentions, brief detention with some physical ill treatment, do not constitute persecution. If the list of instances of serious harm in section 91R(2) is to be of assistance in determining the boundaries of persecution, decision-makers should not be too ready to conclude e.g. that some episodes of physical ill-treatment was not "significant" pursuant to section 91R(2)(c).

**D: Detention – treatment of detainees**

5. The provision for detention of unlawful non-citizens, e.g. pursuant to section 189 may be necessary in some circumstances, but there is no provision in the Act guaranteeing any minimum standard of treatment. This is a serious omission and should be rectified.

**E: Detention – length and purpose**

6. Further, detention pursuant to the Act is valid only to the extent that it is not punitive. Challenges to lengthy and even indefinite detention under the Act have failed if the Court has considered that the detention is still being carried out and administrative decision for the furthering of a purpose under the Act. The Act should be amended so that indefinite detention cannot occur. It is also essential that the provisions relating to the treatment of people in immigration detention make it absolutely plain, to detainees, staff at detention centres and the community as a whole that people in immigration detention are not being punished but are being kept in one place for an administrative purpose.

**F: Refugee determination**

7. Frequently applicants for a protection under the Refugees Convention are unable to support their claim with independent corroborative evidence. There may be some background information on the situation in the country concerned but the Minister's delegate or the Tribunal is not able to check details of claims. Therefore the assessment of the credit of the applicant may be critical to the outcome of the claim. In these circumstances it seems a very great weakness of the Act to impose on solitary decision makers the heavy burden of determining whether to believe an applicant and give protection or to disbelieve an applicant and refuse it. At one stage in the past cases were considered on the review by the Refugee Status Review Committee, a committee frequently of 4 members drawn from different branches of government and the community. There is a strong case for change such that, at least when the credit of an applicant is in issue, a decision ought not to be made by a solitary decision maker but by a panel of at least 3. If there were a 3 member panel then applicant should not be refused protection unless the Panel were unanimous. This is a moderate change when one considers that our law rightly gives a right to trial by jury of 12 in many relatively minor criminal matters.

**G: Mandatory detention**

8. It may be necessary in the national interest to detain some persons who arrive without identification for the necessary time to make identity checks or health checks. Beyond that, the policy of mandatory detention of, e.g. persons who arrived by boat and seek asylum, is not justifiable. It is frequently justified on the basis that it is necessary for national security, yet it is in the highest degree unlikely that any serious international terrorist would seek to enter Australia without proper identity papers in the conspicuous method of a boat arrival. Further and more basically there is a serious moral question about the detention of one person in order to deter another from asking for help.

**H; Excision from the migration zone**

9. There is an incoherence between Australia being a signatory of the Refugees Convention and therefore agreeing not to send person back from Australia to territory where they may have well founded fear of persecution, and the legal fiction that for the purposes of persons making application for protection visas, Australia's off-shore islands are to be treated as if they were not part of Australia. The policy is clearly one intended to prevent people from asking for help. A proper deterrent against bogus claims for protection is to have a rapid and effective and fair determination system followed by the rapid removal from Australia of those who are confidently determined not to be in need of protection. There is otherwise an absurd conflict between Australia's claims of territorial sovereignty and the reduction of the "migration zone".

**Conclusion**

10. This is by no means a comprehensive submission. It merely raises for discussion very briefly a few points concerning which it appears that the Act and Regulations either have serious flaws or are often not well applied.

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