

Our ref: A/2003-2012213

2 March 2005

Mr W J Farmer
Secretary
Department of Immigration and Multicultural
and Indigenous Affairs
PO Box 25
BELCONNEN ACT 2616

Dear Mr Farmer

I am writing to provide a regular report on complaint handling by my office concerning the Department.

May I start by acknowledging the valuable discussion at our meeting in December. It is pleasing that the differences that arise between our offices can be raised and discussed in a constructive manner. I shall refer again in this letter to some of the issues we covered.

May I also note the constructive dialogue that is occurring between officers in both our organisations to ensure that complaint investigation and resolution occurs on a proper foundation. There have been difficulties in only a small number of complaints, but it is important that these can be addressed and resolved appropriately in a timely fashion. I encourage your staff to take up any issues of concern in the first instance with Mary Durkin, Senior Assistant Ombudsman, or George Masri, Director of Investigations for our Immigration Team.

As I foreshadowed at our meeting, this report will cover complaints for a six month period for July to December 2004. Now that staffing changes have settled down in my office I hope to return to a regular quarterly report.

Complaint numbers

The table below shows that the number of complaints we received in the October – December quarter decreased after increases in the previous two quarters. The total number of complaints received in the first half of this financial year is about the same as it was in the first half of 2003-04.

Quarter	Complaints received
July - September 2003	220
October – December 2003	215
January – March 2004	209
April – June 2004	223
July – September 2004	231
October – December 2004	208

Delays in the processing of requests under the *Freedom of Information Act 1982* by the Department of Immigration and Multicultural and Indigenous Affairs

Over recent months, my office has received numerous complaints from individuals and representations from organisations about significant delays in processing requests under the *Freedom of Information Act 1982* by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA).

The Department has been facing difficulty in complying with the statutory requirement that Freedom of Information (FOI) requests be processed within 30 days. It currently has 750 requests in a processing backlog and average processing times are xxx.

My office has been discussing this issue with DIMIA and has pressed the Department for action to address the problems that have given rise to the delays. I am satisfied that the strategy being put in place by the Department to resolve the problems will be appropriate to get the processing of FOI requests back under control in the longer term. My office will closely monitor the implementation of the strategy and ensure that the Department gives it a high priority.

In the meantime, my office will continue to accept complaints about FOI delays and may investigate individual complaints if we consider that particular matters should be given priority. I should also note that when an agency fails to comply with the statutory deadline for processing FOI requests, the FOI Act provides that the agency is deemed to have refused access and the person may appeal to the Administrative Appeals Tribunal. I do not necessarily recommend this course of action, as there are costs attached to it and it may not lead to earlier resolution of an FOI application, but it is an option provided for in the FOI Act that should be noted.

Prof. John McMillan
Commonwealth Ombudsman

Recently my office has provided some historical data to your staff to assist them to better understand the trends in complaints made to my office. Further details are provided in the attachment to this letter. I note in particular that complaints about detainees have decreased from 32% of total complaint issues to 24% over the two financial years.

Our analysis of complaints received in July to December 2004 indicates that the broad trends of the last financial year are continuing, with about 22% of complaints relating to detainees, 35% to migration, and 13% to temporary entry.

For complaints closed during July to December 2004, 41-42% of issues were investigated. This compares with 49% for the corresponding period in 2003, 40% for the period January – March 2004, and 48% for April – June 2004.

A recording of 'agency defect' was made in 12% of the issues investigated. This compares with 9% and 14% in the previous two quarters, and 19% for the same period in 2003.

Issues in most closed complaints were about the Department's decisions/actions, followed by complaints about timeliness. Most complaints about migration issues related to family/spouse visas and skilled migration, while complaints about temporary visas concerned student and tourist visas and sponsored visits. Complaints from detention centres covered a range of matters, with complaints about assault, property and health issues more common.

I have also included a table, which provides a summary of the cases for which we recorded defective administration during the period July to December 2004.

Finally, I should note that there may later be some small changes to the statistical data, following further quality assurance processes; there may be some slight discrepancies between the statistics in this report and our annual report data.

Maintenance costs arising from detention

My office has received a number of complaints in relation to the costs incurred by detainees when in a detention centre. MSI 234, at paragraph 21.3, specifies that detained non-citizens should be informed of the likely costs as soon as detention commences. Thereafter, detainees should be provided with regular weekly updates of the costs they have incurred to date. Based on the complaints that we have received, it appears that the MSI may not be complied with on all occasions. Some complaints indicate that detainees do not get an update of costs incurred on a weekly basis and therefore have no indication of the likely debt they are accumulating. Hence it is not surprising that concerns are raised with my office when detainees receive notification of sizeable debts at the end of their detention period. May I suggest that steps are taken to ensure that officers are aware of the guidelines in relation to detention costs and that the MSI is being complied with; I would welcome your assurance to that effect.

Roles and responsibilities of the detention service provider and DIMIA

In my first quarterly report to you in May last year I noted some concerns about ACM's performance in managing detention centres. Since then the new provider, GSL, has been engaged and developed a number of operational policies and guidelines. We have been provided with many of these and I am pleased to see the progress that has been made.

DIMIA has also developed a number of new instructions in relation to detention and I have noted previously my appreciation of the opportunity to provide input into the recent MSI on 'Transfer of Detainees within Immigration Detention Facilities'. We have now received a copy

of the final version of this MSI and I am pleased that a number of the suggestions made by my office, aimed at addressing issues that had been the subject of complaints, have been picked up.

I note, however, that a number of points relating to consultation with the DIMIA Manager or Deputy Manager at the centre, which were in the first draft, have now been omitted. These points related to provisions that required the DIMIA Manager to be satisfied that the decision to transfer made by the service provider was lawful, appropriate and reasonable, that the factual basis for the transfer is correct and that appropriate communication strategies with the detainee have been employed.

My office was informed that the provisions dealing with the responsibility of the DIMIA Manager were removed, to make it clear that it is the service provider who makes the final decision in operational matters such as a transfer of a detainee. I can understand this point to the extent that it deals with operational considerations. Yet a decision on transfer is not necessarily and exclusively an operational issue. The Department's overall responsibility for detention and the administration of the *Migration Act 1958* (Cth) means that other issues can arise, even though they may not be prominent in each individual decision. It seemed particularly appropriate that the MSI should make note of the DIMIA Manager's duty to ensure that decisions on transfer are lawful, appropriate and reasonable. This could be important in clarifying the division of responsibility between DIMIA and the service provider, and in ensuring that all relevant matters are properly considered when a transfer decision is being made.

This touches on the larger issue of contracting out. You will be aware of the philosophy broadly espoused by my office over many years that an agency that has contracted out a function does not relinquish responsibility for the way the function is discharged. I do not understand the Department to disagree with that, though some of the responses we have received in relation to individual complaints might have been construed as suggesting that DIMIA was not responsible for the actions of the service provider.

Rather than traverse that larger issue at this point, it seems preferable that I invite your response on the specific issue I have raised as to the removal from the draft MSI of the provisions dealing with the DIMIA Manager's responsibility.

Use of restraints

In the course of investigation of a complaint about the use of restraints on a detainee, my office was advised that a July 2003 report "Appropriate Use of Restraints within the Immigration Detention Environment" by Knowledge Consulting had been commissioned by the Department. My office sought access to this report but DIMIA staff have been reluctant to provide it, on the basis that it was prepared after the incident being investigated, it was not DIMIA policy, and operational procedures are being developed, taking the report into account.

I decided not to take that issue further because the investigation of the complaint that gave rise to this issue had concluded. Our continuing interest in the appropriate use of restraints can be taken up as appropriate on other occasions. I have drawn attention to the issue, however, as I think it illustrates a point I raised at our meeting in December that the investigation of some complaints is at times bedevilled by what I think is an unhelpful attitude to the disclosure of documents. In the course of investigation of complaints we frequently receive a large volume of material from agencies, some of which ends up being of marginal or outdated relevance to the investigation. There is no risk to the agency in making that material available to my office: we are subject to strict secrecy provisions and cannot express any adverse opinion about an agency without first providing the agency with an opportunity

to comment. On the other hand, it can be very useful for my office to have the surrounding or related documents in gaining a good understanding of the context of government in which individual problems arise. To be denied access to documents on a strict relevancy test is unhelpful and can unnecessarily excite suspicion.

My recollection from our December meeting is that the Department will prepare a first draft of a protocol between our offices dealing with issues of communication of information and documents.

Employment related matters and the Ombudsman Act

Over recent weeks my office has been investigating a complaint made by (2004-2353338), that prompted the Department to query my jurisdiction to investigate where an internal disciplinary inquiry was being undertaken by the Department.

The *Ombudsman Act 1976* s 5(2)(d) provides that I am not authorised to investigate employment related action such as the promotion, termination, discipline of an employee or the payment of remuneration. The interpretation of this provision was the subject of considerable debate in the early days of the office, but the issue is now largely settled. My view is that the provision is aimed at preventing public servants from complaining to this office about employment issues. It was not the purpose of the provision to remove from jurisdiction a complaint that has given rise to an internal disciplinary inquiry by an agency. Otherwise, an agency could seek to evade the jurisdiction of the Ombudsman by undertaking a disciplinary inquiry in relation to any complaint made to us. I am happy to discuss this matter further if there are ongoing concerns.

Internal complaint handling

Your letter of 17 November 2004 advised that the Department has been reviewing its complaint handling processes. I look forward to hearing more about the outcome of the review. As I commented at our December meeting, the general pattern in the work of my office is that the investigation rate declines when we feel confident that there is a robust complaint handling system in place in an agency. We generally exercise the discretion not to investigate more readily in those circumstances.


The same observation applies to our investigation of detention centre complaints. We are far more likely to refer matters back for investigation by GSL or the DIMIA detention centre managers if we are satisfied that there is an effective complaint handling mechanism in place, supplemented by appropriate and useful information for detainees. This might include posters for detainees about internal and external complaint handling processes and information brochures for detainees about their rights and responsibilities. My office has been discussing this with your Department for some time and would welcome the opportunity to see initiatives in this area progressed.

May I note in closing that over the past months your staff have briefed my staff on a number of issues; this has been useful in enabling both our agencies to gain a better understanding of each other's perspective. As you are aware, I have flagged an interest in compliance issues this year and I appreciate the time that Vince McMahon and Yole Daniels have taken to discuss the issues with my staff.

I would also express the appreciation of my staff for the helpful approach that has been taken at regional levels in resolving complaints quickly and informally with my office. In particular,

Melbourne, Brisbane and Hobart office staff have been singled out by my officers as having provided a quick and comprehensive service in recent times. These are good examples that demonstrate how open lines of communication between our organisations can help us deal with matters cooperatively and in a timely fashion.

Yours sincerely



Prof. John McMillan
Commonwealth Ombudsman

Table 1 Complaint issues identified in complaints received 2002-03 and 2003-04

Table 1 shows the complaint issues identified in complaints received by the office over the past two financial years.

Complaint issue received	2002-03	% of 2002-03	2003-04	% of 2003-04
Citizenship	34	3	38	4
Complaint service	9	1	14	1
Detainee	392	32	231	24
FOI/general access	8	1	7	1
FOI/personal access	16	1	15	2
Humanitarian	54	4	42	4
Migration	427	34	358	38
Multicultural services	3	0	0	0
Other	114	9	97	10
Temporary entry	185	15	151	16
Tender/contract	1	0	1	0
Total	1243	100	954	100

Table 2 Complaint issues identified in complaints received July 2004 – December 2004

Table 2 shows the issues identified in complaints received in July to December 2004. This information may be subject to further change, particularly as those complaints which are open are dealt with further. This is the first time we have identified complaints about compliance separately.

Complaint issue received	Jul-Sep 04	% recd Q1	Oct-Dec 04	% recd Q2	% recd Jul - Dec
Citizenship	15	6	16	7	6
Complaint service	7	3	3	1	2
Compliance activity	7	3	11	5	4
Detainees	50	20	54	24	22
FOI/general access	0	0	3	1	1
FOI/personal access	7	3	1	0	2
Humanitarian	11	4	14	6	5
Migration	87	34	81	36	35
Multicultural services	0	0	2	1	0
Other	30	12	15	7	9
Temporary entry	39	15	23	10	13
Tender/contract	2	1	1	0	1
Total	255	100	224	100	100

Table 3 Ombudsman's Office responses to closed complaints, July to December 2004

Table 3 summarises the Ombudsman's Office responses and outcomes to complaint issues closed during the July – December 2004 period. Investigation officers closed 460 complaints with 511 identified issues.

Response	Outcomes	Number of Issues	
		Jul - Sep	Oct - Dec
Discretion not to investigate	Advised to pursue elsewhere	79	75
	Investigation not warranted	58	47
	Complaint not pursued	15	23
Total		152 (58%)	145 (59%)
Ombudsman investigation	Agency defect	12	12
	No agency defect	45	46
	Not determined	30	26
	Complaint not pursued	2	4
	Discretion not to investigate further	17	14
Total		108 (42%)	102 (41%)
Out of jurisdiction		1	3
GRAND TOTAL		261	250

Table 4A: Complaints closed by issue and Ombudsman office response, July to September 2004

Complaint issue closed	Decision not to investigate	Investigated	Total	% investigated
Citizenship	6	7	13	54
Complaint service	1	5	6	83
Compliance activity	5	0	5	0
Detainee	33	28	61	45
FOI/general access	1	1	2	50
FOI/personal access	4	1	5	20
Humanitarian	7	8	15	53
Migration	51	34	85	40
Other	23	5	28	18
Temporary entry	19	19	38	50
Tender/contract	2	0	2	0
Total	152	108	260	42

Table 4B: Complaints closed by issue and Ombudsman office response, October to December 2004

Complaint issue closed	Decision not to investigate	Investigated	Total	% investigated
Citizenship	13	6	19	35
Complaint service	4	1	5	20
Compliance activity	5	2	7	29
Detainee	27	26	53	49
FOI/general access	2	1	3	33
FOI/personal access	0	1	1	100
Humanitarian	12	1	14	8
Migration	48	47	95	49
Multicultural services	2	0	2	0
Other	12	6	18	32
Temporary entry	19	11	30	37
Tender/contract	1	0	1	0
Total	147	102	247	41

Table 5: Complaint issues investigated – outcome, July to December 2004

Complaint issue investigated	Agency defect	No agency defect	Not detd	Decision not to investigate further	Withdrawn/lapsed
Citizenship	2	5	3	3	0
Complaint service	1	3	1	1	0
Compliance activity	0	1	0	1	0
Detainee	6	18	17	11	2
FOI/general access	1	1	0	0	0
FOI/personal access	0	1	1	0	0
Humanitarian	0	4	4	1	0
Migration	12	38	18	11	2
Multicultural services	0	0	0	0	0
Other	1	6	1	2	1
Temporary entry	3	14	11	1	1
Tender/contract	0	0	0	0	0
Total	26	91	56	31	6

Table 6 Complaint issues closed by cause and outcome

Table 6 provides an overview of the actions taken in relation to particular complaint issues and the conclusions reached.

Cause of complaint	Outcome	Number of issues	
		Jul - Sep	Oct - Dec
ADVICE	Agency defect	2	0
	No agency defect	7	6
	Not determined	2	2
	Withdrawn or lapsed	2	2
	Discretion not to investigate [further]	19	17
Total Advice		32	27
BEHAVIOUR	Agency defect	1	2
	No agency defect	1	2
	Not determined	2	3
	Withdrawn or lapsed	0	1
	Out of jurisdiction	0	1
	Discretion not to investigate [further]	15	14
Total Behaviour		19	23
DECISION/ACTION	Agency defect	6	6
	No agency defect	27	25
	Not determined	18	14
	Withdrawn or lapsed	9	15
	Out of jurisdiction	0	1
	Discretion not to investigate [further]	65	54
Total Decision/Action		125	115
POLICY	Discretion not to investigate [further]	7	9
	No agency defect	0	1
	Not determined	0	1
	OOJ	0	1
	Withdrawn or lapsed	2	1
Total Policy		9	13
TIMELINESS	Agency defect	4	4
	No agency defect	8	12
	Not determined	8	6
	Withdrawn or lapsed	3	5
	Discretion not to investigate [further]	31	26
Total Timeliness		54	53
Other	No agency defect	2	0
	Discretion not to investigate [further]	9	7
	Withdrawn or lapsed	0	1
	Out of jurisdiction	1	0
Not determined	Agency Defect	1	0
	Discretion not to investigate [further]	8	9
	Withdrawn or lapsed	1	2
GRAND TOTAL		261	250

Table 7 Complaints closed July – December 2004 where 'defective administration' was recorded

Table 7 summarises the complaints closed during the period where 'defective administration' was recorded, as at February 2005.

Ref. No.	Name	Issue	Cause	Comment
2002-1816614	Wang	Detainee Accommodation	Behaviour - Harassment	Transfer of detainees to Stage 1
2003-2083631	Thambyappah	Migration Family Member	1) Decision - wrong 2) Advice – fail to provide	Alleged misinformation in nephew's visa application. Length of time to receive response from department, destruction of departmental file.
2003-2119742	Dobari	Detainee Property	Not determined	Lost property during room search at Pt Hedland
2003-2129506	Zhu	Detainee Removal	Decision/Action - Fail to act	Wrong photo ID prevents scheduled departure
2004-2196422	Romea	Temp. entry – tourist	Decision/Action - wrong	Request to waive 8503 visa condition
2004-2228167	Bain Gasteen	Migration skilled	Advice - inconsistent	Decision letter contained contradictory advice re review rights
2004-2241284	Austr. Visa Service	Migration Skilled	Decision/Action - wrong	Cancellation of student visa prevents application for permanent visa
2004-2246681	Clarke	Migration Family Member	Timeliness - delay	Processing spouse visa in Vietnam
2004-2247203	Dhanji	Migration – Other	Timeliness - delay	Visa processing at Nairobi Post
2004-2253013	Bijl	Citizenship Evidentiary certificate	Decision/Action – Application of law/rule	Witness to have known applicant for lesser period than 12 months
2004-2265409	Rahman	Temp entry Tourist	Timeliness - delay	Delay in grant of tourist visa in Pakistan
2004-2273010	Baddiley	Migration Family Member	Timeliness - delay	Delay in processing spouse visa
2001-1710414	Sahade	Compliance	Behaviour - harassment	Conduct of a compliance activity, record keeping
2004-2172798	Sadiqi	Detainee - property	Decision/Action – failure to act	Failure to act on report of stolen property
2004-2212121	Halliday	Complaint service - other	Decision/Action - wrong	CDDA claims decided by staff without delegations
2004-2215065	Bedum	Migration – Family Member	Decision/Action – failure to act	Failure to handle application remitted from MRT
2004-2225840	Reed	Detainee – bridging visa	Decision/Action – Application of law/rule	Delay in processing application
2004-2266431	Jama	Citizenship – return of certificate	Decision/Action – wrong	Failure to return certificates

2004-2281997	Maskey	Temporary entry - other	Timeliness - delay	Not following correct procedures in alleged withdrawal visa application, subsequent delay in addressing issue
2004-2289634	Taylor	Detainee - other	Decision/Action - wrong	Retention personal faxes on files
2004-2304657	Huynh	Migration - Family Member	Behaviour - attitude	Advice about, and rescheduling, spouse interview
2004--2331415	Boulet	Migration - skilled	Decision/Action - wrong	Advice on application fee
2004-2338794	Le Sueur	Migration - Family Member	Timeliness - delay	Delay in responding to correspondence
2004-2341974	Davidson	Migration - Family Member	Timeliness - delay	Delay in processing application
2004-2346855	Deans	FOI - General Access	Timeliness - delay	Delay in processing request



Our ref: A/2003-2012213

7 December 2004

Mr Steve Davis
First Assistant Secretary
Unauthorized Arrivals and Detention Division
Department of Immigration
and Multicultural and Indigenous Affairs
PO Box 25
BELCONNEN ACT 2616

Dear Mr Davis

Thank you for your letter of 10 November 2004 to Professor McMillan concerning the videotaping of detention centre incidents. We have noted the information you provided, including the extracts of proposed records management guidelines.

Thank you also for the invitation to provide comments in relation to the guidelines. I would like to offer the following points for your/GSL's consideration:

- It would be preferable if video footage of incidents shows times and dates to be able to assess when the footage was taken and whether it was a continuous recording.
- If larger incidents involving several detainees and officers are taped, consideration might be given to having more than one video operator.
- Where 'close-up' footage of an interaction between a detainee and officer is being taped, the verbal interaction between the detainee and the officer may be obscured if the video operator is talking. We understand that some explanations can be very helpful at times but care needs to be taken in this respect.
- We appreciate that video footage may often be taken in challenging circumstances and that it will not always be possible to get the best possible recording of a situation. If specific training in video recording is undertaken, however, we suggest that some emphasis might be given to the following areas:
 - how best to maintain focus control;

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- seeking to maintain as much as possible a focus on the subjects in question (unfortunately, we have seen a number of videos where the surrounding buildings, the floor etc have become the main focus); and
 - ensuring that images of text, eg. signs on a door, are recorded straight-on and not from a side angle, to enable better reading of signs.

I hope these comments might be useful and I would be grateful if we could be given a copy of the guidelines once they are in place.

Yours sincerely

A handwritten signature in black ink, appearing to be 'MD', with a long horizontal line extending to the right.

Mary Durkin
Senior Assistant Ombudsman

