

Lessons for Public Administration: the Ombudsman Investigation of Referred Immigration Cases

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Introduction

The publication today of the Ombudsman report, *Lessons for Public Administration*, closes a chapter on a troubling period in public administration. The chapter holds numerous stories of flawed administrative decisions that led to the wrongful detention of many people, including Australian citizens. The incidents of detention were much-publicised in Australia, resulting in considerable adverse criticism for the Department of Immigration and the Australian Government.

On the other hand, this chapter exposes some strength in our system of government, from which – paradoxically – we can draw positive lessons. The investigation by my office of the 247 cases that wrote this chapter was undertaken at the request of the Government and received throughout the full cooperation and support of the Department of Immigration and Citizenship. The large number of recommendations that were made for substantial reform of immigration administration have all been accepted by the Department and the Government. They are being implemented in what constitutes perhaps the largest change program in a central government department that we have witnessed in recent decades.

The Department has actively encouraged the Ombudsman's office to play a role in that change process. This strong cooperation between an executive agency and an external oversight body, in exploring and correcting serious administrative error, speaks well of the system of government.

This new publication, *Lessons for Public Administration*, builds on those developments. The theme of the publication is that errors can and will occur in all administrative systems. Even when a system is working in optimal mode, errors happen. Moreover, the errors are usually the same across government. It is therefore important to know the causes of those errors, and how to prevent and lessen them.

I will firstly give an overview of the Ombudsman work on the referred immigration cases. There is a list of the relevant reports in the Appendix to this paper.

Overview of the reports and findings

In 2005 and 2006 the Australian Government asked my office to investigate 247 immigration detention cases. This followed widespread media publicity about two other incidents – the immigration detention for 10 months of Cornelia Rau, an Australian permanent resident whose true identity was unknown during her detention; and the removal from Australia to the Philippines of an Australian citizen, Vivian Alvarez, whose whereabouts remained a mystery for 22 months.

Following those incidents the Department identified a further 247 cases in which a person had been detained, but later released and their computer record marked with the descriptor 'not unlawful'. The task for the Ombudsman's office was to investigate

whether all or any part of the period of the person's detention was unlawful or wrongful.

The investigation of all 247 cases has been completed, and published in two individual reports, and six consolidated reports. The two individual reports related to Mr T, an Australia citizen, born in Vietnam, mentally ill, who was detained on three separate occasions for a total of 253 days; and Mr G, born in Timor, also mentally ill, who was detained for 43 days until it was resolved that he had held an absorbed person visa for eight years.

The six consolidated reports dealt with mental health and incapacity, covering another nine people, children in detention (10 people), data problems (45 people), notification problems (78 people), detention process issues (70 people), and a report on other legal issues (33 people).

Together, the reports identified legal and factual errors in nearly all 247 cases. There were many cases of wrongful, if not unlawful detention. The periods of detention occurred during 2000-2007; they ranged from a few hours or days in most cases, to over five years in one case, and 6½ years in another. Twenty-six of those detained were Australian citizens.

The individual reports were at times directly critical of officials in the Department of Immigration and Citizenship. In a couple of cases it was recommended that there be further examination of whether there was an Australian Public Service Code of Conduct breach or a lapse in professional standards. The report on Vivian Alvarez described the overall handling of her case as 'catastrophic'. Other criticisms were that some detention errors were inexcusable, that officers failed to perform duties competently, committed serious errors, showed a lack of understanding of their duties, and abrogated their duty of care responsibilities.

Alongside those criticisms, however, was a constant theme: that individual officers should not be singled out and shoulder all blame for what had gone wrong. The mistakes and failures were the consequence of systemic administrative problems.

In short, poor systems will produce bad decisions. Conversely, well-developed systems will minimise problems and result in better decision making.

The system errors and problems that were identified are ones that, over thirty years of Ombudsman complaint handling and administrative investigation, we have identified in other areas of government administration. They are collected in this latest report, setting out Ten Lessons for Public Administration.

The lessons should come as no surprise, and there is nothing new: they capture the basic essentials of good administration. What is new is that the Ombudsman reports contain case study after case study of how a departure from these timeless principles of good administration can have significant adverse consequences for members of the public.

Ten lessons for public administration

Lesson 1 – *Maintain accurate, comprehensive and accessible records.* An error as simple as misspelling someone's name, misstating their date of birth or arrival in Australia, or misfiling their visa or review application, can result in the person later showing up as an unlawful non-citizen and being taken into detention.

Lesson 2 – *Place adequate controls on the exercise of coercive powers.* Powers to detain, to confiscate, to summon, to demand and to penalise are often exercised by staff at low-ranking levels, in offices spread across Australia. The officers will make mistakes unless they are adequately trained, supported by clear manuals and policies, and their work is constantly supervised and monitored.

Lesson 3 – *Actively manage unresolved and difficult cases.* Difficult cases will arise that are beyond the skill of the case officer assigned to the case, but can be managed with help from elsewhere in the agency. Agencies should therefore move matters around, consult other officers, escalate difficult cases, and monitor the risk areas in agency decision making. Vivian Alvarez’s whereabouts were unresolved for over 18 months until her former husband tried a more senior entry point, and the case was brought to the attention of an executive level officer. She was then located within three weeks and a wider inquiry into departmental practices commenced.

Lesson 4 – *Heed the limitations of information technology systems.* We trust in technology, but automated systems are in fact no better or more reliable than the data entered on the system. Officers must not assume that a person is an unlawful non-citizen because the computer screen says they are. Or, if a person cannot be found on the system, the explanation may simply be that the search coordinates were wrongly entered, not that the person gave false information to disguise their real identity.

Lesson 5 - *Guard against erroneous assumptions.* For example, in the immigration context, do not assume that a child has the same citizenship status as its parents; do not assume that information given by State police about a person’s identity is necessarily correct; and do not assume that someone who does not look or sound Caucasian was born overseas.

Lesson 6 – *Control administrative drift.* Be realistic: delay and procrastination *will* occur unless there are procedures in place to stop it. The Rau, Alvarez and Mr T cases were admittedly confusing and difficult for officers to handle, and many officials acted in good faith and worked hard to resolve the identity and other issues. But where things went wrong is that it took ten months to identify Ms Rau, 22 months to resolve that Ms Alvarez was wrongly removed, and 253 days to decide that Mr T should not be detained for a fourth time.

Lesson 7 – *Remove obstacles to prudent information exchange with other agencies and bodies.* Information must be exchanged between government agencies and with other people and organisations. Break down information barriers that impede good decision making. For example, the *Privacy Act 1988* is too easily misapplied and can delay the correct identification of a person. Similarly, government contractors (such as detention centre managers) must understand that relevant information they hold should be passed back to the agency.

Lesson 8 – *Promote effective communication in your own agency.* The ability of staff to make good decisions will be undermined if administrative manuals are out-of-date, if there are different data management systems that are not integrated and that give incorrect answers, or if staff are not informed of important court decisions. The result of one such court decision,¹ studied in these reports, that was not properly understood or communicated within the Department is that over fifty people were either wrongly taken into detention or held longer than was justifiable.

¹ *Chan Ta Srey v Minister for Immigration and Multicultural Affairs* [2003] FCA 1292, discussed in the report, *Notification issues*, Report No 9/2007.

Lesson 9 – *Manage complexity in decision making.* Immigration law and administration is a microcosm of the complexity that now permeates government. Many of the errors that occurred in these 247 cases were a product of that complexity. Officials, who were both competent and well-intentioned, made factual and legal mistakes because they were out of their depth. The same could happen 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.

Bringing those nine lessons together, it is clear what action is required. There must be targeted and regular training of officers, clear guidance in administrative manuals, IT systems that model the business processes of the agency, proper supervision of compliance officers, active case management of difficult and unresolved cases, ongoing quality assurance and review of problematic decisions, identification of the risk areas in administration, effective information exchange, and an agency culture that regards good decision making as a joint and collective responsibility

Moreover, we know those strategies make a difference. During the course of this investigation the Ombudsman's office has watched the transformation occurring within the Department of Immigration. As those strategies have been steadily implemented, the quality of decision making has progressively risen.

And that brings me, finally, to Lesson 10.

Lesson 10 – *Check for warning signs of bigger problems.* All agencies experience problems in decision making. Sometimes the problems are one-off and exceptional, but more often a problematic case is not unique and points to a recurring difficulty in the agency. The Rau, Alvarez, Mr T and other cases show quite powerfully that a flaw in an individual decision can portray a larger problem. Those cases were, in Andrew Metcalfe's words, 'the major catalyst for comprehensive business and cultural change in the department'.²

The implication is clear. An agency does not have to wait – indeed, there is a compelling reason not to wait – for an external crisis to focus attention on the problems within. Through internal monitoring and quality control, and through internal and external complaint handling, agencies can pick up the warning signs and initiate reform when needed. That is perhaps the most important lesson of all to emerge from the referred immigration cases.

Appendix – Ombudsman reports on referred immigration cases

Mr T, Report No 4/2006, March 2006

Mr G, Report No 6/2006, December 2006

Mental health, Report No 7/2006, December 2006

Children in detention, Report No 8/2006, December 2006

Detention process issues, Report No 7/2007, June 2007

Data Problems, Report No 8/2007, June 2007

Notification issues, including Srey, Report No 9/2007, June 2007

Other legal issues, Report No 10/2007, June 2007

² Department of Immigration and Citizenship, 'Palmer Report – two years of progress – the Secretary's introduction', *Information Sheet 1*, June 2007.

Lessons for public administration, Report No 11, August 2007

The two other reports referred to in this paper are:

Report of inquiry into the circumstances of the immigration detention of Cornelia Rau, Report by Mr Mick Palmer AO APM, July 2005

Report of inquiry into the circumstances of the Vivian Alvarez matter, Commonwealth Ombudsman Report No 3/2005, September 2005