Australian Government

Department of Immigration and Citizenship

Address to the Inaugural CPD Immigration Law Conference

‘Post-Palmer reform of DIAC and regulation of the migration advice industry’

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9 February 2007

Introduction

I recently spoke to the Sydney Institute about some key historical themes in immigration policy.

It’s a pleasure to have the opportunity today to expand on one of those themes — the all-important legal underpinning to our migration policies and programmes.

Every Australian government since 1901 has used migration as a policy tool to shape the future of the nation.

And of course, the enabling laws and regulations have been at the heart of this substantial element of national policy and programme activity. The history of Australian immigration is told not just in the people but also in the evolving legal framework.

Back in 1901, the 17th Act of the Federal Parliament established the so-called ‘White Australia’ policy — the Immigration Restriction Act 1901. And this Act and its administration started over a century of contention over migration law.

In 1945, the use of migration as a policy tool expanded enormously with the advent of what we now call ‘planned migration’. Since then, almost 6.5 million people have settled permanently in Australia, including a humanitarian component of around 660 000.

This year alone, around 140 000 permanent migrants will arrive under the migration programme, and 13 000 under the refugee and humanitarian programme.

This use of migration policy to shape the nation has been one of Australia’s great policy and programme successes. I believe it is indeed one of the great themes of our history.

We now live in a nation where almost one in four of our population was born overseas, and a total of 43 percent were either born overseas or have a parent who was born overseas.

And we are recognised around the world as having remarkably little disharmony among the many cultural and religious backgrounds making up our diverse nation.

So from a government and national interest perspective, Australia’s migration programmes have been a huge success. And with the ageing of the Australian population and the demand for skilled workers, they will continue to be a key tool of policy.

But it is equally true that the broad programmes and aggregate numbers comprise thousands upon thousands of individuals. Individual people who have their own aspirations, hopes and plans for the future.

From their perspective, the right to reside in Australia is often of enormous value — for reasons including to be reunited with family, to take advantage of our safe society or Australia's exceptional opportunities for education or entrepreneurship. It can often be a similarly important issue for a prospective student or temporary resident.

So the decision to grant a permanent visa or not is usually a life-changing decision for the applicant and their family.

And with 43 percent of our population having direct family links with another country, there is effectively a huge network around the world of people with a relative already living here and possibly interested in coming here.

This interest is reflected in the recent news that Australia topped the Lonely Planet Travellers Survey late last year as the destination travellers most want to visit next for an extended break of one week or more, and we also ranked first in the poll as the favourite country that travellers have visited.

Clearly, we are an attractive nation for people to visit or settle and so we shouldn't be surprised that the granting of visas is the subject of intense interest — the stakes are high. And so it also shouldn't be a surprise that sometimes disappointed applicants pursue legal action.

This pressure has clear implications for the administration of migration law by my department, and your work as lawyers or members of the migration advice profession.

On our part, we need to make lawful and explicable decisions, based on fair and reasonable dealings with our clients, and in a culture that is open and accountable. And we must also ensure that delivery meets government programme objectives.

And we need to support the migration advice profession with accurate and timely information, as well as the most simple and consistent decision-making procedures possible, which you can use to assist your clients.

Today, I would like to speak about how we can both achieve our common goal of better service for our clients.

I will briefly reflect on the legal and accountability framework in which my department works, and how this influences the work of our in-house lawyers, then outline how the reform and improvement programme underway at DIAC will bring benefits both to our clients and the advice profession, and finally discuss the future regulation and engagement with the migration advice sector.

Before I do that I will give you a quick overview of the environment in which my department operates.

A week in the life of DIAC

I visited our Victorian office between Christmas and New Year and was, quite frankly, surprised at the volume of work underway during an otherwise 'quiet' period for many Australian service organisations.

In that office alone, 770 clients were served at the counter, nearly 5000 calls were answered at the Client Contact Centre and almost 3000 calls were answered by the Translating and Interpreting Service, on the two days we opened between Christmas and New Year.

Recognising that we provide services at the borders and in other areas on a 24-hour a day basis, during a typical week, my department will:

- receive over 30 000 phone calls through our contact centres,
- grant nearly 3000 visas for permanent stay in Australia
- grant citizenship to nearly 2000 people
- and — as I will discuss further in a moment — be a party to the resolution of around 100 matters which have reached the stage of litigation.

Just about now, QF94 from Los Angeles is arriving a few kilometres away at Tullamarine, and departmental officers are standing by to process hundreds of passengers, the decision to admit a person to Australia taking less than a minute in most cases.

Each of these thousands of interactions with clients at the counter or on the telephone requires action or a decision to be made by departmental staff. And each of those decisions needs to be made lawfully and is then often open to scrutiny by a range of administrative review bodies or the courts, sometimes years after the decision has been made.

We also have to work with people who choose not to follow the rules: who arrive without a visa or using false documents; or who overstay their visa. A few — a very, very small number in both absolute and proportionate terms — are required to be detained to guarantee their availability pending resolution of their situation. As we all know, the powers of departmental staff in this area are very significant and thus have to be exercised fairly, reasonably and lawfully.

Sometimes our clients can be particularly challenging: where there are identity, or mental health, or very complex family relationship issues. And it is in this area that we must be at our most professional — where we have to meet the highest standards of behaviour and accountability.

The High Court judgement late last year in *Nystrom* v *Minister for Immigration and Multicultural Affairs* provides a glimpse of some of the complex issues, concepts and legislation my officers are often required to administer. The court commented on the 'tortuous legislative history' and evolution of the legislation.

Clearly, a wrong decision of any sort is unacceptable, but especially those decisions that affected Cornelia Rau, Vivian Alvarez and other people held unlawfully.

In these matters, the department made clear and substantial mistakes, and while we can't undo those errors, we have apologised fully and frankly to those affected, as well as making other reparations.

The inexcusable mistakes made and the subsequent analysis of them by Mr Mick Palmer, Mr Neil Comrie and the Commonwealth Ombudsman do demonstrate the cultural change required as well as the pressures and risks we must overcome in our daily work. [1]

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[1] Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau, Mr Mick Palmer AO APM, July 2005.
Inquiry into the Circumstances of the Vivian Alvarez Matter, Report by the Commonwealth Ombudsman, of an inquiry undertaken by Mr Neil Comrie AO APM, September 2005

As a result, we are implementing an ambitious and extensive reform package, with literally no area of the department untouched by these changes. As I will outline later, we have achieved substantial progress with these reforms, but there is still much more to do.

It's important to remember that while we are implementing this comprehensive reform agenda, we are still working with clients to deliver our 'business as usual' programmes in the areas of permanent migration and temporary entry, refugees, humanitarian entry, citizenship, multicultural affairs and settlement.

If your car is not working, you stop the engine while you fix it, but we don't have that luxury — we still have to respond to over 30 000 phone calls and grant 3000 permanent visas and more than 67 000 temporary visas — every week. We still have to grapple with our detailed and complex legal framework and manage the 2000 plus litigation matters we have on hand at any one time.

This means that in the post-Palmer environment, one of our greatest challenges is to marry the need for lawful, fair and reasonable decisions to the expectations of our clients and stakeholders for swift service.

This is a good moment to mention the competing policy objectives which shape the legal framework and how we administer the migration law.

There is a strong and reasonable expectation from clients and executive government that our processes and rules will be easy to understand, and that we will be able to administer these rules flexibly to provide a good outcome rather than just following process.

The government also understandably demands certainty of outcome. From this perspective, the best decisions will never reach the tribunals or courts because they are so well-made that any legal challenge will fail.

As I said before, there's a conundrum to consider here in that each individual person and their case is unique, but taken together over a year, these unique cases collectively constitute the policy or programme outcome for that year. And of course, our responsibility to the government is to achieve standard outcomes and targets, which we have to achieve from a vast number of individual circumstances and cases.

With these competing expectations — simplicity and flexibility, to be married with certainty — my department deals weekly with the thousands of decisions and interactions I have already outlined.

And in an environment of mass decision-making where the merits of an applicant or the issues are usually clear-cut, there is always a proportion of very complex cases which require special treatment.

I will come back to how we balance the resolution of the exceptional cases with swift decision-making a little later.

But first, we need to look at how the complexity of immigration law and our accountability requirements feed into this environment.

Immigration law and accountability

I mentioned immigration law has been a highly contested area of public policy, ever since the Immigration Restriction Act 1901.

The enduring power to issue visas derives from the minister, but with 3 500 000 visitor visas and over 150 000 permanent visas issued in a year, it is clearly unworkable for the minister to issue every visa.

The minister and parliamentary secretary do have intervention powers to override decisions of the department in specific cases, and the minister also keeps some other decision-making powers such as the decision to cancel visas on certain grounds.

A range of accountability mechanisms have grown up over time to ensure the delegated decisions made by staff are appropriate.

This has included over time the *Administrative Decisions (Judicial Review) Act*, the Freedom of Information mechanism, the powers of the Commonwealth Ombudsman and the Human Rights and Equal Opportunity Commission and the Migration Act specific judicial review scheme.

We also have merits review through the Migration Review Tribunal, the Refugee Review Tribunal — and in some cases the Administrative Appeals Tribunal.

These mechanisms put immigration policy and decision-making at the forefront of administrative law contestability.

To minimise the risks from a poorly made decision, successive governments have established detailed policies and procedures.

There were also a number of critical external reports in the late 1980s, which recommended the codification of immigration rules into legislative provisions.

Accordingly, since 1986, the Migration Act has changed from a slim volume of broad principles to now encompass more than 550 provisions, more than 1900 pages of Regulations and 140 visa subclasses.

As an example, in 2005, 1100 amendments were made to the Migration Regulations.

The legislation we administer regulates detention of unlawful non-citizens, the operation of our borders, offences in relation to facilitation of illegal entry, search and seizure of people and things, judicial review, merits review, procedural requirements, eligibility requirements, the actions of sponsors, removal and deportation and a plethora of other matters.

It is complex – reflecting our sophisticated policy and operational environment.

It is large – representing real challenges for supporting staff in decision-making.

And it is highly contested – reflecting the nature of the decisions involved affecting as they do the lives of individuals.

In 2007 we will receive more than 3000 applications for Administrative Appeals Tribunal and judicial review.

In 1986 our litigation cases were in double figures.

In the past financial year we resolved 5000 litigation matters. Significantly, 94 percent of these were resolved in favour of the Minister.

The complexity and volume of regulation makes administration especially challenging, and opens up risks which need careful management.

For instance, one of the matters for which we were rightly criticised in the Palmer and Comrie reports was the "process rich, outcomes poor" nature of aspects of our operations.

In other words, it's not enough to tick the boxes in making a decision.

We also have to be mindful that we have some very significant powers — such as detention — which need to be exercised carefully.

So we now work to ensure our decisions are fair, reasonable, transparent, well-supported by evidence, properly recorded and also lead to improved outcomes.

My staff issuing visas are at the centre of a set of competing forces: the differing expectations of stakeholders, a complex legal regime, the need for strong and effective risk management, and demanding accountability requirements.

They are supported by a team of 120 in-house lawyers, ably led by Robyn Bicket, our Chief Lawyer.

Robyn is fond of pointing out to me and the executive of the department that there is nothing in our legal framework which is not there for a policy or business reason — the 'lawyers don't create complexity just for the fun of it'.

In many respects our legislative framework is reflective of the interplay between the competing objectives I mentioned before. There has been at least in part a legislative arms race with ever increasing specification of limits, criteria, and requirements to ensure certainty of outcome and clarity of purpose in response to challenge.

It is perhaps ironic that this may ultimately contribute to reduced flexibility and increasing complexity which undermines clarity and fair outcomes.

This portfolio is by no means alone in this challenge. It was recently observed by one commentator on the occasion of the Administrative Review Council's 30th anniversary that the Australian Parliament had passed more legislation in the last 14 years than in its entire history prior to that time.

In a perfect world we would probably start again with the blank piece of paper, but we must work with what we have and seek to reform it consistent with government priorities. Robyn and her team are also taking a greater leadership and governance role to ensure the health of our immigration legal framework. This also supports the organisation to ensure legal compliance and foster fair and reasonable dealings with our clients.

Our legal area now also has oversight of our procurement and contract management processes — a critical area where we are rightly held accountable for our performance, even if we are not actually doing the work. The lawyers' role is crucial to improving organisational capability and oversight in this area.

I should add that we are one of the largest spenders on external legal services among the major Australian Government departments and agencies, coming in just behind the Tax Office with a bill of $34.7 million in the past financial year.

Post-Palmer reform of DIAC

I've already mentioned the reports by Mr Mick Palmer and Mr Neil Comrie, which drew a line in the sand for the department's operations.

They noted a 'culture that was overly self-protective and defensive, a culture largely unwilling to challenge organisational norms or to engage in genuine self-criticism or analysis'.

More broadly, the Palmer and Comrie reports focused on leadership, governance, training, systems support, the relationship between policy development and implementation, client service delivery and records management.

The reform required went well beyond the specific failings which resulted in the detention of Ms Rau and the removal of Vivian Alvarez.

In response, we have done a great deal of work since my appointment as Secretary in mid-2005.

We have had a year and a half of comprehensive reform and improvement programme, covering almost every aspect of the department's activity, but especially cultural change and systems change — both to support excellence in decision-making and client service.

It was essential that we have a shared understanding of important values such as the need for excellent client service, lawful decision-making, openness and accountability.

These requirements were discussed extensively and quickly refined into three strategic themes around which we have aligned the department's culture, planning and operations.

They are:

- an open and accountable organisation
- fair and reasonable dealings with clients, and
- well trained and supported staff.

We sum all this up with our tagline — people our business.

The agenda for change has been backed up with nearly $780 million in additional and redirected funding to be spent over five years.

Our Palmer Plus project in response to the original report has now expanded to 113 initiatives at last count, many of which are completed or up and running.

Fundamental improvements have been made in our client service capability through a range of initiatives covering risk management, planning, training and better support systems.

A key objective of this work has been to change the culture of the department from that described by Mick Palmer.

Among other initiatives, we have made a concerted effort to build the leadership capability of staff, and establish clear organisational values and ethical decision-making.

I am aware of the enormous effort I have asked from my managers and staff.

The difficulty of the task was reinforced in the first week of this year, with the report that the United States Citizenship and Immigration Service has concluded it is unable to manage its existing workload. US Immigration officials are reported as saying they are yet to update an antiquated, paper-based application process ahead of the government granting a new path to citizenship for as many as 12 million illegal immigrants already living in the United States. [2]

It's a reminder of the need to persevere with out own business and cultural transformation, so that we can significantly improve our business processes, information systems and client service for years to come.

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[2] 'Immigrant Processors Fall Behind: System Overwhelmed Even Without 'Amnesty,' Guest Workers'
By Spencer S. Hsu, The Washington Post, January 4, 2007; Page A03

You may be aware that Mick Palmer has come on board — literally — to chair the Advisory Board for the College of Immigration. The College was a key element in responding to his reform proposals and is now a central element of our drive to equip staff with the skills and knowledge for better decision-making and improved client service.

I was also pleased to see the Commonwealth Ombudsman say late last year that there had been 'significant culture change' in the department.

And in the recent release of a report on detention facilities, Human Rights Commissioner, Graeme Innes said[3]:

> 'It is clear to us that the Department of Immigration and Multicultural Affairs has gone to great lengths to improve the approach and attitude of staff towards detainees in immigration detention centres over the last year.
>
> There have been substantial efforts to improve the physical environment, reduce the tension levels, enhance the programs and activities available to detainees and improve mental health services. [The department] and the detention services provider (GSL) also seem more open to requests, suggestions and concerns voiced by detainees.'

There are recent comments I could quote from other stakeholders, but I will just say that I am heartened by this encouragement while recognising there is still much more we must do.

With this background, I want to clarify how we are working in the post-Palmer environment to deal with the issue I mentioned earlier of mass decision-making but swift identification of and resolution of exceptional cases.

We have committed strongly to well-trained staff. I have already mentioned the College of Immigration and our broader training priorities include client contact, quality decision-making, and instilling stronger leadership and values-based behaviours across the department.

One of the key supports for improving the swiftness, cost and efficiency of our mass decision-making rests with our $500 million investment in upgraded information technology known as Systems for People.

This project is already rolling out in a phased process. To give you some idea of how this will help, one of the first upgrades provided my staff with a single view of a client's history, so that it was no longer necessary to access the different legacy systems separately. This has greatly reduced the risk of an officer missing crucial details through differing spellings of a client's name or for other reasons.

In the future, we are looking at portals for particular functions and this could include a portal for migration agents, building on the gateway we already operate.

Identity and verification of identity is one of the key issues we have to address to ensure the integrity of our visa administration in coming decades, and Systems for People will help with this along with other projects we have underway in the area of biometric testing, such as the SmartGate trials being rolled out at some airports.

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[3] *Summary of Observations following the Inspection of Mainland Immigration Detention Facilities*, Human Rights and Equal Opportunity Commission, released 19 January 2007

To manage the exceptional cases, we have implemented a new case management framework to facilitate the resolution of exceptional cases, where clients have complex circumstances or are especially vulnerable.

We are also looking at our business processes with a view to substantial redesign. With around 80 centres where processing and decision-making occurs, around 140 different visa categories and so much legislation, there are potentially significant gains to realise from simplified and consistent business rules.

This slide shows how only a handful of visa categories cater for the vast majority of clients — other classes are very much 'niche' or boutique' visas. We are looking at the case to achieve simplification.

This work requires care, thoughtful reflection and staging to ensure optimal implementation. Our 'tortuous legislative history' is not something to repeat where avoidable. Much can be done without legislative change but the pervasiveness of legislative rules will make continuing amendment a reality as we reform business and client service approaches.

Regulation of the migration advice profession

These improvements in process and decision-making will have significant flow-on benefits for your work.

I'm very aware that you collectively comprise a pool of hands-on knowledge about the quality of our services and I am keen to tap into that experience and expertise.

As part of our reform and improvement programme, we have run a scan over our stakeholder relations and recognised the clear need to lift our game.

Although having said that, I think our relations with the migration advice profession have been one of the more successful exceptions in this picture.

Our engagement with stakeholders in general offers an opportunity to understand how our activities impact on the wider community, and then make sure we understand community needs and expectations.

We necessarily had more of an internal focus while we developed our reform and improvement programme following the release of the Palmer and Comrie reports.

It's now important that we communicate and engage with our external stakeholders with a view to developing as far as possible, a mutually agreed view of what we are doing and where we are heading.

A specific example is the forthcoming industry review of migration agents, which will be an opportunity to address the broad relationship between the migration advice profession and the department, as well as drill down on some specific issues, such as the dual registration of lawyers.

It's important we keep the regulation of the profession and the purpose of the review in context.

The migration advice industry was first regulated in 1992 with the introduction of the Migration Agents Registration Scheme or MARS. Taking a broad view, the purpose of MARS was to introduce some consumer protection for vulnerable clients, following complaints of poor practice and exploitation by migration agents.

The Scheme was reviewed in 1994, but it was the review in 1996-97 that led to the move away from government regulation towards self-regulation and the appointment of the Migration Institute of Australia (MIA) to do the work of the regulatory authority, the Migration Agents Registration Authority (MARA).

Further reviews in 1999 and 2001-02 recommended extension of this regulatory framework.

As a result of the Deed of Agreement subsequently negotiated with the Migration Institute of Australia Ltd in 2003, the Commonwealth is obliged to hold a further review by June 2008.

The upcoming review will allow the progress of the industry in implementing the 27 recommendations of the 2001-02 review to be assessed. These issues were essentially milestones to be achieved towards self-regulation and cover areas such as consumer protection and the operation of the industry and its regulator. The review should also identify any measures that need to be implemented to further strengthen the existing scheme.

I expect it will cover the following issues:

- whether the industry is ready to move to full self-regulation, including should the MIA continue to act as the MARA
- whether or not lawyers should be required to be registered
- complaints handling by the MARA
- effectiveness of the Continuing Professional Development scheme for agents
- effectiveness of legislation surrounding registration of agents, and
- options for priority processing by DIAC of applications lodged by registered migration agents.

I encourage everyone in the profession to participate in this review through the appropriate channels and use it to set a solid path for the future.

I also encourage you to provide feedback to my department through the Agents Initiatives and Monitoring Section run by Susan Pegg.

For instance, there are many issues common to the not-for-profit and for-profit sectors on which you can provide feedback to us, such as timeliness of our advice and decision-making, the clarity of the information we provide, ways we can improve our responsiveness and so on.

In the same way, these and other issues cut across any boundaries between legally-trained migration agents and non-lawyers.

I do see a special role for yourselves as legal practitioners in working with us to provide feedback on the effectiveness of the laws and to improve the communication of the law to clients.

To achieve these aims, it is essential that we receive consistent arguments and feedback that synthesise the views of as many of the profession as possible. The more you are able to speak with one strong and clear voice, the more impact you will undoubtedly have in influencing the future of the migration advice profession.

I must add as an observer of the migration advice profession over past years, that I have seen a clear improvement in the quality of advice you provide, the depth of understanding demonstrated by your clients, and an increase in professional standards brought about through initiatives such as improved training.

Conclusion

I think it's important that as we work to build a closer and more effective relationship that we each recognise where the other is at.

For our part, we are working through an ambitious reform agenda but have some considerable way to go.

It's essential that we have your engagement at this stage of the process so that we can make the reforms both effective and helpful in meeting your needs.

From my view, I recognise the enormous capability and expertise of the legal migration advice profession, and some of the difficulties you face in moving the profession forward in a united way that will maximise your influence on government and so assist your clients.

Nevertheless, there is a clear opportunity to build on the existing solid relationship between my department and the profession, so I look forward to working with you to achieve that.

Thank you.