

Contemporary Comments

Slipping through the net? Some thoughts on the Cornelia Rau and Vivian Alvarez Inquiry

Introduction

The unlawful detention of Australian resident, Cornelia Rau, and the unlawful removal of Australian citizen, Vivian Alvarez, by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA)¹ have been headline news in Australia during 2005. Revelations about the indefensible mistreatment of both women have seriously embarrassed an unusually apologetic Federal Government and thrown a spotlight on practices that are likely to have affected numerous other nameless people, particularly asylum seekers, who struggle to attract the same levels of government contrition or sympathy, especially if they are detained away from public scrutiny in remote locations such as Nauru and Christmas Island.

The reports of the Inquiry initiated by Immigration Minister, Amanda Vanstone, into both of these matters² make interesting, if somewhat depressing, reading. Both provide evidence of high levels of bureaucratic incompetence, if not outright malevolence; a lack of attention to the mental health and personal sensitivities of both women; a punitive, inadequate and inappropriate immigration detention regime; and an internal DIMIA culture driven by the exclusionary imperatives of the Government's border protection policies. Nevertheless, both documents are still very limited in their scope, raising more questions than their authors seem able to ask or answer. This might partly be explained by the very tight terms of reference set by the Minister (Palmer Report, Appendix A; Comrie Report, Appendix A), which do not invite any examination of the Government policies that shape DIMIA's activities. Indeed, the Palmer Report is prefaced by an outline of the principles governing Australia's immigration policy that concludes with the statement:

1 The Department's current name is used in this Comment.

2 The Inquiry into the detention of Cornelia Rau, chaired by former Australian Federal Police Commissioner, Mick Palmer, was established on 9 February 2005. On 2 May 2005, the Palmer Inquiry was also asked to examine the circumstances surrounding the removal of Vivian Alvarez. Some provisional findings regarding Vivian Alvarez were incorporated into the Palmer Report, which was published in July 2005. Responsibility for completing the Alvarez investigation was then passed on to the Commonwealth Ombudsman, who is investigating 201 cases of detainees later found to be lawful where similar DIMIA errors may have occurred. Although the report of the Alvarez Inquiry was published by the Ombudsman in September 2005, the Inquiry was conducted by former Victorian Police Commissioner, Neil Comrie, who had commenced his investigations into the matter as part of the Palmer Inquiry. Here, I will refer to them as the Palmer and Comrie Reports. On 16 June 2005, the Senate Foreign Affairs, Defence and Trade References Committee established its own Inquiry into the Alvarez case, referring to her as Vivian Solon. However, Neil Comrie requested that no officers involved in the Solon matter be approached in relation to their dealings with her until his investigation was finalised. An interim report, based largely on departmental records, was published in September 2005. The final report is due to be released as I write (12 October 2005).

This policy was introduced in 1992 and has been maintained by successive governments. The Inquiry's comments in this report are not intended to call the policy into question (Palmer Report:1).

Consequently, there is no attempt to assess these episodes in light of the broader human rights standards employed by previous inquiries such as those conducted by the Human Rights and Equal Opportunities Commission (HREOC).³ As a result, both reports have a largely managerial focus that concentrates on 'DIMIA's culture, policies, systems, processes and staff shortcomings in connection with the apprehension and detention of suspected unlawful non-citizens' (Comrie Report:5). This enables official responses to be confined to operational matters within DIMIA; reduces political accountability; and provides some insight into the limits of the state investigating itself, with implications for how criminologists might approach the concept of state crime.

The two women

Both reports record in detail the sequences of events leading to the discovery of the two women. Only a brief summary is provided here but in each case, it is clear that had the fate of the women been left to DIMIA alone, the consequences could have been even worse.

Cornelia Rau

Cornelia Rau was a permanent resident of Australia who was unlawfully detained for ten months under s119 of the *Migration Act* 1958. She spent six months in a women's prison in Brisbane and the remainder at the Baxter Immigration detention centre, near Port Augusta in South Australia.

Cornelia Rau arrived in Australia with her family from Germany, aged 18 months, in 1967. She spoke fluent Australian-accented English and according to her sister, could not engage in 'a sustained or very complex conversation in German' (Palmer Report:1-2). In about 1996, she began suffering from mental health problems, including psychotic episodes. In March 2004, she disappeared from a Sydney hospital but because this had happened before, she was not reported missing by her family for five months. In late March, she turned up in north Queensland where, having given conflicting accounts of her identity to the police, she was detained at the request of DIMIA. Following an interview with DIMIA in Cairns, during which she maintained she was German and gave her name as Anna, she was detained in the Brisbane Women's Correctional Centre (BWCC). As a result of her behaviour, she was transferred to the Princess Alexandra Hospital in Brisbane on 20 August for a psychiatric assessment. She was returned to prison after six days, after being diagnosed as not suffering from a mental illness. She continued to have difficulty coping at BWCC, where she was placed on four separate occasions in confinement cells used for prisoners who have breached discipline.

On 6 October, Cornelia was sedated, placed in restraints and transferred against her will to Baxter detention centre. There, she underwent an erratic series of psychological and psychiatric assessments. A psychologist initially diagnosed her as having a personality disorder and her behaviour was regarded as 'attention seeking'. On 6 November, a psychiatrist recommended a further assessment at a psychiatric facility but this was not properly followed up. A further assessment at Baxter on 7 January 2005 suggested she was schizophrenic. Eventually, on 3 February she was committed for further assessment under the South Australian *Mental Health Act* but later the same day, as a result of a chain of

3 See, for example HREOC (1998) and (2004).

events triggered on 21 January by the circulation of details about her plight that appeared on the Baxterwatch website,⁴ Cornelia was identified by her family and transferred to hospital for urgent psychiatric treatment. During her time at Baxter, Cornelia's behaviour was considered 'disruptive and non-compliant ... and she persisted in the attitude that she had done nothing wrong' (Palmer Report:207). She spent only fourteen days in normal 'open' conditions. The rest of her detention was spent in 'behaviour management' units, where she had little privacy; was often under the surveillance of male officers; and restrictions on the regime included limiting time out of her room to four two-hour blocks per day.

Vivian Alvarez

Vivian Alvarez was unlawfully detained under s189 of the *Migration Act* 1958 and unlawfully removed to the Philippines under s198 of the Act in July 2001. At the time of her removal, she suffered from serious physical and mental health problems. For most of the time since her arrival in Manilla, she has lived in a charitable hospice.

Vivian Alvarez Solon was born in the Philippines. In 1984, she married an Australian, Robert Young, and in 1986, she became an Australian citizen. The couple divorced in 1993. Between 1995 and 2000, Vivian had contact with various mental health services in Queensland and in 1999, was diagnosed as suffering from 'a paranoid psychotic illness complicated by alcohol and illicit substance misuse' (Comrie Report:10). On 16 February 2001, a day after her brother had called the police to have her removed from his house for 'acting strangely', Vivian failed to collect her younger son from a Brisbane day care centre. Near midnight on 30 March, she was discovered seriously injured in a park in Lismore and taken to Lismore Base Hospital, where she was subsequently detained under the NSW *Mental Health Act*. On 3 May, she was interviewed in hospital by DIMIA officers and assumed to be an 'unauthorised, undocumented arrival who might have been manipulated by certain people for sexual purposes' (Comrie Report:13). On 12 July, Vivian was discharged from hospital having been treated for a spinal lesion and taken to Southport by DIMIA officers for interview. During the course of the interview, the record of which she was unable to sign, Vivian told the officers she was an Australian citizen and that she wanted to remain in Australia. Although it should have been possible, DIMIA officers could not find a record of her under the name of Vivian Alvarez and failed to properly pursue the information she gave them. She was detained and placed under guard at a motel where she had little privacy and no access to the medical facilities available to people held in immigration detention centres, even though one of the guards logged her condition as 'basically immobile/she requires assistance for walking, dressing and all basic hygiene needs' (Comrie Report:15). On 16 July, an undated, unauthorised note was placed on her file: 'Smuggled into Australia as a sex slave. Wants to return to the Philippines. Has been physically abused' (Comrie Report:15). On 17 July, the Queensland Police Missing Persons Bureau activated a missing persons report, after being eventually notified about the apparent abandonment of Vivian's son. On 19 July, a locum doctor, with no access to her medical records, declared Vivian fit to travel. She was removed from the country the following day accompanied by a Queensland Police officer. Despite concerns raised earlier by the Philippines Consulate General in Brisbane, no arrangements were made for Vivian's care on arrival in Manilla and she was simply left at the airport. By chance, she was put into contact with the Overseas Workers Welfare Association, who passed her onto the Daughters of Charity with whom she remained until 'discovered' by Australian officials on 12 May 2005.

4 <www.baxterwatch.net>.

During the intervening period, and as early as July 2003, three senior DIMIA staff were made aware of the unlawful removal but failed to follow it up. A number of more junior staff also knew. Vivian's photograph and name were broadcast on a missing persons program on television on 20 August and 'the unlawful removal of Vivian Alvarez was the subject of much discussion in [DIMIA's] Brisbane Compliance and Investigations Office in September and October 2004' (Comrie Report:30). In September 2003, the Queensland Police notified the Department of Foreign Affairs and Trade (DFAT) that Vivian had been removed but neither the police nor the two DFAT officers concerned pursued the legality of the removal. Following the revelations regarding Cornelia Rau, Vivian's former husband, Robert Young, who had persistently contacted DIMIA after being told by the Queensland Police in 2003 that Vivian had been removed,⁵ emailed the Minister's office in April 2005. This triggered the chain of events that uncovered Vivian's unlawful removal but has yet to result in her return to Australia.⁶

Findings, recommendations and omissions

Much of the media coverage suggested both reports were highly critical of aspects of DIMIA's activities. At one level, this is true. There are a number of adverse findings in relation to the important matters such as the regime at Baxter; the role of its private operator GSL; the provision of mental health services; and the use of the prison system for immigration detainees (Palmer Report:xv-xxxvi; Comrie Report:xvii-xxvi). There is also substantial criticism of DIMIA's internal culture. According to Palmer:

There is a serious cultural problem within DIMIA's immigration compliance and detention areas: urgent reform is necessary. 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 self-protective and defensive, a culture largely unwilling to challenge organisational norms or to engage in genuine self-criticism or analysis (Palmer Report:ix).

Comrie is even blunter:

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

For some DIMIA officers, removing suspected unlawful non-citizens has become a dehumanised, mechanical process. The Inquiry is particularly worried by the fact that some DIMIA officers it interviewed said they thought they would be criticised for pursuing welfare-related matters instead of focusing on the key performance indicators for removal (Comrie Report:31).

Unfortunately, having raised the bar to a level where some questioning of Government policy is the obvious next step, both reports proceed to slip under it, in two principal ways.

5 One of the more curious records produced by Comrie is the note taken by the officer at the DIMIA Contact Centre in Sydney (which takes Brisbane inquiries) of a phone call from Robert Young on 24 September 2003. After noting that the caller had been told by the police that his wife had been removed from Australia in July 2001, the note concludes: 'he took my name ... and said he would ring again when [name removed] is available. He didn't sound irate or annoyed, but he sounded more like Anthony Hopkins from *Silence of the Lambs*. And I kid you not' (Comrie Report:49). Although the information was circulated at the Contact Centre, nothing was followed up. And despite the perceived shortcomings in Robert Young's phone manner, the Inquiry recommended he be commended by the Minister for his diligence in pursuing the matter and bringing it to the attention of the Australian Government (Comrie Report:75).

6 Negotiations are still taking place over the compensation package offered by the Federal Government. See Clennell et al. (2005).

First, they focus substantially on organisational and operational matters such as better interagency co-operation; more efficient and coherent information systems; improved systems of decision making and review; more staff training; and more oversight and review of the Baxter contract. Second, they argue that DIMIA officers failed to interpret properly the relevant legislation or diligently follow internal DIMIA instructions. Thus, in relation to Cornelia, Palmer found the original decision to detain pursuant to s189 of the *Migration Act* was lawful because at the time the officer reasonably suspected she was an unlawful non-citizen. However, because of a failure to subject that suspicion to ongoing review, the detention subsequently became unlawful (Palmer Report:21–29). A similar analysis was applied to Vivian's case, but here, Comrie found the suspicion that led to the original detention was not reasonable, specifically because of 'the failure to test the information Vivian provided in circumstances in which her poor mental health was readily apparent, the inadequacy of the investigation, and the lack of rigorous analysis of the available information' (Comrie Report:68). Moreover, the decision to remove Vivian less than a week after an interview in which she said she wanted to stay in Australia and apply for a visa, disregarded the flexibility allowed under the *Migration Regulations* 1994, and although the questions of visas was ultimately irrelevant for an Australian citizen, the Inquiry found 'the visa provisions were manipulated to accommodate the officers' management of Vivian's case' (Comrie Report:70–71).

It is a moot point whether the application of the legislation in line with the Inquiry's interpretation would have reduced Cornelia's detention or prevented Vivian's removal. It is also questionable whether the recently announced improvements to the Baxter regime (DIMIA Press Release, VPS 114/2005, 19/9/05) will have a significant impact, given the deprivation of liberty; the prolonged uncertainty; and the high rates of self-harm and mental health problems associated with detention.⁷ Proposed changes to the *Migration Act*, that further extend courts' powers to summarily dispose of immigration proceedings and impose personal liability for legal costs on lawyers will also further restrict independent oversight and legal representation (Newhouse 2005).⁸

From the Government's standpoint, the focus on organisation and process enabled the Minister to 'accept the thrust of the findings and recommendations' of both reports (DIMIA press release, VPS 087, 14/7/05; DIMIA Secretary's Reports, 27/09/05 and 4/10/05), without being too challenged by wider questions of responsibility. The Inquiry also navigated a very careful course on this issue. Palmer attributed no specific responsibility, although by implication the Secretary had to bear some responsibility for the internal culture. That person was Bill Farmer, who in the week the Palmer Report was presented to Cabinet, was chosen as Australia's next Ambassador to Indonesia. By contrast, Comrie found that the three senior DIMIA officers who ignored information about Vivian's unlawful removal might have breached the Australian Public Service Code of Conduct (Comrie Report:77–83). One of the officers subsequently resigned, while two more now face disciplinary procedures.

The moving of chairs in this way does little to inspire confidence that any serious changes will take place within DIMIA, especially in the absence of a thorough open inquiry such as a Royal Commission. It is also no substitute for a proper analysis of how the culture

7 Those with experience of dealing with the psychiatric problems of detainees are particularly critical of the cosmetic nature of the changes. See for example, the interviews with Dr Jon Jureidini, broadcast on *Lateline*, on 15 July 2005 (<<http://www.abc.net.au/lateline/content/2005/s1415568.htm>>); and *PM* on 21 September 2005 (<<http://www.abc.net.au/pm/content/2005/s1463711.htm>>). For a report on recent research by Denise Leith revealing the extent of self-harm in immigration detention centres, see Topsfield (2005). See also Silove and Steel (1998); Sultan and O'Sullivan (2001) and Steel et al (2004).

8 George Newhouse is the solicitor for Vivian Alvarez. See Migration Litigation Reform Bill (2005).

developed in the first place. While individual DIMIA staff might not have exercised the minimal discretion allowed under s189, the fact there has been a series of amendments to the migration legislation since 1992 introducing mandatory measures, a high degree of administrative power and reduced judicial scrutiny, surely has some bearing on the way DIMIA officers perceive their powers and responsibilities. Moreover, the whole border protection discourse that developed during the 1990s has enforcement at its core.⁹ Vivian Alvarez was removed from the country only a few weeks before the Tampa episode triggered a full-scale military mobilisation that gave rise to the 'Pacific Solution' and an election campaign run largely on the merits of mandatory detention and removal, which remain central to Government policy.

The Inquiry provides only a hint of the atmosphere within the Department following those events. However, it seems Vivian's case might just be the tip of the iceberg. One of the DIMIA officers who failed to act on the information that she had wrongly been deported told the Inquiry: 'There was a lot worse things going on than this particular case'. He then elaborated:

We were trying to deal with a huge amount of complex and difficult removal cases, etcetera, at the time ... But that's not an issue I can resolve. This is bigger than me. This is huge. As I said, there were—I'd begun to think about it and I couldn't even think of a way out of it, insofar as how you could begin to resolve it (Comrie Report:81).

Both of these DIMIA 'mistakes' had serious consequences for the women involved and provide important insights into the dynamics of criminalising unauthorised migrants. Vivian's case also highlights the lack of concern for someone who is allegedly trafficked and/or exploited as a sex slave, notwithstanding the provisions of the *Criminal Code Amendment (Slavery and Sexual Servitude) Act* 1999, which like the subsequent *Criminal Code Amendment (Trafficking in Persons Offences) Act* 2005, focus largely on the criminal justice process, that is the policing of traffickers, rather than the rights of the victim.

Both cases also raise issues that connect with recent criminological literature on state crime (Green & Ward 2004; Pickering 2005). Both make it apparent that adopting a traditional criminal justice approach of seeking to find an individual to blame for a specific wrongdoing, prevents a serious analysis of the institutional forces at work. Conversely, they highlight the difficulty in establishing state deviance, when we are told that all along more flexible ways of interpreting rigid legislation and guidelines were Departmental policy. For criminologists, the challenge is to establish a framework for examining such cases that allows culpability for the acts of individual immigration officers to be shared by those centrally responsible for the formulation, legitimisation and enforcement of border policy. Our starting point should be the systemic denial of human rights, rather than cracks in the enforcement apparatus.

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9 To that end, DIMIA produces regular reports on immigration compliance. See, for example, DIMIA (2005). It also appears that until at least June 2001, DIMIA may have been receiving bonus payments for detaining and deporting illegal entrants (<<http://www.abc.net/news/newsitems/200510/s1481126.htm>>).

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