

REPORT FOR TABLING IN PARLIAMENT BY THE COMMONWEALTH AND IMMIGRATION OMBUDSMAN

Under s 486O of the Migration Act 1958

Personal identifier: 443/08

This is the fifth s 486O report by the Ombudsman on Mr X as he had remained in immigration detention following the Ombudsman's combined third and fourth report. The Ombudsman's first report (64/06) was sent to the Minister on 18 May 2006 and tabled in Parliament on 20 June 2006. The Ombudsman's second report (102/06) was sent to the Minister on 24 October 2006 and tabled in Parliament on 5 December 2006. The Ombudsman's combined third and fourth report (336/07) was sent to the Minister on 23 November 2007 and tabled in Parliament on 13 February 2008. This report updates the material in those reports and should be read in conjunction with them.

Principal facts

Visa applications

1. The Department (DIAC) advises that on 10 January 2008, the Minister exercised his detention intervention powers under s 195A of the *Migration Act 1958* and granted Mr X a Global Special Humanitarian Visa (GSHV).

Current immigration status

2. Mr X was released from detention on 11 January 2008. He resides lawfully in the community.

Ombudsman consideration

3. DIAC's further report to the Ombudsman under s 486N is dated 5 December 2007 and the Minister's Statement to Parliament was tabled on 13 February 2008.
4. Ombudsman staff sighted a report by Mr Y, a Turkish-speaking Psychologist from the Transcultural Mental Health Centre, dated 7 April 2007 and communicated with Ms Z, Senior Guardian, Office of the Public Guardian on 12, 13 and 22 February 2008.
5. Ombudsman staff attempted to interview Mr X in February 2008 but were unable to contact him.

Key issues

Health and welfare

6. Mr X has been diagnosed with a Delusional Disorder and was assessed at hospital twice and did not meet criteria for involuntary treatment under the *NSW Mental Health Act 1990* as he was not at risk of self-harm or harm to others.
7. In Report 336/07 the Ombudsman noted, '*DIAC's Detention Health Services advises that a Community Treatment Order under the NSW Mental Health Act 1990 does not operate to enable involuntary psychiatric treatment in Villawood IDC [Immigration Detention Centre] because the centre is on Commonwealth land*'. The basis for DIAC's assertion that the state Mental Health Act would not apply is not clear. DIAC has indicated that the reason is because Villawood IDC is on Commonwealth land. A contrary view could be that the state Mental Health Act, to the extent that it is not inconsistent with any other Commonwealth power, applies to Commonwealth places such as Villawood IDC due to the *Commonwealth Places (Application of Laws) Act 1970*. Although Mr X has now been

released from detention, this issue is raised in this report as it may become relevant for people in similar circumstances detained in immigration detention centres. The Ombudsman notes that involuntary treatment would be a clinical decision.

Guardianship

8. On 2 November 2007, Mr X filed a NSW Supreme Court appeal against his Guardianship Order. Ms Z advised that the order lapsed at the Guardianship Tribunal hearing on 18 February 2008.

Post release issues

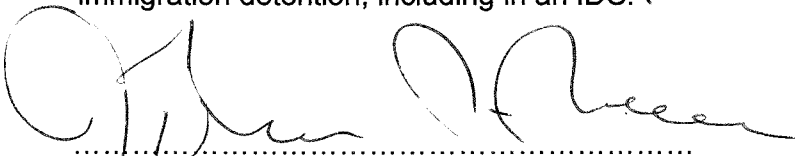
9. When Mr X was granted a GSHV, he refused to leave Villawood IDC and asked DIAC to withdraw from the Guardianship Order hearing. The Villawood IDC DIAC Executive was able to encourage Mr X to leave the IDC and supported him in his transition into the community. DIAC initially provided accommodation for Mr X until 11 February 2008 and gave him \$760. DIAC records indicate that Mr X had a Centrelink appointment on 18 January 2008. As the holder of a GSHV, Mr X is entitled to services available to permanent residents including Centrelink and Medicare. DIAC advises that he is also entitled to assistance in obtaining accommodation under the DIAC-funded Integrated Humanitarian Settlement Strategy.
10. DIAC delivered a letter to Mr X on 26 February 2008 advising him that payment on his serviced apartment had only been extended until 11 March 2008. He was advised on 5 March 2008 of short-term rental accommodation available through the Australian Centre for Languages (ACL). On 7 March 2008 DIAC wrote Mr X another letter informing him that accommodation was available through ACL on condition he make a rental contribution and work with ACL to secure long-term accommodation.
11. DIAC's Detention Health Services referred Mr X to the Richmond Fellowship for post-release transitional support. However, DIAC advises that despite numerous attempted home visits, the Richmond Fellowship were unable to engage with Mr X.
12. DIAC advises that on 13 March 2008, after numerous attempts to assist Mr X to find long-term accommodation, he had not vacated the serviced apartment. After obtaining legal advice, on 14 March 2008, accompanied by three NSW Police Officers, DIAC entered his apartment and packed his belongings. Mr X returned to his apartment on the evening of 14 March 2008 and contacted ACL, who again offered the option of short-term accommodation, which Mr X refused. Mr X has since contacted DIAC's storage service provider to arrange for the return of his belongings. At the time of writing this report, DIAC had no forwarding address for Mr X.

Ombudsman assessment/recommendation


13. Mr X was in detention from January 2004 until January 2008 when he was released on a GSHV with access to income support and health services.
14. DIAC advised the Ombudsman's office in December 2007 that it accepted clinical advice that Mr X's condition would not improve while he remained in immigration detention but highlighted that Mr X refused to leave Villawood IDC unless he was granted a visa. DIAC actively pursued a variety of options in supporting Mr X and moving him out of Villawood IDC but indicated that it did not have the power to grant Mr X a visa. The Minister granted Mr X a GSHV on 10 January 2008.
15. The Ombudsman noted in Report 64/06 parallels between this case and that of Ms Cornelia Rau. The Palmer Report raised the importance of clinical leadership, an assertive approach to care, and the need to actively review cases where problems continue, despite attempts to provide care. The Ombudsman recommended in Report 64/06 that Mr X's case be referred promptly to an independent senior psychiatrist for a

thorough assessment and case review. It was further recommended that the Minister consider using her detention intervention powers to facilitate the most appropriate living arrangements while Mr X's immigration status remained unresolved.

16. In the Ombudsman's second report on Mr X, Report 102/06, the Ombudsman recommended that DIAC pursue the issue of guardianship to ensure that Mr X received the treatment trial recommended by the independent psychiatrist and that the Minister consider making a Residence Determination enabling Mr X's release from Villawood.
17. In Report 336/07 the Ombudsman wrote *'DIAC advises that Mr X needs to be mentally stable before he can be released from detention. It is questionable whether this is a sufficient reason for failing to progress Mr X's movement out of an immigration detention centre. Mr X's illness may mean that he will continue to refuse to speak to DIAC or his guardian. His cooperation should not be essential to DIAC making arrangements to move him'*. The Ombudsman noted that it was inappropriate for Mr X to remain in immigration detention and recommended *'that DIAC take steps to arrange Mr X's release on an appropriate basis and with whatever community support he will accept as soon as possible'*.
18. As the Ombudsman noted in previous reports, Mr X's case is complicated and his mental disorder has been difficult to treat as he has limited insight into his condition and lacks the capacity to consent to or refuse treatment. DIAC is to be commended for the effort taken to support Mr X and facilitate his release from detention and the support provided. As far as the Ombudsman is aware, since his release from detention, Mr X has not taken up offered support services.
19. This case highlights several issues that could also arise in relation to other people in immigration detention. One such issue is the application, in an immigration detention context, of the principle in mental health care of the right to treatment for mentally ill people who lack the capacity to decide to accept treatment. Another is the jurisdictional issue of involuntary treatment in a Commonwealth centre under a state Mental Health Act. It appears in Mr X's case that he remained in prolonged psychological distress without psychiatric treatment because DIAC was of the view that the state Mental Health Act did not apply to a detention centre on Commonwealth land. The issue of mental disorder in the detainee population occurs from time to time therefore the Ombudsman **recommends** that DIAC reconsiders its position, including seeking senior legal opinion on the issue. This is particularly timely in the context of the recently announced new detention principles and the further examination of community detention options. The Ombudsman also suggests that DIAC engages with the Ombudsman's office in their reconsideration of the application of state mental health legislation for those in immigration detention, including in an IDC. \



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Prof. John McMillan
Commonwealth and Immigration Ombudsman



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