

Report on People Detained and later Released as Not Unlawful 1 July 2021 to 30 June 2022

Introduction

This is the first in a new series of reports on the Ombudsman’s ongoing investigation into people who are detained in immigration detention and later released as not unlawful non-citizens.

Under the own motion investigation, we receive reports from the Department of Home Affairs (the department) about individuals detained on suspicion of being an unlawful non-citizen and who were subsequently found to be not unlawful and released.

This report covers the period 1 July 2021 to 30 June 2022.

The cases identified in these reports demonstrate the importance of ongoing improvements to policies and procedures, training and quality assurance processes in preventing inappropriate detentions.

This ongoing investigation into cases of inappropriate detention continues to provide an important opportunity to identify and address significant and/or systemic issues.

We make recommendations for improvement on specific cases.

Background

The Ombudsman commenced this investigation in 2007 following 2 high profile cases – Cornelia Rau (an Australian citizen who was unlawfully detained for 10 months in 2004 / 2005) and Vivian Alvarez (an Australian citizen who was unlawfully removed from Australia in 2001).

Overall, the number of people inappropriately detained and the average length of time that a person is held in inappropriate detention has decreased since a peak in 2017.

The department continues to address the issues identified in these reports and mitigate associated risks. We will continue to monitor this caseload.

Contact us

ombudsman.gov.au
1300 362 072

GPO Box 442
Canberra ACT 2601

This ongoing investigation continues to provide an important opportunity to identify and address significant systemic issues.

1 July 2021 to 30 June 2022 - Analysis and Suggestions

Visa cancellation error

The reports received from the department from 1 July 2021 to 30 June 2022 include three instances where a visa holder was not provided with, nor given an opportunity to respond to, information that was given weight in making a visa cancellation decision which is contrary to sections 119 and 120 of the *Migration Act 1958 (Cth)*. On average, the individuals were inappropriately detained for 4.6 days.

In 2019, the department implemented a risk management approach to preventing and detecting visa cancellation errors. However, these recent errors indicate that it may now be timely for the department to provide some additional training to delegates and ensure that such cases, when they do arise, are used as an opportunity to reinforce existing process and procedures.

Recommendation

1. The department should provide appropriate and timely training, initially by 31 October 2023 and then on an ongoing basis, on the correct process and procedures to follow in relation to issuing Notifications of Intention to Consider Cancellation and ss119 and 120 of the *Migration Act 1958 (Cth)* to delegates making visa cancellations.
2. The department should update training, initially by 31 October 2023 and then on an ongoing basis, to include the potential consequences of errors for individuals impacted by them, as well as for departmental decisions.

Issues arising in connection with the XJLR judgment

The reports also include three cases arising from the XJLR¹ judgment by the Full court of the Federal Court of Australia on 3 February 2022 in which the Court held that a term of imprisonment can only constitute grounds to revoke a visa on one occasion. On average the individuals were inappropriately detained for 47.3 days. When conducting its review of people potentially affected by the XJLR case, the department prioritised those in immigration detention. The department also noted that it has conducted a review of any persons who may be in prison who were not identified in the initial review.

Recommendation

3. The department should provide the Ombudsman by 31 October 2023 with assurance that the review of people potentially affected by the XJLR case and held in prison has been finalised and any visa cancellation errors identified and rectified prior to release from prison.

Timing of communication of Ministerial decisions

Four cases of inappropriate detention of 1 day each arose when the department delayed releasing detainees from held detention because the Minister's decision to grant visas was communicated to the department after close of business on a Friday evening. The department reported that, while necessary arrangements to facilitate release from detention commenced on the day of the decision, it considered it was impracticable to finalise arrangements and release the detainees late at night.

¹ [XJLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs \[2022\] FCAFC 6](#)

We understand that, while a decision affecting an individual's immigration status must be communicated and acted upon promptly, there may be occasions where it is not practical, or in keeping with the department's duty of care, to immediately release from detention where it may adversely affect the individual/s concerned.

However, where release from detention is delayed, the department should find alternative accommodation or obtain the consent of the affected individual to remain in detention, until the appropriate arrangements can be put in place to support the individual following release, in line with the available procedural guidance.

Recommendation

4. The department should amend its Procedural Instruction, *Legal services – Notification and communication of immigration decisions*, by 31 October 2023, to state that where the department forms the view that release from detention cannot be effected immediately alternative accommodation arrangements must be put in place, or consent to remain in the immigration detention facility must be obtained from the affected individual, pending the finalisation of appropriate arrangements to support the individual in the community.

Visa notification errors

The reports include 5 cases the department characterised as visa notification errors, three of which resulted from errors relating to incorrect addressing of notification letters, and one from a lack of evidence of timeliness of delivery. On average, the individuals were inappropriately detained for 3.6 days. The Ombudsman considers that the department has put in place appropriate process improvements, quality assurance checks and training to address these type of notification errors.

The fifth reported case of inappropriate detention in this category arose from errors relating to determining the status of visa applications affected by the significant migration regulation changes that came into effect on 1 September 1994, in addition to a notification error.

In this case, the individual was placed into immigration detention upon the conclusion of a custodial sentence, following which the Status Resolution Helpdesk obtained legal advice that there was an outstanding protection visa application with an associated bridging visa.

Recommendations

5. The department should review the Status Resolution risk matrix used by the Detention Review Manager team by 31 October 2023 to ensure any cases potentially affected by the 1 September 1994 migration regulation changes be included as priority 1 cases and escalated to Status Resolution Helpdesk for review.
6. The department should finalise the standard operating procedures on managing non-citizens in criminal detention by 31 October 2023 including appropriate guidance on the management of the conclusion of a period of criminal custody and deliver training to all relevant staff.

Visa application withdrawal error

There was one visa application withdrawal error resulting in the individual being inappropriately detained for 4 days. This is the first error of its type identified in this

investigation. The case arose from an issue with a form that is now obsolete. The new version of the form contains an update to prevent a similar problem occurring. We are satisfied with the action taken.

Corrective Actions Analysis

In the Monitoring Immigration Detention Report 2020-2021, the department stated in its response that it had commenced work aimed at analysing corrective actions identified through inappropriate detentions reported to the Ombudsman since 2018. This analysis was to focus on identifying systemic or recurring trends across cases where further corrective actions or investigation may be required, to be included in the January to June 2022 report.

The January to June 2022 report contained the usual corrective actions analysis including the previous three reporting periods.

Recommendation

- The department should provide the Ombudsman with a copy of the corrective actions analysis from 2018 by 31 October 2023.

Summary of Recommendations

Ref	Description
-----	-------------

1	The department should provide appropriate and timely training, initially by 31 October 2023 and then on an ongoing basis, on the correct process and procedures to follow in relation to issuing Notifications of Intention to Consider Cancellation and ss119 and 120 of the <i>Migration Act 1958 (Cth)</i> to delegates making visa cancellations.
2	The department should update training, initially by 31 October 2023 and then on an ongoing basis, to include the potential consequences of errors for individuals impacted by them, as well as for departmental decisions.
3	The department should provide the Ombudsman by 31 October 2023 with assurance that the review of people potentially affected by the XJLR case and held in prison has been finalised and any visa cancellation errors identified and rectified prior to release from prison.
4	The department should amend its Procedural Instruction, <i>Legal services – Notification and communication of immigration decisions</i> , by 31 October 2023, to state that where the department forms the view that release from detention cannot be effected immediately alternative accommodation arrangements must be put in place, or consent to remain in the immigration detention facility must be obtained from the affected individual, pending the finalisation of appropriate arrangements to support the individual in the community.
5	The department should review the Status Resolution risk matrix used by the Detention Review Manager team by 31 October 2023 to ensure any cases potentially affected by the 1 September 1994 migration regulation changes be included as priority 1 cases and escalated to Status Resolution Helpdesk for review.
6	The department should finalise the standard operating procedures on managing non-citizens in criminal detention by 31 October 2023 including appropriate guidance on the management of the conclusion of a period of criminal custody and deliver training to all relevant staff.
7	The department should provide the Ombudsman with a copy of the corrective actions analysis from 2018 by 31 October 2023.



OFFICIAL

Mr Iain Anderson
Commonwealth Ombudsman GPO Box 442
Canberra ACT 2601

Dear Ombudsman

Thank you for providing the Department of Home Affairs (the Department) with a copy of your *Report on people detained and later released as not unlawful - 1 July 2021 to 30 June 2022* (the DRNU Report).

The Department values the Commonwealth Ombudsman's ongoing investigation into people who are detained in immigration detention and later released as not unlawful non-citizens as part of the Commonwealth Ombudsman's Office own motion investigation.

The Department would like to thank the Commonwealth Ombudsman for the opportunity to provide comments on the DRNU Report prior to its publication. The Department has no other further comments to add regarding the content of the DRNU Report.

The Department's response to the recommendations is provided at *Attachment B - Table of Recommendations – Detained Released not Unlawful Reports 1 July 2021 to 30 June 2022*.

The Department accepts recommendations 1, 2, 3, 5, 6 and 7, and does not accept recommendation 4.

Should you wish to discuss the Department's response, please contact Ms Robyn Miller, Assistant Secretary, Audit and Assurance Branch on 02 6275 5908.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M. Graham'.

Michelle Graham
Acting First Assistant Secretary
Integrity, Security and Assurance Division
Department of Home Affairs

17 May 2023

OFFICIAL

Attachment B Table of Recommendations

Commonwealth Ombudsman's Table of Recommendations – Detained Released not Unlawful Reports 1 July 2021 to 30 June 2022			
#	Recommendation	Accepted Y/N	Department of Home Affairs (the Department) comment
1	The Department should provide appropriate and timely training, initially by 31 October 2023 and then on an ongoing basis, on the correct process and procedures to follow in relation to issuing Notifications of Intention to Consider Cancellation and ss119 and 120 of the <i>Migration Act 1958 (Cth)</i> to delegates making visa cancellations.	Yes	<p>This recommendation has been completed.</p> <p>The Department's training program for cancellation officers now extensively covers the requirements in relation to issuing Notifications of Intention to Consider Cancellation (NOICCs) and section 120 notices.</p> <p>In addition to the training program, the Department has amended the Notice of Intention to Consider Cancellation (NOICC) template to include 'additional information for consideration' for both sections 116 and 109 cancellation consideration cases. This will ensure information that is not relevant to cancellation grounds, but is relevant to cancellation considerations, is presented to the visa holder in the initial NOICC for comment. This will also be updated in procedural instructions.</p> <p>Where adverse information relevant to the consideration becomes known post NOICC, delegates are aware of the requirement to present information to the visa holder either through a section 120 notice or re-NOICC under section 109 of the <i>Migration Act 1958</i>. This is outlined in the current General visa cancellation powers (s109, s116, s128, s134B and s140) procedural instruction.</p> <p>Notifications are also assessed in the Department's internal quality assurance program, and where errors are identified, additional and targeted training or mentoring is provided to the individual officers.</p>

2	The department should update training, initially by 31 October 2023 and then on an ongoing basis, to include the potential consequences of errors for individuals impacted by them, as well as for departmental decisions.	Yes	<p>This recommendation has been completed.</p> <p>As per the response to recommendation 1, the Department’s cancellation training and support materials now outline the consequences of notification errors. Training materials are continually reviewed to ensure that they reflect any changes to interpretation from recent court cases. All material has been reviewed to ensure that information remains accurate.</p>
3	The department should provide the Ombudsman by 31 October 2023 with assurance that the review of people potentially affected by the XJLR case and held in prison has been finalised and any visa cancellation errors identified and rectified prior to release from prison.	Yes	<p>This recommendation has been completed.</p> <p>Legal Opinions undertook an assessment for possible <i>XJLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs</i> [2021] FCA 619 (XJLR) case affected prisoners which commenced in April 2022 and was provided to the National Character Consideration Centre in February 2023. The review indicated that none of the prisoners were affected by XJLR and no further action was necessary.</p>
4	The department should amend its Procedural Instruction, <i>Legal services – Notification and communication of immigration decisions</i> , by 31 October 2023, to state that where the department forms the view that release from detention cannot be effected immediately alternative accommodation arrangements must be put in place, or consent to remain in the immigration detention facility must be obtained from the affected individual, pending the finalisation of appropriate arrangements to support the individual in the community.	Not accepted	<p>The Department notes that these logistical matters are managed at point of notification and coordination on visa grant through published discharge procedures and supporting processes, rather than through the notification procedure.</p> <p>Whilst these may be contemporaneous activities, they are separate processes that are well understood and managed with a common understanding between departmental stakeholders and visa holders accommodated with their explicit and express consent within an immigration detention facility for the shortest possible interval.</p>

5	The department should review the Status Resolution risk matrix used by the Detention Review Manager team by 31 October 2023 to ensure any cases potentially affected by the 1 September 1994 migration regulation changes be included as priority 1 cases and escalated to Status Resolution Helpdesk for review.	Yes	The Department will review the Status Resolution risk matrix used by the Detention Review Manager team and ensure processes are robust and that cases potentially affected by the 1 September 1994 regulation changes are escalated appropriately. The Department notes that in this particular case, the Detention Review Manager appropriately escalated the case to the Status Resolution Helpdesk for review within two business days.
6	The department should finalise the standard operating procedures on managing non-citizens in criminal detention by 31 October 2023 including appropriate guidance on the management of the conclusion of a period of criminal custody and deliver training to all relevant staff.	Yes	<p>The standard operating procedures (SOP) on managing non-citizens in criminal detention has been finalised and published, however since its publication, departmental operational areas have expressed concerns around an element of the SOP.</p> <p>The Department’s Legal Division team have been re-engaged to work through the identified concerns.</p>
7	The department should provide the Ombudsman with a copy of the corrective actions analysis from 2018 by 31 October 2023.	Accepted	<p>The Department wishes to clarify that the work aimed at analysing corrective actions identified through inappropriate detentions is not a separate analysis to that provided in the <i>Report on people detained and later released as not unlawful</i> (the DRNU report). Corrective actions analysis is embedded in each of these reports and involves consideration of all errors within the last four reports provided to the Commonwealth Ombudsman Office. From this analysis, determination is made as to whether any systemic or recurring trends have occurred throughout this period. The analysis (as in the January to June 2022 DRNU report) did not identify any systemic or reoccurring trends requiring further corrective actions or investigation.</p> <p>The Department will continue to analyse corrective actions identified through inappropriate detentions and assess their effectiveness in mitigating similar errors occurring. As part of the ongoing analysis, the Department will identify systemic or recurring trends across cases where further corrective actions or investigation may be required.</p>