

COMMONWEALTH OMBUDSMAN

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27 August 2003

Mr WJ Farmer
Secretary
Department of Immigration and Multicultural and Indigenous Affairs
PO Box 25
Belconnen ACT 2616

Dear Mr Farmer,

It is my pleasure to forward a second Quarterly Report outlining the activities of my office in relation to your department for the period April to June 2003. Once again the report also contains a brief discussion of some issues we are currently looking at; I trust you will find the information useful.

Complaint numbers

My office received 241 complaints for the period 1 April to 30 June 2003. This represents a significant decrease of 19.4% from the previous quarter ending March 2003 and also represents the lowest number of complaints for any quarter in the 2002/03 financial year. While complaint numbers tend to fluctuate markedly over the year, I would hope that this decrease may continue.

Overall my office has received 1125 complaints covering 1239 issues about DIMIA for the 2002/2003 financial year. This represents a slight increase of 27 complaints or 2.5% over the last financial year. This increase is less than was expected on the trend indicators at the end of the March quarter and is mainly due to the significantly lower complaint numbers we received in the last three months.

We closed 276 cases covering 320 issues for the period April to June 2003. As for the previous quarter, most complaints (49.1% of complaint issues) arose out of concern about DIMIA's actions and decisions, particularly in relation to detention and migration (temporary and permanent entry) decisions. In the majority of complaints it was asserted that DIMIA staff made the wrong decision or failed to act in the matter, followed by concerns about how the law was applied in the decision making process. Other complaints arose out of concern about advice given by DIMIA officers on all aspects of Departmental

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business, behaviour of DIMIA officers towards members of the public, timeliness of Departmental response, and matters concerning DIMIA policy.

Significant Issues for the April - June Quarter

Ombudsman Office response to complaints

Statistics for the fourth quarter of the 2002/03 financial year and for the year as a whole show two noteworthy trends in my office's response to complaints. Firstly, there has been a slight upward trend over the four quarters of the year in the rate for declining to pursue an investigation, with a corresponding downward trend in the number of issues we investigated. Our rate for declining to pursue complaints rose by 2.2% over the year; though the increase is small, I would hope that this trend could continue. In my previous report I made the point that an improvement in the quality of the complaint handling mechanisms in an agency generally results in a decline in the number of complaints investigated by the Ombudsman.

Secondly, we have been unable increasingly to determine an outcome in our investigations of complaints. In 35.4% of issues we investigated during the last quarter we could not determine whether or not defective administration was evident. This represents an increase of between 10-15% over previous quarters. Some areas stand out in this regard. We are most likely to record a finding of "not determined" in relation to decisions/actions concerning detainees' access to medical services and the safety and security of detention centres. The principal reason is the absence of clearly defined standards and benchmarks against which actions can be measured, for example, there is no stated benchmark as to what is considered to be an appropriate waiting period for detainee access to medical or dental services in the community; nor a defined measure of when a detainee is considered to be a threat to the good order of a detention centre and exactly how such a threat (perceived or real) should be managed.

The Department has proposed that detainee access to medical services should be similar to the access to services (and waiting time experienced) by members of the general community. There is intrinsic merit in this proposal, but only if there is a clear community benchmark, for example, as to the waiting time experienced by members of the general community. Current immigration detention standards are very broadly defined, leaving much to the discretion of the detention officer, their supervisor or manager. This makes it difficult to assess how a decision was made and on what principles/guidelines it was based.

We also find it difficult to determine whether or not defective administration was evident in the time taken to deal with family member (usually fiancé or spouse) visa applications. For example, complainants state that applications take a long time to process and requirements for applications can be confusing and/or difficult to meet. Wrong information may have been supplied by the applicant, or information may have been missing, but applicants are not informed of these shortcomings and not able to correct the information supplied. We wish to explore further the role that the Department would play in assisting applicants with applications before a final decision on a visa application is made.

Ombudsman finding of 'Defective Administration'

It has become increasingly clear over the past three months that both Ombudsman staff and DIMIA officers are concerned about making a finding of 'defective administration' in the course of complaint investigation. DIMIA staff have expressed some uncertainty as to how the term is used and what might be the implication for the Department. Of particular concern is the perception that Ombudsman staff appear to arrive at a conclusion of 'defective administration' without offering Departmental officers the opportunity to respond and to discuss the complaint before the conclusion is reached.

A quick survey of DIMIA complaints where 'defective administration' was recorded has indicated that some confusion exists among Ombudsman staff on the procedures that need to be followed when recording 'defective administration'. As a result, statistics for the 2002/03 financial year in relation to 'defective administration' may not be as accurate as they could be and should be viewed with some caution.

This issue is currently under review in my office, at both a legal and policy level with a view to clarifying the standard to be applied and the process to be followed. This may lead to some further updating of our investigation guidelines and appropriate staff training. We will keep the Department informed of progress on this issue.

Case Handling - Extension of Time

This issue was mentioned in my first Quarterly Report in which I referred particularly to the length of time that we are experiencing in obtaining answers to our inquiries to the Department. I have [REDACTED] Esteyn's comments in relation to improved procedures and monitoring of our inquiries and I agree that complaints often involve very complex and time consuming issues that are not easily dealt with.

I understand that my officers have been discussing these matters in their regular liaison meetings with the Department to work on possible solutions. For example, we are now getting regular updates on visa processing times for the various overseas posts. This information is being disseminated to all our investigation officers. Timelines in visa processing is by far the most common issue in complaints about migration matters. Now that investigation officers are able to check on the average processing times for a particular overseas post, I am hopeful that we are able to exercise our discretion not to investigate a complaint further in many more of these cases.

It is often the case that a little bit more information is all that is needed by my office when a request for an extension of time to answer an inquiry is made. For example, it can be helpful to know the current status of an inquiry, how much more information needs to be collected, whether it is likely that the response will be provided within the new timeframe, or whether another extension is likely. Once again, I understand that this is being discussed between my office and the Department in an effort to resolve matters.

I am pleased to see that good progress is being made with regard to this issue.

Removal of Unauthorised Arrivals

We are currently looking at a case (2003-2032064) where a detainee at Villawood had alleged that DIMIA decided to take removal action before he had received the full reasons

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for refusal of his application by the RRT. The detainee could not decide if he should lodge an application with the Federal Court until he knew the grounds for the refusal. It appeared that the Department had issued a removal notice without allowing for time for the detainee to receive all relevant information from the RRT. The removal notice has since been withdrawn, however the case highlighted some questions about the general nature of the removal process.

Rather than look at the issue from the individual's case, we have asked the Department to consider the complaint from a systemic point of view. We are particularly interested to know

- whether there have been other cases with similar circumstances;
- the procedures followed in relation to these cases;
- whether, in the Department's opinion, the current procedures are sufficient to prevent this situation; and
- if they are sufficient, how the present case arose and what can be done to prevent such issues arising in the future.


DIMIA liaison officers are currently working on this matter and we are expecting a response shortly.

Medical Services Provision within Detention

We continue to be interested in the provision of medical services to detainees. Our discussion paper on this matter should be finalised shortly and will be forwarded to you in due course. I also understand that my officers have been in touch with the Department in relation to the draft Coroner's Report on the death of [redacted] at the Villawood Detention Centre. Whilst we do not intend to take any action on the matter, we are interested in the outcome of any review the Department may be undertaking as a result of the report and would be grateful to be kept informed on the matter.

For your information I have annexed to this letter additional statistical information on complaints dealt with by my office in the first quarter of this year (January to March 2003).

Yours sincerely



Prof John McMillan
Commonwealth Ombudsman

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**COMPLAINTS TO THE COMMONWEALTH OMBUDSMAN CONCERNING
THE DEPARTMENT OF IMMIGRATION, MULTICULTURAL AND INDIGENOUS
AFFAIRS (DIMIA)**

1 April 2003 – 30 June 2003

COMPLAINTS CLOSED

As stated in my previous report our database allows us to record the issues identified in a complaint, as well as the underlying areas of concern (causes), which led to the complaint. Causes of complaints are separated into seven categories: advice, behaviour, decision/action, policy, timeliness, other and not determined. Table 1 gives an overview of complaint numbers closed and the underlying causes for the period April to June 2003.

Table 1: Complaint issues closed by cause of complaint

Cause of Complaint		Number of Issues	Percentage of Total
ADVICE	Access	4	
	Clarity	7	
	Completeness	1	
	Fail to provide	15	
	Inconsistent	9	
	Relevance	1	
	Wrong	4	
Total Advice		41	12.8
BEHAVIOUR	Attitude	7	
	Bias	5	
	Corrupt	1	
	Harassment	2	
	Intimidation	1	
	Privacy	2	
Total Behaviour		18	5.6
DECISION/ACTION	Application of Law/Rule	18	
	Date of effect	5	
	Failure to act	32	
	Wrong	102	
Total Decision/Action		157	49.1
POLICY	Legislation	3	
	Unfairness	15	
Total Policy		18	5.6
TIMELINESS	Delay	54	
	Statutory deadline	2	
	Department deadline	2	
Total Timeliness		58	18.2
Other		17	5.3
Not Determined		11	3.4
GRAND TOTAL		337	100.0

Nearly half of all complaint issues (49.1%) related to the Department's actions/decisions. This represented a 6.4% increase over last quarter and was the highest number for the year. Complaints about departmental advice also increased (by 3.9% over the previous quarter) to the highest number for the financial year.

Complaints about timeliness accounted for nearly one fifth of complaint issues. However, numbers decreased by 5.5% to the lowest count for the year. Numbers for all other complaint issues remained relatively steady.

Ombudsman Office responses (closed complaints)

Of the 320 complaint issues brought to our attention and closed during the three-month period, the office exercised its discretion not to investigate on just over half of the issues (54.1%). We investigated 45.9% (147 issues). There has been a slight upward trend in our discretion rate over the four quarters of the 2002/03 financial year and a corresponding downward trend in the number of issues we investigated. In the first quarter of the year we investigated 48.1% of all issues, which fell to 45.9% in the fourth quarter. Correspondingly, we exercised our discretion not to investigate on 51.9% of issues in the first quarter of the year, which increased to 54.1% in the fourth quarter.

Where we exercised discretion not to investigate, we generally advised the complainant to pursue the issues with DIMIA first (in 41.1% of issues). In 39.3% of issues the complaint was not warranted under the circumstances and in 8.6% of issues the complaint was withdrawn or lapsed. Table 2 sets out this office's response to the 320 complaint issues closed for the period.

Table 2: Response for complaints closed, 1 April – 30 June 2003

Response	Outcomes	Number of Issues	
Discretion not to investigate	Advise to pursue with DIMIA	71	
	Advise to pursue with court/tribunal	3	
	Advise to pursue with subject specialist	3	
	Being considered by Minister/Member of Parliament	1	
	Has been or is being considered by court/tribunal	2	
	Not warranted in the circumstances	68	
	Insufficient interest by complainant	1	
	Withdrawn by complainant or lapsed	15	
	Written complaint requested but not received	6	
	Out of jurisdiction	2	
	Not determined	1	
	Total		173 (54.1%)
	Ombudsman investigation	Agency defect	29
No agency defect		47	
Not determined		52	
Withdrawn by complainant		2	
Discretion not to investigate further		17	
Total		147 (45.9%)	
GRAND TOTAL		320	

Outcome of complaint issues

Table 3 provides an overview of the outcomes of our actions in relation to the causes of complaints. It has been extended to include those issues that we did not investigate, but used our discretion not to pursue a matter further.

In those cases that we did investigate, we found no defective administration in 31.9% of issues. In 19.7% of issues investigated the outcome was a finding of 'defective administration' and in 35.4% of the issues we did not or could not make a determination as to whether or not defective administration existed.

Table 3: Investigated complaint issues by cause and outcome

Cause of complaint	Investigation outcome	Number of issues
ADVICE	Agency defect	5
	No agency defect	6
	Not determined	6
	Withdrawn or lapsed	2
	Discretion	21
	Out of jurisdiction	1
Total Advice		41
BEHAVIOUR	Agency defect	
	No agency defect	4
	Not determined	2
	Withdrawn or lapsed	2
	Discretion	10
Total Behaviour		18
DECISION/ACTION	Agency defect	8
	No agency defect	26
	Not determined	26
	Withdrawn or lapsed	10
	Discretion	87
Total Decision/Action		157
POLICY	Agency defect	2
	Not determined	3
	Discretion	13
Total Policy		18
TIMELINESS	Agency defect	13
	No agency defect	8
	Not determined	14
	Withdrawn or lapsed	3
	Discretion	20
Total Timeliness		58
Other	Agency defect	1
	No agency defect	2
	Not determined	1
	Discretion	13
Not Determined	No agency defect	1
	Not determined	1
	Discretion	8
	Out of jurisdiction	1
GRAND TOTAL		320

The most commonly investigated concerns related to the Department's decisions and the timeliness of actions taken. We investigated 65.5% of all complaint issues relating to timeliness and 44.6% of issues relating to DIMIA decisions/actions. Though the numbers

are small we only investigated about a quarter of complaint issues relating to Departmental policy. We found defective administration in relation to 22.4% of concerns about timeliness and in 5.1% of issues in relation to decisions/actions. The latter represents a decrease of well over 10% from the last quarter.

Table 4 below looks at how we dealt with complaints in more detail and incorporates figures for the whole of 2002/03. Complaint issues have been categorised into 'detention', 'migration' (including permanent and temporary entry into Australia), and 'other' issues, which encompass citizenship matters, FOI applications and residence issues.

Migration matters make up more than 50% of all complaints we received during the year, with detention and other issues accounting for approximately one quarter each.

Table 4: Complaints by cause, issue and outcome for 2002/03

Cause	Issue	Agency Defect	No Agency Defect	Not Determined	Withdrawn	Discretion	OOJ	Total
Advice	Detention	3	4	3	-	6	-	15
	Migration	10	23	12	5	42	1	93
	Other	2	4	2	1	18	-	27
		15	31	16	6	66	1	135
Behaviour	Detention	4	7	7	1	9	-	28
	Migration	1	4	2	3	13	-	23
	Other	1	2	1	1	16	3	24
		6	13	10	5	38	3	75
Decision/Action	Detention	11	32	27	8	78	1	157
	Migration	21	67	24	17	146	1	276
	Other	16	31	10	6	78	4	145
		48	130	61	31	302	6	578
Policy	Detention	3	1	3	-	16	-	23
	Migration	1	3	-	1	24	-	29
	Other	1	1	1	-	10	-	13
		5	5	4	1	50	-	65
Timeliness	Detention	7	4	3	2	17	-	33
	Migration	25	44	31	7	39	1	177
	Other	11	8	10	3	13	1	46
		43	56	44	12	69	2	256
Not determined	Detention	1	1	-	-	6	1	9
	Migration	-	2	2	1	18	1	24
	Other	-	-	1	-	6	1	8
		1	3	3	1	30	3	41
Other	Detention	5	3	4	1	22	1	36
	Migration	2	5	1	1	14	2	25
	Other	3	2	3	1	17	2	28
		10	10	8	3	53	5	89
GRAND TOTAL		128	248	146	59	638	20	1239

As the figures indicate, we are more likely to exercise the discretion not to investigate on a complaint in relation to policy or behaviour matters than we are on complaints relating to