Commonwealth OMBUDSMAN

Department of Immigration and Multicultural Affairs

REPORT ON REFERRED IMMIGRATION CASES: MR T

March 2006

Report by the Commonwealth and Immigration Ombudsman,
Prof. John McMillan, under the *Ombudsman Act 1976*

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EXECUTIVE SUMMARY

Introduction

Mr T's case is one of some 200 cases involving immigration detention matters previously referred in May 2005 to the Palmer Inquiry by the Minister for Immigration and Multicultural and Indigenous Affairs[1]. In July 2005, the Federal Government asked me to complete the investigation of these cases. I accepted the Government's request and advised that I would investigate these matters under the Ombudsman's own motion provisions, as provided for in s 5 of the *Ombudsman Act 1976*. I had the valuable assistance in this investigation of Mr Neil Comrie AO APM, who worked on both Inquiries and Reports into the Circumstances of the Cornelia Rau and Vivian Alvarez Matters (2005), which are noted in this report.

Officers of the Department of Immigration and Multicultural Affairs (DIMA) detained Mr T on three occasions, in 1999 and 2003 (twice) for a total of 253 calendar days as a suspected unlawful non-citizen. Mr T is an Australian citizen, having been granted citizenship on 16 August 1989.

Scope of the investigation

The investigation of Mr T's case focused on establishing the facts leading to the detention of Mr T and the identification of necessary remedial action. In particular, this case has highlighted the serious problems experienced by the Department in the management of cases involving people suffering from mental illness.

As part of this investigation the Ombudsman's office examined relevant DIMA compliance files and computer records and the detention dossiers and medical files prepared by the management of the Villawood Immigration Detention Centre (VIDC). We interviewed DIMA officers and former employees of Australasian Correctional Management (ACM), a medical practitioner and members of Mr T's family. These interviews were recorded with the permission of the interviewees.

Centrelink, the NSW Police Service and the NSW Protective Commissioner also provided assistance to the investigation by the provision of documentary evidence and other relevant information.

In accordance with s 8(5), those persons and agencies that are expressly or impliedly criticised in this report were invited to comment on the contents of the draft report. All responses were taken into account and, where applicable, comments from individuals have been incorporated into the text of this report. The response from the Secretary of DIMA is discussed in the executive summary and the response from the New South Wales Police Commissioner has been addressed in paragraphs 3.5 and 3.6.

Conclusion

Mr T's mental illness, his homelessness and lack of an effective personal social support structure, his poor English language skills and his ethnic background were all

[1] The name of the Department was changed in January 2006 to the Department of Immigration and Multicultural Affairs (DIMA).

factors that contributed to the decisions taken by DIMA officers to detain and continue to detain him as a suspected unlawful non-citizen.

Evidence gathered during this investigation has revealed many of the systemic failures in the Department previously identified in the reports of the Rau and Alvarez matters. These systemic failures include:

- a negative organisational culture
- a poor understanding of the requirements and implications of the *Migration Act 1958*
- a rigid application of policies and procedures that do not adequately accommodate the special needs of persons suffering from mental illness
- poor training of DIMA officers, including the management of mental health, language, cultural and ethnic issues
- an abrogation of duty of care responsibilities
- poor instructions, procedures and practices relating to the identification of detainees, including the failure to use fingerprints as a means of identification
- information systems and database shortcomings
- poor case management, including no effective review process, a failure to follow up on information and poor record keeping
- a lack of appropriate arrangements to facilitate the gathering of important information that may assist in the identification of a detainee from Immigration Detention Centre (IDC) service providers.

Although it is clear that some of the DIMA officers responsible for managing Mr T's case during his three periods of detention have failed to perform their duties competently, in my opinion these failures were a direct consequence of the systemic departmental failures outlined above. Accordingly, individual officers have not been singled out in this report for specific criticism.

A disturbing practice was identified during the investigation of this matter and has also emerged in other cases currently under investigation by the Ombudsman's office; suspected unlawful non-citizens were taken into detention on a Friday (this occurred twice to Mr T) and not formally interviewed by a case officer until the following week. This practice, which also occurred over public holiday periods, was claimed by some DIMA officers interviewed by this office to be budget driven, as case officers were not generally available at weekends or on public holidays. This unacceptable practice delayed opportunities for detainees to establish their identity and status until it was convenient for departmental officers to interview them. I formed the opinion that this practice should cease immediately. This issue is further discussed in paragraphs 2.65 to 2.72 in Part 2 of this report.

Outline of recommendations

This investigation has revealed various problems in DIMA's detention practices and procedures. Specific recommendations have been made concerning:

- detention under s 189 and the interaction of this power with other provisions of the Act. Attention has also been drawn to the need for better policy guidance and training about the use of s 189 as well as tighter controls on the category of DIMA officers authorised to exercise that power

- the need for training about the use of the 'questioning detention' power under s 192 of the Act
- inadequate release procedures whereby detainees with mental health issues are not afforded continuity of care or sufficient support upon release into the community
- the need for DIMA to consider its practices and procedures when responding to an inquiry from a police force
- the importance of DIMA accessing relevant national biometric databases
- a lack of cultural awareness, particularly with regard to language and naming conventions, and a need for training about the role of, and how to work with, interpreters
- poor record keeping practices, including inconsistent and inadequate file and data system input and management
- a failure to access the valuable information held by detention centre service providers that may assist DIMA to identify persons in detention
- the importance of ensuring that formal interviews are conducted as a matter of priority so that detainees are afforded an opportunity to provide important information to DIMA within hours of their detention.

This investigation also revealed evidence that supports a number of the recommendations from the reports into the Rau and Alvarez matters. Relevant recommendations from those reports are included at Attachment A. These recommendations are also referred to throughout this report where they are relevant to issues under consideration. DIMA has already responded to these recommendations and implemented changes following the publication of those reports and is not, therefore, expected to again respond to the recommendations at Attachment A.

DIMA's response to the report

The Secretary of the Department of Immigration and Multicultural Affairs in his response to my draft report advised that he agreed with all of the recommendations. Specific comments addressed to individual recommendations can be found at Part 5 of this report.

Relevantly, the Secretary's response was as follows:

'Dear Prof. McMillan

Thank you for the opportunity to comment on your draft Report of Own Motion Investigation into Referred Immigration Case into the circumstances of Mr T. I have closely considered and agree with the thrust of the recommendations arising from Mr T's case.

This case is deeply concerning and on 17 February 2006 I wrote to Mr T to formally apologise for his placement in immigration detention. We have arranged for a senior departmental officer to meet with Mr T, his family and his social worker to deliver and discuss the letter given Mr T's circumstances.

Your report reinforces the serious issues identified in the Rau and Alvarez Inquiries. As your report recognises, the Government and the Department have many projects well underway to address the issues identified.

My response to this report reflects changes already made in policy, procedures, systems and training. This understandably invites the question of how my agency will know whether these changes have had the expected impact. At the divisional level, quality assurance measures have been put in place, such as the creation of the Compliance Quality Assurance Section. From the broader perspective, the restructuring of the Department will also strengthen and facilitate our capacity to test that we have met your recommendations nationally. By way of example, I refer to the creation of the Governance and Assurance Branch and DIMA National.

The Governance and Assurance Branch will undertake research and development in governance areas, promote better governance practices in DIMA, develop and roll out practical governance capability-building tools and manage an enhanced audit program performed by a team of independent auditors.

A top priority for the Department is the development of a compliance-based national quality assurance framework across all business areas with initial priority on those areas of highest risk. In conjunction with that process, we are closely examining the 220 cases to address systemic issues. Where systemic issues are identified, they are reported to the responsible business areas for management and to the Governance and Assurance Branch to inform its work program.

DIMA National's role is to support consistency by strengthening the relationship between National Office and the State and Territory Offices (STO). Some of the projects to achieve this include:

- systematic identification of service delivery quality improvements, testing the robustness of improvements and ensuring that the changes are implemented in a consistent way across the whole STO network; and
- identification and promotion of 'Lead States' to give STOs increased opportunities to lead change processes.

In addition, stronger governance arrangements, including the Values and Standards Committee, are now operational. As you know, the committee includes four key external members: the Deputy Ombudsman, the Deputy Public Service Commissioner and two other representatives. The Values and Standards Committee is well placed to ensure the Department is meeting community expectations by monitoring that:

- the people with whom we deal are treated fairly, reasonably and lawfully; and
- our staff are well supported in their work, which they undertake ethically and with all regard to the APS Values.

Lastly, while my response to your recommendations indicates that MSIs will be revised, it is important to note that the effectiveness of MSIs as a policy instruction system for compliance officers is under review. The changes reflected here will be incorporated into any system that may replace it.'

PART 1—BACKGROUND

Background

1.1 Mr T was born in Saigon, Vietnam, on 27 February 1961. He is of ethnic Chinese background and was educated in Vietnam, leaving school early in his high school years. He worked in his parents' printing business until, reportedly, the Vietnamese government confiscated the printing presses. Fearing that he may be conscripted in the communist army he left Vietnam in August 1980.

1.2 He arrived in Trengganu, Malaysia, on 13 August 1980 and was accommodated in the Pulau Bidong refugee camp. On 15 August 1981, he was transferred to the Sungei Besi camp in Kuala Lumpur, where his mental illness is reported to have first become evident. In October 1981, he was admitted to the psychiatric hospital at that camp and diagnosed with schizophrenia.

1.3 In February 1983, Mr T's sister who was already in Australia, sought to sponsor Mr T, another sister and her husband (also then at the Sungei Besi camp) to Australia. Visas were issued on humanitarian grounds on 7 March 1984.

1.4 Mr T arrived in Australia on 14 March 1984. He was initially placed in the Endeavour Hostel at Coogee. On 27 March 1984, he was admitted to the Prince Henry Hospital and then the Gladesville Hospital and treated for his mental illness.

1.5 Mr T was granted Australian citizenship on 16 August 1989.

1.6 Until 1997, Mr T had resided with his sister in Auburn, Sydney. It is understood that due to his mental illness, the behaviour of Mr T caused a breakdown in this family relationship and Mr T left that address. He has since been homeless and had regular contact with the NSW Police and mental health authorities. He is currently an inpatient at a psychiatric hospital.

1.7 DIMA detained Mr T on three occasions as a suspected unlawful non-citizen. These detentions occurred from 19 March 1999 to 23 March 1999 (five days); from 17 January 2003 to 16 September 2003 (242 days) and from 17 October 2003 to 22 October 2003 (six days). Each of these periods of detention resulted from initial contact with the NSW Police who referred Mr T to DIMA.

Brief chronology of events

27 February 1961	Mr T, born in Saigon, Vietnam.
11 August 1980	Afraid of being conscripted to Vietnamese Army, Mr T escaped by boat from Vietnam. Two of his sisters were not allowed to embark.
13 August 1980	Mr T arrived in Trengganu, Malaysia and entered Pulau Bidong refugee camp.
15 August 1981	Mr T transferred to the Sungei Besi camp in Kuala Lumpur. It is at this time that his mental illness is said to have suddenly appeared.
October 1981	Mr T admitted to a psychiatric hospital and diagnosed with schizophrenia.

April 1982	Mr T's sister and her husband arrived at Pulau Bidong Camp.
May 1982	A psychiatric assessment classified Mr T as 'schizophrenic residual type in remission'.
21 April 1983	A psychiatric assessment report states: 'probably suffered from schizophrenia form disorders …'. 'He is mentally stable.' 'The prognosis is greatly favourable. The patient should completely recover.'
26 August 1983	An application for a visa for Mr T to enter Australia is rejected on medical grounds relating to his being diagnosed with schizophrenia.
7 March 1984	A sister who was already in Australia, sponsored Mr T, another sister, as well as that sister's husband and child. A visa is issued for Mr T to enter Australia from Kuala Lumpur, Malaysia.
14 March 1984	Mr T arrived in Sydney, Australia from Kuala Lumpur. He was accommodated at the Endeavour Hostel, Coogee.
27 March 1984	Mr T admitted to the Prince Henry Hospital, Little Bay for treatment of mental illness.
18 June 1984	Mr T transferred to the Gladesville Hospital.
9 July 1984	Mr T is discharged from Gladesville at the insistence of his sister and he resided with her.
12 July 1984	Dr N commenced medical care of Mr T. At about this time an application was made to the Department of Social Security for an invalid pension, which was granted. Dr N continued to provide medical care for Mr T until 1997.
21 May 1985	Mr T arrested by NSW Police for an offence of stealing and fingerprinted. This was the first of numerous recorded contacts with the NSW Police.
Date Unknown	Mr T applied for Australian Citizenship. He gave his sister's address.
16 August 1989	Mr T granted Australian citizenship.
11 July 1997	Mr T admitted to Cumberland Hospital for treatment of his mental illness.
12 August 1997	Mr T discharged from the Cumberland Hospital.
2 July 1998	Mr T detained at the Canberra Hospital on mental health grounds .
5 July 1998	Mr T referred for an inpatient stay at the Cumberland Hospital.

First detention—19 March 1999 to 23 March 1999

18 March 1999	Newcastle Police found Mr T loitering around a closed service station at about 11 pm. The police recorded his name as John [his family name was misspelt], born 27 February 1961. DIMA notes indicate that the police had advised them that Mr T had stated that he had fallen off a boat three days previously. He had apparently given various names to police and had not co-operated with police when making inquiries in relation to his identity and immigration status.
19 March 1999	Mr T was interviewed with the assistance of a Telephone Interpreter Service (TIS) Cantonese interpreter at about 1.30 pm. At the interview he stated that he arrived in Australia on a tourist visa from Vietnam. At 2.10 pm he was interviewed with the assistance of a Vietnamese interpreter and provided his correct name but his first and middle names were transposed. He provided his correct date of birth. The DIMA compliance officers made a request for their office to search DIMA systems for a record of Mr T. They were informed that Mr T's identity could not be confirmed. He was detained and conveyed to the VIDC. The *Request for ACM Services* form recorded: 'Note; it was the opinion of the TIS interpreter that [T] appeared to be confused and may some [sic] mental problems'.
23 March 1999	Mr T was interviewed with the assistance of a Cantonese interpreter. He provided the name, address and telephone number of his sister. It is recorded that after several attempts, Mr T's sister was contacted and arrangements were made for him to be collected from the VIDC and he was released.
20 April 1999	Mr T was arrested by the NSW Police and conveyed to Hawkesbury Hospital for assessment under the *Mental Health Act* (NSW) and then detained at the Pialla Mental Hospital.
21 April 1999	Mr T was reported as a missing person from this hospital and located on the same date. Mr T was reported to police as a missing person on at least six occasions up until January 2003.

Second detention—17 January 2003 to 16 September 2003

16 January 2003	NSW Police arrested Mr T at Regents Park Railway Station. DIMA was contacted to assist with the identification of him. Police records indicate that DIMA was unable to assist. Fingerprints were taken from Mr T and he was identified. He was issued with a Court Appearance Notice and released.
17 January 2003	NSW Police found Mr T at the Central Railway Station. He was interviewed by a Cantonese speaking police officer. Mr T wrote his name down in Chinese script. These Chinese characters were

translated into an alternative anglicised version of his name. However, his date of birth was correctly recorded as 27 February 1961.

DIMA compliance officers attended at about 6.35 pm and Mr T was detained and conveyed to their Sydney office where further attempts were made to find a record of the name given. Mr T was conveyed to VIDC.

DIMA records note that he had possible mental health issues and that: 'He was cognisant of his surroundings, almost as if he had been at the VIDC before'.

17 January 2003 — Mr T was examined briefly by an ACM medical officer on suspicion of being under the influence of drugs or alcohol. A Management Action Plan (MAP) noted, 'At interview he presents with formal thought disorder, speaks in neologisms…' and he '…behaved as a person who is used to taking medications'.

An Interim at Risk Plan (IRP) noted: 'Could come to harm because of his present state'.

18 January 2003 — A memorandum, prepared by medical staff, to the VIDC Operations Manager noted: 'This man is severely thought disordered, disoriented and disorganised, all symptoms of a psychotic process'.

22 January 2003 — A DIMA case officer interviewed Mr T. The Record of Interview shows that he gave two different names and two different dates of birth. He also 'claims Australian citizenship'.

24 January 2003 — As a result of the behaviour of Mr T he was escorted to Bankstown Hospital and admitted for treatment (mental health). The letter of referral from ACM notes that Mr T used the word 'merci' and claims he is from Vietnam.

12 February 2003 — Mr T returned to the VIDC. A letter provided by a Banks House psychologist noted: '… he is extremely thought disordered'. 'He is unable to effectively answer orientating question [sic].'

ACM staff continued to closely monitor Mr T and noted concern for his safety and his ability to look after himself.

17 February 2003 — A MAP noted: 'placed in cell to minimise the effects of his interaction with others'.

1 March 2003 — A Suicide Watch record sheet noted: '… so far has not caused any major problems with other detainees but, be advised it is only a matter of time!'.

20 March 2003 — A DIMA compliance officer sent a fax to ACM requesting a thorough psychological assessment of Mr T stating that they were unable to identify him under the name he has provided and that they had no indication of his previous medical history or any family.

An ACM Clinical Psychologist examined Mr T and provided a report that included:

- client portrays severe thought disorder
- he had been recognised by another inmate in VIDC who had stated that his current behaviour pattern existed six years previously and that he was 'described as a wanderer'—this detainee had met Mr T in the community prior to his and Mr T's detention
- Mr T had asked for a Mandarin interpreter. The Mandarin interpreter could not understand Mr T's dialect
- Mr T asked for a Vietnamese interpreter then denied any knowledge of the language and refused to continue the conversation.

The Clinical Psychologist concluded that the 'client has a long standing chronic mental illness'.

17 April 2003 — A DIMA Compliance Manager from the Sydney office attached a memo to the DIMA compliance file relating to Mr T. At this time responsibility for the casework of detainees was being transferred to the Parramatta office. The memo noted:

- 'for all we know he could be an Australian citizen'
- 'he might have family looking for him'
- 'more likely is that he has been in the care of other mental health institutions in the state'.

25 April 2003 — ACM staff continued to raise concerns for the welfare of Mr T. One of the medical staff noted: 'He urgently requires a rehabilitation environment but VIDC is unable to offer this'.

23 July 2003 — Officer A, a DIMA case officer, visits Mr T at the VIDC and notes: 'Mr [a variation of his family name] is heavily burden [sic] by his mental disturbance and answers to my questions did not make any sense'.

He also noted that Mr T gave two other names that were not his own, that he was born on 27 February 1961 and that he lived in Auburn.

Officer A also noted: 'May need to consider more appropriate detention centre'.

25 August 2003 — Officer A provided a description and photograph of Mr T to the NSW Police Missing Person Unit. No fingerprints were provided.

28 August 2003 — A DIMA file note shows that the NSW Police could not identify any match on their missing person records.

11 September 2003 — Officer A spoke with Mr T at the VIDC. He noted on ICSE that Mr T had provided 'bits and pieces of info'. This included that he was possibly from Vietnam and that he lived opposite a Bingo shop not far from Auburn railway station.

15 September 2003 — A DIMA file note prepared by Officer A stated that he had requested that Mr T write his name. Another DIMA officer translated the

	names written down and one of the names provided enabled Mr T to be identified from electronic records. The DIMA files were requested.
16 September 2003	DIMA requested ACM to release Mr T immediately. The fax noted that he had been 'identified as citizen'. ICSE records detail attempts by DIMA case officers to arrange for family members to collect Mr T. This did not occur and Mr T was provided with $20 cash and released. It was noted that he had three bags with him and he left these under a tree just outside the VIDC.
1 October 2003	NSW Police arrested Mr T for a transport offence. The police sought assistance from DIMA. NSW Police records indicate that DIMA advised the police that they would not detain Mr T without a correct identification.
2 October 2003	NSW Police identified Mr T by fingerprints as a missing person. The Police again contacted DIMA and they provided details of Mr T and that he was an Australian citizen. Due to his mental illness, the police took no action regarding the initial offence and conveyed Mr T to his brother's house.

Third detention—17 October 2003 to 22 October 2003

17 October 2003	NSW Police again located Mr T. His name was interpreted as yet another permutation of the anglicised versions of his name. DIMA requested ACM to collect Mr T from the police and detain him in the VIDC.
20 October 2003	An ICSE record was created indicating that Mr T had been placed in detention. No DIMA compliance file was created.
21 October 2003	Officer A attended the VIDC in relation to another matter. He recognised Mr T and reported the matter to his superiors.
22 October 2003	Mr T was released.

Circumstances of detention

First detention—19 March 1999 to 23 March 1999

1.8 The first detention of Mr T occurred on Friday, 19 March 1999. DIMA records indicate that Newcastle Police arrested Mr T at about 11 pm on 18 March 1999 when he was found loitering about a closed service station and had no means of identification. Mr T told the Police that he had fallen off a boat three days prior. The NSW Police 'Prisoners/Intoxicated Persons Transfer Note' indicates that Mr T had provided the Police with the name John [surname, vowels were transposed].

1.9 Newcastle Police contacted DIMA, advising the Department of Mr T's situation and the information he had supplied. DIMA compliance officers attended the Newcastle Police Station at about 1.30 pm on Friday, 19 March 1999 and spoke with Mr T with the aid of a Cantonese speaking TIS interpreter. Mr T said:

- he had originally arrived from Vietnam
- he had been in Australia for a couple of years but couldn't remember when he arrived
- he used to live in Auburn but couldn't remember the address
- he arrived in Australia on a tourist visa
- he arrived on a Vietnamese passport
- he had hoped to meet someone in Australia who would sponsor him.

1.10 The interpreter could not translate Mr T's name but advised that his date of birth was 27 February 1961.

1.11 At about 2.10 pm on that same date, DIMA arranged for a Vietnamese speaking TIS interpreter. Mr T stated his name, with the first two names transposed and his correct date of birth. A check of DIMA systems was conducted to identify Mr T. Mr T was not identified and he was detained under s 189 of the Act and conveyed to the VIDC. The DIMA Request for ACM Services form, completed by Officer B, notes that 'it was the opinion of the interpreter that [T] appeared to be confused and may some [sic] mental problems'.

1.12 The citizenship records of Mr T did exist in DIMA systems, as did his movement records. It is not clear why Mr T was not identified from DIMA systems. The data that existed at the time has now been merged and migrated into the ICSE database. At interview the DIMA officers involved in his detention were perplexed as to why they had been unable to use this data provided by Mr T to identify him.

1.13 On Monday, 22 March 1999, an attempt was made for an interpreter to attend VIDC to facilitate a post-detention interview. It has been ascertained that no interpreter was available on that date and arrangements were made for the interview to be conducted on Tuesday, 23 March 1999.

1.14 Officer C, a compliance officer from the DIMA Parramatta office, conducted the interview with the assistance of a Cantonese speaking TIS interpreter. Mr T advised:

- his full name but with the first two names transposed
- his date of birth was 27 February 1961
- he was born in Saigon and was a Vietnamese citizen
- he lived with his sister at (correct address provided) in Auburn
- he provided his sister's phone number.

1.15 Officer C contacted Mr T's sister and, on her advice, contacted Dr N. Dr N provided visa details for Mr T and from that information Officer C identified Mr T as an Australian citizen. Mr T was immediately released after having been detained for five days.

Second detention—17 January 2003 to 16 September 2003

1.16 On the evening of Friday, 17 January 2003, Mr T was detained at the Central Railway Station by NSW Police. DIMA compliance officers were called and attended. Assistance was sought from a TIS interpreter and advice was received that Mr T spoke Cantonese with an accent, probably from Malaysia or Northern China. A short time later, a Cantonese speaking police officer (who is not an accredited interpreter/ translator) attended and Mr T wrote down his name in Chinese characters. This was translated by the police officer as another permutation of the anglicised version of his name with date of birth 27 February 1961. (DIMA continued to use that name in all of their correspondence and actions regarding Mr T until 15 September 2003.)

1.17 Mr T was conveyed to the DIMA Sydney office for further inquiries, having been detained under s 192 of the Act by Compliance Officer D. (The detention of Mr T under this section of the Act was inappropriate as detailed in Part 2 of this report.) Officer D recorded in a file note that she checked DIMA systems (ICSE, MR, TRIPS and TRIM) for a record of the name and translation variants of that name, none of which were Mr T's actual name. She was not able to identify Mr T. Officer D stated that she sought the advice of the duty manager at the time, Officer B, and as a result detained Mr T pursuant to s 189 of the Act. Mr T was then conveyed to the VIDC. On the related DIMA Request for ACM Services form, Officer D noted 'possible mental health issues'.

1.18 In a file note prepared three days after the detention, Officer D recorded that during her interview with Mr T he not only appeared to have mental health issues, she was mindful that he may have had a hearing problem or could even have been under the influence of alcohol. Despite these observations, Officer D appears to have disregarded these factors in assessing why Mr T was unable to provide information about his immigration status. Indeed, she went on to note that she had formed a reasonable suspicion that he was an unlawful non-citizen under s 189 'as per MSI-321, the person's inability to provide satisfactory evidence of being a lawful non-citizen and a lack of a credible explanation for this'. In the same file note Officer D noted that when she delivered Mr T to the VIDC he acted in such a manner that it was 'almost as if he had been at the VIDC before'. She did not pursue this observation any further.

1.19 The medical staff at the VIDC immediately identified Mr T's mental health problems. It was noted on an ACM Interim at Risk Plan, dated 17 January 2003 that he 'could come to harm because of his present state'.

1.20 The MAP prepared by K, a registered nurse on the mental health team, for the week commencing 18 January 2003 stated:

> On interview he presents with formal thought disorder. Speaks in neologisms and is difficult to contain. For his own safety because he has disturbed fellow detainees with his ungirdled intrusiveness, he has been moved to the Management Unit until his mental status is stabilised. When he received medication he behaved as a person who is used to taking medications. The therapeutic challenge is to alleviate his psychotic symptoms and to minimise the effects on his interactions with others.

1.21 Another compliance officer, Officer E, interviewed Mr T on 22 January 2003 with the assistance of a Cantonese-speaking TIS interpreter. Officer E noted on the interview form that Mr T had stated that he was an Australian citizen. At interview, when asked what he had done to confirm the statement by Mr T, Officer E advised

that it was not his job to make these inquiries and he just filled in the form. It was his understanding that the case officer would conduct any follow-up if they thought it was needed.

1.22 Due to the continued erratic behaviour of Mr T, on 24 January 2003 ACM medical staff requested that Mr T be conveyed to Banks House, the psychiatric unit of the Bankstown Hospital, for assessment. He remained in Banks House for treatment until 12 February 2003 when he returned to the VIDC.

1.23 In the letter requesting admission to Banks House it was stated that Mr T had 'responded in French "merci" after one exchange' and 'he claims he was born in Vietnam'. There is no evidence that this information was conveyed to DIMA, nor is there any evidence that DIMA officers reviewed ACM files.

1.24 A letter written by consultant psychologist Dr L from Banks House was provided to ACM on 12 February 2003. It stated, in part:

> No meaningful history is obtainable from Mr [name used by DIMA]. It is evident from his mental state examination however that he is extremely thought-disordered with poor goal-direction and loose associations to the point of 'word-salad'… He denies current suicidality or homicidality but is an unreliable historian.

1.25 An Incident Follow-up Report dated 12 February 2003 advised DIMA of the return of Mr T to the VIDC. The report also advised that 'Detainee [name used by DIMA] remains extremely thought disordered…'.

1.26 On 20 March 2003, Officer F, a DIMA compliance officer, faxed the ACM Health Coordinator requesting a thorough psychological assessment of Mr T. The reason given was that they had not been able to identify him under the name he had provided and that they were hoping that a psychological assessment would assist them.

1.27 Dr M, a clinical psychologist at the VIDC, conducted a psychological assessment of Mr T. His report, provided to DIMA on 26 March 2003 stated:

> When enquired, another individual in Stage1 reported that he had seen Mr [name used by DIMA] outside in the community around six years back and that the current behavioural pattern was the same even then … the client portrays severe formal thought disorder with derailment and at times flight of ideas. On questioning his cognitive responses are vague and disjointed. The verbal responses are not coherent and mostly tangential … Also, due to the formal thought disorder it is at this stage extremely difficult to elicit any meaningful response from this individual.

1.28 There is no record of DIMA having any regard for this assessment or taking any action to further inquire with the individual identified (in Stage 1) who may have been able to provide further information. Nor is there any evidence that the DIMA officers involved in Mr T's case made any inquiries at any mental health hospitals—an avenue of inquiry that would be appropriate in the circumstances and one that may have led to Mr T's early identification.

1.29 In April 2003, DIMA restructured the compliance and removals function and transferred the detention case files being managed at Sydney to the Parramatta office. This involved the transfer of hundreds of files, including Mr T's, to the

Parramatta office. The management of this transfer was criticised by some DIMA officers interviewed who expressed the view that they felt overwhelmed by the additional workload flowing from the transfer of the Sydney caseload.

1.30 On 17 April 2003, Officer G, a compliance team leader from the Sydney office attached a hand written note to the file as part of the transfer process. In that file note she expressed a view that they had no idea who Mr T was but 'for all we know he could be an Australian citizen'. She also wrote that she had intended seeking help from the Chinese welfare organisation stating: 'more likely as not he has been in the care of other mental health institutions in the state. It might be worth checking through NSW Health to see if there are old records for him'. This important information was not entered on the ICSE database. There is no record or other evidence of any action being taken in relation to the advice given by Officer G.

1.31 Officer G has a social welfare background and had previously been employed at a migration hostel for South East Asian migrants. She is aware of the large number of ethnic Chinese people from Vietnam who had migrated to Australia. She was aware that Sino/Vietnamese people often intersperse their language with French words. At interview she stated that knowledge that he had come from Vietnam and used the French word 'merci' should have focused identification attempts. Had the information referred to above been accessed by DIMA when it was acquired in February 2003 and acted upon, Mr T may have been identified at that time.

1.32 There is no record that any further action was taken until 23 July 2003, when Officer A, a DIMA officer attached to the Parramatta office, visited Mr T at the VIDC. Officer A's involvement in this case was a result of a policy initiative at the Parramatta office that required that detainees must be interviewed at not less than fortnightly intervals. Officer A is of Chinese background and is fluent in Cantonese. He prepared a file note relating to this visit and noted, amongst other things:

> It appears that Mr [name used by DIMA] is heavily burden [sic] by his mental disturbance and answers to my questions did not make any sense … During the interview, he mentioned the name of Auburn as the suburb where he lived. At this stage, I am not quite clear if Mr [name used by DIMA] is receiving any treatment or taking any medications. If we continue to fail to identify him, given his mental condition, more appropriate alternative detention facility may need to be considered.

At interview, several DIMA officers said that alternative options for accommodation were very limited at that time.

1.33 On 25 August 2003, Officer A sent a facsimile to the NSW Police Missing Persons Unit seeking assistance to identify Mr T. He provided a photograph and other details of Mr T, including that he was 'probably from Vietnam (ethnic Chinese)' and 'he did mention that he lived at Auburn and residence is not far from the rail station. Possibly he has a wife who lived there with him'. This is the first time that DIMA recorded that Mr T may have been Vietnamese rather than Chinese. This communication was followed up with another facsimile and photograph on 28 August 2003 from Officer A to the Missing Person Unit.

1.34 On 12 September 2003, Officer A made an entry in ICSE advising that he had visited Mr T at the VIDC and again noted that Mr T was possibly Vietnamese and had stated that he lived in Auburn.

1.35 On 15 September 2003, Officer A sought the assistance of another DIMA officer, a person who was ethnic Chinese from Vietnam, to translate the characters written by Mr T. One of the translations of the characters was Mr T's correct full name and date of birth. This name matched a record in the DIMA systems and the related files were requested. It was suggested by Officer A that this was the first time that Mr T had provided all three correct Chinese characters. Mr T's brother was interviewed during the Ombudsman's investigation and shown the different forms of Mr T's name that were on record as having been written by Mr T on various occasions. He informed the investigation team that on each occasion the characters for his first and family name were provided, as was the date 27 February 1961. The third character varied; this is consistent with Officer A's account. However, had a Sino/Vietnamese interpreter translated the characters for the first and family names they should have been correctly identified.

1.36 On 16 September 2003, Mr T was identified as an Australian citizen from the files. DIMA records indicate that the family of Mr T was contacted to collect him but declined to do so. Mr T was provided with $20 cash and released after having been detained for 242 days. The records indicate that at the time of his release he carried three bags of personal possessions. Mr T left these bags under a tree near the VIDC.

Third detention—17 October 2003 to 22 October 2003

1.37 On 1 October 2003, a short time before his third detention, Mr T was arrested by NSW Police under a name that was translated differently from the previous name translations for a commuter crime offence at the Cronulla Railway Station. NSW Police records indicate that police sought the assistance of DIMA and were told that DIMA would not detain the person unless police had identified him. Police identified Mr T on 2 October 2003 by live scan fingerprinting and again contacted DIMA for advice. DIMA advised the police that Mr T was an Australian citizen and did not become further involved in this matter.

1.38 Approximately two weeks later on Friday, 17 October 2003, NSW Police arrested Mr T under a name, which was another variation of the anglicised translation of the Chinese characters for his name, at the Hornsby Police Station for a commuter crime offence. It is interesting to note that the Police Custody Management Record indicates that Mr T did not appear irrational or mentally disturbed and that he 'appears to be in good health. No complaints. Refusing to give correct particulars'. It is not known if Mr T was fingerprinted at this time.

1.39 Examination of ACM records and interviews of DIMA compliance officers has revealed that on 17 October 2003, Officer H, a compliance officer, requested that ACM collect and hold Mr T. This request was faxed to the VIDC. Officer H could only vaguely recall having prepared the document and stated that he would not have acted on his own volition; rather, he would have been instructed to do so by a superior, but that person has not been identified. Following receipt of Officer H's facsimile, ACM staff took Mr T into detention at the VIDC.

1.40 There is no DIMA compliance file in existence for this detention. Officer H states that it would have been the responsibility of DIMA detention staff at the VIDC to commence the file. Officer H did make an entry in ICSE on 20 October 2003 noting that a person had been detained.

1.41 ACM records indicate that on 18 October 2003, medical staff at the VIDC recognised Mr T. They recorded that he had been there before and was possibly an

Australian citizen. At interview, one of the medical staff advised that they knew the true identity of Mr T and that he was an Australian citizen and this was common knowledge among all the VIDC staff in Stage 1. There is no record of this being conveyed to DIMA officers. At interview, Officer I, the DIMA Centre Manger at the VIDC, stated he did not believe any of his staff had been advised of Mr T's situation. He also advised that he would not have expected his staff to recognise Mr T despite him having been a high profile detainee who had been held in detention for some eight months until only one month prior. I am of the opinion that this latter explanation is implausible.

1.42 There is no record of any formal interview with Mr T during this period of detention. The reason for this could not be determined from documents or interviews.

1.43 DIMA file notes record that Officer A, the compliance officer who identified Mr T in September 2003, attended VIDC on 22 October 2003 in relation to another matter. He observed Mr T in Stage 1 of the VIDC. He reported this matter to his superiors at the Parramatta office and Mr T was released on that date. ICSE access records indicate that Officer A accessed the records of Mr T and the name he was known by during the second period of detention on 21 October 2003 indicating that this was the date he identified Mr T. At interview, Officer A stated that Mr T was released on the day that he was identified or no later than the day after. This would support the view that Mr T was identified on Tuesday, 21 October 2003 and released on Wednesday, 22 October 2003. The identification of Mr T by Officer A was the result of a fortuitous chance meeting rather than the result of any planned activity by DIMA. Had this chance meeting not occurred, Mr T's detention on this occasion might have been considerably longer.

1.44 There is no record of what was done to consider the welfare of Mr T at the time of his release. No notes were recorded on ICSE and, as previously stated, no file was created for this period of detention.

PART 2—AREAS OF CONCERN

Legal and policy framework

Administration of s 189 of the *Migration Act 1958*

2.1 Issues related to s 189 were discussed in the two reports released in 2005 on the Rau and Alvarez cases: *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, Report by Mr Mick Palmer AO APM, July 2005; and *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. The reports discuss s 189 in the light of two cases that had considered aspects of s 189: the decision of the Full Court of the Federal Court in *Goldie v Commonwealth* (2002) 188 ALR 708 (*Goldie*), and the more recent decision of the High Court in *Ruddock v Taylor* [2005] HCA 48 (8 September 2005) (*Taylor*). The main points arising from that discussion can be summarised as follows.

- Section 189 imposes an obligation upon an authorised officer to detain any person who is 'reasonably suspected' of being an unlawful non-citizen. A properly based decision as to 'reasonable suspicion' constitutes the only protection in the section against arbitrary detention.
- A 'reasonable suspicion' is one that is objectively reasonable: it cannot be founded on purely subjective or personal opinion.
- The Full Federal Court in *Goldie* intimated that s 189 imposed a duty to undertake reasonable searches and inquiries, in order to ground a decision to detain a person. The High Court in *Taylor* likewise commented that an officer must act on what is known 'or reasonably capable of being known at the relevant time'.
- A decision to detain a person under s 189 can be lawful even though the detaining officer's reasonable suspicion was based on material that was subsequently found to have been affected by a mistake of law or fact (*Taylor*).
- Even though the initial detention of a person is justified under s 189 because the person is reasonably suspected of being an unlawful non-citizen, the continued detention of the person will not be justified if the basis for that reasonable suspicion becomes diluted by other facts or circumstances that become known to officers of DIMA. See also *VHAF v Minister for Immigration & Multicultural & Indigenous Affairs* (2002) 122 FCR, ordering the release of a person who was properly detained as an unlawful non-citizen, but whose immigration status changed while in detention.

2.2 Section 189 of the Migration Act was also discussed in two reports that I prepared pursuant to s 486O of the Migration Act in relation to persons who had been in immigration detention for more than two years.[2] The following points were made in those two reports.

- It is probable that implicit in s 189 is a requirement that the DIMA officers responsible for a person's detention *continue* to hold a reasonable suspicion that a person is an unlawful non-citizen.

[2] Those reports, on Detainee Nos 014/05 and 016/05, were tabled by the Minister in the Parliament on 1 March 2006, and are available on the Commonwealth Ombudsman website www.ombudsman.gov.au.

- A failure by a person to provide satisfactory evidence of their identity is a relevant but not a conclusive factor in deciding whether there is a reasonable suspicion that the person is an unlawful non-citizen. An unresolved doubt about a person's citizenship or residency status falls short of a reasonable suspicion that the person is unlawfully in Australia. In part this follows from human experience: for example, the explanation for the doubt may be that a person is mentally ill, or is confused about their own immigration status. The powers conferred by the Act (eg s 188) to seek evidence of a person's identity or immigration status should be construed strictly, in light of the public law principle that except as required by statute people are not obliged either to answer questions posed by government officials or to give frank or truthful answers in reply.
- The administration of s 189 should take account of the serious consequences that ensue from the reasonable suspicion of an officer that a person is an unlawful non-citizen. Once an unlawful non-citizen is taken into detention under s 189, they must remain in detention (s 196) and can only be released from detention by removal from Australia (ss 198 and 199), by being deported (s 200), by being granted a visa, or in other limited circumstances.

2.3 It follows from those considerations that DIMA must have in place an administrative system that is rigorous and that facilitates decision making and enforcement of a high and defensible standard. Above all, the administrative system must ensure that decisions are lawfully made and pay appropriate regard to the rights and liberty of those to whom decisions apply.

2.4 It cannot be said, in respect of Mr T, that the administrative systems of DIMA met that requirement. Mr T has held Australian citizenship since 1989. Despite this, he was detained once in 1999 and twice in 2003. His detention on three occasions was a product of cumulative administrative deficiencies and systemic failures within DIMA. It is probable—though only a court of competent jurisdiction could conclusively determine this issue after a proper trial of the matter—that Mr T's detention for at least part of the overall period of detention was unlawful, lacking any reasonable suspicion to support the view that he was an unlawful non-citizen. It is sufficient for the purposes of this report to point to the administrative deficiencies and systemic failures that support the view that his detention was wrongful.

- Mr T was detained in 1999 and 2003 despite the acknowledgement of DIMA officers that he may have had a mental illness. It was recognised at the time that he was confused and he may have had mental health problems that were impacting upon his ability to communicate with interpreters. Given that Mr T had a diagnosed mental illness that severely affected his capacity to reason, it is difficult to understand how any reliance could be placed on any of Mr T's statements. Nor could there be an expectation that he could provide a credible explanation for any lack of evidence he may have been requested to produce. Despite his disorderly and incoherent communication, DIMA officers seem not to have paid adequate regard to his mental state in forming their suspicion that he was an unlawful non-citizen. It seems instead that the officers selectively seized upon information that tended to support their suspicion, without having regard to all of the information he was presenting. It is vital to the proper administration of s 189 that all of the information, which was known at that time, is taken into consideration.
- There is no evidence of any internal review or reconsideration of the decision to detain ever being undertaken. It is important to do so for two reasons. It was suggested above that the decision to detain a person is one that requires

a continuing justification based on a reasonable suspicion that a person is an unlawful non-citizen. Internal reconsideration of a decision to detain a person provides the opportunity to revisit the issue of reasonable suspicion. Moreover, the power to detain a person and to deprive them of liberty is a coercive power of great magnitude, which is commonly exercised at the operational level within DIMA. Quality control of decision making and enforcement within the agency requires that there is supervision at a more senior level of the exercise of the coercive power of detention.

- On the occasion of Mr T's first detention, DIMA officers apparently conducted searches under Mr T's correct name (with the first two names transposed) and date of birth of 27 February 1961. An appropriate search should have revealed entries for Mr T's correct name with the same date of birth. Although this information should have been readily accessible, it was not located and acted upon. While the reason for the failure cannot be determined at this late stage, it would seem this is an example of a situation in which DIMA officers did not access information on DIMA's own systems that was reasonably capable of being accessed.
- During Mr T's second detention there was five months of inactivity on DIMA's part and a complete lack of systematic attempts at identification (between February to June 2003). Despite ACM holding information as early as 24 February 2003 that Mr T was Sino-Vietnamese, DIMA failed to access and act upon that information. ACM files were always available for DIMA's consideration and yet many DIMA officers advised that they were unaware of ACM's files or had not thought of those files as a potential source of relevant information. Further, there is no evidence that the DIMA officers involved in Mr T's case made any inquiries at any mental health hospitals; in the circumstances, that avenue of inquiry was both logical and necessary and may have led to his identification.
- DIMA officers relied on Chinese characters written by Mr T and translated by a NSW Police officer on 17 January 2003. Although this police officer was able to speak and read Cantonese, he was not an accredited interpreter/translator. His translation of Mr T's name was not revisited until 15 September 2003 when a Sino/Vietnamese DIMA officer translated Chinese script recently written by Mr T and identified his correct name. The Chinese script that was translated on 17 January and 15 September 2003 included the characters for his correct first and family names and was capable of being read as such by a Sino/ Vietnamese interpreter. Other communications with Mr T between 17 January 2003 and 15 September 2003 had been conducted through telephone interpreters who did not have the opportunity to translate any of the characters written by Mr T.
- It is of concern that Mr T was detained for a third time just one month after he had been released from the same detention centre following his identification as a citizen. Mr T had a high profile in the detention centre and had been detained there for some eight months. Both of the earlier detentions had followed from NSW Police referrals and it was readily foreseeable that Mr T was at risk of coming to the attention of DIMA again. Had DIMA conducted a comprehensive analysis of the failings that had led to Mr T's second detention and alerted ACM and DIMA staff to Mr T's true status, it is highly likely that the third detention would not have occurred.

2.5 Those matters indicate that s 189 of the Act was not administered properly in this matter. A common finding in the Rau and Alvarez Reports and in this report is that DIMA should review the policies, systems and training that support the

administration of s 189. As part of that review, DIMA should address another particular problem that became prominent in the course of this investigation. Shortly stated, it seems there is a lack of understanding within DIMA as to who is responsible for making the decision to detain a suspected unlawful non-citizen. Detention is a two-part process: after steps are initially taken to detain a person, there is a continuing process to keep a person in detention. This is recognised in the definition of 'detain' in s 5 of the Act, which gives two meanings to the word: 'take into immigration detention'; and 'keep, or cause to be kept, in immigration detention'.

2.6 Many DIMA officers hold a narrower view of detention that is at odds with that definition. At interview, several DIMA officers explained their view that only the officer who said the words 'you are detained' carries out a detention. It was also their view that officers who escorted a person into a car or completed paperwork directing ACM to transport someone to detention were merely assisting the detaining officer rather than causing a person to be detained. A product of this narrow view of detention is that officers do not always focus on the degree of responsibility they individually carry to ensure that the initial and continuing detention of a person is both proper and lawful. Nor do officers show appropriate interest as to whether the decision of another officer to detain is justified in all the circumstances.

2.7 This failure by DIMA officers to grasp the requirements of s 189 is reflected in documentary and record-keeping practices. In Mr T's case, the documentary record does not reveal which officer bore the responsibility of forming the reasonable suspicion required under s 189. The administrative practice followed in this and some other cases of which we are aware is that an officer who has detained a person may instruct a different officer to complete the documentation that causes ACM to take a person into detention. While there is no problem in principle in officers obtaining assistance from others, and indeed this can provide the opportunity for independent verification of the propriety of decisions, this should not result in administrative laxity.

2.8 A decision to place a person in immigration detention and thus deprive them of their liberty should be supported by a proper documentary record. All officers who, whether by word or action, cause a person to be taken into and remain in immigration detention should be identified on the record. The role played by each officer should be evident and the reasons for the detention should be clearly set out. The decision to keep a person in continuing detention should be reviewed constantly. If detention continues, the reasons for that continuation must be accurately recorded. This review must involve management level oversight and input.

2.9 The complexity of the legislative scheme for initial and continuing detention may be a contributing factor to the problems revealed by this investigation. Section 189 is framed as a power to place a person in immigration detention. Other sections (such as ss 191 and 196) deal expressly with the release of a person from immigration detention. The practice that seems to have developed is that those sections are viewed at least by some officers as the only avenue by which a person detained under s 189 can be released from detention. This is at odds with the view expressed earlier in this report that it is implicit in s 189 that a person detained under that section can only be kept in detention if there continues to be a reasonable suspicion they are an unlawful non-citizen. DIMA should be active in testing on a continuing basis whether that reasonable suspicion can be sustained. The onus does not shift to the person taken into detention to establish that the reasonable suspicion is unfounded. Viewed in this light, a person should be released from detention when there is no longer a basis for reasonable suspicion, notwithstanding that there may be some residual doubt as to their identity.

2.10 A review of whether DIMA administrative practices are compatible with the legislative framework should also take account of other provisions of the Act; for example the Act specifies some principles and procedures for ascertaining a person's identity or immigration status (eg s 188). In 2005, some other sections were enacted to provide for the release of an unlawful non-citizen from detention—for example, ss 195A and 197AB, which respectively empower the Minister to grant a visa on public interest grounds to a person detained, or to make a residence determination for such a person. Those new powers are an important means of addressing some of the issues that have been thrown up by the detention of people under s 189, but they do not negate DIMA's obligation to ensure that there is a continuing justification for the detention of a person under s 189. An Australian citizen who is wrongly or inadvertently detained under s 189 is independently entitled to be released from detention: they do not need a visa or residence determination. It is therefore important that the interrelationship between the new provisions in the Act is examined, lest any inappropriate administrative practices arise or become entrenched.

Recommendation 1:
In light of the serious problem exposed by this investigation concerning the wrongful detention of an Australian citizen under s 189 on three occasions for a total of 253 days, DIMA should review:

- section 189 of the Act and its relationship to other provisions of the Act dealing with the detention of people, release from detention, and the ascertainment of a person's identity or immigration status
- the policies, systems and training that support the administration of s 189 of the Act.

Section 192 of the *Migration Act 1958*

2.11 The way in which s 192 of the Migration Act was used to detain Mr T on the second occasion provides another worrying indication of problems occurring within DIMA concerning the administration of questioning and detention powers. The problems were threefold in that: s 192 was inapplicable to Mr T; the action taken by DIMA officers did not accord with the terms of s 192; and the Migration Series Instructions do not accurately represent the terms of s 192.

2.12 Section 192 provided at the relevant time (in January 2003) that an officer may detain a non-citizen if the officer 'knows or reasonably suspects' that the person holds a visa that is liable to cancellation under one of a number of specified provisions of the Act. The purpose of the detention is to enable the person to be questioned in circumstances where the officer reasonably suspects that the person would otherwise attempt to evade the officer or not cooperate with the officer's inquiries about their visa. As a general rule the person is not to be detained for more than four hours, unless they are concurrently detained under another provision of the Act. Amendments to s 192 made in 2004 (after Mr T's detention) empower an officer to require a person to provide a personal identifier, such as a photograph, signature, passport or travel document. Failure by a person to supply a personal identifier can be taken into account by the officer in forming a reasonable suspicion that the person is an unlawful non-citizen under s 189.

2.13 Guidance on the administration of s 192 is provided in several Migration Series Instructions (MSIs). Two that were pertinent will be discussed.

2.14 *MSI-368 Visa cancellation under sections 109, 116, 128 and 140* explains (at paragraph 28.1.1) that 's 192 provides for limited detention of visa holders'. The MSI goes on to explain that there are several steps involved in the lawful use of this detention provision: officers should first seek to establish the person's identity and immigration status and the knowledge or reasonable suspicion that someone is a non-citizen, or a particular non-citizen, must be founded upon legitimate evidence. The MSI goes on to suggest sources of that evidence, including reliable information that originates from outside of DIMA. The MSI then advises that officers must establish knowledge or reasonable suspicion that the visa the person holds may be liable to cancellation having regard to relevant legislation, policy and the facts of the case. Thirdly, the MSI explains that 'before placing an immigration cleared non-citizen in questioning detention, there must be a sound basis for the reasonable suspicion that the person will not co-operate or would attempt to evade the officers'. At this point, the MSI also warns that in making that last assessment, officers should not contemplate the use of the questioning detention until a person has indicated that they will not co-operate. The MSI is clear and unambiguous in its language. It also builds upon the guidance provided about the formation of a reasonable suspicion in *MSI 234 General Detention Procedures*. (Inexplicably, though it is not relevant to this case, the MSI does not refer to all of the relevant sections under which a visa is liable to cancellation.)

2.15 *MSI-318 Compliance and Enforcement Overview* is also relevant to s 192. That MSI provides, amongst other things, that s 192 allows an officer to detain a lawful non-citizen (that is, visa holder) who the officer has reasonable grounds to suspect would be liable to cancellation under section 109 and 116 (which are some only of the provisions specified in s 192(1)). The MSI goes on to incorrectly advise that an officer must have a *belief*—not a reasonable suspicion—that a person would attempt to evade the officer or would not cooperate with inquiries unless detained. We note that this is a higher test but it is also inconsistent with the language of the legislation.

2.16 The position in brief is that s 192 was inapplicable to Mr T: the officers who detained him in 2003 could not reasonably have formed the opinion either that he held a visa or that there was a visa liable to cancellation under one of the relevant provisions. There were also problems to do with the calculation of the duration of Mr T's detention for the purpose of being questioned, and with the documentation of his detention.

2.17 Mr T's second detention commenced on 17 January 2003 when a compliance officer, Officer D, attended a NSW Police station with another DIMA officer, Officer J. Officer J was from another section of DIMA and did not have compliance experience. Some three days after the detention, on 20 January 2003, Officer D recorded the circumstances of the detention in an email. My staff have since viewed Officer D's compliance notebook and have noted that there are no entries in respect of the detention of Mr T on 17 January 2003. In her email, Officer D recorded that at one point during the interview with Mr T she put to him that she thought that he did not have a visa. Shortly after expressing this view, Officer D decided to detain Mr T under s 192. Officer D does not record whether she was satisfied to the requisite degree about whether Mr T was a non-citizen, whether he had a visa liable to cancellation under at least one of the relevant cancellations provisions, nor whether he was likely to be uncooperative or attempt to evade the officers. Indeed, it would

appear impossible to hold the view that someone did not have a visa while simultaneously suspecting that they held a visa that was liable to cancellation.

2.18 Officer D noted the time that Mr T was taken into questioning detention under s 192 (7.30 pm) and the time that he was subsequently detained under s 189 (8 pm). Though it is not material to this case, the officer should arguably have recorded the time that it took to travel from the police station to the DIMA office in order to carry out system checks. Section 192(7)(a) provides that travel time can be discounted in calculating the four hours that a person can be held for questioning detention.

2.19 At interview, some two and a half years later, both Officers D and J stated that s 192 enabled detention for four hours in order to establish identity. They did not agree that a reasonable suspicion concerning the existence and cancellation of a visa was a prerequisite to the valid exercise of that power. Officer D stated that she had received no formal training in the use of the detention power under s 192 and other more experienced officers trained her when she joined the area.

2.20 In summary, it is clear that these officers share a misunderstanding of the requirements of, and limitations upon, the power to detain under s 192. Interviews in relation to other immigration matters presently under investigation by this office have confirmed that this misunderstanding is shared by many more DIMA officers and is indicative of unfamiliarity with relevant guidelines and deficiencies in training.

Recommendation 2:
In light of the serious problem exposed by this investigation concerning the administration of s 192, DIMA should ensure that:

- compliance officers are properly trained in the requirements of s 192
- the Migration Series Instructions accurately reflect the requirements of s 192.

Relevant recommendations from the report of the Rau Inquiry:
Recommendations 3.1 and 7.2.

Detention policy

2.21 Another issue that arose during the investigation of Mr T's case was the question of who has the authority to exercise powers under the Act to detain suspected unlawful non-citizens. Sections 189 and 192 of the Act simply confer that power upon an 'officer'. That term is defined broadly in s 5(1) of the Act to include all DIMA officers (unless the Minister specifies to the contrary), other persons from specified Commonwealth agencies, federal, state and territory police officers, and other persons authorised in writing by the Minister.

2.22 The power to detain a person can therefore be exercised by *any* DIMA officer, unless the Minister specifies to the contrary. The only limitation that has been placed upon this breadth of authority is to be found in Part 3 of MSI 321 on Detention of Unlawful Non-citizens, which provides:

> 3.6 Section 189 requires an officer to detain a person in the migration zone who they know or reasonably suspect is an unlawful non-citizen. However, it is ordinarily certain staff in Border Control and Compliance, trained in the lawful use of detention, who exercise this power.

3.7 Officers who have not been trained in the use of detention powers should contact a member of the Border Control and Compliance Program in circumstances where they believe s 189 requires them to act.

2.23 In my view this is a loose and inappropriate policy constraint on the exercise of the extraordinary powers of detention that are found in the Migration Act. The position is all the more worrying in a setting where, as noted elsewhere in this report, there is inadequate training for compliance officers concerning the exercise of detention powers.

2.24 The Department has advised the Ombudsman's office that MSI 321 is currently being revised in the form of a new MSI titled 'Procedures for detaining persons of interest'. The Ombudsman's office is also aware of new training initiatives being implemented in the Department. As part of this revision of MSI 321, DIMA should promulgate more explicit instructions to ensure that only those DIMA officers who are appropriately trained and authorised are empowered to detain suspected unlawful non-citizens.

Recommendation 3:
For the purposes of the definition of 'officer' in s 5(1) of the Act, the Minister should specify that the category is to include only those DIMA officers who have been trained and certified to exercise detention powers. Pending the development of a proper training program, the Minister should specify that the category is to include only those officers designated as compliance officers.

Mental health issues

2.25 Mr T has a long history of chronic mental illness. He has been diagnosed as a florid schizophrenic with severe thought disorder. Some of the recorded symptoms of his illness are:

- restlessness, constantly on the move
- a propensity to 'make things up'—he speaks in 'neologisms'
- an inability to effectively communicate orally or in writing or comprehend communication with him
- confronting behaviour placing him at risk of others offended by this behaviour
- social disinhibition
- poor personal hygiene.

2.26 The investigation of this matter has identified the following significant events regarding Mr T's mental health.

- In October 1981, he was admitted to the psychiatric hospital at the Sungei Besi camp in Kuala Lumpur and diagnosed with schizophrenia.
- In May 1982, he was classified as 'schizophrenic residual type in remission'.

- On 21 April 1983, a psychiatrist examined him and assessed him as mentally stable, providing the following prognosis:

  > The prognosis is greatly favourable. The patient should completely recover. He may benefit from a prompt resettlement, an adapted treatment (the present treatment should be reduced, or stopped under his social, personal, and economic independency). He may be helped, at the beginning of being admitted in a Chinese community. He is fit to travel. He does not need medical escort.

- Mr T arrived in Australia on 14 March 1984 and was admitted on 27 March to the Prince Henry Hospital in Sydney for treatment of his mental illness. He transferred to the Gladesville Hospital on 18 June 1984 and was discharged on 9 July 1984 at the request of his sister.
- Dr N, a general practitioner, commenced providing medical care for Mr T in 1984 and continued to care for him until 1997. At this time Mr T ceased to reside with his sister and started to live on the streets.
- It is known that Mr T was held as an involuntary patient in the Cumberland Hospital on 11 July 1997 and released on 12 August 1997. He was also held as an involuntary patient at the Canberra Hospital on 2 July 1998 and was transferred for an inpatient stay at the Cumberland Hospital on 5 July 1998. NSW Police records show that since 1997 Mr T has spent a considerable amount of time in the care of the Cumberland Hospital.
- On 20 April 1999, Mr T was arrested by the NSW Police, assessed at the Hawkesbury Hospital and held as an involuntary patient at the Pialla Mental Hospital.
- On 24 January 2003, whilst in detention at VIDC, Mr T was admitted to Banks House, a psychiatric unit attached to the Bankstown Hospital. He returned to VIDC on 12 February 2003 and his treatment was continued until his release on 16 September 2003.
- Mr T is currently an inpatient of a psychiatric hospital and receiving treatment.

2.27 Advice has been received from the NSW Protective Commissioner that Mr T does not recall any events surrounding his detentions. Given that advice regarding the current status of his mental health, the Ombudsman's office decided that an interview with him would not serve any constructive purpose.

2.28 Discussions with his brother revealed that whilst his family would like to be able to care for Mr T, they do not have the facilities to supervise him and prevent him leaving their homes. NSW police had on a number of occasions conveyed Mr T to his brother's home but Mr T only stayed for a short time and then left, seemingly to wander the streets.

2.29 Mr T's poor state of mental health should have been evident to DIMA officers during each of the three periods he was held in detention. It is generally accepted that DIMA owes a duty of care towards those who are in detention, especially those who are vulnerable and not able to take control of their own health and wellbeing (for example, *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549). The steps taken in relation to Mr T fell short of any professional discharge of that duty of care. I refer to the following points as examples of that failure.

- Though it was apparent that Mr T was mentally ill, DIMA officers relied on information he provided to them as a basis for forming a 'reasonable suspicion' that he was an unlawful non-citizen for the purposes of s 189 of the Act.
- Responsibility for the management of Mr T's mental illness was placed totally in the hands of ACM after his admission to the VIDC. There is no evidence that any assistance was sought from mental health professionals before a decision was taken to place Mr T into immigration detention.
- No inquiries were made with mental health hospitals while Mr T was in detention in an attempt to identify him.
- DIMA acknowledged that once Mr T had been identified as an Australian citizen he could not be lawfully detained at the VIDC. On each occasion that he was released from detention Mr T was returned to the community without any arrangements apparently being made for ongoing management of his observable mental illness. The most that appears to have been done was an unsuccessful attempt to reunite Mr T with his family. There is no evidence that DIMA sought advice from the VIDC medical staff regarding the ability of Mr T to care for himself upon release, or of any attempts to determine if other options were available for his care. The worst aspect of this lack of care was demonstrated at the end of his second period of detention. After 242 days in detention at the VIDC he was given $20 and simply let out onto the street, though it was then known that he was an Australian citizen who had been held in detention for a lengthy period. Mr T abandoned his three bags of personal possessions under a tree near the VIDC. In my opinion this demonstrated an insensitive disregard of the duty of care that should have been displayed towards Mr T.

2.30 The release of detainees suffering from mental illness is a matter that must be addressed by DIMA. Presently, the Department's response to this issue is driven by two imperatives.

- If there is no longer any valid reason for detaining a person, they must be released immediately.
- The management responsibility for the health of detainees has been contracted out to the operators of the Immigration Detention Centres (IDCs). The contractual responsibility of the operator of the IDC ceases the moment a detainee is released from an IDC. There is no obligation on the IDC operator to arrange for continuing mental health care for released detainees.

2.31 It is necessary for DIMA to acknowledge that it has a duty of care that surpasses those considerations. Specifically:

- DIMA should acknowledge that its duty of care requires it to make appropriate arrangements for the care of detainees suffering from mental illness at the time of their release from immigration detention.
- DIMA should negotiate appropriate arrangements with relevant State and Territory mental health services to facilitate the care of detainees with mental illness immediately following their release from detention.
- DIMA should develop a release package for detainees with appropriate support mechanisms; for example, Centrelink should be advised of the detainee's situation.

2.32 Whilst in detention at the VIDC, Mr T received regular and ongoing treatment for his mental illness, including a period of treatment at Banks House, the psychiatric unit of the Bankstown Hospital. In accordance with the terms of the contract between DIMA and ACM, the management of Mr T's health while in detention was the responsibility of ACM. Medical staff at the VIDC did note that the VIDC was not an appropriate place for his rehabilitation but it was also noted by ACM staff and DIMA officers that options for alternative detention arrangements were limited. Mr T's disinhibited and confronting social behaviour occasionally created situations where, for his own safety, he was separated from other detainees. Clearly, as stated in the Rau Report, IDCs are not suitable places for the detention of persons with serious mental illness.

2.33 Problems to do with the care and treatment of immigration detainees with mental health problems were addressed at length in the reports on the Rau and Alvarez matters. The various findings and recommendations in those reports are as applicable to Mr T's case; indeed, in some ways his case presents a more worrying picture of the failure of the Department to deal with the critical issue of mental health. In my opinion, Mr T's case provides clear evidence of an urgent need for the Department to address detainee mental health issues.

Recommendation 4:
In light of the serious problems exposed by this investigation concerning compliance handling and detention of a person with a serious mental illness, DIMA should develop a clear policy and guidelines that specify in a practical manner:

- the nature of DIMA's responsibility towards a detainee who is suffering from a known mental illness upon that person's release into the community
- the arrangements that should be made for continuing mental health care of any such detainee upon their release into the community

As part of this policy development, DIMA should:

- negotiate appropriate arrangements with relevant State and Territory mental health authorities to facilitate this continuing mental health care
- develop a release package that includes arrangements to ensure that appropriate support agencies, such as Centrelink, are advised of the detainee's needs at the time of release from detention.

Relevant recommendations from the report on the Rau Inquiry:
Recommendations 6.10, 6.11 and 6.13.

Relevant recommendation from the report on the Alvarez Inquiry:
Recommendation 8.

Failure to identify

General

2.34 The identification of detainees with mental illness was discussed at length in the Rau and Alvarez Reports. It is acknowledged that DIMA officers are presented with a difficult problem in cases where detainees provide false information, either by

deliberate deception or as a consequence of mental incapacity. Nevertheless, this problem will generally be overcome by an organised approach involving the use of all available identification resources.

2.35 As discussed in the Rau and Alvarez Reports and elsewhere in this report, there is a considerable degree of risk involved in DIMA officers accepting, without intense scrutiny, any information provided by a person who is known to suffer from mental illness. This information should not be relied upon solely as the basis for forming a 'reasonable suspicion' that a person is an unlawful non-citizen for the purposes of s 189 of the Act.

2.36 DIMA is heavily reliant upon its own data systems to provide data to assist in the identification of persons. This reliance on these systems has seemingly led to some DIMA officers adopting the position that if data cannot be found on the systems it does not exist. This is flawed reasoning. As reported in the Rau and Alvarez Reports, there are serious problems with DIMA's data systems and with the capacity of DIMA staff to access the data on those systems. There was important data about Mr T on DIMA databases that could and should have been found. The fact that it was not found was a major factor in him being detained for an extended period of time.

2.37 Mr T's case—involving the detention on three occasions of an Australian citizen for a total period of 253 days—also highlights the consequences of a failure to diligently pursue appropriate avenues of inquiry to identify a suspected unlawful non-citizen. The relevant files exhibit long periods of inactivity by DIMA officers in taking steps to identify Mr T. The identification inquiries were ad hoc and lacked any sense of continuity or urgency. There is ample evidence to support the view that some compliance officers believe that it is the detainee's responsibility to identify themselves. This 'reverse onus' culture is especially inappropriate in a case such as this where the detainee has limited capacity to meet this expectation.

2.38 The unusual behaviour of people suffering from mental illness will often result in them coming into contact with police, as is the case with Mr T. Police have a variety of resources available to assist them in the identification of people and are guided in this process by explicit instructions and training. It is imperative that DIMA compliance officers, who often lack an adequate degree of training for this identification role, satisfy themselves that where police are holding an unidentified suspected unlawful non-citizen, that the police concerned have exhausted all appropriate avenues of identification before DIMA takes that person into detention.

Recommendation 5:
DIMA should take all necessary measures to ensure that compliance officers are trained to:

- act with caution before detaining a suspected unlawful non-citizen being held by police
- satisfy themselves that police have exhausted all appropriate avenues of identification before taking them into detention.

Relevant recommendations from the report on the Rau Inquiry:
Recommendations 5.2 and 5.7.

Relevant recommendation from the report on the Alvarez Inquiry:
Recommendation 4.

Fingerprints and biometric data

2.39 As Mr T's fingerprints were recorded on NAFIS, the national fingerprint database at CrimTrac, he should have been identified readily on each occasion that he was detained by either the NSW Police or DIMA. Evidence in support of this view is found in the events of 1 and 2 October 2003 when the NSW Police arrested Mr T for a transport offence. After discussions with DIMA, the police fingerprinted Mr T and discovered that he was a missing person and an Australian citizen. Due to his mental illness, he was released without charge into the care of his brother.

2.40 *MSI 125: Fingerprinting of Detainees* was issued in 1996 and was in place during Mr T's three detentions. That MSI relevantly explains that pursuant to s 258 of the Act, authorised officers may do all such things that are reasonably necessary in order to facilitate the present or future identification of a person in immigration detention. Section 258 refers to photographing, measuring or otherwise recording matters in order to facilitate identification; the MSI asserts that this power encompasses fingerprinting. The MSI explains that a person should consent to this procedure, but in the absence of such consent, the MSI informs officers that they may use reasonable force. The MSI was subsequently altered in July 2003, to reflect legal advice received by the Department in late 2001, that reasonable force could not be used if a person had not consented to providing fingerprints.

2.41 In Mr T's circumstances it is of concern that, on the evidence available to this office, DIMA appears to have not even considered the option of obtaining fingerprints from Mr T. Given the difficulties experienced by DIMA in identifying Mr T, especially during his second detention of 242 days, the failure to consider the use of fingerprints to identify him is inexplicable.

2.42 The *Migration Legislation Amendment (Identification and Authentication) Act 2004,* which came into effect on 27 August 2004, provides that people in immigration detention must provide personal identifiers (including fingerprints). Supporting regulations and instruments commenced operation in February 2005. There was also a policy directive issued by the Minister on 26 February 2005, which requires that all people taken into immigration detention must be fingerprinted.

2.43 The introduction of this legislation and supporting policy directive should, if properly applied, ensure that there are no future cases of unidentified Australian citizens whose fingerprints are on the NAFIS system being held in immigration detention for protracted periods of time.

2.44 The identification of persons using biometric data was discussed at length in the Rau Report. The ongoing Minimum Nationwide Person Profile (MNPP) Project at CrimTrac at this time offers the best prospects for a national capacity to utilise a range of biometric data (including photographs) to assist in the personal identification process. DIMA should have significant interest in the further development of this project and should ensure that DIMA, through Commonwealth representation on CrimTrac, has access to any database that may be developed as a result of the MNPP Project. Access to a database of this nature would have provided a real opportunity for DIMA to identify Mr T and to avoid his wrongful detention.

Recommendation 6:
DIMA, through Commonwealth representation on CrimTrac, should maintain interest in the development of the Minimum Nationwide Person Profile (MNPP) Project and take the necessary steps to ensure that DIMA has access to any national biometric database developed as a result of this Project.

Relevant recommendations from the report of the Rau Inquiry:
Recommendations 5.3 and 5.4.

Language and cultural issues

2.45 Language, ethnic and cultural difficulties also posed a barrier to the identification of Mr T. Although he has lived in Australia since 1984, Mr T speaks very little English. He is fluent in Vietnamese and Cantonese and writes in Chinese script. His preferred language is Cantonese, and it is this that apparently caused confusion when attempting to identify his origins. The English translation of the Chinese script of a name is dependant upon the background of the translator and the translator's understanding of the origins of the person to whom the character refers. This situation may lead to the English translation of the character for Mr T's family name being spelt at least three completely different ways. Irrespective of the English spelling, the sound of the name in Vietnamese and Cantonese is the same.

2.46 Mr T was mistakenly believed to be Chinese; although of ethnic Chinese origin, he is Vietnamese. This created confusion and significantly delayed his identification. At the time of his second detention, Mr T wrote his name in Chinese script. The interpreter correctly translated Mr T's date of birth but his first and family names were not translated into the correct anglicised version.

Recommendation 7:
DIMA should include training on awareness of cultural, language and ethnic issues for all compliance officers in the syllabus at the proposed College of Immigration, Border Security and Compliance and this training should include instruction on the use of translators/interpreters to ensure that communications from detainees are correctly translated/interpreted.

Relevant recommendation from the report of the Alvarez Inquiry:
Recommendation 6.

Database Information

2.47 At the time of his first detention in 1999, Mr T gave the name John, an anglicisation of the pronunciation of his first name, but he also provided his correct surname and his correct date of birth. He was not identified from this information despite the fact that his surname and date of birth were on DIMA databases. It was indicated to my investigation officers that the reason for this failure may have been that a name search on the system produced too many results and the correct name was not matched. It was also suggested that at that time the database required an exact match to be made between the name entered and the database records. In either case, this was an unsatisfactory outcome that contributed to the detention of

Mr T. As the database systems that existed at that time have been superseded by ICSE there is nothing to be achieved by recommending remedial action with regard to these non-existent systems. However, this case provides further evidence of the urgent requirement to address the Department's IT shortcomings in the manner recommended in the Alvarez Report.

Relevant recommendation from the report of the Alvarez Inquiry:
Recommendation 4.

Failure to follow up on information

2.48 A number of opportunities to identify Mr T were lost because they were not followed up. One compliance manager suggested early in Mr T's second period of detention that he might have had dealings with NSW Health. This suggestion was not followed up and no inquiries were made by DIMA officers with mental health hospitals in an endeavour to identify Mr T.

2.49 There was no consolidation of all the information known about Mr T. ACM noted that he may be Vietnamese, he lived in Auburn, he had a long-term health problem and another detainee had recognised Mr T from about six years previously, stating he was a street wanderer. Potentially fruitful avenues of inquiry were lost, as this information was not pursued by DIMA.

2.50 At the time of his second detention, a compliance officer conducted a formal interview of Mr T and he stated that he was an Australian citizen. This response was not followed up; the compliance officer stated to my investigation team that his job was only to ask the questions and record the answers, not to follow up. In accordance with DIMA practice at that time, it was up to case officers to decide what action needed to be taken. This is clearly unsatisfactory and points to a dysfunctional case management system.

2.51 On admission at the VIDC on his third detention, ACM staff recognised Mr T. There is no evidence that this information was passed on to DIMA. Clearly, ACM staff regarded their role as being restricted to the management of detainees placed under their control; they did not regard themselves as responsible for the questioning of detainees or the gathering and dissemination of intelligence regarding detainees to DIMA. Similar contractual 'boundary' issues were discussed in the Rau and Alvarez Reports: in each case the failure of the Department to access valuable information in the possession of the contracted detention centre staff resulted in the loss of valuable opportunities to identify the detainees involved.

Relevant recommendation from the report of the Rau Inquiry:
Recommendation 5.2.

Relevant recommendation from the report of the Alvarez Inquiry:
Recommendation 3.

Case management

General

2.52 Serious problems with the case management of detainees were discussed in the Rau and Alvarez Reports and appropriate recommendations were made for remedial action. The investigation of Mr T's matter has again revealed a deficient case management system that must be addressed as a matter of urgency. The following deficiencies were noted in this case.

- There is no evidence that a case officer was responsible for Mr T's case except for the period of time when Officer A was the case officer during the second period of detention.
- There was no continuity in the management of Mr T's case—field officers detained Mr T, another officer interviewed him and then a case (removals) officer took over. On his third detention, the officer requesting that ACM collect and detain Mr T had not spoken with him and had not seen him, nor had the officer spoken about him with the NSW Police. This officer stated that he did not form any view about Mr T's status and just acted on the instruction of another officer whom he was unable to identify. Several DIMA officers stated that it is a common practice for a junior person to complete the 'paper work' on behalf of a superior.
- During his second period of detention, there were long periods of inactivity when no action took place in relation to Mr T. During the period of transfer of the case management function from the Sydney office to the Parramatta office, there was a period of approximately five months where there was effectively no action taken on his case.
- Important information was isolated to field officers, case management/removals officers or contract management teams and did not flow effectively between these officers.

Relevant recommendations from the report of the Rau Inquiry*:*
Recommendations 5.1 and 7.1.

Record keeping

2.53 The investigation of the detention of Mr T was made difficult by the absence of many records that should have been maintained in official files. Many decisions or the reasons for decisions were not recorded in official files. Notebooks were poorly maintained and not properly utilised. Of particular concern is the fact that no file was created for the third period of detention. The officer requesting the detention simply bundled up whatever papers he had completed and left it to the case officer to create the file—which did not occur. An ICSE record of this detention was not created until three days after Mr T was detained. No person was nominated on this record as being responsible for follow-up of the case. There is also no record on ICSE of Mr T's release after his third detention.

2.54 It should be mandated that an ICSE record of any detention is created immediately upon detention and that the detention is simultaneously brought to the attention of a responsible manager. This manager should then be the nominated officer responsible for quality control, including the monitoring of progress and the adequacy of inquiries and record keeping. A mandatory field should be established in

the ICSE record to require acknowledgement that a file has been created and has been given an official file number.

Recommendation 8:
DIMA should amend its direction to staff to require that at the time a person is detained under the Act:

- an appropriate entry is recorded forthwith on the ICSE database
- this entry is simultaneously brought to the attention of a responsible manager who must:
  - ensure that a file has been created
  - ensure that the file has been given an official file number
  - be responsible for quality control, including monitoring of progress of the case and the adequacy of inquiries and record keeping
- the manager should ensure that the time that a person is released from detention is recorded on the ICSE database.

Relevant recommendations from the report of the Rau Inquiry:
Recommendations 5.1 and 7.1.

Review of process

2.55 On each of the three occasions that Mr T was detained, the poor case management and record keeping described in this report went unchallenged. There is no evidence in any of the related files that, following the realisation that he had been detained as an Australian citizen, the process of his detention was internally reviewed at any time; nor is there any evidence that the matter was escalated to senior executive level at any time. Given that there were multiple detentions of an Australian citizen and one detention was for 242 days, this fact is both extraordinary and unacceptable.

2.56 In tandem with the findings of the Rau and Alvarez Reports, Mr T's case points to ineffective case oversight and review that can lead to disastrous outcomes. Each case was characterised by long periods of inactivity by compliance and case officers, with seemingly scant regard for the fact that individuals for whom they were responsible had been deprived of their liberty. An exacerbating factor in each case was that the person detained was vulnerable as a consequence of mental illness and had no advocate who was aware of their detention and capable of pursuing their interests with the Department.

2.57 Recommendations 3.4 and 3.5 of the Rau Report recommended the creation of a dedicated Identity and Immigration Status Group and a review of the functions of the Detention Review Committee. Those recommendations apply squarely to the process shortcomings identified in Mr T's case and have the support of this report.

Relevant recommendations from the report of the Rau Inquiry:
Recommendations 3.4 and 3.5.

Training

2.58 There was criticism in the Rau and Alvarez Reports of inadequate training of DIMA compliance staff. This has likewise been a theme in Mr T's case. Some of the DIMA officers interviewed in the course of this investigation:

- misunderstood the requirements of s 192 of the Migration Act and were therefore likely to apply that section unlawfully
- had little knowledge of relevant changes arising from case law—for example, none of the compliance officers were aware of the implications of the *Goldie* case in 2002, which required that continuing inquiries be made to sustain any 'reasonable suspicion' formed for the basis of s 189 of the Act
- had not received training on s 189 of the Act and the requirement for 'reasonable suspicion'
- had been placed in management positions with no related experience or training
- had not received training on the dangers of relying on information provided by mentally ill people
- had not received training on cultural awareness or the translation and recording of foreign names
- had not received training on the duty of care owed to those in immigration detention.

2.59 It needs no emphasis that when coercive powers are conferred on government compliance officials to detain members of the public for an indefinite period, the officials should receive a thorough grounding in the scope and requirements of the powers they can administer. This is not the case at present in DIMA.

2.60 I am aware that the Secretary of the Department has announced plans to establish a new Training Branch to develop a national training strategy that will include a College of Immigration, Border Security and Compliance. The serious training deficiencies revealed in the investigation of Mr T's case indicates that remedial training action should be pursued with some urgency.

Relevant recommendations from the report on the Rau Inquiry:
Recommendations 3.1 and 7.4.

Relevant recommendations from the report of the Alvarez Inquiry:
Recommendations 6 and 8.

Relationship with ACM

2.61 During the relevant periods of Mr T's detention in 1999 and 2003, ACM operated the VIDC. DIMA's relationship with ACM was managed through a contract with the DIMA contract manager based at the VIDC and referred to as the Centre Manager. Contract management staff moved freely about the VIDC but their attention was focused on ACM's adherence to the contract. DIMA contract managers interacted with the detainees and received any complaints from detainees regarding their treatment by the service providers (ACM). (I interpolate an observation at this point that the investigation team were advised that the complaint forms were written

only in the English language.) There is little evidence of direct contact between the case officers and ACM, although ACM staff provided reports relating to individual detainees that were eventually placed in compliance files. As a general rule, if communication between case officers and ACM staff did occur, it was through contract management staff.

2.62 Former ACM staff interviewed by my investigation team expressed the view that they were actively discouraged from information sharing and that they were just expected to undertake their contracted responsibilities to manage the detainees. Issues of health care were the responsibility of ACM; DIMA did not become involved in this area unless there was a complaint about the level of care or ACM advised it could not manage a particular detainee. Thus, for detainees such as Mr T, who presented with significant management difficulties, the daily accommodation, security and health issues for him were matters for ACM to manage. It was ACM's responsibility to identify any problems with a detainee and bring any related issue to the attention of the DIMA officers at the Centre. However, concerns expressed by ACM medical staff about the appropriateness of Mr T's detention at the VIDC are not reflected in DIMA records. Some ACM staff said that such observations were actively discouraged by DIMA.

2.63 Because ACM staff interacted daily with the detainees and often became involved in problem resolution with them, communication between ACM staff and detainees could often lead to the acquisition of valuable information that would be of assistance to DIMA. However, there was no mechanism in place to advise ACM staff that certain information should be passed on to DIMA officers. In Mr T's case, ACM officers were in possession of information that should have assisted in his identification. This information was not sought by or supplied to DIMA.

2.64 The Rau Report provided a detailed explanation of the consequences that flow from flawed contractual arrangements between DIMA and IDC service providers. Mr T's case provides further support for the concerns raised in the Rau Report, especially with regard to the absence of a positive operational communication link between the Department and the providers. It is not acceptable that critical information about detainees received by contracted detention officers is neither sought by, nor given to, DIMA decision makers. DIMA should take the necessary action to review contractual arrangements with current service providers to ensure that there is both a legal and operational basis to facilitate the flow of information between these organisations.

Recommendation 9:
DIMA should take all necessary action to put in place appropriate policies, procedures and structures to ensure that important information that may assist in identifying a detainee is gathered from detention centre service providers.

Relevant recommendation from the report of the Rau Inquiry:
Recommendation 4.2.

Detention over weekends and holiday periods

2.65 On both the first and third occasions that Mr T was detained by DIMA, the initial detention occurred on a Friday. On the first detention, Mr T was not formally interviewed until four days after his detention. On the third detention, there is no

record of a formal interview with Mr T, even though he was not released from detention until the following Wednesday. The practice of a person being detained on a Friday and not being interviewed until the following week has also emerged from other matters currently under investigation by this office. There is also evidence that this practice occurred over holiday periods. What this practice means in real terms is that detainees were prevented from having an immediate opportunity to produce evidence at a formal interview that may lead to their prompt release from detention. As a general rule, a detained person should be formally interviewed and provided with such opportunity within four hours of their detention. Operational planning should ensure that resources and facilities are available to conduct such interviews within the appropriate times.

2.66 At interview, DIMA officers stated that they had been instructed that post-detention interviews should be conducted within 24 hours of the person being detained but that this period excluded weekends. The source or authority for this practice has not been identified, but it is a practice that has been recognised as highly inappropriate. The detention of any person is a serious matter and it is an exercise of legal authority that must be undertaken with great care. Any period of detention must be as short as is legally and practically possible and the duration of detention must never be determined by matters of convenience for those with the authority to detain. It was explained to my investigation team that the practice of holding people in detention over the weekends and holiday periods was budget driven, as case officers were not generally available at that time. Whether or not this claim was true, the detention of persons over weekends and holiday periods as a matter of convenience was seen an unacceptable practice that should cease immediately. It was considered that this practice further illustrated the view expressed in the Rau and Alvarez Reports, that there is a cultural problem in DIMA that some officers do not attach sufficient importance and value to the right to freedom and liberty in a democratic society.

2.67 I viewed this practice with such concern that I took it up with DIMA during this investigation. Formal advice regarding this issue was received from the Department on 30 November 2005. This advice stated:

- it is not the policy of the Department to delay interviewing individuals in detention because of intervening weekends and/or public holidays
- the Department's current formal instructions are not explicit on this point
- it is possible that in the past some formal post-detention interviews did not take place at the first possible time that an interview could be held.

2.68 DIMA also outlined the requirements of relevant departmental instructions MSI 234 and 321 regarding the timing of actions to be taken following the act of detention. DIMA advised that another MSI would shortly be issued, titled 'Procedures for detaining persons of interest'; this MSI would deal explicitly with the question of when interviews must be conducted.

2.69 The proposed policy settings in that instruction are:

- officers should interview detainees **as soon as possible** after they are detained, in order to gain further information relevant to their continued detention
- as a general rule, detainees should be formally interviewed **within 48 hours** of their detention.

2.70 The latter setting will be subject to special rules in relation to unidentified detainees and detainees who make a claim of Australian citizenship or permanent residence. These people are to be formally interviewed **within 24 hours**.

2.71 DIMA's advice was explicit on a key point—'that intervening weekends or public holidays are not, under any circumstances, a reason for deferring the formal interview'. DIMA has advised that this policy has now been implemented.

2.72 It is accepted that there may be circumstances beyond the control of DIMA that may make it impractical to interview a detainee within four hours of their detention—for example, if an unscheduled compliance activity results in the detention of a large number of people at the same time, or if someone is detained at night and an interpreter is not available until the next day. In such exceptional cases the time before a person must be interviewed may be extended however, in all but extraordinary circumstances, this period should not exceed 24 hours and the reasons for extending the time for interview must be clearly recorded.

Recommendation 10:
DIMA should take all necessary action to require that, as a general rule, persons detained under the Migration Act be formally interviewed as soon as possible and no later than four hours after detention.

In exceptional circumstances the time before an interview is conducted may be extended but the reasons for the extension must be clearly recorded. In all but extraordinary circumstances, this extended period shall not exceed 24 hours.

This rule should operate in relation to a detainee who is held over a weekend or holiday period.

PART 3—OTHER ORGANISATIONS INVOLVED

New South Wales Police

3.1 Mr T has a long history of contact with the NSW Police. From Police records it appears that he first came to their attention in 1985 when he was arrested for an offence of stealing.

3.2 Police records reveal that he was fingerprinted on at least three occasions: 21 May 1985, 6 March 1998, and 16 January 2003. Of particular interest is that Mr T was arrested by police at Regents Park Railway Station on 16 January 2003, fingerprinted, issued with a Court Appearance Notice and released on the same date. One day later, he was located by police at the Central Railway Station, not positively identified and was subsequently referred to and detained by DIMA. This detention resulted in Mr T being held in immigration detention for 242 days until 16 September 2003. NSW Police has an efficient system for identifying people by the use of fingerprints. Had Mr T's fingerprints been obtained on this occasion he would not have spent eight months in detention.

3.3 An examination of the records provided by the NSW Police also indicate that they were well aware of Mr T's mental illness, having received missing persons reports and located him on numerous occasions, particularly since 1999.

3.4 The detention by DIMA of Mr T was on each occasion a result of his direct contact with the NSW Police. NSW Police has a clear policy relating to the location and detention of persons suspected of being unlawful non-citizens. Based on the documentary evidence seen by this office, there is no indication that this policy is not being adhered to. The investigation of this matter indicated that there was a positive working relationship between the NSW Police and DIMA. However, some DIMA employees have expressed their view that police would attempt to shift the responsibility for some of their more difficult identification issues to DIMA.

3.5 NSW Police also has a detailed and clear policy providing guidance to officers dealing with persons with impaired intellectual functioning. In particular, it is noted that Memorandum of Understanding exists with the NSW Health Department and that officers should, if in doubt about a person's mental health, seek help from a mental health team or a doctor. On each occasion that Mr T was detained it was noted that he might have been suffering from a mental illness. The actions of the Police have not been investigated and no definitive statement can be made as to their compliance with their guidelines, but there is no record that, on the occasions he was referred to DIMA, they took any action to ascertain the extent of his mental incapacity. If that had been done, perhaps, Mr T would not have been detained by DIMA.

New South Wales Police response

3.6 The New South Wales Commissioner of Police provided a written response to extracts of the draft report. In his letter, Commissioner Moroney advised that he has implemented a review of the current guidelines for the referral of persons to DIMA. Subject to legal advice, the Commissioner anticipates that the guidelines will be amended to clarify that police officers should take all steps that are reasonably practicable, including taking fingerprints, to ascertain the identity of a person in

custody who is also suspected of being an unlawful non-citizen before referring that person to DIMA. Commissioner Moroney also explained that:

> Police officers are not experts in diagnosing mental illnesses and nor should they be. Under s 24 of the *Mental Health Act 1990 (NSW)* police are able to take persons to hospital if:
>
> - they find a person who appears to be mentally disturbed and police have reason to believe that the person has recently committed or is about to commit an offence, or
> - the person has recently attempted to commit suicide, or
> - it is probable that the person will attempt to kill themselves or any other person, or cause themselves serious bodily harm or harm to any other person.
>
> In circumstances where a person presents with both mental health issues, and is suspected of being an unlawful non-citizen it is nonetheless appropriate for the person to be referred to DIMA, who are in a position to provide ongoing support for the mental health issue if required.

3.7 As illustrated in Mr T's case, the very fact that a person suffers from poor mental health may contribute to the suspicion that the person is an unlawful non-citizen and lead to their detention under s 189. In view of the potential interaction between mental health and perceptions about a person's immigration status, it is suggested that DIMA liaise with the New South Wales Police concerning that organisation's review of the existing referral guidelines. Ideally, the role of each organisation should be clearly delineated and, where it appears that a person of interest is suffering from mental health issues, the agreed referral protocol should clarify which organisation is primarily responsible for accessing mental health services at the earliest opportunity.

New South Wales Protective Commissioner

3.8 During the investigation of this matter, the Office of the Protective Commissioner of NSW was consulted. Advice was received from the Commissioner with regard to Mr T's capacity to participate in an interview. Based on the Commissioner's advice a decision was made that an interview with Mr T was not appropriate at this time as a consequence of his mental illness.

PART 4—REMEDIAL ACTION

4.1 Given that Mr T, an Australian citizen, was detained by DIMA for 253 days, there is, in my opinion, an obligation on the Department to take appropriate remedial action. As Mr T has no known advocate and, through mental illness, is incapable of managing his own affairs, the identification of an appropriate course of remedial action will be problematic. Nevertheless, DIMA should pursue this course of action in consultation with relevant public authorities.

Recommendation 11:
DIMA should take all necessary steps to initiate remedial action to redress the wrongful detention of Mr T. This action should include consideration of whether he qualifies under the Commonwealth Compensation for Detriment caused by Defective Administration (CDDA) scheme, for an act of grace payment, an ex gratia payment, under legal liability principles, or under the Reconnecting People Assistance Package.

PART 5—CONCLUSIONS AND RECOMMENDATIONS

5.1 The recommendations that follow the discussion of the issues in this matter identify areas where action might be taken to improve DIMA's detention related practices and procedures. DIMA's response to the recommendations is reproduced after each recommendation below.

Recommendation 1:
In light of the serious problem exposed by this investigation concerning the wrongful detention of an Australian citizen under s 189 on three occasions for a total of 253 days, DIMA should review:

- section 189 of the Act and its relationship to other provisions of the Act dealing with the detention of people, release from detention, and the ascertainment of a person's identity or immigration status
- the policies, systems and training that support the administration of s 189 of the Act.

DIMA's response: Agreed—implementation underway

Section 189 and its relationship to other provisions

The Department fully understands the gravity of decisions made under s 189 of the Migration Act. In recent months we have put in place a number of measures that seek to ensure that any decision relating to the detention and release of people or to the determination of their identity or immigration status are made fairly, reasonably, carefully and lawfully.

Detention Review Managers (DRMs) and the Detention Review Committee regularly review detention cases to ensure compliance with standard procedures and whether reasonable suspicion continues to be held. Detainees are screened for mental health problems and if such problems are identified, a treatment plan is put in place. Complex identity cases are managed through the National Identity Verification and Advice Section (NIVA) and new instructions have been issued to assist Compliance staff address identity and immigration status issues while in the field. Further training of relevant staff particularly in respect of the application of reasonable suspicion is ongoing and will become part of the curriculum for the College of Immigration Border Security and Compliance.

These measures are part of the much wider reform program being undertaken in the department, which is directed at ensuring that decision making is fair, reasonable and lawful and that staff recognise when to elevate issues for resolution by more senior staff. These initiatives are explained in more detail below. Our starting point for this activity is the comment in the Rau Report that:

> 'There is no automatic process of review sufficient to provide confidence to the Government, to the Secretary of DIMIA or to the public that the power to detain a person on reasonable suspicion of being an unlawful non-citizen under s 189(1) of the Commonwealth's *Migration Act 1958* is being exercised lawfully, justifiably and with integrity.'

Building on the initiatives outlined above and your comments in relation to the two-year detention cases (reported to Parliament under s 486O of the Migration Act), I note that the department and your office are having further discussions about the detail of this recommendation.

Policies

Two revised sets of administrative instructions for officers have been issued on establishing identity and immigration status both in the field and in detention (MSI 409: *Establishing identity—in the field and in detention*; and MSI 411: *Establishing immigration status—in the field and in detention*). These instructions came into effect on 20 December 2005.

Amongst other things, officers must be able to demonstrate under these new policy instructions that at any point in time:

- they know that a detainee is an unlawful non-citizen; or
- any suspicion that the detainee is an unlawful non-citizen persists and is reasonably held.

For example, MSI 409 sets out the following expectations of officers (with detailed instructions on how to achieve these expectations):

- identity issues are to be resolved as a matter of urgency
- ensure there are no periods of inactivity, including ensuring that cases of unresolved identity are escalated and reviewed on a regular basis
- think laterally and creatively to uncover all possible explanations for the pieces of information held and to pursue all avenues of inquiries
- fully document the process of, and conclusion reached, of identifying a person, even in straightforward cases; and
- escalate unresolved identity issues to senior officers, NIVA and the DRM.

Systems

In response to the Rau and Alvarez Reports, a number of initiatives were implemented including:

- NIVA was established in May 2005 to provide expert assistance to DIMA staff in identifying individuals. It manages complex identity cases including the escalation of unresolved identity issues. NIVA also provides training and support to officers on identification issues.

  In its first eight months of operation NIVA received, on average, 12 referrals each month. In the light of the tens of thousands of interactions where a person may come to the attention of a compliance officer, it is too early to draw any firm conclusions about its impact. It is, however, a clear indication that NIVA has been well accepted and is being used for the purposes for which it was implemented.
- DRMs commenced in June 2005. Their role is to regularly review detention cases and ensure compliance with standard procedures, including whether reasonable suspicion continues to be held. DRMs work directly to the State Director and are alerted of all cases within 48 hours of a person's detention; and within 24 hours where the identity is in doubt. They offer an additional

check within the compliance and detention framework to provide quality assurance.

- The Compliance Coordination Helpdesk, established in January 2006, provides policy and procedural guidance and advice to compliance staff and other officers in the department.

Training

Training is a high priority following the recommendations of both the Rau and Alvarez Reports.

- A Compliance Training Unit has been created to review and enhance training content and learning programs in line with the specific recommendations of the Rau and Alvarez Inquiries.

  The Compliance Training Unit's programs include the nationally accredited Certificate IV—Statutory Investigations and Enforcement and Transitional Training. The Certificate IV course includes strengthened segments on reasonable suspicion and investigating and establishing identity. (See tables 1 and 2 below for details of completed and proposed training.)

- The College of Immigration Border Security and Compliance, which is on track to be functioning by June 2006, will deliver comprehensive, tailored operational training for DIMA officers. The Compliance Coordination Helpdesk will also assist in better targeting the training of Compliance officers through identifying areas for improvement.

Table 1—Training courses delivered

Course/Subject	Number of staff	Dates
Certificate IV Module 1 (5 days)	54	November—December 2005
Transitional Training (1 day)	252	November—December 2005
Search Warrants For Delegates	33	By end of January 2006
Module 1 (5 days)	12	6—10 February 2006

Table 2—Proposed training courses

Course/Subject	Location	Dates
Module 1 (5 days)	Sydney	20—24 February 2006
Transitional Training (1 day)	Sydney	27—28 February & 1 March 2006
Search Warrants for Delegates	Sydney	March 2006
Search Warrants for Delegates	Canberra	March 2006
Search Warrants for Delegates	Melbourne	March 2006
Module 2 (5 days)	TBA	Expected to be delivered in March/April 2006

Recommendation 2:
In light of the serious problem exposed by this investigation concerning the administration of s 192, DIMA should ensure that:

- compliance officers are properly trained in the requirements of s 192
- the Migration Series Instructions accurately reflect the requirements of s 192.

DIMA's response: Agreed—implementation underway

The issues raised here are of equal concern to the department. Accordingly, the training curriculum will be changed to reinforce the distinction between ss 189 and 192. In the coming weeks we will write to you setting out the steps we will take to ensure that persons are not inappropriately detained prior to the revised training being delivered.

Both MSI 368 and 318 are currently being reviewed to focus on detention under ss 189 and 192. It will reinforce the difference between ss 189 and 192, including that in order to form a reasonable suspicion that the person holds a visa that should be cancelled, the person's identity cannot be unknown or doubtful. This MSI is due for completion at the end of March 2006. Prior to finalisation, it will be made available to you for comment, should you wish to do so.

Recommendation 3:
For the purposes of the definition of 'officer' in s 5(1) of the Act, the Minister should specify that the category is to include only those DIMA officers who have been trained and certified to exercise detention powers. Pending the development of a proper training program, the Minister should specify that the category is to include only those officers designated as compliance officers.

DIMA's response: Agreed in principle—implementation underway

The Department agrees that the authority to detain should only be exercised by officers who have undertaken certified training and indicated a satisfactory practical understanding of their powers and responsibilities.

The Department took steps to address this issue in September last year in response to recommendations in the Rau Report. The First Assistant Secretary of Compliance Policy and Case Coordination Division wrote to all State and Territory Offices directing them that only staff who have completed Module 1 of the course are to undertake compliance field operations. It also directed that staff who lead field teams in compliance operations must have completed Module 2.

An administrative direction from the Secretary (in the shape of an MSI) will be issued to both reinforce the instruction issued by the First Assistant Secretary and meet the intent of the recommendation.

Recommendation 4:
In light of the serious problems exposed by this investigation concerning compliance handling and detention of a person with a serious mental illness, DIMA should develop a clear policy and guidelines that specify in a practical manner:

- the nature of DIMA's responsibility towards a detainee who is suffering from a known mental illness upon that person's release into the community
- the arrangements that should be made for continuing mental health care of any such detainee upon their release into the community.

As part of this policy development, DIMA should:

- negotiate appropriate arrangements with relevant State and Territory mental health authorities to facilitate this continuing mental health care
- develop a release package that includes arrangements to ensure that appropriate support agencies, such as Centrelink, are advised of the detainee's needs at the time of release from detention.

DIMA's response: Agreed—implementation underway

The implementation of this recommendation is a staged process.

The Australian Health Ministers Advisory Council, National Mental Health Working Group (NMHWG) has agreed to bilateral discussions to develop better mental health services for people in detention and upon release.

As an example, a memorandum of understanding is in place with the South Australian Health Department to formalise clinical protocols for the care of detainees with mental health disorders from Baxter IDF.

In the interim, the department is managing the release of detainees on a case by case basis to take account of their mental health needs in planning their release.

The Department is also taking a 360° perspective on the management of clients who have come to the attention of the department as a result of compliance activities. The work being done to achieve this includes:

- A model for mental health care in detention has been developed and is operational at the Baxter Immigration Detention Facility (IDF). Under the new system, detainees are screened for mental health problems on admission and are routinely and regularly screened after that. A mental health plan is developed for any detainee who screens positive. Rollout is expected to be completed in all other facilities by 30 June 2006.
- The holistic case management framework will ensure that all vulnerable clients are comprehensively assessed and a case management plan developed to address their specific individual needs. Case Managers will regularly review the progress made against the plan. Case Managers will ensure that appropriate arrangements are in place to assist clients, with mental health issues, transition into the community. This can include Centrelink payments and social work services, as appropriate. This case

management system is currently underway in NSW and Victoria, and will be progressively implemented in other states; and

- A community care pilot, to be implemented in Sydney and Melbourne, will work in partnership with the community to provide supported accommodation and other specialist services.

These programs are not mutually exclusive and irrespective of where the person is located (whether in detention or in the community on a bridging visa), their needs will be managed. Where appropriate, this will include planning for their release from immigration detention, taking into account our responsibilities under both the common law and statutory law.

Recommendation 5:
DIMA should take all necessary measures to ensure that compliance officers are trained to:

- act with caution before detaining a suspected unlawful non-citizen being held by police
- satisfy themselves that police have exhausted all appropriate avenues of identification before taking them into detention.

DIMA's response: Agreed—implementation underway

The training package for DIMA compliance staff will be reviewed to ensure that it reinforces that officers must independently form their own views as to whether a person is unlawful. In conjunction, the administrative instruction dealing with establishing identity (MSI 409) reinforces that if a person is detained by police under s 189 of the Act the responsibility of DIMA officers to establish that person's identity is not diminished in any way.

As the report recognises, police officers are also migration officers for the purposes of the Act. They may detain a person pursuant to s 189 of the Act or refer the case to DIMA compliance officers for consideration. Therefore, it is paramount that the police also understand their obligations under the Act. The following steps are being undertaken:

- In November 2005, the Department commenced development of a new National Police Training package that focuses on the formation of reasonable suspicion and the associated obligations under the Act. The training covers mental health status and its impact on confirmation of identity. Training for police is planned to commence in April 2006.
- In response to recommendation 5.6 of the Rau Inquiry, the 24/7 Immigration Status Service (ISS) is being established. This 1800 phone service began on 20 February 2006 and will be made available progressively to police officers throughout Australia and will provide an immediate response to questions regarding the client's immigration status.
- The impact of ISS will be tested through a comprehensive quality assurance program that will include regional and remote areas. In particular, both the quality of referrals and the time that a person is held by the police will be monitored, in order to assess the impact of ISS.

Recommendation 6:
DIMA, through Commonwealth representation on CrimTrac, should maintain interest in the development of the Minimum Nationwide Person Profile (MNPP) Project and take the necessary steps to ensure that DIMA has access to any national biometric database developed as a result of this Project.

DIMA's response: Agreed

DIMA has a strong continuing interest in this project. It has held discussions with the Attorney-General's Department, the Commonwealth representative on the Board of Management of CrimTrac and will continue to cooperate with the Attorney-General's Department to achieve the implementation of the project.

Recommendation 7:
DIMA should include training on awareness of cultural, language and ethnic issues for all compliance officers in the syllabus at the proposed College of Immigration, Border Security and Compliance and this training should include instruction on the use of translators/interpreters to ensure that communications from detainees are correctly translated/interpreted.

DIMA's response: Agreed—implementation underway

Cultural awareness training has been identified as a high priority for staff and a new course is currently being developed. Course material will cover culture, language and ethnicity as well as responsibilities of compliance officers when engaging with clients from diverse backgrounds. It will also include practical instruction on the difference between interpreters and translators and the importance of using accredited interpreters and translators. This training is expected to be piloted in mid 2006 and incorporated into the curriculum of the College.

Recommendation 8:
DIMA should amend its direction to staff to require that at the time a person is detained under the Act:

- an appropriate entry is recorded forthwith on the ICSE database
- this entry is simultaneously brought to the attention of a responsible manager who must:
  - ensure that a file has been created
  - ensure that the file has been given an official file number
  - be responsible for quality control, including monitoring of progress of the case and the adequacy of inquiries and record keeping
- the manager should ensure that the time that a person is released from detention is recorded on the ICSE database.

DIMA's response: Agreed—implementation underway

The recently revised administrative instruction on establishing identity (MSI 409) requires officers to ensure that all actions taken in attempting to identify a person are accurately and comprehensively documented. This includes the creation of appropriate electronic and paper records on departmental systems and the individual's case file as soon as possible after the action is taken.

A comprehensive quality assurance framework for compliance operations is under development. This recommendation will be addressed as part of this initiative.

Additionally, the department is undertaking a number of projects to improve record keeping. These include the:

- Record Management Improvement Project, which has included a thorough review of DIMA record management by the National Archives of Australia; and
- training for staff in decision making and the necessity of documenting decisions.

Recommendation 9:
DIMA should take all necessary action to put in place appropriate policies, procedures and structures to ensure that important information that may assist in identifying a detainee is gathered from detention centre service providers

DIMA's response: Agreed—implementation underway

As a result of recommendations made in relation to the Rau and Alvarez Reports, initiatives to work more effectively with service providers are being developed.

The new case management framework (please refer to our response to recommendation 4) will provide the initial platform for achieving this recommendation, particularly for vulnerable individuals. Further policies, procedures and organisational arrangements are being developed to ensure appropriate and improved communication between the Detention Services Provider, its subcontractors and DIMA. These will specifically address communications in relation to individuals whose identity remains uncertain, particularly during the intervening hours before a referral is made to NIVA or where reasonable suspicion is under review.

Recommendation 10:
DIMA should take all necessary action to require that, as a general rule, persons detained under the Migration Act be formally interviewed as soon as possible and no later than four hours after detention.

In exceptional circumstances the time before an interview is conducted may be extended but the reasons for the extension must be clearly recorded. In all but extraordinary circumstances, this extended period shall not exceed 24 hours.

This rule should operate in relation to a detainee who is held over a weekend or holiday period.

DIMA's response: Agreed—implementation underway

On 19 December 2005, an interim instruction was issued instructing officers to conduct an interview as soon as possible and under no circumstances was the interview to be deferred due to an intervening weekend or public holiday.

The Department will revise the administrative instruction in line with the above recommendation and will submit the draft to you for consideration, as we agree that there should be flexibility in its application. For example, it is possible that if a person is detained in the early hours of the morning, they may either wish to be interviewed straight away or alternatively, rest for a period, so they can answer questions with a fresh mind. This may result in an interview appropriately occurring after four hours.

Recommendation 11:
DIMA should take all necessary steps to initiate remedial action to redress the wrongful detention of Mr T. This action should include consideration of whether he qualifies under the Commonwealth Compensation for Detriment caused by Defective Administration (CDDA) scheme, for an act of grace payment, an ex gratia payment, under legal liability principles, or under the Reconnecting People Assistance Package.

DIMA's response: Agreed—implementation underway

The Department has taken action to ensure that appropriate remedies are made available to Mr T. On 17 February 2006, I wrote to Mr T to apologise for the actions of the department. We have been in contact with his family in order to make arrangements to meet with Mr T and have arranged for a senior departmental officer to meet with Mr T, a family member and a social worker to deliver my letter of apology.

The letter is the first step in initiating remedial action to provide a fair and practical resolution for Mr T, which will not be limited to consideration of monetary compensation alone.

ATTACHMENT A—OTHER RELEVANT RECOMMENDATIONS

Relevant recommendations from the report of the Rau Inquiry

Recommendation 3.1

The Inquiry recommends that DIMA:

- design, implement and accredit—for all compliance officers and other staff who might reasonably be expected to exercise the power to detain a person under s189 (1) of the *Migration Act 1958*—a legislative training package that provides the officers with the requisite knowledge, understanding and skills to fairly and lawfully exercise their power
- ensure that the training comprehensively covers the use of DIMA and other agencies' databases and search capability and the conduct of searches to support investigations
- restrict the authority to exercise the power to detain a person under s189 (1) to staff who have satisfactorily completed the training program and who are considered to be otherwise sufficiently experienced to exercise that power
- ensure that a component on 'avenues of inquiry' be included in the Certificate IV in Government (Statutory Investigation and Enforcement) Training Program delivered to DIMA officers.

Recommendation 3.4

The Inquiry recommends that DIMA create a dedicated Identity and Immigration Status Group to ensure that, where the identity or immigration status of a detainee remains unresolved after initial inquiries have been completed, frequent follow–up reviews are conducted.

The Identity and Immigration Status Group should:

- review the continued validity of 'reasonable suspicion'—based detention on a regular basis – and at least every month—against the background of accumulating information
- be staffed by people who have wide experience in compliance and detention policy and operations, are familiar with the associated Commonwealth and state and territory legislation and arrangements, and have skills in investigation and analysis
- have the authority, responsibility and accountability for conducting and/or overseeing all necessary inquiries to establish the identity and immigration status of unidentified detainees
- report monthly to executive management on the status of individuals still in immigration detention, the reason why they are being detained what is currently being done to resolve the situation and the expected date for resolution.

Recommendation 3.5

The Inquiry recommends that DIMA critically review the functions of the Detention Review Committee and restructure its focus and operations to ensure that it:

- is chaired at branch head level or higher, depending on the matter under consideration
- draws on advice and reports from the Identity and Immigration Status Group
- comprehensively reviews and analyses complex or difficult detainee cases.
- seeks input from detention facility managers and provides feedback
- determines appropriate action and ensures monitoring and reporting on progress and outcomes to executive management
- clarifies case management responsibility, intended outcomes and reporting time frames
- is responsible for providing to executive management advice on critical or sensitive cases.

Recommendation 4.2

The Inquiry recommends that, as an integral part of renegotiating its contract with GSL, DIMA:

- agree with GSL innovative changes to overcome the challenges to staffing and service delivery presented by Baxter's remote location
- develop and implement effective arrangements for monitoring and managing the outcomes, to maintain quality services and ensure that the Government's policy objectives are met in a way that protects the health, safety and dignity of detainees
- rely on the advice and leadership of the Detention Contract Management Group (see recommendation 7.6) when negotiating these changes.

Recommendation 5.1

The Inquiry recommends that the DIMA Secretary:

- commission and oversee a review of departmental processes for file creation, management and access
- take a leadership role in implementing the major changes that will probably be necessary as a result
- ensure that staff receive training in effective file management practices and the reasons for them
- make executive management personally accountable for ensuring that sound file management practices are followed.

Recommendation 5.2

The Inquiry recommends that the DIMA executive ensure the preparation for staff of a checklist to be used as a minimum standards template for conducting identification inquiries. The checklist should provide a menu of avenues of inquiry, specify a

sequential order for investigations, be included as an attachment to the DIMA Interim Instruction on Establishing Identity in the Field and in Detention, and form a part of the personal investigation file.

The DIMA executive should also:

- formalise the Interim Instruction together with the checklist attachment as soon as practicable
- ensure that suitable training modules are developed and delivered to all staff—including managers—who might be involved in identification inquiries
- institute management arrangements to ensure that such inquiries are linked as appropriate to the Identity and Immigration Status Group.

Recommendation 5.3

The Inquiry recommends that, as a matter of urgency, the Commonwealth Government take a leadership role with state and territory governments to develop a national missing persons policy to guide the development of an integrated, national missing persons database or capacity. Initial policy developments could be carried out under the guidance of the Australasian Police Ministers Council, with the output submitted to governments for consideration and agreement.

Recommendation 5.4

The Inquiry recommends that, on the basis of an agreed national missing person policy, the Commonwealth Government take a leadership role with state and territory governments in developing and implementing a national missing persons database or capacity that will provide an effective national recording and search capability under both names and biometric data. Discussions in this regard should be informed by reporting on the progress and success of the Minimum Nationwide Person Profile project to the Australasian Police Ministers Council.

Recommendation 5.7

The Inquiry recommends that DIMA ensure that:

- fingerprints and other biometric data collected from individuals in immigration detention are stored on a national database to facilitate investigations by Commonwealth and state and territory police and other law enforcement agencies
- appropriate liaison arrangements are made with CrimTrac
- any DIMA decisions in relation to the collection and storage of biometric data are consistent with strategies being pursued by CrimTrac in response to guidance by Australian governments.

Recommendation 6.10

The Inquiry recommends that, as a matter of urgency, DIMA establish the Health Advisory Panel, as specified in the detention services contract, to help GSL develop and review Baxter's health plans and to provide, for health and social service professionals employed by GSL, access to well-qualified specialists and consultants-particularly in more complex cases or cases that have become protracted.

Recommendation 6.11

The Inquiry recommends that the Minister for Immigration establish an Immigration Detention Health Review Commission as an independent body under the Commonwealth Ombudsman's legislation to carry out independent external reviews of health and medical services provided to immigration detainees and of their welfare. The Commission should report to the Minister and:

- be appropriately staffed and resourced, with a core of experienced people with relevant skills
- have the ability to invite specialists to participate in particular reviews and audits
- have the power to initiate its own reviews and audits
- in consultation with the Immigration Detention Advisory Group and the Health Advisory Panel, carry out an independent assessment of the current structure of health care arrangements at immigration detention facilities and of the adequacy and quality of the services provided
- in consultation with the Detention Contract Management Group (see recommendation 7.6), review each health and medical care performance measure specified in the detention services contract and, where necessary, replace it with a more appropriate measure and propose arrangements for monitoring the measures
- recommend more effective arrangements for providing health and medical services to immigration detainees, together with arrangements for monitoring and management of the provision of those services
- identify the most appropriate national accreditation standards applicable to the immigration detention environment that service providers should be required to meet.
- coordinate its operations with the Ombudsman and the Immigration Detention Advisory Group in order to maximise the effectiveness of oversight machinery.

Recommendation 6.13

The Inquiry recommends that the Immigration Detention Health Review Commission work closely with the Immigration Detention Advisory Group and the Health Advisory Panel to review the adequacy of current systems for continuing professional development, to ensure the maintenance of high standards in the delivery of health services to immigration detainees.

Recommendation 7.1

The Inquiry recommends that DIMA develop and implement a holistic corporate case management system that ensures every immigration detention case is assessed comprehensively, is managed to a consistent standard, is conducted in a fair and expeditious manner, and is subject to rigorous continuing review.

Recommendation 7.2

The Inquiry recommends that DIMA critically review all Migration Series Instructions from an executive policy and operational management perspective with a view to:

- discarding those that no longer apply in the current environment
- where necessary, rewriting those that are essential to the effective implementation of policy, to ensure that they facilitate and guide effective management action and provide real guidance to busy staff
- ensuring that up-to-date, accurately targeted training is delivered to staff who are required to implement the policy guidelines and instructions
- establishing regular management audits that report to executive management, to ensure that the Migration Series Instruction are up to date and DIMA officers are adhering to them.

Recommendation 7.3

The Inquiry recommends that the Minister commission the Secretary of DIMA to institute an independent professional review of the functions and operations of DIMA's Border Control and Compliance Division and Unlawful Arrivals and Detention Division in order to identify arrangements and structures that will ensure the following:

- DIMA's compliance and detention functions are effectively coordinated and integrated.
- the desired outcomes of these functions and the necessary resources—including the number and the skills profile of staff—are clearly identified before a decision is made on the structure that will best enable effective and equitable service delivery.
- the restructuring accommodates these requirements and ensures that arrangements are made to monitor and manage the high-level risks to the Commonwealth inherent in immigration detention.
- there is a seamless approach to dealing with immigration detention operations and case management.
- the aims and objectives of the Government's immigration detention policy are fairly and equitable achieved and human dignity is demonstrably respected.

Recommendation 7.4

The Inquiry recommends that DIMA:

- review the current training programs for compliance and detention officers to ensure that induction and in-service programs convey an accurate and contemporary picture of DIMA operations and adequately prepare operational and management staff for all aspects of the work they will be expected to do
- ensure that such training particularly deals with the consultation, coordination, reporting and management requirements of compliance and detention operations and shows how to manage the risks inherent in the performance of these functions
- immediately develop and implement a policy that requires that every decision to detain a person on the basis of 'reasonable suspicion of being an unlawful non-citizen' is reviewed and assessed within 24 hours or as soon as possible thereafter.

DIMA should incorporate this policy of 24-hour review in all relevant training programs and operational guidelines to ensure that compliance officers understand the need to:

- objectively determine the reasons and facts upon which a decision to detain is made
- verify the validity of the grounds of 'reasonable suspicion' and the lawfulness of the detention
- take immediate remedial action as necessary and report the circumstances of any unresolved matter to the Identity and Immigration Status Group.

Recommendation 7.6

The Inquiry recommends that the Minister establish a Detention Contract Management Group made up of external experts to provide direction and guidance to DIMA in relation to management of the detention services contract and report quarterly to the Minister. Group members should have expertise in the following areas:

- project management in a high-risk government policy environment
- corrections management
- contracting strategy and management
- performance monitoring and management
- legal contracting and statutory reporting requirements
- management accounting and financial management.

The Detention Contract Management Group should have DIMA representation at First Assistant Secretary level to advise on policy implications and ensure that the Group's directions are implemented effectively through new departmental arrangements.

Relevant recommendations from the report of the Alvarez Inquiry

Recommendation 3

The Inquiry recommends that the formal interview of detainees be constructed in such a way as to require that, where necessary, responses from a detainee be further investigated. The interview process should be dynamic and designed to elicit information useful to the making of decisions about detention and removal.

Recommendation 4

The Inquiry recommends that, as an urgent priority, DIMA commission a thorough, independent review and analysis of its information management systems. The review should be carried out by an experienced, qualified IT systems specialist and should aim to do the following:

- identify the real organisational policy and operational information management requirements - particularly requirements for interconnectivity, compliance management functionality, and growth

- explore the potential for single-search entry to all DIMA databases
- formulate an implementation plan for consideration by the DIMA executive.

Recommendation 6

The Inquiry recommends that in the training program for compliance and investigations officers there be a focus on objectivity in decision making and a strong warning that false assumptions will contribute to poor decisions. Further, all staff at DIMA should be reminded of the need for great care in the spelling and recording of names in files and records.

Recommendation 8

The Inquiry recommends as follows:

- that compliance staff be trained to exercise greater caution in performing their duties—including verification of information—where it is known or suspected that a possible unlawful non-citizen may have mental health problems
- that any training program developed as a result of recommendations in the Palmer Report and this report include a component designed to better equip compliance officers to deal with people with known or suspected mental health problems.

ACRONYMS

ACM	Australasian Correctional Management
CDDA	Compensation for Detriment caused by Defective Administration
DIMA	Department of Immigration and Multicultural Affairs
DRMs	Detention Review Managers
ICSE	Integrated Client Service Environment
IDC	Immigration Detention Centre
IDF	Immigration Detention Facility
IRP	Interim at Risk Plan
ISS	Immigration Status Service
MAP	Management Action Plan
MNPP	Minimum Nationwide Person Profile
MR	Movement Records
MSI	Migration Series Instruction
NAFIS	National Automated Fingerprint Identification System
NIVA	National Identity Verification and Advice Section
NMHWG	National Mental Health Working Group
STO	State and Territory Offices
TIS	Telephone Interpreter Service
TRIM	Total Records Information Management
TRIPS	Travel & Immigration Processing System
VIDC	Villawood Immigration Detention Centre