AUSTRALIAN INSTITUTE OF MULTICULTURAL AFFAIRS

MIGRATION ACT 1958 AND HUMAN RIGHTS

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REFORMING THE MIGRATION ACT 1958

The Australian Institute of Multicultural Affairs ('the Institute') exists, amongst other things, to provide advice to the government concerning legal and policy issues of relevance to the Australian community to ensure that its institutions and laws adapt to the multicultural nature of the Australian community. The Human Rights Commission was established by the Australian Parliament in 1981 under the Human Rights Commission Act 1981. Its functions include the examination of enactments for the purpose of ascertaining whether they are inconsistent with or contrary to any human rights. The Commission is also empowered to enquire into acts or practices that may be inconsistent with or contrary to human rights. The Commission's powers are advisory. It is required to make recommendations. The expression 'human rights' is defined by the Act to mean 'the rights and freedoms recognised in the Covenant, declared by Declarations or recognised or declared in any relevant international instrument'. In other words, the frame of reference for the Human Rights Commission ('the Commission') is not at large. It is the collection of statements on human rights included in international instruments to which Australia is a party. A number of schedules are attached to the Human Rights Commission Act 1981. The first of these (Schedule 1) is the International Covenant on Civil and Political Rights.

2. In May 1983 a public advertisement by the Commission indicated that it was inquiring into the Migration Act 1958:

> to see whether any parts of that Act are inconsistent with or contrary to any human rights as defined for the purposes of the Commission. The Commission proposes making a report to the Attorney-General of the Commonwealth at the conclusion of its inquiry, which will be tabled in Parliament and published.

The Commission invited members of the public and interested organisations to write to it on any aspect of the Migration Act 1958:

which is considered to be contrary to or inconsistent with human rights

Submissions are to be received no later than 31 July 1983.

3. Meetings of members of the Institute are being held around Australia as part of a regular program of meetings. The Institute comprises approximately 60 persons, including members of the Council and ordinary members. They come from diverse backgrounds and different parts of the country. They share in common a background in or association with policy issues concerning migrants and ethnic communities in Australia. The Institute is therefore well placed to provide the Commission with assistance in its inquiry. Its statutory functions make it appropriate that it should offer such assistance.

4. Two other projects by Commonwealth agencies should be mentioned. The first is the examination of criminal investigation laws of the Commonwealth by the Law Reform Commission ('ALRC'). The ALRC was in 1975 asked to review the laws governing law enforcement by Federal Police and other officials. The inquiry was led by G J Evans, then a member of the ALRC and now Federal Attorney-General. The report, Criminal Investigation (ALRC 2), is a major review of the topic. At the time, it was intended to apply to those migration officers who were to have been members of the then proposed 'Australia Police'. Subsequently the incorporation of migration officers within the new Federal policing unit was dropped. However, many recommendations in the report are relevant to the human rights of migrants and others with an ethnic background, in their associations with Federal Police. The provisions of the Criminal Investigation Bill, attached to the ALRC report, contain significantly different rights and duties, when compared to the provisions of the Migration Act 1958. In particular, there is a contrast between the provisions relating to:

* rights to interpreters
* general search warrants
* rights to bail
* protections during interrogation, including sound recording

5. In addition to the ALRC inquiry, the Administrative Review Council ('the Council') has for some years been conducting its examination of rights of review under the Migration Act 1958. This project was initiated by the Council in March 1977 when it resolved:

> to commence as soon as possible an examination of powers conferred by legislation administered by the Department of Immigration and Ethnic Affairs and of decision-making under those powers for the purpose of considering the review of these decisions and other matters that come within the statutory functions of the Council.

Those statutory functions are defined in the Administrative Appeals Tribunal Act 1975. They are principally concerned with the improvement of administration and of Federal laws and practices. The Council had before it a draft report in November 1982. That report reviewed critically the Migration Act 1958. It examined existing means of review of migration decisions available to non-citizens. It sought to specify the considerations relevant to review. It then examined the decisions that ought to be subject to review and considered a number of models available for providing improved review of migration decisions in Australia.

6. When the draft report came before the Council, a number of criticisms were offered, including by the present writer, who is a member of the Council. In particular, it was pointed out that the draft required reconsideration in order to ensure that proposed reforms of migration legislation were considered not only against the general criteria for the improvement of administrative review, but also against the background of the radical changes in the Australian community since the Second World War.

7. At the meeting of the Council in June 1983, a letter was tabled from the Attorney-General in which he advised that the government intended to make a number of amendments to the Migration Act 1958. The government invited early signification of the Council's recommendations following its review of the migration legislation. The Council decided to give high priority to its review, in the light of the government's intention. The notice of the Council was drawn to the projects on the Migration Act being conducted by the Institute and the Commission. It seems important that there should be some co-ordination between the research effort on the Migration Act within the Institute, the Council and the Commission.

APPROACHES TO REVIEW

8. The immigration and community relations program of the Federal Government, issued before the March 1983 election, reaffirmed the government's commitment to ethnic communities' development and its responsibility to 'assist migrants in establishing themselves with the same rights, opportunities and responsibilities as all Australians'. Numerous specific promises were made, including one relevant for present purposes:

> The Citizenship Act and the Migration Act are in urgent need of reform. Both contain many anomalies and discrimination on the grounds of sex, ethnic origin and nationality. Labor would see to it that all discrimination would be removed from the Act as quickly as possible.

9. A note on legislative reform concerning the Migration Act 1958 and prepared by the Hon Moss Cass and Mr E Klein (September 1980) contains a number of criticisms of the Act. It also contains a general observation:

> To amend some of these provisions would mean only keeping alive an obsolete piece of legislation. The whole Act has to be revised and brought up to date in order to apply the legislation to the whole of the Australian community regardless of wherever they were born or came from.

10. Following this general comment concerning approach, a number of specific criticisms of the Act are offered:

* Section 5 contains provisions which discriminate in favour of British subjects and Irish citizens in the definition of 'alien'
* Section 7(6) contains discriminatory provisions concerning women entering Australia
* Sections 18 and 19 are also similarly discriminatory on the grounds of sex
* Section 12 provides for deportation without a possibility of appeal
* Section 13 provides for deportation of convicted migrants or others, involving double punishment
* Section 14 provides for deportation of certain aliens in excessively broad and vague language

11. The general criticism of the Act is based upon the very wide discretions conferred upon the Minister and a promise is made to introduce appeals:

> In fact one could say that the present powers of the Minister ... are second only to God. He has absolute power over who will or will not be allowed into Australia, who will be deported and so on, and his decisions are not subject to appeal. In order to overcome this, the Labor Government will introduce an Appeals Tribunal (part of the Administrative Appeals Tribunal) which will deal with appeals in four major areas:
>
> (a) deportation orders
> (b) denials of citizenship
> (c) refusals of resident status
> (d) refusals of permission to sponsor relatives or visitors or immigrants.

12. The paper also promises that decisions of the Tribunal will be binding on the Minister and appeals only permitted on points of law. At present, such appeals from the Minister for Immigration and Ethnic Affairs as may be taken to the Administrative Appeals Tribunal ('AAT') are not determinative. They result in decisions in the form of a recommendation only. The Minister may override the recommendation of the AAT. In one case, this was done, although subsequently, as a result of an outcry, the decision was reversed.

HUMAN RIGHTS

13. A review of relevant 'human rights' as defined in the instruments attached to the Human Rights Commission Act 1981 would be a major task. A close analysis of the Migration Act 1958 and a comparison to those 'human rights', as defined, would be a significant research effort. However, a number of Articles of the International Covenant on Civil and Political Rights ('the Covenant') are specially relevant to provisions in the Migration Act 1958, particularly in relation to the exercise of the power to deport. The most relevant provisions are:

* Article 7. No-one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment
* Article 13. An alien, lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority
* Article 14(7). No-one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country
* Article 23(1). The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

AREAS FOR CONSIDERATION

14. If the approach suggested by Dr Cass and Mr Klein is taken, the Institute should undertake a major review study of the Migration Act 1958 with a view to:

* comparing each paragraph of the Act with the statements of 'human rights' as defined in the Human Rights Commission Act 1981

* comparing each paragraph of the Act with proper and modern principles of administrative review, as evidenced in such recent Commonwealth legislation as the Administrative Appeals Tribunal Act 1975, the Ombudsman Act 1976, the Administrative Decisions (Judicial Review) Act 1977 and the Freedom of Information Act 1982. This legislation ('the new administrative law') has introduced many important and beneficial principles and remedies into Federal administrative law and practice in Australia. These remedies are especially directed at reducing unbridled discretions, encouraging legislative statements of principle upon which discretions will be exercised, facilitating rights to reasons and enhancing opportunities for review and scrutiny of administrative decisions
* comparing the provisions of the Migration Act 1958 and the rights and duties conferred by that Act on aliens in particular, with the more modern statement of rights contained in the ALRC report on Criminal Investigation, the Criminal Investigation Bill 1981 and the proposed legislation which the present Attorney-General has indicated he will introduce later in 1983.

DEPORTATION

15. Because the purpose of the present paper is the limited one of providing the Institute with a basis for considering a submission to the Commission, because of shortness of time and resources, it seems appropriate to concentrate on the critical provisions of the Migration Act 1958 relevant to human rights. These provisions are those relating to deportation. They are critical because they affect:

* the freedoms and individual liberties of persons presently within Australia
* families, friends and others associated with such persons
* Australia's compliance with internationally assumed obligations, including those under the Covenant

A recognition of their critical importance for human rights can be seen in:

* the detailed attention being given to the subject of deportation review by the Council; and
* the attention which it is understood the Commission is giving to this subject.

Priority attention to deportation and human rights might be criticised by some. It might be said that this gives undue attention to a relatively small number of persons affected by the Migration Act. Often they are persons who have been convicted of offences and are in other ways atypical of the migrant population. However, it is generally possible to judge human rights observation in a country by the way in which unpopular minorities are dealt with under the laws and practices of that country. Although more migrants are probably affected by other provisions of the Migration Act 1958 — especially by the very wide discretions which are conferred upon the Minister throughout the Act — it does seem appropriate to begin any review of the Act by the Institute, concentrating on the deportation section.

16. Deportation is dealt with under Part II Division 2. The most important provisions are:

* Section 12, Deportation of aliens convicted of crimes
* Section 13, Deportation of immigrants in respect of matters occurring within five years after entry
* Section 14, Deportation of aliens whose 'conduct has been such that he should not be allowed to remain in Australia' or 'who advocates the overthrow by force or violence of the established government of the Commonwealth or of a State or of any other civilised country or of all forms of law ...'

17. It is to be noted that Section 12 deportations applying to aliens apply without limit as to the time the person has been in Australia. Relatively few deportations are made under Section 14, although the provisions, which harken back to the post-war communist fears, are in language of the greatest generality ('of any other civilised country').

18. The views of the Institute could usefully be stated on such matters as the following:

(a) whether in certain circumstances to be defined, deportation from Australia (of aliens or immigrants) could amount to 'cruel inhuman or degrading treatment' under Article 7 of the Covenant

(b) whether the differentiation between 'aliens' and 'immigrants' is justified in Australia and if so according to what principle should the distinction be drawn. The better legal view seems to be that a person remains an alien until he takes out Australian citizenship, however long he has been in Australia, and irrespective of his absorption into the community. Pochi v Macphee (1982) 56 ALJR 878, 882.

Should a specified time be fixed for a permanent statutory 'moratorium'? ie if a person can stay in Australia for seven, 10, 15 years, should he thereafter cease to be at risk of deportation as an alien because to then deport him would be 'cruel inhuman or degrading treatment'. Note that the Migration Amendment Bill introduced into Parliament on 26 May this year proposes a 10-year limit.

(c) Article 13 relating to rights of review before deportation does not appear to be observed under the Migration Act 1958. There are many criticisms:

* First, there is no jurisdiction in the AAT in relation to deportation decisions under Section 14. Jurisdiction is confined to Sections 12, 13 and 48
* Secondly, certain persons are not able to secure standing to bring proceedings before the AAT, even though they are migrants subject to deportation. This anomaly was recently illustrated in the case of Mervyn Bright and Minister for Immigration and Ethnic Affairs (N.82/220, Gallop J). In that case, the applicant was held to be entitled to make an application to the AAT for review of the Minister's decision. The present legislation does not always permit a deportee to bring proceedings in his own name. He must find some member of the Australian community who is prepared to bring the proceedings on his behalf and this leads to artificial arrangements in order to secure standing before the AAT.
* Thirdly, the AAT is not empowered to make final decisions. It can make only recommendations. Although these are normally followed by the Minister, some observers, including the majority of the Council, regard the arrangement as unsatisfactory.

19. The Institute might also consider that deporting a person after he has served a prison sentence for an offence for which he has been convicted amounts to double punishment, prohibited by Article 14(7) of the Covenant. Furthermore, Article 23(1) recognising the need to protect and promote the interests of children and the family, suggests that where a family is involved it may be more offensive to human rights to deport a member of that family than to deport an isolated individual. In a number of deportation cases coming before the AAT, consideration has had to be given to the fact that deportation of the alien or immigrant will result, effectively, either in division of his family or in effective deportation of persons who are indubitably Australian citizens. Consideration might be given to whether, where an alien or immigrant of long standing residence has established a family in Australia, he thereby ought to secure protection from deportation because to deport him in those circumstances would infringe provisions of the Covenant designed, amongst other things, to protect innocent third parties in his family.

20. Important questions therefore arise concerning deportation cases. Should there be a distinction between aliens and immigrants? Should there be a period after which any entrant is exempt from deportation? Should a different rule apply to persons who have married Australians and/or have children who are Australians? Would that discriminate against single persons or persons who have friends or de facto relationships? National security cases apart, should there be always rights of review? Is it sufficient to provide review before an informal departmental tribunal or is it necessary to provide for review before an independent judicial-type tribunal such as the AAT? Is the AAT too expensive for the large numbers of review cases likely? Who should have standing for deportation cases before the AAT? Should there be review of visa refusals, including overseas, or should standing be secured only after a period of being in Australia? Should the review be in the form of a decision or a recommendation? Who is the best ultimate guardian of the composition of the Australian population : the Minister or an independent AAT?

OTHER DECISIONS

21. In addition to responding to the immediate call for submissions from the Human Rights Commission, it would seem appropriate for the Institute to initiate and co-ordinate a full review of the Migration Act 1958 by comparing those other provisions of the Act which deal with civil rights, both with the Covenant and with the Criminal Investigation Bill standard. Provisions warranting special attention are:

* Section 37 — powers of entry and search (cf Criminal Investigation Bill 1981, cl.56ff; Covenant, art.17)
* Section 38 — arrest of prohibited migrants (cf Criminal Investigation Bill 1981, cl.9ff; Covenant, art.9)
* Section 41 — persons in custody to have access to legal advice (cf Criminal Investigation Bill 1981, cl.21ff; Covenant, art.14(3))
* Section 42 — persons required to answer questions (cf Criminal Investigaion Bill 1981, cl.18ff, right to silence; Covenant, art.14(3)(g))
* Section 43 — identification of persons in custody (cf Criminal Investigation Bill 1981, cl.35, 36; Covenant, art.10).

It is beyond the scope of this note to compare the Migration Act 1958 provisions with the Covenant and the Criminal Investigation Bill. Suffice it to say that on every occasion the Criminal Investigation Bill, which was drawn in the light of the Covenant, indicates far greater sensitivity to human rights than does the present legislation.

22. There are numerous other aspects of migration legislation that warrant the careful examination of the Institute. Furthermore, practices of the Department of Immigration and Ethnic Affairs warrant examination and study, eg in relation to deportation or refusal of entry of persons with physical disabilities or peculiarities. Australia's multicultural society develops within a framework provided by the Migration Act 1958 and citizenship and other legislation. In addition there are practices, conventions and traditions of the department and its officers. Many of these, including most of the legislation referred to, have been defined long before the multi-partisan acceptance of the principle of multiculturalism. Many provisions and still more practices harken to earlier assimilationist and integrationist philosophies. They are ripe for review, reconsideration and change. The Institute is the body best placed to provide a co-ordinated examination of the legislation and a submission for change sensitive to the opinions and experience of those most intimately affected by the terms of present legislation and practices.

CONCLUSIONS

23. The Institute should adopt as a general project for a significant research exercise a review of the Migration Act 1958 and the Australian Citizenship Act 1948. The criteria for the review should include:

* compliance of the legislation, regulations and practices under the legislation, with the covenant;
* compliance with the principles in the Criminal Investigation Bill; and
* compliance with perceived fair practices arising from principles of multiculturalism.

24. Meanwhile, because of the immediate need for a submission to the Human Rights Commission and because the government is considering amendment of the legislation later in 1983, the Secretariat should give prompt attention to the most obvious areas of the legislation calling for review. Some of these are identified above. They include:

* deportation review (ss.12, 13 and 14)
* the use of general search warrants (s.37)
* bail for persons taken into custody pending deportation decisions (cf Criminal Investigation Bill, cl.46ff)
* removal of the privilege of self-incrimination (s.42)
* refusal of entry of persons having physical peculiarities or abnormalities.

What is needed is a painstaking examination of the current legislation, regulations and (so far as known) practices against the criteria of the Covenant and the Criminal Investigation Bill.

25. The immediate examination (and any long-term research project) should be conducted after thorough consultation with members of the Institute, representative migrant bodies and members of the department. In addition, there should be consultation with the Human Rights Commission, the Administrative Review Council and the Law Reform Commission. After tentative views have been formed, they should be stated in a document which is circulated for comment before final presentation to the Minister and, if approved, the other Commonwealth agencies.

26. The Institute will be more likely to be of immediate effective use to government and the Parliament if it provides assistance such as stated above, with the benefit of intercommunity and interdisciplinary participation such as the Institute can call on. When the Institute's own future is under scrutiny and review, it is important that it should show itself able to respond to priority concerns of government, such as review of the Migration Act. If the Institute fails to do so, the responsibility will pass to other Commonwealth agencies and questions will arise as to the relevancy of the Institute and its capacity to answer the pressing needs of government and Parliament. In the writer's view, the examination of migration legislation ought to have been a priority research concern of the Institute. It is not too late to adopt it as such.