INQUIRY INTO IMMIGRATION DETENTION IN AUSTRALIA

Submission by the Commonwealth and Immigration Ombudsman

August 2008

PART 1—BACKGROUND

The office of the Commonwealth Ombudsman is established by the *Ombudsman Act 1976* and exists to safeguard the community in its dealings with government agencies, and to ensure that administrative action by Australian government agencies is fair and accountable. The Act also confers five specialist roles on the Ombudsman; the Defence Force Ombudsman, Immigration Ombudsman, Law Enforcement Ombudsman, Postal Industry Ombudsman and Taxation Ombudsman.

The Commonwealth Ombudsman has long been engaged in the oversight, investigation and review of immigration detention administration. The Commonwealth Ombudsman was given an expanded role in 2005 with amendments to the *Migration Act 1958* (the Act) which gave responsibility to review the circumstances of people held in immigration detention for two years or longer. Later in that year, amendments to the *Ombudsman Act 1976* conferred the title of Immigration Ombudsman on the Commonwealth Ombudsman.

In carrying out the role of the Immigration Ombudsman we conduct a range of activities as part of our review of immigration detention. These activities include assessments of the circumstances of people who have been detained for two years or more, inspection visits of immigration detention facilities, investigation of complaints from, or on behalf of, people who are held in immigration detention and attendance at various detention related consultative forums. Each of these detention related activities is briefly explained below.

As part of the Immigration Ombudsman function and in addition to the detention review role we also inspect and monitor the Department of Immigration and Citizenship's (DIAC's) exercise of its compliance function including the use of search and entry powers, detention decisions and DIAC's removal and airports operations. We also undertake investigations into broader systemic issues across the range of immigration administration.

Our complaints, inspections and two year detention review work enables the office to undertake an integrated approach to the review of immigration administration. The range of functions enables greater flexibility in the means by which issues are taken up by our office, including own motion investigations, informal dialogue with DIAC, engagement in various DIAC client forums and sharing a systemic issues register with DIAC.

PART 2—THE ROLE OF THE IMMIGRATION OMBUDSMAN

Reporting on people held in immigration detention for two years or more

Under the Migration Act the Secretary of the Department of Immigration and Citizenship is required to provide the Ombudsman with a report relating to the circumstances of a person's detention (s 486N) where a person has been in detention for a period, or periods, totalling two years. A report is also made to the Ombudsman at the end of each successive period of six months detention after that time (s 486M). The Ombudsman is required to give to the Minister an assessment of the appropriateness of the arrangements of a person's detention (s 486O), even if they are no longer in detention (for example if they have since been granted a visa or removed from Australia). A version of the report that protects the privacy of people is also prepared. The Minister is required to table the de-identified report in Parliament within 15 sitting days of receipt.

The assessment may include any recommendations the Ombudsman considers appropriate. The Minister is not bound by any of the recommendations made by the Ombudsman. The Minister's response to the recommendations is also tabled in Parliament with the Ombudsman's de-identified report.

In addition to information received from DIAC, consideration is also given to other information. Officers from the Ombudsman's office conduct face-to-face interviews with people wherever possible and telephone interviews for subsequent reports. We also have regard to reports from the detention health services providers, the person's Tribunal and Court decisions, submissions to the Minister and any other documentation the person, their migration agent, lawyer, treating health professional or support person considers relevant.

The Ombudsman's detention review reports which have been tabled in Parliament as well as the Minister's response to the report can be found on our website at http://www.ombudsman.gov.au/commonwealth/publish.nsf/Content/publications_immigrationreports

Immigration detention inspection and monitoring role

Our inspection and monitoring of immigration detention centres as well as other forms of immigration detention including residential housing centres and community detention commenced in 2006. The purpose of this function is to monitor whether detention service standards, including access to medical and other services and activities aimed at maintaining detainees' well-being, are being met. As part of this function we provide feedback to DIAC as well as to its service providers including recommendations where standards have not been met or where they need to be further developed or adjusted.

Initially inspections of the mainland immigration detention centres were conducted on an 'announced' basis. Since September 2007 such visits have been conducted on an unannounced basis with DIAC executives at the centres only being advised of the intention to visit approximately thirty minutes in advance.

Issues we have focused on in our inspections and monitoring role include:

- conditions in Stage 1 of Villawood Immigration Detention Centre (IDC) including observation rooms
- management of the mess in Stage 2 of Villawood IDC
- documentation and review of decisions to transfer people to the management support unit and adequacy of services provided to people in the unit
- administration of the Purchasing Allowance Scheme
- access to activities while in detention
- administration of property records
- complaint handling by DIAC and detention service providers
- the quality of incident reports and adequacy of action taken to respond to allegations of assault.

Handling complaints about immigration detention

Ombudsman office staff provide detainees at mainland immigration detention centres with a complaint-taking service on a regular monthly basis. Complaints are also taken from, or on behalf of, detainees by phone, fax and letter.

Where possible, complaints are resolved at the detention centre with discussion with the appropriate DIAC or detention service provider management. Where further investigation is required, complaints are pursued with DIAC's national office in accordance with complaint taking protocols.

Participation in immigration detention consultative forums

Ombudsman staff regularly attend various consultative forums focused on immigration detention. These include client consultative meetings and food delegates meetings which include detainee representatives at detention centres, and community consultative group meetings which are held bimonthly in capital cities where key stakeholders meet with DIAC and detention service providers regarding detention issues. We also have observer status on the Detention Health Advisory Group.

These forums enable the Ombudsman's office to follow up on issues we identify through our other activities. They are also important information sharing forums and enhance our understanding of contemporary and local detention matters.

PART 3—GENERAL OBSERVATIONS

Recent improvements in detention administration

These broad ranging and integrated detention related activities have given the Ombudsman's office a unique insight into immigration detention administration. We offer the following observations of the current immigration detention regime and its effects upon the people detained. At the outset we would like to note that since taking up the Immigration Ombudsman role we have observed many improvements in key areas of detention administration, including:

- ***Greater flexibility in immigration detention arrangements*** - including the introduction and use of a variety of non centre based forms of detention such as community detention, the construction of the Brisbane and Melbourne Immigration Transit Accommodation, immigration residential housing in Perth and Sydney and the increased use of alternative detention arrangements

- ***No children in immigration detention centres*** - families with children are no longer detained in immigration detention centres. If they need to be detained, alternative detention arrangements such as community detention are found.

- ***Improvements in detention health services*** – including DIAC acting on the duty of care owed to detainees, the development and implementation of a detention health framework and supporting health standards, and improved health services in detention centres as well as in community detention

- ***Integrated client placement*** – providing a mechanism for DIAC and the detention service providers to regularly assess the appropriateness of individual detainee's detention arrangements

- ***Improvements in infrastructure*** – detention centre infrastructure improvements have been made and the recent announcement of improvements to key priority areas at Villawood IDC (stage one and the management support unit) are examples of further improvements being planned

- ***Case management*** – providing a mechanism for improved monitoring of the immigration, detention and other needs of detainees, including any transitional needs following release from detention

- ***Greater transparency*** – including through various governance committees such as the Detention Health Advisory Group, Community Consultative Group and detention centre based client consultative meetings which incorporate external stakeholder representation. In addition, there is increased monitoring of detention particularly by the Ombudsman but also by agencies such as the Human Rights and Equal Opportunity Commission, Immigration Detention Advisory Group and the Australian Red Cross

- ***Complaint handling*** - acceptance by DIAC and detention service providers of complaints as part of core business and their assistance with organising regular Ombudsman complaint taking sessions

- ***Improvements in compliance activity checks and reviews*** – greater checks of detention decisions by management in relation to each compliance activity and improved training and instructions to staff on compliance and detention issues

- ***Increased used of bridging visas*** – greater use of bridging visas by DIAC compliance officers as an alternative to detaining unlawful non-citizens

- ***Improved coordinated response to court decisions*** – including review of the detention population to determine those who may be impacted by court decisions and to release affected people from detention

- ***Reduction in the number of long term detainees*** – over the past three years the number of people in immigration detention for two years or more has reduced from 160 to 44 in August 2008. The recent review by the Minister of long term detention cases significantly impacted on reducing the number of long term detainees.

Areas of concern

In some areas of immigration detention administration there continue to be areas of concern requiring further focus. These include:

- the length of time people spend in immigration detention centres
- timely and regular consideration of alternative forms of detention
- the use of the management support unit and adequacy of services provided to people in them
- how the more vulnerable detainees who may be threatening suicide or self harm are monitored and appropriately cared for
- the need for further infrastructure improvements in some of the centres, in particular Villawood IDC
- access to activities while in detention, including the implementation of the excursions policy
- the adequacy of action taken to respond to allegations of assault, including police jurisdiction over immigration detention centres.

Changes to the immigration detention scheme

The changes to Australia's immigration detention scheme announced by the Immigration Minister on 29 July 2008 are significant reforms in this area of immigration administration. Of particular note is the commitment to a set of seven detention values which will underpin the operations of DIAC as well as detention service providers. An important reform will be applying a risk based assessment so that the presumption will be that persons will remain in the community rather than immigration detention while their immigration status is resolved.

The values also commit to detention as a last resort and for the shortest practicable period. Implementation of such values will however need regular monitoring by DIAC as well as by external oversight agencies. This was recognised by the Minister who announced that DIAC will need to justify a person's detention including having senior departmental officials examine every three months whether further detention of the individual is justified and enhancing the role of the Ombudsman to review all situations where a person has been detained at six months or more.

PART 4–ADDRESSING THE TERMS OF REFERENCE

1. The criteria that should be applied in determining how long a person should be held in immigration detention

When determining the criteria for assessing length of time in detention we suggest that the following be taken into account:

- the application of a risk-based assessment of detention
- assessment of 'reasonable suspicion' that a person is an unlawful non-citizen
- the use of bridging visas to avoid placing unlawful non-citizens in immigration detention or if detained releasing them from detention
- the form of immigration detention arrangement

Before discussing these issues in more detail it is important to consider the factors which have impacted on the length of time in detention and the affect prolonged detention has had on individuals. These observations are drawn from our observations in reviewing immigration detention.

Factors affecting the length of detention

The Ombudsman's two year detention review function includes a detailed analysis of the circumstances surrounding a person's detention and often results in recommendations aimed at resolving a person's immigration status. More recently, the Ombudsman's office has contributed to the Minister's review of long term detainees, with a particular focus upon the mental and physical health of those who have been detained for two years or more.

The total number of people detained for more than two years has reduced from about 150 in June 2005, to 72 at the start of the Ministerial Review of Long Term Detainees that was announced in March 2008. At the end of the review, in June 2008, 53 people remained as long term detainees, with an expectation that this will reduce further when all the decisions made by the Minister come into effect. At the conclusion of the review the Minister decided that 31 people be processed for visa grant or have been granted visas, 24 have or will be removed and the remaining 17 are subject to ongoing proceedings and their immigration status could not be resolved at the time.

There are some key lessons coming out of this Ministerial review of long term detainees which can be applied to reviewing people's detention arrangement at a much earlier time. One such lesson was the importance of a more coordinated and proactive approach to reviewing detention placements involving senior management from all relevant areas within DIAC. Regular consultation with the Ombudsman's office during this review process also added to DIAC's level of understanding of the detainee's circumstances and the possible options available. Having external review by the Ombudsman's office does not however negate the need for DIAC senior management to ensure they continue to give this proper priority and focus. Taking a regular case management approach to reviewing people's detention arrangements is necessary.

The long term detainee population can be generally categorised into those who became unlawful non-citizens having overstayed their visa and those who had their visas cancelled, including those cancelled on character grounds under s 501 of the Migration Act. Many long term detainees have also been unsuccessful in their application for a protection visa.

There may be a number of reasons why a person has not been removed and has had their immigration detention prolonged:

- ***Litigation*** often prevents removal action from being taken. It is not uncommon for an unlawful non-citizen to claim protection only when detained. It is also not uncommon for those subject to character cancellation under s 501 to be made aware of the decision not long before they are due to be released from correctional detention and just before they are taken into immigration detention. This means that detainees who want to remain in Australia are often pursuing litigation whilst they are in immigration detention. Depending on the individual circumstances, a detainee may be able to seek review of an unsuccessful visa application, of a decision to cancel a visa or a removal decision, to bodies such as the Refugee Review Tribunal, Migration Review Tribunal, Administrative Appeals Tribunal, Federal Magistrates Court, Federal Court, Full Federal Court and the High Court. These processes can take a significant period of time to conclude. To date the norm has been that people remain in immigration detention during these challenges. Rarely are people released from detention pending resolution of their tribunal or court challenge. We note that the new detention

values and approach announced by the Minister should change this assumption or practice.

- ***Ministerial requests***. Many detainees have the right to lodge a request for Ministerial intervention, which DIAC assesses against guidelines. Meanwhile, any planned removal action is usually postponed. Many of the Ministerial intervention requests are made under s 48B of the Migration Act, seeking to have the s 48A bar, which prohibits the lodgement of a fresh protection visa application, lifted. A shorter turn around time for the processing of these requests would also assist to reduce the length of a person's detention. A factor which may impact on time taken to consider such intervention applications would be whether these discretionary powers continue to reside solely and personally with the Minister or whether there is capacity for delegation of some of the powers.

- ***Lack of cooperation*** where detainees refuse to sign a request for travel documents which may be required in order to achieve removal from Australia. This is a common occurrence as many long term detainees fear returning to their home country for a variety of reasons. This fear may not be related to a refugee convention reason that would otherwise attract protection. For many long term detainees who have used every legal avenue to challenge DIAC decisions the adjustment required to return to their home country is hard to make.

- ***Inability to obtain travel documents*** is also a problem which can extend the period in detention. The Ombudsman's office has been advised that some countries such as Russia and, until recently, India, will not provide travel documents unless the removal is voluntary.

- ***Establishing the identity of a person*** may also be a problem if it has not been established sufficiently so as to enable a foreign country to issue travel documents.

The affect on mental health as time in detention increases

As a result of preparing almost 440 two year detention review reports, the Ombudsman's office has seen a number of trends emerge.

A major theme in the review of long term detainees has been the increase in mental health issues evident. This is not only a problem for individuals suffering from mental illness but it can also have associated impacts upon detainee behavior with significant consequences for the order and management of the detention centre and the safety and well being of all detainees. There is scope for a greater focus on alternatives to immigration detention for those with mental health issues.

The following case studies refer to the discussion in Ombudsman two year detention reports on the impact of prolonged detention on mental health.

Case study Reports 91/06 & 427/08: Mr A

Mr A was placed in community detention in February 2008 after having been detained since March 2004. He was diagnosed by a consultant psychiatrist as '*suffering from a major depression arising from the isolation that he was experiencing in the detention environment and the uncertainty that he had over his status ... leading me to a diagnosis of generalised anxiety disorder with secondary depression. The onset of this condition occurring during detention, the fact that it has gotten worse with time and that he*

has proven largely unresponsive to medications and psychotherapy suggest that his condition is a response to being in the detention environment and the stress associated with applying for a visa'.

The detention psychological services provider, PSS, reported that *'Mr A's mood appears to be related to long term detention ... as previously mentioned Mr A's ongoing detention is detrimental to his mental health'.* At interview with Ombudsman staff, Mr A also complained about the deterioration in his mental health during detention.

Case study Report 358/08: Mr C

Mr C was detained in June 2003. The Ombudsman said in Report 358, *'recent psychiatric and psychological evidence notes that Mr D has been diagnosed with significant depression and anxiety, which is related to his prolonged detention. The medical evidence notes it is a matter of urgency for his situation to be resolved before his mental state deteriorates further.*

'Mr C's permanent visa was cancelled under s 501 in February 2003. He had been a lawful Australian resident since 1990, though he had spent some time in prison for offences committed in Australia. He has been in immigration detention for over four and a half years since he finished serving his criminal sentence. The period that he has spent in immigration detention is considerably longer than the non-parole period of 31 months he spent in imprisonment. Mr C was taken into immigration detention in preparation for his deportation, which has not yet occurred. It is now two years since the Ombudsman first recommended that Mr C be considered for release on a visa pending any definite arrangement for his removal from Australia. Taking into account these considerations, the Ombudsman again recommends that Mr C be granted a suitable visa with work rights'.

Mr C was part of the Ministerial review into long term detainees. Being a s 501 case, the Minister deferred making a decision until a review into s 501 cases has been completed. He remains in an IDC.

Case study Reports 96/06 and 391/08: Mr D

Report 96/06 noted that *'whilst there is no current medical evidence available to the Ombudsman that indicates that detention is having an adverse impact on his mental health, the risks of this occurring must increase with continued detention'.*

In Report 391 of March 2008 the Ombudsman noted that *'Current clinical reports indicate that Mr D's mental health has deteriorated, and will continue to deteriorate, as a direct result of the length of his detention and his fear of the future if he is returned. The Ombudsman is of the view that there is now a compelling need for alternative detention arrangements to be made for Mr D'.*

The Ombudsman recommended that the Minister consider alternatives to an IDC, either community detention or release on a visa. Mr D was granted a Bridging Visa E on 3 June 2008.

It is apparent that decisions about the length of a person's detention should take account of their mental health and capacity and, where necessary, include liaison with relevant mental health State and Territory authorities.

Concerns that some mentally ill detainees may not have the capacity to conduct their own affairs and make rational decisions regarding their immigration future

An appreciable number of long term detainees display mental health problems. Some spend periods in hospital either voluntarily or scheduled under a State mental health Act. There are instances in which detainees have a guardian appointed. However, there remain some detainees who have significant mental health problems but

continue to make decisions for themselves. This raises questions about their mental capacity and whether they are able to fully understand the complex issues that arise in immigration matters.

Case study Report 409/08: Mr E

A psychiatrist from Banks House Psychiatric Unit reported *'it is impossible to separate Mr E's true desire to be dead from his desire to be removed from Villawood Detention Centre to Bankstown Hospital ... My view is that it is not appropriate for Bankstown Hospital to be used as a "refuge" from detention and it appears that this is the only additional "treatment" we can offer (he has refused ECT) ... the only way to mitigate this man's risk is to expedite resolution of his visa status rapidly or to facilitate his deportation'.*

This view was reflected in medical reports stating *'I agree that he suffers from a chronic adjustment disorder with depressed mood which technically would meet DSM-IV criteria for major depression but response is certainly directly an outcome of his prolonged detention and his loss of hope for any future. As we stated the only remedy is "freedom". He remains a high suicide risk'.* Prof. S recommended *'It is implausible that any standard psychiatric intervention will make much difference to his core depressive symptoms or suicide risk. The only "intervention" that will change the situation is resolution of his refugee status'.* Prof. S concluded *'It is troubling to witness a situation where the application of refugee policy so directly impacts adversely on the mental health of a patient whatever the validity or otherwise of his claims for protection'.* Mr E was moved to community detention arrangement in May 2008.

Case study Report 62/07: Mr F

Mr F was detained with his wife and four children in 2003. When the Ombudsman completed Report 62, Mr F and his family had been detained in community detention since July 2005.

The Ombudsman noted that *'from the available evidence, Mr F appears to have a serious mental illness, a psychotic disorder, either a form of schizophrenia or a paranoid delusional disorder. This illness appears to be affecting his judgement in areas related to his delusional thinking'.*

The PSS psychologist provided a diagnosis of Delusional Disorder, stating *'Mr F did have a reduced capacity to make well-informed decisions, such as issues relating to medical concerns and legal representation'.* DIAC reported that *'Mr F presents as being both delusional and paranoid, particularly in regards to government departments'.* The RRT noted that *'the combination of what he says has happened to him in the past and his general demeanour at the hearing suggests that he may suffer some form of mental illness'.*

The lawyer acting for Mr F wrote to DIAC on 13 November 2003 and asked for a formal psychological assessment before proceeding with his PV application. The RRT reports that a psychological assessment was not carried out. The RRT hearing went ahead as the Tribunal was satisfied that Mr F was able to understand the nature of the Tribunal proceedings.

DIAC confirmed that there is no record of Mr F being assessed by a psychiatrist whilst in detention or during the period of his residence determination. There is no mention of Mr F's mental health problems in the brief IHMS reports.

The Australian Red Cross obtained Mr F's agreement to have a psychological assessment. A Mandarin-speaking clinical psychologist assessed Mr F: *'Mr F might have been suffering from a chronic schizophrenia form of paranoid delusional psychosis. He showed that he experienced moderate anxiety and depression'.*

Subsequent to that report, DIAC advised that Mr F had agreed to see a psychiatrist and *'Mr F's current presentation is consistent with the diagnosis of 297.1 Delusional Disorder, persecutory type'.*

PSS also noted that *'Mr F's longstanding persecutory belief, as well as his mistrust in medical practitioners is affecting his ability to make well-informed decisions in relation to his wife's medical concerns'*.

Mr F, his wife and children were granted Global Special Humanitarian Visas (GSHV) and released from detention on 7 March 2008.

A question that sometimes arises in long term detention cases is whether an involuntary referral should be considered, in line with the principle of the *right to treatment*. This principle can apply where a person has disabling symptoms of mental illness, they have limited insight about their condition, and the benefits arising from involuntary referral could outweigh the risks. The Ombudsman has recommended in some reports that DIAC refer a detainee to a psychiatrist and a mental health multi-disciplinary team who may be able to confirm the diagnosis, advise on management issues, and make a professional recommendation on the option of involuntary treatment.

Administrative drift

In many older cases the length of a person's detention was extended due to periods of inaction by DIAC. People remained in detention for extended periods because there had not been a coordinated approach to dealing with a detainee's case. The more difficult cases also took longer to resolve. In more recent times however we have noticed an improvement in this area and less evidence of administrative drift. It is expected that the regular and more comprehensive review by DIAC, the external review by the Ombudsman at six months and the case management approach to those in detention, will have an impact in redressing delay in resolving difficult cases. This reinforces the need for regular case management and coordination within DIAC.

Case study Report 375/08: Mr G

'It is difficult to draw any conclusion other than that administrative drift within DIAC is causing the continued detention of Mr G. The available medical advice is that Mr G should be in a less restrictive environment and the Ombudsman's two previous recommendations were that, should there be any delay in removing Mr G, then alternative detention arrangements or a visa should be considered by the Minister.'

A risk-based assessment of detention

The new detention values reflect a more focused risk based assessment for determining time in immigration detention. The key determinant of the need to detain a person in an immigration detention centre will be risk to the community. Under the new approach to detention, once health and safety checks have been successfully completed, continued detention while immigration status is resolved is unwarranted.

As part of the risk based focus the detention values set out three groups that will be subject to mandatory detention:

- all unauthorised arrivals, for management of health, identity and security risks to the community
- unlawful non-citizens who present unacceptable risks to the community
- unlawful non-citizens who have repeatedly refused to comply with their visa conditions.

Specifying the criteria for detention in this way should have the effect of both reducing the number of people placed in immigration detention as well as the length of time they need to remain in immigration detention.

An important principle is that *'people are detained for the shortest practicable time, especially in centre-based detention'*. This has been a focus of many two year detention assessments. This principle has been enhanced by the new detention value that '*detention in IDCs is only to be used as a last resort and for the shortest practicable time.*'

One issue that will squarely arise is the application of the risk assessment to detainees who are subject to s 501 visa cancellations. The concern will be that s 501 visa cancellation detainees (who objectively may not be a risk to the community or at risk of absconding) will not be placed in less restrictive detention arrangements or released into the community through the grant of bridging visas. There is a danger that s 501 detainees will, for a long term period, remain in immigration detention centres irrespective of the merits of their case to be placed in less restrictive environments. In recent times s 501 detainees have been released from detention for at least a period of time following court decisions such as *Nystrom* and *Sales*. Such releases were made without any risk assessments. It is important in the future, where there is continuing detention of a person affected by s 501, that there should be a clear evidentiary basis to explain how the risk assessment principles were applied. It is not uncommon for some s 501 detainees to spend more time in immigration detention than they did in correctional detention.

Assessing and reviewing a 'reasonable suspicion'

When examining the criteria to be applied in determining the length of time a person should be held in immigration detention, consideration should be given to the initial point of detention following immigration compliance activity. At this point DIAC may need to consider a range of things – such as whether a reasonable suspicion that a person is an unlawful non-citizen is maintained or whether it would be more appropriate to release the person from immigration detention by granting them a bridging visa.

It is essential that, in situations where there is a reasonable suspicion that the person is an unlawful non-citizen, immigration detention should be limited to periods where that reasonable suspicion is maintained and can continue to be justified. Ongoing and active review is essential. If there are doubts about whether a person is an unlawful non-citizen (because of uncertainty over their immigration status or their identity) the question of whether a reasonable suspicion can be maintained needs to be continuously and thoroughly tested during any period of detention. In some of the 247 referred immigration detention cases we investigated we found that DIAC had wrongfully detained people because they did not test whether the reasonable suspicion was sustained or believed that the reasonable suspicion existed because the person's identity or immigration status could not be ascertained.

The following case from 2005 revealed a failure to examine whether there was still a reasonable suspicion that a person is an unlawful non-citizen.

Cast study Report 14/05 & 99/06: Mr H

Mr H told Police in 2002 that he was unlawfully in the country and was taken into immigration detention. When the Ombudsman reported in December 2005, Mr H had still not been identified.

The Ombudsman noted *'it can be acknowledged that in recent months DIAC has acted strenuously to identify Mr H, by way of database searches, contacts with previous associates, and visits to the place where he was detained. The same cannot be said of the efforts taken in 2003 and 2004, when seemingly little was done beyond interviewing Mr H. DIAC failed to ask for his fingerprints from NSW police until January 2004 (by which time they had been destroyed) and failed to speak to the arresting police officer until 2005. Notwithstanding that Mr H had a number of regular visitors, little effort was made to obtain information from those visitors until 2005. On 14 July 2005, the DIAC file notes that it is not clear whether Mr H had been directly asked if he was a citizen or a permanent resident.*

'Mr H's case worryingly suggests, as noted in the Palmer Report on Ms Rau, that there are systemic failures in the way that DIAC investigates the circumstances of individuals who are uncooperative or confusing in disclosing their identity. A foreseeable consequence of a DIAC failure of that kind is that a person may be held in immigration detention for a longer period than is necessary or lawful. As to Mr H, he has been in immigration detention for three years, though it has never been convincingly established that in fact he is an unlawful non-citizen.'

The Ombudsman recommended in Report 14/05 that DIAC seek further legal advice on whether there were grounds to support the continuing detention of Mr H under s 189. The Minister stated that Mr H was released from immigration detention on a Removal Pending Bridging Visa (RPBV), following receipt of legal advice that the possibility of him being an unlawful non-citizen was no longer '*of sufficient cogency to warrant ongoing detention*'.

The view expressed in Report 14/05 was that the restrictions associated with a Removal Pending Bridging Visa (RPBV) would only be appropriate if DIAC maintained its 'reasonable suspicion' under s 189 that he is an unlawful non-citizen. In Report 99/06 the Ombudsman noted that on a RPBV Mr H is prevented from travelling overseas and he was required to comply with reporting requirements, with the attendant risk of being returned to immigration detention if he breaches those requirements. The Ombudsman also noted that if DIAC continues to hold a reasonable suspicion about Mr H, then a RPBV may be appropriate. On the other hand, '*If Mr H's circumstances do not meet the "reasonable suspicion" test he would be entitled to be released into and remain in the community free of any restriction'.* The Ombudsman recommended that DIAC continue to monitor whether it maintains a reasonable suspicion that Mr H is an unlawful non-citizen. This is necessary to avert the danger that a person could continue on a RPBV into the indefinite future. In addition, the Ombudsman is aware that many people who were released on a RPBV in 2005 remain uncertain of their future in Australia.

Bridging visas

Even within a mandatory detention statutory and policy framework not all unlawful non-citizens need to be placed or kept in immigration detention following immigration compliance activity. The detention of unlawful non-citizens must be considered in the context of the equally legitimate bridging visa statutory and policy framework. The granting of bridging visas enable those who would otherwise be in immigration detention to remain lawfully in the community, usually until a particular event has passed (for example 28 days following notification of an unsuccessful Tribunal decision) or following set time (for example two weeks to enable the person to make arrangements to depart Australia).

It is however recognised that the bridging visa regime is complex and has restrictions which do not really cater for the full variety of circumstances that may otherwise justify either non detention in the first place or subsequent release from detention.

This complexity and restrictions in bridging visas may be a reason for limited or inconsistent granting of bridging visas by DIAC compliance or detention officials. We have provided feedback to DIAC that greater guidance for officers making decisions will lead to improved consistency in decision making. Our inspection of DIAC's compliance activity in recent times has however verified a trend towards a more beneficial interpretation of bridging visa entitlement adopted by DIAC.

A more fundamental review of bridging visa criteria and entitlement, with a view to simplification, comprehensiveness and greater flexibility, is warranted. This is particularly so given the government's recent changes to immigration detention and the adoption of a risk based approach to detention. The present bridging visa legislation and policy does not sit comfortably with the changed focus in detention. Bridging visa criteria are directly relevant to the criteria to determine the length of time a person spends in immigration detention. As such, reform of bridging visas is an issue of present importance.

Form of immigration detention

An important factor which should be taken into account in determining appropriate criteria for length of time in immigration detention is the form of immigration detention the person is accommodated in. Clearly a person's experience in an immigration detention centre, with stage one at Villawood IDC being one end of the spectrum, will be very different to being placed in community detention under the residence determination provisions of the Migration Act. It would therefore follow that even though the general principle that a person should spend the shortest practicable time in detention applies irrespective of the form of detention, it would be appropriate to have additional criteria to minimise detention centre placement. Taking a risk based approach to immigration detention, as articulated in the new detention values, will be an important factor in minimising the time a person needs to be placed in centre based detention. In addition to this risk based approach, consideration needs to be given to the health and welfare needs of the person in deciding the appropriate form of detention.

We suggest that immigration detention should be underpinned by an additional principle that, consistent with the other principles, each person should be placed in the least restrictive form of detention available. This should be accessed at the earliest possible time. This principle would be in keeping with the administrative rather than punitive nature of immigration detention.

Quality of information given throughout detention

In order for people who are detained to make informed decisions it is important that they are aware of their options and provided with an appropriate level of advice. It is apparent from our two year detention review caseload and immigration detention complaints that some detainees have not fully understood or been able to act upon the induction information that they are given at the commencement of their detention.

Some information is required to be provided by statute and is included in the Very Important Notice (VIN). Other information is provided in the GSL induction package. However, our experience is that there is no comprehensive, simple outline of the options available to detainees who would like to challenge or complain about DIAC's decisions. Although DIAC's statutory requirements are being met by the provision of more formal notices, having a summary of key information and all the options available to detainees in one, simple document, may help detainees make informed choices. It would assist detainees if they were provided with a comprehensive

detention induction package that provides their options for appropriate referrals to free migration and legal advice as well as information about voluntary departure and removals processes which may enable people to make more informed decisions.

Provision of legal services for detainees

While the Migration Act provides for a person to be afforded 'all reasonable facilities' for obtaining legal advice on request, not all people have sufficient awareness of the Australian legal system at the time of entering detention to identify and request assistance in contacting an appropriate service. In the absence of the systematic early provision of information about legal advice and referral services, it may be some days after a person is first detained that they obtain this information by other means.

In many cases the best interests of an unlawful non-citizen may be served by departing Australia voluntarily and making an application off-shore. This can minimise detention as well as exclusion periods and costs, including accruing costs of detention and removal which, unless paid, would operate as a barrier to return to Australia. In other cases an on-shore application will be appropriate, but may need to be made within the two working days prescribed by s 195 of the Migration Act. An ill-advised protection visa application which is subsequently rejected can prevent the making of further applications, while time served in detention during consideration of the application may result in increased costs. In summary, actions taken in the first days following detention may have serious consequences for a person's future migration options.

This is also a time when people, affected by the upheaval of being taken into detention, are most vulnerable to taking ill-advised action or following unreliable sources of advice in the hope that they will resolve their case and be released from detention. The combination of the above circumstances makes timeliness critical for the provision of reliable legal advice to detainees.

We have observed that a number of people at complaint sessions we undertake at detention centres, present with correspondence or documents from a variety of sources (such as DIAC, the Minister's office, courts or tribunals) seeking explanation of what the documents are, what is happening in their case, or advice or assistance with their case. Unless there appears to be a matter of administration arising from the request, our general response is to refer the person to seek legal advice. In doing so we have observed that some people in detention:

- do not know how to access qualified reliable legal or immigration agent advice
- have acted or omitted to act to their detriment prior to receiving any advice
- have acted or omitted to act to their detriment by relying upon the advice of other detainees
- have not understood advice received
- have paid unscrupulous providers for what may have been inappropriate assistance
- have become committed to a course of action, including ones which prolong detention, based upon erroneous information, assumptions or hopes, which may not have been the case had they received qualified reliable advice at an early stage.

In the course of providing suitable referrals for advice, it has become apparent that there are some gaps in the availability of services to meet the need for reliable, credible and timely advice and also some barriers to access.

Section 256 of the Migration Act provides for detainees to be given visa application forms and reasonable facilities for obtaining legal advice or taking legal proceedings in relation to their immigration detention. The GSL Detainee Information Handbook, provided on induction, indicates that faxes to lawyers can be sent free of charge and that faxes from lawyers will be given to the detainee. Lawyers may visit at the scheduled visiting times and use the interview rooms with three days notice. However the booklet contains no information about how to contact or find a lawyer, nor do the induction talking point notes.

The Immigration Advice and Application Assistance Scheme (IAAAS), which is established by DIAC and funds 23 service providers around Australia, provides free advice and assistance within contracted guidelines to protection visa applicants. Assistance however ceases at the point where the person is found to meet the criteria for a visa or has been found by the relevant merits review tribunal, not to meet the criteria for grant of the visa. IAAAS is not available to people seeking judicial review or Ministerial intervention, even if provision of such advice might prevent the lodgement of unmeritorious requests or applications. Nor is IAAAS available to those not applying for protection. It is important to note that the majority of people in detention are not pursuing protection claims.

Owing to the diverse disadvantages affecting people in detention, including language, cultural and often educational or health disadvantages, the complexity of migration law and people's individual circumstances, we would suggest that people in detention would be best served by access to face to face advice. A realistic assessment of a person's case provided at the earliest opportunity by a credible independent provider may also assist people to come to terms with likely migration outcomes and reduce any adverse personal consequences of unnecessary periods of time spent in detention or involuntary removal.

It may be appropriate, to avoid the encouragement of unmeritorious claims, that such a service be provided on a not for profit basis, for example by a Legal Aid Commission or a community service with sufficient resources and capacity.

Detention debts

A further consequence of detention is the raising and recovery of detention debts. The existence of detention debts may also prevent people from legitimately re-entering Australia in the future. It is particularly important that people are made aware of the quantity of their detention debt throughout their detention.

In April 2008, the Ombudsman published an own motion investigation report into *DIAC's Administration of Detention Debt Waiver and Write-off*[1]. Under s 209 of the Act an unlawful non-citizen who is detained is liable to pay the Australian government the costs of his or her detention. Similarly, s 210 imposes a liability on a person who is removed or deported to pay the costs of their removal or deportation. The report indicated that DIAC could improve in the following areas:

[1] Report No.2/2008, April 2008 see http://www.ombudsman.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports_2008_02/$FILE/reports_2008_02.pdf

- Every request for a waiver of an immigration debt should be submitted to the Department of Finance and Deregulation, even where DIAC has decided to write-off the debt
- DIAC should introduce timeliness standards to prevent unnecessary delay and to ensure people are advised at regular and appropriate intervals of progress in their case
- The 'Notice of Detention Costs Incurred to this Date' should be provided to people in detention at regular intervals during their detention
- DIAC should review its policy and practices to ensure debt waiver is considered where a person is or was released from detention as 'not unlawful'.

It is apparent that immigration detention costs as well as detention debts would be kept to a minimum if periods of detention are limited. It is also possible that some less restrictive forms of detention would cost less and reduce the final amount of detention debts.

It is timely however, given the government's broader review of immigration detention that consideration is given to a more fundamental review of detention debts. As part of the review consideration should be given to the fact that most debts are either written off or are waived. It is also worth re-examining the policy basis for the imposition of detention debts. It is important in any policy review to note that detention debt seems not to serve as an incentive to either cooperate with removal or to minimise the number of attempts to challenge visa refusals or seek judicial or ministerial intervention. This is particularly so for the longer term detainees where the detention debt has long exceeded the amount they are likely to be able to pay back.

2. Relevant criteria in determining when a person should be released from immigration detention following health and safety checks

Drawing on the above observations, some suggested criteria for assessing when a person should be released include:

- There remains no reasonable suspicion the person is an unlawful non-citizen
- A person's illness is being caused or exacerbated by their detention arrangement
- No immediate solution to their immigration status is apparent.

Additionally, if a person appears to be on a visa pathway, it could assist their reintegration into society by being moved initially out of a restrictive detention centre environment into a less restrictive one such as immigration residential housing centre or community detention. The person could also be released on a bridging visa and await their immigration outcome in the community, subject to whatever restrictions their situation demands.

A recurring issue in immigration detention complaints and the two year detention review cases is the circumstances in which a person is released from detention. In particular, it is evident that the intersection between State and Commonwealth legislation can impact upon a person's detention experience. This is further explained below in the context of police attendance at the Villawood Immigration Detention Centre.

In the following case study, the interaction between State and Commonwealth legislation directly impacted upon the processes by which a person with a significant mental health issue was released from detention.

Case study, Report 64/06, 102/06, 336/08: Mr I

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 because the centre is on Commonwealth land'.* The *Mental Health Act 2007* (NSW) replaced the previous Mental Health Act on 7 December 2007. The Ombudsman's Office has considered the application of the Mental Health Act and is of the view that it does apply to Commonwealth places such as Villawood IDC due to the *Commonwealth Places (Application of Laws) Act 1970.*

When Mr I 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 I to leave the IDC and supported him in his transition back into the community.

In Report 64/06 the Ombudsman noted that there were parallels between that case and Ms Cornelia Rau and that 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. Mr I'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. This case highlights several issues of a systemic nature that may remain relevant for other people in immigration detention; the principle in mental health care of the right to treatment for mentally ill people who lack the capacity to decide to accept treatment; and the issue of involuntary treatment under a Mental Health Act where the jurisdiction between State and Commonwealth law is unclear. It appears in Mr I's case that he did not receive alternative psychiatric treatment because of the view that the state Mental Health Act did not apply to a detention centre on Commonwealth land.

The following case study illustrates the importance of cooperation between State and Commonwealth authorities when a person is released from detention.

2008-105389: Mr J

In March 2008 Ms W complained to our office on behalf of Mr J. Mr J had spent some time serving a custodial sentence before being transferred to immigration detention at the Perth IDC. Ms W complained that when Mr J was released from the Perth IDC following a decision by the Minister to exercise his public interest powers, Mr J was not informed that he would be required to comply with parole conditions imposed by the Community Justice Division of Western Australia (WA). When Mr J travelled to NSW to visit his children he was re-arrested and transferred back to a correctional centre in WA.

Our investigation was not able to verify Mr J's claim that he had been informed by DIAC officers at the Perth IDC at the time of his release that no parole conditions would be in effect. DIAC's response to our enquiries noted that parole conditions are not normally a matter for DIAC and DIAC is generally only informed of parole conditions if those conditions will need to be taken into account during the period of detention. In the case of Mr J it may have been prudent for DIAC officers to facilitate Mr J's contact with Parole authorities to ensure he was aware of any parole conditions.

We understand that Western Australian state authorities had previously raised with DIAC their preference for closer liaison when a decision is made to grant a visa and release individuals who had been transferred to immigration detention from a custodial environment. The reason is that the transfer often occurred on the

understanding that DIAC would be taking action to remove the individual from Australia 'as soon as practicable'. Correspondence we received indicates that in such cases Parole Boards may wish to set specific restrictions which were not considered when they understood the individual would be leaving Australia.

A further criterion to be considered is whether the decision to detain, or to continue to detain a person, serves a migration related function – that is, is the detention necessary and appropriate in the context of the Migration Act? The following case study also shows the difficulty experienced where immigration processes follow on from criminal sentencing. In some instances, it appears that s 501 has been applied in circumstances better addressed by criminal justice processes in respective States and Territories.

Case study Report 10/05 & 350/08: Mr K

Report 10 of November 2005 noted that Mr K lodged an application for review of a deportation order with the AAT in December 1999 and the Minister's decision was affirmed by the Tribunal in August 2000; his appeal to the Federal Court was dismissed in April 2001, as well as his appeal to the Full Federal Court in November 2001; his special leave applications to the High Court were dismissed in July 2002 and May 2003; his notice of motion to the High Court was dismissed in October 2004 and his application for special leave to appeal to the Full Court of the High Court was dismissed in February 2005. Mr K lodged a protection visa application in September 2005, which remained outstanding.

In the Ombudsman's sixth report to the Minister on Mr K, Report 350, it was noted that Mr K has been in an immigration detention centre for six years since he completed serving his criminal sentence in 2001. If there was no deportation order issued, he would have been entitled to be released into the community at the completion of his criminal sentence. Mr K was detained in preparation for his deportation from Australia. That has not yet occurred. The litigation commenced by Mr K and his application for a protection visa are a major factor in his continuing detention, though in that regard he is in no different position to many other non-citizens who have instituted proceedings to avoid being removed from the country. People in that situation commonly remain in the community on bridging visas while the proceedings are resolved. It is important, in Mr K's case, to note that he was a lawful Australian resident for 17 years prior to the issue of the deportation order in 1999. The Ombudsman recommended that Mr K be released under s 253(9). Mr K remains in an IDC.

The Ombudsman noted in Report 10/05 that the prospect of people remaining in indefinite immigration detention, when it has proven to be difficult to remove them to another country, has been of concern to this office for some time. Other indefinite detention schemes in Australia, such as schemes for preventative detention of offenders who are regarded as a danger to the community, have appropriate safeguards to protect the interests of the offender, including the requirement for independent and impartial decision making with regard to clear criteria and cogent evidence capable of proof or disproof, procedures consistent with fairness and due process, regular and thorough review by experts and a right of appeal. The Ombudsman considers that a better administrative solution to the issue of indefinite immigration detention needs to be found and such models may provide a basis for review.

3. Options to expand the transparency and visibility of immigration detention

The Ombudsman's office is one of a number of bodies that review detention related issues and bring about a level of transparency and visibility to the administration of immigration detention. The Human Rights and Equal Opportunity Commission, Immigration Detention Advisory Group, Detention Health Advisory Group, Australian Red Cross, as well as Parliamentary Committees, courts and tribunals add to transparency in various ways.

The Ombudsman's office currently contributes to the transparency of immigration detention through the range of activities detailed above. We take an integrated approach to review of detention by ensuring that issues we deal with in investigating complaints and reviewing long term detainees, are factored into our detention inspections work and our consideration of detention systemic matters. The Ombudsman's office is well positioned to continue to take a prominent role in reviewing detention. We also offer the following observations about the limitations of the current means by which immigration detention is made transparent and visible.

Consultative meetings

The involvement of members of the community in detention centre activities and problem resolution increases visibility and accountability of the management of immigration detention. DIAC policy is that internal and external consultative committees should meet regularly to deal with detainee issues which relate specifically to the immigration detention centre. Ombudsman office staff also regularly attend detainee consultative meetings and community consultative reference committees to observe the operation of the process and to contribute to discussions as appropriate.

Presently, Operational Procedure 10.6 requires:

- In each facility GSL will establish a detainee consultative committee and a Community Reference Committee (CRC)
- The detainee consultative committee is an internal committee comprised of detainee, DIAC and GSL representatives (including a GSL programs/activities representative). Arrangements for this committee are the subject of another Operational Procedure under development
- The purpose of the CRC is to provide the Services Provider with advice regarding the range of services, activities and welfare opportunities available to detainees to promote and enhance their physical and mental wellbeing.

It has been our observation that participation by community groups has fallen in recent years and that fewer community organisations now participate in the meetings. According to anecdotal feedback, reasons for the drop in involvement appear to include a lack of resources, a lack of confidence in achieving outcomes (for example, the same issues remain unresolved or re-emerge on a regular basis) and that some community groups feel there is less need to be involved now that some of their issues have been resolved – for example children are no longer accommodated in immigration detention centres.

In relation to detainee consultative meetings we also note that in some immigration detention centres few detainees are now willing to participate in meetings. Detainees have expressed their frustration that while they have raised issues of concern, action

has not been taken to resolve matters. Documentation from meetings at the Villawood IDC verifies that items raised remain as open items for many months. Other barriers to participation include the lack of access to interpreters for individuals who have limited English skills and lack of information on the outcome of requests made through the committee.

Our observations during visits to the Northern IDC indicate that where DIAC meets regularly with detainees with the assistance of an interpreter, participation in meetings is higher and the effectiveness of the meetings is enhanced. We note that Northern IDC has the advantage of generally only one cultural group and therefore only one interpreter is required.

We suggest that consideration be given to re-enlivening these detention forums, including reviewing the membership and terms of reference.

Access for visitors

Access to family and friends is important not only to the wellbeing of individuals in detention but also important for transparency and visibility of detention. The Ombudsman has previously raised with DIAC concerns about the inadequate visitor facilities, particularly at Villawood IDC, such as lack of tables, chairs, privacy, and shelter from the weather. Some improvements have been made but we continue to receive complaints from individuals about their concerns for the safety and security of their visitors given the restricted nature of arrangements for visitors. This issue is also worth consideration under Term of Reference 4 concerning infrastructure options.

Detainee access to records made about them

The Ombudsman has previously raised with DIAC the potential for individuals in detention to be provided with copies of Incident Reports that are generated following incidents within the centre so that they are aware of observations made about their behaviour and how it may affect their ongoing management. While these records can be requested under the Freedom of Information process, it may assist detainees and improve transparency if such records were routinely released without the need for an additional formal process.

Visibility of this type of report is important. Our review of Incident Reports over a number of years and our investigation of individual reports has identified that records completed by detention staff have not always accurately reflected records captured on CCTV, video or documents provided from other sources.

In our view, transparency and accountability could be increased by permitting detainees to add comment to records completed by detention staff and for individuals to be provided with copies of such reports once they have been completed. Similarly, our investigation of complaints indicates that there appears to be value in detainees being provided with copies of CCTV footage or video records of incidents in which they were involved, particularly where they have indicated that they wish to have the matter referred to the police for consideration.

Police presence at the Villawood IDC

The Commonwealth Ombudsman and the NSW Ombudsman regularly receive complaints from detainees and staff regarding assaults and other acts of a criminal nature including theft or damage to property allegedly occurring in the Villawood IDC and the lack of an adequate police response to these matters. These complaints

highlight that people in Villawood IDC do not have the same access to police services as the wider community, and may not be receiving the same standard of policing. This also raises concerns about the extent to which criminal actions within the immigration detention environment are recognised and monitored.

The complaints received highlight a number of issues including:

- In some cases allegations of assault are not investigated, as neither the State nor the Federal police take responsibility for investigating the alleged assault and there can be confusion over who should respond

- Detainees do not always have access to the police, either by telephone or in person when police attend immigration detention centres, to discuss their concerns or pursue an allegation

- GSL and/or the police do not sufficiently gather or consider available evidence in all instances.

There have been concerted efforts over many years to clarify the respective responsibilities of DIAC, the NSW Police Force (NSWPF) and the Australian Federal Police (AFP) in responding to and investigating allegations of criminal acts in Villawood IDC.

The Commonwealth Ombudsman first proposed a Memorandum of Understanding (MOU) in 2001.[2] Since then, steps have been taken by all parties to resolve the jurisdictional, resource and other issues involved, but no formal agreement in NSW has been reached.

On 30 April 2008, the Commonwealth Ombudsman wrote to the Secretary of DIAC and the AFP Commissioner to highlight the need for an agreement to be reached. At the same time, the NSW Ombudsman wrote to the NSWPF Commissioner.

We have been advised that an MOU between all three parties is close to finalisation. It is unfortunate that this matter has taken so long to resolve. The lack of police presence and response to serious allegations has caused anxiety within the detainee population and the staff at Villawood IDC and has likely impacted on the visibility and extent of these issues in immigration detention centres.

4. The preferred infrastructure options for contemporary immigration detention

The Ombudsman's office has also made a number of recommendations concerning immigration detention infrastructure in response to complaints and inspections.

[2] On 22 March 2001, the Commonwealth Ombudsman released a report of an 'Own Motion Investigation into the Department of Immigration and Multicultural Affairs' Immigration Detention Centres'. The report recommended that the Department negotiate MOUs with state, federal and territory police services and other agencies regarding their involvement with IDCs and detainees.

Nature of the detention population

The nature of the detention population has been observed to change from one that was predominantly comprised of people who had sought asylum to a large population of people who have had their visa cancelled or refused on character grounds mixed with asylum seekers or those who have overstayed their visa. Many of the people who have had their visa cancelled on character grounds have spent time in a prison. As one person told Ombudsman staff, *'I don't feel secure ... I have been a student both in China and outside of the detention centre, I am still studying in the detention centre ... everyone is using marijuana, there are murderers, burglars ... I am the youngest here, I don't feel safe ... I am different'.*

This mix of detainees has resulted in increased violence and intimidation. In many centres the limitations of the infrastructure itself has limited the options for addressing the tensions, managing behavior and keeping detainees safe. It has been observed that as time in detention increases, so do management issues associated with some individuals as they become more difficult to manage as their frustration levels rise.

There is continuing tension at stage one of Villawood IDC and at Maribyrnong IDC particularly where individuals with a serious criminal history are accommodated in dorms with individuals with a non-violent or non-criminal background. Under the new detention policy there is a likelihood of a greater proportion of s 501 visa cancellation detainees at immigration detention centres, and as such the issue of appropriate infrastructure at these centres remains a priority.

Dorm style accommodation

Since 1998 the Ombudsman has consistently raised the difficulties caused for individuals, the detention service provider and DIAC through the use of dorm style accommodation. It is possible that many altercations, incidents and complaints could have been avoided had individuals from various cultures and backgrounds not been expected to cohabitate in large, poorly equipped dorms. Inadequate privacy and lack of personal space in the dorm style accommodation continues to be a problem which generates complaints about noise and lack of ability to sleep due to communal lights remaining on. We have previously recommended that privacy screening around the beds be installed.

Accommodation involving separate rooms with ensuites and storage facilities such as those provided at Baxter IDC, provides individuals with much more control over their day to day activities and provides a higher level of safety for individuals. This form of accommodation is clearly preferable to the dorm style.

Access to and appearance of outside areas

As many detainees smoke, accommodation arrangements need to allow for access to outside areas for smoking at all times so that detainees can comply with Commonwealth legislation which prohibits smoking within Commonwealth buildings. Restricting the time of day an individual can smoke appears inconsistent with the administrative nature of immigration detention. The provision of grassed open areas can also contribute to the general well being of individuals.

In addition, the Immigration Detention Standards require maximum access to fresh air at all times. The lock down provisions used in Stage 1 at the Villawood IDC restricts the access of individuals to fresh air and outside exercise areas. Secure

courtyards adjacent to accommodation areas appear to meet the need for access to fresh air while providing a safe and secure environment.

In addition to having access to outside areas it is important to examine the appearance of these areas. Using landscaping such as grassed areas and using plants to hide security fencing can have a beneficial impact on the appearance of detention centres as well as those who are placed in such environments. We understand that DIAC are presently planning similar improvements to the outside areas of Northern IDC. The Immigration Transit Accommodation Centres and Residential Housing Centres also provide examples of what can be done to improve appearance of centres.

Shared showers/bathrooms/laundries

Given the variety of cultural backgrounds and socio-economic backgrounds of individuals in immigration detention it is inevitable that not all individuals will have the same hygiene standards. Maintaining a high standard of cleanliness in shared bathroom/toilet and laundry facilities in such an environment can be very challenging for the service provider. Failure to do so can result in the spread of diseases and infections and a failure to meet duty of care requirements. It may also result in the facility not complying with the relevant State based health standards as required to meet Immigration Detention Standards. Provision of ensuite facilities is consistent with a policy of expecting individuals in detention to be responsible for the maintenance of their own environment whenever possible and contributes to the general well being of the individual.

Access to recreational facilities

Access to recreational facilities is important to the well being of individuals and can reduce the likelihood of incidents and dissatisfaction within the immigration detention centre. Freedom of movement between accommodation and recreational areas is important to detainees and consistent with the principle of administrative detention. Administrative detention should provide for the minimum amount of restriction. The Ombudsman has previously brought to DIAC's attention the frustration and dissatisfaction caused to detainees when their movement is unnecessarily restricted, for example when moving from one compound to another within the Baxter IDC required moving through a series of remotely controlled gates and often the need to undergo pat searches and checks. Our investigation of complaints indicates that such restrictions reduce the likelihood of participation in recreation programs and can increase the likelihood of disturbances within the centres.

A safe environment

During 2007 the Ombudsman became aware of concerns raised by detainees at the Perth IDC in relation to the air quality within the centre given the proximity to Perth International Airport. After a number of enquiries were made by our office we understand that DIAC initiated ongoing discussions and liaison with Airport authorities to ensure that the quality of the air was within authorised standards. The incident raises the need to consider the general environment of the immigration detention centre in addition to focusing on facilities within a centre.

Property storage

Detainees are permitted to keep a limited amount of property with them while in detention. Access to personal items is highly valued by detainees. Investigation of

complaints indicates that detainees do not consider that facilities for safe storage of their property within the immigration detention centres are adequate. This is particularly so in dorm style accommodation. In a number of instances individuals have retained valuable property in their room rather than requesting the detention service provider to store the item as *in trust* property. This is because they claim to have experienced the loss of items held in trust or experienced delays when they have requested access to the property held in trust.

Following a visit to the Villawood IDC in January 2008 we advised DIAC of concerns about the infrastructure for storage of clothing and other goods in Stages 2 and 3.

The Management Support Unit and observations rooms at Villawood IDC

We have concerns about the suitability of the Management Support Unit (MSU), particularly when detainees are housed in the MSU for an extended period of time. Most notably, the windows are fixed and detainees have no access to fresh air while in their rooms. There is no gym area and access to the outside area is limited, especially during wet weather. Light and heating are controlled by the detention service officer from the officer's station. Feedback to DIAC noted that a review of the infrastructure in the MSU may be appropriate. We are pleased that the government recently announced a refurbishment of the MSU as an immediate priority before commencing more significant improvements to accommodation at Villawood IDC.

The observation rooms in Stage 1 of Villawood IDC also require attention. They do not have an intercom and detainees are locked in the rooms from 11.30 each night. Detainees are expected to attract attention through waving at the CCTV camera or by banging on their room door. The rooms have no access to the outside area for smoking or fresh air. Heating and lighting is controlled by the detention service officers.

5. Options for the provision of detention services and detention health services across the range of current detention facilities, including Immigration Detention Centres (IDCs), Immigration Residential Housing (IRH), Immigration Transit Accommodation (ITS) and community detention

The Ombudsman has jurisdiction to investigate the administrative actions of private organisations that are contracted to provide detention services and health detention services. The following observations are drawn from this office's detention complaints and detention inspection visit program. They specifically concern the experience of people in immigration detention centres.

Health service complaints

The Ombudsman's office has received a number of complaints about delays in accessing doctors. We have also received complaints following a decision by nursing staff that a referral to a doctor is not necessary. These complaints have been addressed on a case by case basis, but we would observe that the community standard would not normally involve a process whereby a nurse could determine whether a person should receive attention from a doctor.

While the Northern IDC is not often the source of many complaints, we were alerted to a situation whereby detainees wishing to access the clinic must wait next to a locked gate in the accommodation compound until they are permitted into the medical compound. We suggested that the gate could be left unlocked during clinic hours.

We have received a number of complaints from detainees in Villawood IDC concerning what they considered to be changes in their medication without consultation with a doctor. On occasion, this apparent change in medication has resulted in disputes with the medical staff distributing the medication. After investigating this issue, we suggested that it would be more in keeping with community standards if detainees were given written details of their prescribed medication and for doctors to provide an updated advice to a detainee if the medication does change.

We have also commented on DIAC release policies and procedures with particular emphasis upon the need to ensure that adequate quantities of prescribed medication are provided upon release from detention or transfer to another type of detention.

Assault complaints

Allegations and incidents of assault, both claimed to be perpetrated by and against staff and detainees, are a common source of complaint. While we do not investigate whether an assault has actually occurred, as that is a criminal matter for the police, we have noted some problems with the standard of record keeping and incident investigation conducted by the detention service provider. While it is evident that many detention service provider staff have cooperative and productive relationships with detainees, allegations of assault by staff are sometimes made and complaints relating to rudeness or inappropriate behaviour are more common.

Interpreters

A lack of command of English should not be a barrier to the necessary day to day communication that occurs between detention staff and detainees at immigration detention centres. Being able to clearly communicate may not only be important from a detainee's perspective but also for detention service providers who need to run immigration detention centres effectively and safely. Use of interpreters at an early stage can assist in minimising the risk of difficult issues escalating within centres.

When commenting on proposed instructions, procedures and information products we have regularly raised the need for the use of interpreters and translators in the detention environment. This is particularly significant where crucial medical or migration information is conveyed to a detainee. It is also a necessary component of effective detainee consultation meetings. We have also previously suggested to DIAC to make information about how detainees can access interpreters readily available and visible in detention centres.

We believe there is scope for a more significant review of the provision of interpreters within immigration detention centres. It is important that further consideration be given to greater policy clarification and appropriate training to assist detention staff. It should also be noted that the Ombudsman has commenced an own motion investigation into the use of interpreters. As part of this investigation we envisage an examination of the use of interpreters at immigration detention centres and therefore we may recommend more specific initiatives.

Food service

Following a number of complaints about food service at Villawood IDC, we conducted a number of inspection visits targeted at food service in Stages 2 and 3. The key issues that were identified concerned the insufficient number of chairs and tables, advertised menu items not being served, general cleanliness of the mess and fridges and low detainee satisfaction with the meals. Since our targeted visits we have received fewer complaints about food service and we have observed some improvements in food service at Villawood IDC.

However, we have received complaints that a Muslim detainee was served pork on multiple occasions and non-Muslim detainees have complained about the inability to obtain pork in the Halal certified kitchen.

Operation of the Purchasing Allowance Scheme

The Ombudsman's office has identified a number of issues concerning the administration of the Purchasing Allowance Scheme (PAS). These issues have been the source of complaints to our office and have been raised in detainee consultative meetings. The main points that were identified for further action were failure to update PAS points, detainees receiving more than the maximum amount allowed, inconsistent PAS processes between detention centres, a lack of guidance on the availability of PAS in alternative places of detention and a lack of receipting when detainees utilise points to purchase goods under the Special Buys Scheme.

Property

The loss or destruction of detainee property has been the source of an appreciable number of complaints to our office. Property issues often arise when detainees are transferred within or between immigration detention centres. Property complaints are often occasioned by a lack of record keeping, particularly where detainees acquire or swap property during prolonged periods of detention. The loss of property during the 2005 Baxter fires and the consequential claims for compensation remain a source of complaint to this day.

6. Options for additional community-based alternatives to immigration detention:

- a) Inquiring into international experience
- b) Considering the manner in which such alternatives may be utilised in Australia to broaden the options available within the current immigration detention framework
- c) Comparing the cost effectiveness of these alternatives with current options.

During the past three years or so we have seen significant improvement in detention arrangements. This in part is reflective of a broader range of detention arrangements possible, including community detention under the s 197AB of the Migration Act residence determination provisions. Use of these community detention arrangements has been a particularly important initiative for families with children, torture and trauma victims and those with special health or other needs.

There is scope however to look at further adjustments to community detention. For example even within the present legislative framework hostel type accommodation could be utilised as part of these community detention arrangements. Having such arrangements arguably provides economies of scale enabling this detention arrangement to be considered and better managed for significantly more detainees. The legislative requirement that only the Minister, exercising a personal non compellable discretionary power, can place a person in residence determination imposes administrative constraints which impact on the day to day management and placement of detainees. A scheme which delegates this power to certain senior DIAC officers would arguably be more responsive without diminishing the necessary safeguards.

In recent times we have also seen an increase in DIAC placing detainees in alternative detention arrangements through the use of designated persons. Under these arrangements people may be detained with a designated person (such as a friend, police or a detention service provider) in private houses or apartments, hotels, correctional facilities or in hospitals. Even though these alternative detention arrangements do not require Ministerial decision making they do rely (in the private home context) on the goodwill and agreement of designated persons who have constant supervision over the detainee. According to some designated persons and detainees who are in this situation significant pressures are placed on them when the arrangements are in place for longer periods. Notwithstanding the importance of alternative detention as part of a suite of immigration detention arrangements there is scope for reconsidering the specific restrictions on movement and supervision, in particular for extended periods.

In carrying out the immigration detention monitoring and inspections functions of the Immigration Ombudsman, we have visited individuals who have been placed into community detention. During our interviews people have discussed their experiences since their release from an immigration detention centre. All individuals interviewed to date have commented on the improvement in their sense of well being since their detention arrangements changed. People spoke positively of the support provided by the Australian Red Cross and members of the community generally. In the main, individuals considered that the requirement to report to DIAC officers on a weekly basis was not overly onerous. However, some people who have developed mental health conditions or had particularly traumatic experiences in detention have expressed anxiety at having to regularly report to DIAC.

Individuals also conveyed that the health of their children had improved markedly and they welcomed the opportunity to interact as a family, especially in the preparation of their own meals.

Following complaints made to the office in October 2007 we raised with DIAC our concern that if an individual in community detention wishes to stay overnight with a friend or have a friend stay overnight, DIAC must be contacted and approval must be given prior to the event. As this process requires the provision of personal information (names and addresses) of other individuals we were concerned about the privacy implications of the practice. In response DIAC advised that in their view, collection of the information was consistent with the requirements of the Information Privacy Principles. We understand that the requirement of notifying DIAC of personal details of other individuals in these circumstances continues.

It is important to ensure that, when detainees are transferred from one detention arrangement to another, any special needs they may have are taken into account and accommodated. For example in February 2008 we received a complaint

regarding concerns that when an individual who had been granted Residence Determination was transferred to his accommodation outside the immigration detention centre he had not been provided with a supply of his regular medication to meet his needs until he was able to source a supply outside the immigration detention centre. It was claimed that he did not obtain medication for a number of days and this adversely affected his health.

The international experience

In late 2007 the Ombudsman's Office partnered with Griffith University in a two-year international comparative study of non-citizen detention and removal. The project attracted funding from the Australian Research Council, which concludes in December 2009.

The project examines laws, policies and practices regarding people who do not qualify to remain in Australia but for whom removal is prolonged or problematic. The research project aims to 'develop a comprehensive, coherent and flexible set of proposals' to help governments resolve some of the associated issues by comparing non-citizen detention with other forms of civil detention and the Australian experience with selected comparable nations.

By way of information only we have attached to this submission an interim paper, titled *Global Immigration Detention Practice,* by David Berkman, Doctoral Student, School of Criminology and Criminal Justice, Griffith University, who is conducting the research for this project. Whilst we are not presently in a position to endorse this paper the Committee may benefit from some comparative analysis in this area.

In summary, Mr Berkman writes that there are some lessons to be learnt from a comparison between Australia, Continental Europe, the United Kingdom, New Zealand, Canada and the United States. The comparison highlights that other countries do have a range of less restrictive alternatives to detention, which maintain general compliance. In New Zealand for example detention centre conditions are very open where detainees are free to leave during the day. Of particular interest are the Toronto Bail Program (Canada) and the Vera Project (USA) where detainees are released from detention on bail/parole under supervision.

From the research, it appears that two measures consistently provide greater compliance levels, competent legal advice and dedicated case management and support through the application process.