Report of an Own Motion Investigation into Immigration Detainees held in State Correctional Facilities

Report under section 35A of the *Ombudsman Act 1976*

March 2001

EXECUTIVE SUMMARY

This report examines the administrative detention of individuals in prisons under the *Migration Act 1958*. The main issues considered are the grounds for holding immigration detainees in prisons and whether the policies and procedures established by DIMA, at least partly in response to this office's 1995 report concerning the transfer of immigration detainees to State prisons, are being followed in practice.

The report also focuses on asylum seekers transferred to prisons by DIMA due to their behaviour in immigration detention centres and on immigration detainees held in prisons following their completion of a custodial sentence and pending deportation from Australia.

Information obtained from DIMA indicates that in the period between July 1999 and June 2000, 98 transfers involving 91 immigration detainees were made from an immigration detention centre (IDC) to a State or Territory prison. In addition, as of June 2000, there were 41 immigration detainees held in prisons pending criminal deportation or removal following cancellation of a permanent visa.

Complaints received by my office suggest that the length of detention contributes to the incidence of behaviour problems among the detainees and may exacerbate mental health conditions. Difficult behaviour by a detainee, in turn, can lead to a decision to transfer the detainee to a prison.

Although a transfer to prison is a serious decision and is meant to occur only as a last resort, evidence shows that when transfers of immigration detainees are made their welfare is not always monitored closely. In addition, detainees are not always given notice of the reasons for their transfer, nor is the counselling process consistently followed, as required under DIMA policy. Despite the recommendations made in this office's 1995 report, DIMA has still not reached clear agreements with the relevant State and Territory correctional authorities to ensure that appropriate lines of accountability, processes and standards of care are established.

While a prison can be a place of detention under the *Migration Act 1958*, the state custodial regime essentially caters for the imprisonment of

criminals. Judicial argument mentioned later in this report makes it clear that when the liberty of a person is constrained by the community, the community assumes a heavy burden to ensure his or her safety. The courts have also indicated that there is a duty on the authorities to keep untried prisoners apart from convicted prisoners, as far as possible. In my view, these arguments are even more valid when immigration detainees, who have not been convicted let alone charged with a crime, are transferred to State prisons.

In my opinion, the failure to properly accommodate and monitor immigration detainees held in prisons, may lead to a breach of duty of care on the part of DIMA if a detainee suffers harm while in prison.

The cases described in this report highlight the concerns raised by the complaints made to my office since the 1995 report was published. In particular, I consider there is still room for improvement on the part of DIMA in managing long standing cases. Information provided by DIMA in response to my request shows that, as of June 2000, of the 89 detainees held in prisons, 41 had been there in excess of 9 months.

It is also evident that one effect of a delay in carrying out a deportation order is the imprisonment of an individual for a period greater than the sentence handed down by the court and greater than a citizen would serve. For example, due to the difficulties involved in deporting people to one country, Australian permanent-residents of this nationality frequently are held in jails well beyond the terms of their custodial sentences. One individual has been held in immigration detention at Port Phillip Prison for well over three years since he completed his full custodial sentence of three and a half years.

While I accept that the holding of immigration detainees in prisons is unlikely to be completely eliminated, especially in the short term, my recommendations are aimed at removing detainees from the prison system and ensuring greater accountability for their welfare.

DIMA has welcomed my office's continued interest in the review of this important area of public policy implementation. It has put a great deal of resources into responding to the issues raised in my report.

The Minister for Immigration and Multicultural Affairs, The Hon. Philip Ruddock MP also requested that I consult with him before I form a final

opinion, in terms of subsection 8(9) of the Ombudsman Act. This consultation took place on 26 February 2001.

RECOMMENDATIONS

I make the following recommendations. DIMA's responses to my recommendations are included in italics:

1. **DIMA eliminate the use of penal institutions as places for immigration detention as soon as possible other than when serious criminal behaviour is involved.**

DIMA's long standing policy is that transfers to prisons are a 'last resort option'. Recourse to State correctional facilities could not be ruled out as an option. Where criminal behaviour is involved, appropriate action is taken by the relevant authorities, including laying of charges, trial and, potentially, imprisonment under criminal law.

2. **DIMA establish secure detention facilities for the purpose of holding immigration detainees whose behaviour is not able to be effectively managed in a lower security environment of mainstream immigration detention centres.**

DIMA already has a range of infrastructure providing various levels of capacity within and across centres to assist with the management of detainees at risk of self harm or harm to others. Developments planned for existing and new centres will further increase overall capacity for managing difficult individuals.

3. **DIMA, as matter of priority, finalise MOUs with State and Territory correctional authorities.**

Action had already commenced to formalise arrangements with relevant State and Territory correctional facilities and other outside agencies. DIMA is expediting the development of protocols with relevant agencies regarding their involvement with detention centres and detainees.

4. **DIMA take all necessary measures to reduce the period of time that people spend in detention, particularly detention in prisons.**

A range of measures, including significant reengineering of protection visa processing, have been and are continuing to be pursued to minimise the length of time unlawful non-citizens spend in detention. However, many factors are beyond DIMA's control. Many of those transferred to prisons have exhausted merits review and are pursuing often-time consuming options over which DIMA has no or limited control. Detainees in prisons are regularly monitored to ensure the appropriateness of their place of detention.

5. **DIMA ensure that all information relevant to the management of a detainee (including but not limited to incidents, counselling and transfers) be documented in respect of each detainee. DIMA should also ensure that such file or files be kept in good order in accordance with best practice in record management.**

DIMA agrees with the recommendation which reflects current policy. Procedures will be expanded to cover circumstances where certain documentation relating to a detainee's transfer to a correctional facility may not be required, such as in cases involving laying of criminal charges, escape or national security concerns.

6. **DIMA ensure that mentally ill detainees are not transferred to prisons under the *Migration Act*.**

DIMA accepts that in the unusual circumstance where a mentally ill person is transferred to a prison health facility under the auspice of Mental Health legislation, that MSI 244 procedures should continue to be followed. Instructions will be amended to clarify the procedures relating to detainees transferred to prison hospitals for psychiatric inpatient care pursuant to state legislation.

7. **DIMA, as a matter of priority, undertake discussions with State and Territory authorities with a view to establishing procedures to be followed if a detainee is scheduled under the relevant State mental health legislation.**

DIMA is expediting the development of protocols with relevant agencies regarding their involvement with detention centres and detainees.

8. DIMA, in conjunction with ACM, develop strategies for effectively dealing with difficult behaviour by detainees. Such strategies should focus on defusing conflict and include training for ACM and DIMA officers in:

- **conflict resolution;**
- **managing difficult behaviour;**
- **cross-cultural communication; and**
- **dealing with people who are distressed.**

A range of strategies is already in place for effectively dealing with difficult behaviour. These are constantly under review. DIMA will produce a written instruction drawing these strategies together in one place.

BACKGROUND

1995 Investigation and Report

In 1995 the Ombudsman's office issued a public report under section 35A of the *Ombudsman Act 1976* entitled Investigation of Complaints Concerning the Transfer of Immigration Detainees to State Prisons. Following the investigation which led to the above report, DIMA developed new guidelines and instructions relating to the transfer of immigration detainees to prisons.

Since then my office has received further complaints regarding the transfer of immigration detainees to prisons as well as various aspects of the criminal deportation process. I have, therefore, decided that an own motion investigation of issues relating to the detention of individuals in correctional facilities under the *Migration Act 1958* is both warranted and timely.

Other relevant inquiries

One significant inquiry recently undertaken by a Senate committee has a bearing on matters relevant to this report. In June 1998, the Joint Standing Committee on Migration (JSCM) tabled a report on the Deportation of Non-Citizen Criminals. A number of relevant conclusions and recommendations arising out of this inquiry are discussed in this report.

Regulatory Framework For Detention in Prisons

Migration Act *and Regulations*

The current regulatory framework which provides the basis for immigration detention is similar to that described in my office's 1995 report. In essence, section 189 of the *Migration Act 1958* (the Act) provides for the detention of unlawful non-citizens in the following manner:

> (1) If an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person.

(2) If an officer reasonably suspects that a person in Australia but outside the migration zone:

(a) is seeking to enter the migration zone; and

(b) would, if in the migration zone, be an unlawful non-citizen;

the officer must detain the person.

Under the Act an unlawful non-citizen is a person, present in the migration zone (Australia), who is not an Australian citizen and who does not hold a visa that is in effect.

Subsection 5(1) of the Act defines migration detention as

(a) being in the company of, and restrained by:

(i) an officer; or

(ii) in relation to a particular detainee—another person directed by the Secretary to accompany and restrain the detainee; or

(b) being held by, or on behalf of, an officer:

(i) in a detention centre established under this Act; or

(ii) in a prison or remand centre of the Commonwealth, a State or a Territory; or

(iii) in a police station or watch house; or

(iv) in relation to a non-citizen who is prevented, under section 249, from leaving a vessel—on that vessel; or

(v) in another place approved by the Minister in writing.

The Act also allows the Minister to set up immigration detention facilities and allows for regulations to be made in regard to their operation. Section 273 of the Act provides that:

(1) The Minister may, on behalf of the Commonwealth, cause detention centres to be established and maintained.

(2) The regulations may make provision in relation to the operation and regulation of detention centres.

(3) Without limiting the generality of subsection (2), regulations under that subsection may deal with the following matters:

(a) the conduct and supervision of detainees;

(b) the powers of persons performing functions in connection with the supervision of detainees.

> (4) In this section:
>
> "detention centre" means a centre for the detention of persons whose detention is authorised under this Act.

In addition, persons who are not unlawful non-citizens may be detained in circumstances defined under section 253 of the Act which provides:

> Detention of deportee
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> (1) Where an order for the deportation of a person is in force, an officer may, without warrant, detain a person whom the officer reasonably supposes to be that person.
>
> (2) A person detained under subsection (1) or (10) may, subject to this section, be kept in immigration detention or in detention as a deportee in accordance with subsection (8).
>
> ...
>
> (8) A deportee may be kept in immigration detention or such detention as the Minister or the Secretary directs:
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> (a) pending deportation, until he or she is placed on board a vessel for deportation;
>
> (b) at any port or place in Australia at which the vessel calls after he or she has been placed on board; or
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> (c) on board the vessel until its departure from its last port or place of call in Australia.

Section 200 of the Act enables the Minister to order the deportation of an Australian permanent resident who holds a valid visa if the person becomes subject to section 201 of the Act. In essence, section 201 allows for the deportation of non-citizens who are present in Australia for less than 10 years and who are convicted of a crime. A person may become subject to section 201 in the following circumstances:

> Where:
>
> (a) a person who is a non-citizen has, either before or after the commencement of this section, been convicted in Australia of an offence;
>
> (b) when the offence was committed the person was a non-citizen who:
>
> (i) had been in Australia as a permanent resident:
>
> (A) for a period of less than 10 years; or
>
> (B) for periods that, when added together, total less than 10 years; or

(ii) was a citizen of New Zealand who had been in Australia as an exempt non-citizen or a special category visa holder:

(A) for a period of less than 10 years as an exempt non-citizen or a special category visa holder; or

(B) for periods that, when added together, total less than 10 years, as an exempt non-citizen or a special category visa holder or in any combination of those capacities; and

(c) the offence is an offence for which the person was sentenced to death or to imprisonment for life or for a period of not less than one year;

section 200 applies to the person.

The only regulation relating to the care and management of immigration detainees continues to be Regulation 5.35 which provides authorisation for the medical treatment of persons in detention under the Act.

DIMA policies and procedures

Since the Ombudsman's 1995 report on the investigation of complaints concerning the transfer of immigration detainees to State prisons was released, DIMA has issued a number of policy documents relevant to the care and management of immigration detainees and their transfer to prison. Aside from an updated Migration Series Instruction (MSI) titled General Detention Procedures (currently MSI no 234), MSI 244 issued in June 1999 deals specifically with transfer of detainees to State prisons and MSI 167, Detention of Deportees, clarifies DIMA's powers to detain lawful non-citizens who are subject to a deportation order. In addition, MSI 289, Non-citizens Held in Prison Liable for Enforced Departure, provides further guidance on DIMA's role in regard to prisoners who are liable to be removed or deported. There are also other relevant departmental and ACM guidelines.

DIMA's MSI 244, Transfer of Detainees to State Prisons, sets out the current procedures developed at least partly following this office's 1995 report. The MSI states that detention of immigration detainees within prisons occurs only as a **last resort**[1]. Under DIMA policy, the reasons for detention within a prison may include serious behavioural concerns, completion of a custodial sentence by the non-citizen, or the non-

[1] Emphasis added

citizen's location, for example, the absence of a purpose built IDC in the State or Territory.

Current DIMA policy envisages that detainees may be transferred to a prison when their "behaviour is considered to be unacceptable for the low security IDC environment"[2]. Examples given by DIMA include situations where the detainee behaves in a manner which presents a risk to the other detainees or because the behaviour is violent or unlawful and management and the detainee are unable to resolve the issue, although DIMA says that this arises infrequently. The policy also allows DIMA officers to take into account the detainee's past history in deciding whether he or she may pose a risk to others. According to MSI 244 this may include past use or distribution of narcotics; a history of violence; and/or of sexual offences. In addition, evidence that a detainee is suffering from a psychiatric illness may be a factor in deciding whether an IDC is an appropriate place of detention.

Under DIMA's policy, the decision to transfer a detainee to prison should be made by the State Director of DIMA or the Director's delegate, usually the officer in charge of Compliance in the State or Territory. All decisions must be fully documented, including any incidents which led up to the decision as well as any attempts to resolve the behaviour concerns. A notice with details of the reasons for the transfer must be given to the detainee and must inform the detainee of the procedures for seeking a review of the decision. An interpreter is to be used where necessary. Under DIMA's policy, the detainee is to be informed of how to contact my office.

MSI 244 also requires that each detainee held in a State institution should be assigned a case manager and is to be visited monthly. The case officer should also have regular weekly contact with the institution to monitor the condition of the detainee. These contacts are to be documented. Policy requires that the place of detention for detainees held in State institutions be reviewed initially within 10 working days of the transfer and thereafter on a monthly basis.

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[2] DIMA's MSI 244

INVESTIGATION

One of the causes of complaints about DIMA made to my office in the past year or two has been the transfer of immigration detainees from an IDC to a prison. Complaints have been received directly from the detainees involved as well as from friends and concerned community, legal and religious organisations. The range of issues complained about included the grounds for the transfer; the perception that the transfer was a punishment by DIMA; conditions within the prison; assaults of immigration detainees; and the length of immigration detention in prison. Since the beginning of 1996, my office has received over 70 complaints relating to immigration detention in prisons. A number of the more serious allegations were referred to DIMA for investigation by the appropriate authorities because they involved possible criminal offences. One serious assault allegation was referred to State police.

Memoranda of Understanding (MOUs)

In her 1995 report my predecessor recommended that the use of penal institutions as places for immigration detention be eliminated; that in the short term, prisons should be used as a last resort for the detention of unlawful non-citizens; and that immigration detainees should not mix with convicted prisoners but only be held in remand areas. She also recommended a range of management practices aimed at ensuring greater accountability by DIMA for detainees including that DIMA develop agreements with relevant State agencies in regard to the care of immigration detainees held in prisons. DIMA accepted that it should retain accountability for detainees held in State prisons and undertook to consult with the State and Territory authorities.

Despite DIMA's acceptance of my predecessor's recommendations in 1995, no agreements have been entered into with State and Territory governments. In my opinion, DIMA has unreasonably delayed developing these arrangements.

In the course of this investigation DIMA has provided my office with a copy of a draft Memorandum of Understanding (MOU) between DIMA and the Department of Corrective Services in Queensland. DIMA expects that once this MOU is agreed on, it will become a model for similar agreements with other State correctional authorities.

I note that the draft MOU contains a set of standards relating to the care and welfare of the detainees. If met, these standards should go some way to improving the communication between DIMA and the prison and to ensure the detainees wellbeing. In my view, DIMA should consider how a prison's performance against these standards will be monitored and assessed.

Transfers to Prison

While a prison can be a place of detention under the *Migration Act 1958*, DIMA's policy acknowledges that detention in a prison should occur only as a last resort. According to DIMA, approximately 20% of transfers to prisons in 1999-2000 involved current applicants for protection visas. The holding of immigration detainees within prisons, particularly those who may have been subject to torture or trauma in the past is, in my view, generally undesirable. The transfer of a detainee to prison does not, in many cases, address the cause of the behaviour which led to the decision. Reducing the time that people are held in detention should also lead to a reduction in the type of behaviour which may cause DIMA to consider transfer. In my view, prisons should not be used for their detention other than in exceptional circumstances.

In my opinion, DIMA should employ other strategies aimed at defusing and resolving conflict before deciding to transfer a detainee to prison.

Despite improvements to IDCs since the security review conducted by the Secretary of DIMA in July 2000, the current accommodation in IDCs is not able to securely accommodate the comparatively large number of detainees now held in prisons. DIMA is of the view that, notwithstanding improvements to IDCs to facilitate behaviour management, there are some circumstances in which it is not appropriate or safe for DIMA to detain an individual in a detention centre. DIMA states that where a detainee or a group of detainees poses a real threat to the safety of others, themselves or the good order of the facility, transfer to a State correctional facility may be the most appropriate solution.

In light of the recent announcement that DIMA is to build two new immigration detention centres, in my view, it would be preferable to provide secure accommodation within the detention environment. Part of the new accommodation could be designed to house detainees who are assessed as unsuitable to mix with the general IDC population other than where serious criminal behaviour is involved. This would also

provide DIMA with greater accountability for detainees who, as illustrated in this report, can sometimes be lost in the prison system.

Records

Currently, various documents relating to the welfare and management of a detainee are not necessarily held on one central file, but often loosely and in a range of locations. This has sometimes caused delays in information and documents being provided to my office.

DIMA agrees that all relevant information relating to the management of a detainee should be readily accessible. I accept that it may not be practical to have a single file only for each detainee as health records and certain other documents relating to their day to day living in an IDC may be more appropriately maintained by relevant service providers, such as health care workers. There may be privacy reasons why some staff, particularly ACM, need not have access to information that DIMA holds an a detainee.

In my opinion, all paper records relating to a detainee including, but not limited to, incident reports, counselling, special needs, medical treatment, and review of place of detention should be properly stored on cross-referenced files.

DIMA has accepted that further effort is required to ensure that compliance with procedures is documented and records are appropriately managed.

ASYLUM SEEKERS

Behaviour issues

While any immigration detainee held at an IDC could, potentially, be subject to a transfer to prison on the grounds described earlier in this report (3.3.2), in practice, evidence suggests that those most likely to be transferred are asylum seekers as they also tend to spend the longest time in immigration detention. DIMA disagrees with this view and states that an analysis of 1999-2000 transfers reveals that only 19 of the 91 detainees transferred to prisons were waiting for a primary or a review decision on a protection visa application. However, in addition to the 19 applicants transferred to a prison in 1999-2000, a further 35 were failed asylum seekers. That is, approximately 60% of the detainees transferred had made protection claims. DIMA is of the view that to count failed protection visa applicants as asylum seekers is misleading in the context where the links between motivation and behaviour are potentially important.

DIMA does accept that detention is stressful for most people but states that factors affecting detainees' behaviour are varied and complex.

I accept DIMA's advice that causation is a complex issue. However, evidence gathered in the course of investigating complaints made to my office suggests that the length of detention in an IDC may contribute to behavioural problems due to a sense of frustration, anxiety and helplessness experienced by detainees waiting for the final outcome of their Protection Visa (PV) applications or requests for Ministerial intervention.

While complexity of causation makes it hard to clearly identify representative cases, the following cases support my view.

Mr A
Mr A was an Iranian asylum seeker who was detained for a period of over two years before being granted refugee status. A deportation order was signed in April 1997 after Mr A was convicted of committing crimes which the Federal Court attributed to a psychiatric illness Mr A developed while in detention. The Court specifically observed that "Mr A's illness developed as a result of his detention pending the

determination of his application for a protection visa." [3] Mr A has been in immigration detention at the Port Phillip Prison since December 1998.

In another case, the behaviour, apparently exacerbated by the length of detention, led eventually to serious consequences for a group of detainees, including a transfer to a State correctional facility.

In July 1999, a Member of Parliament complained to my office on behalf of a number of immigration detainees about an incident at the Maribyrnong IDC during which detainees were allegedly assaulted by ACM officers and police. The incident related to a series of disturbances at the IDC which led to extensive property damage and the removal from the IDC, with the assistance of Victoria Police, of seven detainees allegedly responsible for the damage. Six of the men involved were transferred to the Port Phillip Prison. All six detainees were interviewed in the course of my investigation. While I formed the opinion that there was no evidence to support the allegations of assault or use of undue force by ACM or the Victoria Police, the investigation highlighted a number of other issues relevant to this report as demonstrated by Mr B's case, described below.

Mr B

Each of the detainees involved in the disturbance described how in the build up to the events in question they had become extremely frustrated, depressed and anxious about the lack of progress with their cases. They said that they felt hemmed in and not respected and that the uncertainty of their future was having an adverse effect on their mental health. A number of them were being medicated and kept under observation. Mr B, a stateless asylum seeker, had been seeking a favourable resolution of his case for nearly two and a half years. Although he had withdrawn a request for the Minister's intervention, DIMA had been unable to obtain any travel documents for him and there was no immediate prospect of any resolution. At the time of the incident, Mr B had been in detention for approximately five months.

I formed the opinion that the length of their detention was clearly affecting all of the men involved in the incident, and especially those with a history of psychological problems. Many of them were under medication to help cope with depression and to manage their anger. Mr B had been involved in previous incidents and had a history of depression and self harm attempts.

While I concluded that in view of the damage caused and the detainees' violent behaviour, the decision to transfer them to a prison was made in accordance with policy and was reasonable at that time, it is of particular concern to me that Mr B's case remained unresolved for well over 12 months. Since the incident in July 1999

[3] MIMA v Betkhoshabeh [1999] FCA980 (20 July 1999)

Mr B continued to be detained in a State facility, most recently the Melbourne Assessment Prison (MAP), and there is medical evidence to suggest that his mental health has continued to deteriorate. Mr B complained about feeling anxious, stressed and depressed. In December 1999 a consultant psychiatrist provided a report stating that Mr B is a psychologically traumatised man and that there is a significant risk that his state would deteriorate to the point of possibly attempting suicide if the circumstances of his detention were to become more onerous, as would be the case if he were returned to prison. The psychiatrist also commented that in his view Mr B did not represent a risk to the community and that his health would benefit by his placement in a less restrictive environment. A subsequent report in July 2000 by a consultant psychiatrist at the Acute Assessment Unit of the MAP where Mr B was a patient, indicated that as a result of the despair and distress Mr B had become actively suicidal. The doctor expressed the view that Mr B cannot be managed in the general prison system and that his state was not modifiable by medication or psychological intervention but was a consequence of his situation.

DIMA has advised that it has been making attempts to obtain travel papers that would enable Mr B's removal from Australia, however, these attempts have not been successful and there appears to be no evidence to suggest that this will change in the foreseeable future.

I am pleased to note that on 12 September 2000 Mr B was released from detention on a Temporary Humanitarian Visa valid for three years.

Detention of asylum seekers

Complaints received by my office about the transfer of immigration detainees to prisons have raised a number of issues specific to asylum seekers. People who come to Australia seeking recognition as refugees may have experienced imprisonment, torture or trauma in the past and may, as a result, have special needs or vulnerability in a detention context. Complaints investigated by my office suggest that those most immediately responsible for the care and welfare of detainees (ACM, prison staff, DIMA OIC at an IDC) are not always aware of whether the detainee has made claims of past trauma or imprisonment and, even if they are, this may not necessarily be considered an important aspect in the management of that detainee.

While recognising the need to respect the privacy and dignity of individuals, the provision of information needs to be balanced to ensure their effective management and care in detention. I understand that the level and type of information provided to correctional facilities has received added focus over the past twelve months. DIMA has advised

that it intends to examine this issue more thoroughly in the context of negotiating MOUs with State authorities.

In its 1998 report *Those who've come across the seas*, the Human Rights and Equal Opportunity Commission (HREOC) recommended that the detention of asylum seekers should be a last resort for use only on exceptional grounds and that detainees only be transferred to a State prison if they are either charged or convicted of a criminal offence that would result in them serving a custodial sentence.

A similar argument has been presented by Amnesty International (Amnesty) which opposes mandatory detention of asylum seekers and considers it inappropriate that asylum seekers be held in prisons when they have not been charged or convicted of any offence. DIMA's MSI 244 seeks to cover the transfer of detainees to prisons where, due to their conduct, they cannot be adequately detained at an IDC. Conduct is not restricted to criminal behaviour, but may relate to other concerns such as the risk to other detainees, risk of escape and health concerns**.** Amnesty has complained to my office that the guidelines contained in MSI 244 and intended to provide a measure of procedural fairness to detainees are not being followed in practice.

In a recent complaint to my office, Amnesty has relied on the cases of four immigration detainees to illustrate what Amnesty believes are the problems with the application of DIMA's current procedures and/or guidelines. Amnesty has argued that, in each case, the reasons for the transfer to prison given to the detainee were vague and uninformative and appear to use a formula which suggests that each detainee's individual circumstances are not being given appropriate consideration. The typical reasons in the Notice of Transfer state:

> *Your unacceptable and threatening behaviour cannot be managed in the low security environment of the VIDC, and counselling has not resulted in any improvement. Given your behaviour, and the threat to other detainees and to staff, it has been deemed appropriate to transfer you to a State facility.*

DIMA has advised that officers may choose to use standardised or similar approaches to wording on Notices of Transfer where appropriate. DIMA is of the view that the Notice of Transfer is a formal note advising the detainee in writing that they are to be transferred and is neither the basis for the decision to transfer, nor the only communication or record of that decision. DIMA states that the Notice generally follows a

behaviour management process and is accompanied by verbal communication. The detailed reasons for transfer are contained in the submission to the State Director or Compliance Manager and/or in a subsequent minute recording the decision.

Amnesty has also argued that in many cases there appears to be no evidence that "counselling" of detainees is actually carried out prior to a decision to transfer them to a prison.

Complaints investigated by my office indicate that "counselling" is not always carried out in practice and in some cases, such as that of Mr C described below, there is no evidence of the detainee being given a Notice of Transfer.

DIMA's review of 67 transfers during 1999-2000, indicates that counselling of detainees has been documented in only 30 cases. DIMA states that ACM has not routinely documented all counselling of detainees, although DIMA managers have been monitoring this issue more closely in recent times, with a consequent improvement in documentation. Notices of Transfer are not available in 14 of the cases examined by DIMA and documentation regarding a 30 day review of the place of detention (following transfer to prison) appears to be missing, deficient or late in 20% of cases.

DIMA has acknowledged that Notices of Transfer have not always been provided and that there is a need to review MSI 244 with a view to modifying the application of current procedures. In my view, DIMA should provide to each detainee moved to a prison a Notice of Transfer with a clear description of the incidents which led to the decision.

Classification of asylum seekers in prison

Another issue of concern relates to the conditions under which immigration detainees, and asylum seekers in particular, are held within State correctional facilities. The security classification of a prisoner affects a variety of potential rights and entitlements.

DIMA has taken the view that how an immigration detainee is classified while they are held in a prison is a matter for the prison and State Corrective Services. This issue is also discussed in more detail in regard to criminal deportees, later in this report. However, complaints received by my office suggest that some asylum seekers transferred to

prisons are being assigned an inappropriate level of security classification at least partly due to advice provided to prison officials by DIMA. The case set out below, illustrates this point.

Mr C

On 5 June 2000 my office received a complaint from a Mr C. Mr C stated that he had been detained at the Woomera Immigration Reception and Processing Centre (Woomera) for about 6 months and that he was one of about 180 people recently moved into separation detention. He stated that they did not know why they had been separated from the others and were worried by the lack of information. Mr C said that they were only interviewed once by DIMA officers and were asked general questions. In his interview Mr C stated that he is a refugee and cannot return to Iraq but he alleged that the interviewing officer did not give him an opportunity to explain anything in detail. Mr C said that he and others have asked many times to see a lawyer but were told that they would have to pay for one. Mr C said that everyone was becoming distressed and as he speaks some English he was the one who would speak with the manager to try to resolve the problems. Mr C said that one day an older man became upset and started breaking dishes. He tried to calm him down but was then taken away himself by ACM officers and transferred to Port Augusta prison. The prison manager told him that he would be there for 14 days. Mr C said that no one explained to him why he was put in prison. He felt that he had not done anything to deserve it. He went on a hunger strike and was later moved to Yatala prison. Mr C said that he only agreed to eat when he was promised that he could make a telephone call.

Whilst awaiting DIMA's response to the above issues, my office was contacted by the South Australian Ombudsman's office who advised that Mr C had been returned to Port Augusta prison and was being held in a high security punishment cell on a restricted regime. Information provided to the SA Ombudsman by the prison indicated that the prison was informed by DIMA that Mr C was a 'troublemaker' who had attempted to set fire at Woomera. My office was advised that Mr C had been in Port Augusta for three weeks with no contact from DIMA.

Mr C was eventually returned to Woomera from the prison. Documents provided to my office by DIMA show no evidence of any "counselling" being undertaken prior to the decision to transfer, nor is there any record of a Notice of Transfer being given to Mr C. One of the reasons Mr C gave for going on a hunger strike was the lack of information from DIMA about what was to happen to him and why he had been taken to a prison.

DIMA acknowledges that departmental procedures were not followed in this case.

In this office's 1995 report, my predecessor recommended that the detainee should be given a notice of the reasons for transfer and notice of when the decision is to be reviewed. In addition, it was recommended that DIMA retains accountability for detainees who are

being held in State or Territory prisons. DIMA accepted these recommendations.

The report further recommended that, in transferring a detainee from an IDC to a State prison, the DIMA case manager should agree to the detainee's classification within the prison system and the area of the prison in which they will be held. Any changes in classification made by State officials, should be notified to DIMA and discussed with the DIMA case manager. In my opinion, DIMA should ensure that immigration detainees held in prisons are not over classified by the prison authorities.

DIMA's position communicated to my office in the course of complaint investigations is that it is up to the prison authorities to decide where an immigration detainee will be held and that there is no obligation on the prison to inform DIMA when a detainee is moved.

In my opinion, this situation is not acceptable. DIMA has a clear duty of care to all immigration detainees irrespective of their place of detention. It is, in my view, essential that DIMA be aware at all times of the location and the circumstances of all immigration detainees, and particularly those held within correctional institutions. The cases of Mr C and that of Mr J, discussed later in this report, demonstrate the need for DIMA to establish better communication with State correctional authorities and to improve their own systems for keeping track of detainees.

DIMA acknowledges that there would be value in formalising the arrangement where the prison authorities will inform DIMA of a transfer within the prison system. DIMA has also advised that it accepts the need for DIMA officers to turn their minds to the issue of classification in considering the transfer of a detainee to a correctional facility and in reviewing their place of detention. DIMA agrees that in negotiating MOUs with State authorities, it should seek to include protocols on classification and DIMA's involvement in helping to determine classifications.

Furthermore, DIMA has acknowledged that the review of individual cases has identified the need for system changes to improve regular statistical reporting which, once implemented, would enhance its capacity to readily monitor transfers. DIMA has provided additional resources to its Detention Operations Section in Central Office to further support this function.

Management of behaviour

The 1998 HREOC report recommended that DIMA develop clear guidelines on the degree and nature of disruptive behaviour that would warrant a transfer to a State prison or police lockup. In addition, HREOC recommended that DIMA, in conjunction with the detention service provider, should develop strategies and practices for the management of difficult behaviours within IDC.

HREOC suggested that expert advice should be sought in the development of this strategy. "Custodial officers' training should include a component on managing difficult behaviours, conflict resolution skills and managing people who are distressed"[4].

DIMA's MSI guidelines do not appear to address behaviour modification, as opposed to transfer to prison. In my view, greater emphasis should be given to dealing with difficult behaviour within the IDC environment, before a transfer to prison is considered.

DIMA has provided a list of behaviour management strategies already in place at Villawood and Curtin detention facilities. According to DIMA, depending on the nature of the incident, the strategies may include:

- Observation of the detainee;
- Placement in an observation room for a cooling off period (from hours to several days);
- Transfer to a different area within the centre;
- Psychological or psychiatric assessment and, if necessary, treatment;
- Referral to an outside agency for assistance or investigation;
- Counselling of individuals or groups about disruptive behaviour and the potential consequences;
- Counselling for parties involved in a dispute;
- Individual management plans;
- Transfers to other centres; and
- Involvement of residents' committees.

DIMA will expand MSI 244 to refer to the range of management strategies in place but not currently reflected in that instruction. DIMA has also advised that, since June 2000, it has clarified with ACM its performance expectations and particularly its expectation that ACM will

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4 Recommendation 6.16, "Those who've come across the seas", HREOC, 1998

proactively manage detainees. Recent measures taken by DIMA include:

- A new induction program;
- Increased activities programs for detainees;
- Behaviour management programs;
- Better facilities for separate detention; and
- Revamped residents' committees.

In my opinion, such strategies should be complemented by appropriate and ongoing training for DIMA and ACM staff with a focus on conflict resolution, cross-cultural awareness and communication skills. DIMA has advised that new ACM detention officers are required to complete a 240 hour pre-service training course which covers topics such as specific cultural awareness, code of conduct and ethics, detainee management skills, torture and trauma, privacy issues and others. Whilst recognising that the jobs of detention officers can be at times difficult and demanding, it is essential in my opinion that DIMA and ACM actively encourage an organisational culture of respect for the detainees as individuals in the context of administrative detention.

Length of detention in prison

Complaints received by my office indicate that in general there are two main factors which can contribute to lengthening the period of immigration detention. Firstly, the period of detention can be prolonged while the detainee pursues his or her review rights, or conversely, in relatively infrequent cases, while DIMA appeals against a decision favourable to the detainee.

Secondly, and perhaps of more concern, the length of detention is affected by difficulties in deporting or removing a detainee from Australia. It appears that the greatest delays arise in situations where the detainee's nationality and identity are not clear or where DIMA is not able to identify a country willing to accept the deportee.

Information provided by DIMA on 20 June 2000 indicates that there were 89 immigration detainees held in State correctional facilities across Australia. Of these, 41 have been held in immigration detention in a prison for over 9 months.

I acknowledge that the management of long term cases is a complex issue and that DIMA has been active in expediting Federal Court litigation and negotiations with foreign governments. DIMA has also stated that “where a detainee chooses to pursue review rights, the prolongation of detention is in his or her hands and DIMA cannot be held accountable for the consequent extension of detention”. However, it is important, in my view, to bear in mind that a number of those detainees who do pursue review rights will be successful and their claims validated.

DIMA does acknowledge that there are cases of prolonged detention and that there are significant difficulties in removing some people who have no claims to remain in Australia and/or who have been found unsuitable on character grounds. In some cases detainees remain uncooperative in providing information which would facilitate their removal from Australia.

In my view, these numbers remain of concern and point to the need for priority to be given to improved management and further proactive attention towards the resolution of long standing cases.

CRIMINAL DEPORTEES

The timing of the deportation process and the consequences of when the deportation order is issued have been the subject of significant debate[5].

As discussed below, the point in time at which deportation begins to be considered by DIMA may impact on the classification of a prisoner within the prison system; the timeliness of the whole process as well as the actual deportation decision itself.

Classification for deportation purposes

In 1997 my office made submissions to the Joint Standing Committee on Migration (JSCM) regarding our concerns about the classification, and access to programs, of prisoners notified as being of interest to DIMA.

Complaints received by my office since then indicate that such prisoners are still being classified as high security, with consequently reduced access to work and rehabilitation programs within the prisons. Evidence provided to the JSCM by State bodies and other parties confirmed that this is in accordance with standard policies of correctional authorities throughout Australia. It appears that prisoners liable or potentially liable for deportation are routinely classified as medium to high security.

DIMA's policy position, expressed in MSI 289, states that:

> Liability for enforced departure should, wherever possible, not affect decisions concerning work release, rehabilitation or reclassification of prisoners. These decisions should rest solely in the hands of prison authorities. It would be improper for the Department to seek to influence this decision in any way, other than to provide factual information to the prison authorities on the person's immigration status and liability for deportation.

The JSCM's report indicates that the Committee considered that the potential liability for deportation or removal should not, of itself, determine the security status of a prisoner. Rather, there were grounds to support the view that the approach should be merits based, that is, founded on an individual assessment of the risk to the community[6].

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5 See submissions made to the Joint Standing Committee on Migration Inquiry into Deportation of Non-Citizen Criminals, published June 1998

6 p58, report on Deportation of Non-Citizen Criminals, JSCM, 1998

I note that while the JSCM did not make any specific recommendations on this issue in its report, the Committee did conclude that DIMA should encourage decision making based on particular circumstances of the prisoner rather than his or her immigration status. The JSCM did recommend that DIMA undertake wide ranging discussions with the relevant State authorities and formalise its relations with each State through developing a Memorandum of Understanding (MOU).

In my view, the responsibility for the security classification and the care of a prisoner while he or she is still serving their sentence lies clearly with the State correctional authorities. However, I encourage DIMA to adopt the suggestions contained in the JSCM's conclusions to enter into discussions with State authorities. As I have already mentioned, DIMA currently does not have an MOU with any State or Territory correctional authority.

DIMA agrees that, in negotiating MOUs with State authorities, it should seek to include protocols on classification and DIMA's involvement in helping to determine classifications.

Timeliness of deportation process

The timing of the deportation process is important for two main reasons. Firstly, beginning the process towards the end of the prisoner's sentence may, as noted by the JSCM, allow a greater opportunity for participation in rehabilitation programs. It has been argued that this may later enable the DIMA decision maker to reach a more informed decision on whether an individual should, or should not, be deported.

Secondly, however, delaying the process may result in the individual spending a further and arguably unnecessary period in prison in immigration detention while awaiting the outcome of any appeals in regard to the deportation decision, or the necessary travel documents.

This, in my view, would be undesirable as the holding of immigration detainees in prisons should be avoided as much as possible for reasons set out in this report. It also creates a financial cost ultimately borne by the community. It is preferable, therefore, that the timing of the process reflects a balance between these competing considerations.

I am pleased to note that the JSCM endorsed the suggestion made by my predecessor and recommended that DIMA commence the deportation inquiry when the prisoner has 12 months of his or her sentence still remaining before the first possible date of release. The JSCM also recommended that DIMA complete the inquiry within three months and, for sentences shorter than 15 months, that the deportation inquiry be completed within six months of sentencing.

The Government's response to the JSCM's report was tabled in Parliament on 17 July 2000. I note that the above recommendations have been largely accepted[7].

However, DIMA's MSI 34 titled Deportation Submissions, issued in August 1994, states that deportation decisions should be made as soon as possible after sentencing and should allow any Administrative Appeals Tribunal and Federal Court reviews to be completed prior to the expiry of the custodial portion of the sentence actually to be served. The MSI goes on to state that:

> ... in all cases, the deportation submission should be ready for consideration at least eight months prior to the prisoner's earliest release date to allow time for review before release.

It does not appear that DIMA has amended its policy on the timing of deportation decisions following the acceptance of the recommendations made by the JSCM. In addition, complaints received by my office suggest that the policy guidelines contained in MSI 34 are often not met in practice.

The following case illustrates the problem.

Mr D
In January 1999 Mr D was sentenced to a term of five and a half years of imprisonment. On 12 March 1999 DIMA advised him that he was liable for deportation. Although the WA Ministry of Justice informed DIMA that Mr D would be considered for parole on 24 February 2000, a decision on the deportation order was not made until after he was released on parole on 4 March 2000. Mr D was subsequently detained by DIMA on 29 June 2000. He now faces a lengthy period of immigration detention at the Campbell Remand Centre in Perth while he appeals the deportation decision to the AAT.

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[7] The exception are cases clearly not for deportation. In these cases the matter should be disposed of early in the sentence so as not to disadvantage the prisoner in terms of access to any rehabilitation programs.

DIMA has acknowledged that review of some relevant cases, as a result of my own motion investigation, has revealed considerable variation in the timing of action leading to criminal deportation or cancellation relative to the date of release from criminal custody. DIMA has advised that it proposes to examine this issue more thoroughly.

DIMA has also advised that MSIs 34 and 171 are currently being reviewed as part of the implementation of the Government's decisions in relation to the JSCM's recommendations.

DUTY OF CARE

The issue of what duty of care DIMA owes to immigration detainees in prisons has been the subject of some debate. In general, DIMA has argued in the past that the welfare of detainees who are held in State prisons is the responsibility of the prison authorities, despite the fact that they remain in immigration detention.

At this point in time, DIMA still does not have formal arrangements relating to the management, care and welfare of immigration detainees with any State prison authorities. DIMA has also acknowledged that communication with State authorities in relation to immigration detainees is not always satisfactory. My office has received complaints from, and on behalf of, detainees held in prisons who are fearful for their own safety. We have also investigated a complaint from a detainee who was assaulted and seriously injured.

The following case illustrates the problems experienced by detainees in prison custody.

Mr E

Mr E, a criminal deportee, complained to my office on 29 January 1999 about his detention at the Silverwater Prison in NSW. Mr E claimed that he had been assaulted and injured by a prison inmate in December 1998. Mr E wanted to be transferred to an IDC. My office immediately sought information from DIMA about any decisions and reviews regarding Mr E's place of detention as well as any reports regarding the alleged assault. We further asked what steps DIMA had taken to monitor Mr E's safety.

On 12 March 1999 DIMA provided a response. DIMA advised that my office's inquiry brought to attention a number of shortcomings in communications between DIMA and the NSW Department of Corrective Services. DIMA also advised that its officers were unable to ascertain how Mr E suffered his injuries, however, DIMA did confirm that Mr E received treatment for a back injury at both Long Bay Prison and Westmead Hospitals. The decision to detain him in prison rather than the IDC was based on Mr E's past behaviour and concerns about security of the IDC in view of Mr E's history of drug use.

Copies of documents provided by DIMA indicated that on 23 December 1998 the Criminal Deportation Section of the Bankstown office received a phone call from Mr E's girlfriend who advised that Mr E had just told her that he had been assaulted by his cellmate. The DIMA officer who took the call contacted the Assistant Operations Manager at the prison who stated that he knew nothing about an incident involving Mr E and would have been informed had it occurred.

On 5 January 1999 the same DIMA officer attended the prison and spoke with Mr E for the purpose of encouraging Mr E to complete a passport application form. The file note of the meeting indicates that the officer noted Mr E was in pain and was advised by him that he had injuries to his back. On 11 January 1999 Mr E's girlfriend again contacted DIMA and repeated her concerns about the injuries sustained by Mr E. A subsequent file note indicates that on 22 January 1999 two DIMA officers who visited Mr E expressed concern about his mental state. They observed that Mr E "was very upset and crying, particularly about an incident which occurred in the gaol with his cell mate". The officer who made the file note contacted the prison to advise of DIMA's concerns about Mr E's mental state. A subsequent review of Mr E's place of detention, completed on 2 February 1999, acknowledges that Mr E suffered injuries as a result of an incident with a cellmate. However, there is no evidence that DIMA took any action to investigate the allegation of assault despite repeated calls from Mr E's girlfriend and DIMA's own observations. It was also of concern to me that communication between DIMA and the State corrective services appeared to be inadequate and that Mr E's welfare had not been appropriately monitored. Whilst DIMA officers had visited Mr E on a regular basis, no one appeared to have taken the responsibility for reporting the alleged assault to the proper authorities.

Despite the time which had passed since the incident, I recommended that DIMA report the allegation of assault on Mr E to the NSW Police Service. I also referred the matter to the NSW Ombudsman in regard to the conduct of the Department of Corrective Services in failing to inquire into the origin of the injuries sustained by Mr E.

DIMA reported the alleged assault to the police on 27 July 1999. An advice to DIMA officers reminding them of the importance of reporting such incidents to the appropriate authorities was also sent out. Unfortunately, Mr E was deported before he had the opportunity to pursue any potential compensation claim arising out of the incident.

A number of prisons in which immigration detainees continue to be held have been the subject of strong criticism in regard to the safety standards maintained. For example, Casuarina prison in Western Australia, at which a number of immigration detainees have been held, has been publicly criticised for overcrowding and deaths in custody and was subject to a 'lock-down' for almost a year following a riot at the prison.

There is substantive authority to support the view that DIMA has a non-delegable duty of care in regard to immigration detainees, irrespective of their place of detention. In *Quayle v New South Wales*[8] Hosking J argued that 'as a broad proposition it is surely a fundamental precept that when the liberty of a citizen is constrained by the community then

[8] (1995) Aust Torts Reports 81-367.

the community assumes *a heavy burden to ensure* his or her safety'.[9] Although his Honour used the word 'citizen' it is unlikely that the sentiment expressed would change in relation to immigration detainees.

In *Burnie Port Authority v General Jones Pty Ltd*[10] (*Burnie Port Authority*) the High Court explained that in certain categories of cases the nature of the relationship of proximity between the relevant parties will give rise to a special and more stringent 'non-delegable' duty of care.[11] Their Honours defined the relevant inquiry as being whether there is a special dependence or vulnerability on the part of that person to whom the duty is said to be owed.[12] This test would seem to be satisfied by immigration detainees. Applying Mason J's reasoning in *Kondis v State Transport Authority*[13] (*Kondis*) to detainees, DIMA 'has undertaken the[ir] care, *supervision*, *and control*'[14] by placing them under immigration detention.

The existence of a duty of care has been recognised in the Parliamentary Joint Standing Committee on Migration's *Immigration Detention Centres Inspection Report* which states that the 'Australian Government and ACM, as service provider, [both] have a duty-of-care to detainees'.[15]

As Mason J explained in *Kondis* a 'personal' non-delegable duty of care differs from the basic duty under negligence law as, rather than requiring DIMA to 'take reasonable care', it requires it 'to ensure that reasonable care is taken.'[16] Applying Mason J's wording in *Stevens v Brodribb Sawmilling Co Pty Ltd*[17] to DIMA's status, 'a principal [being the Department] who engages another [being the State prison authorities] to perform work will be liable for the negligence of the person so engaged' regardless of the fact that DIMA may have exercised reasonable care in the selection of the other party.[18] In my view, DIMA

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9 (1995) Aust Torts Reports 81-367, 62,795.
10 (1994) 179 CLR 520
11 (1994) 179 CLR 520, 550.
12 (1994) 179 CLR 520, 551.
13 (1984) 154 CLR 672.
14 (1984) 154 CLR 672, 687.
15 Commonwealth Parliament Joint Standing Committee on Migration, *Report on Inspections of Immigration Detention Centres throughout Australia* (August 1998) 5.
16 (1984) 154 CLR 672, 686.
17 (1986) 160 CLR 16.
18 (1986) 160 CLR 16, 32.

cannot claim that it is absolved of, or has a lesser, responsibility even if in practical terms care is undertaken by another entity. The existence of any contractual arrangements, Memoranda of Understanding or other link, financial or otherwise, between the prison authorities and DIMA is irrelevant to the presence or absence of the Department's non-delegable duty of care.

DIMA's own Immigration Detention Standards[19] acknowledge the duty as being non-delegable, stating that even though in 'its operation of detention facilities the service provider will be under a duty of care in relation to the detainees, 'Ultimate responsibility for the detainees remains with DIMA *at all times*'.[20] Although the Standards are applied to immigration detention centres, there is no reason why there would not be the same recognition in relation to prisons, which are expressly included as alternative places of detention under Section 5 of the *Migration Act 1958* (Cth). The fact that DIMA may exercise a lesser degree of supervision on State prison authorities than it does in relation to immigration detention centre administrators is irrelevant to the existence of a duty, and may actually point to its inadequate discharge (as discussed below).

As the High Court pointed out in *Burnie Port Authority*[21] quoting Lord Blackburn in *Hughes v Percival*,[22] DIMA is at liberty to select a third party to fulfil its detention function, even if it is a State correctional authority (subject to concerns as to a proper exercise of its power to detain and transfer, dealt with separately in this report). However, in my opinion, DIMA will continue to be liable for the consequences of these parties' actions where they breach DIMA's duty of care in relation to its detainees. In my view, DIMA would at all times be potentially liable for harm including, arguably, psychological harm to detainees while in prison detention unless the Department had adequately fulfilled its obligations to ensure that prison authorities took reasonable care. Commenting on a detainee's contraction of hepatitis B while held in prison, Emmett J in *Ghomrawi v Minister for Immigration & Multicultural Affairs*[23] suggested, without deciding, that the Commonwealth may have

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[19] Department of Immigration and Multicultural Affairs, *Immigration Detention Standards*, 44.
[20] Department of Immigration and Multicultural Affairs, *Immigration Detention Standards*, 44.
[21] (1994) 179 CLR 520, 550.
[22] (1883) 8 AC 443, 446.
[23] [1999] FCA 1454.

been in breach of its duty of care.[24] State prison authorities would also owe a duty to detainees to *take* reasonable care, but this duty would not displace DIMA's.

In *L v Commonwealth*[25] Ward J stated that there was a duty on the authorities to keep untried prisoners apart from convicted prisoners, as far as possible.[26] His Honour pointed out that if the authorities depart from this rule the risks involved, including of physical harm, should be contemplated,[27] strengthening the need to take care. This requirement would be equally applicable to immigration detainees transferred to prisons. I consider that an element of DIMA's duty towards detainees should, therefore, be to implement measures to ensure that prison authorities do not place detainees with the general prison population. The fact that it might be difficult for DIMA to monitor immigration detainees' conditions in prisons does not remove its duty of care. If DIMA chooses to continue placing detainees in prisons, there is a need for greater supervision, checks or controls on prisons that hold detainees.

In response to this report DIMA advised that, essentially, it accepts that it retains a duty of care to immigration detainees whether they are held in a detention centre or in a State correctional facility. DIMA agrees that the way in which DIMA's duty towards detainees in State correctional facilities is discharged should be formalised in agreements with State authorities.

Mental health and medical treatment

As mentioned earlier in this report, complaints received by my office suggest that mental health is often a significant issue in cases involving immigration detainees, particularly those who have spent a lengthy period in detention. Mr F's case described below is an example.

Mr F
In April 2000 an asylum seeker and a detainee, Mr G, complained to my office that his friend, Mr F, also a detainee held at the Perth IDC had "lost his mind" after being detained for almost two years. Mr F was, in fact, diagnosed with schizophrenia and had been admitted to a hospital on at least three occasions during that time. While in the IDC he was on a program of medication and close observation which however

[24] [1999] FCA 1454 [89] - [90].
[25] (1976) 10 ALR 269.
[26] (1976) 10 ALR 269, 277.
[27] (1976) 10 ALR 269, 277.

did not prevent him from attempting to set fire to himself. My office became involved when Mr G complained that the smoke detectors failed to activate during this incident and he and another detainee where forced to attempt to put out the fire themselves before any ACM officers arrived. Mr G complained that his mental health had also deteriorated as a result of the time spent in detention and the uncertainty as he and Mr F awaited the outcome of their request for Ministerial intervention.

Mental health can also be an issue in situations where a detainee has spent only a relatively short time in immigration custody, as was the case with Mr J. The case described below highlights a number of problems identified in the course of this investigation including poor communication between DIMA, ACM and State authorities as well as a failure to follow procedures.

Mr J

Mr J was refused immigration clearance and detained at Sydney airport in early April 2000. He was placed at the Villawood IDC and applied for a Protection Visa the following day.

On 3 July 2000 my office received a complaint from the Legal Aid Commission of NSW who was representing Mr J. The Legal Aid Commission complained that its client had been moved to Long Bay Gaol and was being kept in the mainstream prison. When the Legal Aid Commission contacted the Gaol, a prisoner information officer advised the lawyer that Mr J was being kept in the Metropolitan Medical Transient Centre which he said is for very seriously disturbed prisoners who cannot be kept anywhere else. The Legal Aid Commission lawyer feared for his client's safety and had asked DIMA to arrange an examination by a psychiatrist for his client following an episode at the IDC. He had lodged a Bridging Visa E (BVE) application on medical grounds on behalf of his client on 27 June 2000, as he was concerned that the IDC was not a suitable environment for Mr J.

On 3 July 2000 my office sought advice from DIMA regarding the above matter. On 10 July 2000 DIMA responded advising that Mr J was transferred to Ward D at the Long Bay Gaol on 20 June 2000 after he was diagnosed with paranoid psychosis. My office was also advised that the decision to transfer him to Long Bay was made by his treating physician under the NSW Mental Health Act. DIMA indicated that, following the committal, decisions in respect of Mr J's placement and management were made under the NSW Mental Health Act. DIMA also argued that, as Mr J was not being detained under the Migration Act, no review of his place of detention was required. Lastly, DIMA advised that although a transfer to the Metropolitan Medical Transit Centre (MMTC) was considered at one stage, Mr J was never actually transferred there.

On 12 July 2000 it became apparent that the information provided by DIMA to my office was not correct. After a number of requests for clarification, a month later

DIMA advised that Mr J had been, in fact, transferred to the MMTC. My office was told that:

"During the time that Mr J was committed he was detained at the following locations:

21/6/00	*Transferred to Ward D*
30/6/00	*Transferred to MMTC*
4/7/00	*Transferred to Ward D (transferred back to Ward D because he set fire to legal paper and his cell)*
12/7/00	*Transferred back to Villawood Immigration Detention Centre"*

DIMA stated that:

"*Any movements of detainees in the NSW prisons system are determined by the NSW Department of Corrective Services and they are not required to inform DIMA or ACM of movements between facilities if these are for short periods of time*."

Because of the delays in obtaining a response from DIMA regarding Mr J's transfer, on 15 August 2000 my office also sought DIMA's file on Mr J's detention. The file was received on 8 September 2000. It is significant and of concern that the DIMA detention file was only created the day after my office requested it, despite the fact that Mr J had been held at the IDC since April 2000. I now understand that Villawood IDC previously kept dossiers on detainees, rather than immediately creating files. DIMA has advised that this practice has been discontinued. Documents on the file provided some of the background to Mr J's transfer to Long Bay Gaol.

The first incident report placed on file is dated 16 June 2000. It appears that neither DIMA nor ACM were aware that Mr J had jumped out of a second storey window a day earlier until he failed to turn up for muster the following morning. He was subsequently examined by a nurse and found to have "no serious injury". ACM wanted to move Mr J to another compound within the IDC, apparently to allow for better monitoring. Mr J refused to move to Stage 1 and said he would kill himself if forced to do so. Mr J then requested to be taken to a hospital. The ACM officer replied that he would be taken to hospital if the IDC doctor thought he needed to go. Mr J then complained that a doctor who had taken his blood previously had attempted to poison him. He was subsequently seen by a doctor and medicated. It is not clear from the DIMA file whether the assistance of an interpreter was sought in order to communicate with Mr J during the medical examination. Later that day Mr J was taken to a diagnostic centre as he was still complaining of pain in his back. X-rays revealed that Mr J had a compressed fracture of the spine. He was prescribed medication and bed rest. A later examination by the IDC doctor found that Mr J was also suffering from paranoid psychosis. It appears that Mr J was then placed on further medication. Late that night Mr J was seen straddling the windowsill and was then transferred to Stage 1 of the IDC.

Three days later Mr J was again behaving erratically, running around the exercise yard backwards and drinking water from puddles of rain. Mr J was returned to "his secure room" but refused to speak to ACM or medical staff and insisted they were trying to kill him. He refused to take medication. A little later that morning he was "counselled" by ACM officers in regard to his behaviour (there is no indication in the incident report whether an interpreter was used for this purpose). It appears that, despite being assessed as suffering from a paranoid psychotic state, the ACM

continued to treat Mr J as a difficult detainee who had to be "counselled" about his behaviour.

It was not until the following day that Mr J was seen by the on site doctor who, according to the incident report, recommended that Mr J be transferred to Long Bay Correctional Facility. On 20 June 2000 it was submitted to DIMA by ACM that the "Detainees (sic) present behaviour is not conducive with the good order and management of the Centre and could place his own safety in jeopardy".

On 21 June 2000 a medical practitioner completed Schedule 2 of the NSW Mental Health Act 1990 certifying that Mr J was mentally ill. The same day, DIMA issued a request under the *Migration Act 1958* for Long Bay Gaol to hold Mr J in immigration detention. A Notice of Transfer "on medical grounds" was also completed by a DIMA officer. The Notice stated that the place of immigration detention would be reviewed within 7 days of the date of the Notice. There is no evidence that such a review was undertaken. A copy of an email message dated 7 July 2000 states that it was "*resolved with the Long Bay D Ward … that Mr J will be returned to the VIDC … next week*".

It appears that there was some confusion as to who was responsible for Mr J's transfer to Ward D and subsequent decisions regarding his place of detention. DIMA argued that the decision to move Mr J to Long Bay Gaol was made under the NSW Mental Health Act and that during this time he was not being detained under the *Migration Act 1958*. This argument appears to be insupportable on closer examination.

Although a doctor did certify Mr J as suffering from a mental illness, there is no evidence to suggest that any other processes required under the NSW *Mental Health Act 1990* were followed. The NSW legislation distinguishes between "forensic patients" and others. A forensic patient is usually a person detained or transferred to a hospital pending committal for trial or while serving a sentence. Their detention in a prison hospital may be reasonable and appropriate. A medical practitioner who certifies a prisoner, completes Schedule 3 of the *Mental Health Act 1990*. A person transferred under this Act from a prison to a hospital must be brought before the Mental Health Review Tribunal as soon as practicable.

Non-forensic patients certified under Schedule 2 of the *Mental Health Act 1990* are not placed in prison hospitals and must be informed of their legal rights in writing. Such patients must also be examined on arrival in hospital by a psychiatrist and must be brought before a Magistrate as soon as practicable.

There is no evidence that Mr J was treated in accordance with the *Mental Health Act 1990* nor accorded any rights or protections afforded by the NSW legislation. However, DIMA did request the Long Bay Gaol to hold Mr J in immigration detention. In my view, contrary to the advice provided by DIMA, Mr J was transferred to Long Bay Gaol by DIMA and continued to be held in immigration detention. In my opinion, DIMA failed to review his place of detention as required under policy and failed to monitor his welfare despite Mr J's history and previous injury. The lack of appropriate scrutiny resulted in incorrect information being given to the detainee's legal representative as well as my office.

DIMA has acknowledged that, in the unusual situation where a mentally ill detainee is transferred to a prison hospital under the relevant mental health legislation, the provisions of MSI 244 will continue to apply. DIMA states that, although the MSI 244 procedures were not followed as such, Mr J's case was very carefully monitored. DIMA advises that the State Director was informed of the transfer and the Villawood Health Services Director was in regular contact with Ward D. However, the fact that DIMA was not aware of Mr J's transfer from Ward D to MMTC does not, in my opinion, suggest that the level of monitoring was adequate.

DIMA advised that it intends to expedite the development of protocols with relevant State agencies regarding their involvement with detention centres and detainees. In my opinion, there is also a need for DIMA to examine in more detail how the State mental health laws apply to immigration detainees scheduled under the relevant legislation.
