

August 2005

The Secretary
Senate Legal and Constitutional References Committee
Parliament House
CANBERRA ACT 2600

Dear Mr Walsh

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

I make this submission to the inquiry being conducted by the Senate Legal and Constitutional References Committee. I will outline the issues that have arisen in the complaint investigation work of my office, and refer to the new role foreshadowed for my office as Immigration Ombudsman. I would be happy to discuss the issues raised in this submission with the Committee in a hearing.

Complaints to the Ombudsman

Over the past five years, the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) has accounted for 5 to 6% of the complaints made to my office. Complaint numbers peaked at around 1100 during 2001-02 and 2002-03, and in the following two financial years have been steady at just under 900.

Complaints about DIMIA can be categorised into three distinct areas: migration issues, which are usually about decisions on visa applications; immigration detention issues, raised by or on behalf of detainees; and other issues such as Freedom of Information (FOI) applications and citizenship processes. Complaints about migration issues continue to form the largest category.

In investigating complaints we endeavour to work as informally as possible, enabling matters to be dealt with efficiently. However the Commonwealth Ombudsman has statutory powers similar to a Royal Commission. When investigating a complaint, the Ombudsman can:

- provide protection and immunity for witnesses
- require witnesses to attend and give evidence on oath
- require the production of relevant documents from any person
- enter premises.

New functions for my office

In June 2005, Parliament passed amendments to the *Migration Act 1958*. These changes give the Ombudsman a statutory role in reviewing the cases of detainees who have been held in immigration detention for more than two years (cumulative), with follow-up reviews every six months if the person remains in detention. Such a statutory audit role provides a

substantial enhancement to our capacity to improve the administration of important and sensitive legislation which can have a major impact on people's lives.

As a result of a number of recent factors, including the independent inquiry by Mr Mick Palmer into the circumstances of the immigration detention of Ms Cornelia Rau, our office is developing a broader Immigration Ombudsman role. This role also involves investigating some 201 cases where Australian citizens or other people lawfully in Australia have been subject to immigration detention or removal from Australia.

I expect that our Immigration Ombudsman role will involve a greater focus on other detention-related matters, including detainee health issues, and on compliance issues, as well as a strengthened capacity to deal with complaints in areas such as migration.

Specific areas of concern

During the past several years we have pursued a number of major issues with DIMIA. The Palmer inquiry has highlighted a number of areas for improvement in DIMIA, and I will not traverse those areas in this submission. I would note that over the past years we have raised many concerns with DIMIA about the conditions under which people are kept in immigration detention, including:

- the processes, procedures and practices of the Red One behaviour management compound and the Management Unit at Baxter Immigration Detention Facility
- the availability and adequacy of medical and psychiatric services for detainees
- the way in which allegations of assaults within Immigration Detention Facilities were being handled
- the investigation of major incidents related to detention facilities, including the riot at Port Hedland in December 2003, and the transfer of five detainees from Maribyrnong to Baxter in September 2004
- the regular notification to people of the costs of their detention, in accordance with departmental policies.

However, there are a number of other issues which the Committee may care to consider.

Complaint handling system

In general we investigate a higher proportion of the complaints we receive about DIMIA, compared to the average across all Australian Government departments and agencies.

This reflects the experience of my office, that DIMIA does not have a robust complaint-handling system in place. Where an agency does have such a system, we feel more confident in suggesting complainants take up their concerns with the agency involved in the first instance. We can also focus our efforts on dealing with more complex or systemic matters, and on periodically reviewing the effectiveness of the complaint-handling arrangements.

My office has raised this issue with DIMIA, and it is the subject of continuing discussion.

Compliance issues

In our 2003–04 annual report, we foreshadowed our intention to concentrate on complaints about compliance activity. To date complaints have centred around the information leading to the issuing of a warrant, the manner in which it is executed and the lack of documentation of the exercise. During the year I released two reports under section 15 of the *Ombudsman Act*

1976 related to DIMIA's compliance activities, and we will continue to focus on this in the coming year. (An abridgement of both reports is available on our website www.ombudsman.gov.au, as Report No 5/2004 and Report No 2/2005.)

As noted above, the Government requested my office to investigate the cases initially referred to Mr Palmer where Australian citizens or other people lawfully in Australia have been subject to immigration detention or removal from Australia. As part of the Immigration Ombudsman proposal, I consider there would be advantage in my office having an inspections/auditing function of DIMIA's compliance activities, including its use of search and entry powers and its removal operations. This would bring the oversight arrangements for DIMIA more into line with other areas where government action can severely curtail the freedom of people.

Visa cancellations

Over the past year or so we have received several complaints from long-term Australian residents whose permanent residency had been cancelled under s 501 of the *Migration Act 1958*. Under s 501 the Minister or a delegate can refuse or cancel a visa on character grounds. Each of the complainants had been in Australia since childhood and was in detention facing possible removal from Australia. As a result, we commenced an own motion investigation into this issue. While the investigation is yet to be completed, some of the key issues of possible concern identified include:

- the quality of advice provided to the Minister
- whether there is a detailed and independent assessment of the best interests of the person's children
- the extent to which DIMIA investigates key issues such as the family circumstances of the person or their criminal offences
- the extent to which the affected people (the person whose visa is cancelled and their family members) are afforded natural justice, in the absence of review rights.

Visa processing issues

Each year my office deals with a number of complaints related to visa applications. These complaints can cover issues such as:

- the actual decision on the visa application
- whether an application is valid or not
- the time taken to process applications
- the adequacy and correctness of advice provided by DIMIA
- the processes for gathering information related to visa applications
- the notification of visa decisions
- the notification of time frames in which an appeal for review by a tribunal must be lodged, where the person has review rights
- the recording of oral advice.

Migration agents regulation

The Migration Agents Registration Authority (MARA) is responsible for overseeing the registration of migration agents and for investigating complaints about their actions. Where an agency has such a regulatory role, it is important that the agency deals with complaints properly and fairly. We have received some complaints from migration agents which have

raised some concerns about the way in which MARA investigates some complaints, and whether it provides adequate reasons for its decisions.

Whilst MARA is separate from DIMIA, given the important role migration agents play, it is essential for its administrative processes to be effective and fair.

FOI processing

During 2004-05, we received many complaints about significant delays in DIMIA's processing of FOI requests. We discussed our concerns with DIMIA, who have advised us of a number of initiatives to address the problem, including allocating additional resources, setting up a separate FOI section in the Department, implementing a prioritisation system for cases in the backlog and new cases, and working with migration agents to seek their assistance in narrowing the scope of their requests to seek specific documents rather than asking for whole files.

Conclusion

DIMIA administers a complex piece of legislation in the Migration Act, and its decisions each year have a substantial impact on the lives of thousands of people. As recent events have highlighted, DIMIA faces a number of challenges in dealing with the issues raised, and in ensuring that its administrative processes are soundly based in legislation, fair, transparent and consistent.

I expect that my enhanced role as Immigration Ombudsman will enable my office to play a greater part in assisting DIMIA to improve its processes and culture. Should you wish to discuss this submission with me, please do not hesitate to contact me on (02) 6276 0111.

Yours sincerely

Prof. John McMillan
Commonwealth Ombudsman