

DAVID MANNE

Post-Palmer reform of the Immigration Department: progress and pitfalls

This chapter focuses on the so-called 'post-Palmer reform process' and on how the Immigration Department ('Department') is progressing with it, rather than focusing on government policy. Since the Mick Palmer and Neil Comrie reports,² to what extent has there been significant reform within the Department in areas identified by them, and are there areas in the reform process which have been deficient? While it was government policy to accept, comprehensively, the recommendations made by Palmer and Comrie,³ reform of government policy itself was clearly outside their briefs. Nevertheless, these policies, which continue to amount to one of the toughest, most legally controversial, hostile and extensive anti-asylum seeker systems in the Western world – including mandatory detention; temporary protection and humanitarian visas; 'excision' of Australian territory; naval repulsion of asylum seekers arriving by boat; and the 'Pacific solution' – provide crucial context for the reform process.

First, let us take stock, and recall where we have come from in recent times. During 2005, the shocking and tragic circumstances of the Cornelia Rau and Vivian Alvarez cases awakened in Australians a recognition of the scandalous abuse and cruel indifference which the Immigration system was perpetrating on innocent and vulnerable people, including asylum seekers. A number of significant developments flowed from this. The government rejected credible calls for a Royal Commission and instead established the Palmer Inquiry, amidst much scepticism as to whether Mick Palmer could and would do the job required. Mick Palmer's report surprised many sceptics – it ultimately made findings constituting one of

the most devastating indictments of a major government department in Australia's history.

The key problem areas of Departmental practice which Palmer identified centred on two things: a 'culture that is overly self-protective and defensive, a culture largely unwilling to challenge norms or to engage in genuine self-criticism or analysis',⁴ and a systemic approach and 'entrenched culture' described as 'fixed on process and apparently oblivious to the outcomes being achieved'.⁵ It was largely in response to the Palmer Report – and the Petro Georjiov MP-sponsored-and-proposed Private Members Bills and the compromise deal subsequently struck with the Prime Minister⁶ – that a process of 'wide-ranging, systemic reform' of the Department was promised and commenced in the first half of 2005.

So what has been achieved since then? To what extent has there been significant reform within the Department in the areas identified by Palmer; and are there areas where the reform process has been deficient? In addressing these issues, I want to give an impressionistic – rather than systematic – sketch of some key areas and themes from the viewpoint of a legal practitioner and advocate heading a leading agency whose daily work includes dealing directly with some of the most complex and difficult interactions with the Department for clients and stakeholders. I think a useful way to address the question of progress is to compare some examples of problem areas in Departmental operation before and after the Palmer Report under two broad categories: treatment of clients, that is, *people*, who must always matter most in the administration of the Immigration system; and treatment of stakeholders.

Treatment of clients

Processing of boat arrivals

The Refugee and Immigration Legal Centre Inc is somewhat uniquely placed in comparing the Department's approach to processing of the claims of asylum seekers arriving by boat informally during, say, 2001, and then in 2006. During 2001, for example, we provided independent legal representation to groups of mainly Afghan and Iraqi Protection Visa applicants held in remote detention centres such as Curtin Immigration Reception and Processing

Centre (TRPC) and Port Hedland IRPC. The Department named these processing regimes in remote detention 'Taskforces'. Taskforces essentially involved very short periods of approximately one to three weeks in which a team of legal advisers advised and prepared full written, individual applications for refugee status⁷ for asylum seekers in large groups, which were then lodged and assessed by Departmental officers in client interviews.

As coordinator of legal teams which performed some of this work, our overwhelming experience was that the Department brought a 'siege' mentality to much of the work under this process, in which there were serious deficiencies in procedural fairness. There were significant delays in clients being able to access legal assistance, with some clients being held in 'separation'⁸ or incommunicado detention for many months before ultimately being allowed to access legal help. Treatment of clients was often confusing, hostile and at times intimidating from the outset, framed by an institutional suspicion which started with the assumption that these people may *not* be, or probably *were not*, refugees, but rather, cynical opportunists. Unrealistic and overly onerous conditions were often imposed by the Department on the advice and preparation of claims. Clients were interviewed by Departmental officers who were often poorly prepared or equipped, with insufficient understandings of the clients' claims, and cultural and country background. Questioning was regularly irrelevant, disrespectful, and/or aggressive. The role of the legal adviser was commonly severely restricted and not sufficiently appreciated, resulting in a general disinterest or lack of engagement in legal submissions made on behalf of clients. Finally, there was a lack of consistency in approach and decision-making, to the extent that it was often difficult to discern why some cases were approved while others were rejected.

In the words of Palmer, then, the processing regime in place in 2001 was dominated by 'rigid, step-by-step protocols'⁹ designed by Senior Immigration officials in Central office and imposed in ways that were inflexible and procedurally unfair.

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Some five or so years later, in late January 2006, a legal team from my organisation, including myself, went to Christmas Island on

another Departmental Taskforce, as independent legal advisers. This time, the task was to provide legal assistance to the 43 West Papuan asylum seekers who had arrived some two weeks earlier. Our professional experience was somewhat rare and unique. It is clear that the processing of the West Papuan claims was seen as a significant test case of the new, reforming Department. As I remarked publicly shortly after 42 of our clients were granted Protection Visas in late March 2006, our clients were grateful that justice had been done; that their treatment and the due legal processes provided by the Australian government and the Department had been fair, reasonable, just and decent. What features of the process contributed to this judgment?

The West Papuan refugees were treated with respect and dignity from the time of their arrival. From our observation, they were treated, quite properly, as if they *may well be* refugees and accordingly, may have certain rights and needs. They were promptly provided with experienced, competent legal representatives, who were given sufficient time to both advise and prepare detailed written claims for submission in support of each person's formal application for a Protection Visa. These claims were examined by a Departmental delegate at an interview with the client, legal adviser and qualified interpreter present. Clients were treated with respect and dignity, and given a genuine opportunity to put their case forward. Post-interview, there was reasonable opportunity for lodgement of detailed legal submissions. There was great flexibility and decisions about the functioning of the process were made in a general spirit of cooperation and guided by the aim of achieving fair and reasonable results.

Of course, this is not the full picture. In response to Indonesia's fury and threats over the grant of Protection Visas to the 42, the government presented a radical, rearguard retreat from a commitment to such fair and decent treatment, with the introduction of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2006 ('offshore processing Bill'), which sought to preclude any future refugee applications by people arriving by boat being made in Australia at all, let alone fairly. It represented the sudden ushering in a new era of extreme harshness and potential cruelty – a new policy of 'Radical Rejection'.¹⁰

Essentially, at the first sign of external political trouble, the Australian government's commitment to a fair and decent process for asylum seekers appeared to be surrendered. This revealed the radical contradictions in government policy and its reform principles, and thus the inherently fragile and tenuous nature of reform in this context. But one legacy, at least, of the Papuan processing is a concrete case study of how processing of asylum claims – albeit illogically, irrationally and at exorbitant expense conducted on Christmas Island under government policy – should and can be done properly. It is an important precedent.

Case management, including vulnerable clients and those with 'complex' circumstances

In the pre-Palmer era, one of the enduring and intractable problems centred on the Department's treatment of people detained, as well as particularly vulnerable people in the community. A number of common concerns arose. There was a lack of 'case coordination' – that is, a lack of a holistic understanding of and approach to clients' often interrelated health, welfare and legal needs – and a lack of a consistent approach to clients' cases within the Compliance and Detention areas of the Department. There were no proper systems for risk assessment regarding a client's needs and rights, so that the Department was routinely responding in a rigid and myopic way to an individual's immigration status. Finally, there were numerous structures and processes which obscured and avoided responsibility for a client's needs, to the extent that it was often difficult to discern to whom such concerns should be addressed.

I briefly refer to a refugee case which provides a graphic illustration of the terrible problems and consequential damage resulting from such an approach. The following was far from an isolated incident. The case involved Ibrahim,¹¹ a stateless asylum seeker from the Middle East, who had initially arrived in Australia informally. He suffered from a mental impairment which severely diminished his capacity to accurately present his claims for refugee status. Ibrahim applied for protection, the application was refused, and he continued to remain in detention for a number years. Ultimately, he was released from detention by way of a *habeas corpus*

order of the Court. Upon his release he underwent, for the first time, a full needs assessment when a non-government agency with expertise in assisting asylum seekers became concerned about signs of potentially serious psychological issues. Expert health assessments revealed that Ibrahim had a serious intellectual disability which directly diminished his memory and capacity to answer questions about his refugee claims accurately, especially when under pressure. Apparently, such disabilities are difficult to detect with a non-expert eye. It became clear to welfare workers that the client had never given an accurate account of his claims, and that it would be necessary to contact family overseas to help with reconstructions of his real history. This had not been identified by the Department when he was in detention. Ibrahim was then able to access intensive, expert legal help to re-state his claims. Upon a Departmental reassessment of his claims, he was found to be a refugee under the United Nations Refugees Convention,¹² and a Protection Visa. Had the Department undertaken a comprehensive, holistic assessment of Ibrahim's needs, it is likely that they would have detected barriers to him properly presenting his claims and could have explored avenues to rectify this situation. Of course, this may have not only resulted in quicker attention to treatment of the client's health and welfare needs, and less damage to him, but also the timely recognition of refugee status and release from incarceration into the community.

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Progress by the Department after the Palmer Report is such that there is now a reduced chance that situations such as the one just described would happen now. This is largely due to one of the reform flagships, Case Management (and the related Community Care Pilot),¹³ which have been developed and commenced implementation. These are specifically aimed at the better treatment of, and provision of targeted, coordinated, holistic assistance to those with 'complex' circumstances, and particularly disadvantaged or vulnerable clients.

Although it is too early to fully assess the case management model, some positive and tangible progress has been made. For example, in a number of cases, the Department has quickly ensured

that a holistic assessment of a client's needs is undertaken. This innovation has resulted in prompt referral to independent agencies with expertise in legal, health or welfare matters. It has been facilitated by the formalisation and funding of processes which are aimed at a higher and more consistent degree of collaboration and coordination amongst key stakeholders. For example, the Australian Red Cross, International Organisation for Migration, and certain health and welfare services and legal providers with expertise in working with asylum seekers and migrants are now working together with the Department to comprehensively deal with complex cases. We have also witnessed the Department shift from an approach of apprehension about seeking and acting on expert health and welfare advice, to one of readiness, if not, at times, enthusiasm, to do so. One tangible initiative has been the introduction of Departmental Case Managers and Detention Review Managers, tasked with managing not only holistic needs assessment, but also assessment of whether detention is lawful and reasonable.

Despite some substantial improvements, one of the principal concerns of Case Management remains lack of consistency in implementation and service delivery. Some clients have still fallen through the cracks, and have not been properly assessed in relation to health needs and legal rights, resulting in potentially dire consequences. These problems have been particularly, but not exclusively, present for clients in the community. Although the Compliance Section of the Department has vastly improved its practices, with flexible and reasonable treatment of clients now becoming the norm, application of Bridging Visa laws still suffers from unevenness on matters such as work rights and duration of visa grant. There also continue to be incidents involving imminent or actual manifest injustice and harm to clients – including on issues concerning detention and removal from Australia – which have not been properly identified by the Department unless and until there has been active intervention by non-governmental organisations or individuals. Given that one of the hallmarks of fairness in public administration is consistency, these are substantial concerns.

Finally, the tension between imperatives of the reform process and other government policies has also been evident in Case Management and the Community Care Pilot. Whether 'special care' ser-

vices should continue for a client who seeks judicial review or Ministerial intervention is one of clearest cases in point. More work remains for the Department to ensure that the potential tension between the imperatives of 'removal'¹⁴ and proper treatment of clients is *rationally* resolved in favour of the client's rights, needs and dignity – that is, in a way which is 'fair and reasonable', and with recognition that to achieve this aim, removal may, at times, need to be deferred while the client explores options and is cared for.

Processing of 'offshore' applications

The post-Palmer reform process has rightly developed a fresh framework of values for the Department, which include it being 'an open and accountable organisation', and 'having fair and reasonable dealings with clients'.¹⁵ The Secretary has stressed that it is essential that these values be applied to work done by the Department 'offshore' as well as in Australia.¹⁶ Regrettably, there is no substantial evidence that the post-Palmer reforms are taking hold in the operations of overseas posts, where much of the Department's work on individual visa applications is done. Much 'offshore' processing is nothing short of eccentric in the context of contemporary Western legal systems.

A compelling case in point is the current approach to the processing of applications made by clients under the Refugee and Special Humanitarian Program. Openness, accountability, fairness and transparency continue to be almost *non-existent* in the processing of these claims. For decisions which involve matters that could hardly be more grave – family reunion and protection from persecution – written refusals are issued with a *pro forma* statement which does not disclose any specific reasons for the failure of the particular application. Legal advisers are left with no idea of the basis of the refusal, and applicants and their Australian 'proposers' are commonly left baffled and distraught.

The absence of transparency is so fundamental that copies of Departmental file records obtained under Freedom of Information provisions rarely give any further hint of the specific reasons for refusal. If they do, it is commonly a comment as oblique and incomprehensible as 'claims not current'. In the case of an Afghan widow with five young children, from a persecuted minority ethnic group, stranded illegally in Pakistan and from a family with an

adverse political profile in Afghanistan, I am reliably informed that this phrase is code for a judgement that she no longer has a need for human rights protection and can return to Afghanistan. Such judgment is completely at odds with trends in decision-making for Protection Visa applications made and assessed by government officials in Australia. When advisers seek explanations for such refusals, it can be left to another Departmental official to read between the lines, if there *are* any lines. In many cases, there are not. In processing of 'offshore' applications under the general migration program, similar systemic problems persist. They include arbitrary use of documentary or expert evidence, and the application of sweeping, unsupported cultural stereotypes on issues crucial to determination of the visa application, such as age, family relationship and identity.

Treatment of stakeholders

It is also important to ask whether there has been post-Palmer progress in the treatment of stakeholders. Why does this issue matter? Principally, if stakeholders are doing their job properly, they should be well-positioned to comment on the things that matter most to clients in their interactions with the Department. They should also be able to help shape the Department's approach to clients and their communities, enriching its understanding of the content of its self-proclaimed duty to have 'fair and reasonable dealings with clients'.¹⁷

The Secretary and his Department have prioritised stakeholder engagement, so that stakeholders are to be considered 'an asset, rather than a liability or obligation'.¹⁸ However, stakeholder engagement by the Department has historically been very problematic. There has been a lack of genuine dialogue and preparedness to openly discuss operational or client-based issues, including defensiveness and withholding of information about the bases of decisions. There has been a lack of responsiveness to requests for information about clients or systemic issues. In some senior ranks there has been a 'fortress mentality' and inadequate dissemination of key information to less senior departmental officials. Key stakeholder fora have failed to have appropriate representation of those working directly in the fields of relevance. Finally, there has been

a reluctance to consult with known critics and an institutional misunderstanding and mistrust of legal practitioners.

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Post-Palmer, there have been some substantial and tangible improvements, both attitudinal and practical. On the attitudinal front, the Department has displayed a far greater openness and interest in engaging in meaningful and respectful dialogue with stakeholders. This has included an increased willingness at both State and national levels to discuss and debate issues of concern on client-specific, as well as more systemic issues. In relation to practical measures, there has been a significant increase in the development of fora for dialogue, such as the establishment of Client Reference Group meetings in some States.

An area of particularly important progress has been the inclusion of key stakeholders on national steering/reference or advisory groups to collaborate on the development and implementation of new reform programs, such as the Community Care Pilot. Stakeholders chosen have been from agencies which directly deal with the issues at stake, including legal practitioners. The establishment of the Detention Health Advisory Group to provide the Department with advice regarding the design, implementation and monitoring of improvements in health care (particularly mental health care) for people in immigration detention,¹⁹ comprising experts from right across the health sector, including some well-known critics of past policies and practices, has been another significant development. There has been increased follow-through and responsiveness from Departmental officials, greater implementation of stakeholder suggestions, and energetic efforts by senior officials to build relationships across a wide range of stakeholder groups.

Nevertheless, some considerable problems remain. Levels of responsiveness have been inconsistent. Consultation processes have sometimes been scattergun, confusing, and poorly coordinated across different fora. Frequent changes of key personnel have produced a lack of continuity. The community legal sector – which provides a substantial proportion of the legal assistance in the relevant areas of the reform process and more generally – has continued to lack representation at peak fora.

Stakeholder engagement is also vulnerable to the dictates of external government policy factors. For instance, in early June 2006, the Department held a day-long debriefing session with key agencies and officials involved with the West Papuan Taskforce and settlement of the clients in Melbourne. It was a commendable idea, but the session was held at the very point when the 'offshore' processing Bill had been introduced into Parliament and looked likely to become law. The effect of the proposed laws would have been to deprive all future boat arrivals of the ability to apply for protection in Australia. We were being debriefed on lessons learnt about something which looked likely to be non-existent in the near future.

Conclusion

The shape and trajectory of the reform process is very fragile and tenuous because it remains ever-vulnerable to the dictates of the external political environment. Only 400 or so asylum seekers arriving by boat in Australia between 1989 and 1992 triggered the introduction of a mandatory detention system. Further asylum seeker boat arrivals that were relatively minuscule by international standards triggered the legislative 'excision' of parts of Australian territory pre-election 2001. Indonesian fury at the grant of protection visas to 42 West Papuans triggered an attempt to legislate that all future boat arrivals be denied the right to apply for protection in Australia, and be 'exiled' to Nauru instead.

The reality is that the fundamental planks of the government's Immigration policy are in many respects at odds with the principles of the Departmental reform process, which is therefore vulnerable. Framed by fair and reasonable treatment of clients, the reforms are potentially limited because, in many areas, we do not have fair and reasonable government policies. Adherence to the reform imperatives depends on the external environment remaining substantially unchanged and benign.

The situation of eight Burmese asylum seekers who arrived by boat in August 2006 is a stark reminder of this tension. The then Immigration Minister, Senator Amanda Vanstone, who had a discretion to allow the men to remain in Australia and apply for protection under Australian law, exercised her discretion *against* them,

sending them to possible indefinite exile in Nauru. No reasons were given; no legal review or other redress was available. This decision ran radically counter to the reform process in at least two key respects: first, it deprived the Burmese men of access to the due legal processes and other benefits of the reform process itself, and second, they have become subject to a policy which has, in recent years, produced terrifying human destruction of many, rather than holistic care. Rather than operating on values of openness and accountability, it is a policy which can be characterised as 'out of sight, out of mind, out of rights'. It is also, it would seem, outside the reform process.

Ultimately, the reform process has involved some notable improvements in numerous key areas, while poignant tensions and problem areas remain. The reframed core principles are correct, and much will depend on their effective and extensive implementation, as well as the political environment remaining relatively unchanged and benign. In a broad sense, much will depend on how focused, disciplined and robust the Department can be in ensuring that the principles and programs of the reform process are implemented without fear and *in favour* of the government's policy to comprehensively accept and act on the recommendations of the Palmer and Comité reports. The Department must do so with as little interference or infection as possible from other key aspects of the government's Immigration policy, which are at fundamental odds with this agenda.

Notes

- 1 Hereinafter, 'Department' will be used to refer to the Department of Immigration under its various full titles in recent years, such as the Department of Immigration, Multicultural and Indigenous Affairs.
- 2 Palmer, M, *Inquiry into the circumstances of the Immigration detention of Conelia Kaur Report*, Commonwealth of Australia, Canberra, July 2005 [Palmer Report]; Commonwealth Ombudsman, *Inquiry into the circumstances of the Vitian Aluway matter*, Report by the Commonwealth Ombudsman of an inquiry undertaken by Mr Neil Comité, AO, APM (Report no 3 of 2005), Canberra, October 2005.
- 3 Hereinafter, unless expressly stated otherwise, references to the 'Palmer' or the 'Palmer Report' should be read as including the Comité brief and report referred to above.

- 4 Palmer Report, above, n 2, p ix.
- 5 Ibid, p 169.
- 6 The drafting by Liberal MP, Petro Georgiou, of Private Members Bills sought a serious curtailment of the mandatory, indefinite detention system, and the abolition of Temporary Protection Visas. The compromise deal subsequently struck with the Prime Minister represented a significant, albeit seriously inadequate, set of reforms which had the real potential to limit or end the suffering of many still subjected to the system, if implemented quickly and in good faith. They included: provisions for release of children and their families, as well as others from detention centres; quicker processing of refugee applications; oversight of cases involving over two years of detention by the Commonwealth Ombudsman; and oversight of the reform process by an Inter-Departmental Committee chaired by the head of the Department of Prime Minister and Cabinet.
- 7 Under Australian migration legislation, an application for refugee status is an application for a Protection Visa (Class XA). See, in particular, *Migration Act 1958* (Cth) s 36, and Migration Regulations 1994, Schedule 2, clause 866.221 which requires the Minister be satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention (being the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees).
- 8 For an explanation of the term 'separation' detention see, for example, *Report of an Own Motion Investigation into the Department of Immigration and Multicultural Affairs' Immigration Detention Centres*, March 2001, p 13, which states, inter alia: 'Separation detention is an administrative arrangement that restricts a person or a group of persons to a particular area of a detention facility on initial arrival at or before removal from a facility. Detainees are kept separate from the main population of the IDC and are not permitted to make telephone calls to, or correspond with, people in the Australian community'.
- 9 Palmer Report, above, n 2, p 79.
- 10 See further, speech by David Manne for Castan Centre for Human Rights Law: *Boatloads of Extinguishment?*, Forum on the proposed 'offshore' processing of 'Boat People', 5 May 2006, <www.law.monash.edu.au/castan-centre/events/2006/manne-paper-5-5-06.pdf>.
- 11 This man's real name has been changed to preserve confidentiality.
- 12 He was found by a Departmental delegate to meet the definition of a refugee.
- 13 See Departmental Fact Sheet: 'Quality Case Management and the Community Care Pilot', <www.immi.gov.au/about/department/perf-progress/dima-improvements/_fact_sheets/Quality_case_management_and_community_care_pilot.pdf>.
- 14 The term is used to refer to removing a person from Australia, whether voluntarily or involuntarily. See, for example, *Migration Act 1958* (Cth) s 198. Removal from Australia of unlawful non-citizens.
- 15 Transcript of Plenary Address, Transformations Conference 2006, Federation of Ethnic Communities' Councils of Australia, Canberra, Mr Andrew Mercalle, Secretary of the Department of Immigration and Multicultural Affairs, 29 November 2006, p 2.
- 16 Ibid, p 3.
- 17 Ibid, p 2.
- 18 Ibid, p 6.
- 19 See Departmental Fact Sheet: 'Fact Sheet 82. Immigration Detention', at <www.immi.gov.au/media/fact-sheets/82detention.htm>.