

# Department of Immigration and Citizenship

DETENTION ARRANGEMENTS—THE TRANSFER OF  
22 DETAINEES FROM VILLAWOOD IMMIGRATION  
DETENTION CENTRE TO THE METROPOLITAN  
REMAND AND RECEPTION CENTRE SILVERWATER

April 2012

Report by the acting Commonwealth and Immigration Ombudsman,  
Alison Larkins, under the *Ombudsman Act 1976*

REPORT NO. **02|2012**

## Reports by the Ombudsman

Under the *Ombudsman Act 1976* (Cth), the Commonwealth Ombudsman investigates the administrative actions of Australian Government agencies and officers. An investigation can be conducted as a result of a complaint or on the initiative (or own motion) of the Ombudsman.

The *Ombudsman Act 1976* confers six other roles on the Commonwealth Ombudsman—the role of Defence Force Ombudsman, to investigate action arising from the service of a member of the Australian Defence Force; the role of Immigration Ombudsman, to investigate action taken in relation to immigration (including immigration detention); the role of Postal Industry Ombudsman, to investigate complaints against private postal operators; the role of Taxation Ombudsman, to investigate action taken by the Australian Taxation Office; the role of Overseas Students Ombudsman, to investigate complaints from overseas students about private education providers in Australia; the role of Law Enforcement Ombudsman, to investigate conduct and practices of the Australian Federal Police (AFP) and its members. There are special procedures applying to complaints about AFP officers contained in the *Australian Federal Police Act 1979*. Complaints about the conduct of AFP officers prior to 2007 are dealt with under the *Complaints (Australian Federal Police) Act 1981* (Cth).

Most complaints to the Ombudsman are resolved without the need for a formal report. The Ombudsman can, however, culminate an investigation by preparing a report that contains the opinions and recommendations of the Ombudsman. A report can be prepared if the Ombudsman is of the opinion that the administrative action under investigation was unlawful, unreasonable, unjust, oppressive, improperly discriminatory, or otherwise wrong or unsupported by the facts; was not properly explained by an agency; or was based on a law that was unreasonable, unjust, oppressive or improperly discriminatory. A report can also be prepared to describe an investigation, including any conclusions drawn from it, even if the Ombudsman has made no adverse findings.

A report by the Ombudsman is forwarded to the agency concerned and the responsible minister. If the recommendations in the report are not accepted, the Ombudsman can choose to furnish the report to the Prime Minister or Parliament.

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## PART 1—BACKGROUND

1.1 In April 2011, there were several major disturbances at Villawood Immigration Detention Centre (IDC). On 20 and 21 April, a total of nine buildings were set on fire and destroyed. The loss of amenities included the classroom, gym, medical centre and kitchen. Other protest activity included detainees demonstrating on the roof and threatening acts of self-harm. The Australian Federal Police (AFP) were called to the IDC and attempted to take control of the situation.

1.2 On the evening of 21 April 2011, the First Assistant Secretary of Detention Operations in the Department of Immigration and Citizenship (DIAC), on the advice of the AFP, decided to transfer 22 detainees suspected of involvement in the disturbances to the Metropolitan Remand and Reception Centre (MRRC) at Silverwater. The transfer occurred in the early hours of 22 April 2011.

1.3 A representative of the NSW Council for Civil Liberties was the legal representative of the detainees transferred to the MRRC. In response to a complaint from the legal representative, the Ombudsman undertook an investigation to consider why the detainees were transferred and whether DIAC's procedures had been properly followed in this instance.

## PART 2—INVESTIGATION

2.1 We asked DIAC to provide details and all relevant documentation pertaining to the decision to transfer the detainees to the MRRC. This included records of the notice of transfer provided to the detainees and copies of all records for individual detainees kept by DIAC as required by policy set out in the DIAC Procedures Advice Manual 3 (PAM3).

2.2 An officer of the Ombudsman's office visited the MRRC at Silverwater on 29 April and spoke with some of the detainees who were transferred there from Villawood IDC.

2.3 Our investigation determined that there were three areas in which it appeared the relevant PAM3 procedures were not followed: the notification to the detainee of the transfer; record keeping; and visits to the person in detention.

### Notification in writing to the detainee of the reason for the transfer

2.4 PAM3 states:

#### 4 NOTICE OF TRANSFER TO A CORRECTIONAL FACILITY

Once placement in a correctional facility has been authorised, the person in immigration detention must be provided with a *Notice of transfer to a correctional facility*. The Notice provides reason for the placement and the date of the formal review of the placement. Copies must be sent to the person in immigration detention's legal representative and/or migration agent, - if engaged by the person in immigration detention.

2.5 We asked DIAC if such notice was provided to the detainees in this instance. DIAC responded that the detainees were not provided with written notice due to operational demands at the time of the transfer.

2.6 We accept that the operational demands at the time of the transfer did not permit such notice to be given at that time. However, in our opinion DIAC should have provided the notice, both to the detainee and their representative, as soon as practicable after the operational demands had eased.

2.7 DIAC advised us that the detainees were verbally notified of the reasons for the transfer, but were not able to say when the notice was given, who gave it, or whether such advice was given to the detainees individually or as a group. Villawood IDC was not under the control of Serco or the AFP at the time and was not considered a safe environment for interpreters to be present. Accordingly, any advice would not have been given in the detainees' own languages. No record of notice being given was recorded on individual client files. When Ombudsman staff spoke with the detainees at the MRRC on 29 April 2011, the detainees stated that they had not been informed about why they had been transferred.

2.8 DIAC advised us that its Immigration Advice and Assistance Scheme sent notification of the transfer to the migration agents of 21 detainees on 29 April 2011. Verbal notification was provided to the agent of the 22<sup>nd</sup> detainee on 13 May 2011.

2.9 As a result of DIAC's response, we broadened the scope of our investigation and asked DIAC for details of any further transfers of detainees to the MRRC since May 2011. DIAC advised that an additional 13 detainees had been transferred to the MRRC and that each had been issued with a written notice of transfer. Notification had also been provided to their legal representatives.

## **Record keeping**

2.10 Section 10 of DIAC's PAM3 requires that a comprehensive list of records must be kept by the nominated officer with responsibility for managing the welfare of the person in immigration detention who has been transferred to a correctional facility.

2.11 To determine if the procedures had been followed in this instance, we asked DIAC to provide copies of all the relevant records, as required by PAM3, for two randomly selected detainees.

2.12 DIAC's response demonstrated considerable gaps in the record keeping relating to the transfer of these two detainees.

2.13 DIAC advised us that at the time of the transfer from Villawood IDC, an envelope was passed from Serco to NSW Department of Corrective Services representatives. The envelope contained a security risk assessment, health discharge summary and background information for all the detainees. DIAC did not keep a copy of the information passed to the Corrective Services officers.

2.14 Other aspects of record keeping required by PAM3 include:

- records of the initial welfare check, visits and monitoring by a departmental nominated officer during the person in immigration detention's stay in a correctional facility
- records of all subsequent welfare checks, including the time and date when each check was conducted and whether it was conducted in person, over the phone or with correctional staff
- file notes of conversations (including by telephone) with the person in immigration detention or other parties involved in their welfare.

2.15 In respect of each of these requirements, DIAC advised us that it did not have a record.

## Visits to the person in immigration detention

2.16 PAM3 states:

5.3 Visits to the person in immigration detention

All persons in immigration detention accommodated in a correctional institution shall be visited by the nominated departmental officer within 24 hours of arrival at the correctional centre.

Regular visits by the nominated departmental officer are required. These visits must include contact, at a minimum of once a week, and a personal visit, at a minimum, of once every 28 days.

2.17 We asked DIAC for details of all visits by DIAC staff to the detainees following their transfer to the MRRC.

2.18 The first recorded visit to the detainees by DIAC staff was on 28 April 2011. Further visits were conducted with all detainees on 9 and 10 May 2011.

2.19 Two detainees who had requested removal from Australia were visited on 13 May and 3 June 2011 for the purpose of discussing their requests for removal from Australia and to progress the arrangements.

2.20 It is apparent that DIAC did not fully adhere to the requirements in PAM3 to visit the detainees transferred to MRRC. The first visit did not occur until six days after the detainees were transferred, and only one or two more visits in person occurred 11 or 12 days later. There is no evidence of the mandated weekly contact, either in person or by telephone, during the period the detainees were held at the MRRC.

2.21 A number of detainees were charged by the AFP in relation to the disturbances at Villawood IDC and remanded in custody. Those detainees who were not charged were released from the MRRC on or about 11 May 2011 and returned to immigration detention centres.

## PART 3—CONCLUSION

3.1 The procedures in PAM3 appear to provide the necessary safeguards to ensure that a detainee is only transferred to a correctional institution for a valid reason and that their health and welfare needs are managed. The record keeping provisions, if followed, provide for the proper documentation of all relevant stages of the detainee's detention in the correctional facility.

3.2 We acknowledge that at the time that DIAC decided to transfer the 22 detainees to the MRRC, Villawood IDC was in a state of considerable unrest. The physical safety of detainees, DIAC, Serco and International Health and Medical Services staff, as well as emergency services and AFP officers, was under threat. Fires were not yet under control and a significant number of detainees was still protesting.

3.3 We make no criticism of the actions of any officers undertaking their duties in this situation and accept that the decision to transfer the detainees from Villawood IDC to the MRRC was an operational one made in good faith by DIAC on the advice of the AFP.

3.4 However, once the decision was made, DIAC had an obligation to ensure that the procedures that apply to such a transfer were fully and properly implemented. We accept that it was imperative to transfer the detainees to the MRRC quickly to help

restore order to Villawood IDC. In such circumstances it is not unreasonable for the administrative procedures applying to such a transfer to be deferred to a time when an acceptable level of order is restored. But it is important that such procedures are followed as soon as practicable after the transfer. Minimum timeframes within which this should occur should be mandated in the relevant PAM.

## **PART 4—RECOMMENDATIONS**

4.1 In response to our draft report, DIAC advised the Ombudsman that it is reviewing its various transfer arrangements (including transfer to correctional facilities). Depending on the outcome of the review, DIAC expects to update relevant policy and procedure manuals during the first half of 2012. DIAC also stated that in future instances a 'Notice of transfer to a correctional facility' would be completed and provided to each client transferred to a correctional facility, and their agent.

4.2 We are pleased to note that DIAC is reviewing its procedures relating to the transfer of detainees to correctional facilities and that new procedures are likely to be implemented in 2012. In addition, the Ombudsman makes the following recommendations:

### **RECOMMENDATION 1**

Pending the completion of the review, relevant staff across the detention network are made aware of the current PAM3 requirements and informed about the obligations to be implemented in full on each occasion that a person is transferred from an IDC to a correctional facility.

#### **DIAC response**

The Department agrees that there is a need to ensure that Case Managers are aware of the requirements under this instruction and, since the incident at Villawood in April 2011, Case Managers have been made aware of these requirements verbally and in writing; this includes the addition of this content in the Case Management Handbook which is on Legend<sup>1</sup>. In addition, the Certificate IV training that all Case Managers undertake is being updated with this new content and will be provided in the next and all subsequent case management Certificate IV training.

### **RECOMMENDATION 2**

DIAC take steps to ensure that when a person is transferred to a correctional facility, relevant officers have the means to record, for example by way of a checklist, that all of the requirements of PAM3 have been fulfilled; that this is recorded on the detainee's file; and that managers at the appropriate level are able to review the actions taken to ensure compliance with PAM3.

#### **DIAC response**

The Department agrees that good record keeping is essential and can confirm that this is built into the Case Management role. All client interactions are recorded as a matter of course by Case Managers in the CCMDS<sup>2</sup> portal and supervisors are actively involved in reviewing these records on a regular basis.

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<sup>1</sup>Legend is an electronic database of migration and citizenship legislation and policy documents.

<sup>2</sup> Compliance, Case Management, Detention and Settlement.

## **Commonwealth Ombudsman—DIAC detention arrangements: The transfer of 22 detainees from Villawood IDC to the Metropolitan Remand and Reception Centre Silverwater**

Since April 2011, the Department has improved its performance and is now properly following existing procedure while the review of the PAM is underway. All proposals and decisions to transfer a client from immigration detention under section 189 of the *Migration Act 1958* into a restrictive place of detention, including a correctional facility such as Silverwater MRRC, must only occur after a rigorous assessment has been completed.

All decisions to place a client in a restrictive place of detention must be supported by comprehensive and defensible decision making. A key component of this is ensuring that departmental records clearly reflect and document the rationale supporting a client transfer prior to the transfer being affected.

All detention power and transfer of custody documents must be completed prior to any proposed transfer being affected. The Department has developed a draft check list and new guidelines for completing the transfer form.

### **RECOMMENDATION 3**

DIAC investigates why in this instance visits to the clients in the MRRC, and associated record keeping, did not meet PAM3 requirements, and that any new procedures post review are informed by DIAC's investigation of these shortcomings and by the deficiencies identified in this report.

#### **DIAC response**

The Department acknowledges there had been some process shortcomings in the transfer of detainees from Villawood IDC to Silverwater Correctional following the April 2011 disturbances.

As noted in the response to Recommendation 4 below, the Department is undertaking a review of existing policy settings for the transfer of people in immigration detention. The review includes examination of the shortcomings identified in relation to the April 2011 transfers.

In relation to in-person visits, the Department notes that, according to Section 5.3 of Chapter 8 of the Detention Services Manual, "These visits must include contact, at a minimum of once a week and personal visits at a minimum of once every 28 days".

Monthly visits to the clients were undertaken for every client from April 2011 except for June 2011, when Case Managers were not able to access all of the clients at MRRC due to a lockdown at the facility.

### **RECOMMENDATION 4**

PAM3 be amended to reflect minimum standards where operational demands do not allow all procedures relating to the transfer of a person from an IDC to a correctional facility to be implemented at the time of transfer. This should include mandated time frames for those procedures to be completed.

#### **DIAC response**

As a result of the disturbances at VIDC in April 2011 and the subsequent transfer of a number of detainees to the Silverwater MRRC on short notice, the Department initiated a review of existing policy settings for the transfer of people in immigration detention. This ongoing review includes policy surrounding transfer of immigration clients between detention facilities and correctional facilities.



**Commonwealth Ombudsman—DIAC detention arrangements: The transfer of 22 detainees from Villawood IDC to the Metropolitan Remand and Reception Centre Silverwater**

The review has identified risks associated with the transfer of clients in immigration detention from facility to facility, including correctional facilities, and has led to the development of mitigation strategies to address these identified risks.

As a result, the current PAM guidelines relating to the transfer of people in immigration detention are being amended to mitigate associated risks. The implementation of the updated PAM will further inform transfer procedures which are applied within immigration detention facilities.

It is anticipated that the draft updated PAM will be sent to relevant stakeholders for final comment in early April 2012. Following consideration of any final stakeholder comments, the updated version of the PAM will be then published on Legend.

## ABBREVIATIONS AND ACRONYMS

AFP	Australian Federal Police
CCMDS	Compliance, Case Management, Detention and Settlement
DIAC	Department of Immigration and Citizenship
IDC	Immigration Detention Centre
MRRC	Metropolitan Remand and Reception Centre
PAM	Procedures Advice Manual
PAM3	Procedures Advice Manual 3
VIDC	Villawood Immigration Detention Centre