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OMBUDSMAN

Department of Immigration and Citizenship

REPORT INTO REFERRED IMMIGRATION CASES: DETENTION PROCESS ISSUES

June 2007

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

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Reports by the Ombudsman

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PART 1—SCOPE OF INVESTIGATION

1.1 In 2005 and 2006, the Australian Government referred to the Commonwealth Ombudsman the cases of 247 people who had been detained by the Department of Immigration and Citizenship (DIAC)[1] and later released on the basis that they could not be detained any longer as an unlawful non-citizen. The Ombudsman's office agreed to investigate and report to DIAC about each individual's case under the Ombudsman's power to conduct an own motion investigation, as provided for in s 5 of the *Ombudsman Act 1976*.

1.2 For the purposes of analysis, the cases were divided into seven categories on the basis of preliminary information provided by DIAC.[2] This report deals with 70 cases categorised as detention process issues. These cases involved the detention of individuals between 2000 and 2006 when DIAC's decision to detain was often problematic—falling short of the relevant legislative requirements or resulting from a procedural deficiency.

1.3 An individual analysis of each of those 70 cases has been provided by the Ombudsman's office to DIAC, but these will not be published. Instead, the systemic issues concerning immigration administration that arose from the individual investigations relating to detention process issues are addressed in this consolidated public report.

Methodology

1.4 The investigation of each case focused on establishing the circumstances that led to the detention of each person and the process undertaken by DIAC to resolve their status or bring their detention to an end. This investigation also focused on identifying whether these cases provided any evidence of systemic issues impacting on DIAC's effective administration of the *Migration Act 1958* (the Migration Act). The methodology included consideration of:

- DIAC client files for individual cases
- the Integrated Client Services Environment (ICSE)[3] records for individual cases
- detention dossiers, where applicable, for individual cases investigated
- relevant sections of the Migration Act and Migration Regulations 1994
- relevant DIAC policy documents
- briefings provided by DIAC
- in one case investigated, the officers involved were interviewed.

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1 At the time of detention the department was first called the Department of Immigration and Multicultural and Indigenous Affairs, and then the Department of Immigration and Multicultural Affairs.

2 The cases were divided into the categories of mental health, children in detention, data problems, those affected by the Federal Court decision in *Srey*, validity of notification, detention process issues and other legal issues; further, see *Commonwealth Ombudsman Annual Report 2005–06* at p. 83–84.

3 ICSE is DIAC's primary database and provides a single reference point for all records of contact between clients and DIAC. The system supports onshore processing for citizenship, visas, assurance of support, sponsorship, nomination and compliance.

PART 2—OVERVIEW OF THE DETENTION PROCESS CASES

2.1 The majority of the cases in this category involved persons being taken into immigration detention under s 189 of the Migration Act. That section requires that an officer must detain a person if the officer knows or reasonably suspects that the person is an unlawful non-citizen. A decision to that effect was often made in these cases despite the person being either an Australian citizen, an Australian permanent resident or a lawful visa holder.

2.2 A critical error in the decision-making process in most of these cases was DIAC's failure to consider available information and take adequate steps to resolve a person's identity and/or immigration status prior to forming a suspicion under s 189. It is concerning that in many of these cases people were detained so that DIAC could establish their identity. This was often despite people having already provided information and evidence of their identity and lawful status.

2.3 The detention power in s 189 has been discussed at length in other reports[4] and DIAC has acknowledged the issues raised in those reports. The discussion and conclusions in this report take account of DIAC's reforms, yet point to areas that warrant further consideration.

2.4 The following is a general description of the 70 cases in this category.

- The detentions occurred between 2000 and 2006.
- Fifteen people detained were Australian citizens, 13 were permanent residents, 36 held either a bridging visa or temporary visa, two were unlawful non-citizens, and in four cases the information about a person's detention was incorrectly entered on another person's immigration record.
- Twenty-eight cases were brought to DIAC's attention as the result of a referral by a State or Territory police service.
- In 61 cases DIAC officers failed to identify a person correctly.
- Twenty-two people were detained partly as a consequence of DIAC not being able to locate a record of the person on its systems.
- Thirty-three people were detained without first being interviewed by a DIAC officer.
- Thirty people were not released from detention until DIAC had sighted their passport or other identity document, despite other information showing that the person was lawfully in the community.
- Twenty-three people were detained for one calendar day or part thereof; and a further 43 people were detained for periods ranging from two to 26 days.

[4] Commonwealth Ombudsman reports include *The inquiry into the circumstances of the Vivian Alvarez matter,* Report No. 03/2005*,* the reports into *Referred immigration cases*: *Mr T* and *Mr G*, (Report Nos. 04/2006 and 06/2006 respectively); the reports into *Referred immigration cases* on *Mental Health and Incapacity* and *Children in Detention* (Report Nos. 07/2006 and 08/2006). See also the *Report of inquiry into the circumstances of the immigration detention of Cornelia Rau*, Mick Palmer AO APM, July 2005.

Deficiencies identified

2.5 The general conclusion of this report is that in many of these cases DIAC officers did not have an adequate basis on which to form a reasonable suspicion that the person being detained was an unlawful non-citizen. There were recurring deficiencies in a majority of the cases that included:

- failure to consider or follow legislative and policy requirements
- failure to take reasonable action to identify a person prior to the person being detained
- failure to take reasonable steps to resolve conflicting information about a person's immigration status prior to the person being detained
- failure to conduct appropriate checks of DIAC systems and other available information, prior to making a decision to detain a person
- failure to interview or speak to a person prior to their detention
- reliance on information provided by police, which was not questioned by DIAC
- failure to weigh up all of the available evidence and justify the detention decision in appropriate records.

2.6 These deficiencies indicate that s 189 was not properly administered in many cases. The failures also contributed in many cases to a delay in a person being released from detention. A particular deficiency is that there was a tendency by officers to rely upon one small piece of information that may have indicated a person was an unlawful non-citizen, even where there was ample other evidence to show that the person was lawful. This was evident in cases where a compliance officer noted that the decision to detain a person was because the person had an accent, was not of Anglo-Saxon appearance or could not be located on DIAC's systems. Overall, the deficiencies in these cases point to a culture amongst compliance officers at the time of exercising the detention power either carelessly or prematurely.

2.7 It should, on the other hand, be acknowledged that DIAC officers faced a difficult challenge in administering the Migration Act and in particular the s 189 detention power. It has been accepted by DIAC that there was inadequate internal support for officers in the period under review. The shortcomings included limited training, poor systems to support the compliance activity and decision-making processes, and limited internal supervision, quality assurance and oversight. External factors also present a difficulty for compliance officers. There can be language and cultural barriers between officers and clients, and there are recurring instances of deception and fraudulent action by people attempting to remain in the country without a lawful basis.

2.8 Nevertheless, the decision to detain a person is significant and should be underpinned by diligence and careful attention to legislative and policy requirements and a consideration of all relevant and available information.

Remedies

2.9 In relation to the individual cases investigated, the Ombudsman's office has not expressed a view on whether there was a period of unlawful detention. Although in 64 cases the person being detained was either an Australian citizen, a permanent resident or a lawful visa holder, the decision to detain turns on whether an officer

holds a ‘reasonable suspicion’ that the person is an unlawful non-citizen. This would require a more extensive analysis (including consultation with the relevant parties) of the facts in each case. Ultimately, too, only a court of competent jurisdiction can decide whether there was a period of unlawful detention. Nevertheless, in most of the individual cases the Ombudsman’s office recommended to DIAC that it give further consideration to this issue, for the purpose of considering whether a remedy should be provided to the person to acknowledge or redress any suspected unlawful action.

PART 3—LEGAL AND POLICY FRAMEWORK

3.1 Section 189 involves both taking a person into immigration detention and keeping a person in immigration detention. Specifically, the section requires that, 'if an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person'. Section 196(1) of the Migration Act provides that a person can be released from detention by being removed from Australia, deported or granted a visa. The section goes on to provide in s 196(2) that, to avoid doubt, subsection (1) does not prevent the release from immigration detention of a citizen or lawful non-citizen.

3.2 At the time of these detentions, the relevant Migration Series Instructions (MSIs) that provided guidance to DIAC officers, were:

- MSI 321: *Detention of unlawful non-citizens*—basic guidance to compliance officers on the use of the s 189 detention power. Key instructions include:
    - Officers must ensure that knowledge or reasonable suspicion about a person's status as an unlawful non-citizen is based on objective evidence. This evidence would include information held in departmental records, credible information from third parties, the person's inability to provide satisfactory evidence of being a lawful non-citizen, and a lack of a credible explanation for this and/or the person attempting to evade officers.
    - Oral evidence from a person may be accepted as evidence in its own right and sufficient to reach a conclusion about his or her status.
- MSI 318: *Compliance and enforcement overview*—general overview of the various compliance functions.

3.3 Section 189 and related provisions have been analysed in some court decisions and earlier reports by the Ombudsman's office. There are key points noted in those decisions and reports that are relevant to many of the deficiencies found in the 70 cases discussed in this report.

- The terms of s 189, requiring that an officer *knows* or has a *reasonable suspicion* that a person *is* (not may be) an unlawful non-citizen, are an important safeguard against arbitrary detention.[5] The power to detain a person under s 189 should be exercised with great caution and by a rigorous process.
- A reasonable suspicion to detain a person cannot be founded purely on the subjective or personal opinion of an immigration officer. A decision under s 189 must be objectively justifiable and based upon all relevant material, including material that is discoverable by a process of search and inquiry that is reasonable in the circumstances.[6]
- An obligation is borne by an officer making a decision to detain a person under s 189 to be able to point to the information on which the 'knowledge' or 'reasonable suspicion' was based.
- The decision to detain a person under s 189 can be lawful even if the suspicion that a person is an unlawful non-citizen turns out to be incorrect; an incorrect

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5 *Report of inquiry into the circumstances of the immigration detention of Cornelia Rau*, Mick Palmer AO APM, July 2005, p. 22.

6 *Goldie v Commonwealth* (2002) 188 ALR 708

suspicion can nevertheless be one that was reasonably formed in the circumstances.[7]

- It is implicit in s 189 that there is a continuing obligation on DIAC officers to hold a reasonable suspicion that a person being detained is an unlawful non-citizen. Proper consideration should be given to any information that becomes known to DIAC officers that contradicts or dilutes a reasonable suspicion that was earlier formed.[8]
- There is a legal obligation to release a person from detention if there is no longer a basis for reasonably suspecting that person to be an unlawful non-citizen, even if doubts persist as to the person's identity or immigration status.[9]

3.4 These points have been acknowledged by DIAC and are now reflected in revised instructions for immigration officers that were introduced in December 2005. Specifically, MSI 409: *Establishing identity in the field and in detention* and MSI 411: *Establishing immigration status in the field and in detention*, now provide better guidance to DIAC officers on administering s 189. These MSIs outline that officers must resolve a person's identity and immigration status as a matter of priority and provide detailed advice on how this might be achieved. The MSIs instruct officers to make all reasonable efforts to identify a person of interest before they are detained. More comprehensive guidance is provided about forming a reasonable suspicion. Importantly, the MSIs also outline factors that would not amount to a reasonable suspicion under s 189.

3.5 It is unfortunate that that direction was not available to officers at the time these 70 cases occurred. However, for a full picture it should also be noted that the limited direction available at the time was often either not considered or not properly understood by officers or their managers.

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7 *Wai Yee Yeoh v Minister for Immigration and Multicultural Affairs* (1997) 1316 FCA (Emmett J, 31 October 1997).

8 See Commonwealth Ombudsman's report on *Referred immigration cases*: *Mr T* (Report No 04/2006), p. 17.

9 See p. 20 of Mr T report

PART 4—FAILURE TO PROPERLY CHECK IDENTITY AND IMMIGRATION STATUS

4.1 A recurring problem is that DIAC officers did not take adequate steps to resolve a person's identity or immigration status prior to making a decision to detain them. This problem was evident in 61 of the 70 cases.

4.2 As a general rule, if a person's identity or immigration status is unknown, it will be more difficult to form a reasonable suspicion that the person is an unlawful non-citizen. There is no power to detain a person in order to confirm the person's identity or immigration status.

4.3 A range of material and information may go towards establishing a person's identity and immigration status. This includes identification documents, immigration documents, information contained within DIAC's database systems and information provided by the person of interest and third parties. Careful consideration must be given to all of this information prior to making a decision to detain a person.

4.4 In many of the cases in this report, DIAC officers placed little weight on a person's claim of lawful status or did not conduct adequate systems checks to verify information relating to the person's immigration status. A frequent problem is that DIAC officers failed to document either their assessment or how they weighted the material before them in coming to the decision to detain.

Systems checks

4.5 An alarming feature of many cases was that officers detained a person under s 189 simply because a record of the person could not be found on any of DIAC's database systems. The failure to find any record of a person on DIAC's systems should not be a conclusive factor in reasonable suspicion that the person is an unlawful non-citizen. This is especially the case where the person claims lawful status.

4.6 There are many reasons why a record for a person may not be located on DIAC's systems. These include:

- the person may be an Australian citizen who has never departed Australia
- the person's name may be spelt incorrectly
- the person may have changed their name
- the person may have entered Australia before DIAC's current system was created
- the person may have a legitimate alias or be using a different name to that recorded on the system
- DIAC's system may be inaccurate
- through mental incapacity or for another reason, the person may have provided false information to DIAC.

4.7 It is vital, before a person is detained, that the clarity and accuracy of the details being searched are verified, and that all search options and systems are exhausted. Where DIAC officers fail to find a record of a person in the first instance, they should be diligent in directly confirming known details with the person and also undertaking further searches. This investigation found a consistent lack of diligence.

Twenty-two people who had lawful immigration status were detained with the primary reason recorded being that there was no record of the person on the system.

Case study: Decision to detain based on no record being located

DIAC officers located Ms A at her place of work. She did not have any identification with her. She was asked to spell her name. DIAC records show the spelling with one letter wrong. Using this incorrect spelling, a search of DIAC's system found no record of Ms A. A decision was made to detain her as an unlawful non-citizen under s 189. In fact, Ms A was the holder of a business visa, which was recorded against her systems record.

The search conducted by DIAC officers was cursory—for example, Ms A's date of birth, address and spelling variations were not tried. Further, DIAC did not engage an interpreter to speak to Ms A or to assist in ascertaining accurate biographical data for her, which could have been used more effectively to search DIAC's systems. Ms A was released the same day when her passport was provided to DIAC.

4.8 DIAC's MSI 409: *Establishing identity in the field and in detention*, states that officers might not be satisfied about a person's claimed identity where that person cannot be located on the systems or where the person shows on the systems as being outside Australia. While it can be accepted that those scenarios raise some doubt about a person's lawful status, two cautions should be stated: DIAC's systems must be reliable and accurate before such an inference can be drawn; and an officer should not form a reasonable suspicion on this basis alone. In several cases included in this report, where the systems either showed a person as 'offshore' or where no record was found, the person was in fact a lawful non-citizen and the system or search efforts were flawed.

Identity documents

4.9 There were also cases where the detention decision appeared to be based solely on the fact that a person did not have documents to confirm their claimed identity. In many of these cases the person does not appear to have been provided with an opportunity to produce their identity documents. While it can be accepted that a person's failure to produce identity documents will sometimes be telling, the absence of identity documents should not be a conclusive factor in determining that the person is an unlawful non-citizen. Moreover, a person should always be given an opportunity to produce identification.

Case study: Possible identity issues and lack of reasoning for detention decision

Mr B held a bridging visa. DIAC officers located Mr B at his place of work. He provided his true name, which officers used to search DIAC's systems. The records showed that he was the lawful holder of a bridging visa. Nevertheless, DIAC officers detained Mr B—based, presumably, on a belief that he was not who he claimed to be, as he had no identification. There is no record of an interview with Mr B prior to his detention.

Mr B was interviewed the next day and provided accurate information about his immigration history and again stated that he held a visa. This information was not followed up and he remained in detention for a further two days. Mr B was released from detention when DIAC confirmed his identity. There are no records on Mr B's file to shed light on what considerations led to the decision to detain him.

4.10 Appropriately, DIAC's new MSI 411 states that the fact a person's identity cannot be established should not be a conclusive factor in determining that the person is an unlawful non-citizen, and is not by itself a sound basis for a reasonable suspicion. There is, however, a different emphasis in MSI 409, which states at paragraph 4.1:

> It is departmental policy that, where officers are considering whether or not to detain a person, they should always check a person's claimed identity by asking them to provide documentary evidence in support of that identity. Officers cannot be satisfied as to a person's identity unless they see documents confirming that identity.

4.11 This policy direction in MSI 409 was implemented after the time of the detentions that are the subject of this report. It is possible that the two differently worded instructions in MSI 411 and MSI 409 could cause confusion amongst DIAC officers as to whether or not identity documents are required prior to making a decision to detain a person. Importantly, the Migration Act does not empower DIAC to require a person claiming to be a citizen to produce evidence of their citizenship. The Ombudsman therefore considers that paragraph 4.1 of MSI 409 should be amended to state that the lack of identity documentation should not be a conclusive factor in deciding whether or not a person is or may be an unlawful non-citizen, and that the lack of such documentation should be a factor to be considered along with other available and relevant evidence.

More than one identity

4.12 In three cases an officer was presented with two names for an individual. Usually this involved one name being provided and officers appearing to accept that this was the person's correct or more likely name. Yet other information before the officers, albeit with a tenuous link, suggested that the person may use or have previously used another name.

4.13 It seems that if the system searches of the second 'possible' name returned no record or showed the person as an unlawful non-citizen, the officers tended to favour this information and use it as justification for a detention decision. This was despite the officers recording the detention of the person under the true and accepted name, which appeared on DIAC's systems showing the person as having lawful immigration status. In these cases, the officers did not undertake additional enquiries or searches to resolve these possible inconsistencies prior to making a decision to detain a person. The case of Ms C illustrates this issue.

Case study: Tenuous links to a false name led to detention

DIAC officers located Ms C, who was the holder of a bridging visa, at her work place. Ms C's employer gave some information to DIAC officers to suggest that Ms C may have used another name, although the employer could not conclusively state what Ms C's name was. When questioned, Ms C provided her true name and date of birth and she consistently used her true name throughout her interactions with DIAC officers. The information given by Ms C was consistent with that held on DIAC's database. There was no record on the system of the name provided to DIAC by Ms C's employer.

DIAC officers detained Ms C under s 189. In making that decision, the officers placed more weight on the information provided by Ms C's employer than evidence held on their own systems and information provided to them by Ms C. Additionally, Ms C was not given an opportunity to produce evidence of her identity and immigration status prior to being detained. Ms C was detained for eight calendar days while DIAC satisfied itself about her immigration status.

Weighing up evidence

4.14 A recurring problem in the decision to detain people in these cases was a tendency by DIAC officers to give weight to one small piece of information which may have led to an officer forming a view that a person was an unlawful non-citizen, when there was ample material available of the person's lawful immigration status. The conclusion arising from these cases is that DIAC officers often detained a person who could not prove their lawful immigration status, rather than assessing all available material before reaching a decision on that issue.

Case study: One piece of information outweighed other significant evidence

Mr D is an Australian citizen who was detained following targeted compliance activity on a farm. The compliance activity was based on information alleging that there may have been unlawful non-citizens working on the farm using the identities of Australian citizens. Mr D was located and questioned by compliance officers. He incorrectly told officers that he acquired Australian citizenship in 1995 when he had acquired it in 1991. Against this, he advised that he was an Australian citizen and provided a driver's licence and a Medicare card to support his identity. He provided his home address, which was consistent with the address recorded on DIAC's system for him. Mr D also correctly informed officers of the date and place of his arrival in Australia.

The detaining officers placed more weight upon Mr D's inability to provide the correct date on which he acquired Australian citizenship than on other information, and selectively used this information to justify detaining him. There was also no evidence on the file that officers properly interviewed Mr D in an attempt to resolve his status. Mr D was released later the same day after his passport was provided to DIAC.

4.15 In some instances DIAC officers relied heavily on one piece of information without questioning its relevance or accuracy. This was evident in two cases, where an impostor had falsely used the identity of a person of interest and this was recorded against the record of that person. This information, although false, had a detrimental impact on the person and seemed, in the minds of the DIAC officers, to outweigh other evidence provided by the person to support his or her identity and lawful immigration status.

Case study: Failure to accept satisfactory evidence of citizenship

Mr E had been in Australia for more than 30 years and was an Australian citizen. DIAC had information that an unlawful non-citizen, Mr Z, was claiming to be Mr E. When Mr E was located, he provided information about his immigration history (although DIAC was not satisfied about its accuracy) and invited DIAC officers to his home where he provided his Australian passport, the passport from his birth country and his Australian citizenship certificate. Despite this documentary evidence, Mr E was detained for four calendar days before being released.

The intelligence leading to Mr E's detention, and which the detaining officer regarded as outweighing the evidence provided by Mr E, is not sufficiently documented on the file.

4.16 It can be acknowledged that DIAC officers are placed in a difficult situation when there is conflicting information about a person's immigration status. However, as a general rule, it is doubtful that a DIAC officer could form a reasonable suspicion that a person is an unlawful non-citizen if the person produces documentary evidence to support their claim to be an Australian citizen, permanent resident or lawful visa holder, and DIAC's systems support this claim. At the very least, there must be compelling evidence to outweigh the person's claims and this should be carefully documented.

4.17 The legality of the decision to detain a person hinges on whether a DIAC officer knows or reasonably suspects a person to be an unlawful non-citizen—not on whether the person is in fact an unlawful non-citizen. It is thus possible that an officer, faced with conflicting information about a person's immigration status, can make a decision that is legally defensible yet factually wrong. As that suggests, officers need to take special care to document and to justify their decision to detain a person, and to demonstrate that all available material was obtained and carefully considered and assessed. In our opinion, this did not occur in a majority of the cases covered by this report.

PART 5—INADEQUATE CHECK ON IDENTITY AND IMMIGRATION STATUS FOLLOWING A POLICE REFERRAL

5.1 The general failure of DIAC officers to take adequate steps to resolve a person's identity or immigration status was especially noticeable in those cases where a person was brought to DIAC's attention through a State or Territory police referral. This occurred in 28 cases. A usual pattern was that a person of interest was located or apprehended by police, and before the person was released from custody, contact was made with DIAC to enquire about the person's immigration status. In these 28 cases, DIAC undertook only cursory background systems checks before issuing the police with an authority to hold the person in immigration detention under s 189.

5.2 Importantly, all police officers are 'authorised officers' for the purpose of exercising powers conferred by the Migration Act (s 5). This means that they have authority to detain an unlawful non-citizen under s 189 of the Act. However, in the cases investigated, the decision to detain a person was not made by the police but by the DIAC officer who was contacted to check a person's immigration status.

Interviews of persons in police custody

5.3 The decision was frequently made under s 189 to detain a person who was in police custody without a DIAC officer first talking to the person. In only three of the 28 cases where a person was referred to DIAC by police, did an interview or telephone conversation occur with the person prior to the DIAC officer authorising their detention under s 189.

5.4 The relevant DIAC policy noted at the time that a person may provide a credible oral account of their immigration status. It is therefore to be expected that DIAC officers should have spoken to or interviewed people prior to detention. The importance of doing so is highlighted in the earlier Ombudsman report on Mr G,[10] and in the following case study.

Case study: Failure to speak to a person in police custody prior to authorising s 189 detention

Mr F used two names, one being his traditional name that he preferred to use. When police apprehended Mr F he provided them with his traditional name. The police contacted DIAC to enquire about Mr F's immigration status and provided his traditional name. DIAC undertook a search of its systems and could not locate a record. The DIAC officer sent the police a request to hold Mr F in immigration detention with the reasoning that: 'I could find no record of this person's arrival in Australia. That being the case and based on his statement that he is a Polynesian, until I am satisfied that he is lawfully in the country he must be detained.'

The detaining officer gave the police his mobile number and said to contact him if a different name and date of birth became known to the police over the weekend. Mr F was detained over the weekend and was interviewed by DIAC on the following Monday. When asked about his identity, Mr F immediately stated that he could sort everything out as he had two names that both appeared on his birth certificate. He advised that he used his traditional name, though his passport was in his other name. Mr F provided

[10] Commonwealth Ombudsman, *Report into Referred Immigration cases*: *Mr G,* Report No 06/2006.

his movement details and the names of his family members. DIAC confirmed this information with that held on its systems under his second name and released Mr F from detention.

Had Mr F been interviewed by a DIAC officer or spoken to by phone prior to the decision to detain, he would have been able to provide this critical information—preventing his detention.

5.5 As the case of Mr F shows, it is essential a person be given the opportunity to provide information that may be used to resolve their immigration status prior to a decision being made to detain the person. This is particularly important when the information that DIAC is relying on to search its systems and use as the basis for the detention decision, is provided to DIAC by police.

DIAC's reliance on police information

5.6 The 28 cases where a person was referred to DIAC by police illustrate a general problem of DIAC officers relying on police information without questioning or checking its relevance for immigration purposes.

5.7 The information held by police may have little relevance to a person's immigration status or records. A person may have different reasons—lawful or otherwise—for providing an alias to the police; doing so may have no bearing on the person's immigration status. Some of the cases in this report show that when a person is advised that identifying details are required to establish their immigration status, they are often immediately able to provide relevant information that can be confirmed against DIAC's systems.

Case study: Detaining a person to verify identity and immigration status

Mr H was a permanent resident of Australia. Police located Mr H in relation to alleged credit card fraud. The police contacted DIAC to check Mr H's immigration status. The police provided DIAC with the false name that Mr H was using in connection with the alleged fraud. DIAC could not locate a record of this name on its systems and authorised his detention under s 189. The officer requested that police hold Mr H in detention 'pending identification and confirmation of his immigration status'.

The following day, Mr H provided his true name to DIAC and he was released from detention.

5.8 This case highlights the importance of DIAC officers undertaking their own independent enquiries in order to satisfy themselves of a person's identity and immigration status, particularly if the s 189 detention decision is being made by a DIAC officer. In this case, the DIAC officer relied only on the information provided by police, rather than questioning its relevance and undertaking further enquiries in order to determine Mr H's immigration status. The fact that DIAC was advised Mr H had come to the attention of police, using a false name in connection with alleged credit card fraud, should have prompted officers to enquire as to his real identity prior to conducting systems checks and making a decision to detain him.

5.9 It is important to stress that a decision cannot lawfully be made under s 189 solely for the purpose of establishing a person's identity: s 189 confers a power to detain a person who is known or reasonably suspected of being an unlawful non-citizen. A decision to detain under s 189 cannot be made at a time when an officer is still examining whether a reasonable suspicion can be formed that the person is an unlawful non-citizen.

5.10 The Ombudsman report on Mr G[11] highlighted areas of concern about DIAC's interaction with police. The report stated that 'a DIMA[12] officer who is exercising the s 189 detention 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 the information to them'. That observation is reinforced by this investigation. It is important to draw attention once again to Recommendation 1 of the Mr G report, which was that DIAC should, either before a person is detained or as soon as practicable thereafter, speak to the person and document the conversation.

5.11 In 22 of the 70 cases in this report, a DIAC officer authorised a person's detention under s 189 because the officer could not find a record of the person on DIAC systems. Sixteen of these cases resulted from police referrals, and in 14 of those cases people were not interviewed or spoken with by DIAC prior to the decision to detain. Generally, after DIAC officers spoke directly to a person, information was received that resulted in the person's release. These figures highlight the importance of DIAC speaking with people before a detention decision is made and conducting their own enquiries in relation to the information provided to DIAC by police.

5.12 MSI 409: *Establishing identity in the field and in detention*, introduced in December 2005, provides DIAC officers with some guidance on matters where the police have detained a person under s 189. The MSI does not provide instruction on how to deal with police enquiries and referrals where the police have not already made a decision to detain. In light of the issues identified in these cases, it is important that officers are well guided on how to deal with matters referred to them by the police, and what steps they should take prior to authorising a person's detention under s 189.

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11 Commonwealth Ombudsman, *Report into Referred Immigration cases*: *Mr G,* Report No 06/2006.

12 See footnote 1 regarding change of department's name.

PART 6—REVIEW OF DETENTION AND RELEASE

6.1 In 23 of the 70 cases, DIAC took one day or part thereof to resolve a person's status and to release the person from detention. In other cases people remained in detention for longer periods. In many cases there was evidence on the files to indicate that DIAC officers had ample information to suggest a person was not an unlawful non-citizen, yet officers kept those people in detention until that information could be absolutely verified.

Case study: Delayed release from detention with little action taken to resolve status

Ms J was an Australian citizen. She was detained by DIAC at her place of work because officers did not believe she was who she claimed to be. DIAC officers undertook enquiries both before and soon after Ms J was detained, yet those efforts appear to have ceased on her second day in detention. On the fifth day of her detention, Ms J provided DIAC officers with a receipt for a Newstart allowance from Centrelink and this prompted DIAC to request further information from Centrelink. On the sixth day of her detention, the DIAC officer received Ms J's DIAC file showing her permanent residence application. This led to her release.

Ms J was detained for six calendar days while DIAC resolved her status. There was no priority or urgency in following up on important information to enable Ms J's release.

Onus and standard of proof

6.2 A particular concern is that in 30 of the cases, DIAC did not release people from detention until documentary evidence of their identity was provided. This was despite DIAC having other evidence of a person's identity or lawful status, and officers appearing to accept this information.

6.3 These cases illustrate a common view among DIAC officers that although a detention decision only requires a 'reasonable suspicion' that a person is an unlawful non-citizen, a decision to release cannot be made until absolute proof of the detainee's lawfulness has been obtained. This points to a belief among officers that the standard of proof required to detain a person is significantly less than the proof required to authorise a person's release from detention.

6.4 This approach is legally flawed. As stated earlier in this report, if there is no longer a firm basis for a reasonable suspicion that a person is an unlawful non-citizen, s 189 does not authorise the detention of the person.

Case study: Not released until passport provided despite other evidence of lawfulness

Ms K had given an oral account of her lawful immigration status to DIAC officers both before the decision to detain her and on the following day when she was interviewed. This information was consistent with that held on DIAC systems, yet no checks were conducted to verify the information that Ms K had provided. Ms K's solicitor contacted DIAC on the second day of her detention and advised that he could provide DIAC with a certified copy of Ms K's passport, which he did. DIAC advised the solicitor that a certified copy was insufficient and that DIAC would need to sight the original. The solicitor, based in a separate city to where Ms K was being detained, was also told by DIAC that it would not be acceptable for him to take the passport to the office in his city as that office would not know the case and could not make an identity assessment. Ms K's passport was subsequently viewed by DIAC after she had been detained for eight calendar days. Ms K was then released.

6.5 A matter of particular concern in Ms K's case is that DIAC would not accept a certified copy of her passport provided by a solicitor. She remained in detention for a further six days until the original passport was provided to DIAC.

6.6 There was a similar problem in other cases when DIAC officers were often mistaken about the onus and standard of proof required under s 189. The view held by many DIAC officers at the time was that the onus rested on a person to provide documentary evidence to *prove* their lawful status, either to prevent the person being detained or to facilitate their release from detention.

6.7 This practice was notable in cases where a false or mistaken identity had been attributed to a person, leading to their detention. In many of these cases the DIAC officers had then been given information that clearly and correctly identified a person as a citizen or lawful non-citizen. At that point it should have been evident that the initial reasonable suspicion that the person was an unlawful non-citizen could not be sustained. However, despite this, DIAC waited for documentary evidence prior to authorising the person's release from detention.

Case study: Documentary evidence required prior to release from detention

Mr L was the holder of a bridging visa at the time of his detention. He was located by police and referred to DIAC. Mr L was in possession of a bankcard belonging to another person. Police provided the details of this second person to DIAC, which was unable to match the name to information held in DIAC's systems. On this basis DIAC authorised Mr L's detention under s 189.

Mr L was transferred to an immigration detention centre and interviewed by a DIAC officer the following day. During this interview, Mr L provided his correct name and date of birth. He told the DIAC officer that police had falsely relayed his name to DIAC. Mr L also provided the details of his immigration history and stated that he had an outstanding protection visa application. Mr L provided the DIAC officer with the name of his solicitor.

The DIAC officer recorded all of this information in an email to another officer, yet there is no evidence on the file to indicate that it was used to check against information held in DIAC's systems. Mr L's migration agent contacted DIAC the next day and confirmed that Mr L had an outstanding protection

visa application and that DIAC had him in 'unjustified detention'. Again, according to the file material, this information does not appear to have been acted upon and Mr L remained in detention over the weekend.

The migration agent provided Mr L's passport to DIAC the following Monday, and Mr L was released from detention that afternoon. Mr L was detained for six calendar days.

6.8 DIAC had a number of opportunities and sources of information to pursue in order to resolve Mr L's immigration status. The information provided by Mr L at interview should have been sufficient for DIAC to undertake further enquiries, particularly checks of its system, in order to confirm Mr L's story and release him from detention. Instead DIAC waited for his passport to be provided before releasing Mr L from detention.

6.9 Initial and ongoing detention decisions must be based on objective examination of all of the relevant material. The obligation cast on DIAC officers by s 189 to hold a reasonable suspicion to sustain initial and ongoing detention must be kept constantly in mind. A frequent problem in the cases in this report is that DIAC officers did not consider and re-assess new information provided to them. They instead required that other documentary evidence be provided before a person would be released from detention. In many cases this extra information was not needed in light of the information already available to DIAC.

6.10 Deficiencies such as these have been recognised by DIAC and are the subject of its significant reform program and policy development, particularly in MSI 411: *Establishing immigration status in the field and in detention*.

PART 7—CONCLUSIONS

7.1 This report deals with many cases in which the decision to detain a person under s 189 of the Migration Act fell short of the standard of fairness and integrity that should be expected. Section 189 is a significant coercive power with far reaching consequences for anyone detained under that section. Not least is the loss of liberty that detention causes. There should be nothing short of a careful and lawful exercise of the power, characterised by thorough attention to detail and ongoing review of any decision to detain a person.

7.2 It is not necessary for the Ombudsman to make fresh recommendations in this report, additional to those made in earlier reports on the referred immigration matters. Those earlier recommendations are already being addressed in DIAC's current reform program. It is appropriate, however, to draw attention to the key lessons that can be extracted from the 70 cases in this report. Those lessons need to be at the forefront of the ongoing reform program in DIAC.

- There is no power conferred in the Migration Act to place a person in immigration detention in order to establish the person's identity or immigration status. If there is insufficient information on which to form a reasonable suspicion that a person is an unlawful non-citizen, the person should not be detained under s 189.
- There is no power in the Migration Act to require Australian citizens to prove their citizenship. Nor does s 189 confer power for that purpose. A decision cannot be made under s 189 to detain a person unless an officer knows or forms a reasonable suspicion that the person being detained is an unlawful non-citizen. A reasonable suspicion cannot be based solely on a person's inability to provide documentary evidence of their identity or status.
- In making a decision under s 189, DIAC officers must carefully consider and weigh up all of the available and relevant information. This consideration and decision should be clearly documented on the appropriate record.

7.3 A decision to detain a person under s 189 must be subject to continuous review and enquiry. Where information is obtained that dilutes the suspicion that a person is an unlawful non-citizen, to the point that suspicion cannot reasonably be held, the person should be released from detention.

ATTACHMENT A—RESPONSE FROM DIAC

Dear Dr Thom

Thank you for providing me with your draft *Report into Referred Immigration Cases: Detention Process*. Your findings, and the observations that you make, demonstrate the serious errors that have occurred in the past, which have directly impacted on many peoples' lives. They are very clear reminders of the importance of my department maintaining direction with the substantial changes it has made, and continues to make, aimed at preventing such mistakes recurring.

As you have noted, the issues you raise in your report are already being addressed by DIAC's significant program of reform. That program has maintained a consistent focus on ensuring that decisions to detain people under s 189 are made lawfully, and in a way that treat clients fairly and with respect. My responses to previous reports describe many of the major policy, systems, training and procedural initiatives that have been adopted by DIAC to strengthen and support officers' capacities to make sound decisions. Of particular relevance to the observations in your current report are specific measures, such as:

- new policy instructions making clear that a reasonable suspicion must be based on the careful consideration and weighing of all relevant information; and that a client's inability to provide documentation of their immigration status or identity is not, by itself, sufficient for forming a reasonable suspicion;
- revised Compliance Field Interview forms which require evidence of decisions to detain, and the reasons for them, to be systematically recorded by compliance officers;
- instructions and mandatory control points requiring officers to review their decisions to detain in light of new information to determine if detention continues to be supported by reasonable suspicion;
- the establishment of Detention Review Managers to provide quality assurance reviews of detention decisions for clients who are already detained;
- the establishment of the Immigration Status Service for police referrals to ensure that consistent procedures are followed to establish the best information available in considering decisions to detain under s 189;
- the establishment of a training strategy for police, including a training package to ensure that police fully understand their roles and responsibilities under the *Migration Act 1958,* and
- the initiation of a *Systems for People* Portal in April 2007 to ensure full client information, consistent decision-making and data quality assurance across the business activities of Compliance, Case-management and Detention.

DIAC continues to engage in further measures, including the updating of policy guidance and instructions such as *MSI 409 – Establishing identity in the field and in detention.*

These and other reforms contribute to a heightened capacity and professionalism among DIAC staff, to ensure that detention decisions and processes will be of high quality.

A clear sign of the cultural change taking place in DIAC is our commitment to strengthening internal processes of monitoring, performance management and accountability, so that client-service goals continue to be met in line with principles of good governance. DIAC's recent review of its governance arrangements is an example of this commitment.

Your observations in this and other reports have been instructive in reminding DIAC of the issues and systemic risks that my department will remain alert to. As we have both agreed, DIAC has already put in place many of the organisational reforms necessary to prevent these issues and risks recurring. DIAC is also committed to monitoring the effectiveness of these reforms, and to responding quickly and effectively where any issues might arise.

Yours sincerely

(Andrew Metcalfe)

ATTACHMENT B—GLOSSARY

DIAC	Department of Immigration and Citizenship
ICSE	Integrated Client Services Environment
Migration Act	*Migration Act 1958*
MSI	Migration Series Instruction
s 189	section 189 of the *Migration Act 1958*