



# Lessons for public administration

OMBUDSMAN INVESTIGATION OF REFERRED  
IMMIGRATION CASES

August 2007

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

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## Reports by the Ombudsman

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## FOREWORD

In 2005 and 2006 the Australian Government asked my office to investigate 247 immigration detention cases. Eight published reports contain the results of those investigations. The purpose of this new report is to draw together ten lessons from the referred immigration reports that are relevant to all areas of government.

The administrative problems and errors exposed in those reports are not unique to immigration administration. The experience of the Ombudsman's office, gleaned from thirty years of administrative investigation, is that similar practical problems recur in all areas of decision making. Agencies should heed those lessons to guard against administrative error and ensure good decision making.

While this report draws many examples from the referred immigration reports, the purpose in doing so is not to direct any further criticism at immigration administration. The Department of Immigration and Citizenship gave its full cooperation and support to these investigations and has worked hard since 2005 to address the weaknesses that were identified.

Prof. John McMillan  
Commonwealth Ombudsman

## INTRODUCTION

The 247 immigration detention cases referred by the Australian Government to the Commonwealth Ombudsman followed two earlier reports concerning the immigration detention of Ms Cornelia Rau, and the detention and removal from Australia of Ms Vivian Alvarez.<sup>1</sup> In each of the 247 cases referred to the Ombudsman, a person who had been taken into detention by the Department of Immigration and Citizenship (DIAC) was later released and their computer record marked with the descriptor 'not unlawful'. This descriptor meant that the person either was not an unlawful non-citizen and should not have been detained, or was now recognised as being lawful and could no longer be detained. For example, in some cases the person was an Australian citizen; in others the person either held a visa that entitled them to live in the community or something had occurred (such as a court case) which meant they should no longer be detained. The core issue in each investigation was whether all or any part of the person's detention was unlawful or wrongful.

The issues arising from the investigation of the 247 cases formed the basis of six consolidated public reports and two reports on individual cases. Appendix 1 has a summary of those eight reports, together with a summary of the reports of the inquiries into the cases of Cornelia Rau and Vivian Alvarez. The reports highlighted errors made in many but not all of the 247 cases, and pointed to systemic failures in immigration administration. Administrative, legislative, policy and system-based changes that were recommended in the reports were accepted by DIAC and addressed in a significant reform program that commenced in 2005.<sup>2</sup>

The cases under investigation should be viewed in context. The modern migration regime is complex and poses many challenges for decision makers. The regime is fraught with factual uncertainty and legal difficulty and is made all the more demanding by the human implications of each decision. There is a complex range of visa categories, migration policies and instructions, and legislative provisions, some of them coercive. There is frequent litigation and legislative and policy amendment. Decision makers must maintain careful judgement across a high volume of cases that are decided in a large number of locations, nationally and internationally. DIAC clients exhibit great diversity in their national, cultural and linguistic backgrounds, and their circumstances can change frequently.

A significant proportion of DIAC administrative decisions relate to the complex visa regime. There are many visa categories with multiple conditions regulating how a person can enter and remain in Australia. The visas range from short-term temporary visas to long-term or permanent visas, and are issued for travel, personal, business, educational and other purposes. The bridging visa regime, which is currently under review, is also multifaceted and includes many sub-categories and conditions.

A special feature of the legislation administered by DIAC is that it confers a range of coercive powers, including the power to place people in immigration detention. The use of the detention power conferred by s 189 of the *Migration Act 1958* was a key

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<sup>1</sup> *Report of Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, Report by Mr Mick Palmer AO APM, July 2005; and Commonwealth Ombudsman, *Report of Inquiry into the Circumstances of the Vivian Alvarez Matter*, Report No 03/2005.

<sup>2</sup> These are described in ten Information Sheets published by the Department of Immigration and Citizenship in June 2007, entitled 'Palmer Report—two years of progress'.

issue in the cases investigated by the Ombudsman's office. Section 189 provides that an officer must detain a person if the officer knows or reasonably suspects that the person is an unlawful non-citizen. Other powers conferred by the Migration Act that can impact upon a person's freedom or liberty include the power to search premises, seize property, cancel a visa, remove or deport a person, and question a person.

The legislative powers conferred upon immigration officers, and the decisions they are required to make, are not unlike the functions exercised in other areas of government. At the end of every administrative process is a person who can be affected, beneficially or adversely. It is therefore important in all areas of government administration that the exercise of significant powers is underpinned by high quality internal systems, rigorous decision making, clear policy guidance, effective training, active oversight and quality assurance, and efficient internal and external information exchange. The 247 cases that were referred to the Ombudsman's office for investigation exemplify those themes. The cases are a reminder that all areas of government should heed the practical lessons presented in this report.

## TEN LESSONS FOR PUBLIC ADMINISTRATION

### Lesson 1—Maintain accurate, comprehensive and accessible records

- Could a lapse in records management in your agency result in administrative errors that cause damage to clients?
- Are there weaknesses in records management in your agency?
- Does your agency have a clear and strong policy on records management, backed up by training for all staff, and regular evaluation of whether the policy is being observed?

1.1 Administrative decision making directly affects the lives and well being of members of the public. For that reason alone the records that underpin decisions must be accurate, comprehensive and accessible. Information management systems must be robust and contain appropriate safeguards to identify and counteract problems. Careful attention must also be paid to the many legal requirements that require good records management, such as freedom of information and archival legislation and administrative law review of government decision making. The commitments made in government service charters to be timely, responsive and accountable can depend on good records management.

1.2 The *Data problems* report illustrates how poor record-keeping practices can adversely affect a member of the public, in this instance by unwarranted detention. A small error can cause great damage. The report contained case studies of how data management errors led to visa holders being wrongly detained and deprived of their legal right to freedom in the community. The errors, often simple in nature, included data about a person's personal details or immigration status being wrongly entered on DIAC's system, documents that recorded essential facts being misplaced, files being lost, files dealing with the same person not being cross-referenced, and files not showing clearly when or by whom a decision was made.

1.3 Other government agencies exercise similar powers that can adversely affect members of the public. Examples are powers to arrest, search premises, prosecute, restrict movement, control assets, deny or revoke benefits, and impose penalties and charges. In all areas of government, decision makers rely on agency records for timely and accurate information to support and justify good decisions.

1.4 Good record keeping will only exist when there is a strong cultural commitment within an agency to rigorous practice in records management. This includes correct folio numbering, document filing, and description and indexing of files; care in entering data onto systems; proper maintenance, storage and retrieval of files; and evidence-based decision making. The emphasis on records-management practices may seem pedantic at times, but the lesson to be grasped is that looseness or slippage in records-management practices is but a short step away from the more serious errors and consequences of the kind identified in the immigration investigations.

1.5 In summary, agencies should establish good records management, by ensuring that:

- staff are well trained and supported in good records-management practices
- administrative systems accurately record client details
- clear, accessible and current policy guidance is provided on records-management processes
- it is part of agency culture that professional records management is essential to underpin high quality decision making
- quality assurance mechanisms are applied at all stages of records-management processes.

## Lesson 2—Place adequate controls on the exercise of coercive powers

- Does your agency exercise coercive powers?
- Is there proper training and policy guidance for the officers who exercise coercive powers?
- Are checks and controls in place to ensure that coercive powers are properly exercised?

2.1 ‘Coercive power’ refers to the authority given to government officers by legislation to compel individuals and organisations to comply with decisions, orders and directions. Failure to comply may attract a penalty or be enforced by a court order. Examples are the power conferred on officials to summon people to provide information or documents, to enter private premises, confiscate goods, impose a penalty, detain a person or restrict their freedom of movement. Powers of that kind are commonly found in legislation relating to taxation, customs, immigration, law enforcement and national security.

2.2 A strong theme in Australian legal tradition is that government coercive power should be closely controlled. This is necessary to safeguard rights and freedoms that are regarded as fundamental in our society. Courts have developed many legal principles that limit and control the use of coercive power.<sup>3</sup> They include:

- legislation is required to confer coercive power upon government officers, and the conferral must be clear and explicit
- coercive power can only be exercised by an officer nominated in the legislation or to whom power has been expressly delegated under the legislation
- an officer exercising a coercive power must pay close attention to all relevant considerations and may need to make enquiries to clarify issues in doubt before exercising the power.

2.3 A coercive power conferred by the Migration Act that arose in many of the referred immigration cases investigated by the Ombudsman’s office was the power to detain a person reasonably suspected of being an unlawful non-citizen (s 189). The reports concluded that in many instances the use of that power went unchecked, unjustified and without review. The problems were numerous. A decision to detain was sometimes made on the basis of information that was insufficient to support a reasonable suspicion, or that conflicted with other information that was ignored. Officers did not always act on the basis that s 189 imposed a continuing obligation to maintain a reasonable suspicion that a person in detention was an unlawful non-citizen. It was not always clear from the file which officer had made the decision to detain or to continue a person’s detention. File information was not checked for accuracy before compliance action was taken. Some people were also detained by police officers, at the request of DIAC, without proper checking of the information that aroused police suspicion.

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<sup>3</sup> For example, *Coco v The Queen* (1994) 179 CLR 427, *Goldie v Commonwealth* (2002) 188 ALR 708.

2.4 Although those problems were unique to s 189, they hold lessons that should be heeded by all government agencies. Wherever coercive power is being exercised, there must be rigorous managerial and administrative controls in place. This includes clear guidelines and instructions for staff, regular and up-to-date training, active supervision of staff exercising the powers, and periodic review of whether decisions are being made properly and consistently.

2.5 An added reason for tight control on the use of coercive power is that it is often exercised at numerous locations around Australia, by operational staff who hold relatively junior positions in the agency. Both the legislation being administered and the facts to support its use can be complex and require the exercise of discretion and judgement. There may be pressure to make a swift decision, with a limited opportunity to consult with other officers, for example, in deciding to detain or arrest a person or to confiscate goods.

2.6 In summary, agencies should place strong checks and controls on the use of coercive powers, by ensuring that:

- staff are well trained and provided with practical and up-to-date policy guidance
- the delegated authority to exercise coercive powers is only given to staff who have the required skill level
- the use of coercive powers is well documented and records the identity of officers and the reasons for decisions
- the use of coercive powers is regularly monitored and audited, and subject to quality assurance
- agency policies that guide the use of coercive powers draw attention to unique circumstances that may require special attention (such as the use of power affecting a child or person with a physical or intellectual disability, or other special need).

## Lesson 3—Actively manage unresolved and difficult cases

- Does your agency make difficult decisions that challenge the knowledge and experience of officers?
- Are there internal arrangements to pinpoint difficult cases and ensure they are actively managed?
- Is there a quality assurance system for reviewing the correctness of agency decisions?

3.1 Agencies generally have the collective experience and wisdom to deal with all problems faced by the agency. Rarely, however, does a single officer have the requisite skills to manage every problem. This makes it necessary for agencies to work in an integrated and coordinated manner. By doing so, agencies can identify problems at an early stage and take appropriate action to resolve them and prevent a recurrence. It is equally important to learn from mistakes and to safeguard against future error.

3.2 That did not always happen in the immigration cases investigated by the Ombudsman's office. Difficult cases were not referred for advice or brought to the attention of more senior officers. Decisions known to be flawed were not studied to detect if there were systemic issues that needed to be addressed. The arrangements for quality assurance and periodic review of decisions by senior officers were deficient. Nor was there a strong culture among officers that it was their responsibility to correct any error they identified in a decision.

3.3 Lapses of those kinds were more likely to occur in cases that were inherently difficult. Some clients gave confusing and conflicting information, or spoke only a foreign language. Others were in poor mental health and unable to communicate their situation. In some cases clients were uncooperative or deliberately deceptive.

3.4 Complications of that kind can overwhelm good decision making unless effective procedures are put in place to deal with difficult cases. The purpose of doing so is to ensure that all the expertise of an agency can be called upon at the right time.

3.5 The case of Vivian Alvarez provides a good illustration of the need to involve senior management in resolving difficult cases. Telephone calls made by Ms Alvarez's former husband to DIAC over a period of 18 months had failed to prompt any action to locate her. After a call to the Minister's office was brought to the attention of executive level staff in DIAC, the matter was escalated immediately and Ms Alvarez was located in the Philippines three weeks later. This also triggered a wider inquiry into departmental practices.

3.6 Since then, DIAC has implemented reforms to ensure that difficult cases are properly managed, and that unresolved cases are reviewed periodically. Special measures have also been implemented in the detention environment, where some of the more serious problems had occurred, to ensure that there are clearer procedures and responsibility for making and reviewing detention decisions.

3.7 In summary, agencies should guard against the risk that difficult cases will be wrongly decided or overlooked, by ensuring that:

- the authority to decide issues that are prone to be difficult is assigned to officers with the appropriate level of skill and understanding of legislative requirements
- quality assurance, oversight and review of decisions is a feature of all systems in which a large number of decisions are made under tight pressures
- agency procedures emphasise the need to escalate unresolved or difficult cases for consideration by more senior officers
- risk areas in agency decision making are reviewed periodically and systems adjusted where necessary
- all agency officers understand that it is their joint responsibility to ensure that problems are not overlooked or hidden.

## Lesson 4—Heed the limitations of information technology systems

- Does your agency rely on IT systems to assist decision makers?
- Are officers alert to the risk that systems may not contain accurate or complete information?
- Are systems designed and maintained for accuracy, transparency and completeness?

4.1 The administration of legislation and government programs now relies heavily on the use of information technology (IT) systems to store, retrieve, exchange and analyse information. They have become key support tools in administrative decision making.

4.2 Used and managed appropriately, IT systems bring greater accuracy, consistency and transparency to public administration. There is an understandable tendency for officers to place great reliance on automated systems. They are assumed to be up to date, accurate and reliable. In contrast, traditional data systems such as paper files and batch-stored documents can be difficult to access and unreliable, reflecting poor practices of the past.

4.3 In fact, automated systems can suffer from the same weaknesses as the manual systems they replace. They are no better or more reliable than the data entered on the system. Equally, a design or a programming error can feed through and taint decisions that are based on information in the system.

4.4 Problems caused by inappropriate reliance on IT systems arose in many of the immigration cases. There was a tendency in some cases for officers to accept uncritically the information they read on a system, even when there was contradictory information from other sources or systems. In other cases, there was a lack of understanding of the complexities of an IT system. These errors resulted in officers uncritically accepting information about a person's immigration status, without drilling further into the system to verify or clarify a person's status.

4.5 Another error was to assume that a person who could not be located on DIAC's system must be unlawful and liable to detention. In fact, the inability to locate a record could be due to other factors, such as an error in data entry and retrieval, or a person using an alias for reasons unrelated to their immigration status. In one instance, an Australian citizen who spoke with an accent due to a mental illness could not be located on the system and an order for his detention was made. However, the person had been born in Australia, had never travelled overseas and therefore would not have been recorded on DIAC's IT systems.

4.6 The design of DIAC's IT systems was also an issue. Different areas of DIAC used their own system, and officers might need to search multiple systems to correctly determine a person's immigration status. The inadequate level of integration between the IT systems hampered officers. DIAC has recognised these shortcomings and is currently working towards a new integrated and tailored 'Systems for People'.

4.7 The failure of agency officers to heed the limitations of IT systems has been a regular theme in complaints to the Ombudsman across all areas of jurisdiction. Another example that illustrates the seriousness of this issue is described in a recent

report of the New South Wales Ombudsman. In a report on DNA sampling, the Ombudsman found instances in which DNA computer records were incorrect, leading in one case to a person being wrongly arrested and charged. The problem could arise from an error as simple as an officer mistakenly believing that two files related to the same person and thus recording the DNA profile of one person against another.<sup>4</sup>

4.8 General guidance on the use of IT systems in administrative decision making is now given in *Automated Assistance in Administrative Decision-Making: Better Practice Guide*. The Guide was developed jointly by several Australian Government agencies, including the Commonwealth Ombudsman's office.<sup>5</sup> The purpose of the Guide is to ensure that IT systems are aligned to principles of good decision making and administrative law. Issues that are addressed in the Guide include the governance principles that should apply to IT systems, and the steps that can be taken to ensure accuracy, transparency and accountability in the design and operation of IT systems.

4.9 In summary, agencies should ensure that:

- IT systems in the agency appropriately model the business processes of the agency, such as the legislation administered by the agency
- if there are different IT systems for different business processes in the agency, those systems are properly connected and integrated
- staff are trained to be cautious in entering and retrieving data from IT systems, and basing decisions on that data
- agency officers have the requisite skills, knowledge, training and policy guidance to properly use the agency's IT systems
- IT systems support accurate decision making, both in the agency and in other agencies to which information is provided.

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<sup>4</sup> NSW Ombudsman, *DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000*, NSW Ombudsman, October 2006 at iv and Ch 11.

<sup>5</sup> *Automated Assistance in Administrative Decision-Making: Better Practice Guide*, Australian Government, February 2007.

## Lesson 5—Guard against erroneous assumptions

- Is there a risk that false assumptions could play a part in decisions made in your agency?
- Have the areas of potential risk in decision making been identified and dealt with in agency guidelines, training and case review?
- Are officers given practical instruction on how to make discretionary decisions?

5.1 It is rare that a statute will provide a complete answer to every uncertainty that arises in administering the statute. Issues will continually arise that require the exercise of discretion and practical judgement. In discharging that task, it is to be expected that officers will rely on their experience and wisdom, and be guided by agency policies. Indeed, a hallmark of good administration is that decisions are made by officers who are experienced in dealing with similar problems. They can ensure sound judgement and consistency in decision making.

5.2 There is an associated risk, however, that officers who work partly from experience and intuition will be influenced by notions or assumptions that lead to error. Erroneous notions, if too blatant, will be classified as prejudgement or bias that invalidates decisions. A more subtle, but more prevalent, danger is that erroneous notions will cause decision makers to discount relevant information or lines of enquiry or to give disproportionate weight to unconvincing items of information.

5.3 Three examples of this danger were discussed in the referred immigration reports. Firstly, the *Children in detention* report found a tendency by officers to assume that a child had the same immigration status as its parents. In fact a child's status could be different because of the terms of the *Australian Citizenship Act 1948*. The result is that some children who were citizens were detained along with parents who were unlawful non-citizens.

5.4 Secondly, the *Detention process issues* report found a tendency by DIAC officers to rely on police information without questioning or checking its relevance for immigration purposes. The result is that many people who were referred to DIAC by the police were detained following a cursory background systems check and without the person first being interviewed by DIAC. The use of an alias by a person could also be viewed as suspicious though in fact it was unrelated to a person's immigration issues.

5.5 Thirdly, the *Mental health and incapacity* report noted that in many of the cases in that report the foreign ethnicity of a person was apparent and appeared to be a factor in the referral of that person to DIAC by state police. This was also a feature noted in the reports concerning Ms Cornelia Rau, Ms Vivian Alvarez, Mr T and Mr G. The concern is that police and DIAC officers may have wrongly assumed that someone who was born overseas and had difficulty in communicating in English was not an Australian citizen or lawful resident.

5.6 A recent report by a Canadian Commission of Inquiry provides an example from another jurisdiction of what can happen when inappropriate reliance is placed on information provided by others.<sup>6</sup> Mr Maher Arar, a Canadian citizen, was detained

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<sup>6</sup> *Commission of Inquiry into the Action of Canadian Officials in Relation to Maher Arar*, Commissioner Dennis O'Connor, 18 September 2006.

by American authorities, removed to Syria where he was detained for nearly a year and interrogated and tortured. The Inquiry found that the American decision to detain very likely relied on information provided by the Royal Canadian Mounted Police that was inaccurate, portrayed Mr Arar in an unfair fashion, and overstated his role in an investigation into suspected terrorism.

5.7 Agency officers are more likely to be influenced by erroneous notions when they approach their work in a routine or repetitive manner and do not pay close attention to the individual circumstances of each case. The danger is heightened if officers feel the need to apply agency policies rigidly, without deliberation. Short-term goals, such as meeting quotas or deadlines, can also obscure the practical judgement required of officers.

5.8 In summary, agencies should ensure that:

- areas of potential risk in decision making in the agency are identified and strategies put in place to guard against error
- guidelines for agency decision making give clear practical guidance on matters that should and should not be considered when discretionary decisions are being made
- agency training courses on decision making give practical illustrations that warn officers of how they can unthinkingly be wrongly influenced by inappropriate cultural habits and stereotypes
- the reasons are recorded for all administrative decisions that have an adverse impact on people, indicating the matters that were taken into account
- there is regular monitoring, quality assurance and review of all areas of discretionary decision making.

## Lesson 6—Control administrative drift

- Is there unnecessary delay in making decisions in your agency?
- Have procedures and mechanisms been implemented to prevent unnecessary delay?
- Do staff know it is their responsibility to advise others when delays in decision making are occurring?

6.1 Delay occurs in all administrative systems. Sometimes it is unavoidable, but more often it can be reduced or prevented. A common explanation for unnecessary delay is inattentiveness: a matter is simply allowed to drift.

6.2 The causes can be numerous. A file may have been put in the ‘too hard’ basket to be looked at later. The responsibility for dealing with a case passed from one officer to another, who took time to become acquainted with it. A matter was left idle while advice was sought on one aspect of it. A case that was given a lower priority continued to be ignored as other cases requiring attention continued to arrive.

6.3 Administrative drift was a particular problem in many of the immigration cases: it took ten months to identify Ms Rau; 22 months to determine that Ms Alvarez had been wrongly removed from Australia to the Philippines; and 253 days over three periods of detention to put measures into place to prevent the re-detention of an Australia citizen, Mr T. In many other cases there were extended periods of inactivity that resulted in the detention of a person lasting far longer than could be justified.

6.4 The issue of delay has been raised in other inquiries into government. An example is the report of a Senate Committee into the military justice system, which was critical of unnecessary and inordinate delay in disciplinary and administrative investigations.<sup>7</sup> The report pointed to the problems this caused, including loss of confidence in the military justice system, and anxiety and distress for those under investigation.

6.5 Administrative drift will be a problem in any government program area unless measures are put in place to counteract it. Examples of what can be done were given in the Commonwealth Ombudsman Annual Report 2005–06. Establishing an agency complaint unit gives members of the public a place to turn to when delay occurs. Defining the time frame for each stage in a decision provides a clear structure for measuring the progress of cases. Periodically reviewing all cases that have been unresolved for a set period of time ensures they are not left unattended. Assessing the inherent complexity of all new cases before they are allocated to staff enables forward planning to be done. And preparing written plans for how difficult cases will be handled sets a realistic timeframe for the resolution of each case.

6.6 In summary, agencies should ensure that:

- the time taken to make individual decisions is recorded and appraised periodically

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<sup>7</sup> Senate Foreign Affairs, Defence and Trade References Committee, *Inquiry into the effectiveness of Australia’s military justice system*, June 2005 at xi and xiii.

- decisions that took too long to make are studied to identify if there are systemic problems that need to be addressed
- timeframes are built into decision-making processes, supplemented by formal procedures for review and escalation of cases that breach those timeframes
- the areas of potential delay in agency decision making are identified and strategies put in place to guard against delay
- it is part of agency culture that unnecessary delay in decision making is spurned.

## Lesson 7—Remove unnecessary obstacles to prudent information exchange with other agencies and bodies

- In making decisions does your agency rely upon or need information provided by other agencies?
- Do other agencies rely upon your agency to provide information relevant to their decisions?
- Have workable and sensible procedures been put in place for inter-agency information exchange?

7.1 Good decision making requires accurate and comprehensive information. It may need to be assembled from other units in the agency or from other agencies. Information is a two-way flow: just as agencies need to collect information from other agencies, they need to provide or share it with other agencies. Unnecessary obstacles and blockages to the exchange and flow of information within government can impair the quality of decision making.

7.2 The *Rau* and *Alvarez* reports both criticised an inappropriate reliance by DIAC officers on personal privacy protection to explain why information was not provided to people who had a relevant and legitimate interest in receiving it. Protection of personal privacy was the reason given in Ms Rau's case for not circulating her photograph to other agencies at a time when her identity was unsolved, and in Ms Alvarez's case, for not divulging details of her whereabouts to her former husband. Both inquiries concluded that the *Privacy Act 1988* did not preclude the selective disclosure of those personal details. The *Mr G* report similarly noted that officers declined on privacy grounds to discuss his case with a person who offered to assist in resolving his identity and immigration status.

7.3 The same complaint has been made in other areas—that the Privacy Act is wrongly cited as a reason for non-disclosure or dissemination of information. A report of a Senate Committee on the Privacy Act noted that inappropriate reliance on the Privacy Act could undermine accountability and transparency in government.<sup>8</sup> The same criticism has been noted by the Australian Law Reform Commission in an Issues Paper on a review of Australian privacy laws.<sup>9</sup>

7.4 Problems of a different kind in managing the exchange of information between agencies were highlighted in three other referred immigration reports. The *Data problems* report noted instances of delay and breakdown in communication of information between DIAC and merit review tribunals concerning appeal proceedings. Failure in some cases by the tribunals to notify DIAC that appeals had been lodged, or by DIAC to record such information, meant that some review applicants were wrongly thought to be unlawful non-citizens and were taken into detention. The *Mr T* report noted a breakdown in exchanging information between DIAC and the company contracted to manage detention centres. Staff of the company thought their responsibility was limited to managing the centres and caring for detainees, and did not pass on information that might have clarified Mr T's identity

<sup>8</sup> Senate Legal and Constitutional Committee, *The real Big Brother: Inquiry into the Privacy Act 1988* (2005) at 5.92–5.116.

<sup>9</sup> Australian Law Reform Commission, *Review of Privacy*, Issues Paper 31 (2006) at 144–149.

and that he was an Australian citizen. The *Detention process* report noted that state police had authority to detain people thought to be unlawful non-citizens under the Migration Act. Inaccurate information provided either by police to DIAC, or by DIAC to police, resulted in the wrongful detention of some people.

7.5 Exchanging information with other agencies and organisations is an important dimension of government, and can be indispensable to accurate and reliable decision making and compliance action. There are necessary controls and limitations on what can be exchanged, to safeguard important public and private interests. On the other hand, those controls should be carefully managed to ensure that they do not become impediments to prudent information exchange. It is also incumbent on agencies to ensure the reliability of the information that is both provided and received. Staff must be alert to the need to be cooperative and careful when exchanging information with other agencies.

7.6 In summary, agencies should ensure that:

- where appropriate, memorandums of understanding with other agencies are entered into to facilitate effective information exchange
- unnecessary obstacles to sensible information exchange with other agencies are eliminated
- information exchanged with other agencies is monitored to check the reliability of information being received and being given
- staff are cautious in basing decisions on information provided by others that may not have been verified
- staff are properly instructed in applying the Information Privacy Principles.

## Lesson 8—Promote effective communication within your own agency

- ❑ Are the administrative manuals in your agency that provide guidance to staff on making decisions accurate and up-to-date?
- ❑ Is decision making monitored to review whether decisions are consistent with the agency's policy and procedural guidelines?
- ❑ Are legislative changes and court rulings communicated promptly and clearly to staff?

8.1 Good decision making within agencies relies on effective communication between officials at all levels and locations within the agency. Effective communication is both a vertical and a horizontal process. This issue becomes steadily more important for agencies as they grow larger, functions become more complex, and decisions are made at separate offices located around Australia and internationally.

8.2 One important source of information for officers is the administrative manuals that provide guidance on administering the agency's legislation. There can be a direct correlation between the adequacy of manuals and the quality of decision making in an agency. Echoing that point, the referred immigration reports highlighted deficiencies in the guidance given on matters such as forming a 'reasonable suspicion' to detain an unlawful non-citizen under s 189 of the Migration Act. This issue has been taken up by DIAC in a substantial revision and clarification of many internal policies and manuals.

8.3 It is equally important that officers refer to the agency's manuals, particularly when faced with sensitive or difficult decisions. Again, the referred immigration reports pointed to instances in which immigration officers made decisions that were contrary to policy instructions, or when interviewed by Ombudsman staff claimed to be unaware of relevant policy instructions. An example discussed in the *Children in detention* report is that officers did not give proper effect to policy instructions on verifying identity and considering alternative forms of detention. As that suggests, it should never be assumed that all policies, however skilfully drafted or conscientiously circulated within the agency, are digested and applied by officers. Intensive training and regular monitoring of decision making is necessary to ensure that this occurs.

8.4 The information databases in an agency are another vital resource for storing and communicating information to staff. The referred immigration reports showed a number of cases where erroneous detention decisions stemmed from the unreliability of DIAC's databases. Partly this was caused by intermittent failures by staff to enter comprehensive and accurate information on the databases about visa applicants. Another problem, first highlighted in the *Alvarez* report, is that client details were recorded on several different databases that were not properly integrated and could not be fully accessed by a single search. Staff had not received proper formal training on using the systems. The major project since initiated by DIAC to develop a new information management system, 'Systems for People', confirms the important role that information systems play in supporting effective communication and good decision making.

8.5 Staff also depend on their agency to provide accurate and up-to-date information about legislative changes and recent court and tribunal decisions. The *Notification issues* and *Other legal issues* reports dealt with instances in which

important court decisions were not properly understood or communicated to staff. An example was the Federal Court decision in 2003 in *Srey*,<sup>10</sup> holding that a defect in a letter notifying a person of a visa refusal decision had the result that the person still held a bridging visa and was not an unlawful non-citizen liable to detention. This ruling was potentially relevant to thousands of other cases, including over 50 of the referred cases in which people were either wrongly taken into detention or held longer than was justifiable.

8.6 The *Srey* case illustrated a point of broader relevance to government, that judicial decisions can have far reaching and unforeseen consequences for government agencies. Agencies need to keep abreast of significant legal developments and to keep staff properly informed.

8.7 In summary, agencies should ensure that:

- effective communication within the agency is supported by appropriate policies and procedures
- administrative manuals that provide guidance to staff on applying the agency's legislation are easy to use and up-to-date
- there is regular monitoring, quality assurance and review of decisions to check if they are consistent with the agency's policy and procedural guidelines
- information barriers and 'silos' within the agency do not impede good decision making
- legislative changes and important court and tribunal rulings are communicated promptly and clearly to staff.

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<sup>10</sup> *Chan Ta Srey and Minister for Immigration and Multicultural Affairs* [2003] FCA 1292.

## Lesson 9—Manage complexity in decision making

- Does your agency administer complex legislation or programs?
- Is the agency aware of faulty decisions that resulted from complexity?
- Is special attention given in the agency to handling and supervising the resolution of difficult and complex cases?

9.1 Immigration law and administration is a microcosm of the complexity that now permeates government. An immigration legislative framework that, two decades ago, was brief and built on discretion and internal policy, now contains thousands of pages that spell out a multiplicity of rules, powers, visa classes and time limits. Each year hundreds of court and tribunal decisions add refinement to the legislative rules. The steady growth in movement of people into and out of Australia creates a variety of new and unique issues to be addressed by decision makers.

9.2 A similar complexity arises in other areas of government. Laws about taxation, customs, superannuation, social security, child support, health insurance, workplace relations, crime and anti-terrorism throw up equally difficult issues to be decided by officers across government. The decisions that are made can have a substantial and adverse impact on the comfort and well being of members of the public.

9.3 The more complex a system, the greater the risk that mistakes will occur and decisions will be faulty. A particular hazard in complex systems is that officers will misunderstand and misapply the legislative standards. The risk of error increases when people's circumstances and other facts are unclear or in dispute.

9.4 Many of the errors that occurred in the referred immigration cases were a product of this complexity. An example discussed in the *Notification issues* report concerned the statutory rules for notifying a person that a visa had been refused or cancelled. Failure to notify a decision correctly—for example, by sending it to an incorrect address, sending it to the wrong migration agent, or through an error in drafting the notice—could mean that the intended recipient still held a bridging or other visa until a notice was correctly served. DIAC might be unaware of the error and institute compliance action to detain the person. Months or even years could pass before the error was identified.

9.5 Complexity of other kinds was explored in some of the individual case studies. The report on *Mr G*, who was detained for 43 days, highlighted the confusion that arose in deciding whether Mr G, a mentally ill and homeless man who had arrived from East Timor nearly thirty years earlier, had held for over eight years a unique and complex visa, the absorbed person visa, on which there was little accessible policy guidance and support. The *Other legal issues* report discussed the case of Mr A, who spent over three years in detention after his permanent resident visa was overridden by a one month border visa that he was granted when he re-entered Australia after travelling abroad. Though officers actively considered his plight during his detention, the view taken was that there was no power in the Migration Act to revisit or undo his detention and inadvertent loss of permanent resident status. A different view was later taken and he was released after the intervention of the Ombudsman's office.

9.6 Another factor that can complicate decision making is that legislation and policy can send conflicting messages. This was a theme taken up in the Alvarez report. Some of the officers interviewed for that report explained that their key performance indicators were focused on the prompt removal of unlawful non-citizens, rather than on the welfare of those subject to compliance action.

9.7 The challenge facing all agencies is to safeguard good decision making in the context of increasing complexity in government administration. Many of the ways of doing so are taken up elsewhere in this report—targeted and regular training for officers, clear guidance in administrative manuals, active case management of difficult and unresolved cases, and ongoing quality assurance and review of problematic decisions.

9.8 Other structural reforms may also warrant consideration. At the administrative level, there is much to be said for identifying early the officer with responsibility for the carriage of a complex case, and requiring that officer to supervise the case until completion. At the legislative level, a recommendation made in the *Other legal issues* report is that consideration be given to amending the Migration Act (and, by inference, other statutes) to insert a specific legislative power to enable officers to revisit and vary decisions that are found to be based upon legal or factual error.

9.9 In summary, agencies should guard against poor decision making resulting from complex legislative and administrative schemes, by ensuring that:

- areas of decision making known to be complex are identified and procedures put in place to provide proper training, guidance and support to officers
- there are clear lines of responsibility in the agency for handling and supervising the resolution of difficult and complex cases
- decisions known to be faulty are studied to see if there are systemic problems that need to be addressed
- staff are encouraged to draw attention to difficulties in decision making and to workshop alternative approaches to dealing with problems
- there is constant review of whether legislative amendment is required to alleviate difficulties in decision making faced by the agency.

## Lesson 10—Check for warning signs of bigger problems

- Does your agency monitor decisions and complaints to check for systemic problems in agency administration?
- Does your agency learn from the experience of other agencies that have encountered problems?
- Does your agency encourage critical self-appraisal?

10.1 All agencies experience problems in decision making. This is to be expected when thousands or even millions of decisions are made by a large number of officers, of varying experience, who are located in offices around the country. The growing complexity of legislation and the intricacy of the issues to be decided adds to the probability of error.

10.2 Sometimes the errors are one-off or exceptional and can be corrected through the agency's internal processes and by external review. At other times, error in a single case is not unique and points to a larger problem that may need to be addressed. It is a function of leadership and good management to identify problem areas and initiate reform.

10.3 What does it take to alert an agency to the problems within? What is needed to trigger an internal reform program?

10.4 An important lesson from the referred immigration cases is that flaws in individual decisions can portray larger problems that need to be addressed by the agency. In short, the reports in the *Rau*, *Alvarez* and *Mr T* cases were, in the words of the Secretary of DIAC, 'the major catalyst for comprehensive business and cultural change in the department'.<sup>11</sup> This included reforms in data management, case management, record keeping, internal audit, client service, stakeholder engagement, training, governance arrangements, cultural values, compliance operations and immigration detention.

10.5 The same has happened in other areas of government. An inquiry by the Joint Committee of Public Accounts into problems in the Midford Shirts case<sup>12</sup> was a stimulus to substantial reform of customs administration. A report of a Senate Committee on the military justice system<sup>13</sup> was followed by a substantial reform program to the procedures for military complaint handling, investigations and discipline. And a report of the Hope Royal Commission on security and intelligence,<sup>14</sup> following a botched training exercise for ASIS officers at the Sheraton Hotel in Melbourne in 1983,<sup>15</sup> fed into legislative and administrative reform of security

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<sup>11</sup> Department of Immigration and Citizenship, 'Palmer Report—two years of progress—The Secretary's introduction', *Information Sheet 1*, June 2007.

<sup>12</sup> Joint Committee of Public Accounts, *Report 325: The Midford Paramount Case and Related Matters, Customs and Midford Shirts—The Paramount Case of a Failure of Customs*, AGPS, Canberra, 1992

<sup>13</sup> Senate Foreign Affairs, Defence and Trade References Committee, *Inquiry into the effectiveness of Australia's military justice system*, June 2005.

<sup>14</sup> Royal Commission on Australia's Security and Intelligence Agencies, *Report on the Sheraton Hotel Incident*, 1984.

<sup>15</sup> See *A v Hayden (No 2)* (1984) 156 CLR 532.

intelligence arrangements and the creation of the Inspector-General of Intelligence and Security.

10.6 A lesson for agencies is that the same process of reform can be triggered internally and driven by the agency when incidents occur that highlight systemic weaknesses in the agency's processes. There is no need to wait—indeed, there is a compelling reason not to wait—for an external crisis to focus attention on problems in agency administration.

10.7 Major case failures will not trigger internal reforms unless the supervisory and managerial arrangements in an agency are designed to capture and highlight problems when they first arise. There must be constant review and analysis of case failures, followed by a briefing to senior officers and ministers. The agency processes must allow those unwelcome messages to get through: cumbersome processes can block bad news that needs to be heard.

10.8 Complaints to the agency, either to its own internal complaints unit or externally to the Ombudsman or similar oversight bodies, are another valuable source of intelligence about potential weaknesses in agency administration. Complaints provide a window on a larger picture; they should feed into a process of continual review and change.

10.9 It is equally important that agencies are attuned to critical self-appraisal. A tendency that can be self-defeating, noticed frequently by the Ombudsman's office, is for agencies to explain away complaints by observing that they relate only to a minor proportion of the total number of decisions made by the agency. The tendency of agencies to downplay the significance of individual errors comes to light also when there is an external review of agency action by the Ombudsman, a parliamentary committee or other independent commission of inquiry. The reports of those bodies are frequently more critical of agencies than agencies are of themselves. And yet, more often than not, agencies accept and implement the recommendations in independent reports. The implication to be drawn is that agencies can be slow to recognise the magnitude or significance of internal problems.

10.10 In summary, agencies should ensure that:

- complaints to the agency and the Ombudsman, and court and tribunal decisions relating to the agency, are systematically reviewed to see if they highlight administrative problems that need to be addressed
- leaders in the agency look for and respond to weaknesses in agency administration that are highlighted by individual case failures or complaints to the agency
- staff in the agency are encouraged to identify and report on decision-making errors and problems in agency administration
- reports from staff about problems in agency decision making and administration are transmitted to senior officers of the agency
- the agency takes heed of case failures and administrative problems in other agencies.

## ATTACHMENT 1—SUMMARY OF REPORTS

### Referred immigration cases

- **Mr T** (Report No 4/2006)  
This report concerned Mr T, an Australian citizen born in Vietnam, who suffered from severe mental illness. Officers of DIAC detained him as a suspected unlawful non-citizen on three occasions between 1999 and 2003. On one of those occasions he was detained for a period of eight months.
- **Mr G** (Report No 6/2006)  
This report concerned the detention of an Australian resident of East Timorese origin who suffered from chronic schizophrenia. He was detained for a period of 43 calendar days in 2002. He was released when he was later found to be a permanent resident who had held an absorbed person visa since 1994.
- **Mental health and incapacity** (Report No 07/2006)  
This report dealt with nine cases of people who appeared to be suffering from poor mental health or incapacity at the time of their detention. In these cases officers uncritically accepted information from unmistakably irrational or delusional people in forming their reasonable suspicion that the person was unlawful. The recommendations in these reports were aimed at improving DIAC's practices in dealing with people with mental health or incapacity issues.
- **Children in detention** (Report No 08/2006)  
This report dealt with ten cases where children were taken into immigration detention. In eight of those cases the children were Australian citizens or lawful non-citizens and were not liable for detention. The main administrative deficiencies that led to these problematic detentions included inadequate training of staff and the lack of a dedicated policy document dealing with issues relating to children.
- **Detention process issues** (Report No 07/2007)  
This report dealt with 70 cases where DIAC's decision to detain was often problematic—falling short of the relevant legislative requirements or resulting from a procedural deficiency. This report highlighted issues surrounding the use of coercive powers and the training and policy guidance that supports DIAC's s 189 detention power.
- **Data problems** (Report No 08/2007)  
This report dealt with 45 cases in which a data recording error occurred at some stage during the detention of a person. Forty-two of these persons were lawful non-citizens at the time of detention. The report highlighted several data management issues for DIAC and recommendations centred on improved training, systems and the need for quality assurances processes.
- **Notification issues, including cases affected by the Federal Court decision in Srey** (Report No 09/2007)  
Part One of this report dealt with 21 cases where a person was detained after a decision was made by DIAC either to refuse the person's application for a substantive visa, or to cancel the person's existing visa. In 20 of these cases there had been an error in notifying of either the decision to refuse or cancel a visa, or an essential preliminary step in making that decision. The

recommendations in this report focused on training and policy development on legislative requirements and implications for decision making.

Part Two of this report dealt with 57 cases where a person may have been affected by the Federal Court decision in *Srey*. This part of the report highlighted DIAC's systemic failure in responding to the implications of a court decision.

- **Other legal issues** (Report No 10/2007)

This report dealt with 33 cases where the detention of people followed the cancellation or refusal of their visas. In many cases, the cancellation or refusal decision was later set aside due to a procedural deficiency or some other error of law. Some cases also involved people who were detained and then released while subject to a deportation order. This report highlighted issues of procedural fairness, record keeping and the legislative complexities associated with the migration regime in relation to revisiting and setting aside flawed decisions. This report recommended that DIAC give consideration to proposing a legislative amendment to allow variation of decisions based on legal or factual error.

## Other immigration reports

- **Report of inquiry into the circumstances of the immigration detention of Cornelia Rau** (Palmer report July 2005)

This report dealt with the detention of Ms Cornelia Rau, an Australian resident of German origin who was in poor mental health during her detention. Ms Rau was detained in 2004 by DIAC in Queensland as a suspected unlawful non-citizen, and was later transferred to Baxter Immigration Detention Centre. She was detained for a total of ten months.

The report was critical of numerous failures by DIAC officers and of DIAC processes that adversely affected Ms Rau. These included the failure by DIAC officers to properly identify Ms Rau, the ongoing failure to review her detention, and the treatment and level of health care provided to her while in detention. The report also identified cultural problems within DIAC's compliance and detention sections and a lack of training for the powers DIAC officers are authorised to exercise. (Mr Mick Palmer AO APM, July 2005).

- **Inquiry into the circumstances of the Vivian Alvarez matter** (Report No 03/2005)

This report related to Ms Alvarez, an Australian citizen, who was detained by DIAC officers as a suspected unlawful non-citizen, and removed from Australia in 2001. While some DIAC officers became aware in 2003 and 2004 that Ms Alvarez had been removed, it was not until 2005 that she was located.

This report identified failures in DIAC's processes and failures by DIAC officers to properly identify Ms Alvarez, the decision to detain her under the Migration Act, the subsequent decision to remove her from Australia, the level of health care provided to her while in detention, and DIAC's response to concerns raised by her former husband as to her whereabouts.