



File Reference: 2011/2000

24 April 2012



Ms Julie Dennett
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Dennett

Inquiry into the Migration Legislation Amendment (Student Visas) Bill 2012

I am writing in response to your letter of 26 March 2012 inviting the Australian National Audit Office (ANAO) to make a submission to the above parliamentary inquiry.

Background

The Committee will be aware that the ANAO recently conducted a performance audit to assess the effectiveness of the Department of Immigration and Citizenship's (DIAC's) management of the student visa program. The resulting report, *Audit Report No. 46 2010–11 Management of Student Visas*, was tabled in parliament on 31 May 2011. The report is available at: <http://www.anao.gov.au/Publications/Audit-Reports/2010-2011/Management-of-Student-Visas>

One of the three areas examined by the audit was DIAC's performance in ensuring compliance with student visa conditions. The ANAO's findings are reported in Chapter 6 of the audit report. Recommendation No. 4 of the report was as follows:

To improve the effective application of the mandatory conditions attached to student visas, the ANAO recommends that DIAC review:

- whether the student visa cancellation regime applying to the visa conditions for student course attendance and progress is achieving DIAC's integrity and compliance objectives; and
- the operation of the student work rights limitation in relation to evidentiary requirements, decision-maker discretion and compliance resources.

DIAC agreed to this recommendation, noting that the Strategic Review of the Student Visa Program, conducted by the Hon Michael Knight (the Knight Review), would present findings in relation to both of the areas covered by the ANAO's recommendation, and that a review would be considered in that context. The Knight Review subsequently reported to the Government, and recommended that:

Automatic cancellation of student visas should be abolished and replaced by a system in which information conveyed by Student Course Variations is used as an input into a more targeted and strategic analysis of non-compliance.

The Bill before the Inquiry is designed to give effect to the Government's agreement to the Knight Review recommendation.

Comment

I draw to the Committee's attention the different purposes of the performance audit and the Knight Review. The latter was commissioned by the Government as a review of student visa policy and was therefore able to recommend changes to policy settings. The ANAO's performance audit functions do not extend to examining and reporting on the appropriateness of government policy, but may recommend improvements to the effectiveness of government administration.

In this context, the ANAO considered that the student visa cancellation regime required review, based on our conclusion that there were systemic flaws and vulnerabilities in the regime for automatic and mandatory cancellation of student visas for breaches of visa condition 8202 relating to course progress and attendance (audit report para 6.38). The ANAO found the effect of the regime to be potentially severe, given that it had limited flexibility and may be triggered by minor infractions (para 6.22).

In particular, the ANAO concluded that the system of automatic cancellation was highly vulnerable to legal challenge. The audit report noted that automatic cancellations of student visas made between May 2001 and December 2009 were subsequently overturned, for all but five months of that period, by court decisions. The ANAO assessed that the complexity of the visa cancellation regime made it liable to procedural vulnerabilities, which would likely see it continue to be tested in the courts (paras 6.26 and 6.27).

Furthermore, the ANAO noted DIAC data collected for specific periods in 2009–10 showing the high percentage of automatic visa cancellations that were successfully revoked on appeal: 63 per cent of cases appealed in NSW and 72 per cent in Victoria in the given periods (paras 6.35 and 6.36).

The ANAO also concluded that the requirement for DIAC's student visa integrity and compliance units to respond to every report of a condition 8202 breach through a visa cancellation process is resource intensive and restricts their capacity to pursue proactive or targeted action in relation to specific areas of compliance concern (para 6.38). The Knight Review similarly commented critically on this impact on DIAC's integrity and compliance resources. The ANAO notes that the Explanatory Memorandum for the Bill states (p. 2) that the abolition of automatic cancellation 'will allow integrity resources to be more strategically targeted towards risk.'

The Explanatory Memorandum also states (p. 2) that 'the Bill will allow for consistency in the treatment of alleged breaches of the student visa condition relating to unsatisfactory course attendance or course progress, enabling each case to be considered on its merits' and that 'it is intended that reports of non-compliance with a prescribed condition of a student visa will be assessed and any consideration of the student's visa will be under the discretionary visa cancellation framework in the Migration Act' (p. 1).

In this respect, the audit report noted that, under the current visa cancellation regime for student visas, DIAC officers officially had limited discretion to take into account certain exceptional circumstances in making a decision to cancel a student visa. However, the report found that DIAC decision-makers were finding exceptional circumstances and were applying discretion not to cancel visas in many cases (para 6.34), and that a number of these were cases where education providers had made errors in complying with the procedures for reporting student non-compliance set down under the *Education Services for Overseas Students Act 2000* (the ESOS Act) (para 6.37).

The ANAO notes that the Bill proposes to achieve abolition of automatic cancellation by amending the ESOS Act to stop education providers sending the notice under section 20 of the Act that triggers the automatic cancellation provisions of the Migration Act. The administration of the ESOS Act was excluded from the scope of the audit (para 1.40) and the ANAO is therefore not able to comment on this aspect of the Bill.

ANAO Audit Report No. 46 2010–11 was subject to inquiry and report by the Joint Committee of Public Accounts and Audit in *Report 428: Review of Auditor-General's Reports Nos. 16 to 46 2010–11*. The JCPAA Report is available at: http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jcpaa/auditgen6_11/report.htm

I trust that the Committee will find the information above, and the content of Audit Report No. 46 2010–11, of assistance to its Inquiry. Our contact officer in relation to this matter is
Executive Director, Performance Audit Services Group

Yours sincerely

Ian McPhee
Auditor-General