



Department of Immigration and Multicultural Affairs

REPORT INTO REFERRED IMMIGRATION CASES: MR G

December 2006

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

REPORT NO. **06|2006**

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CONTENTS

Executive summary	1
Scope of the investigation	1
Conclusion	1
Summary of recommendations	2
Part 1—Background	3
Circumstances of detention	3
Complaint to the Commonwealth Ombudsman	7
Part 2—Areas of concern	8
Section 189 and the decision to detain Mr G	8
Initial detention under s 189	8
Ongoing detention under s 189	10
Missed opportunities to end the detention	11
Section 34—Absorbed person visa	11
Comment	15
Failure to follow up information	17
Other detention related matters	20
Mental health issues	20
Interviews	21
Removal inquiry	22
Fingerprints	23
Relationship with ACM	24
Compliance notebooks	24
Computer records	25
East Timorese migration to Australia	26
Part 3—Other organisations involved	28
Western Australia Police	28
Part 4—Remedial action	29
Part 5—Conclusions and recommendations	30
Acronyms	39

EXECUTIVE SUMMARY

Mr G's case is one of some 200 cases involving immigration detention matters previously referred to the Palmer Inquiry by the Minister for Immigration and Multicultural and Indigenous Affairs¹ in May 2005. 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*. In all, 247 detention matters have been referred to this office for investigation.

Mr G is of Timorese origin. Although he appears to have been healthy upon his arrival in Australia in September 1975, by the time he was detained on 28 August 2002 he was suffering from severe mental health problems and living on Fremantle streets. DIMA records indicated that he entered Australia lawfully in 1975, but the systems did not reveal any further information. In the absence of further records, it was assumed by the relevant DIMA officers that he became unlawful sometime after he entered Australia and had never regularised his immigration status. After 43 calendar days in detention, Mr G was released on 9 October 2002 after DIMA assessed him as meeting the criteria for an absorbed person visa. By operation of law, Mr G is deemed to have held this visa since 1994. His detention was occasioned by serious errors on the part of DIMA, especially in its use of the s 189 detention power, its assessment of the absorbed person visa criteria and failures to pursue relevant information.

Scope of the investigation

The investigation into the circumstances of Mr G's detention focused on the events leading to his detention and the steps taken by DIMA to bring it to an end. This case has again highlighted the serious problems experienced by DIMA where compliance officers encounter and detain people suffering from mental illness.

As part of the investigation my office examined relevant DIMA compliance files and computer records, and the detention dossiers and medical files prepared by the Perth Immigration Detention Centre (PEIDC). We interviewed current and former DIMA officers, former employees of Australasian Corrections Management (ACM), and members of the East Timorese community. The interviews were recorded with the permission of the interviewees.

Centrelink and the Western Australia Police Service (WAPOL) also provided assistance to the investigation by the provision of documentary evidence and other relevant information.

Conclusion

It should be noted at the outset that the investigation into this matter has revealed that many DIMA officers were aware of Mr G's poor mental health and, in recognition of the complexity of his situation, management level officers intervened at a very early stage. They explored three options for Mr G's release: removal from Australia to East Timor, a bridging visa in conjunction with an application for a protection visa, and an absorbed person visa. Given the difficult nature of Mr G's case, this senior level intervention was warranted and appropriate.

¹ In January 2006 the name of the Department was changed to the Department of Immigration and Multicultural Affairs (DIMA).

However, this investigation has also revealed a number of areas in which DIMA's decisions and procedures have been found wanting. The first concerns the injudicious exercise of the detention power under s 189 of the *Migration Act 1958*. For the reasons detailed in the body of this report, I am of the opinion that there was a lack of rigour and analysis by DIMA officers in deciding whether Mr G's detention met the requirements of s 189. A second area of concern arises from missed opportunities to bring his detention to an end. In particular, I am of the opinion that DIMA failed to pursue relevant sources of information that would have enabled it to resolve his detention at an earlier stage. Further, it would appear that DIMA failed to consider Mr G's absorbed person visa in a timely manner or in accordance with law. This failure is largely attributable to the lack of accessible policy guidance and support for DIMA staff who face the difficult task of considering these unique and complex visas.

Additionally, this investigation has highlighted issues concerning the recognition and implication of mental health issues, interviewing techniques, removal procedures, record keeping practices and the need to address immigration concerns amongst those members of the East Timorese community who arrived in Australia around 1975.

Although some of the officers involved in Mr G's case failed to carry out their duties in accordance with the relevant legislation and/or policies, it is my view that these failures were a direct consequence of systemic departmental failings. The lack of timely training and practical policy guidance rendered futile initial attempts to resolve Mr G's immigration status.

DIMA has coercive powers that can lead to the deprivation of a person's liberty and their removal from Australia. It is imperative that officers exercising those powers receive comprehensive and practical training in order to ensure that compliance activities comply with DIMA's administrative and legal obligations. I welcome the introduction of the College of Immigration, Border Security and Compliance and support the implementation of comprehensive training as a matter of urgency.

Summary of recommendations

The recommendations that flow from this investigation into the immigration detention of Mr G are summarised below. This investigation has also identified issues that were earlier discussed in detail in the reports into the Circumstances of the Cornelia Rau and Vivian Alvarez Matters (2005) and in my *Report on Referred Immigration Cases: Mr T* (Report No. 4 of 2006).²

The recommendations made in this report cover a number of matters: DIMA's procedures when a person of interest is referred by a state or territory police force; the lawful exercise of the s 189 detention power; misunderstanding of the implications of the *Privacy Act 1988* within DIMA and the importance of pursuing all avenues of inquiry; and a lack of understanding of the criteria for, and implications of, the absorbed person visa under s 34 of the Act. It is imperative that DIMA review the relevant Migration Series Instruction (MSI) and provide more practical assistance for officers likely to deal with the absorbed person visa.

² *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, July 2005, Mick Palmer AO APM; *Inquiry into the Circumstances of the Vivian Alvarez Matter*, undertaken by Neil Comrie AO APM, Report No.3 of 2005, Commonwealth Ombudsman.

PART 1—BACKGROUND

1.1 Mr G was born in East Timor (then known as Portuguese Timor) in 1954. In 1975, in the midst of civil unrest, he fled to Australia with the Portuguese family for whom he had been working. DIMA's microfiche movement records reveal that Mr G entered Australia on 1 September 1975 on a V10 permit. DIMA records from that period indicate that he entered Australia on flight A4140 classed as a refugee but was granted a visitor visa, as Australia did not have a humanitarian refugee program at that time. After some years in Australia he learned that his family had been killed in East Timor and this apparently led to the first manifestations of mental illness.

1.2 In 1990, Mr G commenced receiving unemployment benefits and in 1996, following submissions from the Fremantle Migrant Resource Centre and assessments by an occupational therapist and a medical practitioner, Mr G was transferred onto a disability support pension on the basis of an 'intellectual disability'.

1.3 Mr G lived at several addresses and received state assistance for his rental costs at various times. Information provided to my staff indicates that since the early 1980s, Mr G spent a great deal of his time in a particular section of Fremantle where he became well known to the local residents and police. He was also known to the Perth East Timorese community, including the Chancellor of the Honorary Portuguese Consulate in Perth, who would often have lunch or a coffee with him. Some members of the East Timorese community invited Mr G to their houses but after a few hours he would invariably return to the same park in Fremantle. It seems that Mr G was living on the streets when he came to the attention of DIMA in 2002.

Circumstances of detention

1.4 Mr G came to the attention of DIMA following a Fremantle police telephone inquiry on 28 August 2002. Documents from the Fremantle police indicate that Mr G was taken into custody as a result of a complaint that he was sleeping on the veranda of a private residence. The attending police suspected that Mr G was Indonesian but they were initially unsuccessful in their attempts to communicate with him. Mr G ultimately told the police that his passport was in Portugal and he was unable to produce identification documentation. The police transported Mr G to the police station where a telephone interpreter advised that Mr G 'was lying and that he was born on an island off the west coast of Africa'. Records indicate that Mr G also stated that he was born in Timor and Singapore.

1.5 The Fremantle police made telephone contact with the immigration inspectors at Perth airport, being the contact point for after hours immigration inquiries. Officer A, a senior immigration inspector with 30 years experience in DIMA, took the telephone call from the Fremantle police. The police advised that they had a man in their custody who appeared to be East Timorese or Indonesian. Officer A suggested that the police attempt communication via interpreters fluent in several different languages.

1.6 Although Mr G carried a Commonwealth Bank book that contained his correct name (AG), 15 minutes later the police called again advising that a Portuguese interpreter had ascertained that the man's first name was C, rather than A, and that his surname was G. Mr G's date of birth was unknown at that time. Officer A was informed that Mr G had variously claimed to be of Indonesian, Singaporean and African origin. Officer A then conducted a search of the electronic Movements Database and Integrated Client Services Environment (ICSE) for the name CG without a date of birth. Those searches did not reveal any records for a person by

that name. Officer A's file note records that the absence of records led him to form the view that he 'could not be satisfied that the person was a lawful non-citizen'. He issued documentation to ACM requesting that ACM transport Mr G to the PEIDC and detain him so that compliance 'can confirm his identity and status tomorrow'. Officer A never spoke to Mr G himself.

1.7 On reaching the PEIDC, ACM officers inducted Mr G into the centre and logged all of his property. He had numerous personal items in his possession, including the Commonwealth Bank book in the name of AG (his correct name), and a wallet containing \$473.55. An ACM nurse observed that he was unkempt and exhibiting abnormal behaviour suggestive of a psychiatric condition. Mr G was placed on routine suicide watch for the first 24 hours of his detention. The nurse noted that Mr G had spent time in Fremantle Hospital in 1995. There is no indication from the file that this information was passed onto DIMA or that DIMA officers obtained this information from the ACM file.

1.8 The following day, on 29 August 2002, compliance Officers B and C attended the PEIDC and interviewed Mr G. Officer B explained to my staff that, in light of his relative inexperience, his role was largely administrative and that upper management was actively involved in the matter. Officer C told my staff that after the interview with Mr G he expressed concern to either the ACM nurse or the DIMA Detention Manager as Mr G was behaving in an unusual manner. It appears that neither officer was informed that Mr G's demeanour had already been assessed as being indicative of psychiatric illness.

1.9 Between 29 August 2002 and 5 September 2002, the two compliance officers made several inquiries with other organisations about Mr G. Those organisations included Centrelink, the Commonwealth Bank, Western Australian Police Bureau of Criminal Intelligence (BCI), Offender Information Bureau (OIB), and the WA Missing Persons Bureau. The information they obtained included three addresses in Perth, several different dates of birth, a copy of a 1986 Portuguese passport issued in Sydney and advice that Mr G only had four convictions for minor offences in Western Australia (stealing in 1986 and 1987, park drinking in 1989 and loitering in 1992). Importantly, within the first few days of Mr G's detention, a search of the DIMA microfiche Movements Database had revealed that a Mr AG had entered Australia on 1 September 1975 under a V10 permit. It would also seem from anecdotal evidence that concern about Mr G's immigration status led Centrelink to cancel his pension around the time of this contact with DIMA.

1.10 At interview, some DIMA officers and managers advised that they had unsuccessfully inquired of long-term DIMA officers and the DIMA national office about the nature of the V10 permit under which Mr G had entered Australia. At some point, although the nature of this visa remained unknown, it was assumed by the relevant officers that Mr G entered Australia on a three month visitor visa. Information received by my office on 20 December 2005 indicates that the visa was a visitor visa issued for humanitarian reasons on the basis that Mr G was an East Timorese refugee.

1.11 Shortly after Mr G's detention, three members of the Perth East Timorese Community, including Mr E, a Chancellor with the Honorary Portuguese Consulate, learned that a member of the East Timorese community was being held in detention. On 3 September 2002, they attended the PEIDC and identified the East Timorese detainee as Mr G. They had a conversation with a DIMA officer and explained Mr G's background and mental health issues, and also advised DIMA that they understood that Mr G was a permanent resident. Whilst they were initially informed that they

could take Mr G home with them, they were subsequently advised that DIMA's records indicated that he was not lawful and he could not be released until his status was resolved.

1.12 On 4 September 2002, Mr B (ACM Detention Centre Manager) sent an email to Officer D (DIMA Detention Manager), Officer E (Officer in Charge of Compliance) and Officer F (Manager of Compliance and Cancellations). Mr B outlined his concerns about the lawfulness of Mr G's detention and summarised information that was known to him about Mr G. Although this email generated discussion and emails amongst the DIMA managers, no one replied to Mr B's email. Officers E and F both expressed the view that Mr G's detention was lawful.

1.13 On 6 September 2002, Mr G was interviewed by Officer B and another compliance officer, Officer G. That interview was taped and involved Mrs F, who had earlier identified Mr G on 3 September 2002, in her capacity as an interpreter.

1.14 On 10 September 2002, a DIMA compliance officer asked a removals officer to inquire of the East Timorese Consulate concerning the process for obtaining East Timorese travel documents. On the same day, ACM referred Mr G to the Transcultural Psychiatric Health Unit at the Royal Perth Hospital. The letter of referral explained that:

Today I asked for him to be reviewed by our visiting doctor, who found him to have delusions to place and person. He believes that he is the President of Australia, East Timor and Darwin.

1.15 On 12 September 2002, Officer G fingerprinted Mr G. The fingerprints were provided to BCI and resulted in a match with Mr G's identity. The next day, following abnormal behaviour, Mr G was admitted to the Mills Street Centre for psychiatric evaluation .

1.16 As far as is possible to discern from DIMA's records, Officer F appears to have considered the absorbed person visa on or shortly before 17 September 2002. It was his view, as expressed in an email to the compliance help desk, that Mr G did not meet all of the relevant criteria. Despite record keeping requirements in the relevant MSI, there is no record of the initial unfavourable assessment against the absorbed person visa criteria. The email also reveals that the possibility of a protection visa or Ministerial intervention had been considered by this time.

1.17 On 17 September 2002, Officer F sent an email to an officer of the Department of Foreign Affairs and Trade (DFAT) in Dili, inquiring about the availability of psychiatric services in the Dili area of East Timor.

1.18 The file shows that on 18 September 2002, a woman from the East Timorese Association rang DIMA about advocating on Mr G's behalf. Although the woman left her contact details with DIMA, officers did not make contact with her to discuss Mr G. On the same day an appointment with a lawyer from a community legal centre was arranged for Mr G by DIMA.

1.19 On discharge from the Mills Street Centre on 19 September 2002, Mr G was diagnosed with chronic schizophrenia, including delusions and thought disorder, probably of long standing duration. When he reached the PEIDC he was placed on 30 minute suicide watch but one officer noted that Mr G 'can be very annoying to other detainees but very compliant with staff. I don't believe he should be held at this facility for his safety.'

1.20 Three members of the East Timorese community visited Mr G at the PEIDC on 26 September 2002 and provided a signed statement to a DIMA officer concerning their knowledge about Mr G's immigration and personal history. They requested that Mr G be released from immigration detention. DIMA officers noted the signed statement but the three signatories were not contacted about their information.

1.21 A reply from DFAT was received on 27 September 2002 in which it was explained that there was very little in the way of psychiatric services in Dili and it was likely that Mr G would be 'left to his own devices' there.

1.22 On 2 October 2002, a solicitor from the community legal centre engaged to represent Mr G wrote to DIMA advising that she had visited Mr G in hospital but, due to his poor mental health, she was unable to obtain instructions from him. She also explained that she had spoken with Mr G's doctor who informed her that he had been placed on medication that would take six to eight weeks to take effect. She had also been informed that in light of his long-term symptoms there was no guarantee that the medication would be able to stabilise his condition. On the same day Mr G was removed from suicide watch. Throughout the 14 days in which he had been in suicide watch he was generally recorded as 'cheerful' and 'happy'.

1.23 Two days later Mr G was admitted to Graylands Hospital under the Western Australian *Mental Health Act 1996*. Mr G was released on 8 October 2002, after assessment by a doctor that he was not sick enough for hospitalisation.

1.24 It appears that Mr M, who had earlier visited Mr G and was a signatory to the statement of 26 September 2002 (see 1.20 above), had made several attempts to communicate with DIMA about Mr G. On 8 October 2002, Mr M was successful in reaching Officer F by telephone. This was the first time that Mr M had been able to speak directly with the officer who was considering Mr G's situation. On the same day, Mr M also wrote to DIMA demanding the immediate release of his friend. This letter was received by DIMA on 9 October 2002.

1.25 On the basis of the further information supplied by Mr M, Officer F revisited his initial consideration of the absorbed person visa and determined that Mr G could meet the criteria. At interview, Officer F confirmed that the additional information provided by Mr M was the trigger for reconsideration of this type of visa.

1.26 The next day, 9 October 2002, Officer F signed a record of his favourable assessment of the absorbed person visa criteria. Officer F then contacted Mr M and arranged for him to take Mr G into his care. Mr G was released from detention and Officer F arranged for an officer from the settlements branch to drive Mr M to the PEIDC to pick up Mr G and deliver them both back to Mr M's residence in South Perth.

1.27 In the days following Mr G's release, members of the East Timorese community took him to Centrelink to restore his payments. A few weeks later he was admitted to hospital. Mr M engaged in correspondence with Officer H, the State Director, concerning access to documents, requesting an apology on behalf of Mr G and explaining that the incident had caused concern for the immigration status of other members of the East Timorese community. This letter was noted by Officer H but it was determined that no further action needed to be taken in respect of this correspondence.

Complaint to the Commonwealth Ombudsman

1.28 On 8 October 2002, Mr M made a complaint to the Commonwealth Ombudsman's office in Perth. That complaint centred on Mr G's continuing detention and was actioned by a Senior Investigation Officer. On 9 October 2002, Mr M contacted the Ombudsman's office and advised that he had just been informed that Mr G was going to be released into his care. The Ombudsman's office confirmed that Mr M's primary complaint had been resolved by the release of Mr G but advised that the office would continue with preliminary inquiries. The office discussed the matter with WAPOL, Centrelink and DIMA. After examining DIMA's files and listening to interview tapes, on 29 October 2002 DIMA was advised that no further action would be taken in respect of the complaint by Mr M. The 2002 file refers to the resource implications of further investigation and that the central issue in the complaint (being the release of Mr G) had been resolved.

PART 2—AREAS OF CONCERN

Section 189 and the decision to detain Mr G

2.1 Mr G was detained under s 189, which provides that an authorised officer must detain a person whom the officer knows or ‘reasonably suspects’ to be an unlawful non-citizen. Section 189 has been discussed in detail in previous reports on referred immigration cases, particularly in the Mr T Report, No. 4 of 2006. I refer to that discussion, which draws attention to problems occurring in DIMA concerning the administration of s 189, and in particular to the lack of adequate awareness of DIMA officers of what is required to form and to continue to hold a ‘reasonable suspicion’ for the purposes of s 189. The comments in the earlier reports are reinforced by the observations arising from this investigation. The issues discussed below are concerned with the process behind the formation of the suspicion that led to Mr G’s detention and the need to review the reasonableness of that suspicion throughout the detention.

Initial detention under s 189

2.2 Mr G came to DIMA’s attention as a result of an after hours telephone inquiry by WAPOL. Although members of WAPOL are officers for the purposes of the Migration Act, it was DIMA Officer A who formed the requisite ‘reasonable suspicion’ which led to Mr G’s detention under s 189. Officer A has had many years of experience in DIMA, including a period of service in the compliance area. Officer A explained to my staff that he was most likely processing passengers at the airport when this phone call came through to him.

2.3 The opinion I have reached is that there was a lack of rigour and analysis in the process that led to Mr G’s initial detention. I draw attention to the following deficiencies, which highlight the risk that a court would determine the decision to detain Mr G was unlawful because the processes surrounding his detention do not support a reasonable suspicion under s 189.

- On 28 August 2002, Officer A was asked by WAPOL to check whether a man named CG was lawful. Officer A searched two of DIMA’s systems and did not find any entries under this name. Despite being aware that the police were having difficulty in obtaining a name for the person in their custody, Officer A formed the view that Mr G was an unlawful non-citizen solely because he could not find an entry for CG on DIMA’s systems. At interview, Officer A confirmed that the absence of a record was the only factor that he took into account in deciding to detain Mr G under s 189. It was well known by all DIMA officers interviewed that DIMA’s systems were problematic and, at times, inaccurate. In light of this knowledge, it is not objectively reasonable, in my view, to rely solely upon the absence of information in DIMA’s systems when forming a suspicion about a person’s immigration status. The need to act with caution is even greater where there are grounds to suspect that the name provided may not be correct.
- Having examined DIMA’s systems, Officer A formed the view that he ‘could not be satisfied that the person was a lawful non-citizen’ and arranged for his detention so that ‘compliance can confirm his identity and status tomorrow’. On the face of it, this note appears to indicate a shift in the legislative test – that the officer has to be satisfied of lawful status rather than forming a reasonable suspicion of unlawful status. Section 189 requires a DIMA officer to form a state of mind, yet Officer A’s note seems to place an onus upon the

person detained to prove their status. At interview, some officers, including Officer A, were of the view that this note reflects a different turn of phrase rather than a different test. Even if that were so, this case highlights the danger in deviating from or paraphrasing the language of s 189. A reasonable suspicion that is properly formed constitutes the only protection in s 189 against arbitrary detention; it is imperative that DIMA officers have regard to and abide by the exact wording of the section.

- Although it was Officer A and not the police who formed the suspicion, at no point did he speak to Mr G. While it is certainly reasonable to rely upon information provided by members of the police for the purposes of an inquiry, the serious consequences that stem from a decision to detain require that the DIMA officer concerned personally speak to the person of interest. It would also seem that the language of *MSI 321: Detention of Unlawful Non-Citizens*, which instructs officers in the means by which they should form a reasonable suspicion, envisages that the officer will communicate directly with the person of interest. Officer A not only had the responsibility to make reasonable inquiries of Mr G; his experience in immigration matters may have enabled him to glean new information from Mr G.
- The morning after Mr G was detained, DIMA officers located a Commonwealth Bank book amongst his possessions. The information provided to this office indicates that the name on this bankbook was AG. Given that Mr G had this document on his person when he was brought into detention, it is unclear why the police did not locate it on him when they were trying to establish his identity. Had the book been located, Officer A would have conducted a database search under the name AG rather than CG. At interview, Officer A said it was his usual practice to ask the police whether they had access to a passport or identity documents and he assumes he would have done so in this instance. This investigation has not revealed why this important information was not located by WAPOL but it further illustrates the need for DIMA officers to speak, preferably in person, to each person of interest before forming any view as to the immigration status of that person.

2.4 It is noted that on 20 December 2005, DIMA issued a new MSI which touches upon the interaction between DIMA officers and the police, namely *MSI 409: Establishing identity – in the field and in detention*. The MSI will undergo further revision in light of a recommendation I made in the report on Mr T, to the effect that in all but exceptional circumstances a person detained under the Migration Act should be formally interviewed as soon as possible and no later than four hours after detention.

2.5 In Part 10, MSI 409 focuses on DIMA's responsibility in circumstances in which the police detain a person under s 189. The MSI states that the obligation upon DIMA officers to establish the detainee's identity is not diminished in circumstances where the police carry out a detention. However, this investigation has highlighted the difficulties that can arise when police and DIMA officers are both involved in detaining a person. A DIMA officer who is exercising the s 189 power on the basis of a police telephone inquiry must be mindful that their obligation to form a reasonable suspicion based on all available information is not diminished by the fact that it is the police who are providing information to them. Any officer exercising the s 189 detention power must satisfy himself or herself of the person's identity and their immigration status. Unless there are exceptional circumstances, a person who has been referred to DIMA by the police should be interviewed by the DIMA officer, preferably face-to-face, before a decision is made to detain the person under s 189.

Ongoing detention under s 189

2.6 Interviews were held with all of the DIMA senior officers involved in Mr G's detention: the State Director, the Manager of Compliance and Cancellations, and the Officer in Charge of Compliance. Each officer informed my staff that they held a suspicion that Mr G was an unlawful non-citizen. They based their state of mind on various matters including the timing of his arrival, initial information indicating that his arrival permit may have been temporary, and the lack of records indicating further visas or regularisation of status. There was, however, some doubt expressed at the relevant time between these officers and the Detention Manager as to whether Mr G's detention could be justified. This appears from an email interchange between DIMA officers on 4 September 2002, in response to Mr B's concerns about the lawfulness of Mr G's detention.

2.7 One DIMA officer wrote:

I also remain concerned that we have a person in detention who is a permanent resident (if not an Australian citizen) and that we are on very shaking (sic) grounds to continue to hold him here. It appeared to me yesterday that there was sufficient grounds to release him but [Officer E] said no to that for the moment. He has now been in the centre for a week and we seem to be no closer to confirming his identity. Fortunately, Mr G is not educated enough to consider suing us for unjustified detention however, I think we need to be very careful in regard to how long we continue to detain him. If released he will be easy enough to find if it is found that he is unlawful.

2.8 Another responded:

That the detainee may well be a permanent resident has always been our concern. A Holding Order ... is in effect because he cannot be identified on any [DIMA] systems at present. He has given multiple names, multiple dob's, multiple entry dates ...

To effect his removal now without establishing his lawful status would give rise to legal action, as he would be released without any material change in information provable by the Department. To suggest that his detention now is unlawful, or opens us up to litigation is an absolute nonsense.

We have lawfully in the past detained Australian citizens until their status has been proven. The duration is not an aspect. The legality of the detention has been proven in the courts.

2.9 A general concern that arises from this investigation, both from these emails and from other circumstances, is that some officers within DIMA held the view that if a person could not be conclusively identified and located on DIMA systems, the person had to be detained and kept in detention. It was conceded by a senior immigration officer that at the time of Mr G's detention there was a greater reliance upon the person detained to prove their lawful status, rather than DIMA revisiting the reasonableness of the suspicion. There is also evidence of a view prevailing at that time that DIMA could only release a person from detention if their identity had been proven and their lawfulness had been positively evidenced.

2.10 The terms of the Migration Act probably contributed to the mistaken view held by some officers, that only a reasonable suspicion is required to detain a person but that absolute proof is required to release them. Notably, s 191 provides that a person must be released if there is evidence or it is reasonably believed that they are an Australian citizen or a lawful non-citizen; and s 196 provides that an unlawful non-

citizen who has been detained must be kept in detention until they are removed or deported from Australia or granted a visa. However, as I pointed out in the Mr T report, it is, in my view, 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 that he or she is an unlawful non-citizen. The reasonableness of that suspicion must be constantly reviewed and, in the event that the reasonable suspicion is diminished to the point that the test in s 189 can no longer be met, the person must be released from detention. I note that the need to review the reasonableness of the suspicion is now recognised by DIMA in *MSI 411: Establishing immigration status in the field and in detention* (in which officers are instructed that they must release a person from detention if they no longer reasonably suspect that the person is an unlawful non-citizen).

2.11 Once it was determined that Mr G had arrived in 1975 and had not left since that date, some DIMA officers did inquire of the national office in an effort to determine the type and duration of his original permit. That question was not conclusively answered while Mr G was in detention. At some point during that detention the view was taken that the V10 permit was akin to a visitor visa. DIMA officers informed my staff that they thought it was most likely a three month visa and that Mr G had been an overstayer since that visa expired; none of the officers interviewed were aware that Mr G arrived in Australia as a refugee. The point at which his original permit ceased is highly relevant to the question that is discussed below of whether he had qualified for an absorbed person visa. Information about the V10 permit – and, consequently, Mr G’s immigration status – should have been readily available to the officers when Mr G was initially detained.

Recommendation 1

DIMA should issue an instruction to provide guidance to police officers and DIMA officers on the exercise by police of the power conferred by s 189 of the Migration Act. The instruction should state that a DIMA officer must be contacted before a person is detained under s 189, unless there are exceptional circumstances. Either before a person is detained by a police officer under s 189, or as soon as practicable thereafter, a DIMA officer should speak to the person and document the conversation. The instruction should provide guidance on what might constitute an exceptional circumstance to warrant a departure from this practice.

Missed opportunities to end the detention

Section 34—Absorbed person visa

2.12 Within a day or two of Mr G’s detention it was known that he had arrived in Australia in 1975 and had not left since that date. This information should have immediately triggered a consideration of the absorbed person visa under s 34 of the Act. The following discussion of the absorbed person visa criteria serves to illustrate the steps that should have been taken to assess Mr G against the relevant criteria and to highlight the shortcomings of the current MSI.

2.13 An absorbed person visa is a visa that enables the holder to remain in, but not re-enter Australia. It is, in effect, a permanent residence visa. Section 34 provides that an absorbed person visa is deemed to have been granted to a person on and from 1 September 1994 if the conditions specified in s 34(2) are satisfied. This visa is unusual in that it does not require an application, decision or actual grant from DIMA; rather, if the visa holder meets the relevant criteria, he or she is deemed by operation

of law to have held the visa since 1 September 1994³. For the purposes of this matter, the criteria that must be satisfied by a non-citizen in the migration zone are:

- a. the person was in Australia on 2 April 1984
- b. before that date, they had ceased to be an immigrant
- c. they have not left Australia between 2 April 1984 and 1 September 1994, inclusive
- d. immediately before 1 September 1994, the person was not subject to s 20 of the Act as then in force.

2.14 Arguably, a person does not have to come to DIMA's attention in order to hold the visa. Importantly, *MSI 116: Absorbed Person Visa* discusses the implications of this situation with respect to s 189. In paragraph 8.1 under 'Consequences for Detention and Removal Procedures', the MSI says:

Detention is only mandatory where an officer has a reasonable suspicion that a person is an unlawful non-citizen. Unless a person clearly cannot meet the objective criteria set out in section 34 (e.g. arrival after 2 April 1984) or there has been a finding made that the person is not an absorbee, there will not be any reasonable suspicion on which to act.

2.15 None of the officers involved in Mr G's detention, including one officer who currently conducts DIMA training, were aware of this paragraph. If a person prima facie meets the test in s 34 for an absorbed person visa, it is not open to a DIMA officer concurrently to maintain a reasonable suspicion that the person is an unlawful non-citizen. In order for such a person to be detained under s 189, a positive finding would have to be made that the person did not meet the criteria specified in s 34. Accordingly, as soon as DIMA realised that Mr G arrived in 1975 and had not left since that date, he should have been released from detention unless a finding was made that he did not meet the criteria for an absorbed person visa. Although it was evident as early as 29 August that Mr G had arrived in 1975, it was not until 17 September 2002 that an assessment was made, albeit erroneously (see below), that he did not meet the absorbed person visa criteria. It was not until 9 October 2002 that DIMA determined that Mr G did hold an absorbed person visa.

2.16 The complex history of legislative amendments that preceded the present form of s 34 has been authoritatively detailed in several court decisions.⁴ The following discussion looks at how the criteria in s 34 (listed above in 2.13) applied to Mr G.

a. The person was in Australia on 2 April 1984

2.17 Section 34(2)(a) requires that the non-citizen be in Australia on 2 April 1984. This is a question of fact. The answer, in Mr G's case, is that he arrived in Australia in September 1975 and there is no evidence to suggest that he has departed Australia at any time since. Mr G met this criterion.

³ See *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 420 as to the implications of this deeming provision. The decision of the Full Federal Court in *Nystrom* is presently under appeal.

⁴ See *Yong Khim Teoh v Minister for Immigration and Ethnic Affairs* [1996] 572 FCA 1, and *Hary Tjandra aka Jimmy Yek v Minister for Immigration and Ethnic Affairs* (1996) 67 FCR 577, endorsed in *Boon Yin Chee v Minister for Immigration and Multicultural and Ethnic Affairs* (Lockhart, Heerey & Sundberg JJ, 13 June 1997, unreported) and *Sit v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 40.

b. Before 2 April 1984, the person had ceased to be an immigrant

2.18 This criterion in s 34(2)(b) is founded upon the constitutional doctrine of absorption, under which a person, once absorbed into the Australian community, is no longer regarded as an immigrant. The test of whether a person has become absorbed into the Australian community is a question of fact, although there are legal bars to absorption. By way of an example that is relevant to Mr G's circumstances, before 2 April 1984, the legislation provided that a person became a prohibited immigrant after the expiry of a temporary entry permit (TEP) (s 7(3)). If a person became and remained a prohibited immigrant, it was a legal bar to absorption within the Australian community. The person's status as a prohibited immigrant could nevertheless change. Relevantly, s 7(4) provided that a person to whom that section applied:

... ceases to be a prohibited immigrant at the expiration of a period of five years from the time at which he became a prohibited immigrant unless, at the expiration of that period, a deportation order in relation to him is in force.

2.19 Section 7(4) was repealed in 1983. The repeal had the effect of denying a prohibited immigrant (subsequently called an prohibited non-citizen) the possibility of ceasing to be prohibited after five years of non-detection. Thereafter, the only means by which such a person could cease to be prohibited was by virtue of the grant of a suitable permit and not otherwise.

2.20 As this discussion indicates, the path to absorption is fraught with legal and factual complexities. Most relevantly for Mr G's circumstances, if he entered lawfully and subsequently became a prohibited immigrant by expiration of his permit, but remained undetected for five years (before 2 April 1984), he was then in a position to be absorbed into the Australian community⁵.

2.21 DIMA's records indicate that Mr G arrived with a V10 permit as part of the evacuation of East Timorese refugees. It seems from departmental correspondence at that time that East Timorese evacuees were issued with TEPs that were initially valid until 31 December 1975. The TEPs were subsequently extended until 30 June 1976. Departmental correspondence indicates that in late June 1976 a decision was made that, upon application, East Timorese refugees were entitled to be considered for permanent residence. Further correspondence from DIMA in mid July 1976 to another department reveals that there were discussions as to whether temporary residents who remained in hostels should be entitled to do so until 30 June 1977. It is not known whether TEPs had been extended to this date or whether these people were temporary, pending the processing of applications for permanent residence. It seems that in June 1976, signs were placed in the migrant hostels, which housed the majority of East Timorese evacuees, advertising the possibility of permanent residency.

2.22 DIMA has not been able to locate any application for permanent resident status from Mr G. In the absence of such an application, or any other record indicating that an application was made, it appears that Mr G was not granted permanent residency and it follows that he most likely became a prohibited immigrant on 1 July 1976. Allowing five years from this date, at 1 July 1981 Mr G ceased to be liable for deportation as a prohibited immigrant (that is, he fell within the parameters of s 7(4)) and became eligible for absorption into the Australian community.

⁵ See *Queen v Forbe; ex parte Kwok Kwan Lee* (1971) 124 CLR 168; *Ang v Minister for Immigration and Ethnic Affairs* (1980) 40 FLR 412.

2.23 The test as to whether Mr G was absorbed involves a consideration of his personal history in Australia prior to 2 April 1984. In *Johnson v Minister for Immigration and Multicultural and Indigenous Affairs (No 3)* (2004) 136 FCR 494, the Federal Court discussed the factors relevant to an assessment of whether a person has been absorbed into the Australian community. After outlining nine main factors, including the time that has elapsed since the person's entry into Australia, economic ties, criminal history, employment history and family or other close personal ties in Australia, the Court explained that:

This list of factors is plainly not exhaustive. Rather, it illustrates the multi-dimensional character of the judgement involved. It is also necessary in making that judgement to avoid narrow mono-cultural assumptions about what constitutes membership of the Australian community.⁶

2.24 The investigation into Mr G's detention has provided my staff with an opportunity to learn about Mr G's personal history from members of the Perth East Timorese community. Many of the witnesses had made representations to DIMA at the time of Mr G's detention and were involved in Mr G's welfare after his release from detention. These people have been forthcoming with information and generous with their time. It was wrong of DIMA during the period of Mr G's detention not to establish better communication with them. Indeed, as detailed below, it would seem that DIMA's refusal to receive information from members of the East Timorese community contributed to an erroneous initial assessment and delayed Mr G's release from detention.

2.25 In summary, the information provided to this office confirmed the material provided to DIMA in 2002 and indicates that Mr G was in good health when he arrived in Australia. Further anecdotal information from members of the East Timorese community, as well as Centrelink records, indicate that Mr G initially obtained employment in a Fremantle tannery and in a factory. While it appears that Mr G owned two second-hand cars in succession, it is unclear whether he ever owned real estate. Although his English language ability apparently diminished as his mental health deteriorated, records indicate that he was previously able to communicate effectively in English. At some point he learned that his family had been killed in East Timor and he began to show signs of mental illness.

2.26 Mr G's criminal history is relevant to an assessment of whether he is absorbed only in so far as he was not convicted of any offences until 1986, which is after the cut off date of 2 April 1984. There is nothing to indicate that during the period in which Mr G was capable of being absorbed, he either engaged in or was convicted of any criminal offences.

2.27 There is sufficient information to indicate that Mr G was capable of absorption before April 1984 and was absorbed into the Australian community by then.

c. The person has not left Australia between 2 April 1984 and 1 September 1994, inclusive

2.28 This criterion in s 34(2)(c) is again a question of fact. The evidence indicates that Mr G has never left Australia since his arrival here in 1975. He therefore met this criterion.

⁶ At paragraph 46 of *Johnson v Minister for Immigration and Multicultural and Indigenous Affairs (No 3)*.

d. Immediately before 1 September 1994, the person was not subject to s 20 of the Act as then in force

2.29 This criterion is in s 34(2)(d). Section 20 applied to situations in which a person was an illegal entrant as a result of evasion or the provision of false or misleading statements when they entered Australia. All information indicates that Mr G entered Australia lawfully as part of a humanitarian evacuation. There is no suggestion that his entry information was anything other than bona fide. Accordingly, he was not ineligible for absorption pursuant to s 20.

Comment

2.30 It follows from the above discussion that Mr G met the requirements of s 34 and has been correctly assessed by DIMA as holding an absorbed person visa. However, DIMA did not consider this issue in a timely manner and also failed to follow its own policies in assessing the absorbed person visa criteria. These issues are expanded below.

2.31 It was Officer F who initially assessed Mr G against the absorbed person visa criteria and sought guidance from the compliance help desk. He also read the relevant MSI and discussed it with the State Director, Officer H. In an email dated 17 September 2002, Officer F wrote that '[Mr G] only meets two criteria, that he was an immigrant, and he arrived before Sep 84. He doesn't meet the important ones. It looks like we'll go down the [Protection Visa] avenue at this stage.' It is apparent that Officer F did not understand what was required to meet s 34 of the Act and did not adequately document the reasons for his assessment. Further misunderstanding about the relevant period for assessing whether a person has been absorbed is evident in Officer F's email to DFAT on 17 September 2002 in which he wrote that Mr G did not meet the absorbed person visa criteria because 'he has a criminal record, has been unemployed for a number of years, does not own property etc'. At interview, Officer F explained that he was confused by the MSI and did not initially appreciate the distinction between the mandatory criteria contained in s 34 and the more fluid factual criteria that indicate absorption.

2.32 Officer F's consideration of the absorbed person visa criteria was not helped by his reluctance to obtain information from third parties. At interview he confirmed that it was not until DIMA obtained information from Mr M, on 9 October 2002, that he had sufficient information to consider the absorbed person visa favourably. This information was only accessed by DIMA after numerous attempts at communication by members of the East Timorese community.

2.33 The MSI explains that because the visa applies to a person by operation of law, it does not involve a decision and no delegation is required. The majority of officers interviewed were of the understanding that a decision by an appropriate delegate was required for this visa to come into effect. In light of the complexity inherent in this visa, the MSI suggests that each regional office nominate an appropriate officer or officers to manage s 34 matters. In this case, the complexity of the situation was recognised at an early stage but the s 34 issue fell to the Manager of Compliance and Cancellation because of his position rather than his knowledge.

2.34 The MSI explains that while there is no legal need for an absorbed person visa to be evidenced, comprehensive file notes should be made of any s 34 action. Furthermore, before a person is found not to be absorbed, that person should be given an opportunity to respond to that preliminary view. The MSI explains that an unfavourable absorbed person visa assessment may result in judicial review. Accordingly, DIMA should maintain detailed information evidencing how the

assessment was reached that the person had not been absorbed. In Mr G's case, this office has been unable to conclusively determine the date at which the absorbed person visa criteria was first erroneously considered. There is no file note or ICSE record of that initial consideration. It seems that the assessment was some time before 17 September 2002 and the reasons, as best as they can be determined, appear to be those referred to in Officer F's two emails of 17 September 2002. Officer F informed my staff that he did not notice the part of the MSI which instructed him to record the unfavourable determination. He expressed frustration at the lack of guidance in the MSI and explained that he used a decision template derived from his previous experience in order to record the later favourable assessment.

2.35 The MSI goes on to advise at paragraph 6.5 that:

[T]he need to enter information about section 34 findings on Departmental systems is still being assessed. At this time, there is no proposal to make entries on the Movement Data Base. If it is clear that the person has been of concern to Compliance sections, a copy of the Departmental finding should be copied to them for their information ... If an absorbed person applied for a resident return visa, his or her details will be entered in to the Movements Data Base at that time.

2.36 It is of concern that DIMA has not yet resolved whether these findings should be recorded in its electronic systems. Furthermore, in light of the other immigration matters presently being investigated by this office, it is recommended that DIMA ensure that all s 34 assessments are detailed on all hard copy and electronic systems as soon as they are made. It is not appropriate for only the local compliance area to be informed of the outcome as the person may move to another State or Territory and come within the purview of another compliance team. In this case, consideration of the absorbed person visa criteria was recorded on ICSE, however, for reasons explained under the heading 'computer records' below, Mr G's status remained unlawful on that system.

2.37 The officers involved in assessing Mr G against the absorbed person visa criteria did not carry out the task promptly or competently. However, it is recognised that these officers were attempting to bring Mr G's detention to an end and their conduct is a reflection of the lack of training and guidance concerning this unusual visa. MSI 116 was issued in 1995 and appears not to have been revised since that date. In its present form, the MSI is unduly legalistic and historical. It is not easily understood and is poorly suited to the practicalities of compliance work. Interviews with officers who have read this MSI revealed that they found little, if any, assistance in the MSI. Unfortunately, in its present form, those parts of the MSI that are of assistance to officers are not readily apparent. This office has examined the MSI and urges DIMA to review and amend the document.

2.38 It follows from the above discussion of the administrative deficiencies and systemic failures in this matter, as well as the issues detailed above concerning the interaction between s 34 and s 189 of the Migration Act, that it is probable that some or possibly all of Mr G's detention was unlawful, lacking any reasonable suspicion to support the view that he was an unlawful non-citizen.

Recommendation 2

In light of the serious problems exposed by this investigation concerning the administration of s 34, DIMA should ensure that:

- compliance officers are properly trained about the absorbed person visa under s 34 of the *Migration Act 1958* and that they have access to a specialist advice service concerning absorbed person visas
- compliance officers are trained about the implications of s 34 for detention under s189 of the Act
- Migration Series Instruction 116 is reviewed and revised in a manner that affords practical assistance and guidance to compliance officers, including appropriate checklists and pro-forma documentation
- all absorbed person visa assessments are comprehensively recorded and evidenced.

Failure to follow up information

2.39 It is pleasing to note that at the time of Mr G's detention, the Perth compliance office employed a practice by which the detaining officer retained responsibility for the management of persons they had detained. The continuity inherent in this practice is more likely to ensure that one person retains control of the entire matter and that all available information is conveyed to a central point. Such a practice should minimise the possibility of information being overlooked, or one part of DIMA having relevant information that is not imparted to the person who is responsible for resolving the detention. Notwithstanding this practice, this investigation revealed numerous informational opportunities that were not recognised and acted upon by the officers involved.

2.40 As noted in the report on the detention of Ms Cornelia Rau, as at 2004 there was no policy guidance for officers in how to pursue identity leads. At the time of Mr G's detention, some two years earlier, it seems that only MSI 318 (at 6.2) and MSI 321 (at 2.1.1) drew officers' attention specifically to the value of credible information provided by third parties, although they did so in the context of needing objective evidence for a reasonable suspicion under s 189. It would appear that there was no policy guidance which directed DIMA officers to pursue all avenues of inquiry, including third party information, in order to resolve identity and status questions. The failure to follow all avenues of inquiry disadvantaged Mr G and significantly delayed a favourable assessment that he held an absorbed person visa.

2.41 There was an assumption made by most DIMA officers involved in this matter that the East Timorese community had abandoned Mr G. At interview many of the officers who were involved were surprised to learn that there had been a delegation from the East Timorese community as early as 3 September 2002. This assumption persisted despite numerous attempts by members of that community to communicate with DIMA, the most important of which are discussed below. Had DIMA actively pursued contact with these people it is likely that the information required for an assessment against the absorbed person visa criteria would have been available much earlier. It is probable that an earlier and accurate assessment would have resulted in a much shorter detention for Mr G.

2.42 From an assessment of the documentary material and interviews with the individuals concerned, it appears that DIMA failed to follow up viable informational opportunities in the following instances:

- As soon as Mr G was detained, the ACM Detention Manager, Mr B, recognised him as a Fremantle resident. In his email of 4 September 2002, he advised that Mr G had resided in Goldfields House. At interview Mr B also stated that he had suggested to DIMA that it contact the Fremantle police for further information. DIMA did not seek any further information from the ACM Detention Manager and did not make contact with either the Fremantle police or Goldfields House. Given that DIMA knew that the Fremantle police had last identified Mr G as CG, it would have been reasonable to consult with the Fremantle police about their records for AG.
- It appears that only two of the three available residential addresses were visited by DIMA officers in the early stages of their attempts to identify Mr G.
- Despite Mr G revealing on induction into the PEIDC that he had spent time in Fremantle Public Hospital in 1995, there is no indication on file that this information was accessed by DIMA or conveyed by ACM. More generally, Mr G's mental health issues were evident at a very early stage and yet no inquires were made with mental health service providers to ascertain information about his history or mental condition.
- The DIMA officer at the PEIDC who discussed Mr G with representatives from the East Timorese community on 3 September 2002 did not record that this contact had occurred, nor the details of the conversation. Although the East Timorese community representatives were initially informed that they would be able to take Mr G out of detention, an officer subsequently made contact with a supervisor and informed them that DIMA was still of the view that Mr G was unlawful. Had the DIMA officer at the PEIDC made records of the information provided by Mr G's visitors, the initial consideration of the absorbed person criteria may have included information that was capable of founding a favourable absorbed person visa assessment. At interview, Officer D recalled conversations with Mr G's visitors to the PEIDC, but this contact was not recorded on any DIMA systems and the information they provided was not brought to the attention of the officer considering the absorbed person visa. The failure to record this information is a reflection of poor record keeping practices. The failure to identify these people as a source of information is an indication of little or no coordinated case management.
- During the second interview on 6 September 2002, Officers B and G learned that Mr E, the Chancellor from the Honorary Portuguese Consulate, had been one of the first people to learn about Mr G's detention and had also visited him at the PEIDC on 3 September 2002. Despite Mr E's position in the East Timorese community and the obvious possibility that he may have had information about Mr G's history, DIMA did not make contact with Mr E as a result of this interview, nor when he offered information as a signatory to the statement of 26 September 2002. My staff interviewed Officers B and G. Each officer explained that they expected the other officer to follow up on any new information that arose from the interview: Officer B felt he was too inexperienced and was just learning and Officer G thought that his role was just to conduct the interview.
- On 18 September 2002, a woman from the East Timorese Association left her contact details with DIMA advising that she was interested in advocating for Mr G. The contact was noted in an email but no further steps were taken. At interview, DIMA staff said that the *Privacy Act 1988* prevented them from

contacting this woman. Clearly, DIMA could have made contact with this woman and asked for her information without releasing any information in return.

- On 26 September 2002, three members of the East Timorese community, including Mr E and Mr M, lodged a signed statement with DIMA requesting the release of Mr G. Their statement included further information about Mr G's personal and immigration history. They provided their mobile phone numbers and offered further assistance. This statement was noted by the managerial officers involved but none of these men were contacted by a DIMA officer. When asked why these leads were not pursued, Officer F explained that privacy considerations prevented officers from contacting these people. Some officers also indicated that they disregarded all of the information in this statement because it contained the incorrect assertion (in their assessment) that Mr G had held permanent residency since 1975. Had contact been made with these men, DIMA would have had the information that triggered the reassessment of the absorbed person visa on 8 October 2002 some 13 days earlier. In light of Mr G's poor mental health and the need to acquire as much information as possible about his history in Australia for the absorbed person visa, it was wrong not to make contact with these people.
- Mr M advised my staff that he made several phone calls to DIMA in an attempt to speak to the officers who were responsible for resolving Mr G's detention. Mr M explained that he wished to provide DIMA with relevant information but his calls were not taken because of privacy considerations. It was not until 8 October 2002 that, after several attempts, Mr M was able to speak to Officer F. This conversation provided Officer F with new information that was then used to reassess Mr G against the absorbed person visa criteria.

2.43 Had DIMA utilised the opportunities discussed above, it is likely that the information that caused DIMA to revisit the absorbed person visa criteria on 8 October 2002 would have been available at a much earlier time. Whilst it is noted that DIMA has taken steps to encourage proactive inquiry by its officers, including policy guidance in the form of MSI 409 and MSI 411, the importance of recognising and pursuing all available sources of information must be emphasised to all compliance and removal officers.

Recommendation 3

DIMA should ensure that all officers:

- are trained to pursue relevant information from all available sources
- are accurately informed of the terms of the *Privacy Act 1988*
- document and appropriately disseminate all relevant information about detainees which comes to their attention, regardless of their role within DIMA and the source of that information.

Other detention related matters

2.44 This investigation has revealed other areas in which DIMA's practices and policies have been found wanting. Each area is detailed below.

Mental health issues

2.45 The care of mentally ill detainees is the source of many challenges for DIMA. It is acknowledged that DIMA owes a duty of care towards those persons in detention who are vulnerable and are not able to take control of their own health and welfare (eg, *S v Secretary, Department of Immigration & Multicultural Affairs* [2005] FCA 549). Many of the officers who were interviewed agreed that detention was not a suitable environment for someone in Mr G's condition, although they considered that there were few, if any, alternatives at that time.

2.46 It is pleasing to see that anecdotal evidence suggests that on release, DIMA instructed ACM officers to provide appropriate medication to Mr G in order to ensure that his medication would continue until he was able to see a doctor. In recognition of his vulnerability, DIMA also made arrangements for Mr M to be picked up and brought to the PEIDC, and then for Mr G and Mr M to be driven back to Mr M's house. Apparently, these types of release arrangements were not normally put in place but the DIMA officers involved in this matter were concerned for Mr G's well being. In circumstances where a detainee has received ongoing or significant medical treatment while in detention, it would be appropriate for DIMA to develop release arrangements that enable continuity of medical care. It is important that any such release arrangements also facilitate reconnection with support services such as Centrelink. It is noted that it was only because members of the East Timorese community took Mr G to Centrelink that his benefits were reinstated. I am aware that DIMA is making attempts to address the need for improved release arrangements.

2.47 While it is also evident from the file and interviews that Mr G's mental health was taken into account and was a pivotal consideration in deciding not to remove him to East Timor, there were other instances in which DIMA paid insufficient regard to the implications of Mr G's diagnosed schizophrenia. For instance, there is a suggestion in the DIMA emails of 4 September 2002 that Mr G was initially held in isolation for one week. However, the ACM records do not indicate when a period in isolation commenced and concluded, nor do they indicate the reasons for any such isolation. The relevant parties cannot recall whether or why Mr G may have been placed in isolation, but they assume it was a decision that was taken on medical advice. If Mr G was placed in the isolation area for a week, it is unacceptable that the reasons for that situation cannot now be ascertained.

2.48 Furthermore, despite manifest symptomology and a diagnosis of chronic schizophrenia, at no point was Mr G assessed for his ability to consent to processes and sign documentation. By way of example, on 9 October 2002 Mr G signed a document acknowledging the return of his property and indemnifying ACM in respect of claims relating to this property. It would also seem that little attention was paid to whether he understood, and indeed was capable of understanding, the documentation placed before him upon release.

2.49 Problems with the care and treatment of immigration detainees were discussed in the Reports on the Rau and Alvarez matters, and further discussion appears in Report No 4 of 2006. The information obtained in this investigation reinforces the recommendations made in those reports. It is pleasing to note that DIMA is currently reviewing the use of isolation units and, in the meantime, DIMA has suspended the use of such facilities.

Recommendation 4

As discussed in previous reports, DIMA should conduct comprehensive training for staff that addresses the following issues:

- the recognition of mental illness
- the implications of mental illness for DIMA compliance and detention activity
- legal issues arising from a person's lack of mental capacity
- steps that should be taken by compliance officers where they suspect that someone may lack the ability to understand the nature and effect of any documentation or processes for which their consent is required.

Interviews

2.50 Compliance officers interviewed Mr G on two occasions; the first interview occurred on 29 August 2002 and the second occurred on 6 September 2002. At those times, *MSI 321: Detention of Unlawful Non-Citizens* was a relevant policy instruction. The MSI advised that officers should take contemporaneous notes of the detainee's response to questions and that the detainee, and any interpreter used in the interview, should acknowledge in writing that the record of interview accurately recorded the detainee's responses. A pro-forma interviewee statement and interpreter statement were attached to that MSI.

2.51 Contrary to the provisions of MSI 321, Officer B was of the view that he most likely recorded the 29 August interview with Mr G on a sheet of paper. That paper is not on the file. Officer C's notebook reveals that a Portuguese speaking interpreter was engaged but the interview itself, which apparently ran from 10:05 am to 10:28 am is summarised in just a few lines that read:

Pedro Mundo G DOB: 15/8/1959 Passport at Portugal lives in Fremantle. Came to AUST (1979). Aust Gov brought him here to Darwin/Sydney.

There is no indication from the file that the compliance officers took any action in respect of the name Pedro Mundo G.

2.52 The second interview with Mr G took place on 6 September 2002. Having reviewed the tape of this interview, it is clear that the procedures outlined in *MSI 234: General Detention Procedures* were not followed. Most relevantly:

- It is evident throughout the interview that Mr G was delusional and incoherent; at times he rambled, he was often contradictory and his responses were obscure. There was little utility in interviewing Mr G at this stage and the manner in which the interview was conducted demonstrated an inability on the part of the DIMA officers to recognise and respond to acute mental illness.
- Neither the tape nor the file indicates whether Mr G was warned that a failure to answer questions truthfully might invite prosecution. There is no indication that Mr G consented to the taping of this interview, but more importantly, it would seem that Mr G's mental health condition might have deprived him of the capacity to do so. This is one of several instances in which Mr G poor mental health, and the related consequential possibility that he lacked mental capacity to consent, was not taken into account by DIMA.

- The transcript of the interview reveals many instances in which Officer G addressed his questions to the interpreter, rather than to Mr G himself. By way of example:

Officer G Okay. Could you ask him to spell his name for us?
Interpreter No, I don't know.
Officer G He doesn't know how to spell it?
Interpreter No. No, I don't.

This interview was directionless, confusing and frustrating for all parties concerned. Questions were not posed in an appropriate way and the officer failed to take control of the interview. It is apparent from this tape that the new training program being introduced by DIMA should include a section about the most effective means of using the services of interpreters.

Recommendation 5

DIMA should ensure that officers who conduct interviews in the course of their work:

- take detailed notes or make a consensual recording of the interview, taking care to note the date, time and duration of any interview
- have the record of interview endorsed as an accurate record by the interviewee and provide a copy to that person
- are cognisant of, and comply with, the requirements of the *Migration Act 1958* and the relevant Migrant Series Instructions
- are trained in investigative interviewing techniques
- are instructed in the role of interpreters and techniques for effectively working with interpreters
- are informed of, or have access to and consider, relevant information that is already in DIMA's possession before commencing an interview
- are mindful of the health and capacity of the interviewee before commencing an interview.

Removal inquiry

2.53 While noting that the officers involved in this matter directed their efforts towards bringing Mr G's detention to an end, it is of concern that on 10 September 2002 – two days before he was fingerprinted and therefore at a time when Mr G's identity was still in question – DIMA inquired with the East Timorese Consulate about the process for securing East Timorese travel documents. A senior DIMA officer has explained that this inquiry was undertaken in order to verify Mr G's detention and not for the purpose of removing him from Australia. It was nevertheless an inquiry that was open to the different interpretation that a removal process was being contemplated. It would have been inappropriate to contemplate or commence a removal process in circumstances in which a person's identity, country of origin and immigration status were in doubt. If officers were unsure whether the man in detention was Mr G, they could not have been sufficiently satisfied that his lawful country of residence was East Timor or that his status in Australia was unlawful. Section 198 only enables the removal of a person who *is* an unlawful non-citizen. Had Mr G been removed then, owing to the deeming provision in s 34, DIMA would have unlawfully removed an absorbed person visa holder from Australian shores.

Fingerprints

2.54 *MSI 125: Fingerprinting of Detainees* was issued in 1996 and was in place during Mr G's detention. MSI 125 relevantly explained 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. The MSI asserted that this power encompassed fingerprinting. Officer G fingerprinted Mr G on 12 September 2002. Those fingerprints were provided to BCI, which confirmed an identity match. This was an effective means of identification and illustrates a point made in earlier Ombudsman reports that DIMA should use all available identification mechanisms, including fingerprints. This investigation has nevertheless identified two areas of concern in DIMA's fingerprinting practice.. Before discussing those issues it should be noted that the source of DIMA's power to obtain fingerprints has been extensively altered by subsequent statutory amendments⁷ and the replacement of MSI 125 on 10 March 2005 with MSI 405.

2.55 The first area of concern has to do with the need for a person to consent to being fingerprinted. At the relevant time, MSI 125 explained that a person should consent to this procedure, but in the absence of such consent, the MSI informed officers that they may use reasonable force. In late 2001, DIMA was provided with legal advice that fingerprints could only be obtained with the informed consent of the person concerned. It was not until July 2003 that DIMA took steps to amend MSI 125 in a manner that was consistent with this legal advice. Rather than update the text in the body of that document, a hyperlink to a pop-up screen was added to two paragraphs within the MSI. The information contained within the pop-up screen said 'following receipt of legal advice subsequent to the issuing of this MSI, note that force may not be used to obtain fingerprints'. This information, which directly contradicts the text of the MSI, is not printed out when the text of the MSI is printed. In printed form, the hyperlink appears only as underlining, which may be read as emphasis upon those sentences in the MSI, rather than alerting officers to the presence of an important and contradictory instruction. Clearly, the addition of a pop-up screen was an ineffective mechanism for communicating a fundamental change in legal position and policy.

2.56 The second area of concern has to do with whether Mr G was able to give informed consent to his fingerprints being taken. It would seem from the available material that his poor mental health may have rendered him incapable of consenting to this procedure. Just two days before Mr G was fingerprinted, he had been assessed as suffering from delusions as to place and person, and it was only one day after the fingerprinting that he was admitted to a psychiatric hospital. This investigation has not revealed any indication that this issue was taken into account when fingerprinting Mr G. Furthermore, the officer who carried out the fingerprinting was not cognisant of the legislative provision or policy document that governed this procedure and he did not turn his mind to whether fingerprinting was 'reasonably necessary'.

2.57 In light of the legislative changes that have occurred since Ms G was fingerprinted, there is little practical utility in making a recommendation to address these deficiencies in DIMA practice in 2002. It should nevertheless be noted that insufficient training, poor policy guidance and the practice of moving people between sections of DIMA with little or no transitional instruction, appear to have been the primary cause of these deficiencies.

⁷ *Migration Legislation Amendment (Identification and Authentication) Act 2004.*

Relationship with ACM

2.58 In 2002 ACM, a contractor and signatory to the 1998 detention contract, was the detention services provider. This investigation again revealed tension between ACM and DIMA at the contractual level, which is best illustrated by the response of managerial staff to the email of 4 September 2002 from Mr B, ACM Detention Manager. That email contained Mr B's personal knowledge about Mr G, his concern that the detention may not be lawful because some people believed that Mr G was a permanent resident, and advice that he had been identified on 3 September 2002. Some of the officers who read this email expressed the view that Mr B was interfering with DIMA's activities, rather than helping DIMA. This view is disappointing and does not take into account two matters: Immigration Detention Standard 1.1 in the detention contract, which states that ACM 'must satisfy itself that the detention of any person is authorised by the Migration Act'; and the 'Principles Underlying Care and Security' which provide that ACM should refer any issue which arises in relation to the migration status of a detainee to DIMA. In this instance, Mr B had personal knowledge of Mr G which caused him concern about the lawfulness of Mr G's detention. His email was both reasonable from a common sense perspective and obligatory under the terms of the contract.

2.59 It is understood that DIMA has implemented a new computer system for detention service providers. If this new system enables informational voids to be flagged, facilitates improved record keeping and information sharing by the service provider, and promotes proactive monitoring by compliance staff, it should bring greater efficiency to DIMA's work. DIMA must also establish a process for information sharing which enables communication between DIMA and the detention service provider to be accurately and formally recorded on DIMA's systems and files.

Recommendation 6

DIMA should instruct its staff in the potential value of information held by the detention services contractor and medical subcontractors. Information deficiencies about a person in detention should be flagged for the attention of the detention services provider.

Compliance notebooks

2.60 The use and management of compliance notebooks in DIMA's Perth office has most recently been the subject of discussion and recommendation in an Ombudsman report; *Report into the Investigation of a Complaint by Mr Z about his Immigration Detention: Report 2 of 2005* (Report 2 of 2005)⁸. The conclusions reached in the present investigation support the discussion and recommendations in the earlier report.

2.61 The National Compliance Operational Guidelines (NCOGs) direct officers in the use of notebooks. That policy emphasises the use of compliance notebooks during field operations. Field operations are defined as 'any organised compliance activity occurring outside the office, including inter-agency operations'. It would seem that the NCOGs envisage the use of notebooks during organised searches and targeted operations. The Perth office merges compliance and removal in that the officer who detains a person retains management of that person's detention. This blurring of roles offers an opportunity to ensure information is centrally and

⁸ See [www.ombudsman.gov.au/commonwealth/publish.nsf/attachmentsbytitle/reports_2005_02dimia.pdf/\\$file/abridged_immi_detention_may05.pdf](http://www.ombudsman.gov.au/commonwealth/publish.nsf/attachmentsbytitle/reports_2005_02dimia.pdf/$file/abridged_immi_detention_may05.pdf).

cohesively managed, yet the focus of the NCOGs on field operations may implicitly discourage officers from utilising notebooks for post detention activity.

2.62 This investigation has confirmed that the use of notebooks is ad hoc and arbitrary; they record both office based and field based activities but their use is intermittent and often fails to record known events. Only Officer C's notebook has entries concerning Mr G – one record of the interview on 29 August 2002 and another record of contact from Officer D on 3 September 2002. Officer C's record of the interview on 29 August 2002 is scant. Officer G has not noted any interactions with Mr G even though he conducted an interview on 6 September 2002 and took fingerprints from him at the PEIDC six days later. At interview, one officer explained that he was under the impression that the manner and frequency with which compliance staff utilised their notebooks was a matter of personal choice and the 'significance of the situation'. The notebooks and interviews also revealed that some officers may not use their notebook for months on end and some choose to record information on loose sheets of paper that may not, as in this instance, be placed on the relevant file.

2.63 DIMA should again take note of the recommendations made in Report 2 of 2005 concerning the use of notebooks. In summary, in the interests of comprehensive record keeping, notebooks should be consistently utilised by compliance officers to diligently record all contacts, information and activity, whether pre or post detention. Notebooks should also be regularly audited for quality control and to ensure that officers are discouraged from recording their activities on an ad hoc or discretionary basis.

Computer records

2.64 As part of this investigation, DIMA provided a complete printout of all relevant information from its ICSE system. The ICSE screens were printed and compiled on 12 October 2005 and reflect the information held in ICSE as at that date. The first document in the ICSE compilation is a computer screen headed 'client detail'. On the top right side of that document Mr G's immigration status is recorded as 'unlawful'. If officers look further into ICSE under 'client of interest note', information is available which says 'the client is LAWFUL from 9/10/02; holds an absorbed person Visa. It is not possible at this stage to make ICSE/TRIPS databases show his new, LAWFUL status for systems reasons.'

2.65 On 5 December 2005, my staff emailed DIMA and asked that the record be amended to reflect Mr G's lawful status. On 8 March 2006, DIMA provided a written explanation of the reasons for this inaccuracy as well as information about the steps taken to correct ICSE. Relevantly, that briefing explained that ordinarily a recording of lawful status on the system came about after a visa had been granted, whereas an absorbed person visa is not granted, it is deemed. DIMA has since amended the system so that it is able to recognise Mr G's lawful status. DIMA has also advised that a further systems amendment has been proposed as part of the departmental change process in response to the reports concerning Cornelia Rau and Vivian Alvarez.

2.66 Investigations presently underway into the other referred immigration detention matters have revealed instances in which people were lawfully in Australia, but the information contained on the initial ICSE screen indicated that they were unlawful. In many instances those people were detained on the basis of the information on the initial ICSE screen, despite ICSE concurrently holding information on other screens which indicated that they were actually visa holders. The inaccurate recording of immigration status puts people at risk of compliance activity and unlawful

detention. Indeed, up until the point at which ICSE was amended to record Mr G's immigration status as lawful he was at risk of a further period of detention. The potential inaccuracies of ICSE have been acknowledged by DIMA. For instance, in the recently issued MSI 411 officers are warned that 'departmental systems may be inaccurate or not up to date'. It is imperative that the inaccuracies within ICSE be remedied as a matter of priority and, until the system can be relied upon, officers must interrogate all aspects of the system and compare information from other sources.

Recommendation 7

DIMA should take steps to ensure that the ICSE system enables the entry of accurate immigration status information. The ICSE system should be capable of clearly indicating the correct visa type and duration of any such visa. Until such time as the immigration status information in ICSE can be relied upon, DIMA should issue an instruction in which officers are directed to examine and consider all relevant fields in ICSE and not simply rely upon the immigration status information contained in the client details screen.

East Timorese migration to Australia

2.67 In the course of this investigation, my office has attempted to ascertain the basis on which Mr G was allowed into Australia in 1975 and if he was ever granted a further permit or visa, whether by application or amnesty. In attempting to answer these questions, it has become clear that there is a concerning dearth of information regarding the immigration of East Timorese refugees to Australia in 1975. It is also clear that, despite seeking input from DIMA's national office, even those officers who were involved in determining whether Mr G was an absorbed person were not aware that he arrived in Australia as a refugee.

2.68 Information gleaned from available DIMA records and research indicates that approximately 2,500 East Timorese refugees arrived in Australia around the end of 1975. Information provided by members of the Australian East Timorese community further indicates that on arrival at Darwin, the East Timorese refugees were offered a choice between Australia and Portugal. Those people who chose to stay were provided with accommodation at Commonwealth migrant hostels in Sydney, Melbourne and Perth. From information provided to my staff, it is clear that many East Timorese believe that the refugees who chose to remain in Australia were granted permanent residence shortly after their arrival; it was explained by these former evacuees as an amnesty for East Timorese refugees. The use of the phrase 'amnesty' may stem from the January 1976 announcement by the Fraser government that there would be an 'amnesty' for people who were over-stayers and prohibited immigrants as at 31 December 1975⁹. If, as indicated by some documentation, the East Timorese TEPs were extended until 30 June 1976, the East Timorese evacuees would not have been eligible for this amnesty. Further information was gleaned from Senate Hansard from 9 December 1976 in which it was noted that as at 3 December 1976, East Timorese refugees had made 1,703 applications for residency status, 1,092 of those had been granted and 611 were pending consideration.

2.69 It is apparent from the communication between Mr M and Officer H, that the detention of Mr G has caused alarm amongst some members of the Perth East Timorese community. Some members genuinely believe that Mr G, and themselves,

⁹ This amnesty is discussed in detail by the High Court in *Salemi v Mackellar* (No. 2) (1977) 137 CLR 396.

were granted permanent residency shortly after their arrival in Australia. While it is possible that many former refugees may have taken up residency as part of an amnesty for overstayers, or they may not have understood that at some point they had completed an application for permanent residency, the absence of records which definitively explain the process by which permanent residency became available to the 1975 East Timorese refugees leaves open the possibility that some members of the East Timorese community may unknowingly be in a similar situation to Mr G. Some of the people interviewed by my staff expressed their anxiety at the uncertainty surrounding the 1975 process and were concerned that some former refugees may be detained or removed.

2.70 This ambiguous situation is not acceptable and is understandably concerning for those who may be affected. It is imperative that DIMA conduct a detailed assessment of all available records in order to document definitively the immigration events stemming from, and following, the 1975 refugee evacuation from East Timor.

Recommendation 8

DIMA should develop a policy for informing its staff and the East Timorese community about the circumstances surrounding the arrival and current status of East Timorese refugees who arrived in Australia in 1975.

PART 3—OTHER ORGANISATIONS INVOLVED

Western Australia Police

3.1 Mr G has a history of contact with WAPOL. His criminal record indicates that he first came to WAPOL's attention in 1986 when he was convicted of stealing.

3.2 Mr G was fingerprinted by WAPOL on at least one occasion and his photo was taken in 1989. On the occasion of his detention, WAPOL decided not to charge Mr G and accordingly, no fingerprints were taken. It is, however, unclear as to why WAPOL did not find Mr G's Commonwealth Bank book on his person when they interviewed him on 28 August 2002.

3.3 The information that is available to my investigation team does not indicate whether Mr G's mental health issues were evident when WAPOL initially detained him on 28 August 2002. However, in light of the ACM nurse's observations on 29 August 2002, it would seem likely that some mental disturbance would have been apparent to the police. The actions of WAPOL have not been investigated and no definitive statement can be made as to their awareness of Mr G's mental health or whether they complied with their own policy regarding mentally ill persons in their care.

3.4 DIMA officers informed my staff that they have a professional working relationship with WAPOL. Throughout 2002, DIMA trained members of WAPOL concerning their role as officers under the Migration Act. Information provided to my staff also indicates that police referrals were reasonably common, although there were no specific policy or guidelines concerning this relationship. Importantly, there were no guidelines concerning when, and by what procedure, DIMA should accept a referral from the police.

PART 4—REMEDIAL ACTION

4.1 Mr G was detained under s 189 after only the most perfunctory of assessments. At best, the reasonableness of the suspicion that he was unlawful at the time of his detention is questionable. Upon learning that Mr G arrived in Australia in 1975, DIMA neglected to meet its legal obligations and extant policy by failing to consider promptly the absorbed person visa. This matter was not taken into account in deciding to continue Mr G's detention even though he was prima facie an absorbed person unless an assessment to the contrary was made. When he was assessed against the criteria, the process was occasioned by misunderstanding, inexperience and poor policy guidance. DIMA missed numerous opportunities to acquire information about Mr G and thus failed to secure information that could have led to a favourable absorbed person visa assessment at a much earlier point in time. Finally, this matter has revealed deficiencies in DIMA's records of the arrival of East Timorese evacuees in 1975; the paucity of those records seriously disadvantaged Mr G.

4.2 In light of these deficiencies there is, in my opinion, an obligation on DIMA to take appropriate remedial action. As Mr G has no known advocate and is not believed to be capable 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 9

DIMA should take all necessary steps to initiate remedial action to redress the detention of Mr G. 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, and under the Reconnecting People Assistance Package.

PART 5—CONCLUSIONS AND RECOMMENDATIONS

5.1 On 28 August 2006, Mr Andrew Metcalfe, Secretary, Department of Immigration and Multicultural Affairs, wrote to me in response to this report. The relevant portions of the covering letter from the Secretary, and the attached response to each individual recommendation, are reproduced below:

Dear Prof. McMillan,

Thank you for the opportunity to comment on your draft Report into Referred Immigration Cases: Mr. G, who was detained by the department for 42 days in 2002. After considering your report, I agree with the recommendations you have made.

This case is serious and concerning and I have written to Mr G, through his representative, to apologise for my department's handling of his case.

As you know, the department commenced a major reform and improvement agenda last year in response to concerns raised in the Palmer and Comrie reports. The government has committed around \$780 million in new and redirected funding over the period 2005–06 to 2009–10 to dozens of projects to effect these reforms. Your report into the detention of Mr G highlights a number of critical issues being addressed by the reform process.

Your report reinforces my commitment to changing the culture of the department. I will take the opportunity now to again say unambiguously that I expect departmental officers to treat clients fairly, reasonably, and with respect. While I note that you have not recommended any action in relation to individual officers pertaining to events in 2002, after carefully considering your report, I have taken appropriate action in relation to the officers' conduct in this case. Looking to the future, the new DIMA Plan 2006–2007 includes respect and service excellence as key values. Staff training on values, attitudes, beliefs and behaviours, and ethical decision making is now comprehensively covered in our new training college. Projects under the Client Services Improvement Programme, including the Client Services Charter and Strategy, Value Creation Workshops, Community and Stakeholder Relationships Strategy and the Client Services Performance Management Committee, have and will continue to influence the culture within the department.

Your report has significantly highlighted the need for reliable information systems to properly support good decision-making. Central to the new DIMA Plan is the development of a more client-focused approach to information systems and records management and the ongoing improvement of service to clients. The department is in the process of implementing its major Systems for People initiative to integrate into a single system view, the full client records and all available information needed for DIMA officers to make reliable and accurate decisions and improve client focus and service. This initiative will greatly improve business processes, record keeping, quality control, support for decisions, clarity of operating instructions and operational training. Systems for People has been allocated \$495 million in new and redirected funding over the next four years.

My response to this report indicates my strong commitment to the process of change. DIMA has set in motion a range of policy and programme delivery reforms in response to the Rau and Alvarez inquiries, and to issues you have identified in the case of Mr T. Your report notes some of those reforms. Despite the fact that Mr G's detention occurred in 2002, prior to Mr T's detention, your report provides a further reminder of the need to build on the changes already implemented. This department has laid solid

foundations for change. More importantly, I and my colleagues are committed to ensuring that the changes it implements achieve their intended results in the long term.

Recommendation 1

DIMA should issue an instruction to provide guidance to police officers and DIMA officers on the exercise by police of the power conferred by s 189 of the Migration Act. The instruction should state that a DIMA officer must be contacted before a person is detained under s 189, unless there are exceptional circumstances. Either before a person is detained by a police officer under s 189, or as soon as practicable thereafter, a DIMA officer should speak to the person and document the conversation. The instruction should provide guidance on what might constitute an exceptional circumstance to warrant a departure from this practice.

DIMA's response: Agreed in principle

Section 5(1) of the *Migration Act 1958* defines officer, for the purposes of the Act, to include 'a member of the Australian Federal Police or of the police force of a State or an internal Territory'. This recognises the important role that the large number of state and federal police dispersed throughout Australia play in assisting with border security and compliance under the Act. The obligation outlined under s 189 – to detain a person if an officer knows or reasonably suspects that a person is an unlawful non-citizen – therefore applies equally to departmental and police officers.

The department is strongly focussed on providing police officers all possible support when exercising powers under s 189 and is working closely with police to achieve this, including engaging with police at senior level, through the Australasian Police Ministers' Council Senior Officers' Group, regarding police involvement in compliance operational activities. This work is designed to assure both the department and police that detention powers are appropriately used and to support police through nationally consistent education and through the 24/7 Immigration Status Service (ISS). The ISS, which is now operational nationally, provides police with real-time advice on the immigration status of persons considered to be of interest to DIMA. ISS procedures are being progressively reviewed in the light of operational experience and DIMA's continued liaison with police. In this context the department is focussing on the guidance it will provide in order to encourage police to consult with DIMA before a decision to detain under s189 is made, and the circumstances in which prior contact may not be practicable.

In providing the response, I note that police officers have been 'officers' under the Act since it commenced operation in 1958. This recognises the integral role that the large number of state and federal police dispersed throughout Australia play in border security and immigration compliance. Unlike DIMA staff, federal and state police officers report to the relevant State or Federal Police Commissioner. While DIMA can issue instructions to DIMA staff and implement quality assurance procedures to ensure compliance, it is not a role that DIMA has in relation to state and federal police officers. Accordingly, it would be a matter for Government to consider whether DIMA's role in relation to federal and state police officers could be altered in the way envisaged by this recommendation.

Recommendation 2

In light of the serious problems exposed by this investigation concerning the administration of s 34, DIMA should ensure that:

- compliance officers are properly trained about the absorbed person visa under s 34 of the *Migration Act 1958* and that they have access to a specialist advice service concerning absorbed person visas
- compliance officers are trained about the implications of s 34 for detention under s189 of the Act
- Migration Series Instruction 116 is reviewed and revised in a manner that affords practical assistance and guidance to compliance officers, including appropriate checklists and pro-forma documentation
- all absorbed person visa assessments are comprehensively recorded and evidenced.

DIMA's response: Agreed—implementation underway

Instruction and advice about absorbed person visas

The College of Immigration, which provides training for immigration compliance officers, commenced its pilot course on 3 July 2006. It will further the knowledge and skills of compliance officers to enable them to better understand and exercise the powers available under the *Migration Act 1958*. The training will also improve consistency in our practices and procedures, and in the way decisions are undertaken.

The course provides a framework for understanding the visa system under the *Migration Act 1958*, which includes the absorbed person visa. Guidance is also provided on assistance available to officers including the Legal Opinions Helpdesk, which provides specialist advice about absorbed person visas. In addition to this, the department established an Enhanced Compliance Helpdesk in December 2005 as a national, centralised contact point developed specifically to provide compliance officers with consistent and timely advice on issues they face day-to-day, including queries about specific visas.

Review of MSI 116: Absorbed person visas

The department is reviewing Migration Series Instructions (MSIs) consistent with the Rau Inquiry recommendation 7.2, and the policy guidance contained in MSI 116 is also being reviewed and revised to afford practical assistance and guidance about absorbed person visas.

As advised in the department's response to Mr T, the manner in which departmental instructions are accessed by DIMA officers is under review. It is proposed that policy and procedural guidance will be integrated into *Systems for People*. This will provide compliance officers with greater practical assistance through on-line access to departmental instructions, checklists, policies and legislation that are most relevant to the case.

Recording and evidencing absorbed person visas

Systems for People will also provide a single client view that includes visa status and highlighted circumstances, such as absorbed person status. This new system will

provide for the recording of reasons for decisions and the evidence or information relied upon to reach that decision.

The department has, through its partnership with the National Archives of Australia (NAA), developed a records management improvement programme. In line with the NAA's recommendations, the department has upgraded its records management systems, a process that was completed in early July 2006. These initiatives will be further supported through records management that recognises the importance of:

- recording the extent of an officer's individual responsibility for decisions taken and their role in that decision
- evidencing transactions
- explaining the decision or action that could be questioned in many years from now.

Awareness campaigns, training and quality assurance programs will assist in achieving good records management practices.

Recommendation 3

DIMA should ensure that all officers:

- are trained to pursue relevant information from all available sources
- are accurately informed of the terms of the *Privacy Act 1988*
- document and appropriately disseminate all relevant information about detainees which comes to their attention, regardless of their role within DIMA and the source of that information.

DIMA's response: Agreed—implementation underway

Pursuit of information from all available sources

The department has already taken steps forward to address this issue with the introduction of MSI 409: Establishing identity – in the field and in detention which came into effect on 20 December 2005. That instruction, together with MSI 411: Establishing immigration status – in the field and in detention, advises that officers should take all reasonable steps to obtain information relevant to identifying clients and their immigration status. MSI 409 includes a list of potential sources of further information.

The advice provided in both instructions is supported by comprehensive training units on Information Collection, Information Sources and Effective Searching of DIMA Systems provided in the department's recently commenced College of Immigration.

Detention Review Managers (DRM), located at each State and Territory Office, review the circumstances where it has been decided by the department that a person should be placed in detention. The DRMs then undertake ongoing reviews of all information gathered. This ensures that the reasonable suspicion which led to a person being detained under s 189 was present at the time of their detention, and that thereafter the person is held in detention only for as long as this reasonable suspicion continues to exist or their migration status is resolved.

In December 2005, the department issued instructions to compliance staff to provide additional guidance on the interviewing of unlawful non-citizens following their location and subsequent detention. It contains instructions that all information

obtained during the interview that provided clues to resolving the person's identity and/or migration status be followed up.

To ensure that all cases involving identity issues are referred to the National Identity Verification and Advice team (NIVA) in accordance with departmental instructions, training has been provided to over 300 operational staff around Australia. In recent months, follow-up training was provided to reinforce the key messages, and to emphasise the importance of implementing the escalation and referral mechanisms managed by NIVA.

In recognition of the need to quickly and accurately identify individuals, all specialist identity management resources, including NIVA, were co-located into the Identity Branch on 1 July 2006.

Officers accurately informed about terms of Privacy Act

The department agrees that the *Privacy Act 1988* does not prevent it from following-up on leads and pursuing available sources of information to assist in determining a person's immigration status.

Our current induction training addresses staff obligations under the *Privacy Act 1988*. More detailed information regarding the terms of the *Privacy Act 1988* will be provided to all officers through the national Privacy Training Strategy, due for commencement in October 2006. Privacy training is also part of the curriculum for compliance officers attending the College of Immigration.

In addition, the department has recently entered into a Memorandum of Understanding (MoU) with the Office of the Privacy Commissioner. As part of the work being undertaken by the Office of the Privacy Commissioner under the MoU they will be commenting on the department's training material. These comments will help the department to ensure the accuracy of the material in relation to privacy issues and assist the department in ensuring the training material meets both our obligations and operational requirements.

Document and disseminate all relevant information about detainees

As discussed above, the department has introduced procedures to ensure that information about detainees is followed-up on and escalated where appropriate.

The department is also in the process of implementing its major *Systems for People* initiative to integrate a single system view of all clients' records. This will include all available information needed for DIMA officers to make reliable and accurate decisions. This consolidated view of a person's records is expected to be in place in April 2007.

Recommendation 4

As discussed in previous reports, DIMA should conduct comprehensive training for staff that addresses the following issues:

- the recognition of mental illness
- the implications of mental illness for DIMA compliance and detention activity
- legal issues arising from a person's lack of mental capacity
- steps that should be taken by compliance officers where they suspect that someone may lack the ability to understand the nature and effect of any documentation or processes for which their consent is required.

DIMA's response: Agreed—implementation underway

It is agreed that additional training and an increased awareness about mental health issues will assist with recognition of the implications of interviewing or detaining a person with a mental illness. Accordingly, DIMA is focused on providing a significantly increased level of support to compliance and detention staff through the College of Immigration.

In conjunction with the development of the curriculum, the National Training Branch of DIMA has established a Panel of Learning and Development Service Providers, including those with experience and capability in developing training in the recognition of mental illness. Proposals from appropriate training providers on the DIMA Learning and Development Service Provider Panel will be requested to develop and deliver this training, which will include scenarios that will assess officers' ability to recognise mental illness and respond quickly and appropriately.

Practice Management Groups have been established to implement nationally consistent best practice and quality assurance measures in compliance processes both prior to and after detention. These groups will address procedures that should be taken by compliance officers where a person's ability to understand or provide informed consent may be impeded.

Recommendation 5

DIMA should ensure that officers who conduct interviews in the course of their work:

- take detailed notes or make a consensual recording of the interview, taking care to note the date, time and duration of any interview
- have the record of interview endorsed as an accurate record by the interviewee and provide a copy to that person
- are cognisant of, and comply with, the requirements of the *Migration Act 1958* and the relevant Migrant Series Instructions
- are trained in investigative interviewing techniques
- are instructed in the role of interpreters and techniques for effectively working with interpreters
- are informed of, or have access to and consider, relevant information that is already in DIMA's possession before commencing an interview
- are mindful of the health and capacity of the interviewee before commencing an interview.

DIMA's response: Agreed—implementation underway

Existing administrative instructions on detention procedures, and further instructions currently being drafted, require officers to make detailed records of interview, to have them endorsed as accurate by the interviewee, and provide the interviewee with a copy of the interview record. Officers are also required to take account of all relevant available information about the interviewee before conducting the interview. These processes are all reinforced in training modules in the College of Immigration Program.

A significant component of the training and instruction provided by DIMA's College of Immigration will also focus on skills in preparing and conducting interviews, and

awareness of the roles of interpreters and translators. This will be supplemented with client interview formats and procedures. Quality assurance mechanisms will be implemented to monitor compliance.

As indicated in the department's response to recommendation 7 in the report on Mr T, the College of Immigration will also include practical instruction on the difference between interpreters and translators, and of the importance of using accredited individuals.

As mentioned in the department's response to recommendation 4, training will increase officers' sensitivity to mental health issues in their general management of both pre and post-detention processes. Practice Management Groups will also be addressing the issue of procedures for dealing with clients with mental health issues. These steps will ensure DIMA's processes are both open and accountable.

Recommendation 6

DIMA should instruct its staff in the potential value of information held by the detention services contractor and medical subcontractors. Information deficiencies about a person in detention should be flagged for the attention of the detention services provider.

DIMA's response: Agreed—implementation underway

The department recognises that both recommendations 3 and 6 emphasise the importance of officers acting upon information relevant to a person's circumstances, no matter the source. The continuing role of Detention Review Managers, along with the Case Management Framework, provides the impetus for gathering and analysing information at the earliest opportunity, with the objective of ensuring quicker resolution of immigration status. In February 2006, case managers were given access to the Immigration Services Information System (ISIS), which is the detention services contractor and medical subcontractor's core business system for recording client information.

The establishment of the Detention Health Branch within the Detention Services Division has also led to an improved operational liaison process between the health and psychological service provider and DIMA. This has resulted in better communication processes and provision of detainee care.

In April 2007, ISIS will be incrementally replaced by *Systems for People*. Existing ISIS data and records will be integrated into the new system and will be accessible to appropriate staff from DIMA, detention service providers and medical subcontractors through the *Systems for People* Case Management portal and Detention Services portal. These will allow appropriate staff in DIMA, the detention service providers and medical subcontractors to access all relevant data relating to detainees (including paper records that have been digitised) and to share information. The Case Management portal will be operational in April 2007, and the Detention Services portal in mid-2007, before the beginning of the new detention services contract. As a result of the consolidated view of a client's records that will be available through these computer portals, officers will have immediate access to information recorded by the detention services provider, and any deficiencies will be more readily apparent to officers of both the department and detention service provider.

Recommendation 7

DIMA should take steps to ensure that the ICSE system enables the entry of accurate immigration status information. The ICSE system should be capable of clearly indicating the correct visa type and duration of any such visa. Until such time as the immigration status information in ICSE can be relied upon, DIMA should issue an instruction in which officers are directed to examine and consider all relevant fields in ICSE and not simply rely upon the immigration status information contained in the client details screen.

DIMA's response: Agreed—implementation underway

Under *Systems for People*, data quality will be improved so that the occurrence of multiple Personal Identifiers and opportunities for data entry error are minimised and capture of quality data is increased. This will include alerts that will draw an officer's attention to special circumstances such as absorbed person status.

In the interim, instructions regarding the checking of a person's immigration status are set out in MSI 411: *Establishing immigration status – in the field and in detention* which came into effect on 20 December 2005. The instruction directs officers to carry out checks of relevant departmental systems to confirm a person's claimed immigration status and to be aware that:

- departmental systems may be inaccurate or not up to date
- some people may require special consideration because they are members of a class of people affected by certain court decisions
- even where departmental systems appear to show that a non-citizen does not have a visa, an officer may have information about a particular case or other knowledge that would make it unreasonable for the officer to suspect that the person is an unlawful non-citizen
- if a person claims to be lawfully in Australia, but the departmental systems show otherwise, officers should conduct all reasonable systems checks and, where practicable, arrange for the person's client file to be checked.

The recently commenced College of Immigration includes training relating to advanced interrogation of DIMA systems.

Recommendation 8

DIMA should develop a policy for informing its staff and the East Timorese community about the circumstances surrounding the arrival and current status of East Timorese refugees who arrived in Australia in 1975.

DIMA's response: Agreed—implementation underway

The department agrees that it should inform the East Timorese community and DIMA staff about the circumstances surrounding the arrival of East Timorese evacuees in 1975 and is in the process of doing so.

There are a number of measures and processes that can contribute to achieving these outcomes. The department has made contact with leaders of the East

Timorese community to inform them of the circumstances surrounding the 1975 arrival. The ongoing communication channels established through this process enables members of the community who might consider themselves affected to make contact with the department to clarify their situation. In devising this strategy, the department has considered its record-keeping in relation to the 1975 East Timorese evacuation.

Recommendation 9

DIMA should take all necessary steps to initiate remedial action to redress the detention of Mr G. 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, and under the Reconnecting People Assistance Package.

DIMA's response: Agreed—implementation underway

On 21 December 2005, the department corrected Mr G's records in ICSE to reflect his lawful status.

The department has delivered a letter of apology and advised Mr G, through his representative, about possible remedies. We have initiated discussion with his representative about fair and reasonable remedies for Mr G.

ACRONYMS

ACM	Australasian Correctional Management
BCI	Bureau of Criminal Intelligence
DFAT	Department of Foreign Affairs and Trade
DIMA	Department of Immigration and Multicultural Affairs
ICSE	Integrated Client Services Environment
ISIS	Immigration Services Information System
ISS	Immigration Status Service
MSI	Migration Series Instruction
OIB	Offender Information Bureau
PEIDC	Perth Immigration Detention Centre
TEP	Temporary Entry Permit
TRIPS	Travel and Immigration Processing System
WAPOL	Western Australia Police