



The detention of Cornelia Rau: legal issues

This brief discusses legal issues arising from the mistaken detention of Cornelia Rau, an Australian permanent resident, under the Commonwealth Migration Act for some 10 months between the end of March 2004 and early February 2005.

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Introduction

Scope of the Research Brief

This Research Brief examines legal issues arising from the mistaken detention of Ms Cornelia Rau, a 39 year old permanent resident of Australia who has lived here since she was 18 months old. Calling herself Anna Brotmeyer, Anna Schmidt and other names¹—and claiming to be a German tourist—Ms Rau was detained by police in North Queensland in late March 2004 and held as a suspected illegal immigrant until early February 2005.

As the Research Brief observes, the Rau case highlights aspects of the Federal Government's policy of mandatory immigration detention, supported by both major parties since its introduction in 1992. The Research Brief notes the Federal Government's response to the Rau case, including instituting a broad-ranging inquiry, changing detention procedures and ending indefinite detention for some failed asylum seekers who cannot be deported. The paper considers the test for valid immigration detention set down by the Federal Court in recent cases. It examines the extent to which government statements on the Rau case and published guidance on immigration detention are consistent with the principles from these cases. It outlines arguments in a case currently before the High Court which may clarify the legal basis for ongoing immigration detention. The Research Brief also considers whether or not Ms Rau's detention might be regarded by the High Court as 'punishment' in contravention of the Constitution. It then briefly describes the requirements for detention under Queensland's mental health legislation and finally considers the basis for any compensation claim.

A further paper from the parliamentary library will examine other issues relevant to the Rau case, including the need for a national missing persons register.

Background²

Media articles indicate that in March 2004 Ms Rau discharged herself from Manly Hospital in Sydney where she had reportedly been receiving treatment for schizophrenia.³ After making her way to north Queensland, she was reported to police by local people concerned about her welfare.⁴ According to the Minister for Immigration, Senator the Hon. Amanda Vanstone, Ms Rau:

... claimed that she was German ... (she) spoke German, said she was German, said she was a visitor, said she had no friends and family and had with her a stolen passport. So it's a pretty fair understanding that both police and immigration would think this person maybe an unlawful [non-]citizen.⁵

Ms Rau was initially detained on 31 March 2004 at Coen police station on behalf of immigration authorities, before being taken to the Cairns police watchhouse where she was held from 1–5 April.⁶ Because there is no immigration detention facility in Queensland, immigration authorities moved her to the Brisbane Women's Correctional Centre where she stayed for some six months.⁷ In August 2004 she spent a week in Brisbane's Princess



Alexandra Hospital for a mental health assessment before being returned to the correctional centre.⁸ In October 2004 she was transferred to the Baxter Detention Centre in South Australia. During her time at Baxter, she spent two periods in isolation in the Management Support Unit, both in November 2004, the first for four days and the second for eight days.⁹

After Ms Rau's family recognised her from a report in the *Sydney Morning Herald* in February 2005,¹⁰ she was released from immigration detention and moved to Glenside Psychiatric Hospital near Adelaide.¹¹

The Secretary of the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), Mr Bill Farmer, suggested that the Cornelia Rau matter was highly unusual, standing out 'in stark contrast to the general, if rare, run of such cases.'¹²

The Rau case and mandatory detention

While as Mr Farmer suggested the Rau case may be 'highly unusual', it nevertheless focussed attention on the Federal Government's policy of mandatory or compulsory immigration detention, which requires authorities to take into custody any person suspected of being unlawfully in Australia. An editorial in *The Age* noted that:

... [the Government's] mandatory detention policies have been under sustained attack by refugee and human rights advocates and the Rau case appears to embody their many concerns about the inhumane treatment of detainees.¹³

An article in the *Canberra Times* said that 'one reason Rau was allowed to stay behind bars for 10 months is that jailing people without charge has become the norm'. It warned its readers, however, to 'expect no change to mandatory detention', noting that 'the message ... has filtered through to prospective clients of people smuggling gangs in Indonesia' and that a 'future Labor Government would not change the tough stance'.¹⁴ Amnesty International Australia said that the detention of Ms Rau highlighted the lack of adequate safeguards for the rights and dignity of immigration detainees. The organisation's refugee coordinator, Dr Graham Thom, said that:

Currently the Department of Immigration can detain anyone they consider to be a so called unlawful non-citizen forever. Australian courts do not have the opportunity to determine the need or appropriateness of that detention. The denial of such a fundamental human right means that a person in Australia can be detained without end.¹⁵

As noted above, successive Australian governments have supported mandatory immigration detention since its introduction by a Labor administration over a decade ago.¹⁶ After the Rau case became public, however, Federal Government MP Petro Georgiou called for an end to mandatory detention, arguing that the need to detain individuals varied. In Mr Georgiou's view:

... international and Australian experience suggests that we don't need to detain everyone who arrives without a visa ... we can assess whether and for how long individuals need to be detained on a case-by-case basis.¹⁷

Together with several other Government backbenchers, Mr Georgiou focussed in particular on the plight of asylum seekers who have failed in their bid to stay in Australia but cannot return to their homelands.¹⁸ In 2004 the High Court said such people could be held in immigration detention indefinitely, potentially for life.¹⁹

The leader of the Australian Labor Party, Kim Beazley, said Ms Rau deserved an apology from the Howard Government and criticised the 'inadequacies of the administration of the detention centres',²⁰ but stopped short of backing Mr Georgiou's call for an end to mandatory detention. As Shadow Minister for Immigration, Laurie Ferguson, said:

Labor supports a detention regime ... Petro says that everyone who is detained should be released on amnesty ... I think he's gone too far, and I don't think he represents the Liberal Party at all.²¹

Mr Ferguson claimed that the Rau affair would not have happened under a Labor Government:

We went to the last election with a policy that there'd be independent access for the media and for medicals. As well as that, of course, after 90 days there's a policy that each person would be assessed month after month of their continued detention. As well as that, an independent inspectorate with the support of the independent committee that currently exists. So, I think that's one of the fundamental starting points that this situation which ... went on for many months would simply not have occurred.²²

As the Rau case showed, under current legislation there is no independent assessment of the need for immigration detention, and no provision for automatic external review. In 2001 the Commonwealth Ombudsman noted that in Australia immigration detainees appear to have less protection against improper or unlawful imprisonment than people convicted of criminal offences:

... unlike criminals who have been extended the full protection of the law before being incarcerated, and who, as prisoners, are exposed to significant checks and balances which have been built up over time reflecting decisions of the courts and community expectations, immigration detainees appear to have lesser rights and are held in an environment which appears to involve a weaker accountability framework.²³

The Ombudsman said immigration detainees should be subject to an accountability process 'at least as extensive' as that applied to prisoners held in the criminal justice system.²⁴

Government response to the Rau case

Palmer inquiry

On 8 February 2005, Minister Vanstone announced an official inquiry into the Rau matter. Led by former Australian Federal Police Commissioner Mick Palmer, the inquiry will look at some complex issues arising from the Rau case, including the effectiveness of Commonwealth/State cooperation in locating missing people and in the provision of mental health services. The inquiry was due to report by 24 March 2005, but has now been extended.²⁵ At the time of writing no date had been set for the inquiry's completion.

Terms of reference: Palmer Inquiry²⁶

The Palmer Inquiry will:

- investigate, examine and report on matters relating to the case of Cornelia Rau, including in particular the actions of the Department of Immigration and Multicultural and Indigenous Affairs and relevant state agencies, during the period March 2004 to February 2005.

In particular it 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 co-operation between, relevant state and commonwealth agencies in relation to identification/location of missing persons and provision of mental health services; and
- recommend any necessary systems/process improvements.

As well as the Palmer Inquiry, the Senate has appointed a Select Committee on Mental Health to inquire more generally into the provision of mental health services in Australia.²⁷

New DIMIA procedures

On 25 February 2005, the Minister for Immigration announced changes to her department's procedures 'identified as necessary following the Cornelia Rau case'. The new measures include:

- a 28 day limit in all but exceptional circumstances on the time people can be held in a state prison
- fingerprinting of immigration detainees, without their consent if necessary
- clearer and more precise guidance to immigration staff to clarify and strengthen procedures for establishing a person's identity, especially in complex cases such as Ms Rau's
- measures to increase access for immigration officials to databases of relevant Commonwealth and State law enforcement agencies, and
- a direction that where a person's identity or status is not confirmed within 28 days, immigration staff must consult senior staff in Canberra about future management of the case.²⁸

According to Minister Vanstone:

It is not apparent that these proposals would have made a difference to Ms Rau's case or indeed if they would make a difference if a similar extraordinary case arose today. Nonetheless I believe we need to strengthen our procedures in this complex area and the measures I am announcing today are a good start.²⁹

Ending indefinite detention

On 22 March 2005 the Federal Government announced that some failed asylum seekers who could not be removed from Australia would no longer be kept in immigration detention indefinitely. Instead they would be released into the community on a new type of visa until they could be returned to their country of origin.³⁰ Detainees must agree to reporting and other conditions, including full cooperation with authorities if removal becomes possible.³¹ *The Age* reported that there were up to 120 people who had been incarcerated in immigration detention centres for more than three years.³² The Minister emphasised, however, that the new visa would only be granted to a 'relatively small number of detainees'.³³

Analysing the reasons for this change, one of Australia's most senior political commentators, Michelle Grattan, noted that:

The Cornelia Rau case was critical. The revelation that an ordinary, but mentally ill Australian resident could be lost in the detention system for months, resonated in the

community. The Government knew the danger of the Rau case spurring the wider argument over detention policy; it tried to limit the debate. It couldn't.³⁴

Prime Minister Howard stressed that the conditional release of long term detainees did not mean any fundamental change to mandatory immigration detention or other key aspects of the Government's border protection policy:

We're not going to make any major changes to the policy. We're going to obviously retain mandatory detention and offshore processing because they have been the cornerstones of the very successful policy, but we always keep aspects of the operation of that policy under review.³⁵

Legal basis for detention

The Palmer Inquiry has not been asked to report on the legality of Ms Rau's detention. In the opinion of the Minister for Immigration, while 'this is a very, very sad case,'³⁶ the detention was not unlawful:

... if you do describe it as an unlawful detention, the suggestion that that conveys to the public is that at the time of the detention it was unlawful; and that is, of course, an incorrect statement of fact.³⁷

Similarly, Michelle Grattan said that:

One of the most frightening aspects of this affair is that, according to [co-ordinator of Melbourne's Asylum Seeker Resource Centre, Pamela] Curr, everything the Immigration Department did was lawful. The system has failed totally, but lawfully.³⁸

Nevertheless the lawfulness of Ms Rau's detention has been queried by non-Government parties, both in the Senate itself³⁹ and during Senate Estimates hearings in February 2005.⁴⁰ When asked about the Rau issue, Leader of the Opposition Kim Beazley noted '... of course, there are legal issues there. She may well have a compensation claim'.⁴¹

As a permanent resident Ms Rau has a legal right to live in Australia, even though she has not become an Australian citizen.⁴² Ms Rau was detained by Queensland police and held in immigration detention under the authority of the *Migration Act 1958*. Section 189 of the *Migration Act* places a legal obligation on authorities to detain anyone 'reasonably suspected' of being unlawfully in the country. Section 196 requires unlawful entrants to be kept in detention until they are 'removed, deported or granted a visa'.⁴³ The explanation by Australian courts of what is required for valid detention under these sections establishes the legal test that would apply if the Rau matter were taken to court.

Immigration detention has been a significant issue in recent litigation before the High Court, including in some prominent cases in 2004.⁴⁴ But, until *Ruddock v Taylor* in March 2005,⁴⁵ the High Court had not directly considered the requirements for lawful detention under these sections in the way that may arise in the case of Ms Rau. However the Federal Court has

considered the issue, setting down principles relevant in any challenge to the validity of Ms Rau's detention.

Initial detention

Under s. 189 of the Migration Act, if an 'officer'—including immigration officials or State police—'*knows or reasonably suspects*' that a person is an unlawful non-citizen, the officer '*must detain the person*'. Was it reasonable to suspect that Ms Rau—a *lawful* non-citizen—was actually an unlawful entrant?

In *Goldie* (2002)⁴⁶ the full Federal Court said that such a suspicion 'must be justifiable upon objective examination of relevant material'. Moreover, since a person's freedom was being taken away, detaining officers could not simply rely on information in front of them but must make 'efforts of search and inquiry that are reasonable in the circumstances.'⁴⁷ As the Court said:

... an officer in forming a reasonable suspicion is obliged to make due inquiry to obtain material likely to be relevant to the formation of that suspicion.⁴⁸

In Mr Goldie's case, departmental computer records wrongly showed that he had no current visa. Immigration officials failed to make other checks before detaining him. The Court held that Mr Goldie's arrest 'was precipitate and not justified by s. 189(1) of the Migration Act'.⁴⁹ His detention was unlawful and he had a right to damages from the Commonwealth.

The circumstances of Ms Rau's case are different. In particular, unlike Mr Goldie, police and immigration officials did not know Ms Rau's identity. But the principles from *Goldie* would be relevant in any case considering the legality of Ms Rau's detention. The issue for a court would be what constitutes a 'reasonable' suspicion sufficient to justify detention under s. 189 where a person in Ms Rau's situation gives authorities a false name and a fictional account of their background.

It is important to note that the word 'reasonable' in s. 189 is the only protection in the section against arbitrary arrest. As the full Federal Court said:

By itself the word 'suspects' would be capable of being construed to include the formation of an imagined belief, having no basis at all in fact, or even conjecture. Plainly, to empower an arrest on the basis of an irrational suspicion would offend the principle of the importance of individual liberty underlying the common law.⁵⁰

For this reason the court in *Goldie* placed a strict onus on officials detaining a person to justify their suspicion as 'reasonable'. This means that in Ms Rau's case authorities could not rely simply on what she told them. Otherwise there would be no protection against detention for those prone to inventing stories about themselves, whether because of mental illness, old age or for some other reason. Instead authorities are required to make 'due inquiry' at their own initiative before placing a person into detention. Minister Vanstone stated that a range of Australian and foreign agencies were contacted in the months *after* Ms Rau was detained.⁵¹

On the basis of *Goldie*, however, the legality of Ms Rau's initial detention under s. 189 will depend on whether police and immigration officials carried out the checks and inquiries they might reasonably have been expected to make *before* detaining her.⁵²

Another important factor would be what local people told authorities about Ms Rau. Media accounts suggest she was reported to police not because locals thought she might be an illegal immigrant but because they were worried about her wellbeing.⁵³ From a legal point of view, the issue is whether the information that police were given (together with any observations they could have made themselves about Ms Rau) might have cast doubt on suspicions that she was an unlawful entrant.⁵⁴

According to the Minister:

Police spoke to Ms Rau following concerns raised by members of the community. The information they received raised concerns as to her immigration status. After discussion with DIMIA compliance staff in Cairns, they requested that police detain her consistent with obligations under the Migration Act.⁵⁵

A report in *The Age* said that Ms Rau told policemen in Coen in north Queensland that she was a German tourist from Munich, but:

... they too felt something was askew and contacted the Immigration Department. Next morning an official phoned back to say there was no record of her entering Australia; she might be an illegal.⁵⁶

While officials need only have a reasonable *suspicion* not a reasonable *belief*, the court in *Goldie* emphasised that detention under s. 189 involved a more rigorous test than merely thinking that a person *may* be unlawful:

... 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.⁵⁷

Media reports indicate that for her own safety authorities may have had little option but to prevent Ms Rau travelling further.⁵⁸ Whether immigration detention—with the risk of deportation—was the appropriate option, and whether authorities had the reasonable suspicion required for such detention, is another matter.

Ongoing detention

The Federal Government and the Federal Court seem to have a different view of the legal basis for ongoing immigration detention. This could be a critical issue in any litigation over the Rau matter.

According to the Federal Government, s. 189 of the Migration Act requires that a person suspected of being an unlawful non-citizen must be kept in immigration detention until that

suspicion is shown to be wrong. In contrast, the Federal Court has said that suspicion is not enough to authorise ongoing detention. In its view, the period for which a person can be detained is determined by s. 196, which states that '*an unlawful non-citizen detained under section 189 must be kept in immigration detention*' until he or she is deported or granted a visa. As the full Federal Court said in *Goldie*:

Section 196 operates upon a person detained under s. 189 who is an unlawful non-citizen, not upon a person *reasonably suspected of being* an unlawful non-citizen.⁵⁹

In *VHAF* (2002), Justice Gray said that 's. 189 of the Migration Act provides no authority for the continued detention of a lawful non-citizen'.⁶⁰ *VHAF* involved a member of the Hazara ethnic group from Afghanistan persecuted under the former Taliban regime, who arrived by boat from Indonesia in March 2001. Australian authorities agreed to give him a refugee visa, but with the fall of the Taliban in December 2001 decided to reconsider his case. He was not told of the original approval and was kept in immigration detention. After his lawyers learnt this history, they asked the Federal Court to order his release while his legal status was sorted out.⁶¹ The Government argued that until a court finally decided the applicant's status, immigration officials could 'reasonably suspect' that he was unlawful and under s. 189 must keep him in detention.

Justice Gray noted the contention of Government lawyers that, together with other parts of the Migration Act:⁶²

... the effect of s. 189 is twofold. Not only is there a power, and a duty, to take a person into detention if an officer knows or reasonably suspects that a person is an unlawful non-citizen, but there is also a power, and a duty, to keep that person in detention until the reasonable suspicion has been allayed.⁶³

Moreover, according to the Government, a person must continue to be detained until 'no relevant officer of the Department held a reasonable suspicion that the applicant was an unlawful non-citizen'.⁶⁴ Justice Gray rejected this interpretation, saying that it would cause 'serious practical difficulties':

It would be almost impossible to know whether, somewhere in the Department, there existed an officer, perhaps ignorant of recent developments or other facts, harbouring a suspicion that could therefore be considered to be reasonable, so that continued detention of a person was required. Even if the officer responsible for the original detention no longer had a reasonable suspicion that the person detained was an unlawful non-citizen, that officer would be powerless to arrange the release of the person unless he or she became satisfied that no other officer held such a reasonable suspicion. It would be almost impossible for a person in detention to know whom to contact for the purpose of providing information that would allay a reasonable suspicion.⁶⁵

According to Justice Gray, it was up to government authorities to justify ongoing immigration detention under s. 196. As he said, 'the clear assumption underlying these provisions is that detention of a citizen, or lawful non-citizen, is unlawful unless justified'.⁶⁶

In *VFAD*, a 2003 case involving almost identical facts to *VHAF*, a full bench of the Federal Court unanimously endorsed Justice Gray's position that s. 189 of the Migration Act did not authorise continued detention of a person merely suspected of being unlawful. As Chief Justice Black and Justices Sundberg and Weinberg said:

We consider that his Honour's analysis provides an answer to this additional argument [that s. 189 requires detention until a 'reasonable suspicion' is allayed] advanced on behalf of the minister in this appeal. His discussion of the distinction between the scope of s. 189, and that of s. 196(1), in the context of the word 'detain' is persuasive.⁶⁷

Citing the High Court in *Coco v R* (1994), the three judges said that a fundamental principle of interpreting legislation came into play when the right to personal liberty was at stake, namely that:

The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language.⁶⁸

In their view, 'it would require language of much greater clarity' than the current words in the Migration Act to prevent the court ordering the release of the applicant.⁶⁹

Senate Estimates February 2005

The following excerpts from Senate Estimates hearings appear to indicate that instead of justifying Ms Rau's continued detention as an 'unlawful non-citizen' under s. 196 as required by the Federal Court, she was detained for an extended period on the basis, at best, of a 'reasonable suspicion' that she was unlawful. DIMIA Secretary Bill Farmer explained that Ms Rau was kept in detention for some 10 months because:

At no stage did we have any basis on which to conclude that Ms Brotmeyer, as we knew her then, had a lawful basis to be in Australia. In the absence of that determination, the officers continued, rightly, to have a reasonable suspicion that she was an unlawful non-citizen ... If you have reasonable doubt you must detain ... The point at which we must release is the point at which we can establish that the person is lawfully in Australia.⁷⁰

The uncertainty about Ms Rau's identity and legal status continued until she was released. As the Minister for Immigration said, 'throughout the woman's period in Immigration detention, she was constantly asked for any information which may help identify her.'⁷¹ Doubts about Ms Rau's claim to have recently arrived from overseas appear to have been raised at an early stage. She was visited soon after she was detained by the honorary German consul in Cairns, who thought she spoke peculiar German and that her account of how she came to Australia was 'absolutely unbelievable'.⁷² According to the *Sydney Morning Herald*, the consul told immigration officials that Ms Rau needed urgent medical attention:

I had the impression that this was no surprise to the department and that they had already ascertained she needed to be evaluated.⁷³

Senator Vanstone said that Ms Rau ‘provided details of her background in Germany, which could not be substantiated by German authorities.’⁷⁴ DIMIA Deputy Secretary Philippa Godwin outlined a number of contacts between immigration officials and German consular staff in Australia, noting that it was not until 24 January 2005 that DIMIA received final written confirmation that German officials had no record of Ms Rau under any of the aliases she had been using.⁷⁵

At the Estimates hearings, Minister Vanstone and senior DIMIA officials said authorities are required by s. 189 of the Migration Act to keep a person in detention as long as they ‘reasonably suspect’ that the person is unlawful. Moreover, the onus is not on officials to establish that the person is an ‘unlawful non-citizen’. Instead the person would be released only if they could show, or if it could be shown in some other way, that they had legal authority to be in Australia. As the Minister said, detention would be ‘lawful up until the time you discovered that your suspicion was incorrect’.⁷⁶ According to DIMIA Deputy Secretary Philippa Godwin:

... the way the Act works is that if an officer has a reasonable suspicion that the person is an unlawful, they are obliged to detain them. Sometimes, as a result, a person is detained because an officer has a reasonable suspicion. If that reasonable suspicion is dispelled, however that happens, then the person is obviously immediately released from detention.⁷⁷

Ruddock v Taylor (March 2005)

The difference between the Commonwealth and the Federal Court over the legal basis for ongoing immigration detention may be resolved in a case argued before the High Court on 2 March 2005. In *Ruddock v Taylor*, involving an appeal against damages for false imprisonment under the Migration Act, Justice Hayne said a critical question concerned:

... the meaning to be assigned in 196(1) to the opening expression ‘an unlawful non-citizen detained under’... Is that referring to someone who, in truth, is an unlawful non-citizen or is it referring to a person of a kind identified in 189(1) as a person known or reasonably suspected as falling within that category?⁷⁸

In response, the Commonwealth Solicitor-General, David Bennett QC, reiterated the Federal Government’s view that s. 196 together with s. 189 meant immigration officers must keep a person in detention for as long as a ‘reasonable suspicion’ persisted.⁷⁹ Lawyers for Mr Taylor, on the other hand, argued that there was nothing in s. 196 that authorised the continued detention of ‘a lawful non-citizen who has been picked up on suspicion but who in truth is a lawful non-citizen’.⁸⁰ They said, moreover, that when looking at that part of the Migration Act:

... it does not properly and adequately provide a code so that one can say the legislature has addressed its mind to how you keep in detention someone who is found ultimately to be a lawful non-citizen and how you let them go.⁸¹

The High Court’s decision can be expected later in 2005.

Official guidance

Detention of unlawful non-citizens

Current official guidance for immigration detention is provided by DIMIA's *Migration Series Instruction (MSI) 321: Detention of Unlawful Non-Citizens*.⁸² MSI 321 states that before detaining a person:

Officers must ensure that knowledge or reasonable suspicion about a person's status as an unlawful non-citizen is based on objective evidence such as:

- information held in Departmental records
- credible information from third parties
- the person's inability to provide satisfactory evidence of being a [lawful non-citizen](#) and a lack of a credible explanation for this, and/or
- the person evading or attempting to evade officers.⁸³

The document refers to a range of evidence 'that a non-citizen may produce in order to satisfy an officer that they are a lawful non-citizen'.⁸⁴ It instructs immigration authorities to 'allow the person a reasonable opportunity to provide appropriate evidence'⁸⁵ and notes that a failure to produce evidence immediately 'does not necessarily mean that the person is an unlawful non-citizen'.⁸⁶ It states that officers 'must make an informed judgement as to whether the evidence provided is sufficient in the circumstances to decide that the person is a lawful non-citizen'.⁸⁷ It warns, however, that:

If the person refuses to cooperate in providing evidence of citizenship or identity, that refusal may go towards the founding of a reasonable suspicion that the person is an unlawful non-citizen.⁸⁸

MSI 321 is not wholly consistent with the Full Federal Court's statements in *Goldie* about the basis for detention under s. 189 of the Migration Act. Like *Goldie* it stresses the need for objective evidence before an officer can *reasonably* suspect that a person is unlawful. However its emphasis is on evidence that a suspected unlawful non-citizen can provide to prove that he or she is lawful. In many cases it may be difficult for non-citizens to provide such evidence. Importantly, the MSI makes no mention of the obligation explained by the court in *Goldie* for officials to make 'due inquiry' themselves to obtain relevant material, making their own reasonable efforts of search and inquiry.

More fundamentally, MSI 321 does not provide guidance for officials on the different standards for initial and ongoing detention explained by the Federal Court in *Goldie*, *VHAF* and *VFAD*. In one sense this is not surprising, since in March 2005 the Federal Government's lawyers were still arguing in the High Court that a 'reasonable suspicion' that a person was unlawful justified—indeed required—continued immigration detention. Nevertheless, the Federal Court stipulated in clear language in 2002 and 2003 that a mere suspicion, however

reasonable, was not sufficient to authorise ongoing detention under s. 196 of the Migration Act. Unless the High Court overturns this position, it will be the Federal Court's interpretation that will be used in any future case alleging unlawful detention by immigration authorities.⁸⁹

It needs to be considered whether the Federal Court's interpretation of the basis for ongoing detention might cause practical difficulties for immigration authorities. In particular, what level of certainty that a person is an 'unlawful non-citizen' would be required to justify the continued detention under s. 196 of a person originally detained on suspicion under s. 189? And how much difficulty would be caused by having different legal standards for initial versus ongoing detention?

It might be noted that the Federal Court's approach to s. 196 does not necessarily require the precise identification of a person suspected of being unlawful before the person could be kept in ongoing detention. It is likely, for example, that immigration officials would be justified in regarding a boatload of asylum seekers who arrived in Australian waters without proper documentation as 'unlawful non-citizens' for the purposes of ongoing detention under s. 196, even if their names and/or background could not be precisely identified. For people located within Australia, however, justification as 'unlawful non-citizens' may require additional evidence. This would provide some protection against the mistaken detention for lengthy periods of a lawful Australian resident such as Ms Rau.

Review of detention

Migration Series Instruction (MSI) 234: General Detention Procedures states that 'where a person is detained for a prolonged period' (such as Ms Rau), 'officers should regularly review the need for continued detention, and for maintaining the form of detention'.⁹⁰ To what extent this direction was followed in Ms Rau's case will not be clear at least until the Palmer Inquiry is released. At the Senate Estimates hearings in February 2005, however, DIMIA officials said that during the six months that Ms Rau spent in the Brisbane Women's Correctional Centre, there were visits by DIMIA officers on 7 April and 30 September, with possibly one other visit in between.⁹¹ It seems reasonable to ask whether two or three personal contacts between Ms Rau and DIMIA officials over six months met the requirement in MSI 234 for regular review of the need for detention.

The changes to DIMIA procedures announced by Minister Vanstone in response to the Rau case (see above) appear designed to ensure closer adherence to the requirements of MSI 234.

The prospect of removal

Restricting continued detention to people who are shown to be 'unlawful non-citizens' protects against the danger that people legally in Australia who are wrongly suspected of being here without authority could be 'removed' or deported from this country. Under the Migration Act, once a person is detained, removal from Australia must occur 'as soon as

reasonably practicable'.⁹² Removal appears to have been a prospect for Ms Rau. As DIMIA Deputy Secretary Philippa Godwin said:

Throughout this period, all of our contacts with her continued, on her part, to emphasise that she was from Germany and that she wanted to leave Australia and go back to Germany. When we asked if there was anyone else that we could talk to or approach who would have information about her, she said no. That was asked on a number of occasions. The information coming to us consistently pointed to her being a German national who wanted to go back to Germany. Our efforts were to try to establish her details and circumstances with sufficient certainty so that we could get her a travel document.⁹³

It is not necessary in all cases to obtain a passport—requiring the positive identification of a person—before they can be removed from Australia. Under s. 274 of the Migration Act, the Secretary of DIMIA, or a delegate, can issue a document stating '*to the best of the Secretary's [or delegate's] knowledge, the name and nationality of the person concerned*'.⁹⁴ Official guidance published by DIMIA explains that this document is issued in accordance with International Civil Aviation Organisation (ICAO) standards, and is provided to the airline transporting the person for use at transit points and the final destination.⁹⁵ If a person is in a DIMIA detention centre, the document can be issued by a 'Detention Review Officer'. In deciding whether to do so, the Detention Review Officer should consider various factors, including the likely cost of detention 'to the person in custody and/or to the Australian taxpayer' and 'the wish of the person in custody to depart as quickly as possible.'⁹⁶ As a protection against wrongful removal, immigration officials are instructed that where unlawful non-citizens destroy their travel papers and tickets:

... it is essential to establish and document the route by which they came to Australia ... it is essential that the date of arrival, place of arrival, and responsible carrier be identified in the document.⁹⁷

Such information would be part of the 'details and circumstances' referred to by Ms Godwin that immigration officials would need to establish before they could issue a document to an airline enabling the removal of Ms Rau from Australia. It might be noted that this protection is part of DIMIA's procedural guidance to immigration officials and is not enshrined in legislation.

The Constitution and immigration detention

Immigration detention and punishment

Taking away a person's freedom is normally seen as 'punishment', which under the Australian Constitution can only be imposed by a court after determining guilt for a particular crime.⁹⁸ There are, however, exceptions. Detaining a person while they await trial, for quarantine or mental health reasons, or to protect the person themselves or others in the community is not regarded as 'punishment' and can be imposed by bodies other than courts, including government officials, without offending the Constitution.⁹⁹

Immigration detention is another exception. In *Al-Kateb v Godwin* (2004)¹⁰⁰ (involving Ahmed Ali Al-Kateb, a stateless Palestinian and failed asylum seeker who could not be returned to his homeland) the High Court confirmed that the current scheme of mandatory immigration detention in the Migration Act was a valid use of the Commonwealth's power to make laws with respect to 'aliens' in the Constitution.¹⁰¹ Ms Rau is subject to such laws since, as a permanent resident who has not formally become a citizen, she is an 'alien', despite spending nearly the whole of her life in this country.

But having a power to detain 'aliens' such as Ms Rau does not mean that the Federal Government can take such people into custody for any reason. Detention must be for a *legitimate government purpose* relevant to the 'aliens' power.¹⁰² As the High Court explained in *Al-Kateb*, immigration detention can be used to prevent 'aliens' entering Australia, for removing or deporting them, or to segregate them from the community while an application for a visa is considered.¹⁰³ Provided detention is for such a purpose, it would not be 'punitive in nature', i.e. it would not amount to 'punishment' that only the courts could impose.

The issue for Ms Rau is whether her freedom was taken away for one of the constitutionally permissible purposes specified by the High Court in *Al-Kateb*. She was detained within Australia and as a permanent resident already had legal permission to live here. So preventing her entering the country or segregating her while she applied for permission to stay are not relevant in her case. This leaves removal from Australia as the only legitimate reason for detaining Ms Rau.¹⁰⁴ While DIMIA officials made it clear in the Senate Estimates hearings that they intended to remove Ms Rau from Australia, a court would make its own judgment about whether they validly had such a purpose throughout the time of Ms Rau's detention.¹⁰⁵

Since Ms Rau has a legal right to live in Australia, she could not lawfully be expelled from this country. One view, therefore, is that authorities could never validly have intended to detain her for this purpose. In practice, however, this would mean that lawful residents could never be detained in Australia under the Migration Act, even for the briefest periods, and no matter how strong the grounds for suspecting them to be unlawful.

A better view may be that at least the initial detention of someone such as Ms Rau to check whether they could be deported as an unlawful non-citizen could be sufficiently connected to a purpose of removal. In other words, when a person is first taken into custody 'on suspicion', immigration authorities legitimately intend to deport them if the suspicion proves correct. In Ms Rau's case, however, as each day passed without evidence that she was unlawful, the more remote the purpose of removal from Australia would have become, and the less likely it would be that her continued detention was a valid use of the 'aliens' power.

In *Al-Kateb* the High Court decided, by a 4:3 majority, with Chief Justice Gleeson dissenting, that the power given to Parliament in the Constitution to legislate with respect to 'aliens' allowed the indefinite detention of *unlawful* non-citizens without charge or trial before a court.¹⁰⁶ It is not surprising that this decision was one of the most bitterly divided in the High Court's history. The court had to determine whether a person in Australia without a visa—but who had committed no crime and through no fault of his own could not be deported—could

be kept indefinitely in custody without any charge or trial. From a non-legal point of view, it would appear even more difficult for the High Court to authorise detention on *suspicion*—and potentially for an indefinite period—of a *lawful* resident in Australia such as Ms Rau.

In a hearing before the High Court in March 2005, the Federal Government suggested that even Australian citizens could be kept in detention indefinitely on ‘suspicion’ of being unlawful. In *Ruddock v Taylor*,¹⁰⁷ the Commonwealth Solicitor-General argued that:

It is not contrary to the Constitution that an Australian citizen is detained while it is determined whether the person is an alien or not. It is simply incidental to the necessary determination in order to enforce the existence of the constitutional power against people to whom it does extend.¹⁰⁸

The Solicitor-General said that on this basis that the Commonwealth could pass a law:

... saying that a group of officers would be appointed with power to require every person present in Australia to demonstrate that the person was not an alien, and a person who was born in Australia of Australian parents, an Australian citizen in every way, refuses to attend before that officer and challenges the validity of the law which directs the person to do it. The law, we would submit, would be incidental to the aliens power ...¹⁰⁹

If the Commonwealth’s argument is correct, in theory anyone could be detained indefinitely under the Migration Act until they could prove their citizenship or legal right to remain in Australia.

The transcript from the High Court hearing indicates that the Commonwealth might find it difficult to convince the Court that it has the power to pass such laws. Arguably the key member of the 4:3 majority in *Al-Kateb* in favour of the Federal Government’s position was Justice McHugh. In *Ruddock v Taylor*, Justice McHugh indicated that he would need considerable persuasion before agreeing with the Government:

... I want a lot of argument to persuade me that the Commonwealth, as opposed to a State, can detain somebody when they have no constitutional power to do so on the reasonable suspicion of a person, and, when it is declared that they have no power, that that person has no cause of action against the Commonwealth. I want a lot of argument to persuade me that our Constitution allows the Commonwealth to do that.¹¹⁰

Punishment during detention?

A further issue is whether Ms Rau’s treatment by immigration authorities while in detention may have involved ‘punishment’ in breach of the Constitution. The Palmer Inquiry is to establish the exact circumstances and conditions of Ms Rau’s time in detention. It is accepted, however, that Ms Rau spent some six months in a prison in Brisbane, and that while at Baxter Detention Centre, her treatment included two periods in isolation in the Management Support Unit.¹¹¹



The High Court explored such issues in *Behrooz* (2004).¹¹² Mr Behrooz was charged with escaping from ‘immigration detention’. He claimed the conditions at the Woomera detention centre were so harsh that he was not held in ‘immigration detention’ at all, but was being ‘punished’, which immigration authorities had no right to do under the Constitution. In a 6:1 decision, the High Court said no matter how badly he might have been treated, this would not be ‘punishment’ if he had been detained lawfully in the first place. If Mr Behrooz had been mistreated while in immigration detention, officials could be charged with assault, or he might have a claim against DIMIA for failing in its ‘duty of care’. But, as Chief Justice Gleeson said:

... there is no warrant for concluding that, if the conditions of detention are sufficiently harsh, there will come a point where the detention itself can be regarded as punitive, and an invalid exercise of judicial power ... Harsh conditions of detention may violate the civil rights of an alien ... If an officer in a detention centre assaults a detainee, the officer will be liable to prosecution, or damages. If those who manage a detention centre fail to comply with their duty of care, they may be liable in tort. But the assault, or the negligence, does not alter the nature of the detention ... The detention is not for a punitive purpose. *The detainee is deprived of his or her liberty, but not as a form of punishment.* And the detainee does not cease to be in immigration detention within the meaning of the Act.¹¹³

Justice Kirby was the sole dissenter in *Behrooz*. He reminded the court that Australia was obliged to apply the International Covenant on Civil and Political Rights (ICCPR), which

directs that no-one 'shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'¹¹⁴ Such a right could only be overridden by 'a clear expression of an unmistakable and unambiguous intention' in valid legislation.¹¹⁵ In Justice Kirby's view:

... if the conditions of 'detention' were to take on an attribute, or character, of retribution or punishment for the deterrence of other would-be 'unlawful' aliens tempted to enter Australia without authority, this ... would contravene the ICCPR. In default of a judicial order, the imposition of such *punitive* measures could not, conformably with the Constitution, exist based upon the operation of the [Migration] Act so far as it provides for 'immigration detention' ... Immigration detention, as such, must not be punitive. Even more clearly, it must not involve conditions that are inhuman and intolerable.¹¹⁶

Based on *Behrooz*, the fact that Ms Rau was held in a prison for a lengthy period would not in itself turn her detention into 'punishment'. As Justice Hayne said, such a facility 'would remain one of the places identified by the Act where to be held by or on behalf of an officer would mean being in "immigration detention"'.¹¹⁷

More problematic in a constitutional sense may be Ms Rau's treatment at the Baxter detention centre. A report in the *Sunday Age* said that the 'Management Support Unit' and the medium-security 'Red One' compound 'are used to control aggressive and inappropriate behaviour by confinement, isolation and punishment'.¹¹⁸ A senior DIMIA official noted that Ms Rau:

... spent some time in the Management Support Unit on two occasions ... Psychologists visited her there. In terms of isolation, she was not in a room for 24 hours a day. She was in and out of a room for periods, and for different periods at different times. Nursing staff and psychologists visited her while she was both in the management support unit for the short period she was there and while she was in other compounds in the facility.¹¹⁹

According to Dr Louise Newman, chairwoman of the Royal Australian College of Psychiatrists, if detainees in Baxter do not conform, they stay in isolation until they do. In her view, 'if that is not punishment, I don't know what is'.¹²⁰

While Justice Kirby may well see use of the Management Support Unit and the Red One compound to control detainees as having the 'character of retribution or punishment', the rest of the High Court may find the issue more difficult. According to Justice Hayne, there are formidable difficulties in:

... identifying when, exactly, detention passed from lawful to unlawful ... I consider that the line ... between the valid authorisation of executive detention and punitive detention is difficult to identify with any certainty'.¹²¹

Justice McHugh said that if a law allowed a person to be kept in solitary confinement 'without justification' or subjected them to 'cruel or unusual punishment', it would have a 'punitive' purpose and be unconstitutional.¹²² However he did not explain what would amount to 'justification' for isolation or solitary confinement.

The question would be whether a court saw use of such facilities as part of a formalised system of retribution for designated ‘offences’, or as a necessary measure for the orderly management of the Baxter centre. The former is more likely to be seen as the infliction of punishment, which under federal law can only be imposed by the courts and not by the executive government, including officers of the immigration department or people acting on their behalf.¹²³

Detention for mental health purposes

Another possibility for Queensland authorities to consider when they first encountered Ms Rau (calling herself Ms Brotmeyer) was detention under the *Mental Health Act 2000* (Qld).¹²⁴ The Act allows Queensland police officers and other authorities to seek an emergency detention order if they reasonably believe that:

... a person has a mental illness, and because of the person’s illness there is an imminent risk of significant physical harm being sustained by the person or someone else.¹²⁵

As with similar legislation in other states and territories, the Act emphasises the need to establish the necessity for detention, and provides for regular external review whether or not the individual concerned requests this. The Act warns that a person should be detained:

... only if there is no less restrictive way to protect the person’s health and safety or to protect others; and ... any adverse effect on the person’s liberty and rights is the minimum necessary in the circumstances.¹²⁶

The Act provides a documented procedure for detention, involving separate processes for mental health assessments and treatment orders, with review of involuntary treatment by the Queensland Mental Health Review Tribunal within the first six weeks and then at least every six months.¹²⁷

Compensation

Unlawful detention

In the *Goldie* case, Mr Goldie successfully obtained damages from the Commonwealth for unlawful arrest and detention. Justice French noted that:

Wrongful arrest and imprisonment even for a short time is a serious matter whose seriousness is measured not solely by the length of the period of incarceration. Arrest and imprisonment involve a grave interference with the rights of the individual coupled with humiliation which is both private and public.¹²⁸

The Federal Court noted that the amount of compensation would be determined by reference to:

... the duration of the deprivation of liberty and to hurt or injury to the plaintiff's feelings, that is to say the injury, mental suffering, disgrace and humiliation suffered as a result of the false imprisonment.¹²⁹

Mr Goldie was awarded \$7000 for the initial arrest, physical restraint and medical examinations wrongly imposed on him, plus \$5000 for each of the three days that he was unlawfully held in immigration detention (including an amount for 'the continuing humiliation and indignity associated with that detention').¹³⁰

In February 2005, media reports indicated that the Commonwealth paid \$25 000 compensation to a French tourist wrongly held in Sydney's Villawood detention centre for four days.¹³¹ If Ms Rau's detention for some 300 days was held to be unlawful and compensation was calculated on a similar basis, the damages for false imprisonment alone would be substantial.

Personal liability

In its formal guidance on detention procedures, DIMIA warns its staff that a person detained under the Migration Act 'may seek compensation from the Department and, in extreme cases, from the officer concerned if the exercise of the detention power was, in any respect, unlawful'.¹³²

This is what occurred in *Ruddock v Taylor*, the case now before the High Court. Mr Taylor was a British national who had come to Australia in the 1960s when he was a child. In the 1990s he committed serious crimes, and on his release from prison was detained under the Migration Act to be deported. After he had spent a considerable period in detention, the High Court decided that long-term British migrants who had settled in Australia were not 'aliens' under the Constitution, so could not be subject to the detention and deportation provisions of the Migration Act.¹³³

Mr Taylor successfully sued the then Minister for Immigration, Mr Ruddock, and the then Parliamentary Secretary to the Minister, Senator the Hon. Kay Patterson, for false imprisonment. The New South Wales Supreme Court, upheld by the NSW Court of Appeal, awarded Mr Taylor \$116,000 damages against Mr Ruddock and Senator Patterson personally for wrongly cancelling his permanent visa twice, causing him to be placed in immigration detention.¹³⁴ It is this decision that has been appealed to the High Court.

Based on *Ruddock v Taylor* (as decided to date), a failure to fully reflect Federal Court rulings on the legal basis for immigration detention in official DIMIA guidance may not only increase the risk of legal action against the Commonwealth, but expose both the Minister and potentially DIMIA officials to personal liability for wrongful detention.¹³⁵

Duty of care

In addition—and whether or not her detention was held to be unlawful—Ms Rau could seek damages for any failure by government authorities to comply with their ‘duty of care’. As an official departmental instruction explains:

The Commonwealth (including DIMIA), its employees and agents have a common law duty of care with respect to all detainees. This means that officers ... must ensure that the day-to-day needs of detainees are met ... They must also take all reasonable action to ensure detainees do not suffer any physical harm or undue emotional distress while in immigration detention.¹³⁶

Amongst other matters, the Palmer Inquiry will examine the adequacy of measures taken by immigration authorities to deal with Ms Rau’s ‘medical condition and other care needs’ while she was held in immigration detention.¹³⁷

Defective administration

Ms Rau could also seek payment under the Commonwealth’s *Compensation for Detriment Caused by Defective Administration* (CDDA) scheme. The CDDA guidelines state:

When a Commonwealth agency has acted unreasonably ... it is reasonable to expect that the agency should provide compensation for the loss even if its actions do not amount to a liability to the other party.¹³⁸

The results of the Palmer Inquiry should indicate whether the actions of DIMIA and other authorities in relation to Ms Rau were reasonable or not.

Conclusion

As the furore over Ms Rau’s detention shows, the policy of compulsory or mandatory detention implemented in the Migration Act places immigration officials in a difficult position. Such officials have a legal obligation to detain anyone they merely ‘suspect’ is an unlawful non-citizen. They cannot avoid this legal responsibility. Yet if their suspicion is not ‘reasonable’ or if the detention is not lawful in some other way, the person wrongfully detained can seek compensation both from the Commonwealth and from the individual officers involved.

The word ‘reasonable’ is the only protection against arbitrary detention under s. 189 of the Migration Act. It is not surprising then that the Federal Court emphasised that immigration officers had to actively seek information before a suspicion could be ‘reasonable’. As the court said in *Goldie*, before depriving a person of their freedom, authorities with a power to detain under the Migration Act must take the initiative to make ‘due inquiries’ that are reasonable in the circumstances. Whether this was done in Ms Rau’s case is a matter that could only be properly tested in a court of law.

While in one respect placing a heavy legal obligation on immigration officials, in another sense mandatory detention provides an ‘easier’ option in difficult situations such as that of Ms Rau. A reasonable suspicion by itself not only justifies taking a person into custody, but also—according to the Federal Government’s view of the relevant law—requires continued and possibly indefinite detention. Unlike other options which could have been considered for dealing with Ms Rau, such as the Queensland Mental Health Act, there is no independent assessment of the need for immigration detention, and no provision for automatic external review.

On the basis of the points considered in this paper, there are grounds for questioning the legality of the initial and ongoing detention of Ms Rau under the Migration Act, both at a statutory and constitutional level. Some of these issues may be resolved in the case of *Ruddock v Taylor*, currently before the High Court. Given the difficulty the High Court had in *Al-Kateb* in upholding indefinite detention of a *known* unlawful non-citizen, it would be surprising if the Court authorised detention *on suspicion only*—and potentially for an indefinite period—of *lawful* Australian residents such as Ms Rau.

The Federal Government may have grounds for not accepting the principles for initial and ongoing immigration detention specified by the Federal Court in *Goldie*, *VHAF* and *VFAD*. However, unless and until the High Court overrules the Federal Court, the failure to fully reflect such principles in official guidance increases the risk that immigration staff and others may be held to have acted unlawfully in detaining individuals under the Migration Act. Departmental officials and/or the Palmer Inquiry should consider a review of current protocols to ensure that officials using immigration detention powers are given the most accurate guidance on how to act within the law as explained by the Federal and High Courts.

A revised protocol could emphasise the fundamental right of individuals not to be detained or locked up without reasonable cause. It might address the importance of considering alternatives to immigration detention, including—in appropriate cases—use of the mental health legislation of the various states and territories. Interaction between immigration staff and other authorities, including police, in determining the appropriate option in individual cases would be a particular issue to cover. The role of ‘case officers’ within DIMIA could also be reviewed to ensure that there is a dedicated officer and single point of contact for individual detainees. This may help ensure that, consistent with current guidance, the legality and need for ongoing detention is kept under review.¹³⁹

Endnotes

1. Senate Legal and Constitutional Legislation Committee, ‘Budget Estimates’, *Hearings*, 15 February 2005, pp. 33, 37, 39.
2. Officials from the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) told a Senate Estimates hearing on 15 February 2005 that an official chronology was

- being prepared. It had not been released at the time of writing. See Senate, Estimates, 15 February 2005, p. 33.
3. See e.g., Andra Jackson, 'Solved: mystery of detainee 'Anna'. Mentally ill Australian held for 10 months in custody', *The Age*, 5 February 2005, p. 1; Andra Jackson, 'Howard orders inquiry into Rau case', www.theage.com.au/news, 7 February 2005; Andrew McGarry, 'Mentally Ill Aussie in Detention Centre', *Weekend Australian*, 5 February 2005, p.1; see also Senate, Estimates, 15 February 2005, p. 104 (Senator Allison).
 4. See e.g., David Marr, Mark Metherell, Mark Todd, 'Odyssey of a lost soul', *Sydney Morning Herald*, 12 February 2005, p. 27; Jackson, 'Solved: mystery of detainee 'Anna'', op. cit.
 5. 'Fair to think Rau unlawful: Vanstone', www.theage.com.au/news, 7 February 2005.
 6. Senate, Estimates, 15 February 2005, pp. 33, 37, 39.
 7. *ibid.*, p. 39. Under s. 5(1) of the Migration Act, 'immigration detention' includes being held on behalf of an immigration officer at a state prison.
 8. Senate, Estimates, 15 February 2005, p. 96.
 9. *ibid.*, p. 106.
 10. Pamela Curr, 'How the Rau story broke', smh.com.au, 9 February 2005.
 11. Senate, Estimates, 15 February 2005, p. 57.
 12. *ibid.*, p. 98.
 13. 'Cornelia Rau case demands a full inquiry', *The Age*, 10 February 2005, p. 14.
 14. Ross Peake, 'Rau case exposes big cracks to fill', *Canberra Times*, 12 February 2005, p. 6.
 15. Amnesty International Australia, 'Immigration Detention: Safeguards must be in place', *Media Release*, 7 February 2005.
 16. As then Minister for Immigration, now Attorney-General, the Hon. Phillip Ruddock, said in 2000:

To suggest that mandatory detention is 'Philip Ruddock's policy' demonstrates an appalling ignorance of facts and knowledge of Australian history ... Legislation providing for mandatory detention was introduced in the early 1990s under a former Labor Government, while detention facilities at Pt Hedland and Curtin were commissioned under a former Labor Government.

Phillip Ruddock, 'Misinformation on mandatory detention', *Media Release*, MPS 129.2000, 10 December 2000.
 17. Petro Georgiou, 'Five steps to a more compassionate policy on asylum seekers', *The Age*, 18 February 2005, p. 13. See also Petro Georgiou, 'Governor-General's speech: Address-in-Reply', House of Representatives, *Debates*, 9 February 2005, p. 159.
 18. Elizabeth Colman and Steve Lewis, 'PM eases stance on detainees', *The Australian*, 23 March 2005, p. 1.
 19. *Al-Kateb v. Godwin* (2004) 208 ALR 124 and *Minister for Immigration and Multicultural and Indigenous Affairs v. Al Khafaji* (2004) 208 ALR 201. See Peter Prince, 'The High Court and

- indefinite detention: towards a national bill of rights?', [Research Brief](#), no.1, Parliamentary Library, Canberra, 2004–05, at <http://www.aph.gov.au/library/pubs/rb/2004-05/05rb01.pdf>.
20. Transcript, *Alan Jones Program*, 2 March 2005.
 21. Transcript, 666 ABC Canberra, *2CN Morning Show*, 10 February 2005.
 22. Office of Laurie Ferguson, MP, *Transcript off Doorstop*, Parliament House, Canberra, 7 February 2005.
 23. Office of the Commonwealth Ombudsman, *Report of an Own Motion Investigation into the Department of Immigration and Multicultural Affairs' Immigration Detention Centres*, Canberra 2001, p. 3.
 24. *ibid.*
 25. Senator Amanda Vanstone, '[Cornelia Rau Inquiry](#)', *Media Release*, VPS 30.05, 8 February 2005; and 'Further resources to Inquiry into Ms Cornelia Rau', *Media Release*, VPS 37.05, 27 February 2005.
 26. http://www.minister.immi.gov.au/media_releases/media05/v05030.htm.
 27. The committee was appointed on 8 March 2005 and is to report by 6 October 2005. For terms of reference, see http://www.aph.gov.au/Senate/committee/mentalhealth_ctte/tor.htm.
 28. Senator Amanda Vanstone, 'Changes to DIMIA procedures following Cornelia Rau case', *Media Release*, VPS 36.05, 25 February 2005.
 29. *ibid.* These changes are consistent with the Detention Centre Guidelines issued by the Human Rights and Equal Opportunity Commission which provide for those with special needs such as mental disability (www.hreoc.gov.au/human_rights/asylum_seekers/index.html#idc_guidelines).
 30. Colman and Lewis, *op.cit.*; Meaghan Shaw, 'PM to release about 50 asylum seekers', *The Age*, 23 March 2005, p. 1. The Minister for Immigration said that new regulations would be made allowing such people to be given a 'Removal Pending Bridging Visa'. The new visa would provide access to trauma and torture counselling, schooling for children, and child care tax benefits, the same benefits available to people living in Australia on Temporary Protection Visas. The new visa would not be available to detainees with current visa applications or who are challenging migration decisions, either through merits review or the courts. It would also not be available to failed asylum seekers held in detention on Nauru. See 'Asylum seeker group to be freed', www.smh.com.au, 23 March 2005; Senator Amanda Vanstone, 'Broader Powers for Immigration Minister to Manage Long Term Detainees and Removals', *Media Release*, VPS 46.05, 23 March 2005. http://www.minister.immi.gov.au/media_releases/media05/v05046.htm.
 31. Vanstone, 'Broader Powers', *op. cit.*
 32. Meaghan Shaw, 'PM to free up to 100 asylum seekers', www.theage.com.au, 23 March 2005.
 33. Vanstone, 'Broader Powers', *op. cit.*
 34. Michelle Grattan, 'Door opens for detainees', *The Sunday Age*, 20 March 2005, p. 21.
 35. 'Howard rules out large changes to migration policies', *The Canberra Times*, 21 March 2005, p.2.

36. ABC Radio transcript, *AM*, 7 February 2005.
37. Senate, Estimates, 15 February 2005, p. 98.
38. Michelle Grattan, 'The flawed system that failed "Anna"', *The Age*, 6 February 2005, p. 19.
39. Senator Joe Ludwig, 'Question without Notice: Ms Cornelia Rau', Senate, *Debates*, 10 February 2005, p. 47.
40. Senate, Estimates, 15 February 2005, pp 98 (Senator Ludwig, ALP), 102 (Senator Allison, Democrats), 110 (Senator Nettle, Greens).
41. Capital TV transcript, *Meet the Press*, 6 February 2005.
42. Ms Rau is a 'lawful non-citizen' under section 13 of the Migration Act.
43. Section 196.
44. *Al-Kateb v. Godwin* (2004) 208 ALR 124 and *Minister for Immigration and Multicultural and Indigenous Affairs v. Al Khafaji* (2004) 208 ALR 201 (legality of indefinite detention); *Behrooz v. Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 208 ALR 271 ('harsh and inhumane' detention); *Re Woolley and Another; Ex Parte Applicants M276/2003* (2004) 210 ALR 369 and *Minister for Immigration v. B* (2004) 206 ALR 130 (children in detention).
45. *Ruddock & Ors v Taylor* [2005] HCA Trans 65 (2 March 2005).
46. *Goldie v Commonwealth* (2002) 188 ALR 708.
47. *ibid.*, at 710.
48. *ibid.*, at 711.
49. *ibid.*, at 714.
50. *ibid.*, at 710.
51. Senator Amanda Vanstone, 'Question without Notice (Speech): Ms Cornelia Rau,' Senate, *Debates*, 10 February 2005, p. 56.
52. One issue, for example, may be whether police and immigration authorities could have identified her from details held on databases of missing persons such as the 'National Names Index'. The CEO of Crimtrac, Jonathan Mobbs, confirmed that Ms Rau's name was on this database, although he was not able to say how long it had been there. See Senate Legal and Constitutional Legislation Committee, 'Budget Estimates', *Hearings*, 14 February 2005, p. 92.
53. Marr et al., *op. cit.*, p. 27; Jackson, 'Solved: mystery of detainee 'Anna'', *op. cit.*
54. As Justices Gray and Lee said in *Goldie*:
... the reasonableness of any suspicion formed by [the detaining] officer must be judged in the light of the facts available to him or her at the particular time ... If, at the time of forming the suspicion, the officer is aware of conflicting facts, it may not be reasonable simply to discard those facts and to form a suspicion on the basis of the single fact capable of supporting such a suspicion (188 ALR 708, at 710).

55. Senator Amanda Vanstone, 'Question without Notice (Speech): Ms Cornelia Rau,' Senate, *Debates*, 10 February 2005, p. 56.
56. Gary Tippett et al., 'The missing months of Cornelia Rau', *The Age*, 12 February 2005, Insight 6–7. This account is consistent with testimony of DIMIA Deputy Secretary Phillipa Godwin to Senate Estimates hearings in February 2005:

Police drew her to the attention of DIMIA officers in Cairns, where we have a small office, somewhere around late March—I think 30 March or something like that. Police had previously been alerted about her and made contact with her, and on the basis of the information from that contact they had called us. On the basis of the information that was provided, the officer did a couple of things. He sought to check our movement records, which is standard procedure, and he also asked the police if they would ask her some further questions. Armed with those two pieces of information, the fact that he had not been able to identify her in the movement records and the other information that he had been provided with by the police, the officer then faxed to the police—and again this is standard procedure—a request for her to be detained. She was then taken to a police station. See Senate, Estimates, 15 February 2005, p. 33.
57. 188 ALR 708 at 710 (emphasis in original).
58. See e.g. Tippett, *op. cit.*
59. 188 ALR 708 at 711 (emphasis in original).
60. 122 FCR 270 at 295.
61. *ibid.*, pp 273–275.
62. Section 5(1) which states that the word 'detain' means 'take into immigration detention; or ... keep, or cause to be kept, in immigration detention'.
63. 122 FCR 270 at 294.
64. *ibid.*
65. *ibid.*, at pp 294–5. Justice Gray noted that the definition of 'detain' in s. 5(1)—see note 62—is expressed in the alternative as 'a deliberate step of the drafter for the purpose of making the definition useful in a variety of contexts'. In addition, the definition is applicable 'unless a contrary intention appears.' His Honour said that an examination of the context of s. 189 makes it clear that the word 'detain' in that section means 'to take into immigration detention', not 'to keep, or cause to be kept in immigration detention'. See 122 FCR 270 at 295.
66. *ibid.*, p. 295.
67. 196 ALR 111 at 136.
68. *ibid.*, at 128, citing *Coco v R* (1994) 179 CLR 427 at 437–8.
69. *ibid.*, at 137, referring specifically to s. 196(3) of the Migration Act. In *VFAD*, as in *VHAF*, the main issue was whether the power in s. 23 of the *Federal Court of Australia Act 1976* to make 'interlocutory' orders could be used to order the release, on a temporary basis, of people in immigration detention, or whether this was overridden by s. 196(3) of the Migration Act, which states that s. 196(1) of that Act 'prevents the release, even by a court, of an unlawful non-citizen (otherwise than for removal or deportation) unless the non-citizen has been granted a visa'.

70. Senate, Estimates, 15 February 2005, pp. 100, 110.
71. Senator Amanda Vanstone, 'Sydney Woman in Immigration Detention', *Media Release*, VPS 28.05, 5 February 2005.
72. Marr et al., *op. cit.*, p. 27.
73. *ibid.* At the Estimates hearings, DIMIA Deputy Secretary Ms Godwin said she would need to check this report with DIMIA officers:

The point about needing urgent medical attention I am not aware of, and I will have to check that ... I am not aware at this point whether she [the consul] actually provided a report or how that information was conveyed—or whether it was conveyed. Senate, Estimates, 15 February 2005, p. 59.
74. Senator Amanda Vanstone, 'Sydney Woman in Immigration Detention', *Media Release*, VPS 28.05, 5 February 2005.
75. Senate, Estimates, 15 February 2005, p. 47.
76. *ibid.*, p. 98.
77. *ibid.*, p. 49.
78. *Ruddock & Ors v Taylor* [2005] HCA Trans 65 (2 March 2005) p. 7.
79. *ibid.*, pp. 7–8.
80. *ibid.*, p. 47.
81. *ibid.*
82. Available through the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA)'s on-line service *Legendcom*.
83. DIMIA, *Migration Series Instruction (MSI) 321: Detention of Unlawful Non-Citizens*, current at 23/12/2004, para 2.1.1.
84. *ibid.*, para 2.2.1.
85. *ibid.*, para 2.3.4.
86. *ibid.*, para 2.3.5.
87. *ibid.*, para 2.2.2.
88. *ibid.*, para 2.3.9.
89. DIMIA's guidance notes that:

Officers should be aware that their decisions and actions in relation to the exercise of their detention powers are subject to review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*.

DIMIA, *Migration Series Instruction (MSI) 234: General Detention Procedures*, current at 23.12.2004, para 7.1.
90. *ibid.*, para 7.5.
91. Senate, Estimates, 15 February 2005, p. 45.

92. Section 198.
93. Senate, Estimates, 15 February 2005, p. 88.
94. Subsection 274(3) (emphasis added).
95. DIMIA, *Migration Series Instruction (MSI) 17: Issue of documents to facilitate travel for unlawful non-citizens*.
96. *ibid.*
97. *ibid.*
98. Punishment for a crime has become established as 'exclusively judicial in character' (*Chu Keng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 114). Chapter III of the Constitution vests the 'judicial power' of the Commonwealth in the courts listed in section 71.
99. *Al-Kateb v Godwin* (2004) 208 ALR 124 at 195 (Justice Callinan).
100. (2004) 208 ALR 124.
101. Section 51(19). See *ibid.* at 127 (Chief Justice Gleeson).
102. The fact that Parliament has power under section 51 of the Constitution to make legislation on subjects such as 'aliens' does not by itself make such laws valid. As Justice Gummow pointed out:

... it could not seriously be doubted that a law providing for the administrative detention of bankrupts in order to protect the community would be a law with respect to bankruptcy and insolvency (s.51(27)), or that a law providing for the involuntary detention of all persons within their homes on census night would be a law with respect to census and statistics.(s. 51(11)). If such laws lack validity, it is not by reason of any limitation in the text of paras (17) and (11) but by the limitation in the opening words of s. 51, 'subject to this Constitution', which attract any limitation required by Ch. III. See *Al-Kateb* 208 ALR 124 at 158.
103. *Al-Kateb* 208 ALR 124 at e.g. 127 (Chief Justice Gleeson), 188 (Justice Hayne).
104. Justice Hayne (208 ALR 124 at 186) said it was not necessarily the case that a law requiring detention of aliens 'for other purposes' would be beyond power. However, the examples he gave involved 'exclusion from Australia of non-citizens who do not have permission to enter or remain in Australia'. As a permanent resident, Ms Rau does not come within this description. Similarly, Justice Callinan (at 196) said that he:

... would not necessarily accept that detention for the purpose of deporting an alien is the only purpose which may be effected under the aliens power. It may be the case that detention for the purpose of preventing aliens from entering the general community, working, or otherwise enjoying the benefits that Australian citizens enjoy is constitutionally acceptable.

Again, Ms Rau already had a legal right to such benefits and could not lawfully be prevented from enjoying these.
105. As Justice Gummow said in *Al-Kateb*, 'The continued viability of the purpose of deportation or expulsion cannot be treated by the legislature as a matter purely for the opinion of the executive government'. (2004) 208 ALR 124 at 160.

106. See Peter Prince, *op. cit.*
107. [2005] HCA Trans 65 (2 March 2005). The Commonwealth is appealing against compensation awarded to Mr Taylor for unlawful imprisonment after he was detained under the Migration Act but was subsequently held not to be an ‘alien’ for the purposes of the Constitution, and therefore was not subject to the detention and deportation provisions of the Act. See section on ‘Compensation’ for further details of this case.
108. *ibid.*, p. 9. As Justice McHugh explained in *Al-Kateb*, , ‘incidental’ powers ‘may only be exercised where they are *reasonably necessary* to facilitate the making of laws with respect to the head of power of which they are an incident’ (208 ALR 124 at 134, *emphasis added*). So detention on this basis would be limited to what was reasonable to establish that a person should be removed from Australia or detained for some other valid purpose. In the case of a citizen or lawful non-citizen who gave their correct name, a reasonable time for detention would be very short. In the case of a person who gave a false name such as Ms Rau, the time may be longer, but would only be long enough to give authorities a reasonable opportunity to establish that the person was unlawfully in Australia.
109. *ibid.*, p. 10.
110. *ibid.*, p. 9.
111. Senate, Estimates, 15 February 2005, p. 106.
112. *Behrooz v Department of Immigration and Multicultural and Indigenous Affairs*, (2004) 208 ALR 271.
113. *ibid.*, at 279 (*emphasis added*).
114. Article 7.
115. *Behrooz*, (2004) 208 ALR 271 at 303.
116. *ibid.*, at 303–4 (*emphasis in original*). Justice Kirby said it was absurd to restrict a person such as Mr Behrooz to civil action and other ‘collateral remedies’:

The overwhelming majority of asylum seekers who come to this court are self-represented, and they are so because they lack the resources to retain counsel. People confined in immigration detention are ordinarily likely to be impecunious, powerless, with limited command of the English language and, in a place as remote as Woomera, with extremely restricted access to legal assistance (and that ordinarily focussed solely on pursuit of a protection visa). Such individuals are much less able even than persons not in detention to pursue expensive civil claims against the Commonwealth and its officials where they commonly stand in peril of costs orders if they fail. (at 305)
117. *ibid.*, at 313.
118. Russell Skelton, ‘It’s time to admit we’ve created a Gulag’, *Sunday Age*, 20 February 2005, Agenda Opinion 19.
119. Senate, Estimates, 15 February 2005, p. 106 (evidence of Mr Steve Davis, First Assistant Secretary, Unauthorised Arrivals and Detention Division, DIMIA).
120. Skelton, *op. cit.*
121. *Behrooz* (2004) 208 ALR 271 at 312–13.

122. *Woolley* (2004) 210 ALR 369 at 391. Justice McHugh noted (at 393) that:

... it is important to recognise the distinction ... between purpose and effect ... It is not enough that the effect of a law is no different from the infliction of punishment. If the effect of the law is not readily distinguishable from the effect of inflicting punishment, a rebuttable inference will arise that the purpose of the law is to inflict punishment. But, in determining whether a law authorises or requires punishment to be inflicted in breach of Ch III of the Constitution, it is the purpose of the law that is decisive.
123. *Behrooz* (2004) 208 ALR 271, at 300 (Justice Kirby).
124. While reports indicate that Ms Rau was mentally ill, it has not been suggested that this is why she was detained under the Commonwealth Migration Act by Queensland police.
125. Section 33.
126. Section 9.
127. Section 187.
128. *Goldie v Commonwealth* (No.2) [2004] FCA 156 at [17].
129. *ibid.*, at [14].
130. *ibid.*, at [21].
131. ABC Radio transcript, *AM*, 15 February 2005.
132. DIMIA, *Migration Series Instruction (MSI) 234*, para 7.7.
133. *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, itself overturned in *Shaw v Minister for Immigration and Multicultural Affairs* (2004) 203 ALR 143; see Peter Prince, 'The High Court and Deportation Under the Australian Constitution', [Current Issues Brief](#), no. 26, Department of the Parliamentary Library, Canberra, 2002–03; and 'Deporting British Settlers', [Research Note](#), no. 33, Parliamentary Library, Canberra, 2003–04.
134. *Ruddock & Ors v Taylor* [2003] NSWCA 262. The two Ministers were held personally liable despite the fact that when they cancelled Mr Taylor's visa, the law in Australia as stated by the High Court was that any non-citizen such as Mr Taylor was an 'alien' (see *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178). The Ministers became liable *retrospectively* when the High Court changed its mind on this issue, a key point the Commonwealth has taken up in the current appeal. See *Ruddock & Ors v Taylor* [2005] HCA Trans 65 (2 March 2005) p. 2.
135. Although as the NSW Court of Appeal pointed out, the Commonwealth would have to accept vicarious liability for the conduct of its officers (Ministers included). See *Ruddock & Ors v Taylor* [2003] NSWCA 262 at para [22].
136. Migration Series Instruction 371 23/12/2004, *Alternative Places Of Detention*.
137. Senator Vanstone, *op. cit.*, 'Cornelia Rau Inquiry'.
138. Department of Finance and Administration, *CDDA Guidelines for Agencies*, at www.finance.gov.au.
139. According to DIMIA's 2003–04 Annual Report, there is:

Enhanced focus on case management of those in detention (eg Case Management Pilot at Baxter Immigration Detention Facility). Increased emphasis on careful monitoring of detention caseloads by Detention Review Committees and through the creation of a Detention Case Coordination Section within the department.

DIMIA, Annual Report 2003–04, DIMIA, Canberra, 2004, p. 91. See http://www.dimia.gov.au/annual_report.

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