8 August 2005

Submission to The Senate Legal and Constitutional Committee

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

The Immigration Advice and Rights Centre Inc. (**'IARC'**) thanks the Senate Legal and Constitutional Committee ('**Committee'**) for the opportunity to comment in relation to this inquiry.

1. Terms of Reference

1.1 The Terms of Reference for this inquiry are identified by the Committee as follows:

*a) the administration and operation of the Migration Act 1958 (**'Act'**), its regulations and guidelines by the Minister for Immigration and Multicultural and Indigenous Affairs (**'Minister'**) and the Department of Immigration and Multicultural and Indigenous Affairs (**'Department'**), 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 ('**DFAT'**) 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.

1.2 We note that the terms of reference are extremely broad and that detailed discussion of all the issues requiring examination under such terms of reference would require an extensive thesis. In view of the limited time and resources available to centres such as IARC, we have therefore chosen to highlight just some of the major issues which we believe warrant detailed investigation, being:

- The absence of timely access to independent immigration advice/ assistance for non- protection visa applicants in detention, falling within paragraphs (a), (c) and (e) of the terms of reference specified above).

- The increasing lack of transparency and accountability within Australia's migration determination processes (including policy formulation/ law reform/ departmental discretion and meaningful consultation with stakeholders), falling within paragraphs (a), (c) and (e) of the terms of reference specified above.

2. About the Immigration Advice and Rights Centre

2.1 Established in 1986, IARC is a specialist community legal centre in New South Wales providing free advice, assistance, education, training, and advocacy in law and policy reform in the area of immigration and refugee law. Engaging the services of around 70 volunteer migration agents and administrative staff, IARC provides free and independent advice to almost 5,000 socio-economically disadvantaged people each year. A further 1,000 people or so attend our training seminars annually, while thousands more subscribe to or access IARC's plain English publications which seek to maximize awareness of Australia's immigration law and policy.

2.2 In keeping with our goal of maximizing access to immigration legal information, IARC produces several plain English publications including:

- *The Immigration Kit*, a practical guide for immigration advisers;
- the *Immigration News*, a quarterly publication setting out the latest Australian immigration law and policy developments;
- IARC Information Sheets which provide a step-by-step guide to the application and review process for various visas and other aspects of Australia's immigration processes;
- IARC's website (www.iarc.asn.au), which provides access to the above Information Sheets, and to the latest information regarding IARC's services.

2.3 IARC also conducts training /information seminars for members of the public, the migration profession, those who intend to enter the migration profession, community service providers and community groups. These seminars range in content and objective from raising awareness of IARC's services to informing communities of their immigration rights and obligations.

2.4 Users of IARC's services are generally low or nil income earners and frequently have other disadvantages including low level English language skills, past torture/ trauma, domestic violence etc.

2.5 Since its establishment in 1986 IARC has developed a high level of specialist expertise in the area of immigration law and procedure. IARC uses its expertise to promote the interests of the most vulnerable participants in Australia's immigration system, and advocates, through forums such as this enquiry, to maximize access and equity in Australia's migration processes.

3. Inadequate access to migration advice and assistance to detainees

3.1 Adequate access to immigration advice, assistance and representation is essential to ensuring that detainees are properly informed of their rights and obligations, and that any mistakes in detention centre processing, if and when they occur, are detected by sound, competent and ethical migration practitioners, who can then bring relevant matters to the attention of the relevant authorities.

3.2 Access to sound immigration advice at the early stages of a persons detention is also essential if detainees are to make informed decisions, in a timely manner, as to whether or not to apply for a visa onshore, or to leave Australia and apply for a visa (if applicable) offshore. This leads us to a discussion of section 195 of the Act.

3.3 Pursuant to section 195 of the Act a detainee must, within 2 working days of the section 194 interview, apply for a visa (with an additional 5 working days being granted if DIMIA is notified in writing of a detainees intention to apply for a substantive visa). After the expiration of these strict deadlines, a detainee may only apply for a bridging visa or a protection visa.

3.4 Without access to timely and sound immigration legal advice, the time limits in s195 could have the following consequence:

(a) potential applicants lose their opportunity to apply for any visa other than a bridging visa or protection visa;

(b) having missed the strict, non-waivable deadlines in section 195, potential applicants are left with the only option for permanent residency prior to departure from Australia being to lodge a protection visa application, in circumstances where such an application may not be appropriate.

3.5 The dynamic referred to in paragraph 3.4 above is exacerbated by the structure of the Immigration Application Advice and Assistance Scheme (**'IAAAS'**), administered by the Department. For detainees, access to IAAAS representation is restricted to those applying for protection visas. Detainees do not have access to IAAAS representation unless they apply for a protection visa This, coupled with the strict time limits in section 195 which preclude applications other than those for protection or bridging visas after the narrow time-limits have lapsed, may lead to the lodgment (and funding) of PV applications where other visas may be more appropriate.

3.6 This submission should not, on any view, be construed as advocating for a diminution in the availability of immigration advice and assistance to protection visa applicants in detention. Indeed, our view is that the availability of such assistance is currently inadequate and that eligibility and the allocation of funding for free immigration advice and assistance should be expanded, such that:

- Existing funding for protection visa applications is retained;
- Eligibility for IAAAS assistance (which results in free immigration advice/ representation to detainees) includes *all* detainees, not just those seeking protection visas;
- The amount of funding allocated to the IAAAS scheme is increased in recognition

of that expanded eligibility and the increased demand on IAAAS services which will inevitably flow;
- All detention cases are referred to an IAAAS service provider for advice on relevant onshore visa applications as soon as practicable at or after a detainee's section 194 interview (and not later than 12 hours after that interview), allowing the potential applicant to lodge (or to make an informed decision not to lodge) within the strict time limits prescribed under section 195.

3.7 It is our view that, in order to safeguard against unscrupulous practitioners who may encourage the lodgment of unfounded applications in order to make profit, that such work is undertaken only by non-profit organizations such as Legal Aid and IARC.

3.8 Such a development would be in the public interest for reasons including the following:

- Potential applicants would be in a position to make informed decisions as to whether or not to lodge an onshore visa application, and will be informed of relevant exclusion periods should they not have any onshore visa options;
- The most appropriate visa class would be applied for (which may or may not be a protection visa);
- The strict time-frames prescribed under the Act would be complied with;
- Protection visas would only be applied for where a protection visa is the appropriate visa to apply for;
- DIMIA would receive appropriate and adequately prepared applications, which would minimize processing times and the costs involved in processing incomplete or inappropriate visa applications, and will maximise processing efficiency.

3.9 It is our view that, at the very least, funding under IAAAS to facilitate an advice service (eg a telephone advice service regarding all visa options, rather than just protection visas) for detainees immediately after their section 194 interview would allow detainees to apply for the most appropriate visa, and would be to the mutual benefit of both the Department and potential applicants.

Impact of the Migration Amendment (Detention Arrangements) Act 2005

3.10 Related to the matters set out above, we have concerns regarding the effects of the new section 195A of the Act, introduced under the *Migration Amendment (Detention Arrangements) Act 2005*, which we anticipate will lead to increasing numbers of detainees being granted bridging visas. While we welcome the measure as one which may result in the duration of detention being as short as possible, we would also like to see measures introduced to ensure that these people have access to sound immigration advice and assistance when they are released into the community.

3.11 Once released into the community, former detainees:

(a) will no longer be constricted by the time limits prescribed by section 195 of the Act, and may be eligible to apply for another visa onshore;

(b) will no longer fall within the IAAAS eligibility criteria applicable to detainees (ie detainees who apply for a protection visa);

(b) may fall within the eligibility criteria to access IAAAS services as visa applicants in the community (which has a separate funding allocation under the IAAAS scheme).

3.12 In order to adequately service the demand for IAAAS services by applicants in the community (as opposed to those in detention), we would like to see the Department increase its funding for community based IAAAS services to cover the anticipated increased demand for these services.

4 Lack of transparency/ accountability in Australia's immigration processes

4.1 This concern draws into consideration many aspects of the Act and Regulations. Again, given the limited time and resources at our disposal, we mention only a few of these aspects:

Ministerial Intervention

4.2 Matters raised by stakeholders, and reported in the 2004 Select Committee Inquiry into Ministerial intervention remain matters of concern. The:

- absence of accountability and transparency;
- inconsistency in decisions;
- delay in making decisions;
- lack of access to work/ services for those who request Ministerial intervention;
- absence of any evidence that the Department has given effect to the recommendations of the Select Committee enquiry (particularly to the extent that those recommendations relate to transparency and accountability in the Ministerial intervention process)

remain unaddressed issues of concern, and ones which we wish to flag for in this Inquiry. The above concerns are also relevant to the Minister's personal discretion under section 501of the Act to cancel a visa on character grounds (a power which, if exercised by the Minister personally, cannot be reviewed by the Administrative Appeals Tribunal).

Review Processes

4.3 Further to concerns expressed by numerous stakeholders regarding the trend to minimize access to judicial review of migration decisions, we continue to see amendments and proposed amendments to migration legislation which reduce transparency and accountability within Australia's migration determination processes. We refer the Committee here to the concerns set out in our submissions regarding the *Migration Litigation Reform Bill 2005.* In particular we note the concern that sound legal advice in relation to immigration matters will become more difficult to access in light of the intimidating and far-reaching provisions set out in that bill.

Policy/ Law Reform – Timely Consultation with independent stakeholders

4.4 We are concerned at the increasing trend for amendments to be made to migration law and policy without consultation with independent stakeholders. We refer here to

examples such as the abolition of the Close Ties Visa on 1 July 2005 (to the extent that it allowed children who had spent their formative years prior to turning 18 in Australia, referred to in Departmental policy as 'Innocent Illegals', to acquire permanent residency on that basis). The decision to abolish that visa was made without any consultation with stakeholders. Following submissions made directly to the Department by our organization, it was conceded by the Department that dialogue with stakeholders would have been appropriate. Notwithstanding this, the visa option for 'Innocent Illegals' was abolished on 1 July. While the Department has taken steps to liaise with stakeholders to discuss drafting new regulations to cover genuine 'Innocent Illegals' cases, until new regulations are drafted and given effect, 'Innocent Illegals' are left without an appropriate visa option. This is an unacceptable position for young people, who through circumstances beyond their control, have formed their identity throughout childhood, and have become young adults, in Australia. We flag this situation as an example of where the Department has failed to engage in adequate consultation at a stage in the law reform process where the comments of stakeholders could be taken into consideration prior to the changes being finalized.

While we have seen evidence, since the release of the Palmer Report in July 2005, of an effort by the Department to engage in consultation with stakeholders, we flag this issue as one which is fundamental to ensuring that any changes to migration legislation and policy are informed by the experience and perspectives of stakeholders who are well placed to identify the impact of proposed changes on socio-economically disadvantaged sectors of our society. We also suggest that adequate consultation requires the release of draft regulations (or relevant legislation/ policy) for comment by stakeholders prior to finalisation of those changes.

While our submissions in relation to this Inquiry could be far more extensive, we are limited by time and resources. Our centre would be happy to provide further comment if that would be of assistance to the Committee.

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