

CHAPTER 1

MINISTERIAL RESPONSIBILITY

1.1 This chapter will consider:

- the mistakes and failings recently identified in relation to the Government's immigration arrangements;
- the Government's response to those failings to date; and
- the extent to which the relevant Minister(s) should be held responsible for these failings.

Cultural problems within DIMIA

1.2 The present inquiry was established following serious allegations of significant failings in relation to the Government's immigration arrangements. These failings subsequently came to wider public attention through two high profile cases which highlighted fundamental problems within the Government's immigration systems — the wrongful detention of an Australian resident, Ms Cornelia Rau, and the improper deportation of an Australian citizen, Ms Vivian Alvarez Solon.

1.3 The circumstances surrounding these cases are well documented in two recent reports to Government – the Palmer Report,¹ which details the Rau affair, and the Comrie Report,² which details the Alvarez affair. The findings, recommendations and implementation of these reports are considered in more detail where relevant in other chapters of this report. However, it is worth noting that both reports are highly critical of the leadership, management, actions, systems and processes of DIMIA. They detail the department's 'systemic' and 'catastrophic' failings in relation to these matters.³ In particular, the findings of the Palmer Report point to the need for broader cultural change within DIMIA. Indeed, the Palmer Report concluded that there is a 'serious cultural problem within DIMIA's immigration compliance and detention areas' and that 'urgent reform is necessary'. The report went on to say:

The combination of pressure in these areas and the framework within which DIMIA has been required to operate has given rise to a culture that is overly

1 Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, July 2005 (Palmer Report), available at: http://www.minister.immi.gov.au/media_releases/media05/palmer-report.pdf . See also Appendix 3 of this report.

2 Neil Comrie, *Inquiry into the Circumstances of the Vivian Alvarez Matter*, September 2005 (Comrie Report), available at: http://www.ombudsman.gov.au/publications_information/Special_Reports/2005/alvarez_report_03.pdf See also Appendix 4 of this report.

3 See Comrie Report, pp. xv – xvi.

self-protective and defensive, a culture largely unwilling to challenge organisational norms or to engage in genuine self-criticism or analysis.⁴

1.4 The Comrie Report supported the findings and recommendations made in the Palmer Report, and indeed, concluded that 'many of the systemic problems identified by both investigations had been present in DIMIA for some years'.⁵

Government response

1.5 At the committee's hearing on 11 October 2005, a representative of DIMIA told the committee that a range of legislative and other changes had been implemented in recent months. Subsequent chapters of this report discuss many of these changes in greater detail. However, it is worth noting here that these changes involved amendments to the Migration Act relating to detention arrangements, as announced by the Prime Minister on 17 June 2005. This included, for example, amendments to allow the Commonwealth Ombudsman to review the cases of long-term detainees; and to widen the Minister's discretionary powers — for example, so that the Minister is now able to specify alternative arrangements for a person's detention and to grant a visa to a person in detention.⁶

1.6 Further organisational and administrative changes have been, or are being, made within DIMIA. In particular, to facilitate a change of culture within DIMIA the senior administration within DIMIA has largely been replaced. A new Departmental Secretary, Mr Andrew Metcalfe, has been appointed. A range of other senior managers have also been appointed, including three new Deputy Secretaries, as well as over 40 promotions, transfers and appointments to DIMIA's Senior Executive ranks to date.⁷

1.7 The committee was told that the new Departmental Secretary has focussed on cultural change within DIMIA, emphasising to all staff that, in order to respond appropriately to the Palmer and Comrie Reports, and to meet the expectations of the Government, the Parliament and the wider community:

...the culture of the department must be focussed on the three main goals: a more open and accountable organisation, fair and reasonable dealings with clients, and well trained and supported staff.⁸

4 Palmer Report, p. ix.

5 Comrie Report, p. xvi.

6 *Migration Amendment (Detention Arrangements) Act 2005*; see further, Prime Minister the Hon John Howard MP, *Immigration Detention*, Media Release, 17 June 2005, at: http://www.pm.gov.au/news/media_releases/media_Release1427.html

7 DIMIA, *Estimates Hansard*, 1 November 2005, p. 15.

8 *Committee Hansard*, 11 October 2005, p. 5; see also Mr Andrew Metcalfe, 'Implications of the Palmer Report Future Changes', *IPPA Seminar*, 25 November 2005, available at: http://www.immi.gov.au/media_releases/media05/ippa_speech.pdf (accessed 9 December 2005).

1.8 The new Secretary, who commenced with DIMIA on 18 July, has established a Change Management Task Force, which has developed an implementation plan to improve the structure and workings of DIMIA.⁹

1.9 The committee was told that the Government has committed \$230 million to achieving change within DIMIA. According to a representative of DIMIA, funding has been provided to implement a range of measures, including to:

- establish a College of Immigration Border Security and Compliance to deliver comprehensive, tailored operational training for DIMIA officers, with an emphasis on quality assurance and decision making;
- continue improving the delivery of immigration detention health services, including through the development of a long-term detention health service delivery strategy;
- improve case management and coordination, including a 12-month pilot program to develop a community care model in partnership with community organisations;
- improve immigration detention facilities;
- improve client services and feedback response management;
- improve quality assurance, internal audit and decision-making review, and records management.¹⁰

1.10 Finally, the committee notes that both the Prime Minister and the Minister for Immigration have acknowledged that mistakes were made, and have apologised to both Ms Rau and Ms Alvarez.¹¹

Ministerial responsibility

1.11 While DIMIA itself has undergone a number of changes, and apologies have been made, the question must be asked to what extent the relevant Minister(s) should be held responsible for the 'systemic' and 'catastrophic' failings identified by the Palmer and Comrie Reports. Unfortunately, due to the restricted terms of reference

9 *Committee Hansard*, 11 October 2005, p. 5; see also DIMIA, answers to questions on notice, 11 October 2005, Attachments 1, 2 and 3 for further information in relation to the departmental restructure.

10 *Committee Hansard*, 11 October 2005, p. 4.

11 Transcript of the Prime Minister the Hon John Howard MP, Joint Press Conference with Senator the Hon Amanda Vanstone, Minister for Immigration, Parliament House, Canberra, 14 July 2005, www.pm.gov.au/news/interviews/Interview1460.html (accessed 9 December 2005); see also DIMIA, *Committee Hansard*, 11 October 2005, p. 4. The government has also provided an assistance package designed to help re-establish Ms Solon in Australia: see Senator the Hon Kay Patterson, Minister for Family and Community Services, 'Government Welcomes Vivian Solon's Return', Media release, 18 November 2005, http://www.facs.gov.au/internet/minister1.nsf/content/vivian_solon_package.htm (accessed 14 December 2005).

imposed on these inquiries by the Government, neither report focussed on the questions of whether, and to what extent, the Minister responsible for DIMIA should be held responsible for these failings.¹²

1.12 However, following the release of these reports, the Opposition questioned whether the Immigration Minister should be held responsible for DIMIA's failings. For example, Leader of the Opposition in the Senate, Senator Chris Evans stated:

Mr Comrie has done an excellent job in providing his report. It is the latest revelation of incompetence and mismanagement in Senator Vanstone's department. It reinforces, unfortunately, many of the damning findings of the Palmer report into the case of Ms Rau. Mr Palmer commented that it was difficult to see how the people responsible for such failed practices, poor decisions and regrettable outcomes could have the credibility and objectivity to bring about the fundamental change of mindset that is necessary. But Senator Vanstone ignored that finding and recommendation by Mr Palmer. Mr Howard, the Prime Minister, also ignored that recommendation. Senator Vanstone remains responsible for the department, although she accepts no responsibility for what it does.¹³

1.13 The doctrine of individual ministerial responsibility is central to the Westminster parliamentary system. In general terms, the doctrine states that ministers are individually responsible to the Parliament for actions taken under their authority. In particular, this relates to the actions taken by the portfolio department and agencies for which they are responsible. In the event of departmental error, the principle requires that the minister accepts responsibility for the mistake and if possible corrects it. If the departmental failure is sufficiently serious, the minister should resign.

1.14 However, the committee notes that the doctrine has evolved, and continues to evolve over time. Over the past 30 years, as government departments have grown larger, more complex and diverse, new accountability mechanisms have been introduced to provide a necessary counterbalance to the growth of bureaucratic decision-making and its impact on the lives of ordinary people and businesses. Examples of accountability mechanisms which now apply to government departments include the Freedom of Information legislation, the Commonwealth Ombudsman, judicial review of decisions, and the Senate Estimates process.

1.15 As a result of the growth in public sector administration and accountability, the doctrine has been eroded. Ministers are accepting less direct responsibility for actions taken under their authority. Given the extremely broad range of issues that modern government departments deal with, it would be unreasonable for ministers to be expected to take responsibility for all of the actions of those under their authority. The principle in its contemporary form therefore does not cover situations beyond a

12 See for example, Palmer Report, Appendix A, pp 196-197.

13 Senator Chris Evans, *Senate Hansard*, 10 October 2005, pp 50-51.

Minister's knowledge, in which case the Departmental Secretary or some other senior official must take responsibility.

1.16 The Prime Minister has also released guidelines on ministerial responsibilities entitled *A Guide on Key Elements of Ministerial Responsibility*. According to these guidelines:

Ministers do ... have overall responsibility for the administration of their portfolios and for carriage in the Parliament of their accountability obligations arising from that responsibility. They would properly be held to account for *matters for which they were personally responsible*, or where they were *aware of problems but had not acted to rectify them*.¹⁴ [emphasis added]

1.17 These two circumstances conveniently cover the two situations that the committee considers to be at the heart of the allegations against the Minister for Immigration, Senator the Hon. Amanda Vanstone and the former minister, the Hon. Mr Philip Ruddock MP. That is:

- the apparent failure of the former Minister to properly exercise his discretionary powers under sections 351, 417 and 501 of the *Migration Act 1958*; and
- the failure of the former and current Ministers for Immigration to act to rectify the 'systemic' and 'catastrophic' problems within the culture of the Department of Immigration and Multicultural and Indigenous Affairs prior to the public outcry over the fate of Cornelia Rau and Vivan Solon.

Personal responsibility

1.18 From time to time, legislation grants ministers special discretionary powers regarding particular issues. The use of these special powers may have implications, which at times can be far-reaching, on the individual rights of real people. Under these circumstances, it is reasonable to expect that certain safeguards will be put in place to counterbalance the use of discretionary power. As a general rule, the greater the powers granted, the higher the degree of ministerial responsibility which must be demanded.

1.19 In relation to immigration policy, successive governments have acknowledged the need for greater safeguards when individual liberties are at risk:

Protection of individual liberty is at the heart of Australian democracy. When there exist powers that have the capacity to interfere with individual liberty, they should be accompanied by checks and balances sufficient to

14 Prime Minister the Hon. John Howard MP, *A Guide on Key Elements of Ministerial Responsibility*, 1998, p. 13, www.pmc.gov.au/guidelines/docs/ministerial_responsibility.rtf (accessed 8 December 2005).

engender public confidence that those powers are being exercised with integrity.¹⁵

1.20 The Migration Act grants the Minister for Immigration a wide range of discretionary powers. In general, these powers allow the Minister to intervene in various circumstances where the Minister thinks that it is in the public interest to do so. For example, the Minister is able to intervene personally in visa applications after the Migration Review Tribunal or the Refugee Review Tribunal hands down a decision, where the Minister thinks that it serves the public interest.¹⁶

1.21 In March 2004, a Senate Select Committee prepared a report on Ministerial Discretion in Migration Matters. The report noted that the ministerial discretion powers relating to visa applications were inserted into the *Migration Act* to 'provide an outlet to deal with difficult cases that did not fit statutory visa criteria'¹⁷. The report found that the information provided by DIMIA on the use of ministerial discretionary powers in some cases seems 'to raise more questions than they answer, creating room for speculation about [Minister Ruddock's] use of his powers'.¹⁸

1.22 According to the report, in cases where the discretionary power is used to grant a visa, the sole accountability mechanism is a requirement that the minister table in parliament his or her reasons for thinking intervention is in the public interest. This was often seen to be lacking. Other than this requirement, the powers are non-compellable, non-reviewable and non-delegable. The report found that 'the lack of transparency and accountability of the minister's decision making process is a serious deficiency in need of urgent attention'.¹⁹

1.23 In the committee's view, there can be no doubt that Ministers must be personally accountable where they personally exercise power.

Were Ministers aware of DIMIA's cultural problems?

1.24 Soon after the Palmer Report was made public, the Prime Minister was asked whether, in light of the report's findings, he had considered replacing the Minister. The Prime Minister responded:

No ... because I don't think the circumstances supported such a decision. I indicated last weekend that Ministers should go if they are directly

15 Quoted by Mick Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, July 2005, p. i.

16 Sections 351 and 417, *Migration Act 1958*.

17 Senate Select Committee on Ministerial Discretion in Migration Matters, *Report*, March 2004, p. xi.

18 Senate Select Committee on Ministerial Discretion in Migration Matters, *Report*, March 2004, p. xiii.

19 Senate Select Committee on Ministerial Discretion in Migration Matters, *Report*, March 2004, p. xiii.

responsible for significant failings, or mistakes or if their continued presence in the Government is damaging to the Government. I have full confidence in Senator Vanstone. I don't think for a moment in the circumstances of this case either of those conditions arose.²⁰

1.25 However, in the committee's view, the 'defensive and self-protective' culture²¹ that has developed in the department has been a direct result of the government's tougher immigration policy, led and implemented by Ministers Ruddock and Vanstone. The committee believes that senior officials within the department have been captured by the government's own culture. Further, the committee considers that it is inappropriate for Ministers to hide behind a departmental 'culture' which, in the committee's view, has developed in response to the needs and demands of Ministers Ruddock and Vanstone.

1.26 As noted earlier in this chapter, the Palmer Report concluded that there is a serious cultural problem within DIMIA and that 'urgent reform is necessary'. The report identified one of the reasons behind this cultural problem was 'the framework within which DIMIA has been required to operate'.²² This clearly demonstrates that the government's immigration detention policy, which has undergone drastic modification and strengthening over the past five years, has contributed to the cultural problems within DIMIA. The committee is of the view that it is the responsibility of the relevant department to implement government policy. It must fall upon the department to set up effective management and administrative processes to carry out government policy. However, the committee considers that the Minister must ensure that government policy is being effectively, fairly and humanely implemented, particularly in circumstances where there are such wide-ranging and fundamental policy shifts as have been experienced in immigration policy over the past five years. The committee is concerned that this did not happen, and that Ministers appear to be seeking to avoid responsibility which is rightly theirs.

1.27 The committee also notes that many of the serious and systemic cultural problems stem from the upper echelons of DIMIA's compliance and detention management area²³ — that is, senior officials that on occasions would be in daily contact with the Minister and his or her advisers. The Palmer Report notes that the established DIMIA organisational structure and arrangements 'fail to deliver the outcomes required by the government in a way that is firm but fair and respects human dignity'.²⁴

20 Transcript of the Prime Minister the Hon. Mr John Howard MP, Joint Press Conference with Senator the Hon Amanda Vanstone, Minister for Immigration, Parliament House, Canberra, 14 July 2005, available from www.pm.gov.au/news/interviews/Interview1460.html (accessed 9 December 2005).

21 Palmer Report, p. ix.

22 Palmer Report, p. ix.

23 Palmer Report, p. 166.

24 Palmer Report, p. x.

1.28 The findings of serious cultural problems within DIMIA which were raised by the Palmer Report were also supported by the Comrie Report:

It is reasonable to conclude that the problems discussed in the Palmer report were entrenched in DIMIA back in 2001, when the events associated with Vivian began.²⁵

1.29 The Comrie Report further stated that:

Since the circumstances of the Alvarez matter first arose in 2001 and the Palmer report focused on matters that occurred in 2004, this Inquiry ... concludes that many of the systemic problems identified by both investigations had been present in DIMIA for some years.²⁶

1.30 The committee believes this begs the question: why then did the government, and in particular the Minister, not act earlier to insist that DIMIA change its management approach in order to effectively and fairly deliver the government's immigration detention policy?

1.31 As one journalist noted after the release of the Palmer Report:

The ministers set the tone, the parameters and the mindset. The officials, senior and otherwise, were merely mechanics trying to read and to respond to what ministers wanted. Nothing would have changed if the Rau and Alvarez cases had not been exposed.²⁷

1.32 The committee endorses the view of Professor Richard Mulgan, Director of the Policy and Governance Program in the Asia Pacific School of Economics and Government at the Australian National University:

Responsibility for a departmental culture of harshness must lie, in part, with the minister herself, as well as with her predecessor, Philip Ruddock, and the Prime Minister, John Howard, who public backed a hard-line asylum and refugee policy.²⁸

1.33 As the Minister for Citizenship and Multicultural Affairs himself recently acknowledged to Parliament, DIMIA has, since 2001, merely done what the Government has instructed it to do.²⁹

1.34 A final matter that arises in relation to ministerial responsibility is the role of the minister's office and the minister's advisers. As became apparent in the Comrie

25 Comrie Report, p. 31.

26 Comrie Report, p. xvi.

27 Geoffrey Barker, 'Blame belongs at the top', *Australian Financial Review*, 18 July 2005, p. 54.

28 'DIMIA: the buck stops where?', *Public Sector Informant*, July 2005, p. 8. Note also the comments of Mr Comrie, *Committee Hansard*, 8 November 2005, p. 35

29 The Hon John Cobb MP, Minister for Citizenship and Multicultural Affairs, *House of Representatives Hansard*, 11 October 2005, p. 10.

inquiry, the Minister's staff play a vital role in many aspects of the department's day-to-day administration. As questioning during the Committee's hearings demonstrated, in the case of the removal of Vivian Alvarez, emails relating to Ms Alvarez were sent to the Minister's office on 4 April 2005, yet were not responded to until 21 April 2005 – seventeen days later.³⁰ However, notwithstanding the clear involvement of the Minister's office in the affair, the terms of reference for the Comrie inquiry clearly excluded the Minister and her staff from any investigation.³¹

Committee view

1.35 The roles, powers and corresponding accountabilities of ministers vis-a-vis their departments have been changing considerably over the past decade. As this chapter has examined in the context of the Migration Act, there has been a simultaneous growth in the extent of ministerial discretion and decline in the traditional doctrine of ministerial responsibility for the actions and administration of their department. Much of this is necessary and justified given the complexity of public administration and the wide ranging scope of departmental decision making.

1.36 Nevertheless, the committee considers it important that accountability measures keep pace with these developments. In particular, the creation of terms of reference for inquiries that exclude the Minister and the office is simply not acceptable. This is particularly the case given the wider context in which Senate Committees are unable to question either Ministers or their staff.³² As such, scrutiny is therefore non-existent in the most important area of public administration.

Recommendation 1

1.37 The committee recommends that the terms of reference for any future independent inquiries into the administration of the Migration Act provide the authority for the investigation to include both the Minister and the Minister's office.

30 Mr Comrie, *Committee Hansard*, 8 November 2005, p. 31

31 Mr Comrie, *Committee Hansard*, 8 November 2005, p. 30

32 On this point, the committee notes the report of the Senate Finance and Public Administration References Committee examination of employment, management and accountability of staff under the *Members of Parliament (Staff) Act 1984* (the MOPS Act), October 2003.

