

Inquiry into the Circumstances of the Vivian Alvarez Matter

Report under the *Ombudsman Act 1976* by the Commonwealth Ombudsman,
Prof. John McMillan, of an inquiry undertaken by Mr Neil Comrie AO APM

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26 September 2005

Senator the Hon. Amanda Vanstone
Minister for Immigration and Multicultural and Indigenous Affairs
Parliament House
Canberra ACT 2600

Dear Minister

In July 2005 the Government asked my office to take responsibility for completing the investigation of the removal from Australia of an Australian citizen, Ms Vivian Alvarez. I accepted the Government's request and began an own-motion investigation into the matter under s. 5 of the *Ombudsman Act 1976*. A substantial amount of work had already been done by Mr Neil Comrie AO APM, in cooperation with Mr Mick Palmer AO APM, and at the request of the Government I retained Mr Comrie to continue the investigation.

The investigation is now complete and, in accordance with s. 15 of the Ombudsman Act, I present to you a copy of the report. It is my intention to publish the report under s. 35A of the Ombudsman Act. With that in mind, the names of most individuals mentioned in the report have been removed for privacy reasons.

The continuation of Mr Comrie's inquiry under the Ombudsman Act meant that this report differs in some respects from other Ombudsman reports. This is discussed in Section 1.6 of the report.

Although the report reflects the work of Mr Comrie and his team, it is adopted and published as a report of the Ombudsman in accordance with the requirements of the Ombudsman Act. I take this opportunity to note that many of the concerns expressed in the report accord with matters raised by my office in recent years, especially in relation to compliance activity, the welfare of immigration detainees, and the culture of the Department of Immigration and Multicultural and Indigenous Affairs.

The department's response to a draft of this report expresses a commitment to embark on far-reaching reform to deal with the matters raised in this and other reports. The Government shares that commitment. I welcome the response. I also look forward—in a new role as Immigration Ombudsman—to developing within my office strengthened capacity to play a broader role in monitoring immigration decisions and services.

Yours sincerely



Prof. John McMillan
Commonwealth Ombudsman

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Main findings

1. Vivian¹ was born in the Philippines on 30 October 1962. She married an Australian citizen, Robert William Young, on 26 May 1984 and came to live in Australia on 7 July 1984. She became an Australian citizen on 3 March 1986 and used the name Vivian Solon Young.
2. On 30 March 2001 Vivian was found injured in a park in Lismore, New South Wales, after having fallen into a deep drain. She was taken by ambulance to Lismore Base Hospital, where, under the name Vivian Alvarez, she was admitted as an involuntary patient to the Richmond Clinic Psychiatric Unit.
3. On the basis of information Vivian provided, a social worker at the Richmond Clinic advised the Department of Immigration and Multicultural and Indigenous Affairs office in Southport, in south-east Queensland, that Vivian might be an illegal immigrant. Apart from initial database searches, DIMIA staff did not actively pursue Vivian's case for a month.
4. DIMIA officers first interviewed Vivian on 3 May 2001, at Lismore Base Hospital. On the basis of information Vivian gave them, the officers involved assumed she was an unlawful non-citizen, and it is this assumption that appears to have been the catalyst for much of the subsequent response by DIMIA. The officers did not seek access to hospital records, which contained personal information that would have helped to identify Vivian. Nor did they actively pursue a male friend of Vivian's in Lismore who had information that would have helped with identifying her.

¹ Vivian used or was referred to by a variety of names. Vivian Alvarez is used in this report, since that is the name under which she first came to the attention of the Department of Immigration and Multicultural and Indigenous Affairs in 2001. In the interest of clarity and readability, she is generally referred to as Vivian throughout the report.

5. On 12 July 2001 DIMIA officers collected Vivian from the St Vincent's Rehabilitation Unit in Lismore and took her by car to the DIMIA office in Southport. From the time of Vivian's first interview with DIMIA on 3 May, the DIMIA officers had done little about the case; active use of this time might well have resulted in her being identified. One DIMIA officer made the erroneous assumption that Vivian might have been a sex slave, and this assumption appears to have influenced the way in which her case was handled.
6. On 13 July a formal interview was conducted with Vivian. During it, she said she was an Australian citizen, that she wanted to remain in Australia, and that she wanted to apply for a visa. Inadequate action was taken by DIMIA to pursue these crucial remarks.
7. The inquiries DIMIA officers made focused on confirming the name Vivian Alvarez. Insufficient attention was given to questioning whether this was the correct name. The DIMIA officers were aware Vivian had recently been a patient in a psychiatric facility, so it seems logical that they would have pursued the question of her name more diligently.
8. The inquiries made in an attempt to identify Vivian were ad hoc and symptomatic of a situation in which DIMIA officers had been inadequately trained for their role as compliance officers, particularly in relation to the interrogation of IT systems and databases. There were on DIMIA's TRIM database details that would have linked the name Alvarez to the names Solon and Young, but these were not accessed by compliance officers.
9. The management of Vivian's case was very poor, lacking rigour and accountability. Migration Series Instruction 267 requires that a compulsory checklist be completed in removal cases. It was not complied with. This meant that another requirement under the instruction—that the checklist be approved by the Officer in Charge of Compliance—was also not complied with. Failures are evident in the management of the case from the time of Vivian's first contact with DIMIA until her removal from Australia on 20 July 2001.
10. The DIMIA officers involved in Vivian's case had a flawed understanding of the application and implications of s. 189 of the *Migration Act 1958*.

11. The Inquiry recognises that only a court of competent jurisdiction can ultimately determine whether the detention of Vivian was lawful or unlawful. Nevertheless, it is the Inquiry's view that the decision to detain her under s. 189 of the Migration Act was not based on a reasonable suspicion: the relevant inquiries were neither timely nor thorough and there was a lack of rigorous analysis of the available information. Accordingly, this action was unreasonable and therefore, by implication, unlawful.
12. Vivian is an Australian citizen, so the application of visa provisions to her is irrelevant. The approach DIMIA compliance officers took, however, persuades the Inquiry that the visa provisions were manipulated to accommodate their management of Vivian's case.
13. When she was taken into detention Vivian was photographed, but the photograph was not used adequately in an attempt to identify her. She was not fingerprinted, and this omission precluded the opportunity to match her fingerprints with those held at the National Automated Fingerprint Identification System of CrimTrac (the national law enforcement database).
14. Vivian's serious physical and mental health problems received insufficient attention in decision making associated with her detention and removal from Australia.
15. Although DIMIA officers were presented with a difficult decision about where to detain Vivian before removing her, her detention for one week in a single motel room was inappropriate. Her privacy, dignity and welfare were compromised by the fact that she was guarded in this room at all times by two contracted security guards and had no access to the medical facilities available to people held in immigration detention centres.
16. Although Vivian's disappearance (as Vivian Solon @ Young) had come to the attention of the Queensland Department of Family Services and the Queensland Police Service on 16 February 2001—when she failed to collect her son from a child care centre in Brisbane—it was not until five months later that the Queensland Department of Family Services reported her as a missing person. The Queensland Police Service activated a missing persons report on 17 July 2001, when Vivian was being held in detention. The delay in reporting her as a missing person

greatly limited the likelihood of locating her before her detention and her removal by DIMIA on 20 July 2001.

17. On 19 July 2001 the Queensland Police Service Redcliffe Intelligence Office made inquiries with the Brisbane office of DIMIA about the travel movements of Vivian Solon @ Young. DIMIA's response was that Vivian Alvarez Solon @ Young had last arrived in Australia on 2 September 1993. This was the first time since Vivian had come to DIMIA's attention that DIMIA had linked the name Alvarez with Solon @ Young. Despite the fact that on that very day Vivian was being held in detention in a Brisbane motel, the limited name connectivity of DIMIA databases did not allow for the association of these names. A major opportunity to prevent Vivian's removal was lost.
18. In response to welfare concerns raised by the Philippines Embassy through its Honorary Consulate General in Brisbane, two members of the Filipino community visited Vivian at the motel in which she was detained. The first visit occurred on 18 July, and Vivian gave her name as Solon. The second visit was on 19 July; Vivian again gave her name as Solon and said she had been married to a Mr Young. This crucial information was neither sought by nor supplied to DIMIA.
19. The Philippines Embassy had expressed concern about Vivian's fitness to travel and as a result did not issue a travel document allowing for her removal to the Philippines. A locum medical practitioner visited the motel on 19 July, examined Vivian and certified her as fit to travel. The Philippines Consulate General then issued a travel document that allowed Vivian to be removed the next day.
20. The use of a locum medical practitioner to certify Vivian as fit to travel was inappropriate in the circumstances—including the fact that he had no knowledge of or access to Vivian's medical history. This situation provides evidence to support the Inquiry's contention of a flawed DIMIA culture—one that pays insufficient attention to detainees' welfare and care needs.

21. On 20 July Vivian was removed to the Philippines, escorted by a female officer of the Queensland Police Service. In view of Vivian's poor physical and mental health and the unsatisfactory manner in which her case had been managed, the Inquiry considers that Vivian's removal was effected with undue haste and without adequate consideration of her welfare. DIMIA failed to meet its duty of care obligations to Vivian and unlawfully removed her from Australia.
22. The unlawful removal of Vivian was a consequence of systemic failures in DIMIA—among them inadequate training programs, database and operating system failures, poor case management, and a flawed organisational culture.
23. On 14 July 2003 the Queensland Police Service Missing Persons Bureau contacted the DIMIA Entry Systems and Movements Alerts Office to ask about Vivian Solon @ Cook @ Young. Two DIMIA officers independently carried out database searches that linked Vivian Alvarez with Vivian Solon Young. Both these officers advised the same supervisor of their discovery that an Australian citizen had been removed. The supervisor took no action to redress this serious problem.
24. The television program *Without a Trace* went to air on 20 August 2003; it featured a segment showing Vivian's photograph. The following day, an officer at the Entry Systems and Movements Alerts Office, who had seen the program the night before, performed database checks that linked Vivian Alvarez and Vivian Solon Young. This officer informed the supervisor who had been advised of the discovery on 14 July 2003 that an Australian citizen had been removed. Again, the supervisor failed to take action.
25. A DIMIA Brisbane officer who had been involved in the removal of Vivian also saw the *Without a Trace* program. The following morning this officer performed database searches that linked Vivian Alvarez with Vivian Solon Young. The officer took the search results to the person who had been her supervisor at the time of Vivian's removal and advised him of her discovery that an Australian citizen had been removed. This supervisor failed to take any action.

26. On 9 September 2003 the Queensland Missing Persons Bureau—which by now was aware that Vivian had been removed in 2001—contacted the Department of Foreign Affairs and Trade in Canberra, seeking information in an attempt to locate Vivian in the Philippines. Communications between DFAT in Canberra and the Australian Embassy in Manila record that the DFAT officers involved were aware that an Australian citizen had been removed. These DFAT officers provided the information the Missing Persons Bureau sought but took no action to follow up on the question of how an Australian citizen came to be removed to the Philippines.
27. Robert Young, Vivian’s former husband, had persisted in his attempts to locate Vivian. Having been advised by the Missing Persons Bureau that she had been removed to the Philippines in 2001, he contacted the DIMIA Contact Centre in Sydney on 24 September 2003 and provided important information about Vivian’s wrongful removal. The officer at the Contact Centre failed to pursue the matter.
28. Robert Young’s persistence led the Missing Persons Bureau to contact the supervisor at the DIMIA Entry Systems and Movements Alerts Office in Canberra on 28 September 2004. This supervisor—the supervisor who had been advised on 14 July and 21 August 2003 of Vivian’s removal—carried out further database searches that linked Vivian Alvarez with Vivian Solon Young. He contacted DIMIA’s Southport office and obtained a photograph of Vivian. He then contacted DIMIA’s Brisbane office and had discussions with a senior officer there.

Inquiries by staff at the Brisbane office established that Vivian was an Australian citizen when she was removed in 2001. Two senior officers and other more junior staff in the Brisbane office were aware of these facts. One of the two senior officers was the supervisor who had been told on 21 August 2003 of Vivian’s unlawful removal. Apart from forwarding Vivian’s compliance file to the Entry Systems and Movements Alerts Office in Canberra on 30 September 2004, none of the three senior officers (one in Canberra and two in Brisbane) took any action.

It is the Inquiry’s view that the conduct of these officers could constitute a breach of one or other of the requirements of the Australian Public Service Code of Conduct, as detailed in s. 13 of the *Public Service Act 1999*.

29. After 30 September 2004 Vivian's file was kept at the Entry Systems and Movements Alerts Office in Canberra, where it was found on 21 April 2005, in a correspondence hutch attached to a desk. Standard practice for the securement of official files was that they be placed in the office correspondence locker. Vivian's file had not been put there.
30. It is of serious concern that Vivian's unlawful removal was the subject of considerable discussion in DIMIA's Compliance and Investigations Office in Brisbane in 2004 and that a number of officers performed database searches that linked the names Vivian Alvarez and Vivian Solon.
31. Vivian's unlawful removal in 2001 was eventually acknowledged officially only because of the continued inquiries by Robert Young, who brought the matter to the attention of the Minister's office in an email of 4 April 2005. Had Mr Young not persisted, the wrong done to Vivian and DIMIA's failures in the management of her case—including the failures of three senior officers—might well have remained unknown to the Australian community.
32. Misinterpretation of the provisions of the *Privacy Act 1988*, by both DIMIA officers and officers of the Queensland Missing Persons Bureau, created a situation in which important information that could have led to the discovery of Vivian's whereabouts was not released to Robert Young.
33. The Inquiry's investigation of this case was hampered by the fact that DIMIA had failed to maintain email business records for more than 12 months during the period in question.
34. DIMIA's overall management of Vivian's case can only be described as catastrophic. Nevertheless, it is important to record that some DIMIA officers performed their duties diligently and professionally. Having discovered that Vivian had been unlawfully removed, they took the evidence that established this fact to their supervisors and advised them of a grave problem. That these supervisors failed to take action should not obscure the diligence and professionalism of their subordinates.

35. The Inquiry's investigation produced substantial evidence to support many of the findings and recommendations in the Palmer report—the July 2005 report of the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau. Since the circumstances of the Alvarez matter first arose in 2001 and the Palmer report focused on matters that occurred in 2004, this Inquiry into the Circumstances of the Vivian Alvarez Matter concludes that many of the systemic problems identified by both investigations had been present in DIMIA for some years.

Recommendations

The recommendations of this Inquiry into the Circumstances of the Vivian Alvarez Matter follow immediately. The inquiry's investigation also revealed evidence that supports a number of the recommendations made in the Palmer report—the report of the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau. Those recommendations are recorded immediately following this Inquiry's 12 recommendations.

Recommendation 1

The Inquiry recommends that the Secretary of DIMIA take all necessary steps to:

- redress the negative culture in the Brisbane Compliance and Investigations Office—as demonstrated by the failure of a number of officers to take action on becoming aware that an Australian citizen had been unlawfully removed from Australia
- ensure that the problems and deficiencies identified in relation to the Brisbane Compliance and Investigations Office do not exist in other regional offices and in related areas in DIMIA head office.

[See Section 3.3.1.]

Recommendation 2

The Inquiry recommends that the Secretary of DIMIA instruct staff to comply with the requirement of Migration Series Instruction 267 that a compulsory checklist be completed to record the actioning of a removal and that the actioning of a removal be approved by a senior compliance officer—the Officer in Charge of Compliance. The checklist should be attached to every compliance file.

[See Section 3.3.2.]

Recommendation 3

The Inquiry recommends that the formal interview of detainees be constructed in such a way as to require that, where necessary, responses from a detainee be further investigated. The interview process should be dynamic and designed to elicit information useful to the making of decisions about detention and removal.

[See Section 3.3.2.]

Recommendation 4

The Inquiry recommends that, as an urgent priority, DIMIA commission a thorough, independent review and analysis of its information management systems. The review should be carried out by an experienced, qualified IT systems specialist and should aim to do the following:

- identify the real organisational policy and operational information management requirements—particularly requirements for interconnectivity, compliance management functionality, and growth
- explore the potential for single-search entry to all DIMIA databases
- formulate an implementation plan for consideration by the DIMIA executive.

[See Section 3.3.3.]

Recommendation 5

The Inquiry recommends that DIMIA commission a thorough, independent review and analysis of the IT training requirements for the Border Control and Compliance Division and the Unlawful Arrivals and Detention Division. The review should identify the requirements for the various functional responsibilities within the divisions.

[See Section 3.3.4.]

Recommendation 6

The Inquiry recommends that in the training program for compliance and investigations officers there be a focus on objectivity in decision making and a strong warning that false assumptions will contribute to poor decisions. Further, all staff at DIMIA should be reminded of the need for great care in the spelling and recording of names in files and records.

[See Section 3.5.]

Recommendation 7

The Inquiry recommends that DIMIA institute a review of the operations of contact centres, to determine more effective procedures for dealing with information those centres receive.

[See Section 3.7.]

Recommendation 8

The Inquiry recommends as follows:

- that compliance staff be trained to exercise greater caution in performing their duties—including verification of information—where it is known or suspected that a possible unlawful non-citizen may have mental health problems
- that any training program developed as a result of recommendations in the Palmer report and this report include a component designed to better equip compliance officers to deal with people with known or suspected mental health problems.

[See Section 4.2.2.]

Recommendation 9

The Inquiry recommends as follows:

- that DIMIA take all necessary action to ensure that appropriate standards for health and care needs are developed and introduced for situations involving detainees in transitional detention
- that, where it is necessary or appropriate to conduct a medical examination to determine the fitness to travel of an unlawful non-

citizen, DIMIA officers make all reasonable efforts to ensure that the medical practitioner concerned receives the medical history and record of the unlawful non-citizen and that the medical practitioner—who, if possible, is someone who has previously treated the patient—is advised of the factual circumstances, including the behaviour of the unlawful non-citizen, that have led to the need for the medical examination.

[See Section 4.2.2.]

Recommendation 10

The Inquiry recommends that the Secretary of DIMIA take all necessary steps to ensure that email business records are kept in accordance with the requirements of the *Archives Act 1983*.

[See Section 5.3.]

Recommendation 11

The Inquiry recommends that the Minister for Immigration and Multicultural and Indigenous Affairs write to Mr Robert William Young to commend him for his diligence in pursuing the matter of Vivian Alvarez and bringing it to the attention of the Australian Government.

[See Section 5.1.]

Recommendation 12

The Inquiry finds that the conduct of officers A, B and C, as described in this report, might constitute a breach of one or other of the requirements of the Australian Public Service Code of Conduct, as detailed in s. 13 of the *Public Service Act 1999*. The Inquiry recommends that this opinion be brought to the attention of the Secretary of DIMIA, in accordance with s. 8(10) of the *Ombudsman Act 1976*.

[See Section 7.3.]

Relevant recommendations from the report of the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau

Recommendation 3.1

The Inquiry recommends that DIMIA:

- design, implement and accredit—for all compliance officers and other staff who might reasonably be expected to exercise the power to detain a person under s. 189(1) of the *Migration Act 1958*—a legislative training package that provides the officers with the requisite knowledge, understanding and skills to fairly and lawfully exercise their power
- ensure that the training comprehensively covers the use of DIMIA and other agencies' databases and search capability and the conduct of searches to support investigations
- restrict the authority to exercise the power to detain a person under s. 189(1) to staff who have satisfactorily completed the training program and who are considered to be otherwise sufficiently experienced to exercise that power
- ensure that a component on 'avenues of inquiry' be included in the Certificate IV in Government (Statutory Investigation and Enforcement) Training Program delivered to DIMIA officers.

Recommendation 3.4

The Inquiry recommends that DIMIA create a dedicated Identity and Immigration Status Group to ensure that, where the identity or immigration status of a detainee remains unresolved after initial inquiries have been completed, frequent follow-up reviews are conducted. The Identity and Immigration Status Group should:

- review the continued validity of 'reasonable suspicion'—based detention on a regular basis—and at least every month—against the background of accumulating information
- be staffed by people who have wide experience in compliance and detention policy and operations, are familiar with the associated Commonwealth and state and territory legislation and arrangements, and have skills in investigation and analysis
- have the authority, responsibility and accountability for conducting and/or overseeing all necessary inquiries to

establish the identity and immigration status of unidentified detainees

- report monthly to executive management on the status of individuals still in immigration detention, the reason why they are being detained, what is currently being done to resolve the situation, and the expected date for resolution.

Recommendation 5.1

The Inquiry recommends that the DIMIA Secretary:

- commission and oversee a review of departmental processes for file creation, management and access
- take a leadership role in implementing the major changes that will probably be necessary as a result
- ensure that staff receive training in effective file management practices and the reasons for them
- make executive management personally accountable for ensuring that sound file management practices are followed.

Recommendation 5.2

The Inquiry recommends that the DIMIA executive ensure the preparation for staff of a checklist to be used as a minimum standards template for conducting identification inquiries. The checklist should provide a menu of avenues of inquiry, specify a sequential order for investigations, be included as an attachment to the DIMIA Interim Instruction on Establishing Identity in the Field and in Detention, and form a part of the personal investigation file. The DIMIA executive should also:

- formalise the Interim Instruction together with the checklist attachment as soon as practicable
- ensure that suitable training modules are developed and delivered to all staff—including managers—who might be involved in identification inquiries
- institute management arrangements to ensure that such inquiries are linked as appropriate to the Identity and Immigration Status Group.

Recommendation 5.3

The Inquiry recommends that, as a matter of urgency, the Commonwealth Government take a leadership role with state and

territory governments to develop a national missing persons policy to guide the development of an integrated, national missing persons database or capacity. Initial policy development could be carried out under the guidance of the Australasian Police Ministers Council, with the output submitted to governments for consideration and agreement.

Recommendation 5.4

The Inquiry recommends that, on the basis of an agreed national missing persons policy, the Commonwealth Government take a leadership role with state and territory governments in developing and implementing a national missing persons database or capacity that will provide an effective national recording and search capability under both names and biometric data. Discussions in this regard should be informed by reporting on the progress and success of the Minimum Nationwide Person Profile project to the Australasian Police Ministers Council.

Recommendation 5.5

The Inquiry recommends that DIMIA reassess its position in relation to privacy in all its public policy operations associated with immigration detention. In revising its practices, it should:

- seek advice from the Privacy Commissioner and the Minister
- take immediate steps to increase awareness and understanding on the part of relevant DIMIA staff—including executive staff—of the principles and provisions of the Commonwealth’s *Privacy Act 1988*
- revise and strengthen procedures relating to identity in immigration detention, to ensure that the wider options potentially created by this approach are considered.

Recommendation 5.6

The Inquiry recommends that DIMIA establish for inquiries about immigration detainees a ‘hotline’ facility that can deal with those inquiries as a ‘one-stop shop’. DIMIA should ensure that the contact officer position is continuously staffed, regardless of the absence of any officer, and that all embassies and high commissions are advised of the details of these arrangements and ask their consular officials to direct all immigration detention inquiries to the nominated DIMIA contact officer in the first instance.

Recommendation 5.7

The Inquiry recommends that DIMIA ensure that:

- fingerprints and other biometric data collected from individuals in immigration detention are stored on a national database to facilitate investigations by Commonwealth and state and territory police and other law enforcement agencies
- appropriate liaison arrangements are made with CrimTrac
- any DIMIA decisions in relation to the collection and storage of biometric data are consistent with strategies being pursued by CrimTrac in response to guidance by Australian governments.

Recommendation 7.1

The Inquiry recommends that DIMIA develop and implement a holistic corporate case management system that ensures every immigration detention case is assessed comprehensively, is managed to a consistent standard, is conducted in a fair and expeditious manner, and is subject to rigorous continuing review.

Recommendation 7.2

The Inquiry recommends that DIMIA critically review all Migration Series Instructions from an executive policy and operational management perspective with a view to:

- discarding those that no longer apply in the current environment
- where necessary, rewriting those that are essential to the effective implementation of policy, to ensure that they facilitate and guide effective management action and provide real guidance to busy staff
- ensuring that up-to-date, accurately targeted training is delivered to staff who are required to implement the policy guidelines and instructions
- establishing regular management audits that report to executive management, to ensure that the Migration Series Instructions are up to date and DIMIA officers are adhering to them.

Recommendation 7.3

The Inquiry recommends that the Minister commission the Secretary of DIMIA to institute an independent professional review of the functions and operations of DIMIA's Border Control and Compliance Division and Unlawful Arrivals and

Detention Division in order to identify arrangements and structures that will ensure the following:

- DIMIA's compliance and detention functions are effectively coordinated and integrated.
- The desired outcomes of these functions and the necessary resources—including the number and the skills profile of staff—are clearly identified before a decision is made on the structure that will best enable effective and equitable service delivery.
- The restructuring accommodates these requirements and ensures that arrangements are made to monitor and manage the high-level risks to the Commonwealth inherent in immigration detention.
- There is a seamless approach to dealing with immigration detention operations and case management.
- The aims and objectives of the Government's immigration detention policy are fairly and equitably achieved and human dignity is demonstrably respected.

Recommendation 7.4

The Inquiry recommends that DIMIA:

- review the current training programs for compliance and detention officers to ensure that induction and in-service programs convey an accurate and contemporary picture of DIMIA operations and adequately prepare operational and management staff for all aspects of the work they will be expected to do
- ensure that such training particularly deals with the consultation, coordination, reporting and management requirements of compliance and detention operations and shows how to manage the risks inherent in the performance of these functions
- immediately develop and implement a policy that requires that every decision to detain a person on the basis of 'reasonable suspicion of being an unlawful non-citizen' is reviewed and assessed within 24 hours or as soon as possible thereafter.

DIMIA should incorporate this policy of 24-hour review in all relevant training programs and operational guidelines to ensure that compliance officers understand the need to:

- objectively determine the reasons and facts upon which a decision to detain is made
- verify the validity of the grounds of ‘reasonable suspicion’ and the lawfulness of the detention
- take immediate remedial action as necessary and report the circumstances of any unresolved matter to the Identity and Immigration Status Group.

Recommendation 8.3

The Inquiry recommends that DIMIA:

- develop, for all immigration detention and compliance executives and managers, a briefing program that clearly explains the need for a decision to be made to remove from Australia a person reasonably suspected of being an unlawful non-citizen and the responsibilities associated with exercising that power
- ensure that the central factors relating to removals and the implications for identity investigations and the exercising of detention powers are included in departmental training programs for compliance and removals officers
- ensure that the implications of all aspects of identity checking, detention and removals are included in the checks and balances exercised by the Identity and Immigration Status Group.

1 Introduction

1.1 The unlawful removal of an Australian citizen

It is almost unthinkable that in contemporary Australian society one of our citizens could be unlawfully removed from the country by a government department. That such an incident occurred on 20 July 2001 and went unnoticed at the time should be of grave concern to the Australian Government and the community. The situation was aggravated by a lack of corrective action on the part of certain senior officers of the Department of Immigration and Multicultural and Indigenous Affairs when the unlawful removal became known to them in 2003 and 2004.

It is the opinion of the Inquiry that the unlawful removal of Vivian Alvarez in 2001 was primarily a consequence of the convergence of a number of organisational failures. It is important to identify the causes of these failures and to take remedial action to ensure that such an event never again occurs.

The fact that in 2003 and 2004 senior officers of DIMIA knew that an Australian citizen had been unlawfully removed in 2001 but failed to take any action is inexcusable. In the Inquiry's opinion, the dereliction of duty by these officers may constitute a serious breach of the Australian Public Service Code of Conduct, and it should be the subject of further inquiry by the Secretary of DIMIA.

This report details the facts and circumstances leading to the inescapable conclusion that the case of Vivian Alvarez represents a shameful episode in the long, and generally positive, history of the administration of immigration in Australia.

1.2 Vivian Alvarez

When Vivian married in 1984 she changed her name to Vivian Solon Young. After her divorce in 1993 she reverted to her maiden name, Vivian Alvarez Solon. Later, although it is not clear precisely when, she began to use the name Vivian Alvarez.

All the available official records from 2001 on show her as Vivian Alvarez, albeit with numerous permutations of the spelling of Vivian and Alvarez. It appears that some of the permutations were the result of a lack of care on the part of some DIMIA officers, who made inaccurate assumptions about the spelling of her names. In Australia Vivian used or was referred to by the following names:

- Vivian Alvarez
- Vivian Alvarez Solon
- Vivian Alvarez Young
- Vivian Alverez
- Vivian Cook
- Vivian Solon
- Vivian Solon Young
- Vivian Young
- Vivien Alvaraz
- Vivien Alvarez
- Vivienne Alvarez

The name Vivian Alvarez is used in this report, since that is the name under which she first came to the attention of DIMIA in 2001. In the interest of clarity and readability, she is generally referred to as Vivian throughout the report.

1.3 An overview

Vivian was born Vivian Alvarez Solon in the Philippines on 30 October 1962. She married an Australian citizen, Robert William Young, in the Philippines on 26 May 1984 and came to live in Brisbane, where she adopted the name Vivian Solon Young. She became a naturalised Australian on 3 March 1986. Vivian and her husband separated four years later, and Robert Young subsequently gained custody of their son. They divorced on 29 April 1993.

From the time of her divorce until 2 April 2001, when she came to the attention of DIMIA, Vivian led an unsettled life. She formed a number of relationships, gave birth to a second son, moved home frequently, and on one occasion was taken into protective custody by Brisbane police, who were concerned for her welfare. She also established a minor criminal history under the name Vivian Solon. This allowed the Queensland Police Service to take her fingerprints, which were recorded on the National Automated Fingerprint Identification System of CrimTrac (the national law enforcement database).

Vivian had a history of involvement with Queensland mental health authorities from 1995 to 2000. In 1999 she was diagnosed at the Princess Alexandra Hospital as suffering from ‘a paranoid psychotic illness complicated by alcohol and illicit substance misuse’. By 30 March 2001, when she was discovered in a disoriented state in a park in Lismore, New South Wales, her mental condition was such that, following an initial assessment for physical injuries, she was admitted to the psychiatric unit of Lismore Base Hospital.

Vivian had been diagnosed with a spinal lesion and on 5 April was transferred to Liverpool Hospital in Sydney for treatment. She was returned to Lismore Base Hospital on 24 April and was admitted to St Vincent’s Hospital Rehabilitation Unit in Lismore on 7 May. After her discharge from St Vincent’s on 12 July 2001, DIMIA staff took her to their Southport office, in south-east Queensland, and subsequently to Brisbane, where she was held under detention at the Airport 85 Motel in the suburb of Ascot.

With the exception of two instances, from the time of her admission to Lismore Base Hospital until her removal from Australia on 20 July 2001, Vivian consistently gave her name as Vivian Alvarez. The exceptions occurred during her detention at the Airport 85 Motel: she told two members of the Filipino community, separately, that her name was Solon; she also told one of them that she had been married to a Mr Young.

On the evidence available, it is not possible to say whether Vivian’s failure to provide to DIMIA her correct surname, Solon, or even her former surname, Young, was intentional or the result of a confused mental state. It is of interest, however, that from the time she first came to DIMIA’s attention, on 2 April 2001, until her removal from Australia on 20 July 2001 she provided her correct date of birth each time she was asked for it.

In their attempts to identify Vivian, DIMIA staff consistently chose the same limited parameters to search the various departmental databases. Their apparent acceptance of the name Vivian Alvarez as genuine limited their ability to connect her with the surnames Solon and Young.

While she was in detention at the motel Vivian was visited by an official from the Philippines Honorary Consulate General in Brisbane, as well as by representatives of the Philippine community who were concerned for her welfare. On 19 July 2001 she was examined by a

doctor and assessed as fit to travel by air to the Philippines. The following day, escorted by a female officer from the Queensland Police Service, Vivian was removed to Manila.

A number of opportunities, if taken, could have led to Vivian being identified during the period of her involvement with DIMIA, from 2 April to 20 July 2001. Had these opportunities been pursued diligently, Vivian should have been found to be an Australian citizen. But DIMIA's systems and processes and the capabilities of staff combined to thwart identification.

When two senior DIMIA officers became aware of Vivian's true identity in 2003 they took no action. Again, in 2004, when her identity was brought to the attention of the same senior officers and one other, nothing was done. As noted, it is the Inquiry's opinion that the failure of these officers to make efforts to redress the unlawful removal of Vivian could constitute a breach of the Australian Public Service Code of Conduct. This opinion will be brought to the attention of the Secretary of DIMIA, in accordance with s. 8(10) of the *Ombudsman Act 1976*.

A 4 April 2005 email from Vivian's former husband, Robert Young, to the office of the Minister for Immigration and Multicultural and Indigenous Affairs, Senator the Hon. Amanda Vanstone, resulted in Vivian's unlawful removal being brought to the attention of the Government and the executive of DIMIA.

1.4 The Inquiry's terms of reference

On 2 May 2005 the Acting Minister for Immigration and Multicultural and Indigenous Affairs, the Hon. Peter McGauran, referred to the Palmer Inquiry—the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau—a request to examine the circumstances surrounding the removal from Australia of Ms Vivian Alvarez, an Australian citizen. The Palmer Inquiry's terms of reference were extended to incorporate this and other matters (see Appendix A).

The Palmer report, released by Senator Vanstone in July 2005, made comments on the progress of the investigation of Vivian Alvarez's removal. This current report extends those initial comments and presents a number of findings and conclusions in relation to Vivian's unlawful removal.

In its investigation of the Alvarez matter the Inquiry uncovered much that reinforced the findings of the Palmer Inquiry. In particular, there is a focus on DIMIA's culture, policies, systems, processes and staff shortcomings in connection with the apprehension and detention of suspected unlawful non-citizens. As a consequence, many of the findings and recommendations put forward in the Palmer report are directly relevant to, and are supported by, the findings and recommendations of this Inquiry. The relevant recommendations from the Palmer report are reproduced here in the pages following this Inquiry's recommendations.

1.5 Inquiry processes and procedures

Apart from gathering necessary contextual information, the Inquiry concentrated on events from 2 April 2001, when Vivian was first brought to DIMIA's attention, until her unlawful removal was publicly acknowledged in May 2005. The sequence of events is described in Chapter 2; Attachments I to IV provide a detailed description of contacts and events.

The Inquiry team, led by Mr Neil Comrie AO APM, was made up of Mr Bill Severino APM, Mr Peter Bache, Mr Darren Sterzenbach and Mr Glenn Carey and was supported by Ms Samantha Styles. The agreement of the Secretary of the Department of Employment and Workplace Relations, the Chief Executive Officer of Comcare and the Commissioner of Taxation to second staff to the Inquiry was much appreciated. Mr Michael Pejovic assisted with the preparation and writing of the report. The team brought a wide range of skills to the investigation.

Ms Deborah Tyler and Mr Bruce Pope, who acted as liaison officers for DIMIA, greatly facilitated the work of the Inquiry. In addition, the Inquiry acknowledges the cooperation and assistance of many officers from DIMIA, the management and staff of GEO Group Australia Pty Ltd (formerly Australasian Correctional Management) and consular staff at the Philippines Embassy in Canberra.

Many interviews and discussions were held—in Brisbane and south-east Queensland, Lismore, Sydney and Canberra. (Appendix B provides information about the people interviewed.) In accordance with arrangements that had been established by the Palmer Inquiry to protect that Inquiry's integrity, DIMIA was asked not to communicate with potential witnesses in the Alvarez Inquiry.

With the consent of participants, most interviews were digitally recorded and a copy of the recording was offered to those interviewed. Participants were also given assurances of the confidentiality of the information they provided to the Inquiry. Most of the interviewees cooperated fully; a few individuals declined to have their interviews digitally recorded. A small number of people initially declined to be interviewed, but, when the Commonwealth Ombudsman assumed responsibility for the Alvarez and other immigration detention matters originally referred to the Palmer Inquiry, the authority provided by the *Ombudsman Act 1976* meant that all relevant witnesses could be interviewed. Testament to the comprehensive nature of the Inquiry is the fact that more than 100 witnesses were interviewed.

The Inquiry team also analysed DIMIA, Department of Foreign Affairs and Trade and Australasian Correctional Management files and records, operating practices and procedures, and audit and other reports. It examined the relevant Migration Series Instructions, explored consultation, coordination and cooperation arrangements with other agencies and organisations, and assessed a wide variety of documents and advice provided to it.

Before the report was finalised, agencies and individuals potentially adversely affected by a finding or recommendation were given an opportunity to respond. (The responses of DIMIA and the Department of Foreign Affairs and Trade are reproduced in Appendix C.) All responses were considered.

1.6 The Office of the Ombudsman

On 20 July 2005 Federal Cabinet asked that the Commonwealth Ombudsman, Prof. John McMillan, complete the investigation of the Alvarez matter and 200 other immigration detention cases that had previously been referred to the Palmer Inquiry and that Mr Comrie continue to investigate these matters under the authority of the Ombudsman. The Ombudsman accepted the Government's request and advised that he would investigate these matters under the Ombudsman's own-motion provisions, as provided for in s. 5 of the *Ombudsman Act 1976*.

These arrangements were formalised, and on 20 July 2005 the Ombudsman delegated to the Inquiry team the relevant powers under the Act (see Appendix D). The powers conferred by s. 9 of the Act—the power to issue notices requiring information, documents or the

answering of questions—were of considerable assistance to the Inquiry. They enabled the Inquiry to gain access to all witnesses, documents and information it considered important to the investigation.

The reorganisation of the Inquiry as one being conducted under the Ombudsman Act had a consequence for the way this report is written. The Inquiry's terms of reference required the team headed by Mr Comrie to make 'findings' in relation to the cases in question. In contrast, the Ombudsman Act provides that the Ombudsman shall furnish the 'particulars of the investigation' to a department (s. 12(3)) and may express an 'opinion' that an agency or person has acted wrongly (s. 15). In *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman* (1995) 134 ALR 238, the Federal Court (Einfeld J) held that, for the purposes of the Ombudsman Act, a distinction must be drawn between 'opinions' and 'findings' and that the Ombudsman may not make a finding that an individual is guilty of a criminal offence or a disciplinary breach.

In keeping with the terms of reference, this report presents the Inquiry's findings. To the extent, however, that the findings deal with the official behaviour of individuals, the views expressed in the report should be understood as simply an expression of opinion about what took place.

1.7 Terminology

1.7.1 DIMIA

For some of the period dealt with by the Inquiry the Department of Immigration and Multicultural and Indigenous Affairs was known as the Department of Immigration and Multicultural Affairs. For convenience this report uses only the department's current name or its shortened form.

1.7.2 Identification of individuals

In view of the complexity of the communications and events surrounding the Alvarez matter, a letter code is used to identify the individuals involved.

1.7.3 'Removal' and 'deportation'

Throughout the report reference is made to the term 'removal'. 'Deportation' is used only in direct quotations from documents to which reference is made. The following brief explanations are provided in order to obviate any confusion:

- Section 198 of the *Migration Act 1958* deals with the removal from Australia of unlawful non-citizens. An 'unlawful non-citizen' is a non-citizen who does not hold a visa that is in effect.
- Sections 200 to 206 of the *Migration Act 1958* provide for the discretionary deportation of non-citizens who commit serious crimes or are a threat to national security.

Vivian Alvarez was removed from Australia on 20 July 2001; she was not deported.

1.8 DIMIA's progress with organisational reform

As a consequence of the findings and recommendations of the Palmer Inquiry, DIMIA has instituted a major program of reform. This program is outlined in a 13 September 2005 letter from the Secretary of DIMIA—see Appendix C.

2 The sequence of events

The central elements of the Vivian Alvarez matter are recorded in the chronology that follows. Attachments I to IV provide further information in the form of detailed flowcharts.

2.1 Background

30 October 1962	Vivian is born Vivian Alvarez Solon at Cebu City in the Philippines. She is the second of eight children born to Felino Medalle Solon and his second wife Juliana Solon. Her father's first marriage resulted in Vivian having a number of half-sisters and half-brothers, one of whom is Henry Solon, who lives in Brisbane.
26 May 1984	Vivian marries an Australian citizen, Robert William Young, in Pampanga in the Philippines.
7 July 1984	The couple come to Australia—Vivian travelling on a spouse visa—and settle in a Brisbane suburb.
3 March 1986	Vivian is naturalised as an Australian citizen in Brisbane City Hall and, with Robert, travels to the Philippines later in the year.
10 June 1988	Vivian gives birth to a son, whose father is Robert Young.
1990	Vivian and Robert Young separate.
2 February 1992	An Australian passport is issued to Vivian Solon Young. It shows her birth name as Vivian Alvarez Solon.
29 April 1993	Vivian and Robert divorce.

- 21 April 1996** Vivian gives birth to a second son, whose father is a de facto partner.
- [Vivian had a history of involvement with Queensland mental health authorities from 1995 to 2000. In 1999 she was diagnosed at Princess Alexandra Hospital as suffering from ‘a paranoid psychotic illness complicated by alcohol and illicit substance misuse’. Her former husband, Robert Young, said Vivian had had no psychiatric or personality disorder problems before their separation in 1990.]
- 1999** Vivian is reported as a missing person to the Queensland Police Service on two occasions—in September and November—by the mental health facility of Princess Alexandra Hospital in Brisbane.
- [Police records show that Vivian had established a minor criminal history under the name of Vivian Solon. She was fingerprinted, and her fingerprints were entered on the National Automated Fingerprint Identification System of CrimTrac.]
- [There is minimal anecdotal or documented information about Vivian’s movements between 1999 and 2001. The Inquiry did, however, establish that she lived in various public housing properties during this period.]
- 20 September 1999** A file for Vivian Young is created in DIMIA’s TRIM database; the file contains cross-references to Vivian Alvarez and Robert William Young.
- 2000** Vivian applies for an Australian passport in the name of Vivian Solon and gives her mother’s maiden name as Alvarez. The passport is not collected and is subsequently cancelled and then destroyed by the Department of Foreign Affairs and Trade passports office in Brisbane.

14–15 February 2001	[Henry Solon told the Inquiry that, although he and Vivian were not close, before 2001 he had not noticed any mental problems and he thought her a caring mother. He said that when she had arrived at his house with her younger son she had acted strangely and the following day Henry and his wife called police to evict her. That was the last time he saw or heard from Vivian. He did not report her missing, and he made no efforts to re-establish contact with her.]
16 February 2001	Vivian leaves her younger son at the Brisbane City Day Care Centre and fails to return to collect him.
March 2001	Vivian is known to be in the Lismore area.

2.2 Phase 1: removal, 2001

30 March 2001	A passerby finds Vivian, apparently injured, in a Lismore park just before midnight. The passerby contacts the Ambulance Service. On arrival, the ambulance officers find Vivian seated near a large open drain. Her clothing is wet and torn, and she has difficulty moving her legs. She is taken to the Emergency Department of Lismore Base Hospital.
31 March 2001	Vivian is examined by medical staff, who are unable to find a physical reason for her inability to move her legs properly. Because of her ‘combative’ and ‘argumentative’ behaviour the police are called. A doctor detains Vivian under Schedule 2 of the New South Wales <i>Mental Health Act 1990</i>, and she is admitted to the Richmond Clinic, the psychiatric unit of Lismore Base Hospital, for further assessment. A psychiatric registrar examines Vivian and detains her on a Form 2 under the Mental Health Act.
2 April 2001	Vivian is examined by a psychiatrist, who certifies her as having a mental disorder—not a mental illness. [A person cannot be involuntarily admitted on the grounds of a mental disorder.]

Lismore Base Hospital's medical registrar then examines Vivian and arranges for her transfer from the Richmond Clinic to a general ward in the hospital the following day.

Vivian first comes to the attention of DIMIA staff when the social worker from the Richmond Clinic contacts staff at the Southport office of DIMIA. The social worker advises staff that a Filipino female named Vivian Alvarez had been found wandering the streets of Lismore and had been admitted to the Richmond Clinic on 31 March 2001. She further advises that Vivian's condition suggests that she might have been wandering the streets for some time.

DIMIA staff conduct a number of database searches but fail to identify a Vivian Alvarez.

3 April 2001

Vivian is transferred from the Richmond Clinic to a general ward in Lismore Base Hospital for continued treatment of her physical injuries.

Nurse AL from Lismore Base Hospital advises DIMIA in Southport that Vivian has had a male visitor, who, at DIMIA's request, is subsequently identified as AM.

4 April 2001

An MRI scan reveals a lesion on Vivian's spinal cord, and the hospital arranges for her admission to the next available treatment centre—Liverpool Hospital in Sydney.

5 April 2001

Vivian is transferred to Liverpool Hospital.

18 April 2001

Officer K from the Southport office of DIMIA notifies officer AN of the DIMIA office in Parramatta of Vivian's transfer and adds that hospital staff had said her injuries were consistent with those of a person physically abused. Officer AN notifies the Compliance Field Team Manager at Parramatta, officer AO, of Vivian's admission to Liverpool Hospital and asks for follow-up. But no action is taken to communicate with Vivian while she is in Liverpool Hospital.

23 April 2001

While Vivian is at Liverpool Hospital, a social worker reports to DIMIA that Vivian spells her surname Alvarez.

[DIMIA generally used this spelling from this time on, further clouding the question of identification.]

24 April 2001

Vivian is returned to Lismore Base Hospital.

3 May 2001

DIMIA officers J and Y—one of whom is a Filipino speaker specifically brought to Lismore for the purpose—interview Vivian at Lismore Base Hospital.

The officers decide to visit AM, the male visitor who had visited Vivian on 3 April. Following the interview with Vivian, they proceed to his recorded address, despite the fact that Vivian told them he was in China. No one is at the address; the DIMIA officers leave no notification of their visit and make no further attempt to contact him.

Vivian is issued with the first of three bridging visas, this one due to expire on 15 June 2001. In his related file note, officer J expresses his view that Vivian is an unauthorised, undocumented arrival who might have been manipulated by certain people for sexual purposes.

[Another bridging visa was issued on 15 June 2001, current until 1 July 2001. Upon expiry of this visa Vivian remained without a visa until 12 July 2001, when DIMIA in Southport issued a one-day visa for her.]

April–May 2001

Staff from DIMIA's Southport office make limited inquiries in an effort to identify Vivian Alvarez.

7 May 2001

Vivian is discharged from Lismore Base Hospital and admitted to St Vincent's Rehabilitation Unit in Lismore, where she stays for more than two months. During this time she is not directly contacted by any DIMIA staff.

7 June 2001

Officer J from the Southport office informs DIMIA Queensland officer I that he and a fellow officer, Y, had visited AM's address near Lismore without success. Officer J repeats the view that Vivian had been a sex slave.

10 July 2001

On a visit to Newcastle, officer AQ from DIMIA in Parramatta is informed by AR, an immigration consultant from the Migrant Resource Centre, that Vivian will be leaving St Vincent's Rehabilitation

Unit at the end of the week. Officer AO communicates this to DIMIA officer AE in Southport.

AS, a case worker from the Redcliffe office of the Queensland Department of Family Services, begins to prepare, for the Queensland Police Service Missing Persons Bureau, a report on Vivian Young (nee Solon). The report states that Vivian left her child at the Brisbane City Child Care Centre on 16 February 2001 and has not been seen since.

12 July 2001

Vivian is discharged from St Vincent's Hospital and—although needing a four-wheel walker for safety—is regarded by the Rehabilitation Unit as able to care for herself independently. She is met by DIMIA officers K and AE and taken to the Southport office for interview. During the car journey from Lismore she says she married an Australian (Philip Smith) in the Philippines in 1999 and arrived in Brisbane by plane in 2000.

[When later collated with information Vivian had given to the Philippines Consulate General in Brisbane, this information suggested that she had married Smith in the Philippines on 29 November 1999 and had arrived in Brisbane by plane on 13 January 2000. She said she had arrived on a tourist visa, that she and Smith lived together for five months in Spring Hill in Brisbane, and that Smith had taken her passport and documents.]

DIMIA officers run a series of database checks on Philip Smith and Vivian but are unable to identify either person. Attempts to admit Vivian to the Villawood Immigration Detention Centre in Sydney fail because of a shortage of suitable accommodation, and a decision is made to hold her in Brisbane.

That night, Vivian is placed in Salvation Army emergency accommodation in Southport. No supervision beyond that normally provided by Salvation Army staff is arranged. A one-day bridging visa is issued.

13 July 2001

DIMIA officer U from Southport has a formal interview with Vivian in which she tells DIMIA for the first time that she is an Australian citizen and wants to remain in Australia. She also says she wants to apply for a visa but does not know which one. The record of interview notes that she is 'unable to sign'.

The DIMIA Officer in Charge of Compliance, officer F, arranges accommodation for Vivian until at least 16 July 2001 at the Airport 85 Motel in the Brisbane suburb of Ascot. The officer then issues to Australasian Correctional Management a Request for Officer to Hold in Immigration Detention form in the name of Vivien Alvarez on the basis that this person is known or reasonably suspected of being an unlawful non-citizen.

The Officer in Charge of Compliance advises AV, the DIMIA liaison officer from Australasian Correctional Management, that Vivian is to be transported to the DIMIA offices in Brisbane and then to the Brisbane office of the Philippines Consulate General before being taken to the Airport 85 Motel and kept under 24-hour guard. The visit to the office of the Philippines Consulate General does not occur.

[Notes from the Australasian Correctional Management log maintained at the Airport 85 Motel and interviews with ACM staff responsible for guarding Vivian indicated that Vivian was not independent in her movements and was 'basically immobile/she requires assistance for walking, dressing and all basic hygiene needs'.]

16 July 2001

The Officer in Charge of Compliance contacts DIMIA officer AY in Manila, advising that Vivian will need assistance upon arrival in the Philippines, being 'a very frail, tiny woman ... with no family in the Philippines to assist her'.

[At this point an undated, unauthored handwritten note was placed on DIMIA's Alvarez file; it said 'Smuggled into Australia as sex slave. Wants to return to the Philippines. Has been physically abused'.

The Inquiry obtained a copy—not through the Philippines Embassy or the Philippines Honorary Consulate General in Brisbane—of a memorandum dated 16 July 2001 from the Embassy to the Consulate General, asking the Consulate General to ‘make representations with DIMA for therapeutic counselling for Ms Alvarez before she is sent home ... is obviously a trauma victim and would require necessary treatment ... Please impress upon DIMA authorities that the Australian Government is currently collaborating with the Philippine Government on several initiatives to address the plight of women migrants in distressful conditions such as those [that] befell Ms Alvarez. As such, DIMA should be more compassionate to her plight and true to their commitment to help by being able to provide assistance beyond their traditional response of deportation’.]

DIMIA arranges Vivian’s travel to Manila and notifies Qantas of her health difficulties.

17 July 2001

The Queensland Police Service activates a missing persons report, based on information from the state’s Department of Family Services that Vivian Young (nee Solon) had not been seen since 16 February 2001. On receiving further information from that department, the Police Service updates the report to note that Vivian Young is more likely to use her maiden name, Vivian Solon.

DIMIA officer BB advises the Philippines Consulate General that Vivian is to leave on 20 July.

18 July 2001

An official from the Philippines Consulate General and a nun from the Canossian Catholic order in Brisbane visit Vivian at the Airport 85 Motel. Later that evening, the official returns with a Filipino community representative, BJ. Vivian and BJ have a conversation in Cebuano and BJ interprets for the consular official.

[BJ gave evidence that she had seen Vivian having a seizure and that Vivian had told her that her full name was Vivian Solon Alvarez. DIMIA did not receive this vital information about the name Vivian gave.]

19 July 2001

Concerned about Vivian's welfare, an official from the Philippines Consulate General asks a number of people from the Filipino community in Brisbane to visit Vivian.

[This was not an uncommon practice and in this case the group included a doctor, a nurse, a priest and a nun.]

A Filipino social worker, BC, is also asked to attend. BC arrives first and meets with Vivian on her own. Among other things, Vivian tells BC her name is Vivian Solon and that she had been married to a Mr Young. BC shares this information with the others when they arrive but does not inform DIMIA officers.

The Philippines Embassy contacts DIMIA, expressing concern about Vivian's ability to travel and saying it will not issue a travel document. DIMIA asks Australasian Correctional Management to arrange for a doctor to assess Vivian. This occurs, and Vivian is judged fit to travel. The medical opinion is faxed from the motel directly to DIMIA officer B. The fax describes Vivian as 'medically fit ... occasional muscle spasms related to old neck injury ... no fits ... walks with a walker ... will not be a problem on airplane'. On being notified of the results of the medical assessment, the Philippines Consulate General issues a travel document for Vivian.

Senior Constable BH of the Queensland Police Service contacts the Investigations Section of DIMIA in Brisbane, making urgent inquiries about a missing person. BH says the missing person is of Filipino extraction and asks that inquiries be made to ascertain whether the missing person had travelled from Australia since 18 February 2001. The missing person is named as Vivian Solon @ Young, and four possible dates of birth are provided, one of which is accurate.

DIMIA responds quickly, confirming the date of birth as 30 October 1962 and stating that there is no record of departure for Vivian Alvarez Solon @ Young since the date provided.

[This is the first recorded instance in DIMIA files since 1999 of the name Alvarez being linked to Solon @ Young.]

DIMIA officer B emails the First Assistant Secretary of DIMIA (officer BI) and other senior officers, advising them that, because of Vivian's mental and physical condition, an escort will be provided. He also mentions that the Philippines Embassy has advised him that the Consulate General in Brisbane should be contacted the following day in relation to any matters concerning Vivian.

20 July 2001

Vivian leaves Australia on QF 019 to Manila; she is escorted by female Senior Constable BK from the Queensland Police Service.

2.3 Phase 2: discovery, 2003

14 July 2003

Phase 2 begins as a result of continued efforts by the Queensland Police Service Missing Persons Bureau to locate Vivian. Officer BL from the bureau contacts officer E from the Entry Systems and Movements Alerts Section of DIMIA, seeking records relating to the background of Vivian Solon @ Cook @ Young.

DIMIA officer D checks the databases and, on linking the name Solon with the name Alvarez, reports to DIMIA officer A that it appears an Australian citizen has been deported.

15–16 July 2003

DIMIA database searches conducted by officer E produce records for Vivian Alvarez Solon and Vivian Solon Young. Officer E matches these records to Vivian Alvarez and notes on the Vivian Alvarez Solon file 'ICSE first arrival 7/7/84; Australian Citizenship 3/3/86' and on the Vivian Solon Young file 'Got Citz on 3.3.86'—establishing that Vivian Alvarez is Vivian Solon Young.

This information is reported to officer E's supervisor, officer A, who appears to have taken no further action other than to instruct officer E to 'fully research the matter'.

[Officer A was therefore informed about Vivian's real identity by two DIMIA officers who had independently verified the information and thus revealed the fact of Vivian's unlawful removal.]

Internal DIMIA checks ascertain that Vivian Solon Young's Australian citizenship has not been revoked and that there are no citizenship records in the name of Vivian Cook or Vivian Alvarez.

20 August 2003

The television program *Without a Trace* goes to air and includes a segment on a missing person, Vivian Solon @ Young. The Queensland Missing Persons Bureau has provided the information and photograph used in the program.

21 August 2003

Officers E and F from DIMIA and AL, a nurse from Lismore Base Hospital, independently identify Vivian from the television program.

DIMIA officer E again brings this information—that an Australian citizen has been removed from Australia—to the attention of officer A, the supervisor who was told of the situation on 15 and 16 July. E also advises A of her intention to provide all relevant information to the Missing Persons Bureau.

DIMIA officer F, who was involved in the initial removal of Vivian Alvarez, prints out a number of search results—referred to as 'screen dumps' or 'data dumps'—from her computer. She advises officer B, her supervisor at the time of Vivian's removal, of her discovery that Vivian, an Australian citizen, was removed and leaves the search results with him.

[There is no evidence that DIMIA officer B took any action in relation to the matter.]

The nurse from Lismore Base Hospital, nurse AL, contacts New South Wales Crime Stoppers, providing information about Vivian's identity. The information is subsequently relayed to the Queensland Missing Persons Bureau.

DIMIA officer E replies to Missing Persons Bureau officer BL, providing movement details for Vivian Solon Young and her elder son and reporting that Ms Young is an Australian citizen who came 'to DIMIA's attention in May 2001 using the name Vivian Alvarez. Ms Young was removed from Australia on 20 July 2001 using the name Vivian Alvarez'.

9–10 September 2003 Missing Persons Bureau officer BS telephones DFAT officer BN in Canberra and advises that DIMIA removed Vivian in 2001, not realising she was an Australian citizen. BS asks BN for DFAT's assistance in locating the woman who met Vivian at Manila airport. This woman was thought to be an 'overseas welfare administrative officer' from the Australian Embassy. Officer BN then emails DFAT in Manila with a request for 'anything you can find out' about the matter.

Another DFAT Manila staff member, BQ, replies directly to officer BN in Canberra, providing information on the organisation that looked after Vivian on her arrival at Manila airport, the Overseas Workers Welfare Association. [OWWA is a Philippines government agency that provides welfare support to returning nationals who have been working overseas.]

DFAT officer BN provides to the Missing Persons Bureau the information sent from DFAT in Manila. The bureau contacts OWWA by telephone and fax, asking for information about Vivian Alvarez's whereabouts in Manila and discussing the possibility that an officer from the Queensland Police Service will be sent to Manila to continue the search. [This visit to Manila did not eventuate.]

- 24 September 2003** Vivian's former husband, Robert Young, makes telephone calls to the DIMIA Contact Centre in Sydney (also responsible for dealing with Queensland inquiries) and provides information relevant to Vivian's situation. The Contact Centre does not adequately follow up on the matter.
- 16 October 2003** The missing persons file on Vivian Young nee Solon is archived by the Queensland Missing Persons Bureau on the basis that it was informed by DIMIA that Vivian is in the Philippines.

2.4 Phase 3: discovery, 2004

- 2004** Robert Young persists in calling the DIMIA Contact Centre and the Queensland Missing Persons Bureau throughout 2004, expressing his concern that Vivian, an Australian citizen, has been deported unlawfully. One of those calls prompts the bureau to reactivate its inquiries.
- 28 September 2004** Officer BS from the bureau contacts DIMIA officer A by telephone and email in relation to Vivian Young @ Solon @ Cook. Officer BS states that, following the missing person's photo shown on the television program *Without a Trace* on 20 August 2003, the bureau was contacted by DIMIA officer E, who provided information about Vivian's identity.
- The email also provides Vivian's correct name and confirms that she is an Australian citizen and that her former husband is concerned that she 'had been deported to the Philippines'. The email concludes with officer BS asking for details of a contact person in DIMIA to whom she can refer Mr Young.
- [The Missing Persons Bureau never received a response to this request.]

DIMIA officer A accesses database records on Vivian Solon Young, Vivian Alvarez and Vivien Alvarez.

Officer AA from the DIMIA Contact Centre in Sydney conducts a number of database searches on Vivian Solon Young as a result of a telephone call from Mr Young. No further action is taken in response to Mr Young's inquiry.

29 September 2004

DIMIA officer A again accesses database records on Vivian Solon Young, Vivian Alvarez and Vivien Alvarez.

Officer A asks officer G at the Southport office of DIMIA to check details of Vivian's removal and whether Vivian Alvarez and Vivian Solon are the same person. Officer G locates a photograph, which is forwarded to officer A. The Alvarez file is in Brisbane, however, so officer A forwards the Missing Persons Bureau email to DIMIA officer C in Brisbane.

Officer C and his subordinate, officer AD, obtain the files and realise that Alvarez and Solon are the same person. In an attempt to confirm this, AD contacts Department of Foreign Affairs and Trade Brisbane officers BT and BU and asks for passport records for Vivian Solon Young. The established clearance protocols are, however, not observed and DFAT does not release the files. DIMIA does not pursue the matter.

30 September 2004

DIMIA officer C advises his superior, officer B [who at that time was acting at Executive Level 2, as Deputy State Director], that there appear to be problems arising from the removal of Vivian in 2001. He also forwards the Alvarez file to officer A in Canberra.

8 October 2004

On receipt of the Alvarez file, officer A advises officer H to keep the file while A is on leave. No further action is taken.

2.5 The truth emerges, 2005

4 April 2005

Robert Young is persistent in pursuing DIMIA and the Queensland Missing Persons Bureau with his concern that Vivian, an Australian citizen, has been unlawfully deported.

He emails the office of Minister for Immigration and Multicultural and Indigenous Affairs, outlining the main events of the preceding four years and stating, 'This is a serious matter concerning an Australian citizen who appears to have been deported from Australia due to a mental illness ... Your intervention would be appreciated'.

20 April 2005

Mr Young's email is brought to the attention of executive staff of DIMIA. The matter is immediately escalated.

21 April 2005

It is established that Vivian Alvarez, the person removed, and Vivian Young are the same person. This situation is brought to the attention of the Minister's office.

The Alvarez compliance files are found in the desk hutch of DIMIA officer H, a subordinate of officer A.

DIMIA and the Department of Foreign Affairs and Trade embark on a range of inquiries.

12 May 2005

Vivian Alvarez is found in the Philippines.

3 Circumstances and actions leading to the failure to identify Vivian Alvarez and redress her unlawful removal

3.1 The lost opportunities to identify Vivian

A number of opportunities to identify Vivian presented themselves in the period leading to her detention and removal from Australia. Most of them involved DIMIA officers. The failure to follow up on these opportunities—through more rigorous investigation, considered analysis or database manipulation—highlights the limited capacity of some compliance officers to effectively fulfil their roles and responsibilities.

- Vivian failed to collect her son from the child care centre in Brisbane on 16 February 2001, but the Queensland Department of Family Services did not report her as a missing person until 17 July 2001—three days before her removal from Australia. Had she been reported missing earlier, there would have been more time in which to establish clues to her identity.
- After her marriage in 1984, the visa papers prepared for Vivian contained a standard instruction to cross-reference her married name with the name Alvarez and the name Robert William Young on departmental records. The appearance of these details in the TRIM database in 1999 is confirmation that this instruction was implemented. But repeated DIMIA database searches failed to reveal the link.
- Vivian first came to DIMIA's attention on 2 April 2001, after she had been admitted to the Richmond Clinic in Lismore. DIMIA officers conducted a series of database searches using the name Vivian Alvarez but failed to identify her.
- DIMIA officers interviewed Vivian at Lismore Base Hospital on 3 May 2001 but did not interview hospital staff. Vivian gave the following information to hospital staff on two separate occasions on 31 March:

- She had a brother in Brisbane.
- Her former husband was a bank manager who had custody of their 10-year-old child.
- AM was her boyfriend and she lived with him in Lismore.

Had DIMIA staff obtained this information and made relevant inquiries, Vivian might have been identified.

- After one unsuccessful attempt to contact AM—whom Vivian had said was her boyfriend—DIMIA staff made no attempt to follow up. When interviewed by the Inquiry, AM said Vivian had told him she had been married to a bank manager and provided a number of surnames, one of which he thought was Young. Had DIMIA interviewed AM at the time, he might well have provided the link that would have led to Vivian being identified as an Australian citizen.
- Vivian was hospitalised from 31 March to 12 July 2001. DIMIA failed to adequately use this extended opportunity to pursue a number of inquiries aimed at establishing her identity. In fact, for more than two months of her time in hospital no DIMIA staff contacted Vivian.
- When she was discharged from hospital on 12 July Vivian was taken to the DIMIA office in Southport. The car journey from Lismore afforded an ideal opportunity to check the information she had provided and to find out more. Official file notes detailing the information obtained during this journey are scant.
- During her formal interview on the following day, Vivian said she was an Australian citizen and wanted to remain in Australia. She also said she had previously had a visa and wanted to apply for another one. There is no record of this response having been interrogated or followed up.
- DIMIA photographed Vivian, but her photo was not used to advantage until 2004. Had DIMIA used this photograph more effectively, Vivian might well have been identified.
- Despite being entitled to do so with her consent, DIMIA did not take Vivian's fingerprints. (This entitlement is discussed in Section 3.8.) Had she been fingerprinted, there was potential to

identify her through CrimTrac because her fingerprints were on record with the Queensland Police Service.

- While officers from Australasian Correctional Management were guarding her at the Airport 85 Motel, Vivian made a number of remarks and told them she had two children. There is no evidence that the detail of her conversations was communicated to DIMIA staff. No blame for this lack of communication should be attributed to the security staff: they had no role in interviewing Vivian. DIMIA could, however, have acquired this information if it had established a procedure for obtaining pertinent information from security staff.
- BJ, a member of the Filipino community assisting the Consulate General, spoke with Vivian at the Airport 85 Motel and Vivian told her her name was Vivian Solon Alvarez. This information was not sought or received by DIMIA.

The following day, BC, a Filipino community worker, visited Vivian at the motel. BC said Vivian told her her name was Solon and she had been married to a Mr Young. BC said she passed this information on to other members of the Filipino community who had come to the motel to visit Vivian. Had DIMIA staff sought information from members of the Filipino community who visited Vivian, identification would have been likely.

- On 19 July 2001, the day before Vivian's removal, officer BH, from the Redcliffe District Intelligence Office of the Queensland Police Service, contacted the Investigations Section of DIMIA in Brisbane, making urgent inquiries about a missing person reported to be Vivian Solon @ Young. In response, DIMIA said there was no record of departure for Vivian Alvarez Solon @ Young since 2 September 1993.

This is the first instance of DIMIA associating the name Alvarez with Solon and Young since the department first became involved in her case, on 2 April 2001. The database searches of movement records did not link Vivian Solon Young with the Vivian Alvarez who was being held at the Airport 85 Motel.

3.2 The failure to redress Vivian's unlawful removal

The failure to seize the opportunities to identify Vivian gives cause for serious concern. This concern is compounded by the failure of some DIMIA and Department of Foreign Affairs and Trade officers to take action when her unlawful removal became known to them in 2003 and 2004.

3.2.1 Discovery, 2003

- The Queensland Missing Persons Bureau continued its efforts to locate a missing person. On 14 July 2003 an officer from the bureau faxed a letter to the Entry Systems and Movements Alerts Section of DIMIA, asking for records detailing the background of Vivian Solon @ Cook @ Young. DIMIA officer D identified Vivian Alvarez and Vivian Solon Young as the same person and reported this to officer A, her supervisor.

The following day, searches by DIMIA officer E at the same office revealed records for Vivian Alvarez Solon and Vivian Solon Young. These records were matched to those of Vivian Alvarez. Officer E noted on the Vivian Alvarez Solon file 'ICSE first arrival 7/7/84; Australian Citizenship 3/3/86' and on the Vivian Solon Young file 'Got Citz on 3.3.86', establishing that Vivian Alvarez was Vivian Solon Young. There is evidence that officer E conveyed this information to her supervisor, officer A, who appears to have taken no action other than to instruct officer E to continue making inquiries.

One outcome of these inquiries was that on 16 July DIMIA checks revealed that Vivian Solon Young's Australian citizenship had not been revoked and that there were no citizenship records in the name of Vivian Cook or Vivien Alvarez.

- The television program *Without a Trace* was shown on 20 August 2003 and included a segment on a missing person called Vivian Solon @ Young. The Queensland Missing Persons Bureau had provided the information and photograph used in the program. DIMIA officer E, who had been making inquiries about Vivian since 15 July, saw the program.

On 21 August, after conducting several database searches that linked Vivian Alvarez with Vivian Solon Young, officer E

reported to the Missing Persons Bureau that Vivian was an Australian citizen who had come 'to DIMIA's attention in May 2001 using the name Vivian Alvarez. Ms Young was removed from Australia on 20 July 2001 using the name Vivien Alvarez'. Officer E again conveyed this information to her supervisor, officer A. Having conducted a series of database searches and established the link between Solon and Alvarez for himself, officer A took no further action.

- Independently, on 20 August DIMIA officer F in Brisbane, who had been involved in Vivian's removal in 2001, identified her from the *Without a Trace* program and printed out a number of search results from DIMIA databases. She informed officer B—her supervisor at the time of Vivian's removal—of her discovery and showed him the search results that verified Vivian's identity. Officer B did nothing.
- On 9 September 2003 the Missing Persons Bureau contacted officer BN at the Department of Foreign Affairs and Trade in Canberra, advising that Vivian, an Australian citizen, had been removed by DIMIA in 2001. The bureau sought from DFAT details of the identity of the person who had met Vivian at Manila airport, so that the bureau could pursue its efforts to locate her. DFAT provided the information sought but took no action to follow up on the question of how an Australian citizen came to be removed to the Philippines or to locate her.
- Robert Young made a number of telephone calls to the DIMIA Contact Centre (including one on 24 September 2003), seeking to establish Vivian's whereabouts and providing background information about her removal. But he was unable to obtain any information from Contact Centre staff, who cited privacy as the reason they could not engage in discussion with him. Contact Centre staff did not adequately pursue the information Mr Young provided.

3.2.2 Discovery, 2004

- The failure of DIMIA officers to take action in July and August 2003 to redress Vivian's wrongful removal meant that the serious problem remained unresolved. Robert Young's perseverance, however, resulted in another important opportunity being created in September 2004.

As a result of Mr Young's continued contact with the Queensland Missing Persons Bureau, on 28 September the bureau telephoned and emailed officer A at the Border Systems and Movements Alerts Section of DIMIA, asking about a missing person named Vivian Young @ Solon @ Cook and born on 30 October 1962. From the email, it is obvious that the bureau was relying on information provided to it by DIMIA officer E in August 2003.

DIMIA officer A carried out database searches that linked Vivian Alvarez to Vivian Solon Young. Officer A then contacted officer G at the Southport Compliance Office and officer C at the Brisbane Compliance and Investigations Office and discussed the situation. Officer C gave evidence to the Inquiry that he advised his immediate supervisor, officer B, that Vivian was an Australian citizen who had been unlawfully removed in 2001. Officer C obtained the Vivian Alvarez file from the office records system, searched the passports database on Vivian Solon Young, and forwarded the search results and file to officer A in Canberra. Officer C also asked a junior officer to obtain passport information from the Brisbane passports office of the Department of Foreign Affairs and Trade. The request to DFAT was denied because it was not in the correct format. DIMIA did not pursue the matter.

Apart from sending the Vivian Alvarez file from the Brisbane office to officer A in Canberra, neither officer B nor officer C took any further action in relation to the matter. Nor did the Queensland Missing Persons Bureau receive a response to its inquiry of 28 September.

- An audit of database searches carried out by DIMIA officers in late September and October reveals that a number of officers in Brisbane made a link between the names Vivian Alvarez and Vivian Solon Young. One of these officers told the Inquiry that the unlawful removal of Vivian Alvarez was the subject of much discussion in the Brisbane Compliance and Investigations Office in September and October 2004.

3.3 Systemic problems

3.3.1 DIMIA culture

The Palmer report provides comprehensive coverage of the organisational culture within DIMIA, and there is no need to repeat that discussion here. Although the findings of the Palmer Inquiry relate to events and activities that occurred in 2004 and 2005, this Alvarez Inquiry found substantial evidence in support of those findings. It is reasonable to conclude that the problems discussed in the Palmer report were entrenched in DIMIA back in 2001, when the events associated with Vivian began.

The most disturbing feature of the culture is that senior officers in DIMIA who became aware that an Australian citizen had been unlawfully removed failed to take any action to redress the situation. Also of serious concern is the fact that the unlawful removal of Vivian was a matter of considerable discussion in the Brisbane Compliance and Investigations Office in 2004, yet no one there took any action. In the Inquiry's view, the failure of the senior manager in this office to take the necessary action would have had a negative influence on others in the office.

It is difficult to form any conclusion other than that the culture of DIMIA was so motivated by imperatives associated with the removal of unlawful non-citizens that officers failed to take into account the basic human rights obligations that characterise a democratic society.

For some DIMIA officers, removing suspected unlawful non-citizens had become a dehumanised, mechanical process. The Inquiry is particularly worried by the fact that some DIMIA officers it interviewed said they thought they would be criticised for pursuing welfare-related matters instead of focusing on the key performance indicators for removal.

Recommendation 1

The Inquiry recommends that the Secretary of DIMIA take all necessary steps to:

- redress the negative culture in the Brisbane Compliance and Investigations Office—as demonstrated by the failure of a number of officers to take action on becoming aware that an Australian citizen had been unlawfully removed from Australia
- ensure that the problems and deficiencies identified in relation to the Brisbane Compliance and Investigations Office do not exist in other regional offices and in related areas in DIMIA head office.

3.3.2 Case management

The Inquiry's investigation brought to light major flaws in DIMIA's case management. The flaws extend from poor record keeping to completely inadequate accountability processes.

There is little evidence that any form of case management review was in operation in the months before or during Vivian's time as a detainee—12 to 20 July 2001—thus eliminating the potential for a management review to produce a different result.

A series of failures to manage Vivian's case effectively was an important contributor to the failure to identify her and the failure to initiate action once the unlawfulness of her removal had been discovered.

Files and records

The biggest deficiency associated with the Alvarez files is the lack of adequate records. Vital information and crucial decisions were not recorded. There is evidence of irregularities in file dates. Original notes were lost 'in the system', without copies having been made. Case details that were inaccurate and potentially misleading were forwarded to senior executive staff.

DIMIA staff told the Inquiry that in some situations they deliberately left their actions unrecorded. They said they did this because of perceptions that they would be in breach of departmental policy if they tried to help suspected unlawful non-citizens with welfare-related

matters. If this assistance had been recorded, they thought it might be interpreted as helping the unlawful non-citizens circumvent the requirements of the Migration Act.

There is no record of an actual decision to remove Vivian—if one was made. The compliance manager accepts responsibility for authorising Vivian’s initial detention, but there is no documentation to support the decision to remove her.

Similarly, there is no record of the detention review officer at Southport having any involvement in the matter. In interviews, however, the Inquiry learnt that this officer not only was kept fully informed of all the circumstances surrounding Vivian’s detention but also endorsed the action taken. Furthermore, there is no evidence that the officer directly responsible for control of the compliance function had any involvement whatsoever.

Migration Series Instruction 267—issued on 10 May 1999 and in effect at the time of Vivian’s removal in 2001—requires that a compulsory checklist be completed to record the actioning of a removal ‘to ensure that matters that may prevent the removal or affect its timing are brought to notice’. The instruction also requires that, ‘as a matter of sound administrative practice’, the actioning of a removal be approved by a senior compliance officer, the Officer in Charge of Compliance. There is no evidence on the Alvarez files that such a checklist was ever completed: this oversight could explain some of the failures discussed in this report.

To date, Vivian’s is the only removal the Inquiry has examined, so it is impossible to assert that the compulsory checklist was not being used on a regular basis. The Inquiry’s interviews with a large number of DIMIA staff did not, however, elicit any evidence that compliance officers were familiar with—or indeed used—the compulsory checklist in removal cases.

A large number of DIMIA staff accessed the same computer records in their efforts to confirm Vivian’s identity. Rigorous record keeping would have made this duplication of effort unnecessary and allowed staff to review the searches that had already been done and examine the results obtained.

The lack of adequate care in the keeping of records dealing with the Alvarez matter from 2001 to 2005 highlights the problematic nature of record keeping in DIMIA at that time. On the basis of the evidence it

examined, the Inquiry formed the view that some compliance officers do not understand the principles of openness and accountability that are required, and generally upheld, in the Australian Public Service.

Recommendation 2

The Inquiry recommends that the Secretary of DIMIA instruct staff to comply with the requirement of Migration Series Instruction 267 that a compulsory checklist be completed to record the actioning of a removal and that the actioning of a removal be approved by a senior compliance officer—the Officer in Charge of Compliance. The checklist should be attached to every compliance file.

Internal communication

Although communication between DIMIA and external organisations such as the police appears to have been generally responsive and professional, this was not the case with intra-departmental communication. Information about Vivian passed between DIMIA units such as the compliance and investigations teams but was not adequately recorded or acted on. Respective roles and responsibilities were blurred, and it seems there were no clearly established mechanisms whereby information could be shared and disseminated.

Additionally, there was little continuity of staff involved in managing the Alvarez case. The resultant lack of case ‘ownership’ had a detrimental effect on case management. Various staff members—often from the same DIMIA office—implemented the procedural steps leading to Vivian’s removal with a compartmentalised mindset. This meant there was little, if any, likelihood of a single officer noticing differences in the various accounts given by Vivian. The systemic discontinuity resulted in another lost opportunity to verify her identity and prevent her removal.

In the days leading up to her removal Vivian was being held in detention at the same time as the Queensland Missing Persons Bureau was seeking from DIMIA information about the missing person Vivian Solon @ Young. After searching movement records, DIMIA responded by providing the name Vivian Alvarez Solon @ Young—the first time these names had been linked since Vivian came to DIMIA’s notice on 2 April 2001.

It is difficult to understand that in one state, in one DIMIA region, DIMIA staff were unable to connect the Vivian Alvarez being held in detention with the Vivian Alvarez Solon @ Young who was a missing person. This was a serious systemic failure—particularly in the way information is shared and disseminated and the way internal communication occurs.

Following up inquiries

Compliance officers' follow-up of inquiries was poor. Lines of inquiry that could have helped with identifying Vivian were rarely pursued or even considered. In part, staff were following the organisational directive Migration Series Instruction 321, which clearly regards the burden of proving identity as resting more with the detainee than with DIMIA. Staff were further inhibited as a result of having had little or no training in investigation techniques.

The consequence was that numerous opportunities to identify Vivian were lost. One such situation involved the person who visited Vivian when she was in Lismore Base Hospital. DIMIA officers became aware of this person's identity before their first interview with Vivian but did nothing to contact him. By the time they attended his residence a month later, he had left Australia for an extended period overseas. As noted, when interviewed by the Inquiry, this person said Vivian had told him she had been married to a bank manager as well as providing a number of surnames, one of which he thought was Young. Had he been interviewed by DIMIA at the time, he might well have provided the link that would have led to Vivian being identified as an Australian citizen.

At a different level, there is little evidence that DIMIA officers tried to contact other agencies in their efforts to identify Vivian or to seek welfare assistance for her. From the time of their initial interview with her on 3 May 2001, DIMIA officers made no attempt to contact either Lismore or Brisbane police in order to establish her identity. Communication with Lismore police might have resulted in a link being made when they were later contacted by the Queensland Police Service in relation to the missing persons report. Similarly, no direct contact was made with the Queensland Police Service, despite it being known that Vivian had been a resident of Queensland. Further opportunities were lost.

Interview procedures

Although paragraph 5.4 of Migration Series Instruction 300 provides that officers should complete a formal record of interview, it requires only that the detainee, and any interpreter used, be asked to acknowledge that the record accurately reflects the detainee's responses. It does not require follow-up questions or inquiries to be made in the light of those responses.

Paragraph 13.3 of Migration Series Instruction 234 deals with the conduct and recording of interviews. Nowhere does the instruction require follow-up of answers given in response to questions asked of a detainee. The policy is purely procedural and lacks practical requirements that would assist in identifying detainees.

Importantly, in the record of interview officer U completed on 13 July 2001 Vivian responded that her citizenship was Australian and that she wanted to apply for a visa to stay in Australia. There is no evidence that further questions or follow-up action followed those responses, although DIMIA Southport officer K disputes this. There is an information document entitled *Applying to Stay in Australia* included in the file attached to the record of interview, but there is no copy of a document entitled *Your Detention*, as depicted at Attachment A, Part 1, of Migration Series Instruction 321 and required to be provided to a detainee by sub-paragraph 5.3.1 of the instruction.

Recommendation 3

The Inquiry recommends that the formal interview of detainees be constructed in such a way as to require that, where necessary, responses from a detainee be further investigated. The interview process should be dynamic and designed to elicit information useful to the making of decisions about detention and removal.

3.3.3 IT systems and databases

The range of compliance-related data held by DIMIA is extensive but the ability to search the data is limited. Before 2001 attempts were made to consolidate the data, but compliance officers still had to search several systems, each having a different search capability, when trying to find information vital to their work. A further limitation lay in the fact that these officers had received little or no

formal training. As a consequence of this situation, information that was available in DIMIA databases was not located and the link to Vivian Alvarez's real identity was not made.

Of DIMIA's extensive range of databases, the following five are most relevant to this Inquiry:

- ICSE—the Integrated Client Services Environment—is a single reference point for all records of clients' contact with DIMIA. The system supports onshore processing for citizenship, visas, assurance of support, sponsorship, nomination and compliance.
- IRIS—the Immigration Records Information System—supports the consideration of applications for visas and citizenship at overseas posts.
- MPMS—the Migration Program Management System—contains case details for permanent migrant entry visa applications processed since 1983 and, for some, from 1982. It allows for online inquiry about the details of an individual case or person.
- TRIM—Total Records Information Management—is the records management system.
- TRIPS—the Travel and Immigration Processing System—is a broad collection of mainframe computer systems recording Australian visas and traveller's movements. It is used to facilitate the clearance of passengers entering and leaving Australia and also provides access to information about Australian and New Zealand passports.

A huge variety of DIMIA functions are dependent on data management, and these functions were previously supported by numerous disconnected databases, each with their own specific data structure. ICSE was introduced in 1998 to provide a single interface and replaced a number of databases. The Department has operated a program to increase the functionality of ICSE, but it appears that, in its efforts to provide a service to a wide range of users, the requirements of the compliance function were not adequately taken into account.

Searches carried out

In interviews with the Inquiry the compliance officers involved in the detention of Vivian in 2001 said they had searched TRIPS, ICSE, MPMS and TRIM.

From within ICSE, officers can search the ICSE client database and initiate a search of TRIPS. DIMIA informed the Inquiry that the majority of searches carried out using ICSE are based on unique identifiers such as visa number or travel document identification. Name searching is available, but the search parameters are limited and, in the view of the Inquiry, not well understood by the officers making the searches. This lack of understanding probably leads to an overestimation of the value of the searches done.

The Inquiry was informed that officers had used combinations of the first names Vivian and Vivien and the family names Alvarez and Alvarez. These checks failed to identify Vivian as Vivian Solon Young or Vivian Alvarez Solon, an Australian citizen. Reconstructions of the searches confirmed this. The names Vivian Alvarez Solon and Vivian Alvarez Young are recorded in the database containing movement records. It is of great concern that these records were not located on TRIM and movement records.

The Inquiry initially received information that a ‘wildcard’ search—substituting part of a name with an asterisk or a percentage sign—was available in ICSE and, if used, would have produced records identifying Vivian as Vivian Alvarez Solon. It now knows, however, that there is no wildcard name search available in ICSE or TRIPS. But, because of the particular search capabilities of ICSE, a search using the name Vivian as a family name only and a date of birth of 30 October 1962 would have produced two relevant records in the first 200 names returned. None of the officers involved in the detention of Vivian said they had used these search criteria, and they were generally unaware that such a capability was available.

Search capability

Each of the main processing systems uses a different search engine. ICSE uses a commercial search product that generates keys that are used to find records with similar keys, which are then scored and compared with a threshold. DIMIA has described the search as ‘a sophisticated search which uses phonetics, performs complex transpositions of names and uses other bio-data to score records’. Results are returned on the basis of the total score calculated.

Although TRIPS is accessed via ICSE, it uses a different name search product, one that generates a single key for a person's family name, given names and year of birth. The search ranges are limited to permutations of the elements of family name, given names and three year-of-birth ranges.

Both the ICSE and TRIPS name search products ignore non-alpha characters, so a wildcard search is not available. Because a wildcard search might produce a result, a person unaware of this characteristic might erroneously believe the search was successful and not consider other search options.

TRIM uses a different search facility, allowing for searching on all fields, including file number, record title and notes. The method of search can be chosen by the user. A wildcard search is available in TRIM, but its use was discouraged before May 2000 because it had an adverse impact on network response times. There is no documentation to suggest that staff were told this limitation had been removed after a system upgrade in May 2000.

The TRIM search capability is limited in that, when the wildcard facility is not being used, the search matches only the exact spelling provided and will search only using the method chosen. In this particular matter, the name Vivian Alvarez appears only in the notes field of TRIM. A search for Alvarez in any other field would not have located the relevant record. Similarly, a search for Alverez would not have located a record for Alvarez.

MPMS is a mainframe application and does have a wildcard facility. The search criteria are chosen by the user.

The interconnectivity of databases

ICSE was introduced in 1998 and functionality is continually being added. Its introduction provided a case record and an entry and search platform for a number of previously stand-alone databases that were integrated into it. In 2001, however, the cross-system integration and search facilities were limited. For example, before July 2002 the database parameters required users to first conduct an ICSE search in order to gain access to the TRIPS search facility. This was required for every new search, and it was inefficient and time consuming.

Additionally, to gain access to data relating to movements between 1 January 1980 and 30 June 1990 a separate search must be initiated

from within TRIPS. Data contained in other databases not captured under the interfaces of ICSE and TRIPS must be separately accessed.

As in 2001, there is still no single search that can be run across all data held by DIMIA, nor is consistency of search functionality applied to all the databases used. This might be adequate for officers with a specific and consistent set of input or retrieval requirements, but it is not appropriate for a group of officers charged with identifying a person before exercising the extraordinary power of depriving that person of their liberty.

User-friendliness

ICSE is a graphical user interface-based product and appears to be reasonably intuitive, an assertion supported by the ability of DIMIA officers to use the system in 2001 with little or no formal training.

Compliance officers interviewed said they thought ICSE had not been designed for the compliance function and they had had better search capability with the tools that ICSE had replaced. The validity of this statement could not be tested, but DIMIA advised the Inquiry that ICSE was developed as a ‘decisions record system, not a decision support system’.

It is obviously unsatisfactory to have two different search engines with differing search parameters operating across systems accessed via a single interface, ICSE. Inadequate training and the requirement to search additional disconnected data sources exacerbate the situation. Errors are inevitable.

In addition to comprehensive search and retrieval functionality, compliance officers need a dedicated system of recording, retrieving and managing information and responsibilities. The current structure of records managed in ICSE does not allow for any meaningful monitoring or reporting of compliance officers’ actions.

IT training

The compliance officers the Inquiry interviewed said they had received little or no formal training in the use of ICSE. People are either self-taught or have been tutored on the job by more experienced users. There does appear to be a general degree of proficiency in the use of ICSE, but lack of understanding of the search capabilities could lead users to think they have conducted more complete searches than have actually been done.

When TRIM was introduced, formal training in its use was provided, and employees were not given access to the system until they had attended a training course. This requirement appears to have lapsed at the end of 1999.

Although DIMIA does still provide some formal IT training for employees, there is now heavy reliance on the use of ‘advocates’—formally trained officers who voluntarily provide assistance and support to users in their own work environment.

The advocates are not trained as trainers. There are some positives to this approach, but there are also many limitations. For example, it means that users must recognise their own deficiencies, and confident PC users might not realise they have any deficiencies. Similarly, because the advocates are not trainers, such an approach does not guarantee an increase in a user’s understanding of the system’s functionality and capabilities and an improvement in the user’s overall efficiency.

The focus on on-the-job training creates a situation in which officers who are not suitably skilled in the use of DIMIA systems pass their own inadequacies on to their colleagues.

Recommendation 4

The Inquiry recommends that, as an urgent priority, DIMIA commission a thorough, independent review and analysis of its information management systems. The review should be carried out by an experienced, qualified IT systems specialist and should aim to do the following:

- identify the real organisational policy and operational information management requirements—particularly requirements for interconnectivity, compliance management functionality, and growth
- explore the potential for single-search entry to all DIMIA databases
- formulate an implementation plan for consideration by the DIMIA executive.

3.3.4 Training for compliance and investigations officers

The training of DIMIA compliance and investigations officers is discussed in Section 7.4.2. of the Palmer report. The Alvarez Inquiry uncovered a large amount of evidence to support the Palmer Inquiry's findings in relation to training.

From about 1995 until 2003 DIMIA offered little formal training to its compliance and investigations officers. It relied, and continues to rely, on on-the-job training. Over successive intakes, the staff responsible for mentoring and training new employees have themselves been trained through this informal process. There is little doubt that this has led to inadequate instruction of staff about the functions and responsibilities of compliance and investigations officers. Further, in the absence of an adequate evaluation process to validate standards, the scope and calibre of the training provided to each successive intake of new officers have inevitably been diluted.

Compliance officers have a unique role and associated extraordinary legal powers—including the authority to detain people they suspect to be unlawful non-citizens. These officers must be properly trained to perform their duties and exercise their powers fairly and lawfully. This will be achieved only through a training program that equips the officers with the necessary knowledge and skills.

DIMIA should continue to develop a skills matrix to identify those skills necessary for compliance and investigations officers, as a prerequisite to the development of an accredited competency-based training program. The current generic Certificate IV in Government (Statutory Investigations and Enforcement) is inadequate.

Given the nature of their responsibilities, these officers should be thoroughly trained before they are permitted to exercise their legal powers in the field. If people have access to extraordinary legal powers but lack adequate training, there will invariably be serious consequences—as attested to in this report.

Training areas

There are four important areas where training was inadequate and as a consequence had negative effects on the management of Vivian's case:

- *Understanding, interpretation and application of legislation, policies and procedures.* Compliance officers often represent the front line of DIMIA's contact with the community in connection with migration compliance, and it is reasonable to assume that the community expects these officers to have a high degree of knowledge and competence. Several of the compliance officers the Inquiry interviewed expressed concern at the level of training they had received, especially in relation to legislation, policies and procedures. They were frustrated by the sheer number and complexity of departmental directives (such as the Migration Series Instructions) and had difficulty keeping pace with these requirements while at the same time working in a high-pressure environment.

As discussed in Section 5.1, the decisions in *Goldie v Commonwealth* (2002) 188 ALR 708 and *Ruddock v Taylor* [2005] HCA 48 (8 September 2005) are intrinsic to the development of appropriate training and guidelines for DIMIA compliance officers. The Inquiry is concerned about how the legislation is being interpreted by some DIMIA officers and considers that the *Goldie Case* should be a focus for the training of compliance officers.

- *Information technology.* The comments made by many officers interviewed and the substantial evidence gathered by the Inquiry make it clear that within DIMIA there is a serious problem with the training of compliance officers in relation to the operational use of IT systems and databases. This problem undoubtedly contributed to the failure to identify Vivian and requires urgent redress.
- *Investigation.* As discussed in the Palmer report, many compliance officers have had little formal training in the techniques of investigation—especially in important areas such as avenues of inquiry. Investigative skills are an important component of the skill set required for the effective performance of compliance duties. The absence of such skills was apparent during the Inquiry's investigation: better management of avenues of inquiry should have brought to light information that resulted in Vivian's identification.
- *Record keeping.* Unlike officers from other government authorities with the statutory power to detain individuals, the DIMIA compliance officers involved in Vivian's case do not

appear to have understood the requirement to keep adequate records to support their decisions. The information recorded in DIMIA files and in officers' notebooks about the Alvarez matter is disturbingly scant. Crucial information and key decisions were simply not recorded; there is evidence of irregularities in file dates; original notes were allegedly lost 'in the system'. Any training program for compliance officers should emphasise the importance of keeping adequate records, including note taking.

The Inquiry is aware that DIMIA has taken some preliminary steps to improve the training of compliance and investigations officers, including having decided to appoint a national training manager.

Officer selection

The Inquiry found that compliance officers were generally appointed through internal selection from general office staff, whose functions and skills have usually centred on dealing with inquiries and processing information. Officers appointed from within DIMIA possess useful generic skills, but they are generally insufficiently trained and skilled for the very different responsibilities and much higher levels of authority associated with the role of compliance officer. Selection of compliance officers should focus on their aptitude for the role, and the skills matrix discussed earlier in this section should be a strong reference point in the selection process.

Recommendation 5

The Inquiry recommends that DIMIA commission a thorough, independent review and analysis of the IT training requirements for the Border Control and Compliance Division and the Unlawful Arrivals and Detention Division. The review should identify the requirements for the various functional responsibilities within the divisions.

3.4 The Department of Foreign Affairs and Trade

The Department of Foreign Affairs and Trade was involved in the events pertaining to Vivian Alvarez on three occasions:

- On 16 July 2001 the DIMIA office in Brisbane sent an email to DIMIA in Manila (via the DFAT email system), seeking help with arranging welfare assistance for Vivian. There is no evidence of

this assistance being arranged, and on 20 July 2001 DIMIA in Brisbane emailed DIMIA in Manila to say that the help of Embassy staff there was no longer needed. An internal DFAT email was sent on 20 July, advising DFAT in Manila of background details relating to Vivian's removal and the potential for media inquiries. This is the first record of any direct knowledge on the part of DFAT of the Alvarez matter.

- On 9 September 2003 the Queensland Missing Persons Bureau contacted DFAT in Canberra by telephone and advised that DIMIA had removed Vivian in 2001, not realising she was an Australian citizen. DFAT was asked to help with locating the person who had met Vivian at the airport in Manila. No request was made for DFAT to make any other inquiries in an attempt to find Vivian. DFAT responded by making contact with the Overseas Workers Welfare Association and confirming the identity of the person said to have met Vivian at Manila airport. DFAT in Canberra then forwarded to the Missing Persons Bureau the contact details for this person.
- On 29 September 2004 the DIMIA Brisbane office asked that DFAT in Brisbane provide a copy of Vivian's passport application. The request did not comply with the established protocols, and DIMIA was advised to re-submit the request in the required format. DIMIA did not explain the reason for the request for Vivian's passport application and took no further action to pursue the matter with DFAT.

Although DFAT was involved in the communications associated with Vivian's removal in 2001, the removal process—including arrangements for Vivian to be met at Manila airport—was entirely the responsibility of DIMIA. It is the Inquiry's opinion that no criticism should be levelled at DFAT in connection with this element of its involvement.

It is clear, however, that on 9 September 2003 two DFAT officers (one in Canberra and one in Manila) and one locally engaged DFAT employee in Manila became aware—as a result of advice received from the Queensland Missing Persons Bureau and recorded in a DFAT email of that date—that Vivian, an Australian citizen, had been wrongfully removed in 2001. The response from the DFAT officials at the Australian Embassy in Manila was to treat the matter as an inquiry for information about a third party, so no case file was created. The Inquiry was advised that if the inquiry about Vivian had come from a

family member a case file would have been created. DFAT supplied the information sought by the Missing Persons Bureau and took no further action in this regard.

A senior DFAT officer informed the Inquiry that the communication within DFAT in connection with the Alvarez matter should have been by cable, rather than by email. Had cable been used, the matter would have been brought to the attention of more senior officers. The Inquiry found no evidence that knowledge in DFAT of Vivian's case was held any more widely than by the three officers just mentioned. Nevertheless, a senior DFAT officer told the Inquiry that the way the DFAT embassy staff and the DFAT officer in Canberra had handled this matter was consistent with consular instructions, as detailed in the *Consular Handbook*. It might well be that bureaucratic requirements were met in this case, but the Inquiry is of the view that important obligations to an Australian citizen were not met.

The unlawful removal of an Australian citizen is a grave error, and it should have motivated any government official learning of the situation to do whatever was necessary to resolve the problem. It is reasonable to suggest that the DFAT officers, in Canberra and Manila, who were involved in the incident would ask of their readily accessible DIMIA colleagues 'How could this have happened?' and, more importantly, 'What is being done to resolve the problem?' No such questions were asked.

In a letter dated 13 September 2005, the Secretary of DFAT formally responded to the matters raised in this report in relation to DFAT and outlined remedial action taken by that department to redress the problem—see Appendix C.

3.5 False assumptions

The evidence available to the Inquiry makes it clear that a number of the actions taken by DIMIA officers were prompted by false assumptions. It would appear that the readiness of some compliance officers to assume certain things and then to act on those assumptions impaired their ability to make objective decisions in relation to Vivian.

The assumption that Vivian's correct family name was Alvarez led to all initial inquiries about her identity being made using this name. These inquiries failed to identify her—a situation that contributed to

the assumption that she was an unlawful non-citizen. The knowledge that Vivian had been an inpatient at a psychiatric facility at Lismore should have alerted DIMIA staff to the possibility that more extensive inquiries were warranted in order to establish her identity. As discussed elsewhere, the inquiries made with a view to establishing her identity were neither timely nor thorough, and a number of opportunities to obtain information that would have helped to identify Vivian were not pursued.

It also appears that a number of DIMIA officers assumed that the name Vivian Alvarez should be spelt in a particular way. The various permutations of the spelling of the name that are found throughout DIMIA files appear to be the result of either false assumptions or carelessness. In a government department for which the correct spelling of names is paramount—and could avert a wrongful detention—measures need to be taken to stress to staff that great care must be exercised when recording clients' names and other personal details.

As was discussed in the Palmer report, some officers' assumptions are repeated throughout the files, to the point where they are accepted as facts and dealt with accordingly. In relation to Vivian, one officer opined—without any supporting evidence—that Vivian might have been a 'sex slave'. This opinion was repeated by other officers in subsequent reports and, in the Inquiry's view, probably influenced to some extent the decisions made about Vivian.

In Section 3.3.2 the Inquiry expresses its concern about case management—in particular, continuity and oversight and review. On examination, the Alvarez files clearly show that successive DIMIA officers assumed that all relevant matters had been dealt with by others involved in the case. There is little evidence of validation of actions and opinions recorded in the files—something that undoubtedly contributed to Vivian's unlawful removal.

Recommendation 6

The Inquiry recommends that in the training program for compliance and investigations officers there be a focus on objectivity in decision making and a strong warning that false assumptions will contribute to poor decisions. Further, all staff at DIMIA should be reminded of the need for great care in the spelling and recording of names in files and records.

3.6 Vivian's conflicting evidence

From the time she first came to DIMIA's attention, on 2 April 2001, until she was removed from Australia on 20 July 2001, Vivian provided numerous conflicting accounts to hospital and DIMIA staff in response to questions about herself, her circumstances and events. The statements recorded during these months provide evidence of this. Her responses to questions about who she was, how she had arrived in Australia, when and who she had married, her family members, her children, and her de facto relationships—to name only a few—were inconsistent and in some cases fanciful.

A useful example is information she provided on 3 May 2001, during her first interview with DIMIA. At this interview Vivian said she was married to an Australian named Philip Smith and had arrived in Australia in November 1999, but she was uncertain whether she had arrived by boat or plane. She said she had left Smith at Christmas 2000 and soon after formed a relationship with a man, AM, in Lismore, before being found and taken to Lismore Base Hospital.

Database searches did not reveal any record that matches the details Vivian gave about Philip Smith—including her alleged date of marriage to him in the Philippines and the date of their return to Australia. The Philippines Embassy was unable to find any record to match the alleged date and place of marriage to Smith in the Philippines. In response to questions from the Inquiry (via her lawyers), Vivian said she has never remarried since marrying Robert Young and does not know a Philip Smith. The Inquiry was unable to find any evidence that the Philip Smith Vivian referred to exists, and it is probable that this piece of information is false.

Vivian's account of arriving in Australia by boat or plane after allegedly marrying Philip Smith, being held in a house in Brisbane, and having relationships with a number of men during a short period—together with the circumstances of her coming to DIMIA's attention in Lismore—was apparently not believed by DIMIA officers. But it was then relied on as the reason for suspecting that she was an unlawful non-citizen and for detaining and subsequently removing her.

Among the varied accounts Vivian gave about herself, there were two facts about which she was consistently accurate: all questions about

her first name and her date of birth elicited the same correct responses—Vivian, born on 30 October 1962.

3.7 The DIMIA Contact Centre

Robert Young was persistent in his efforts to locate Vivian. He directed some of his inquiries to the DIMIA Contact Centre in Sydney, which also dealt with calls from Queensland.

There is an email record of a telephone call Mr Young made to the centre on 24 September 2003. Although neither Mr Young's nor Vivian's names are mentioned in the record, it is clear that the matter refers to them. The officer taking the call from Mr Young recorded the following information:

- married a filipina who arrived 1984.
- wife acquired citizenship 1986.
- wife went missing march 2001.
- brisbane police told him wife removed from Australia july 2001.
- his initial query is 'how can this be?'
- brisbane police advised him to contact immigration as it was immigration who removed wife.
- he gotten in contact with a [name removed] of compliance who advised him the matter is a citizenship issue.
- [Name removed] advised him to contact 131880 and ask for [name removed] of citizenship contact centre. as [name removed] was BC, I asked for his name and number. he wouldn't give it to me. he took my name instead and said he would ring again when [name removed] is available. he didn't sound irate or annoyed, but he sounded more like anthony hopkins from silence of the lambs. And I kid you not.

This information was circulated among other staff at the Contact Centre, but no action was taken to follow up the questions Mr Young raised. Another lost opportunity.

The Inquiry sought further information about the incident, and DIMIA made the following comments in a formal response:

Prima facie the telephone contact represented an opportunity for the department either to:

- secure from the caller information to identify the circumstances and the identity of the individuals involved or,
- record the contact in departmental records in a way that the details that were recorded would be available when and if further relevant information came to light so that the information could contribute to identifying the circumstances and the identity of the individuals involved.

That this did not occur is regrettable and of serious concern to the department. Contact centre protocols, systems and record keeping processes are now being reviewed in the light of the record of the call coming to attention.

On 28 September 2004 officer AA at the Contact Centre carried out a number of database searches on the ICSE system using the name Vivian Solon Young. When interviewed by the Inquiry, however, this officer could not recall the reason for these searches.

The Inquiry was unable to establish any link between these database searches and, on the same day, communications about Vivian between the Queensland Missing Persons Bureau and the Entry Systems and Movements Alerts Section of DIMIA in Canberra. Discussions with Robert Young suggest that the most likely explanation is that officer AA carried out the database searches as a result of a telephone call Mr Young made to the Contact Centre.

In any case, no further action was taken as a consequence of the database searches. The incidents provide further evidence of the need for DIMIA to take action to improve operating procedures at contact centres.

Recommendation 7

The Inquiry recommends that DIMIA institute a review of the operations of contact centres, to determine more effective procedures for dealing with information those centres receive.

3.8 Fingerprints and photographs

3.8.1 Fingerprints

Because the Queensland Police Service had previously charged Vivian with criminal offences, her fingerprints (taken on 29 August 1999) were on the Police Service's Polaris database and CrimTrac's National Automated Fingerprint Identification System (recorded on NAFIS on 21 March 2001). When she was detained in 2001, the taking of her fingerprints and submission of them to CrimTrac for matching had the potential to identify her as Vivian Solon.

If such a search had produced positive results it would have provided reference to Vivian's Queensland Police records. A check of the records would then have revealed a photograph of Vivian (taken on 23 August 2000), her last known address, and a previous address. Further, if the Queensland Police Service records check had led to a search of Queensland vehicle driver records it would have revealed details of Vivian Solon Young, born 30 October 1962, and her last known address as of 7 April 1992.

Migration Series Instruction 234 was current on 20 July 2001, and paragraph 12.1 of it quotes section 258 of the Migration Act:

... where a person is in immigration detention by virtue of this Act, an authorised officer may do all such things that are reasonably necessary for photographing or measuring that person or otherwise recording matters in order to facilitate the person's present or future identification.

Sub-paragraph 12.2.1 of the instruction requires that an authorised officer obtain the fingerprints of a detainee only when all other avenues of identifying the detainee have proved inconclusive or when fingerprints are required for the issue or renewal of travel documents. DIMIA officers would thus have been able to take and use fingerprints as a means of identification, since their efforts to conclusively identify Vivian by other means had not been successful.

Sub-paragraph 12.2.2 requires that fingerprints be taken only for the purpose of identifying a detainee when there is an intention to match fingerprints for such a purpose. It is contended that this provision exists in order to prevent the taking of fingerprints as a matter of course and/or if there is no intention to use them for identification purposes.

When interviewed, Southport DIMIA officer K said that compliance officers were discouraged from taking fingerprints and it had been the practice not to fingerprint detainees. This situation was probably the result of legal advice DIMIA received to the effect that s. 258 of the Migration Act did not authorise the taking of fingerprints on a non-consensual basis.² In any event, there is no evidence that any attempt was made to fingerprint Vivian during her detention.

3.8.2 Photographs

Although DIMIA officers photographed Vivian on 13 July 2001, there is no evidence that the photograph was used in a constructive way until September 2003. It was reasonable to have concluded—on the basis of the various accounts she had provided—that Vivian had recently been in Queensland, so one avenue of inquiry could have been to send a photograph of her to the Queensland Police Service to determine whether she was known there. This might have resulted in the matching of Vivian with a 17 July 2001 missing person’s report relating to her and a link being made by that means or through discussions with Department of Family Services child safety officers, one of whom had reported her missing after she failed to collect her younger son from the Brisbane City Child Care Centre.

3.9 The Queensland Police Service Missing Persons Bureau

Before July 2001 the Queensland Police Service Missing Persons Bureau had two records of Vivian Young @ Solon being reported as a missing person. Both records were a result of reports having been made by the mental health unit of Princess Alexandra Hospital, on 29 September 1999 and 5 November 1999.

The evidence suggests that early in 2001 Vivian’s life had reached crisis point. On 14–15 February 2001 Vivian’s half-brother Henry had called the police, asking them to remove her from his house because of her behaviour. She left in a taxi with her younger son after police arrived at the house. The following day Vivian failed to return to collect the child from the Brisbane City Child Care Centre. On 17 February police took her to Murrie Watch in Brisbane for overnight care after she had been found in a drunken state. On

² The *Migration Legislation Amendment (Identification and Authentication) Act 2004* (effective 27 August 2004) and a policy directive issued by the Minister on 26 February 2005 now provide for the fingerprinting of all people taken into immigration detention.

18 February Redcliffe police reported they had seen her at a Rothwell address when responding to a complaint that she was behaving erratically.

Vivian was eventually reported as a missing person—under the name Vivian Young—to Redcliffe police station on 17 July 2001 by a child safety officer from the Redcliffe office of the Department of Family Services. On 18 July 2001 the Missing Persons Bureau started a file on her and, with police from the Criminal Investigation Branch, made extensive inquiries in an attempt to locate her. They were unable to do so, but they were able to establish that her bank account had been used at the Lismore branch of the Commonwealth Bank on 23 March 2001.

On 19 July 2001 the Redcliffe District Intelligence Office contacted the Brisbane office of DIMIA to ask about the movements of Vivian Solon @ Young. DIMIA replied the same day: ‘Vivian Alvarez Solon @ Young (30/10/62) last arrived in Australia 2/9/93. There is no record of a departure since that date’. This inquiry and the reply are crucial for two reasons:

- On 19 July 2001 Vivian was being held in detention at the Airport 85 Motel before her removal the following day.
- The link was made between the names Alvarez and Solon/Young for the first time since Vivian had come to DIMIA’s notice on 2 April 2001.

On 15 August 2003 an officer from the Missing Persons Bureau prepared a media report on Vivian for inclusion in the television program *Without a Trace*, which went to air on 20 August. This officer was contacted the following day (21 August) by officer E from DIMIA in Canberra, who said Vivian had been deported to Manila on 20 July 2001 under the name Vivian Alvarez. Officer E then emailed the Missing Persons Bureau, providing details of Vivian, including that she was an Australian citizen with the name Vivian Solon Young.

On 27 August 2003 the Missing Persons Bureau officer informed the Department of Family Services of the advice received from DIMIA and also made contact with Interpol in Canberra, with a request for the Philippines Police to locate Vivian. On 3 September the officer informed Robert Young that Vivian had been deported by DIMIA in 2001. The officer told the Inquiry Young did not accept this situation: Vivian was an Australian citizen and so could not have been deported.

Mr Young made two further calls to the Missing Persons Bureau later that month. The officer from the bureau continued making inquiries in Australia and the Philippines in an unsuccessful attempt to uncover Vivian's whereabouts. It is plain that misinterpretation of the Commonwealth *Privacy Act 1988*, by both DIMIA and Missing Persons Bureau officers, led to important information not being provided to Mr Young. This is discussed at length in the Palmer report and in Section 5.2 of this report.

The Inquiry examined the log of inquiries made by the Missing Persons Bureau in its efforts to locate Vivian. The inquiries were comprehensive and thorough. The bureau's search for Vivian was complicated by advice given to it by DIMIA on 21 August 2003 that Vivian had been removed from Australia under the name Vivian Alvarez. Despite receiving this advice, the bureau continued to try to find Vivian in the Philippines. It also responded appropriately by informing Robert Young of Vivian's removal.

One might ask why, on being advised that an Australian citizen had been removed, the Missing Persons Bureau did not pursue the matter with other authorities. The bureau had been placed in a very difficult position in that it had been advised by the Australian government department responsible for immigration that Vivian, an Australian citizen, had been removed. As state police officers, members of the bureau would not have been in a position to question this action; nor is it reasonable to assume they would have had the legal or technical knowledge to form the opinion that the removal was unlawful.

Given the bureau's continued, diligent efforts to establish the whereabouts of Vivian—even after it was told she had been removed to the Philippines—no criticism should be levelled at the actions of the Queensland Police Service in this regard.

3.10 The Queensland Department of Family Services

The Queensland Department of Family Services (now called the Department of Child Safety) had been involved with Vivian and her children since 14 August 1997 and had had substantial contact with her. The department became involved in matters relevant to the Inquiry on 16 February 2001, when Vivian did not return to collect her younger son from the Brisbane City Child Care Centre. Brisbane police were called to the centre that evening, and later that night they handed the child over to staff from the department. He was

immediately placed with foster parents, who remain responsible for his care.

The department's focus from this time was the child's welfare. It did, however, make numerous inquiries during the ensuing months in an unsuccessful attempt to locate Vivian. There does not appear to have been any sense of urgency or alarm attached to the inquiries: the situation was probably influenced by the department's knowledge of Vivian's history of erratic behaviour. Nevertheless, as a result of a report made to the Redcliffe police station by a departmental officer, a missing persons report on Vivian Solon was activated on 17 July 2001. This resulted in a concerted response from the Missing Persons Bureau to try to locate Vivian. Neither the department nor the bureau knew that on that very day DIMIA was holding Vivian in detention in Brisbane.

The fact that Vivian was not reported as a missing person for some five months after failing to collect her child from the Brisbane City Child Care Centre on 16 February 2001 undoubtedly limited the opportunities for the Missing Persons Bureau to locate her before she was removed from Australia. It would have been prudent to make such a report shortly after initial inquiries had failed to locate Vivian. Nevertheless, taking into account all the circumstances—including the Department of Family Services' knowledge of and experience with Vivian—it would be unfair to apportion any blame for her removal to that department.

4 Measures taken to deal with medical and other care needs

4.1 Vivian's physical and mental health

At 11.47 pm on 30 March 2001 the New South Wales Ambulance Service received a call to attend the recreational grounds at Uralba Street in Lismore, New South Wales. At 11.56 pm ambulance officers arrived and found Vivian sitting beside a large, open drain. She had obvious head injuries. The bystander who had called the ambulance thought Vivian might have been riding a bicycle and fallen into the drain.

The ambulance report noted that Vivian's clothes were 'wet all over' and that she had sustained the following injuries:

- swelling and haemorrhage to the right cheek area
- abrasions to the left chin area
- pain in both arms and legs.

The patient's given name was recorded as 'Vivian'; the report noted her surname as 'unknown'.

The Inquiry visited the site where Vivian was found. Files the Inquiry saw offered varying accounts of how Vivian came to be injured—including a motor vehicle accident and physical assault. The terms of reference do not call for a thorough investigation of the cause of Vivian's injuries, so the Inquiry did not conduct such an investigation. After careful consideration of the physical and documentary evidence, however, it formed the view that the most plausible explanation for Vivian's injuries was that they were a result of her falling into a deep concrete drain. There is no direct evidence to support the view that her injuries were caused by a motor vehicle accident or a physical assault.

Vivian was taken from the recreational grounds to the Emergency Department of Lismore Base Hospital, arriving at 12.06 am on 31 March. During her first few hours in emergency Vivian was recorded as being combative and using inappropriate and abusive

language. As a result of medical observations and the evidence provided, the treating GP detained Vivian under Schedule 2 of the New South Wales *Mental Health Act 1999*. She was taken to the Richmond Clinic Psychiatric Unit on the same day and was detained there as an involuntary patient.

On 2 April Vivian was diagnosed as suffering from a mental disorder—as opposed to a mental illness. (As noted in Chapter 2, a person cannot be involuntarily admitted on the grounds of a mental disorder.) On 3 April she was transferred to Ward C6 of Lismore Base Hospital, where she continued to receive treatment for her physical injuries. Among her symptoms was limited mobility of her arms and legs.

The medical records show Vivian underwent a series of medical examinations, one of them a CT scan that revealed she was suffering from a compressed spinal cord—also referred to throughout her medical records as a spinal lesion.

On 4 April Vivian was taken by air ambulance to Sydney’s Liverpool Hospital, where she had surgery to release the pressure on her spinal cord. In the final week of April she was taken back to Lismore Base Hospital for a short period of recuperation before being discharged and admitted to St Vincent’s Hospital Rehabilitation Unit in Lismore. Here she remained from 7 May to 12 July 2001.

When Vivian was discharged from St Vincent’s, a social worker at the hospital gave her a letter stating that she was able to move about slowly and to care for herself. There is some evidence the hospital had found Vivian and her visitors difficult to manage, and this might have contributed to her discharge from the Rehabilitation Unit.

Upon discharge, Vivian was given a four-wheel walker and was met by officers from the DIMIA Southport office. She was then taken by car to that office and whilst there was observed seated in a wheelchair and being wheeled about the office by DIMIA staff. Later that afternoon a DIMIA staff member carried her upstairs to her accommodation. On the following day she was carried downstairs, again by DIMIA staff.

On 13 July 2001 staff of Australasian Correctional Management collected Vivian and took her to Brisbane for detention at the Airport 85 Motel. The same day the ACM staff contacted their supervisor and asked that a nurse be made available to assist with Vivian’s care. (The

staff kept a daily log, recording that Vivian was unable to see to her basic hygiene needs such as toileting and showering without help.) On the basis of DIMIA instructions relating to the management of Vivian's detention, the ACM supervisor denied the request for assistance.

On the following day, 14 July, another ACM guard contacted the same supervisor and asked that Vivian be examined by a doctor, citing her debilitating condition and saying she suffered from leg spasms. The guard also added that Vivian required constant care. Although the request was not acted on, it was noted in the log that it was to be considered. When interviewed, the ACM supervisor said DIMIA had instructed that, unless Vivian's health problems escalate further, medical support for her was not required.

There are no further log entries about Vivian's physical or mental health whilst at the motel. It is, however, noted in the logbook that Vivian self-medicated with Ventolin on several occasions during her detainment. Witnesses also confirmed other logbook notations, including that Vivian was a heavy smoker.

It is alleged that, during a visit to the motel by members of the Filipino community, Vivian suffered a fit. One witness described the fit as similar to an epileptic seizure—eyes rolling back, frothing at the mouth, and bodily shaking. This witness's account is supported by evidence from one other person present, but there is no mention of the incident in the daily log kept by the guards. Considering the small size of the motel room, the Inquiry finds it highly unlikely that, had a fit of this nature occurred, it would not have been seen by others present.

Concerns about Vivian's health were made known to the Philippines Consulate General and the Philippines Embassy. They were then expressed to DIMIA by the Embassy, through the office of the Consulate General in Brisbane. Because of the concerns, the Consulate General withheld travel documents until a medical examination was completed and Vivian was assessed as fit to travel. On 19 July 2001 a locum GP attended the motel and Vivian underwent a physical examination. The doctor concluded Vivian was fit to travel and issued a medical opinion to this effect. His opinion included the remark that Vivian did not suffer from any fits. ACM staff faxed the opinion to DIMIA, and the Consulate General issued travel documents the same day.

Vivian needed a wheelchair in order to board the Qantas flight from Brisbane on 20 July 2001. She also needed one in order to disembark and was pushed into the terminal at Manila by her escort from the Queensland Police Service.

The available evidence makes it clear that Vivian suffered significant physical disability as a consequence of her accident on 30 March 2001. Given this, the Inquiry considers there are two major areas of concern in connection with the way DIMIA officers dealt with Vivian's physical condition. The first relates to the suitability of the accommodation (the Airport 85 Motel) in which Vivian was detained for the week leading up to her removal; this is discussed in Section 4.2.1. The second area of concern relates to the circumstances in which Vivian's medical examination was conducted on 19 July 2001. Taking into account the extent of Vivian's physical disability, the Inquiry considers that a more thorough medical examination was warranted and that the locum GP should have had the opportunity to obtain details of Vivian's medical history from Lismore and Liverpool Hospitals.

The GP was asked only to assess Vivian's fitness for travel. His medical assessment was done in a non-clinical setting and with access to very limited information. Although the Philippines Embassy had expressed concern about Vivian's fitness to travel, arrangements had already been made for her to travel the following day, and it is obvious that the medical examination was conducted under some time pressure.

It would have been more appropriate for the removal of Vivian to have been suspended until DIMIA had taken all necessary measures to ascertain that she was fit to travel.

4.2 Vivian's care needs

4.2.1 Welfare

The Inquiry considers that DIMIA officers paid inadequate attention to Vivian's welfare needs, which were substantial. An attempt was made to detain her at Villawood Immigration Detention Centre, but there was no room available there. The officers recognised that detaining Vivian at Brisbane Women's Correctional Centre was inappropriate because of her physical and mental condition. So it was

decided to place her under guard at the Airport 85 Motel, where she was detained for seven days before being removed.

Detention at the motel meant that Vivian was confined in a single room with two guards, at least one of whom was female. Her privacy and dignity were compromised by this arrangement, which, in the view of the Inquiry, should not have extended beyond two days. She had no access to the medical facilities normally available to detainees and, despite experiencing some medical problems, received no medical services. She had not been admitted to an immigration detention facility, so the usual reception practices—including a comprehensive medical assessment—were not available to her.

There is no evidence that DIMIA officers examined alternatives to detention—such as temporary accommodation and the employment of a carer for Vivian. When interviewed about the situation, the DIMIA officers concerned said they thought they had done a ‘good job’ removing her so soon after detention. This is disturbing.

The Inquiry accepts that, as a general principle, once a person is returned to their country of origin, welfare responsibility is transferred from the Australian Government to that other country. Putting aside the fact that Vivian was an Australian citizen when she was removed, the Inquiry considers that, in view of her poor physical and mental health and the lack of known family support, the arrangements made for Vivian’s reception and welfare on arrival in Manila were inadequate. It was more a matter of good luck than good planning that Vivian found herself in the care of the Overseas Workers Welfare Association at Manila airport.

It is clear that the obligations associated with the duty of care and medical attention—as required by Migration Series Instruction 234, which was in operation at the time of Vivian’s detention—were not met during Vivian’s detention at the Airport 85 Motel. In response to the Inquiry’s questions about this, DIMIA provided the following advice:

The Department recognises that while its obligation under the *Migration Act 1958* is to remove an unlawful person as soon as practicable ... there is a lack of clarity about the question of the application of the standards ‘Health Care Needs’ to detainees who are in transitional detention between their Bridging Visa E expiring and the Department making appropriate arrangements for the person to depart Australia, such as in the Ms Alvarez case. There may be a similar lack of clarity in circumstances where

people are held in other similarly transitional detention arrangements prior to being removed 'as soon as reasonably practicable.' It remains a current issue that requires consideration by the Department.

4.2.2 Arrival in Manila

DIMIA did ask about arrangements for Vivian's reception in Manila on 20 July 2001. On 16 July officer F from the Brisbane office emailed DIMIA officer AY at the Australian Embassy in Manila, seeking information about 'services which might be able to meet and assist on her return', and also made a file note 'Centre for Multicultural Care [in Brisbane] trying to arrange something'. There is, however, no evidence that DIMIA staff in Manila took any action to make arrangements for Vivian's arrival.

Staff from the Centre for Multicultural Care told the Inquiry they had referred the request to the Canossian Catholic order in Brisbane. But a spokesperson for that order said they had made no arrangements for Vivian's reception in Manila.

From this point it seems to have been assumed by DIMIA that arrangements had been made for Vivian's arrival in Manila. This is evident in various file notes and emails exchanged between DIMIA and Department of Foreign Affairs and Trade staff in Manila and Australia. The Inquiry is, however, unable to find any evidence that arrangements were in fact made for Vivian's reception on arrival in Manila.

Vivian was escorted to Manila airport by a female officer from the Queensland Police Service. There is conflicting evidence about what happened next. The most likely scenario is that the police officer left Vivian in the care of a Catholic nun in the restricted area of the airport, in the belief that the nun was there to meet Vivian. After the police officer departed, it appears the Catholic nun left Vivian with Qantas ground staff, who took her to the counter of the Overseas Workers Welfare Association. The OWWA has stated that Qantas ground personnel left Vivian at its counter because there was no one to receive her in the arrivals area.

OWWA personnel took Vivian to a nearby hospital and assumed the cost of a medical examination. Once cleared from the hospital, Vivian was transferred to the OWWA Halfway Home. She received free board and lodging for two days and then was moved to the care of the

Daughters of Charity, where she was eventually found on 12 May 2005.

Recommendation 8

The Inquiry recommends as follows:

- that compliance staff be trained to exercise greater caution in performing their duties—including verification of information—where it is known or suspected that a possible unlawful non-citizen may have mental health problems
- that any training program developed as a result of recommendations in the Palmer report and this report include a component designed to better equip compliance officers to deal with people with known or suspected mental health problems.

Recommendation 9

The Inquiry recommends as follows:

- that DIMIA take all necessary action to ensure that appropriate standards for health and care needs are developed and introduced for situations involving detainees in transitional detention
- that, where it is necessary or appropriate to conduct a medical examination to determine the fitness to travel of an unlawful non-citizen, DIMIA officers make all reasonable efforts to ensure that the medical practitioner concerned receives the medical history and record of the unlawful non-citizen and that the medical practitioner—who, if possible, is someone who has previously treated the patient—is advised of the factual circumstances, including the behaviour of the unlawful non-citizen, that have led to the need for the medical examination.

5 Legal and policy considerations

Detention under s. 189 of the *Migration Act 1958* is discussed at length in the Palmer report. Some further discussion is, however, warranted here on factors of particular relevance to the Alvarez matter.

5.1 Immigration detention under s. 189 of the Migration Act

5.1.1 Reasonable suspicion

The *Migration Act 1958*, particularly Division 7, contains provisions dealing with the detention of unlawful non-citizens. Under s. 189 of the Act, authorised officers—including DIMIA compliance officers and police officers—are obliged to detain any person who is ‘reasonably suspected’ of being an unlawful non-citizen. Although this section should be read in conjunction with s. 196 (which deals with the ways in which a person detained under s. 189 may be released from detention) and in the context of the remainder of Division 7, the scope of the section imposes on officers who detain a person under its provisions a clear obligation to form a suspicion that, in the circumstances, is objectively reasonable before they take action to detain a person. Indeed, a properly based exercise of discretion in the determination of ‘reasonable suspicion’ constitutes the only protection in the section against indefinite arbitrary detention.

The courts have had cause to consider the meaning of ‘reasonable’ on many occasions. There are also many precedents in law—mainly in criminal law—relating to the definition of ‘reasonable grounds’ (see, for example, *George v Rocket* (1990) 170 CLR 104). Invariably, the case law emphasises the objective nature of the reasonableness test and makes it clear that a ‘reasonable’ decision or action cannot be founded on purely subjective or personal opinion.

Few cases have considered the definition of ‘reasonably suspects’ in the context of s. 189 of the Act, although the Federal Court has delivered two relevant judgments in *Wai Yee Yeoh v Minister for Immigration and Multicultural Affairs* [1997] 1316 FCA (Emmett J, 31 October 1997) and *Goldie v Commonwealth* (2002) 188 ALR 708 (Full Federal Court). In recent weeks, the High Court has provided

further guidance in its decision in *Ruddock v Taylor* [2005] HCA 48 (8 September 2005).

In the case of *Wai Yee Yeoh v Minister for Immigration and Multicultural Affairs* His Honour stated:

I was referred to the observations of the High Court in *George v Rocket* (1990) 170 CLR 104 at 115 concerning what must be established for there to be a reasonable suspicion. The joint judgment of the court contains references to the observations of Lord Devlin in *Hussien v Chong Fook Kam* [1970] AC 942 at 948 to the effect that ‘Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: I suspect but I cannot prove’. Reference was also made to the observations made by Lord Atkin in *Liversidge v Anderson* [1942] AC 206 to the effect that suspicion and belief requires the existence of facts which are sufficient to induce that state of mind in a reasonable person. In other words, it may in the event turn out that suspicion turns out to be incorrect but that does not mean that it was not reasonable.

The circumstances in *Wai Yee Yeoh* were somewhat similar to those in Vivian’s case. Wai Yee Yeoh was detained under s. 189 following, among other things, database checks a DIMIA officer made in relation to the particular spelling of a name and the result of those checks leading him to conclude that no visa had been granted to the applicant and that they had gained entry to Australia using false identity documents. Vivian was unable to produce any documentation demonstrating her lawful entry to Australia, and database checks also failed to identify her.

Although the judgment in *Goldie’s Case* was handed down after Vivian had been removed, the Federal Court explained the principles governing the operation of ‘reasonable suspicion’. Explaining that the operation of s. 189 involved a more rigorous test than merely thinking that a person might be an unlawful non-citizen, the court said, in part:

... the officer is not empowered to act on a suspicion reasonably formed that a person *may* be an unlawful non-citizen. The officer is to detain a person whom the officer reasonably suspects *is* an unlawful non-citizen. [emphasis added]

The Court also made it clear that the exercise of ‘reasonable suspicion’ detention ‘must be justifiable upon objective examination of relevant material’ and that the detaining officer could not simply rely on information immediately to hand but must make ‘efforts of search and inquiry that are reasonable in the circumstances’.

In its recent decision in *Taylor*, the High Court provided further guidance on the valid exercise of s. 189 of the Act. The case was largely concerned with whether detention under s. 189 was lawful if the detaining officer's reasonable suspicion was based on material that was subsequently found to have been affected by a mistake of law or fact, or both. A majority of the High Court held that the officer's decision would not be invalid for that reason alone. The Court explained:

[Section] 189 may apply in cases where the person detained proves, on later examination, not to have been an unlawful non-citizen. So long always as the officer had the requisite state of mind, knowledge or reasonable suspicion that the person was an unlawful non-citizen, the detention of the person concerned is required by s 189.

Unlike the Federal Court in *Goldie*, the High Court did not refer to any obligation to make reasonable searches and inquiries. It did, however, explain that 'what constitutes reasonable grounds for suspecting a person to be an unlawful non-citizen must be judged against what was known or reasonably capable of being known at the relevant time'.

The principles outlined in *Goldie* and *Taylor* are directly relevant to a consideration of the lawfulness of the detention of Vivian Alvarez, even though these judgments had not been handed down when she was detained in 2001. The judgments are also essential for the development of training programs and guidelines for DIMIA compliance officers.

In forming a 'reasonable suspicion', compliance officers at the Southport office of DIMIA appear to have relied on three sets of information:

- the information Vivian provided to them directly
- the information Vivian conveyed to third parties to whom DIMIA spoke
- the (negative) results of various database searches.

There being no other information available, and in the absence of in-depth follow-up of other avenues of inquiry, Vivian's varying accounts—which were suspected to be untrue—became the basis on which she was detained and removed. This occurred despite the fact

that the first time DIMIA received notification of her was when she was in the Richmond Clinic, the psychiatric unit at Lismore Base Hospital.

Although the findings in *Wai Yee Yeoh* would appear to vindicate the Southport compliance officers' determination of 'reasonable suspicion', the findings in *Goldie's Case*—which was decided in 2002, after Vivian's detention—appear to require more evidence to substantiate such suspicion. The Inquiry took the reasoning of the High Court in *Taylor* into account and, for the reasons detailed in Section 3.1, is of the opinion that the suspicion that led to Vivian's detention was not a reasonable one. Specifically, the Inquiry refers to the failure to test the information Vivian provided in circumstances in which her poor mental health was readily apparent, the inadequacy of the investigation, and the lack of rigorous analysis of the available information. On the evidence before it, the Inquiry considers Vivian might indeed have been identified as an Australian citizen had such investigations been taken to their conclusion.

It appears that, once Vivian had been detained, there was no ongoing review to validate or substantiate 'reasonable suspicion' in relation to her status. In fact, many of the assumptions made about how she came to be in Australia and about the problems of identifying her were without foundation and appear to have become axiomatic and to have been relied on to vindicate the decision to detain and remove her.

The power to detain under s. 189 of the Migration Act is absolute—providing the 'reasonable suspicion' rule has been met—but the Inquiry found little evidence that DIMIA officers either are trained to make a conscious decision to detain or are otherwise required to make such a decision by DIMIA policy. Officers told the Inquiry, 'There is no decision to detain, the Act requires it'.

5.1.2 Deprivation of liberty

Sub-paragraph 2.1 of Migration Series Instruction 234 states that the detention of a person under the Migration Act is analogous to the action that constitutes an arrest by the police or another law enforcement agency. As with police arrest, immigration detention entails depriving a person of their liberty.

Paragraph 7.2 of Migration Series Instruction 234 clearly points out that the power to detain is strictly limited to situations where knowledge or a reasonable suspicion has been established. It states

that the detaining officer must actually have the suspicion and that this suspicion must be a reasonable one based on objective evidence; that is, a reasonable person in the position of the officer and in the particular set of circumstances would hold the same reasonable suspicion. The paragraph also asserts that the powers cannot be used for the purpose of helping an officer establish the requisite reasonable suspicion.

DIMIA officers, from field level to senior executive, seemed to have had little understanding of their responsibilities under the Act—other than a mistaken belief that they *must* detain a person and that when the person is detained the detention is absolute. The seriousness of taking a person’s liberty did not seem to be reflected in their actions. Some officers also asserted that the accepted order of events was to detain a person ‘reasonably suspected’, then gather evidence or information to support that action. The fact that a detainee loses their liberty seemed to be accepted as a consequence of both the operation of the Act and the detainee’s own doing and circumstances brought about by the detainee’s own actions.

These attitudes seem to have been nurtured by a cultural environment in which the detention of suspected unlawful non-citizens was viewed as paramount. A former DIMIA officer told the Inquiry that quick removal of Vivian to the Philippines would have been seen as ‘we had done a good job’ because ‘we didn’t want to keep people in detention too long’. A literal interpretation of s. 198 of the Act would tend to support this notion because it requires that ‘An officer must remove as soon as reasonably practicable an unlawful non-citizen ...’

5.1.3 Removal

It appears the first bridging visa issued to Vivian was granted on the basis of Schedule 2, subclause 050.212(3), of the Migration Regulations 1994, which states:

An applicant meets the requirements of this subclause if:

- (a) the applicant has made, in Australia, a valid application for a substantive visa of a kind that can be granted if the applicant is in Australia and that application has not been finally determined; or
- (b) the Minister is satisfied that the applicant will apply, in Australia, within a period allowed by the Minister for the purpose, for a substantive visa of a kind that can be granted if the applicant is in Australia.

It is clear that from 3 May 2001 to 15 June 2001, the duration of the first bridging visa, compliance officers thought Vivian would apply, or was at least eligible to apply, for a visa.

The second and third bridging visas were granted on the basis of Schedule 2, subclause 050.212(2) of the Migration Regulations 1994, which states, 'An applicant meets the requirements of this subclause if the Minister is satisfied that the applicant is making, or is the subject of, acceptable arrangements to depart Australia'.

The second bridging visa was issued on 15 June 2001. There is no record of what information or advice DIMIA received between 3 May 2001 and 15 June 2001 to cause a change in the basis for the issue of this visa. Section 8 of the Application for Bridging Visa E notes, 'I am satisfied that it is appropriate to grant a bridging visa class E because: Unable to depart or lodge further application'.

Southport officer K issued the third bridging visa on 12 July. But, in answer to questions asked by officer U on 13 July 2001, Vivian said she wanted to stay in Australia and that she would like to apply for a visa but did not know which one. Apparently, she took no action then or subsequently to apply for a visa. It is not known whether assistance or the facility for her to do so was offered.

When interviewed, officer K, the officer responsible, said she made efforts to inform Vivian of her rights in relation to applying for a visa. Officer K did not, however, produce any documentary evidence that this occurred. Nor is there any documentary evidence in any DIMIA files to suggest that it did. Further, when interviewed again, on 2 June 2005, officer K said Vivian had 'refused to apply for a visa'.

Migration Series Instruction 54 was issued on 23 August 1994 and was current on 20 July 2001. Sub-paragraph 2.1.3 of the instruction requires officers to note that some flexibility exists in relation to what period satisfies the direction to remove 'as soon as reasonably practicable', as required by s. 198 of the Act. The sub-paragraph states that, although "'practicable" denotes what can be done, what is feasible or possible, manageable or convenient, it is qualified by what is reasonable in all the circumstances'. It is further required that the five working days allowed for lodging a substantive visa application in s. 195 of the Act must have elapsed. It is not clear if the options for applying for a visa were ever explained to Vivian but, in the event, she was removed less than a week after the interview in which she said she wanted to stay in Australia and apply for a visa.

Because Vivian is an Australian citizen, the visa provisions are irrelevant. The approach taken by DIMIA compliance officers, however, persuaded the Inquiry that visa provisions were manipulated to accommodate the officers' management of Vivian's case.

5.2 Privacy

The question of privacy arose when Vivian's former husband, Robert Young, tried to obtain information about her whereabouts during 2003, 2004 and 2005. Both Queensland Missing Persons Bureau staff and DIMIA Contact Centre staff told him on a number of occasions they were not legally able to supply information about Vivian because of 'privacy issues' stemming from the fact that he was not related to her.

Mr Young's frustration about this culminated in his sending on 4 April 2005 a personal email to the Minister's office, in which he stated, among other things, 'I have contacted the DIMIA contact centres previously to report the matter however they advise that it cannot be further pursued due to privacy considerations'.

File notes by the Missing Persons Bureau show that Mr Young's inquiries on 3, 24 and 25 September 2003 were met with '... due to privacy laws could not give any further info', '... if she didn't want whereabouts disclosed I would have to respect that' and '... this matter was not up for discussion due to privacy laws ...'

At the time of Mr Young's calls both the Missing Persons Bureau and DIMIA knew Vivian had been removed from Australia on 20 July 2001. In fact, in handwriting on a copy of a Queensland Police Service message of 27 October 2004, informing of Vivian's location and removal from police records as a missing person, is the following instruction:

DO NOT disclose details/circumstances of her deportation to her ex-husband Bob Young. Advise him to contact Dept of Immigration ... (only advise Young MP [missing person] returned back to Philippines in 2001).

The Inquiry suggests that, if Mr Young had been given full and frank details of the fact that Vivian had been removed from Australia to the Philippines in 2001, he might have been able to use contacts in Australia and the Philippines to find her. This could have led to the discovery of her whereabouts some two years before 12 May 2005.

DIMIA's interpretation and application of privacy requirements in this case had the potential to contribute to the danger Vivian was in and are completely at odds with the spirit of the legislation. Further, they defy the basic tenets of commonsense and decency.

Privacy and the interpretation and application of the *Privacy Act 1998* are discussed at length in the Palmer report.

5.3 DIMIA's email records

During the Inquiry's investigations it was necessary to examine email traffic between a number of DIMIA officers. This line of inquiry was, however, restricted by the fact that DIMIA did not keep the relevant email records for the period before 2004.

The *Records Management Guide* DIMIA issued in January 2002 provides the following advice: 'Email is essential to the way DIMIA does business and many important business decisions are made using it. Therefore, staff must capture emails that are corporate records and store them in TRIM'. A record keeping policy currently being developed into a DIMIA Administrative Instruction includes the following comment: 'Email sent or received that contains information about business activities and therefore can function as evidence of business transactions form part of the official records of the department and must be managed in accordance with the *Archives Act 1983*'.

The National Archives of Australia does not regard an email system as a record keeping system, so DIMIA's email business records must be stored in TRIM—a record keeping system. This obligation means, however, that individual DIMIA officers must make a judgment about which email records should be stored in TRIM and then actually transfer those records to TRIM. Information gathered by the Inquiry shows that this process is simply not working. Account holders can delete emails from personal computers at any time, and important business records are being deleted from the email server after 12 months. (DIMIA has a contract with Computer Science Corporation Australia Pty Ltd that requires email back-up tapes to be retained for 12 months only.)

In the Inquiry's view, the current arrangements for keeping email business records are seriously flawed, resulting in the loss of many such records after 12 months. This situation is also probably in breach

of the requirements of the *Archives Act 1983* and must be remedied as soon as possible.

Recommendation 10

The Inquiry recommends that the Secretary of DIMIA take all necessary steps to ensure that email business records are kept in accordance with the requirements of the *Archives Act 1983*.

6 Related matters

6.1 Robert Young

Robert William Young is the former husband of Vivian Alvarez; they were divorced on 29 April 1993. Having become concerned about Vivian's disappearance in 2001, Mr Young made several inquiries about her with the Queensland Police Service Missing Persons Bureau and also made a number of telephone calls to the DIMIA Contact Centre in Sydney. These inquiries did not lead to satisfactory resolution of the questions Mr Young raised, and it was after publicity about the Cornelia Rau matter that he decided to make contact with the Minister's office. The 4 April 2005 email message Mr Young sent to Senator Vanstone was the catalyst for a range of government actions taken to find out precisely what had happened to Vivian.

It is important to acknowledge that, were it not for the persistence of Mr Young, Vivian's unlawful removal might still be unresolved and her whereabouts still unknown. Mr Young's actions in pursuing this matter warrant public commendation.

Recommendation 11

The Inquiry recommends that the Minister for Immigration and Multicultural and Indigenous Affairs write to Mr Robert William Young to commend him for his diligence in pursuing the matter of Vivian Alvarez and bringing it to the attention of the Australian Government.

6.2 Media speculation

Some media activities in relation to the Vivian Alvarez case were of a positive nature and actually helped the Inquiry identify important information. But one matter of serious concern resulted from media speculation and an erroneous assumption being made on the basis of a document that detailed database searches DIMIA officers conducted using the names Vivian Alvarez and Vivian Solon Young.

On the ABC's *Lateline* program on 25 July 2005 it was reported that Barbara Sue Tin, a senior immigration official with DIMIA, had particular knowledge relating to the removal of Vivian in 2001. The program left a negative impression in relation to Ms Sue Tin's conduct. The facts do not support this implication, and the Inquiry makes no adverse finding in relation to Ms Sue Tin's actions following the discovery in 2003 that Vivian, an Australian citizen, had been removed.

This damaging and gratuitous 'outing' of Ms Sue Tin was distressing for her, and the Ombudsman has expressed the Inquiry's concern to the executive producer of *Lateline*. A media release about this was posted on the Ombudsman's website on 28 July 2005.

6.3 Interviewing Vivian Alvarez

The Inquiry sought a personal interview with Vivian. She remained in the Philippines throughout the Inquiry's investigation, however, and her legal advisers did not agree to her being interviewed in that country. As a result of discussions with her advisers, the Inquiry posed a number of written questions to Vivian and subsequently received a response through her advisers. Although this approach was not the Inquiry's preference, it did not have adverse consequences for the Inquiry's reporting and development of findings and recommendations.

7 Disciplinary matters

7.1 The removal of Vivian Alvarez

From the time Vivian first came to DIMIA officers' attention, on 2 April 2001, until her removal from Australia on 20 July 2001, several officers were involved in managing her case. As discussed throughout this report, management of Vivian's detention and removal was seriously flawed. A number of opportunities to identify her were not pursued promptly, and the efforts that were made were not systematic and lacked rigour. The Inquiry concluded, however, that these failings were largely a consequence of organisational shortcomings, rather than the result of deliberate poor performance or negligent conduct by the DIMIA officers involved.

Inadequate training programs, database and operating systems failures, poor case management, and a flawed organisational culture all contributed to the approach taken in Vivian's case. The convergence of these systemic problems provided the platform for failure. And that failure is abundantly clear in the case of Vivian Alvarez.

The Inquiry considers it would be unfair to single out for disciplinary action any of the DIMIA officers involved in Vivian's removal from Australia. Responsibility for this unlawful action must rest solely with DIMIA.

7.2 After the removal

After Vivian's removal on 20 July 2001, senior DIMIA officers had a number of opportunities to intervene and redress the situation.

The fact that these opportunities were not pursued leads one to the conclusion that the officers concerned were derelict in their duty to a most serious degree. Their failure to act is inexcusable—morally, professionally and legally—and it is the Inquiry's opinion that the Secretary of DIMIA should consider whether the three officers ought to face disciplinary action. The evidence in support of this opinion follows.

7.2.1 July and August 2003

The Canberra office

On 14 July 2003 a police officer from the Queensland Police Service Missing Persons Bureau faxed to DIMIA Canberra a letter in which she asked for information about and records for ‘suspected Homicide victim/Missing Person—Vivian SOLON @ COOK @ YOUNG. DOB 30/10/62’ and supplied background information on Vivian. The letter was received by the office responsible for law enforcement liaison, and on the same day officer D, a junior member of that office, conducted a number of database searches. It is obvious from an audit of these database searches that officer D identified the link between the Vivian Alvarez removed on 20 July 2001 and Vivian Solon Young, the subject of the Missing Persons Bureau inquiry.

When interviewed by the Inquiry, officer D said that, on establishing the link between Alvarez and Solon Young, she took the data printouts and explained her discovery to her supervisor, officer A, who at that time was acting at Executive Level 1.

The following day, officer E, another subordinate of officer A, carried out an extensive range of database searches that clearly linked the names of Alvarez, Solon and Young. As a consequence of inquiries officer E made, the citizenship records for Vivian Solon Young were also found. This officer printed out the relevant records. She too told the Inquiry she showed this material to and advised officer A of her discovery. On being advised of this, officer A’s response was to instruct officer E ‘to fully research the matter’. Officer E continued her inquiries in an attempt to find the relevant files.

There is no evidence that officer A took any action in response to the serious matter raised by officers D and E. When interviewed, officer A said he ‘could not recall’ being advised by officers D and E of the removal of Vivian Alvarez, an Australian citizen.

About four weeks later, on 20 August 2003, the *Without a Trace* program was aired on television. At the end of it there was a missing persons segment that showed a photograph of Vivian. Officer E saw the program and, on arrival at her office the next day, she carried out further database searches that positively linked Vivian Alvarez with the name of Vivian Solon Young. Officer E again took the data dump material to officer A and informed him of her concern and her intention to tell the Missing Persons Bureau what she knew. The same

day officer A did his own database searches, which also linked the names Vivian Alvarez and Vivian Solon Young.

On 21 August officer E emailed the Missing Persons Bureau, providing full details of the citizenship records of Vivian Solon Young and her travel movement records and stating that Vivian had been removed from Australia under the name Vivien Alvarez. Officer E blind-copied this email to officer A. When interviewed, officer A said he ‘could not recall’ reading this email. There is no evidence that officer A took any further action.

The Brisbane office

Officer F from the Brisbane office of DIMIA also saw the *Without a Trace* program. She recognised the photograph because she had been involved in removing Vivian in July 2001. On arriving at her office the following morning, officer F, who was no longer working in the Compliance Office, carried out a number of database searches that linked the missing person Vivian Solon Young with Vivian Alvarez. Officer F printed off the resultant data dumps and took them to the senior officer in charge of compliance and investigations at the Brisbane office, officer B, an Executive Level 1 officer. Officer F detailed her discovery to officer B—who had also been involved in Vivian’s removal in July 2001—and left the matter with him. There is no evidence that officer B took any further action.

7.2.2 September 2004

The Canberra office

On 28 September 2004 DIMIA officer A received from the Queensland Missing Persons Bureau a telephone call about an inquiry in relation to a missing person Vivian Young @ Solon @ Cook, born 30 October 1962. The same day, after the phone call, the bureau emailed officer A. The email provided extensive background material about Vivian. Of particular importance was a reference to information provided to the bureau by DIMIA officer E on 21 August 2003—including the fact that Vivian was an Australian citizen when she was removed in 2001. Also of importance was that the fact that the bureau mentioned Robert Young’s concerns and his desire to pursue the matter of Vivian’s removal. Officer A carried out nine database searches using the names Vivian Alvarez with Vivian Solon Young.

The following day, officer A ran another series of database searches under the names Alvarez and Solon Young and emailed officer G at

the DIMIA Southport office, saying, ‘As discussed, grateful if you could check your records for details of the removal and any indication that Vivian Alvarez is identical to Vivian Young/Solon/Cook’. He blind-copied this email to officer H in his own office. (Officer H was a new subordinate officer who had no previous knowledge of the Alvarez matter.) The same day, officer G responded with advice that the relevant compliance file was at the Brisbane office and attached a photograph of Vivian. Also on the same day, officer A forwarded the email he had received the previous day from the Missing Persons Bureau to officer C, Manager of Compliance at the Brisbane office, with the comment, ‘As discussed’.

Officer C responded the same day, with screen dump attachments from the passports database that confirmed a passport had been issued to Vivian Solon Young. At interview, officer A claimed officer C rang at about this time to say that the person removed was an unlawful non-citizen and that he, officer C, would respond to the Missing Persons Bureau. Officer C strongly refutes this claim, saying he believed the matter was in the hands of officer A.

On 30 September an eight-minute telephone call between the telephone extensions of officers A and C was logged, and officer C sent the Alvarez compliance file to officer A. Officer H alleges that, on receipt of this file (on or about 30 September 2004), officer A said words to the effect that ‘This is a file on Vivian Alvarez, an Australian citizen we removed’. Shortly afterwards, officer A went on leave and handed the Alvarez file to officer H, instructing H to hold the file while A was on leave. No further action was taken in relation to the matter at this time, and officer A did not tell his superiors he knew of the removal of an Australian citizen in 2001.

On 21 April 2005, following an email from Robert Young to the Minister’s office, action was taken to locate the Alvarez compliance file. It was found in a hutch on officer H’s desk, apparently having remained there since on or about 30 September 2004. The file was not in a filing cabinet in officer A’s office, where such files would normally be secured.

The Brisbane office

On receipt of the request from officer A, on 29 September 2004 officer C, the Manager, Compliance, obtained the Vivian Alvarez file from the office records system. He also searched the passports database on Vivian Solon Young and forwarded the search results to

officer A. Officer C asked a junior officer to obtain passport information from the Brisbane passports office of the Department of Foreign Affairs and Trade. The junior officer made a formal request to DFAT, but the request was denied because it was not in the correct format. This was not pursued with DFAT. On the basis of information officer A provided to officer C, information gained from the passports database, and comments made by officer C during two interviews with the Inquiry, it is clear that officer C was well aware that Vivian Alvarez, an Australian citizen, had been unlawfully removed in 2001.

During his interviews with the Inquiry officer C said he had informed his superior officer B (who at that time was acting at Executive Level 2, as Deputy State Director) on or about 29 September 2004 of the situation with Vivian and that officer B had replied with words to the effect that ‘This is terrible. Let’s not spread it any wider than it has—than it has to be’. There is no evidence that either officer C or officer B took any action to resolve the problem, and at interview officer C said he ‘made this assumption that something was happening in Canberra’.

Probably the most explicit evidence of officer C’s attitude to the Alvarez case is to be found in a comment he made during one of his interviews: ‘There was a lot worse things going on than this particular case’. When challenged on this, officer C explained:

We were trying to deal with a huge amount of complex and difficult removals cases, etcetera, at the time ... But that’s not an issue I can resolve. This is bigger than me. This is huge. As I said, there were—I’d begun to think about it and I couldn’t even think of a way out of it, insofar as how you could even begin to resolve it.

Evidence gathered by the Inquiry reveals that neither officer B nor officer C advised DIMIA’s Queensland State Director of their knowledge that an Australian citizen had been removed and abrogated their responsibilities in the matter by ‘leaving it to Canberra’ to resolve. Since officer A was the person in Canberra that officer C ‘left the matter with’, the outcome of this series of management failures was that nothing was done about Vivian’s unlawful removal.

In the opinion of the Inquiry, the failure by officer A, officer B and officer C to take appropriate action on becoming aware of the unlawful removal of Vivian might constitute a breach of the Australian Public Service Code of Conduct, as detailed in s. 13 of the *Public Service Act 1999*.

7.2.3 Responses from officers A, B and C

Officers A, B and C were each forwarded a draft of relevant excerpts from this report and were invited to make submissions in reply. Each officer took that opportunity and presented a submission that disagreed with various aspects of the draft—including aspects of the evidence provided to the Inquiry by other officers, the Inquiry’s interpretation of some of the actions of the three officers, and the findings reached and opinions expressed by the Inquiry. The Inquiry gave consideration to the submissions of officers A, B and C in reaching the findings and opinions put forward in this report. It notes that the three officers will have a further opportunity to make submissions on the matters raised here if the Secretary of DIMIA accepts the recommendation to consider whether disciplinary action should be initiated against each officer.

7.3 Other matters of concern

In an interview with the Inquiry one DIMIA officer attached to the Compliance and Investigations Office in Brisbane conceded that the knowledge of Vivian’s unlawful removal had been the subject of ‘significant discussion’ in that office. Evidence to support this admission can be found in numerous database searches done by staff at that office that matched the names Alvarez, Solon and Young. The fact that a number of officers in the office knew about this situation and nothing was done about it reflects poorly on the culture of that office.

DIMIA, the Queensland regional office, the managers directly involved (officers B and C) and the individual officers involved in failing to take action must share responsibility for this failure.

Despite this, the Inquiry concluded that, had officers B and C, as the responsible managers, taken action on becoming aware of Vivian’s unlawful removal, the other officers’ involvement would probably not have been of such concern.

Recommendation 12

The Inquiry finds that the conduct of officers A, B and C, as described in this report, might constitute a breach of one or other of the requirements of the Australian Public Service Code of Conduct, as detailed in s. 13 of the *Public Service Act 1999*. The Inquiry recommends that this opinion be brought to the attention of the Secretary of DIMIA, in accordance with s. 8(10) of the *Ombudsman Act 1976*.

Appendix A The Inquiry's terms of reference

On 9 February 2005 the Minister for Immigration and Multicultural and Indigenous Affairs, Senator the Hon. Amanda Vanstone, issued the following terms of reference for the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau:

The Inquiry will investigate, examine and report on matters relating to the case of Cornelia Rau, including in particular the actions of DIMIA and relevant state agencies, during the period March 2004 to February 2005.

In particular the Inquiry will:

- examine and make findings on the sequence of events that gave rise to her being held in immigration detention
- examine and make findings on the circumstances, actions and procedures which resulted in her remaining unidentified during the period in question
- examine and make findings on measures taken to deal with her medical condition and other care needs during that period
- examine and make findings on the systems and processes of, and cooperation between, relevant state and commonwealth agencies in relation to identification/location of missing persons and provision of mental health services
- recommend any necessary systems/process improvements.

The Inquiry will need to request the support and cooperation of relevant state agencies. The Inquiry will report by 24 March 2005.

On 27 February 2005 the Minister extended the time for the Inquiry and agreed to provide additional resources. An interim report was presented to her on 23 March 2005.

On 2 May 2005 a request to examine the circumstances surrounding the removal from Australia of Ms Vivian Alvarez/Solon/Young, an Australian citizen, was referred to the Inquiry by the Acting Minister for Immigration and Multicultural and Indigenous Affairs, the Hon. Peter McGauran MP.

The terms of reference for the Rau Inquiry were extended to include the following:

In addition to your examination of Ms Rau's case, also examine and make findings on any other cases involving Australian citizens or other people lawfully in Australia who have been subject to detention or removal from Australia, which may be brought to your attention by the Minister during the life of your Inquiry into the Cornelia Rau Matter. On the basis of your findings you should recommend any necessary systems/process improvements and, if appropriate, refer any matters to relevant authorities or agencies.

Appendix B People interviewed

In total, 117 witnesses were either directly interviewed by the Inquiry or made formal statements to the Inquiry, as follows:

- the Department of Immigration and Multicultural and Indigenous Affairs
 - 50 current officers
 - seven former officers
- the Department of Foreign Affairs and Trade
 - five current officers
 - four former officers
- the Australian Federal Police
 - one current officer
- the Queensland Police Service
 - 12 current officers
- GEO Group—formerly Australasian Correctional Management
 - eight current staff
 - two former staff
- medical practitioners and staff
 - seven current practitioners and staff members
 - two former staff members
- the Queensland Department of Child Safety—formerly the Department of Family Services
 - two current staff members
- community members
 - 17 people.

The Inquiry also held discussions with representatives of the following organisations:

- the Commonwealth Director of Public Prosecutions
- the Department of Foreign Affairs and Trade executive
- the Department of Immigration and Multicultural and Indigenous Affairs executive
- Department of Immigration and Multicultural and Indigenous Affairs IT and training staff
- the New South Wales Police Service
- the Philippines Embassy, Canberra
- the Philippines Honorary Consulate General, Brisbane.

Appendix C Responses from DIMIA and DFAT

C.1 The DIMIA response



Australian Government

Department of Immigration and Multicultural and Indigenous Affairs

Secretary

13 September 2005

Prof John McMillan
Commonwealth Ombudsman
GPO Box 442
CANBERRA ACT 2601

Dear Prof McMillan

Thank you for the opportunity to comment on Mr Neil Comrie's draft report on the Inquiry into the Circumstances of the Vivian Alvarez Matter (the Comrie Report).

The Comrie Report brings to light serious issues in relation to the handling of Ms Alvarez's case and I have examined the recommendations very closely. The Report also builds on the findings and recommendations made by Mr Mick Palmer in his report on the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau (the Palmer Report). That report pointed to specific failings and to the need for broad cultural change in the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) across leadership, governance, training, client service, openness, quality assurance, values and behaviour. As you know, the Government has accepted the broad thrust of Mr Palmer's findings and recommendations. Work has already commenced to address the issues he raised, many of which are also identified as concerns in the Comrie Report.

There are clearly additional issues that DIMIA must address in response to the examination of Ms Alvarez's case, including a recommendation that I consider taking action in response to the view that the conduct described in the Comrie Report could constitute a breach of requirements under the Australian Public Service Code of Conduct.

I would like to take this opportunity to briefly outline the major activity either underway or proposed that will address the issues raised in the Comrie Report. Much of this work is being developed as part of the response to the Palmer Report. The detailed implementation of those measures is, at the time of writing, under consideration by the Government, but I would anticipate that the Minister will make announcements about the detail shortly after the Comrie Report is made public.

Cultural change: values, standards, stronger accountability and governance

Mr Palmer was extremely critical of the culture in DIMIA, describing it as more focused on process than outcomes, assumption driven, overly defensive and one that is largely unwilling to challenge organisational norms or to engage in genuine self-criticism or analysis. This is strong criticism. With the strong support of the Minister, I have moved quickly in the period since my appointment on 18 July 2005 to implement change to ensure that DIMIA becomes an organisation that meets the expectations of the Government and the wider community. DIMIA must:

- be a more open and accountable organisation;
- deal more reasonably and fairly with clients; and
- have staff that are well trained and supported.

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I have been very clear about the sort of behaviour that all DIMIA staff must demonstrate, including a strong focus on lawful decision-making, escalation of sensitive decisions and issues, and I have placed personal responsibility on all senior managers to resolve issues as soon as possible.

Clearly, cultural change will take time to fully implement. It will involve time, resources and ongoing commitment if there is to be systemic change. Part of the solution lays in improving departmental structures and governance frameworks. I have already initiated work on a departmental restructure that will establish clear lines of responsibility and accountability through:

- three Deputy Secretaries (this includes an additional Deputy Secretary position);
- improved governance arrangements - in particular, I am establishing a high level Values and Standards Committee with external representation (including from your Office and the Australian Public Service Commission) to ensure the organisation is meeting community expectations in this regard;
- a new branch, with a significantly expanded budget, to manage an enhanced internal audit program with a stronger focus on compliance auditing (i.e. are DIMIA officers actually doing what the law or our instructions require?) and to implement a national quality assurance framework, with a particular focus on decision-making; and
- examining State and Territory Office arrangements, with a particular emphasis on appropriate resourcing for operational activity, including training and support, and developing an outcomes focus.

As recommended by Mr Palmer, I have also focused on the detention and compliance areas of the Department:

- a consultant will be engaged to review the functions and operations of detention and compliance activities and to develop a revised business model for their operations;
- the consultant will also review the detention services contract and provide advice on the training requirements for compliance and detention officers;
- I have already moved to restructure the Unauthorised Arrivals and Detention Division and the Border Control and Compliance Division into three new divisions that will provide a better balance of responsibility and accountability; and
- I have recently recruited two key senior executives from other agencies to lead the new Detention Services Division and the Compliance Policy and Case Coordination Division.

Brisbane Office

The Comrie Report is highly critical of the culture permeating the compliance and investigation area in the Brisbane Office and seeks reassurance that similar issues do not exist in other regional offices and related areas in DIMIA's National Office. The new head of the Compliance Policy and Case Coordination Division will, in close consultation with me and the relevant Deputy Secretary, address the wider issues in relation to compliance activity in DIMIA.

In relation to the Comrie Report's specific concerns, I am moving quickly to appoint a new SES Band 1 level Deputy State Director to assist the Queensland State Director in implementing change throughout DIMIA's Queensland Offices. Specifically, the new senior executive officer will focus on improvements in the compliance, border

security and detention areas to ensure high standards in decision-making and operational activity.

Training

Clearly, DIMIA must substantially improve its training capability in order to address the training deficiencies identified both by Mr Palmer and in the Comrie Report. I am establishing a new Training Branch to develop a national training strategy and to deliver:

- effective DIMIA-wide training in leadership, management and values;
- specific training in systems, records management and privacy issues;
- enhanced specialist technical immigration training for compliance and detention officers exercising powers under the Migration Act. A tailored program of operational training will be developed. Under the proposed program, no officer will be able to undertake operational activity until they have completed the relevant training and there will be refresher training for all compliance and detention staff on an annual cycle.

There will also be a thorough review of Migration Series Instructions (MSIs) to support the training programs, focusing on key compliance and detention MSIs in the initial phase.

Case management and client contact arrangements

Many of the issues which arise in Ms Alvarez's case point to the need for better and more holistic case management in DIMIA. A new national case management framework will be developed and implemented by the new Compliance Policy and Case Coordination Division. It will involve better organisational arrangements, better systems support (see below) and a more clearly defined role for the non-government sector. Issues that currently detract from DIMIA's ability to find all details for a particular client will be addressed through development of effective case management tools, including the single entry client search facility (see below).

Identity issues

You would be aware that DIMIA established a National Identity Verification and Advice Unit in May 2005 to assist case managers in State and Territory Offices deal with the identification of persons of immigration interest. We have also established Detention Review Managers to review decisions to detain people, including those where identity is an issue.

Both the Palmer and Comrie Reports are very critical of DIMIA's handling of privacy aspects of cases. I will therefore engage with the Privacy Commissioner in relation to the specific recommendations regarding privacy issues. You would be aware that since August 2004 section 336E of the Migration Act has prohibited general publication of photographs and identifying information. The limited permitted disclosures do not include seeking public assistance in the identification of a person whose identity is in doubt. I note that amendments to the Migration Act will be introduced in Parliament during the current sitting period to enable such action to occur where other reasonable steps to identify a person have not succeeded.

Information and systems support

Like many large organisations dealing with a broad client base, DIMIA receives multiple contacts from individuals: face to face, by telephone, by email, and through electronic and traditional means of lodging applications. Some of those contacts are instigated by the client, some by DIMIA officers. There is a clear challenge in bringing together all information about a single client so that officers can have a full

and accurate picture to hand quickly. As Mr Comrie notes, DIMIA has introduced improved protocols, scripts and training for call handling in contact centres and further remedial action will be taken to ensure that there is appropriate record-keeping in relation to client telephone contact. This will include arrangements to centralise complaints handling.

Both the Palmer and Comrie Reports express serious concerns about the connectivity of DIMIA systems, systems support for decision-making, systems training and records management practices. Initiatives are underway to address this:

- DIMIA has already tendered for an independent review of its information requirements and systems, to be completed by the end of January 2006. The consultant will recommend medium and long term action for consideration;
- we are addressing systems and systemic issues in the maintenance of, and access to, client records;
- DIMIA client records are now updated on a daily basis to reflect client status where a client has an appeal on foot with either the Migration Review Tribunal or the Refugee Review Tribunal;
- work to link the granting of citizenship to visa records has been accelerated;
- a single entry client search facility is being developed to improve access to all information about an individual client;
- there will be enhanced training in ICSE and name searching systems for all operational staff; and
- the usability of existing systems will be reviewed.

As specifically recommended in the Palmer Report, I am taking a strong personal interest in records management arrangements in the Department. I have written to the Director-General of the National Archives of Australia seeking close cooperation on the development of a records management improvement plan for DIMIA. The plan will comprise a strong training component and redeveloped policies and practices. It will particularly focus on the links between electronic (including email) and paper records and archiving arrangements.

Detention issues

The new Detention Services Division will focus on developing a new detention services strategy that will have a significant emphasis on improving the infrastructure at detention centres. I have also established a Detention Health Services Taskforce, led by a policy expert on mental health issues, which is working closely with the Department of Health and Ageing to develop a long term health service delivery strategy that will address mental health care arrangements for people in immigration detention.

The Comrie Report focuses on shortcomings in arrangements for detainees in transitional detention. While the Government had agreed in the 2000-01 Budget to consider establishing an immigration detention facility (IDF) in Queensland as part of the long-term detention strategy, there was no IDF at the time Ms Alvarez was held as an immigration detainee. The challenge for the Department is to find accommodation that does not involve detaining those people awaiting removal in correctional facilities along with persons convicted or on remand for criminal activities. I accept that the decision in July 2001 to detain Ms Alvarez in a motel near Brisbane Airport was far from optimal and that her "privacy, dignity and welfare were compromised" by the arrangements for her care. However, the motel accommodation was seen at the time as preferable to the alternatives available.

There are currently immigration detention facilities in most other states, but still no facility in Queensland, although I note Queensland has a high rate of immigration compliance activity and Australia's third largest international airport passenger load. To that end, DIMIA has entered into negotiations with the CEO of the Shaftesbury Campus who has offered the facility to assist with accommodation of people in detention in Queensland. The facilities at the campus better meet the care requirements of people in detention and resolve some of the problems with motels as identified in the Comrie Report. However, the Queensland Government has indicated it has concerns about whether the CEO is entitled to sublease campus facilities for immigration detention purposes. Despite DIMIA's keenness to take up the offer, we cannot proceed until this issue is resolved between the Queensland Government and the lessee.

Action under the Public Service Act 1999

The draft Comrie Report includes information which led to the view expressed in draft Recommendation 12 that the conduct described could constitute a breach of one or other requirements of the Australian Public Service Code of Conduct. I understand that the affected DIMIA officers have been given the opportunity to respond to this aspect of the draft report. If, following consideration of the responses by the affected officers, the final recommendation reflects that in the draft, I will appoint a senior delegate to form a judgement as to whether action should be taken under the Public Service Act (PSA). If my delegate determines that a formal inquiry is required under section 13 of the PSA, then he will appoint a senior external consultant to undertake the inquiry as a matter of urgency.

Section 189: 'reasonable suspicion' – the implications of *Ruddock v Taylor*

Finally I would like to mention the recent High Court decision in *Ruddock v Taylor* and its implications for actions taken under section 189 of the Migration Act. You would be aware that in the majority decision, their Honours stated that what constitutes reasonable grounds for suspecting a person to be an unlawful non-citizen is to be judged against what was known or reasonably capable of being known at the relevant time. If there were reasonable grounds for detaining someone under section 189 at the time of detention, the lawful nature of this detention does not change where a Court later finds that the decision leading to the person's detention was affected by an error or mistake of the law. I understand that you and Mr Comrie are assessing the implications of this decision for the findings in the Comrie Report.

Yours sincerely



(Andrew Metcalfe)

C.2 The DFAT response



Australian Government
Department of Foreign Affairs and Trade

Secretary

Telephone: 02 62612472*
Facsimile: 02 62732081

13 September 2005

Mr Neil Comrie AO APM
Inquiry into the Vivian Alvarez Solon Matter
GPO Box 442
Canberra ACT 2601
comrie@inquiry.com.au

Dear Neil,

Thank you for the opportunities you have given the Department to comment on drafts of your report. I welcome the invitation to provide a formal response for inclusion in the published version of your report. This response is set out below.

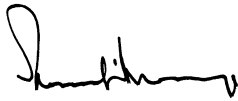
"The Department of Foreign Affairs and Trade notes the conclusions of the Report in relation to its handling of aspects of Ms Solon's case. The Department notes that it had no involvement in Ms Solon's removal from Australia in 2001 and was not aware at that time that she was an Australian citizen. Three Departmental employees became aware of her citizenship in September 2003 when asked by the Queensland Police, in the context of its missing persons investigation into Ms Solon, to identify and locate the individual who met Ms Solon on her arrival in the Philippines. The Department was given no information at that time indicating a welfare concern for Ms Solon and was not asked by Queensland Police to assist it to locate Ms Solon.

"The Department has looked closely and critically at its handling of the matter in the period since April-May 2005 when it first came to the attention of senior management. A number of steps have been taken to ensure effective checks are in place and that any similar cases in the future are exhaustively followed up. These include tightening Departmental rules requiring reporting and tasking of overseas posts to be communicated through the diplomatic cable system, thereby ensuring significant

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developments are brought to the attention of senior officers, and negotiating with the Australian Federal Police more rigorous procedures for coordination of inquiries into Australians missing overseas. These procedures, once finalized, will include tighter protocols for exchanging information on new cases and a quarterly review mechanism to ensure properly coordinated follow-up."

Yours sincerely

A handwritten signature in black ink, appearing to read 'Michael L'Estrange', with a stylized, cursive script.

Michael L'Estrange

cc Professor John McMillan
Commonwealth Ombudsman

Appendix D Ombudsman's delegations

COMMONWEALTH OF AUSTRALIA
OFFICE OF THE COMMONWEALTH OMBUDSMAN
OMBUDSMAN ACT 1976

OMBUDSMAN ACT 1976
INSTRUMENT OF DELEGATION
and
APPOINTMENT OF AUTHORISED PERSONS

Pursuant to s 34(1) of the *Ombudsman Act 1976*, I, John Denison McMillan, Commonwealth Ombudsman, **delegate** to the persons whose names appear in Schedule 1 to this instrument the powers under that Act shown in Schedule 2 to this instrument. This delegation does not revoke or vary any delegation issued previously by me or any of my predecessors.

Pursuant to s 3(1) and s 35(1)(d) of the Ombudsman Act, I **appoint** the persons whose names appear in Schedule 3 to this instrument to be authorised persons who are subject to s 35 of the Ombudsman Act.

Dated at Canberra this 20th day of July 2005



Prof John McMillan
Commonwealth Ombudsman

Schedule 1: Delegates

Murray Neil Comrie
William Severino
Peter Bache
Darren Sterzenbach

Schedule 2: Powers

s 5(1) – power to investigate
s 8(2) – power to determine manner of investigation
s 8(3) – power to make inquiries
s 8(7) – power to approve representation by another person
s 13(1) – power to examine on oath or affirmation

Schedule 3: Authorised persons

Samantha Styles
Glen Carey

Shortened forms

ACM	Australasian Correctional Management
DFAT	Department of Foreign Affairs and Trade
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
GEO	GEO Group Australia Pty Ltd—formerly Australasian Correctional Management
GP	general practitioner
ICSE	Integrated Client Services Environment
IRIS	Immigration Records Information System
IT	information technology
MPB	Missing Persons Bureau
MPMS	Migration Program Management System
MRI	magnetic resonance imaging
NAFIS	National Automated Fingerprint Identification System
OWWA	Overseas Workers Welfare Association
QPS	Queensland Police Service
TRIM	Total Records Information Management
TRIPS	Travel and Immigration Processing System