

**SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE
7 OCTOBER 2005**

Inquiry into the administration and operation of the Migration Act

Questions taken on notice – 7 October 2005

- Q.1 Senator Crossin: When the minister's chief of staff received an email from Mr Young [Ms Alvarez's former husband] it was 16 days before the Department was notified and then a further 10 days before it became public. You mention in this report of Mr Young contacting the minister's office but your investigation seems to stop there. Why is that? Did you look at why it was that at least 16 to 26 days had elapsed, when the minister's office had this email from Mr Young and, I think, even personally interviewed Mr Young but nothing was then done?**

The email address provided on the Minister's website (to which Mr Young sent his email on 4 April 2005) is managed by DIMIA's Ministerial and Communications Section, not by Minister's office staff. Action taken in regard to Mr Young's email is expanded upon at paragraph 2.5, page 23 of the Report.

The DIMIA chronology does indicate that there was a lapse of 16 days (20 April 2005) before the email was attended to and brought to the attention of the then DIMIA Deputy Secretary Ms Godwin who briefed Mr Nation, the Minister's Chief of Staff and DIMIA Secretary Mr Farmer, the next day (21 April 2005). The Chronology indicates a brief was sent to Washington for the Secretary and Minister Vanstone on 22 April 2005.

Given that Ms Alvarez had been identified, the Inquiry did not consider this issue to be as more important than other substantive issues being considered by the inquiry.

- Q.2 Senator Crossin: Did you formally investigate the actions in the Minister's office in the course of this report?**

No - see answer to question 1. Because the email box was managed by the Department there was no need to interview Ministerial staff.

- Q.3 Senator Crossin: Could you also provide us with the reasons if you did not?**

See answer to question 1.

- Q.4 Senator Crossin: My question to you is: why did you get to dot point 31 and stop the inquiry? Why did Mr Comrie stop there? He did not say, 'Gosh, I have the power...' Why did he not then go and talk to people in the minister's office?**

See answer to question 1.

Q.5 Senator Crossin: Was your office or Mr Comrie's office aware of which individuals, agencies or organisations Ms Alvarez was taking legal action against, while you were conducting the inquiry?

No.

Q.6 Senator Nettle: Did the terms of reference provided for the inquiry in any way limit the investigations that your team wanted to do on this issue?

The investigation was conducted as per the Terms of Reference and reported on as required. At the time the inquiry was transferred to the Ombudsman's office, it had been substantially completed and the issues had been defined by the Comrie team. It was adopted by the Ombudsman on this basis.

The only limitation experienced was that some organisations and individuals declined to furnish information and/or documentation until the team investigators were delegated certain powers under the Ombudsman Act on 20 July 2005 and utilised some of those powers.

Q.7 Senator Fierravanti-Wells: How many of the DIMIA complaints received by the Ombudsman's office also have some form of legal procedure on foot?

The Ombudsman's office may not be aware if legal proceedings are being pursued by a complainant and does not necessarily record if each complaint is also the subject of legal action.

The Ombudsman has the discretion not to investigate or not to continue to investigate certain complaints. This includes where a complainant has exercised or exercises a right to have the same action reviewed by a court or tribunal set up under an enactment. In 2004-05, we exercised this discretion for 38 complaints (4.4%) about the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) covering 40 issues.

Q.8 Senator Fierravanti-Wells: Under the heading of visa cancellations [subject to the Ombudsman's own motion investigation into s 501 of the Migration Act] you say 'We have received several complaints'. How many is several? Two?

Our statistics do not separately categorise complaints about visa cancellations under s 501 of the Migration Act. The focus of the s 501 own motion investigation is limited to the visa cancellation of long-term Australian residents who had been in Australia since childhood. It does not apply to the general issue of visa cancellations. As at the commencement of the own motion investigation, the office was dealing with seven complaints into the visa cancellation of long-term Australian residents. These people had spent their formative years in Australia and were in detention pending removal.

Q.9 Senator Fierravanti-Wells: I would appreciate it if you would provide me with some information about the number and the sorts of complaints [about MARA] which could show me the pattern of those complaints in relation to the conduct of migration agents.

The Ombudsman's office only began to separately categorise complaints about the Migration Agents Registration Authority (MARA) in September 2004. Prior to this we recorded them as complaints about DIMIA. In 2004-05, we separately categorised six complaints about MARA. Half of these were about the conduct of investigations by MARA into the actions of migration agents.

The Ombudsman's office does not separately categorise complaints about migration agents as we usually advise complainants to pursue these directly with MARA.

Q.10 Senator Fierravanti-Wells: do you know the time that the person spent in detention in each of the 200 cases that were referred to you?

The following table shows the summary information provided to this office by DIMIA on the number of days people have been held in immigration detention before a decision was made to release them under the Migration Act. The figure includes the additional 20 cases recently referred to the Ombudsman by the Minister. At this stage we have not completed the investigation of the cases so are not in a position to confirm that the data is accurate or indicate whether any or all of the periods of detention were unlawful.

Days in immigration detention	Number of cases
Less than one day	36
1-3 days	73
4-7 days	28
1-2 weeks	9
2-4 weeks	11
1-2 months	11
2-3 months	8
3-6 months	13
6-12 months	10
1-2 years	8
2-3 years	12
3-4 years	1
4-5 years	0
5-6 years	1
6-7 years	1
Total	222

(Note: on the initial information from DIMIA two people had been held twice – 1 and 3 days, and less than 1 day and 25 days respectively).

Q. 11 Senator Fierravanti-Wells: When you look at the broader number of complaints in the context of the statistics that you previously agreed to provide to me, I would appreciate it if you could look at this in that context as well. So, in effect, Rau and Alvarez represent a very small number of gender of complaints?

The Ombudsman's office does not record complaints according to their level of seriousness; therefore we are unable to provide the ratio of Rau and Alvarez type cases against the general immigration complaints.

In 2004-05, we recorded an outcome of defective administration for 39 complaints (4.5%) about DIMIA covering 41 issues. However, an outcome of defective administration has no bearing on the level of complexity of the complaint.

Q.12 Senator Fierravanti-Wells: Questions were put to you about the review of conduct of staff in the minister's office or people working in ministers' offices. You said that it has been an issue in the past. Are there specific instances where that has arisen? ... I would appreciate it if you could go back over some period of time. You said earlier that you have been reviewing DIMIA for 28 years. I appreciate that probably your records do not go back that far. But I would appreciate it if you could look at whether those kinds of instances did arise in governments other than this one and advise of that.

The Ombudsman's office database does not record complaints according to the status of the person who is the subject of the complaint.

Q.13 You talked about complaints coming to the Ombudsman in relation to issues pertaining to detention. Do these complaints go back prior to 1996?

Yes - however we are unable to give any comparative figures because our recording systems have changed over time.

Information on complaints about detention can be found in past Own Motion investigation reports including:

Date	Agency	Title of report
March 2001	Department of Immigration and Multicultural Affairs (DIMA)	Own Motion Investigation into DIMA's Immigration Detention Centres
March 2001	Department of Immigration and Multicultural Affairs (DIMA)	Own Motion Investigation into Immigration Detainees held in State Correctional Facilities
December 1995	Department of Immigration and Ethnic Affairs (DIEA)	Own Motion Investigation of complaints concerning the transfer of Immigration detainees to State prisons

Q.14 Could you provide statistics on complaints about DIMIA since you commenced reviewing DIMIA.

The number of complaints about the Department of Immigration received and finalised since the Ombudsman's office was established is provided below:

	Department	Complaints Received	Complaints Finalised		Total Complaints Finalised
Year		Total	Written	Oral	Total
1977/78	DIEA	153	*	*	100
1978/79	DIEA	149	149	*	139
1979/80	DIEA	340	113	158	271
1980/81	DIEA	487	125	292	417
1981/82	DIEA	678	90	403	493
1982/83	DIEA	637	161	447	608
1983/84	DIEA	836	251	642	893
1984/85	DIEA	1012	223	797	1020
1985/86	DIEA	714	210	523	733
1986/87	DIEA	*	186	395	581
1987/88	DILGEA	*	156	444	600
1988/89	DILGEA	*	231	548	779
1989/90	DILGEA	*	304	581	885
1990/91	DILGEA	*	349	733	1082
1991/92	DILGEA	*	337	747	1084
1992/93	DIEA/DILGEA	*	441	574	1015
1993/94	DIEA	742	*	*	803
1994/95	DIEA	689	*	*	676
1995/96	DIMA	638	*	*	717**
1996/97	DIMA	736	*	*	773**
1997/98	DIMA	878	*	*	973**
1998/99	DIMA	959	*	*	1088**
1999/00	DIMA	983	*	*	1001
2000/01	DIMA	994	*	*	954
2001/02	DIMIA	1098	*	*	1063
2002/03	DIMIA	1121	*	*	1118
2003/04	DIMIA	865	*	*	908
2004/05	DIMIA	873	*	*	885

* Denotes that figures were not included in the Annual Report

** Denotes issues finalised

DIEA - Department of Immigration and Ethnic Affairs

DILGEA – Department of Immigration, Local Government and Ethnic Affairs

Additional questions from Senator Ludwig

Q.1 How many cases have now been referred to you for investigation and report from DIMIA about instances of possible 'unlawful' detention?

222 cases involving 220 individuals have now been referred to the Ombudsman for investigation and report (DIMIA's statistics indicate that two people were detained on two separate occasions). I have indicated that, unless there are special circumstances, and subject to privacy considerations, my reports on these cases will be made public.

Q.2 Would you please provide a breakdown of each case by type and severity? For example:

- the length of detention;
- the type of visa breach;
- whether unlawful non-citizen, student or other; and
- no breach of visa suspected.

As the Ombudsman's office does not yet have all this information, this question is best referred to DIMIA.

Q.3 Would you please indicate which DIMIA Area and/or State Office dealt with each one of these cases? Would you please provide a breakdown by the State Compliance Office that dealt with each of these cases?

As the Ombudsman's office does not yet have all this information, this question is best referred to DIMIA.

Q.4 Recommendation 1 of your report deals with the 'negative culture in Brisbane Compliance'. Is it your view that this 'negative culture' is isolated to the Brisbane Office dealing with compliance or is it more broadly spread, especially in light of the number of cases – now well over 200 – that have been referred to your Office?

Our experience in dealing with complaints from individuals over the past years has indicated that the problems with the culture in the Brisbane office related to compliance issues were not unique. For example, in December 2004 and May 2005 I published reports on two investigations raising concerns about some aspects of DIMIA's compliance activity. Neither of these investigations involved the Brisbane office. I have also indicated in my 2002-03 and 2003-04 Annual Reports that I intend focussing more closely on compliance activities in DIMIA. To this end, we commenced separate recording of compliance complaints in our database in 2004/05.

As we have not completed investigation of the 222 cases, it is too early to indicate how many might raise concerns about compliance activity.

Q.5 Did you limit your investigation so as to not include the Minister's Office?

No decision was consciously made in this regard. See my response to Question 1 of the Questions taken on notice at the hearing.

Q.6 Please outline whether you requested to interview ministerial staff? If so, was that request agreed to or declined? If it was declined, were any reasons provided? If so, what were they?

No request was made to interview ministerial staff.

Q.7 Did the Ombudsman's Office's investigation include the actions of the Department when it was advised by Dr Nation on or about the 21 or 22 April 2005 that the Solon matter should remain confidential at the request of Mr Young (eg, as advised to Mr Ed Killesteyn)? If not, why not? Please explain why the Department's actions in this regard are not mentioned in the Report. Can you say whether or not that it was acceptable behaviour by the Department to accede to the request by Dr Nation? In your view, should further inquiries have been made by the Department in respect of Mr Young's reasons for maintaining the removal of Ms Solon as confidential?

It was the Inquiry's understanding that Dr Nation was briefed on the Alvarez circumstances by DIMIA staff on 21 April 2005. The Inquiry was unaware of any undertaking that the matter should remain confidential, by Dr Nation or any other person. There is nothing in the 'chronology of events' prepared by DIMIA to indicate that this was the case. The Inquiry was unaware of any request by Mr Young that the matter remain confidential and no such wording appears in his email. He made no reference to desiring that the matter remain confidential when interviewed by Inquiry team members. He expressed some concerns for his and his son's privacy due to the intense media interest.

The Inquiry only became aware of this issue on a reading of Hansard in regard to the statements made by Mr Killesteyn to the Senate Legal and Constitutional Legislation Committee on 25 May 2005. By this date Vivian Alvarez had been located in the Philippines (12 May 2005). The issue raised in this question is not regarded as coming within the terms of reference for the Inquiry.

In practical terms, the Alvarez matter became public very quickly, despite Mr Young's concerns for his and his son's privacy, but this did not impede the Inquiry in any way.

Q.8 Of the cases that have been referred to you for further investigation, can you please outline the nature of the next most 'catastrophic' case managed by DIMIA? In particular, can you outline the length of detention (if applicable) and a general description of the case and the State Compliance Office that dealt with it?

The 222 cases involve a wide range of issues, such as the length of time the person was in detention, their age, their immigration status prior to and during the time they were in detention, and their health circumstances. As we have not completed our investigations, our views as to which are the key issues of concern in the cases may change as the investigations unfold. It is not possible, therefore, to describe at this stage any one case as involving greater degrees of seriousness than others.

Q.9 Of the cases referred for investigation, how long is it envisaged before the matters are to be finalised?

We aim to have the bulk of the investigation work completed by the end of 2005-06, but this will depend on the nature of the issues identified as we work through the cases. We hope to provide an interim report on the first two groups of cases (mental health issues and data issues) in December - January.

Q.10 In an answer to a question without notice asked on Thursday 6 October 2005, the Minister indicated that the cases would be dealt with by the Ombudsman in groups. Would you please confirm the approach that is to be taken and provide a general outline of these proposed groupings?

We have categorised the initial 201 cases into eight groups, based very largely on short draft summaries DIMIA has provided on each case. These groupings have been done for the purposes of developing a strategy for dealing with all the cases, with our general intention being to investigate cases that seem to have a similar major issue at the same time. We may find through the investigation process that the key issues in any case are different from those we have initially identified. Each case will be investigated thoroughly.

The eight groups are:

- Children in detention (for example, where the child became an Australian citizen on their tenth birthday and then were no longer unlawful) – 7 cases.
- Data issues – where the DIMIA records may not have been up to date or were incorrect or conflicting, and the person seems to have been detained as a result (50 cases).
- Mental health issues – where the person may have had a mental health issue which caused problems in identifying them or clarifying their status (11 cases).
- Notice issues – where the person may not have been notified, or notified correctly, of decisions regarding their immigration status (14 cases).
- Srey cases – where the person has been released following a specific court case that was considered to set a precedent (37 cases).
- Detention process – where, for example, we have concerns as to why the person was detained, whether the legislation was being applied correctly, or where there may have been other problems such as identifying the person or delays in ascertaining their status (51 cases).
- Legal issues – where the person's status has changed as a result of judicial or merits review following their being taken into detention (30 cases).
- Other – one case not involving immigration detention (1 case).

This is an initial categorisation only to assist in managing the investigation process and, until we have actually investigated the cases, we cannot be confident that we have properly identified the major issues involved. It is premature at this stage to speculate whether in any or all of those cases, the detention was unlawful for any period of time.

Further information on issues discussed

During the Committee's hearing of evidence related to the administration and operation of the *Migration Act* 1958 on 7 October 2005, the following exchange occurred:

CHAIR—*You have no jurisdiction to look at the decisions of a minister; do you have the power to investigate actions of the minister or actions that happen in the minister's office?*

Prof. McMillan—*Yes, we do. The Ombudsman has always interpreted that limitation narrowly. It precludes the Ombudsman from investigating the personal decision-making actions of the minister but the Ombudsman has always claimed—and this is not now contested— jurisdiction to investigate advice given to a minister and action taken to implement the decision of a minister. The Ombudsman can also make comments and recommendations about legislation and policy and that enables matters to be extended broadly. As to investigating decisions made by officers within the minister's office, I would have to say that is an issue that is not formally resolved. There is a very complex definition of 'jurisdiction'. For example, some of the people in a minister's office are often public servants who are on transfer and we would clearly claim jurisdiction to investigate their actions.*

CHAIR—*Why is it not resolved? Is it not resolved because of political appointments in the minister's office?*

Prof. McMillan—*No, it is not resolved because it has never really come to a head. Most of our jurisdictional issues have never been an obstacle. When you have only the power to make a recommendation, it enables you often to overstep the jurisdictional limits on a consensual basis with those who are being examined. So it has never come to a head in the sense that either party has gone to a court to get a definitive ruling on where the jurisdiction starts and ends.*

I would like to take the opportunity to provide the Committee with further information on this issue.

The Ombudsman can investigate administrative action taken by a Commonwealth Department or prescribed authority (s 5(1)(a) and (b)) but not action taken by a Minister (s 5(2)(a)). In some cases, the Ombudsman Act deems the actions of a person other than an agency employee (such as a Ministerial staffer) to have been taken by a body that can be investigated if:

- the person taking action in the exercise of the agency's powers or functions was authorised to do so on behalf of the agency (see definition of "officer" and s 3(5) and (6)); or
- the person exercised a power or function that the person was authorised to exercise or perform by the Minister or Secretary (s3(4)).

The action taken by the person must be related to administration by a Commonwealth agency to be able to be investigated. There would be no obstacle to the Ombudsman requesting (s 8(3)) or issuing a notice to require (s 9(1) and (2)) information from a Ministerial staffer during the course of an investigation.

In response to a question from **Senator Nettle** to Ms Marion Le, migration agent, **Have you seen any changes since the Palmer report, legislative change, or, in particular, the Ombudsman's investigations into long-term detainees and how they are working?**, Ms Le made a number of comments. I would like to provide the committee with some information in relation to those comments.

Ms Le: We have to have yet another level of bureaucracy investigating what is going on in the long run. In the last week I have received three requests from the Ombudsman's office to provide them with information about three of my clients. I brought one of these with me....The Senior investigation officer of the immigration detention team of the Commonwealth Ombudsman sent me an email – one of three- in respect to a client which says "We have met this person who is now in Glenside at Adelaide and he told us you are his migration agent. We'd like to provide you with this opportunity to tell us anything you think may be relevant in our assessment of his circumstances...We understand the minister has intervened under section 48b. Can you tell us about the case and whether there is any progress? Do you have a copy of Dr Jon Jureidini's report of 29 June 2005? Do you have any other information about his medical circumstances?"

I did the section 48 b application to the minister. The minister is actively, as I understand it, considering it at the moment. Now I have the Ombudsman writing and asking if I can provide information that they obviously have not been able to receive from the department so they now fall back on the migration agent for. This is another pro bono case.

Response:

It is standard practice for my office to invite those who have been detained for more than two years to be interviewed but there is no obligation upon them to do so. We also ask the detainee if they would like us to talk to anyone else, including their migration agent, solicitor, advocate or any other person they may wish us to contact. All other advocates and representatives have welcomed this opportunity. If anything, the greater problem faced by us is that representatives may want more consultation than we think we can practicably undertake in the circumstances.

We have stressed in discussions with advocacy and community groups that we do not wish them to provide information that they have already made available in submissions that would be on departmental files. The progress on these cases is moving rapidly, however, and we do ask questions that might provide more up-to-date information than may have been available when we received the report from the department or inspected files.

The detainee referred to by Ms Le specifically requested that we contact her. Ms Le was asked if she had a medical report from Dr Jon Jureidini that was not available from DIMIA. The report is apparently an independent assessment of the detainee and not one commissioned by the Department.

The Ombudsman has established a good working relationship with the department for the purposes of conducting reviews into long-term detention cases. Protocols have been agreed upon for seamless access to any

information that the department holds, which the Ombudsman considers necessary in conducting assessments. In this case, the department does not hold the doctor's report in question. Ombudsman staff first approached the department to obtain a copy but the department, although they quoted a passage from the doctor in their report to the Ombudsman, has advised that they do not hold the whole report. We therefore asked Ms Le, who advised that she also does not hold a copy. We have since obtained a copy direct from the doctor.

Ms Le: We also have a DIMIA report here that came to hand yesterday, which is a report to the Ombudsman on, strangely enough, that same person. It came into our hands because I had his file under FOI. It is unfortunately full of inaccuracies. That is the report going from DIMIA to the Ombudsman.... 'as per the agreement between the Commonwealth Ombudsman, the department and GSL made on 10 August 2005, a medical summary report will be sent separately in the near future.'

We have the medical summary report. So we have it but the Ombudsman does not, so the Ombudsman has to write to us and ask us for it. Increasingly I am feeling I am an outpost of the Department of Immigration and Multicultural and Indigenous Affairs.

....In this case there is a very important issue with this gentleman....his first medical report said that he is a hepatitis B carrier and he is a public health concern....Later on, the report that went to the Ombudsman said he is hep C positive, but he is hep B positive...Of grave concern to us all should be that that very first medical report was ignored, and he was working in the kitchens in Woomera and Baxter.

Response:

Ms Le's response indicates that the report provided to her under FOI was the report prepared for the Ombudsman's office for the purposes of the review of this person's long-term detention.

DIMIA did provide a Medical Summary prepared by the GSL health provider, IHMS. This report did not, however, mention hepatitis, either B or C. DIMIA is raising with GSL as to why reference to hepatitis was not included in the report to the Ombudsman.

It appears that the report to which Ms Le refers, is not the report provided to the Ombudsman for the purposes of the detention review. We have asked DIMIA to make all their relevant files, including what was released to Ms Le, available to us so that we can clarify the issue.

We do take seriously allegations that information provided by DIMIA might be inaccurate. To some extent we are reliant on the accuracy of the information provided by the Department as the files on people who have been detained for several years can be vast and conducting the reviews expeditiously, yet thoroughly, is a challenge for this office. In the first six months at least, it has not been practicable or necessary to verify every aspect of a case. We will, however, be conducting sample audits on the DIMIA files to ensure the accuracy and completeness of the reports provided to us. DIMIA, as per our protocols, has agreed to this and is arranging for us to inspect selected files. These inspections are planned for some time within the next two weeks.