

Chapter 2

The committee's response to the inquiry conducted by the Commonwealth Ombudsman

2.1 This chapter re-examines the committee's interim findings in light of the report produced by the Commonwealth Ombudsman and prepared by Mr Neil Comrie (known as the Comrie Report).¹ Under relevant headings, it compares the findings of each report and also considers the recommendations made by Mr Comrie and Mr Palmer.² The committee makes further comment and recommendations where it believes necessary.

Establishment of identity

2.2 Both the committee and Mr Comrie were highly critical of the processes followed by DIMIA compliance officers in attempting to establish Ms Solon's identity before she was removed in 2001.

2.3 The committee found that DIMIA failed to act diligently in its efforts to establish Vivian's identity. It found that, although Ms Solon insisted that she was an Australian citizen and had married an Australian, potential lines of inquiry were not pursued by DIMIA officials prior to making the determination that she was an unlawful non-citizen.

2.4 The committee found that the process followed to establish or verify her identity lacked rigour and it seemed that once the assumption was made that Ms Solon was an undocumented arrival in Australia, little serious attempt was made to test this assumption.

Mr Comrie's findings

2.5 Mr Comrie's report agreed with the above points made by the committee. He identified a number of lost opportunities to identify Vivian. He considered 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'.³ He also noted

1 *Inquiry into the Circumstances of the Vivian Alvarez Matter*, Commonwealth Ombudsman, 2005.

2 *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, July 2005. See from page 183 for the section relating to Ms Solon.

3 *Inquiry into the Circumstances of the Vivian Alvarez matter*, Commonwealth Ombudsman, 2005, p. 25.

that staff were inhibited in performing these duties as a result of having had little or no training in investigation techniques.⁴

2.6 Mr Comrie's recommendations to address the issue of establishing identity focused on the interview process and IT training (see appendix 4, Recommendations 3, 4, 5 and 6). Mr Palmer's recommendations addressed identification where identity remains unresolved after initial inquiries (3.4), development of minimum standards for identity checking (5.2) and the need to review decisions to detain people reasonably suspected of being an unlawful non-citizen (7.4).

Committee view

2.7 The committee agrees with the findings and recommendations proposed by Mr Comrie and Mr Palmer to address the apparent deficiencies in the process to establish Ms Solon's identity. The committee also notes the response by the department during hearings that measures have been taken to remedy the obvious shortcomings in its processes in this area, eg. the establishment of the National Identity Verification and Advice Unit.⁵

2.8 The committee, however, would like to note two further areas of concern in relation to the interview process as presented to the committee.

Record of interview

2.9 From the documentation made available to the committee it was clear that Ms Solon was unable to sign the record of the interview conducted on 13 July 2001. To ensure greater transparency and fairness, the committee considers that all records of interview must be signed by the interviewee and, if unable to be signed, must be witnessed and certified as correct by a third party.

Recommendation 1

2.10 The committee recommends that in relation to the interviewing of detainees, if a detainee is unable to sign the record, there must be certification by a third party that the record of interview is correct.

Use of DIMIA employees as interpreters

2.11 The committee was told that at the interview in May 2001, the interpreter used was a DIMIA employee. DIMIA further told the committee that they did not know if the person was an accredited interpreter.⁶ The committee considers that to ensure objectivity, fairness and avoid conflict of interest, independent, accredited interpreters must be used and DIMIA employees should only be used in exceptional

4 Comrie Report, p. 35.

5 see paragraph 2.15 of the committee's interim report.

6 *Committee Hansard*, 6 September 2005, p. 43.

circumstances. Migration Series Instruction (MSI) 234 (General Detention Procedures), para 3.1, notes that whenever the person has difficulty understanding and/or speaking English, DIMIA officers are to seek the assistance of a qualified interpreter such as from the Department's Telephone and Interpreting Service.

Recommendation 2

2.12 The committee recommends that DIMIA staff are reminded that independent and accredited interpreters must be used and that the use of a departmental officer as an interpreter should occur only in exceptional circumstances.

The removal process

2.13 The report will now re-examine a number of concerns the committee had with the removal process.

Documentation of the process was inadequate

2.14 The committee found that transparency and accountability were lacking in the process leading to the determination to remove Ms Solon and that the documentation accompanying this determination was inadequate. It believes that any officer involved in the process of depriving a person of their liberty must adhere to strict guidelines and that written records must substantiate that adherence. In particular, the committee has concerns about the checklists used by DIMIA.

The need for comprehensive checklists

2.15 DIMIA told the committee about a checklist for a person's removal that was described as a process list regarding obtaining travel documents, tickets etc attached to MSI 54.⁷ The committee noted this form did not evidence the actual decision-making process, but seemed to be a checklist of things to do once the decision to remove a person had been made. Recommendation 2 from Mr Comrie would require staff to comply with the requirement of MSI 267 that a compulsory checklist be completed to record the actioning of a removal.

2.16 In correspondence, DIMIA later clarified for the committee that two MSIs refer to the same checklist. MSI 54 titled 'Implementation of enforced departures' (replaced by MSI 361 in September 2002, which was replaced by MSI 376 in May 2003) and MSI 267 titled 'Advice of removal arrangements' refer officers to the same checklist which is titled 'removal checklist (Section 198 of the Migration Act 1958)'.

2.17 While the checklist requires the attachment of evidence that a person is an unlawful non-citizen (such as an extract from Movements Data Base),⁸ the committee

7 *Committee Hansard*, 6 September 2005, p. 39.

8 Removal Checklist (Section 198 of the Migration Act 1958).

remains concerned that it does not require the attachment of a comprehensive list of the checks and actions carried out prior to removal. The committee is concerned with both the lack of comprehensiveness and the failure to document the actions taken. This failure to require a person to demonstrate that adequate measures were taken before he or she determined a person to be an unlawful non-citizen means the process lacks rigour. It increases the risk that initial assumptions may not be tested. In Ms Solon's case, the assumption that she was an unlawful non-citizen was perpetuated. The committee considers that the checks undertaken to determine a person's identity, the evidence that they are an unlawful non-citizen, and other necessary actions prior to removal must be carried out diligently and properly documented, attached to the file and cross referenced with the removal checklist above.

Identity

2.18 In Ms Solon's case, DIMIA also had the problem of establishing Ms Solon's identity. The committee notes Mr Palmer's recommendation 5.2 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 committee agrees with the recommendation which addressed the lack of rigour in the identity checking undertaken.

Determination of immigration status

2.19 MSI 376 states an unlawful non-citizen 'is a person who either entered Australia without being immigration cleared, who entered legally but no longer has permission to remain in the migration zone or is a person whose visa has been cancelled'.⁹

2.20 The committee was concerned that in Ms Solon's case, a relatively junior officer had the authority to determine that she was an unlawful non-citizen and as a consequence was to be removed. The committee noted information from DIMIA that now all decisions to remove unlawful non-citizens are cleared by a Senior Executive Service (SES) officer.¹⁰ The committee supports this initiative, which it believes should be standard practice.

Other actions prior to removal

2.21 After the identity checking was conducted and Ms Solon had been determined to be an unlawful non-citizen, there were a number of actions that the committee considered should have been taken. The written record, however, indicates these were not taken. From the evidence presented to the committee it would appear that this is not just a matter of enforcing record keeping but that these actions, considered

9 Migration Series Instruction 376: Implementation of Enforced Departure, issued May 2003, para 1.1.3.

10 *Committee Hansard*, 6 September 2005, p. 3.

essential by the committee to protect the rights of individuals, do not appear to be required by any checklist. These actions are outlined below.

Investigation of any criminal acts against Ms Solon

2.22 The committee's first report noted the extent of Ms Solon's injuries.¹¹ The committee was concerned that as the agency responsible for her well-being, DIMIA made no attempt to ensure that any possible criminal act against Ms Solon, such as assault or road accident, was thoroughly investigated by police. Apart from the fact that such an investigation may have brought to light more details about her identity¹² and facilitated a connection between Ms Solon and a missing persons investigation, the committee considers Ms Solon was not afforded natural justice.

2.23 The committee recommends that in cases where a criminal act is suspected, contact with the police be included as part of a checklist before removal action is commenced. The committee recognises that this action would not be required in the majority of cases (see committee recommendation 4 below).

Ensuring individuals are made fully aware of their rights regarding legal assistance

2.24 The committee found that DIMIA officers did not take adequate measures to ensure that Ms Solon was made fully aware of her legal rights and no person was made available to represent her interests. It would appear that this confused, infirmed woman, who may well have been the victim of an assault or road accident, who did not have any family or friends to support her, was destitute, without a known identity and facing removal to another country, was not afforded appropriate and proper legal assistance. The only direct reference in the written record to any attempt by DIMIA to obtain assistance for Ms Solon regarding her immigration status seems to have been made through a third person.¹³ DIMIA agreed at the hearings that there was no record on the file to confirm that information regarding Ms Solon's legal rights was provided to her.

2.25 The committee considered that the offer of legal assistance should have been made directly to Ms Solon as part of the removal process and was concerned that there was no evidence that this was done. The question in the interview on 13 July 2001 about the notice to people in immigration detention being read to Ms Solon did not allay the committee's concerns, as we know she was confused. The committee recommends including advice regarding legal assistance as part of a checklist to be completed before removal action is commenced (see committee recommendation 4 below).

11 See paragraphs 2.4 and 2.37 of the committee's interim report.

12 see p. 51 of Mr Comrie's report for a discussion of how Ms Solon could have been identified if her fingerprints had been submitted to CrimTrac for matching.

13 see paragraph 2.30 of the interim report.

Committee view

2.26 The committee considers that in cases where the person in question is clearly not in a position to make an informed decision (eg. when obviously confused as in Ms Solon's case), DIMIA should ensure the person has access to independent legal advice.

2.27 To ensure that issues such as the investigation of possible criminal acts and the protection of individuals' legal rights are at least considered by DIMIA compliance officers, the committee recommends that DIMIA review relevant checklists to ensure these actions are included and recorded on the file. The intention is for the list to be a safeguard for the individual and not an onerous paper burden on the DIMIA officer. Where an action is not required or not possible, this should simply be stated, along with a brief reason.

Recommendation 3

2.28 The committee recommends that DIMIA carefully consider the process to ensure someone in a distressed and confused state has access to legal advice.

Recommendation 4

2.29 The committee recommends DIMIA review checklists regarding identity checking and the decision to detain and remove process to ensure that the actions outlined above regarding contact with the police and advice regarding legal assistance are captured so they are addressed by DIMIA officers when effecting a removal.

2.30 The committee considers that the explanation of rights concerning medical examinations should also be included in checklists completed by DIMIA officers prior to removal. This is outlined in the section on the health of Ms Solon.

Ensuring DIMIA officers understand their powers under the *Migration Act 1958*

2.31 The committee was concerned that DIMIA officers did not demonstrate a good understanding of s.189 of the *Migration Act 1958*. The committee was told that 'because of the way the Act [*Migration Act 1958*] is structured, there is technically no decision to remove. Removal is a duty that an officer is required to carry out if a person is an unlawful non-citizen...'.¹⁴ This understanding was examined by Mr Comrie.

Mr Comrie's findings

2.32 Mr Comrie found that 'DIMIA officers, from field level to senior executive, seemed to have had little understanding of their responsibilities under the Act—other

14 *Committee Hansard*, 6 September 2005, pp. 8–9.

than a mistaken belief that they must detain a person and that when the person is detained the detention is absolute'.¹⁵ He noted that:

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 are either are trained to make a conscious decision to detain or are otherwise required to make such a decision by DIMIA policy.¹⁶

2.33 Mr Comrie noted that paragraph 7.2 of MSI 234 clarified that the 'power to detain is strictly limited to situations where knowledge or a reasonable suspicion has been established. It stated that the detaining officer must actually have the suspicion and that this suspicion must be a reasonable one based on objective evidence'.¹⁷

2.34 Mr Comrie's report provided a detailed discussion of the words used in the Act—'reasonable suspicion'—and found that the suspicion that led to Ms Solon's detention was not reasonable.

2.35 Section 189 of the *Migration Act 1958* states:

(1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person...¹⁸

2.36 These are extraordinary powers that result in the deprivation of a person's liberty. Given these powers, the committee is concerned that the current wording of 'reasonable suspicion' in the Act is not sufficiently clear on the amount of evidence that is required before the person is detained. Mr Comrie's report outlined a number of cases in which courts have considered the meaning of 'reasonable suspicion'. In particular, he noted that in *Goldie v Commonwealth*, 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 the person whom the officer reasonably suspects is an unlawful non-citizen.¹⁹

2.37 Mr Comrie's report also noted:

The Court also made it clear that the exercise of 'reasonable suspicion' detention 'must be justifiable upon examination of relevant material' and

15 Comrie Report, p. 69.

16 Comrie Report, p. 68.

17 Comrie Report, p. 69.

18 The *Migration Act 1958*, Section 189 accessed at <http://www.scaleplus.law.gov.au/html/pasteact/0/436/0/PA003340.htm> on 14.10.05.

19 Comrie Report, p. 66.

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'.²⁰

2.38 Mr Comrie drew attention to the recommendations made by Mr Palmer, which focus on:

- improving training for compliance officers and all other staff who might be expected to exercise the power to detain a person under s.189 (1) of the *Migration Act 1958* (see appendix 4, recommendation 3.1); and
- ensuring decisions are reviewed and assessed within 24 hours of the decision being taken (see appendix 4, recommendation 7.4).

2.39 Mr Comrie further noted that once the decision was taken, there was no ongoing review to validate or substantiate 'reasonable suspicion' in relation to her status.²¹

Committee view

2.40 The committee agrees with Mr Comrie and Mr Palmer's findings and recommendations to improve the lack of understanding of s.189 of the *Migration Act 1958*.

Adequacy of s.189 of the *Migration Act 1958*

2.41 The committee questions the adequacy of the Act as it stands to protect people such as Ms Solon from wrongful detention and removal, and to ensure that 'efforts of search and inquiry that are reasonable in the circumstances' are carried out. Given the different definitions that 'reasonable suspicion' allows regarding the amount of evidence required, the committee suggests that a review of the current wording of the Act is warranted to strengthen the Act to ensure the obligation to have substantial evidence is clear. Mr Comrie also noted that the seriousness of taking a person's liberty did not seem to be reflected in the actions of DIMIA officers, which lends weight to the committee's suggestion to review the Act.

2.42 It would also seem that departmental guidelines such as MSIs do not adequately highlight or clarify the steps required in the decision making process. The committee acknowledges and supports the review of MSIs recommended by Mr Palmer (see appendix 4, recommendation 7.2) but considers that the promulgation of a regulation to clarify or even specify the steps required may be necessary. This checklist would clarify, particularly for junior officers, actions which must be at least considered in the process. If actions are not required, the checklist would require a reason to be noted.

20 Comrie Report, p. 66.

21 Comrie Report, p. 68.

2.43 The government could consider a number of options to better capture these requirements:

- Option 1 – examine strengthening s.189 of the *Migration Act 1958* to remove 'reasonable suspicion' and replace it with 'believes on reasonable grounds'. This is the requirement in other Acts relating to the deprivation of liberty, such as powers of arrest in the *Crimes Act 1914*. MSI 234, para 2.1, notes 'the detention of a person under the Act is analogous to the action which constitutes an arrest by the police or other law enforcement agency. As with police arrest, immigration detention is brought about by depriving the person of his or her liberty'.²²
- Option 2 – along with strengthening the Act the government may wish to consider the introduction of an appropriate regulation which refers to a checklist of actions that must be completed before any decision to detain and remove a person can be made.
- Option 3 – the government may wish to consider the introduction of the regulation only, as described in the paragraph above.

Recommendation 5

2.44 The committee recommends that the Australian government review the adequacy of s.189 of the *Migration Act 1958* and/or the introduction of a regulation that stipulates the evidence required for a person to be detained as an unlawful non-citizen.

The health of Ms Solon

2.45 There are a number of issues regarding the health of Ms Solon prior to her removal about which both the committee and Mr Comrie expressed serious concerns.

Fitness to travel

2.46 The Philippines Deputy Head of Mission in Canberra raised concerns about whether Ms Solon was fit to travel.²³ It would appear that these concerns prompted DIMIA to seek medical advice in order to obtain a certificate that she was 'fit for travel'. On 19 July 2001, at the request of a DIMIA officer, a local doctor provided a report that she was fit to travel.²⁴

Mr Comrie's findings

2.47 Mr Comrie found that 'taking into account the extent of Vivian's physical disability, the Inquiry considered that a more thorough medical examination was

22 MSI 234 (General Detention Procedures), paragraph 2.1.

23 Document S23, DIMIA email titled Removal of Filippino – Vivienne Alvarez, dated 19.7.01 (page 15, paragraph 2.41 of interim committee report)

24 *Committee Hansard*, 8 August 2005, p. 16.

warranted and that the locum GP should have had the opportunity to obtain details of Vivian's medical history from Lismore and Liverpool Hospitals'.²⁵

2.48 After speaking to the people directly involved, Mr Comrie also drew attention to another area of concern regarding how DIMIA officers dealt with Ms Solon's physical condition. He believed 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.²⁶

2.49 Mr Comrie's report noted a response from DIMIA acknowledging that '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'.²⁷ Mr Comrie's recommendations focused on achieving a greater awareness of mental health problems, development of appropriate standards of health care for detainees in transitional detention and ensuring that efforts are made to provide a medical history to medical practitioners determining the fitness to travel of an unlawful non-citizen²⁸ (see appendix 4, recommendations 8 and 9).

Committee view

2.50 The committee also found that DIMIA officers paid inadequate attention to Ms Solon's welfare needs and supports the recommendations made by Mr Comrie. As the committee was unable to speak with the people directly involved, the additional information obtained by Mr Comrie about the accommodation in Brisbane and the health of Ms Solon cause the committee even greater concern. In particular, the committee notes the information obtained by Mr Comrie that shows Ms Solon's physical needs were even greater than the committee was able to determine. Mr Comrie notes that:

...staff of Australasian Correctional Management 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).²⁹

25 Comrie Report, p. 60.

26 Comrie Report, p. xi.

27 Comrie Report, p. 61.

28 Comrie Report, p. 63.

29 Comrie Report, pp. 58–59.

2.51 There are three additional issues regarding Ms Solon's health which the committee will now consider.

No counselling/psychological assessment was sought

2.52 No counselling/psychological assessment was sought for Ms Solon. Vivian was initially admitted to the psychiatric unit of Lismore Base Hospital and it was later discovered she had been diagnosed as suffering from 'a paranoid psychotic illness'. The department has acknowledged that there is a lack of clarity regarding the application of the standards 'Health Care Needs' to detainees in transitional detention and Mr Comrie made a recommendation to address this (see appendix 4, recommendation 9). The committee considers that this recommendation should specifically include mental health as an area to be addressed.

Recommendation 6

2.53 The committee recommends that the development of appropriate standards for health and care needs for detainees in transitional detention—identified in Recommendation 9 in the Ombudsman's report—specify mental health as an area to be addressed.

Explanation of rights regarding medical examination

2.54 The committee was concerned to hear that there was no evidence that Ms Solon had been explained her rights regarding the medical examination, which was undertaken to determine her fitness to travel. The committee notes the response from DIMIA that there are some cases where the early notification of a removal may pose a significant risk to the detainee and/or other person's safety, and the person may not be informed of the reason why they have been requested to undertake a medical examination. In these cases the committee suggests this is noted on the checklist.

Recommendation 7

2.55 The committee recommends that the explanation of rights regarding the medical examination be included in a relevant checklist as discussed in recommendation 4 above.

No formal response to concerns raised by the Philippines government

2.56 The committee was also concerned that there was no evidence on file to indicate that a formal response to the health concerns raised by the Philippines Embassy had been provided.³⁰ The press release from the Embassy of the Philippines indicates that the Embassy instructed the [Brisbane] consulate to make representations with DIMIA to provide Ms Solon with 'therapeutic counselling and further treatment

30 *Committee Hansard*, 8 August 2005, p. 34.

for trauma before sending her home'.³¹ The committee suggests that there should have been a formal response to these concerns outlining how they were being addressed.

DFAT involvement

2.57 During the week that Ms Solon was in immigration detention, the deputy head of the Philippines Embassy in Canberra raised concerns not only about Ms Solon's health but also that the issue had the potential to affect the bilateral relationship. An email from a DFAT officer shows that the deputy head of the Embassy made representation to DIMIA that the removal of Ms Solon could damage bilateral relations between Australia and the Philippines.³²

2.58 The committee was surprised that the mention of a threat to bilateral relations did not appear to have been acted on by DFAT with any degree of seriousness. The committee was told that senior officers in Manila were made aware of the concerns but it would seem not in Canberra. It appears unusual, and is of concern, to the committee that something that may impact on bilateral relations would not have been brought to the attention of senior management in Canberra and the Minister. DFAT's explanation that the concerns did not warrant a judgement and they were waiting for more information did not allay the committee's concern.

Mr Comrie's findings

2.59 Mr Comrie's findings relate to the removal process and he found that as DIMIA was entirely responsible for this process, no criticism should be levelled at DFAT in connection with this aspect of its involvement.³³

Committee view

2.60 The committee agrees with Mr Comrie's finding but remains concerned that the issues raised by the Philippines Embassy about the bilateral relationship did not appear to have been treated seriously. The committee cannot understand why DFAT did not take this matter more seriously.

Recommendation 8

2.61 The committee recommends that DFAT review internal processes regarding the treatment of concerns expressed by other governments that have the potential to affect bilateral relationships, with a view to ensuring that appropriate senior officers in Canberra and in relevant posts are made aware of these concerns.

31 Embassy of the Philippines Press Release #050517/AU dated 17 May 2005.

32 See paragraph 2.48 of the committee's interim report; *Committee Hansard*, 25 July 2005, p. 28.

33 Comrie Report, p. 45.

Inadequate reception arrangements

2.62 The committee and Mr Comrie both found that reception arrangements for Ms Solon in the Philippines were inadequate, given she was confused, had no family to meet her, no money and was clearly in need of medical assistance.

2.63 Mr Comrie noted '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'.³⁴

Committee view

2.64 The committee was told that records were unclear as to the arrangements made for Ms Solon's return to the Philippines.³⁵ The committee believes that, given Ms Solon's circumstances, DIMIA failed in its duty of care to ensure that there was adequate assistance and care for Ms Solon on arrival in the Philippines. The committee repeats the findings of Mr Comrie that Ms Solon required assistance for 'basic hygiene needs such as toileting and showering'.³⁶ There is no doubt that Ms Solon was in need of assistance on her arrival. The committee could find no excuse for DIMIA's failings in their duty of care obligations towards Ms Solon.

2.65 It is quite clear that DIMIA was ultimately responsible for Ms Solon's removal, which includes all the associated arrangements on arrival. Records on who was to meet her were confusing. It would appear that these arrangements were left to third parties and were not even checked or confirmed by DIMIA officials. A phone call from the escort and a rough handwritten note on file, indicating that Ms Solon had been handed over, demonstrated a rather casual attitude to her welfare. Moreover, the information recorded on the file note was incorrect in that Ms Olajay was not from the Australian Embassy. This incorrect information would later cause some confusion in the search for Ms Solon.³⁷

2.66 The committee was also concerned that the records show there was no formal hand-over and no follow-up to determine where she went from the airport or that she was safe. The committee considers that DIMIA should review removal processes to ensure that formal and proper procedures are in place for the reception of people being removed from Australia in circumstances similar to Ms Solon. Furthermore, it believes that clear and comprehensive records of arrangements must be kept.³⁸

34 Comrie Report, p. 61.

35 see paragraph 3.4 of the committee's interim report.

36 Comrie Rreport, pp. 58–59.

37 see paragraph 3.9 of the committee's interim report.

38 see paragraph 3.10 of the committee's interim report.

Recommendation 9

2.67 The committee recommends that DIMIA review its procedures to ensure that formal procedures are in place for the reception of people being removed from Australia in circumstances similar to Ms Solon and that their final destination is recorded on file.

2.68 The committee also noted the lack of clarity over when DIMIA's responsibility for a detainee formally ends.³⁹ The committee is firmly of the view that there should be no 'grey area' with regard to Australia's responsibility for those persons removed from Australia. There must be an indisputable and identifiable point at which Australia's responsibility to these people starts and ends. Ms Solon's circumstances have highlighted the need for the Australian government to review and clarify this area of responsibility.

Recommendation 10

2.69 The committee recommends that DIMIA review and advise staff when their responsibilities for a detainee begin and end, noting there may be circumstances like that of Ms Solon where there may not be a strict legal obligation but a moral obligation to ensure their welfare.

System deficiencies

2.70 The committee has already noted the system deficiencies which contributed to Ms Solon not being identified before she was removed. These deficiencies also contributed to the connection not being made between the names Solon and Alvarez until 2003. This area has been dealt with extensively in the Palmer report and the Ombudsman's report and the committee supports the recommendations made in both.⁴⁰

Information was not passed to senior officers in 2003 and 2004

2.71 The most damning finding by the committee and Mr Comrie was the failure of DIMIA officers to take action when they discovered that an Australian citizen had been wrongfully removed. After speaking with the individuals involved, Mr Comrie has referred the matter to the Secretary of DIMIA for investigation of a possible breach of the Australian Public Service (APS) Code of Conduct.⁴¹

2.72 The committee agrees with this course of action but it is still concerned that this failing in communication needs to be thoroughly examined. The reasons for this lapse may include the department's culture, resources, training of staff, systems of

39 see paragraph 3.3 of the committee's interim report.

40 see appendix 4, Comrie recommendations 4 and 5 and Palmer report recommendations 3.1, dot point 2.

41 see appendix 4, recommendation 12 of Mr Comrie.

checks and balances or its reporting regime. Systems must be in place to ensure that senior staff are made aware of what is happening in their areas of responsibility.

Recommendation 11

2.73 The committee recommends that the independent investigation into whether the actions of individual officers breached the APS Code of Conduct include consideration of any systemic issues that may have contributed to the lack of action. Furthermore, if the investigation identifies any systemic issues that it make recommendations to address them.

DFAT involvement in 2003

2.74 In 2003, DFAT received a request from the missing persons unit of the Queensland police force for information on the identity of the person who met Ms Solon when she arrived in Manila in 2001. The committee was told that the request was not formal but 'came through a telephone conversation' and it did say that 'she was an Australian who had been removed or may have been unlawfully removed in 2001'.⁴²

2.75 The committee understood that the request from the Queensland police was couched in specific terms and that the DFAT officer handling the matter in Manila treated the matter as confined strictly to identifying the person who met Ms Solon at the airport in 2001. It is clear, however, that DFAT officials both in Canberra and the Philippines were aware in 2003 that an Australian citizen had been removed. The committee could not understand why further questions were not asked. The committee considered that although it was not the responsible department, in this instance DFAT showed a lack of initiative and good judgement in failing at the very least to make enquiries of DIMIA about this extraordinary case of an Australian citizen being removed from Australia. There must also have been broader diplomatic implications that had the potential to affect both the Australian and Philippines governments. These seem to have been ignored.

Mr Comrie's findings

2.76 Mr Comrie also found that although the handling of the matter was consistent with the Consular Handbook, he was of the view that 'important obligations to an Australian citizen were not met'.⁴³ He found that:

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

42 *Committee Hansard*, 8 August 2005, p. 53.

43 Comrie Report, p. 46.

could this have happened?' and, more importantly, 'What is being done to resolve the problem?' No such questions were asked.⁴⁴

DFAT response regarding remedial action

2.77 DFAT told the committee and Mr Comrie that it is in the process of strengthening their cooperation arrangements with the AFP for the handling of such inquiries. The department also said they have taken steps to ensure the cable system is used for communication with posts, which has a wider distribution than email and ensures other officers who need to know about important matters learn about them.⁴⁵

Committee view

2.78 The committee and Mr Comrie agree on this issue. However, the committee would like to note a further concern regarding the interaction between DIMIA and DFAT.

2.79 In 2004, DIMIA asked DFAT for a copy of Ms Solon's passport dossier. The request did not comply with established protocols and DIMIA was advised to resubmit the request. This was not followed up by either DIMIA or DFAT. The committee considers that this was another lost opportunity to start the process of searching for Ms Solon.

Recommendation 12

2.80 The committee recommends that DIMIA and DFAT remind staff of the correct procedures to be followed when making requests for passport information.

Other committee findings

Poor record keeping

2.81 The inquiry process exposed poor record keeping in DIMIA and this has been emphasised in the two reports of the committee. During the hearings DIMIA officers tried unsuccessfully to answer questions from the committee based on the written record and while examining documents, committee members were able to see the gaps in the record for themselves.

Mr Comrie's findings

2.82 Along similar lines, Mr Comrie found that there were gaps in the records kept by DIMIA and recommended that the Secretary take steps to ensure that email business records are kept in accordance with the requirements of the *Archives Act*

44 Comrie Report, p. 46.

45 see para 4.58 of the committee's interim report.

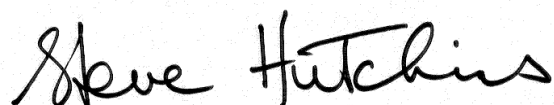
1983 (see appendix 4, recommendation 10). Mr Palmer also recommended a review of file management (see appendix 4, recommendation 5.1).

Committee view

2.83 The committee agrees with the findings of Mr Palmer and Mr Comrie and supports their recommendations.

Conclusion

2.84 The committee was pleased to note that there was a large degree of overlap with the findings of the Palmer, Senate committee and Comrie reports on this matter. Despite being unable to speak with the individuals directly involved, from documentation the committee identified the same systemic issues and supports all recommendations made by Mr Palmer and Mr Comrie to address them. The committee has only made further comment and recommendations where issues were not addressed by the other two reports or where the committee considered Inquiry comment needed to be further strengthened with a recommendation. It was not the committee's intention to place an additional burden on DIMIA officers already planning and implementing the recommendations by Mr Palmer and Mr Comrie. Rather, the committee's input is intended to ensure that all systemic problems are addressed, that there is greater transparency, clarity and evidence-based decision making with the detention and removal processes and greater protection for people in circumstances similar to Ms Solon.



SENATOR STEVE HUTCHINS
CHAIR

