SENATE SELECT COMMITTEE ON MINISTERIAL DSCRETION IN MIGRATION MATTERS

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SUBMISSION BY DR MARY CROCK*

The Committee has the benefit of a variety of submissions addressing the changes that have been made to the migration legislation since 1989 when the decision making regime was changed dramatically. The law reforms of that year are often described as the process that saw the 'codification' of migration decision making. This was achieved through the removal of the sweeping discretions vested hitherto in migration officers and the simultaneous articulation in regulations of decisional referents governing most aspects of migration decision-making.

The thrust of my submission is that the process of distilling, solidifying, articulating all the criteria for the making of migration decisions has occurred with insufficient understanding of the broader impact of the changes being made. The 'official' discourse has been about certainty – and even transparency – when the real effect of the codification process in many instances has been to make the process as a whole less accountable, less transparent and less certain – to the point in some instances of becoming arbitrary.

Put simply, the safety nets built into the system – the residual non-compellable, non-reviewable discretions vested in the Minister for Immigration - have lead to a situation where obtaining a favorable result almost inevitably depends less on the merits of a case than on the identity of the intercessor and the personal access that she or he has with the incumbent Minister. It is not what you know, it is who you know that counts.

The central problem lies in the way in which the Australian Parliament has gone about re-constructing the immigration process since 1989. In the 'bad old days' when the Migration Act contained machinery provisions in the form of sweeping powers to grant and refuse visas and entry permits, migration officials were described variously as "angels or arrogant gods".[1] While immigration officials were left free to make their decisions without the oversight of tribunals or courts, concerns about the corruption of the process were rarely voiced. It was only in the late 1980s when migration decision making began to feel the impact of the "new administrative law" that potential corruption was cited as one of the reasons for replacing the powers vested in the bureaucrats with codified rules. The real reason for the changes however, in my view, was not that the broad discretions were unprincipled in the hands of the migration officers. Rather, it was that the courts were seen to be usurping the *power* vested in the administration every time they ordered a decision to be remade on grounds of denial of natural justice or other form of illegality. In 1989,

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1 H Martin *Angels and Arrogant Gods: Migration Officers and Migrants Reminisce 1945-85* (Canberra AGPS, 1988).

codification was designed as much to curtail the power of the courts as it was the power of immigration officials.

The process has been a gradual one that has been no less radical because of the subtlety and incremental nature of the changes made. One of the first and most significant legislative shifts was the decision not to replace the old s 6A(1)(e) of the *Migration Act* 1958 with an equivalent general power to grant visas to individuals in Australia with strong compassionate or humanitarian grounds for remaining in the country. With one stroke of the legislative pen, the generic power to act with compassion and humanity was removed from mainstream decision making – to be channeled ultimately into the hands of a single politician, the Minister for immigration. As the Senate Legal and Constitutional References Committee found in 2000, the focus of discretionary power in this one source has proved an inadequate safeguard for non-citizens who do not meet the narrow legal definition of refugee who nevertheless have genuine fears for their safety if returned to their country of origin. The removal of a generic provision to grant residence on compassionate and humanitarian cases has placed Australia on occasion a risk of breaching its international legal obligations not to *refoule* individuals in fear of torture or other forms of cruel and inhuman treatment.

Within the general (non-humanitarian) migration process, the creation of a legislative vortex, funneling all meaningful power back to the Minister is reflected at various levels. The Minister's residual power stands in stark contrast with the systematic reduction in the powers vested in every other official. One effective mechanism for reducing the scope for challenging general migration decisions has been the fragmentation and outsourcing of the administrative process. This is reflected in what is known as the "front end loading" of the application process. The tasks that used to be performed by migration officials have been reduced as everything from skills assessments to health and character checking has been out-sourced to expert agencies. Where disgruntled applicants used to turn to the government for redress of adverse rulings, immigration officials will now tell applicants that their quarrel lies with the (private) assessing bodies and that their only remedies are to bring common law actions for tort or breach of contract.[2] Immigration officials are directed that they cannot 'go behind' or that they must 'take as correct' the rulings of the private authorities.

What we have seen happen since 1989 is a steady progression of changes, each of which seems to be trying to take immigration decision making back to some fictitious era where the real power (and discretion) was vested in government hands – rather than in those of the judiciary. Well before the *Tampa* hove into the limelight of Australia's political consciousness, Mr Ruddock was saying:

> It is the government, not some sectional interests, or loud intolerant individual voices, or ill-defined international interests, or, might I say, the courts that determines who shall and shall not enter this country, and on what terms.
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> ....
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> Only two weeks ago a decision to deport a man was overturned by the Federal Court although he had been convicted and served a gaol sentence for possessing Heroin with an estimated street value of $3 million. Again, **the**

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2 See Silveira v MIMA

courts have reinterpreted and re-written Australian law - ignoring the sovereignty of Parliament and the will of the Australian people. Again, this is simply not on.[3]

In the context of the present inquiry, the Minister's statements – which have become something of a mantra since September 2001 – show a peculiar disregard for any notion of either a separation or balancing of official powers. At a jurisprudential level, the statements also reveal a strictly formalistic, mono-lineal thinking about the very nature of the administrative process that has worrying implications given the power structures that are now built into the migration legislation. Although the Minister speaks of government 'policy', his ultimate contention is that democracy requires that as the elected representative, his should be the final word in any administrative process. This notion is central to the way the residual discretions contained in ss 351 and 417 of the Migration Act are designed to operate.

This way of thinking is predicated on very simplistic notions of both democracy and the Rule of Law. In sum, the Minister appears to be alleging that because he is elected, he alone should be the source and voice of government policy; and that for the courts or other 'unelected' body to oppose his policies or interpretations of the law is anti-democratic and anti 'the rule of law'.

In my view, this monolithic vision poses fundamental problems within the regime for migration decision making. These problems lie in the failure to see the nuances or variations in notions of discretion in the jurisprudence and legal history on which our system of law is built. The central questions are: Who should have discretion to rule on migration matters? How much discretion is necessary?

These issues have troubled legal theorists for many years. If Australia's experience is any indication, the one certainty is that simple answers to these questions do not always yield the results that might be desired. At the heart of this inquiry is the meaning and function of the word 'discretion'. In the context of the *Migration Act*, the word seems to carry the meaning ascribed to it most famously by Professor Ronald Dworkin who wrote: "Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction".[4] So, we are presented with a situation where the Minister for Immigration alone stands outside the strictures of regulation. As creator of the Regulations, the Minister also exercises power over those administering his rules.

Professor John Evans – now a justice of Canada's Federal Court of Appeal – offers a different definition of discretion which captures more accurately the act of

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3 Address to the National Press Club, Canberra, 18 March 1998. (emphasis added).
The same theme was repeated in the Minister's *Address to the Victorian Press Club, 26 March 1998*:

"...it is the role of the Government, not other marginal voices, or ill-defined international interests, or might I say, the courts, that make decisions about who shall and who shall not enter this country and on what terms. This has been an axiomatic principle of successive Australian governments and I take that claim as of right. I believe that the Government has a moral obligation to make those decisions on behalf of all Australians."

4 RM Dworkin "Is Law a System of Rules?" in RM Dworkin (ed) *The Philosophy of Law*, 52.

administration. He writes of discretion as the "power to make a choice between alternative courses of action".[5] As the American academic Daniel Kanstroom points out, this second version of the word acknowledges that there can be no such thing as a uniquely correct discretionary decision. Kanstroom writes: "The most basic problems of discretion (understood in this way) are thus how to define and restrain its abuse without destroying its legitimacy within the legal community." [6]

We have not developed the legal language to capture the different senses in which the word "discretion" is used. In Australia, the tendency in recent years has been to conflate notions of discretion with notions of policy and power, focusing on the "hole in the doughnut" rather than on the administrative process itself. The dominant view seems to be that only the Minister should be allowed the latitude to chose between desired outcomes. Put another way, we seem to have reached the point where we have lost faith in the notion of discretion (ability to exercise judgment) vested in anyone other than the Minister.

To accept that one individual should be vested uniquely with this power to choose, or to exercise power, is to render indiscernible the divide between democracy and tyranny. Any system will become corrupt when one person alone has the power to choose, particularly where the responsible individual is not accountable in any meaningful sense.

In 2000, the Senate Legal and Constitutional References Committee declined to confront the problems inherent in the residual discretions reposed in the Minister by the *Migration Act,* even though the inquiry of that year yielded ample evidence of the shortcomings of the system and the potential for abuse. Three years later, the Minister's powers have grown exponentially as those of the ordinary migration officer have diminished in inverse proportion. In the face of the evidence submitted to this committee, it is surely time to recommend the reversal of this process. There is a pressing need to diversify the nature and range of persons capable of responding with humanity to migration applicants in situations of need. The criteria for the exercise of such powers can be articulated without opening the floodgates and losing precious control of the migration process. The criteria are to be found in the human rights enshrined at international law and include such matters as the right to life and liberty of the person; the right to marry and found a family; and the right to live without fear of torture and persecution. In a society that considers itself to be a liberal democracy built on respect for human rights and the Rule of Law, this is not too much to ask.

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5 JM Evans, *De Smith's Judicial Review of Admin Action* (4th ed 1980), 278

6 Daniel Kanstroom, "Surrounding the Hole in the Doughnut: Discretion and Deference in US Immigration Law" (1997) 71 *Tulane Law Review* 703, 711.