COMMONWEALTH OMBUDSMAN

Department of Immigration and Border Protection

THE ADMINISTRATION OF PEOPLE WHO HAVE HAD THEIR BRIDGING VISA CANCELLED DUE TO CRIMINAL CHARGES OR CONVICTIONS AND ARE HELD IN IMMIGRATION DETENTION

December 2016

Report by the Commonwealth Ombudsman,
Colin Neave AM, under the *Ombudsman Act 1976*

REPORT NO. **07**|2016

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ISBN 978-0-9875235-2-5

Date of publication: 21 December 2016

Publisher: Commonwealth Ombudsman, Canberra Australia

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EXECUTIVE SUMMARY

We commenced this investigation in response to complaints received by this office and stakeholder concerns raised with us about the cohort of people who have had their Bridging visas cancelled on the basis of a criminal charge, conviction, or the possibility that the person poses a threat to the Australian community. In particular, we are concerned about the people within that group who are detained based on allegations that lead to criminal charges and also those who are not released once the criminal charges against them have been resolved.

A person must be detained in immigration detention if their visa is cancelled. If they are considered to be an Irregular Maritime Arrival (IMA), the law prohibits them from lodging any further visa application without the personal intervention of the minister. Intervention by the minister is facilitated by departmental identification of cases that fit the guidelines for referral to the minister.

This investigation identified a case management system that is struggling to adequately manage the volume of people in immigration detention. This, coupled with the mandatory requirement for ministerial intervention in many cases before any progress toward status resolution can be made, means people are remaining in detention longer than is desirable.

This investigation sites examples of people who were not prioritised for release from detention after their criminal charges were resolved. This left many subject to unnecessarily prolonged and potentially indefinite periods of immigration detention.

This report also highlights issues associated with the quality of the department's record keeping. The department wasn't able to provide all the information to this office, lawfully requested under the *Ombudsman Act 1976*, within the prescribed time period and, in some cases, not at all. The department has acknowledged and apologised for this failing. The department's data around this cohort appears not to allow for easy extraction and statistical analysis which can explain its inability to provide some of the information requested. The department failed to provide other relevant materials such as submissions, training packages and case specific information, despite repeated requests.

Recommendations

Recommendation 1
That the person who is the subject of a Notice of Intent to Consider Cancellation of a visa under s 116 is given adequate time and resources to seek advice and present their reasons against the cancellation.

Recommendation 2
That the department provide a person with a written notice of decision, including their review rights translated into their own language, when their Bridging visa is cancelled.

The notice should include information regarding:

a) the reasons for the decision to cancel their Bridging visa

b) their right to have the cancellation decision reviewed by the Administrative Appeals Tribunal

c) the applicable timeframe for lodging an appeal with the tribunal

d) details of how to contact the tribunal

e) details of how the department can facilitate contact with the tribunal and a legal representative.

Recommendation 3
That the department:
a) not transfer a person between detention facilities until the statutory time to lodge an appeal has expired (two days), and

b) ensure that all possible steps, in particular providing access to the internet, are taken to ensure that a person can request a review of the decision to cancel their visa within the statutory time frame.

Recommendation 4
That the department:
a) promptly seek the minister's intervention to grant a visa for all cases where the cancellation decision is set aside by the Administrative Appeals Tribunal but the person cannot be released due to the natural expiration of their visa.

b) identify all people in immigration detention whose cancellation decision was set aside by the Administrative Appeals Tribunal and, if not already done, brief the minister about the circumstances of their case seeking the minister's intervention to grant a new visa.

Recommendation 5
That the department ensures its case management and escalation framework adequately supports the timely and efficient identification and referral of cases that meet the minister's guidelines for consideration under s 195A.

PART 1—INTRODUCTION

1.1 The Minister for Immigration and Border Protection (the minister) has a range of powers to cancel a visa under the *Migration Act 1958*. This report is focussed on the administration of his power under s 116(1)(g) and in particular, the cancellation grounds prescribed in r 2.43(1)(p) and (q) of the *Migration Regulations 1994*, the case management of people detained under these provisions and their release from immigration detention These references are set out in full in Attachment A to this report.

1.2 Under r 2.43(1)(p), the minister can cancel a person's subclass 050 or 051 Bridging visa if that person:

- has been convicted of an offence against the law of the Commonwealth, a state, a territory or any other country
- has been charged with an offence against a law of the Commonwealth, a state, territory or another country
- is the subject of a notice issued by Interpol for the purpose of providing a warning or intelligence that the Bridging visa holder has committed an offence against a law of another country and is likely to commit a serious offence
- is the subject of a notice issued by Interpol for the purpose of providing a warning that the Bridging visa holder is a serious and immediate threat to public safety.

1.3 From 29 June 2013 to 9 October 2016, 322 Bridging E visas held by IMAs were cancelled under s 116(1)(g) Reg. 2.43(1)(p).

1.4 Section 116(1)(b) may also be available to cancel a visa where a BVE holder who has a condition on their visa that requires that they do not engage in criminal conduct, does engage in such conduct.

1.5 Cancellation using s 116 is discretionary and governed by Ministerial Direction 63, which requires a delegate to consider the following factors:

- the purpose of the visa holder's travel to and stay in Australia
- the reason for, and extent of any visa condition breach
- the circumstances in which the ground for cancellation arose
- the visa holder's behaviour towards the department
- whether there are persons in Australia whose visas would be cancelled consequentially
- whether Australia has obligations under relevant international agreements that would or may be breached as a result of the visa cancellation
- the impact of cancellation on any victims of family violence; and
- any other relevant matters.

1.6 Where a non-citizen, other than an IMA, has had their BVE cancelled under s 116, they are barred from making any further BVE applications. However, the department retains the

discretion to consider the grant of a BVE without application in order to facilitate release from detention.

Mandatory immigration detention

1.7 The decision to cancel a visa under r 2.43(1)(p) is discretionary. To cancel a visa has serious implications for the Bridging visa holder because Australia has a mandatory immigration detention policy. This means that if a person's Bridging visa is cancelled they become an unlawful non-citizen and are subject to mandatory immigration detention. Due to the cancellation, they are also prohibited from making any further visa applications.

1.8 To leave immigration detention, the person must either depart Australia or be granted a new visa. The latter can only occur in the case of IMAs if the minister personally decides to intervene in the detainee's case by exercising his public interest powers under:

- s 195A to grant a person in detention a visa (referred to as the minister's detention intervention power) or
- s 45A to lift the bar that prohibits a person from lodging an application for a valid visa.

1.9 The minister cannot be compelled to use or consider using his powers. He has issued various ministerial directions to the department regarding the use of his public interest powers. The department plays a critical role in both identifying cases to bring to the minister's attention and providing him with relevant and appropriate information to allow the minister to make an informed decision.

1.10 Subclass 050 and 051 Bridging visas were granted by the minister mainly to IMAs who came to Australia seeking asylum. The former visa type is generally granted to allow an unlawful non-citizen to remain in Australia temporarily for a specified purpose and the latter is to allow an unlawful non-citizen to remain in Australia temporarily while their Protection visa application is being considered.

1.11 Because this cohort consists of people seeking asylum, many have a history of torture and trauma and are therefore significantly impacted by re-detention, especially because their future is uncertain. If the minister does not intervene, the person remains detained. Many of the people we investigated remain in immigration detention, potentially indefinitely.

Investigation

1.12 On 16 October 2015, the Ombudsman commenced this own motion investigation into the department's administration of the people who were re-detained after the cancellation of their Bridging visa under the regulations mentioned above.

1.13 The Ombudsman's investigation focussed on:

- the appropriateness of the Bridging visa cancellation decisions
- the department's actions in a person's case after their re-detention and in particular:
    - where the cancellation decision is set aside on merits review or
    - where the charges against the person are dropped or otherwise resolved
- the advice the department provided to the minister about administering this cohort.

1.14 The Ombudsman's office has investigated complaints about people being held in immigration detention for prolonged periods after the criminal charges that formed the basis of

their visa cancellation had been resolved. This included instances where the charges against the person were withdrawn, where the person was acquitted of committing any criminal offence, or where a person was convicted and given a good behaviour bond or fine.

1.15 We have observed from our statutory reporting function (reports to the minister under s 486O on all people who remain detained for two years) that the department has not been progressing cases to the minister if charges against a person had yet to be resolved through law enforcement processes. This means that some people spend more than two cumulative years in immigration detention with no clarity about when the charges or their immigration status would be resolved.

Methodology

1.16 The department advised that it was not able to meet our request to provide case details for the people who have had their Bridging visas cancelled under these regulations because of resource and computer system limitations. We subsequently amended our request and sought case information for a random sample of 50 people who had had their Bridging visas cancelled under r 2.43(1)(p). Of these, 30 people were reported by the department as being in immigration detention on 22 December 2015. The remaining 20 people were reported as no longer being in immigration detention.

1.17 The case information we requested included copies of:

- the department's Form 1099 Notice of Intention to Consider Cancelling a Visa (NOICC) which included the decision
- any Migration Review Tribunal (MRT) or Administrative Appeals Tribunal (AAT) decisions in relation to the cancellation decision [1]
- any ministerial intervention submissions provided by the department to the minister.

1.18 We met with the department's cancellation policy section on 29 April 2016 and although we requested a briefing from the complex case resolution section, the department did not facilitate this. The department was unable to provide complete and timely responses to our requests for information. As such, this report was prepared based on the material provided to date.

1.19 The Ombudsman's office also sought input into this investigation from stakeholder community organisations and advocates.

Departmental response

On 4 November 2016 the department provided comments on this report which are attached, as are the department's comments in relation to each of the recommendations, at Attachment C to this report.

[1] On 1 July 2015 the Migration Review Tribunal and Refugee Review Tribunal were merged into the Administrative Appeals Tribunal

PART 2—LEGAL AND POLICY FRAMEWORK

Background

Safeguarding the Australian community

2.1 On 28 June 2013, the grounds for cancellation under r 2.43(1)(p) and (q) were introduced by amendment to the migration regulations. The amendments included the new visa condition 8564 that a Bridging visa holder must not engage in criminal conduct.

2.2 The Explanatory Statement [2] that introduced the new visa condition 8564 to the regulations states that the Australian Government 'had become increasingly concerned about BVE holders who engage in criminal conduct or represent a risk to public safety'.

2.3 The amendments expanded the minister's cancellation powers to allow him or the department to consider cancelling a person's Bridging visa if the grounds for cancellation were enlivened. The Explanatory Statement further states that:

> While the new cancellation grounds capture a wide range of criminal offences, a decision to cancel will be based on the individual merits of a client's case, including the severity of an offence. The discretion to cancel a BVE might not be exercised, for example, where Australia has obligations under international law towards the client or their family or where there are compelling grounds not to cancel, such as if the client is a minor, a carer or otherwise vulnerable.

2.4 To give further guidance to the department's decision makers about exercising his cancellation powers for the reasons under r 2.43(1)(p) and (q), the minister issued Direction 63.

Direction 63

2.5 Direction 63 provides a framework for decision makers within which to decide whether to exercise their discretion to cancel a non-citizen's Bridging visa. A copy of the Direction is at Attachment B to this report.

2.6 In the Direction, the minister reiterates the policy of mandatory immigration detention and adds at 4.3(3):

> The Australian Government has a low tolerance for criminal behaviour by non-citizens who are in the Australian community on a temporary basis, and do not hold a substantive visa. In the case of a non-citizen who, but for the Minister granting them a visa in the public interest would be subject to mandatory detention, it is a privilege and not a right to be allowed to live in the community while their immigration status is being resolved.

2.7 The primary considerations for deciding whether or not to cancel a Bridging visa are:

a. 'the government's view that the prescribed grounds for cancellation under r 2.43(1)(p) and (q) should be applied rigorously in that every instance of non-compliance should be considered for cancellation, in accordance with the discretionary cancellation framework; and

[2] Explanatory Statement Selective Legislative Instrument 2013 no. 156 https://www.legislation.gov.au/Details/F2013L01218/Explanatory%20Statement/Text

b. the best interests of children under the age of 18 in Australia who would be affected by the cancellation.'

2.8 The secondary considerations which must be taken into account include:

a. 'the impact of a decision to cancel the visa on the family unit (such as whether the cancellation will result in the temporary separation of a family unit)

b. the degree of hardship that may be experienced by the visa holder if their visa is cancelled

c. the circumstances in which the grounds for cancellation arose (such as whether there are mitigating factors than may be relevant, as well as the seriousness of the offence, the reason for the person becoming subject of a notice issued by Interpol, or the reason for the person being under investigation by an agency responsible for the regulation of law enforcement)

d. the possible consequences of cancellation, including but not limited to, whether cancellation could result in indefinite detention, or removal in breach of Australia's *non-refoulement* obligations, noting that a decision to cancel a Bridging E visa does not necessarily represent a final resolution of a person's immigration status

e. delegates may also consider any other matter they consider relevant.'

2.9 The Direction highlights an expectation that Bridging E visa holders, who have been found guilty of engaging in criminal behaviour, 'should expect to be denied the privilege of continuing to hold Bridging E visa while they await the resolution of their immigration status. Similarly, where Bridging E visa holders are charged with the commission of a criminal offence or are otherwise suspected of engaging in criminal behaviour or being of security concern, there is an expectation that such Bridging E visas ought to be cancelled while criminal justice processes or investigations are ongoing'.[3] There is still considerable scope for a person's individual circumstances, the seriousness of their actual or alleged behaviour and any mitigating circumstances to be considered by the decision maker.

2.10 It is important to remember that a fundamental principle of the Australian common law is the presumption of innocence. The prosecution bears the burden to prove the charges in criminal proceedings. Therefore no guilt can be presumed until the charge has been proved beyond reasonable doubt. To suddenly deny a person their liberty to live freely in the community based on nothing more than an allegation that has led to the laying of criminal charges, raises the question of whether the department is acting prematurely by cancelling a visa and whether the department is not following the spirit of the Explanatory Statement that introduced this legislation. In short, a person has not engagement in criminal behaviour until they are convicted.

PART 3—CANCELLING A BRIDGING VISA

Notice of intention to consider cancelling a visa

3.1 The department can issue a visa holder a Notice of Intention to Consider Cancelling a visa (NOICC) when grounds for cancellation exist. In almost all of the NOICCs we examined,

[3] Direction 63 4.3 Principles (5)

notification of potential cancellation was provided on the same day or within a few days after the laying of criminal charges.

3.2 The department advised that if police arrest a person who they suspect is a non-citizen, they will generally contact the department's Immigration Status Service hotline to confirm the person's immigration status. If the person is a Bridging visa holder and charges are being laid, this information is passed on to the compliance section. Police will provide the department with a copy of the charge sheet which serves as formal confirmation that charges have been laid against a Bridging visa holder enlivening the grounds for cancellation under r 2.43(1)(p)(ii).

3.3 The NOICC can be issued in person or over the phone. Many of the NOICCs we examined showed that the department presented to the police station where the Bridging visa holder was being held and gave the Bridging visa holder the NOICC in person. After the person has received notification, they must be given a reasonable period before the department can commence the interview. That reasonable period is determined to be at least ten minutes.

3.4 The interview, often conducted with the assistance of a telephone interpreter, is the Bridging visa holder's sole opportunity to tell the department how the charges came about and why their visa should not be cancelled. We noted that a common theme in the NOICCs examined was a sense of unfairness by the visa holder that the department might cancel a visa based on the laying of charges where the person denies committing any crime and where the charges have not been proven. This sentiment was echoed in submissions to the office about the unfairness of cancelling a visa and re-detaining a person based on an unproven charge alone.

3.5 The department advised that they are not obliged to postpone the interview even if this is requested by the visa holder. As such, there is little time for the visa holder to seek legal advice or support before they have to speak to the departmental officer who is required to make a decision at the end of the interview that will determine whether the visa holder is detained or not.

Proportionality

3.6 Regulation 2.43(1)(p)(ii) allows the department to cancel a Bridging visa for any criminal charge. A criminal charge can range from a very serious offence such as sexual assault to a comparatively minor one such as shoplifting.

3.7 The Ombudsman is concerned about the proportionality of decisions to cancel a visa under this regulation in relation to charges that sit on the more minor end of the spectrum. The Explanatory Statement explains the purpose is to safeguard the Australian community. It is arguable whether a person charged, or even convicted, of minor matters such as shoplifting or a minor traffic offence, poses such a risk to the Australian community that the person should be detained.

3.8 From the Ombudsman's office observations and input from advocates, it appears that the department tends towards cancellation of a visa even if the charge is not serious. We heard anecdotally that in some cases the department issued the NOICC to the visa holder as they were leaving court having just been granted bail. We note that the Court considers a number of factors when deciding whether to grant bail, including whether there is an unacceptable risk to the community in releasing a person subject to charges.

3.9 As can be seen from a case study in this report, even where the charges are for a serious matter such as sexual assault, the department is acting prematurely when deciding to detain that

person, who was granted bail by the court, as they remain innocent until proven guilty. In the case study, the charges against the person were withdrawn before trial.

3.10 We asked the department to provide our office with examples of cases in which a NOICC was issued and the decision maker decided not to cancel the visa. The department advised that while such cases are common, compiling the information was too resource intensive. We subsequently requested that the department ask its decision makers if they could recall any single example for our review. It was again unable to provide the requested information. As such, we have not been able to assess the way in which the department weighs the factors for and against cancellations of this type and the circumstances under which it would decide not to cancel a visa.

Recording of decisions

3.11 We examined some NOICCs that resulted in cancellation of the Bridging visa, we observed a varying quality in the recording of decisions. Some officers noted the weight they placed on certain factors while others listed the reasons provided by the Bridging visa holder but did not document their analysis of why these were insufficient to support not cancelling the visa.

3.12 It was not apparent from the NOICCs we examined if the department properly analysed the circumstances of the case and, in considering the seriousness of the charge, assessed whether cancellation was reasonable and appropriate and in line with the policy objective of the regulations.

3.13 The department has acknowledged that cancellation decisions could demonstrate a clearer consideration of Ministerial Direction 63 and a clearer assessment against the cancellation guidelines. The department has accepted that there is a need for better training of officers in this regard and acknowledged that there are some capability gaps around cancellations since integration which need to be actively addressed at all levels. These gaps include:

- inconsistent record-keeping practices across states or business lines
- some variance in the quality of decision records – such as differences in the level of analysis included in decision records to support particular conclusions or weighting of material
- ensuring that delegates are kept apprised of updates to cancellation policy or case law matters.

Recommendation 1
The Ombudsman recommends that the person who is the subject of a Notice of Intent to Consider Cancellation of a visa under s 116 is given adequate time and resources to seek advice and present their reasons against the cancellation.

3.14 The Ombudsman notes that the Federal Court has raised concerns about the application of Direction 63 by the department and the Administrative Appeals Tribunal (AAT). In *ACH15 v Minister for Immigration & Anor [2015] FCCA 1250* the court said at paragraph 31:

> The Tribunal did not understand and apply the Direction according to its proper meaning. Rather than understanding that the government's view that the relevant grounds should be applied rigorously in the sense decried above, it understood that view to be that the exercise to cancel should be exercised rigorously, that is strictly. Thus, in spite of having found many mitigating factors in favour of the applicant, it cancelled the

visa simply because it thought it was directed to do so. That misunderstanding by the Tribunal caused it to fail to properly review the decision of the delegate and so it constructively failed to exercise its jurisdiction. Alternatively it failed to consider a relevant consideration being a direction made under s 499 of the Act. Either way its decision was affected by jurisdictional error.

Review of Direction 63

3.15 The department advised that Direction 63 is under review as a result of court decisions which highlighted issues with its application.

Merits review

3.16 A person can apply to the AAT for a review of the department's decision to cancel their Bridging visa.[4] The application must be lodged with the AAT within two working days of the decision if the person is being held in immigration detention, or within seven working days if the person is being held elsewhere, for example in prison.

Accessing review

3.17 The Ombudsman has concerns about the ability of people in detention to access their review rights. A common issue raised with our office is that people were not aware that they could seek merits review of the cancellation decision and by the time they became aware that they could, they were out of time to appeal.

3.18 Information about review rights, including the timeframes for lodging an application for review, are in the NOICC. The department provided our office with copies of the AAT factsheet signed by the person after their Bridging visa was cancelled to acknowledge receipt of the tribunal information. The department advised that where there are language barriers, a telephone interpreter is used and it is part of the process to explain their review rights to the person.

3.19 The Ombudsman considers that having translated written confirmation about review rights for the cancellation decision would assist the person to understand what they need to do if they disagree with the decision and how quickly they need to do it. At the time the NOICC is issued and the decision made to cancel their visa, the recipient has a lot of information to absorb. A critical piece of information about their legal rights, given they likely only have 48 hours to act, should be in writing in the appropriate language. In addition, many of the people who seek asylum in Australia come from countries where it is dangerous to challenge a government decision. This in itself can be a significant barrier to requesting a review of the decision.

Recommendation 2
The Ombudsman recommends that the department provide a person with a written notice of decision, including their review rights translated into their own language, when their Bridging E visa is cancelled.

The notice should include information regarding:

a) the reasons for the decision to cancel their Bridging visa

[4] The person must be in the migration zone and the minister must not have issued a conclusive certificate in relation to the decision under s 339 where the minister believes it would be contrary to the national interest for the cancellation decision to be changed or reviewed.

b) their right to have the cancellation decision reviewed by the Administrative Appeals Tribunal

c) the applicable timeframe for lodging an appeal with the tribunal

d) details of how to contact the tribunal

e) details of how the department can facilitate contact with the tribunal and a legal representative.

Transfers between immigration detention facilities

3.20 Complaints to the Ombudsman's office highlighted that some people were not able to contact the AAT in time because they were being transferred between detention facilities during the two days post cancellation decision. The remote location of some immigration detention facilities also impacted on people's ability to successfully contact the tribunal and engage legal representation in relation to their charges.

Recommendation 3
That the department:
a) not transfer a person between detention facilities until the statutory time to lodge an appeal has expired (two days), and

b) ensure that all possible steps, in particular providing access to the internet, are taken to ensure that a person can request a review of the decision to cancel their visa within the statutory time frame.

Prioritisation of appeals from people in immigration detention

3.21 The AAT prioritises appeals from people who are in immigration detention. While this would usually be favourable to minimise unnecessary time spent in detention, we have heard from advocates that this can be a double edged sword if the criminal charges that formed the basis of the cancellation have not been resolved at the time of the tribunal hearing.

3.22 If the tribunal affirms the department's decision, the cancellation stands and the person will remain in detention. There is no opportunity for the decision to be revisited if the charges are later withdrawn or the person is acquitted of the offence. Direction 63 is silent on how a person in detention should be case managed once the charges that formed the basis of the cancellation are subsequently resolved. This issue will be addressed in part 4 of the report.

Tribunal sets aside cancellation decision after the Bridging visa has already expired

3.23 If the tribunal sets aside the cancellation decision, the department should release a person from immigration detention. Ordinarily a tribunal's *de novo* set aside decision, standing in the shoes of the original decision maker, would restore a person to the same position they were in prior to the decision having been made by the department. But if the Bridging visa has expired in the meantime, there is no visa to enliven thus the person remains in detention and the Tribunal's decision is moot.

3.24 The department does not have the power to re-grant the person a new Bridging visa to allow them to be released from detention. The person remains detained until the department brings the case to the minister's attention and the minister agrees to use his detention intervention power and grant the person a new visa.

3.25 The minister cannot be compelled to make a particular decision. The following case study shows that even in a case where the cancellation decision is set aside, and the department

makes errors in implementing the tribunal's decision, there is no guarantee that the minister will agree to intervene to release a person from detention.

Case study one – failure to implement MRT decision prior to Bridging visa expiration resulting in seven weeks of unlawful detention and subsequent mandatory detention

Mr X arrived in Australia by boat. He was detained under s 189 and brought into immigration detention. On 12 February 2013 the minister lifted the bar under s 46A to allow him to lodge a valid application for a Protection visa. He was granted an associated Bridging visa and released from detention.

In January 2015, he was charged with driving with excess blood alcohol. The department cancelled his Bridging visa and he was re-detained on 13 April 2015. Mr X appealed to the MRT which set aside the cancellation decision on 21 April 2015.

The submission to the Minister notes that Mr X's BVE was reinstated but the department's systems failed to be updated and he was not released from detention. Mr X remained in immigration detention as a lawful non-citizen until his Bridging visa expired on 6 June 2015 when he reverted to being an unlawful non-citizen. The department brought the case to the minister's attention on 23 July 2015, noting that he was a finally determined IMA progressing towards removal. The minister declined to intervene.

Mr X remained in immigration detention until he departed Australia on 14 March 2016.

3.26 The department received notification of the MRT decision on 22 April 2015 and the Tribunal Liaison section notified the regional office it considered had made the decision. The wrong office was notified. The receiving office should have informed the sender of the error but it did not. But that was not the only mistake made.

3.27 In most cases the department system, Integrated Client Service Environment (ICSE), is automatically updated. Due to a system anomaly, the record was not automatically updated so the Tribunal Liaison section attempted to manually update the record but failed due to 'system issues'. IT support was contacted about the problem via a group mail box. There is no record of a response from IT support, possibly due to the IT response going to a private mailbox that belonged to an officer who went on long-service-leave soon after 23 April.

3.28 On 22 April 2015, the MRT sent a fax of its decision to the Immigration Detention Centre where Mr X was being detained, marked 'for immediate hand delivery to Mr X'. Case management was not made aware of the correspondence and therefore Mr X did not receive the correspondence at that time. Case management became aware on 9 July 2015 that a decision was made on 21 April 2015 and provided Mr X with a copy of the decision on 10 July 2015.

3.29 If the department had implemented the MRT's decision, Mr X would have been released from immigration detention on 22 April 2015 as his Bridging visa was valid. If this had occurred, he is likely to have been granted subsequent Bridging visas and been able to live in the community until his immigration status was resolved. Instead he was held in detention until his removal from Australia on 14 March 2016. If he was living in the community on a visa when he was removed, he would have had the opportunity to return home voluntarily making him eligible for reintegration assistance and avoid incurring a debt to the Commonwealth for is removal costs.

Case management when the cancellation decision is set aside

3.30 Although the minister decided not to intervene in Mr X's case, at least it was bought to the minister's attention by the department. We are concerned that this is not a consistent

practice for cases where a cancellation decision is set aside but the Bridging visa has already expired.

3.31 The department advised that of the cancellation decisions made under the regulations, 55 decisions were set aside by the AAT or former MRT. Of these, three people were still in immigration detention because their Bridging visa had expired before the tribunal's decision. We requested specific details of these cases from the department on several occasions but it was not provided.

3.32 The Ombudsman considers that as a matter of urgency the department give priority to bringing these cases before the minister for his intervention consideration.

Case study two – failure to escalate case resulting in eight months of detention (including dependent children) after AAT set aside cancellation decision

Ms X was charged with assault of a minor and attempting to pervert the course of justice. Her Bridging visa was cancelled on 3 July 2015 and she was brought back into immigration detention. At the time her visa was cancelled she was married to an Australian citizen and pregnant with their first child. She has two other children from a previous relationship who are in community detention.

She sought review of the cancellation decision. The AAT set-aside the decision on 15 July 2015. However, her Bridging visa had expired six days earlier so the department could not release her from immigration detention.

In October 2015, Ms X's representative asked the department to consider her case for ministerial intervention. The Ombudsman's office also raised this case with the department in December 2015. The department responded to our office that her case was assessed as meeting the guidelines for a referral to the minister and that this would soon be prepared by the department.

On 5 February 2016 the Ombudsman sent the minister a report under s 486O recommending that Ms X be released from immigration detention. On 16 March 2016 the minister tabled the report in parliament agreeing with our recommendation. She was granted a Bridging visa and released from detention on 30 March 2016. She spent eight months in detention after the AAT set aside the cancellation decision.

While in detention Ms X gave birth to an Australian citizen child who lived in the detention facility as an onsite visitor. The department's records indicate that while in detention she threatened self-harm two times and self-harmed on one occasion.

3.33 The Ombudsman considers that the department should have briefed the minister much sooner to potentially minimise unnecessary time spent in immigration detention. We are especially concerned that prior to this office raising our concerns about this case with the department in December 2015 there was no evidence that her case had even been assessed for possible ministerial intervention, despite her representative's request in October 2015. The Ombudsman considers that this should have been done by the department once it was notified of the tribunal decision and it became apparent that they could not release her from immigration detention because she no longer held a valid Bridging visa.

Recommendation 4
That the department:

a) promptly seek the minister's intervention to grant a visa for all cases where the cancellation decision is set aside by the Administrative Appeals Tribunal but the person cannot be released due to the natural expiration of their visa.

b) identify all people in immigration detention whose cancellation decision was set aside by the Administrative Appeals Tribunal and, if not already done, brief the minister about the circumstances of their case seeking the minister's intervention to grant a new visa.

PART 4—CASE MANAGEMENT OF PEOPLE IN IMMIGRATION DETENTION

Case management framework

4.1 The role of the department's case management service is to assist people with resolving their immigration status. When a person enters immigration detention they are normally streamed into the case management service.[5] After an assessment of their circumstances, they are assigned one of the following case management 'approach' settings:

- Monitored – clients with no identified vulnerabilities and/or barriers to status resolution
- Maintained – clients with vulnerabilities and/or barriers to status resolution that can be resolved in the short term
- Actively managed – clients with identified complex vulnerabilities and/or barriers that require intensive or long-term management to resolve.

4.2 The approach assigned to a person's case articulates the level of risk presented by their circumstances at a point in time. Under the policy, risk includes the risk to the person's health and welfare and risk to the resolution of their immigration status and integrity of the migration program. The approach setting also determines the level of service intervention provided by the case management team to a person in detention.

4.3 Cases that have higher levels of risk will be assigned to a case manager or senior case manager and those with lower risk to a Detention Services Review Officer. Regardless of the approach assigned to a case, the department's policy is to review each case every month as a service minimum. Its Compliance Case Management Detention portal system also reminds staff to do this by triggering a monthly review which includes checking if the current approach setting is appropriate in the circumstances of the case. The department can also trigger a review at any time if there are changes in a person's circumstances.

Minister's detention intervention power

4.4 The people in this cohort are reliant on case management staff doing proper and timely assessments of their circumstances which critically includes determining if they should be referred to the minister for him to consider using his public interest powers.

[5] People who are identified as 'rapid removals' are usually not streamed into the case management service.

4.5 The minister has issued a ministerial direction in relation to his detention intervention power. The direction details the types of cases he wants brought to his attention, the cases that should not be raised with him and the information the department should include in the submission prepared by the department to the minister.

Complex case resolution section

4.6 The Complex Case Resolution Section (CCRS) is tasked with preparing the submissions to the minister. We understand that case managers refer these cases to the CCRS which is tasked with preparing the submission.

4.7 Under s 195A the minister can grant a visa to a person in detention if he considers it is in the public interest to do so. In the previous iteration of these guidelines public interest was thus described:

> The public interest is served through ensuring that no person is held in immigration detention for longer than is necessary. It is intended that my detention intervention power will be used when it is not in the public interest to hold a person in immigration detention.

4.8 On 29 April 2016 the minister reissued these guidelines. They no longer contain a description of the public interest. They also stipulate that requests to consider using this power can only be made by the department after they have assessed the case as meeting the guidelines for a referral to the minister. This highlights the importance of case management's role in identifying cases in a timely manner and including in the submission sufficient and relevant information to enable the minister to make an informed decision about a person's continued detention.

4.9 The department advised that CCRS employs a range of strategies to assist case managers with identifying circumstances that warrant the referral of a case for assessment against the s 195A ministerial guidelines.

4.10 These strategies include:

- the provision of an information pack and associated process documents to case managers, which outline the s 195A power and the referral process
- face-to-face engagement with case managers on the role of s 195A in the management of complex or protracted cases
- provision of subject matter expertise to the Status Resolution Essentials training delivered to all case managers and status resolution officers in DIBP and the ABF
- Maintaining a s 195A helpdesk.

4.11 The department has also introduced the Community Protection Assessment Tool (CPAT) which is a decision support tool, to assist Status Resolution Officers (SROs) to assess the most appropriate placement for a client while status resolution processes are being undertaken.

Recommendation 5
The Ombudsman recommends that the department ensures its case management and escalation framework adequately supports the timely and efficient identification and referral of cases that meet the minister's guidelines for consideration under s 195A.

PART 5—PROLONGED IMMIGRATION DETENTION

Resolution of charges

5.1 The department's case management framework in theory supports regular reviews of a person's circumstances. We are advised that Detention Review Managers review hold detention cases within 48 hours of a person entering a detention facility. Then Detention Review Committees (DRC's) review individual detainee circumstances on a monthly basis[6].

5.2 The Ombudsman considers that resolution of the charges which lead to a person being brought back into immigration detention presents an appropriate juncture to trigger a review of the person's detention. The department notes that non-adverse judicial outcomes are not the sole basis for a decision to grant a subsequent visa and a broader range of factors are considered in the decision to grant a subsequent visa. The Ombudsman office is however firmly of the view that a non-adverse judicial outcome should be a trigger for an urgent review of a person's circumstances.

5.3 Our office has not seen the department do this with any consistency in relation to this cohort. The Ombudsman is concerned that if the department is not considering individual circumstances and taking steps to quickly escalate cases then people are being subjected to detention for longer than is necessary. It is also not consistent with the Australian Government's view, as articulated in its 'detention values'[7], that immigration detention should only be used as a last resort.

5.4 Direction 63 is silent in relation to the case management of a person who is re-detained after the cancellation of their Bridging visa. We understand that there are no separate instructions which deal specifically with this cohort after they are re-detained. It appears that they are assessed as part of the usual case management process.

Charges dropped

5.5 We note that Direction 63 specifically guides a decision maker against cancelling a person's Bridging visa if the charges against the visa holder are subsequently dropped. In line with this sentiment, it is reasonable to assume that the department should be bringing cases like these to the minister's attention soon after the charges are dropped to consider the appropriateness of the person's detention. Although it is ultimately the minister's decision whether or not to intervene in a case, the Ombudsman considers that it is the department's responsibility to brief the minister and give him an opportunity to make an informed decision about a person's continued detention as a matter of priority. Under the current ministerial detention intervention guidelines, the minister has said he will not consider requests to use his powers that come directly from the detainee or their representatives. These have to go through

[6] The department advises the purpose of a DRC is to conduct formal monthly reviews of each immigration detainee to ensure appropriate efforts are being made to progress detainees towards status resolution outcomes. A DRC is held monthly at each facility. The department acknowledged the quality of some DRC's has been variable and that the Senior Director Status Resolution Operational Support, or their delegate, now participates in all DRCs nationally to ensure consistency in the approach of the committees and that all detainees are reviewed. The chair of this group changes each 3 months to ensure additional integrity.

[7] The immigration detention values were announced in July 2008 by then Minister for Immigration and Citizenship, Senator Chris Evans, and were endorsed by Cabinet.

the department and be assessed as meeting the guidelines for referral before he will consider them.

Case study three – delay in referring to the minister after charges dropped resulting in over a year of detention

On 25 September 2014 the department cancelled Mr X's Bridging visa after he was charged with behaving in an offensive manner. The charges were dropped on 15 October 2014.

Over one year later on 21 October 2015 the department included him in a bulk submission to the minister for him to consider using his powers under s 195A to grant a Humanitarian Stay (Temporary) visa and Bridging visa. On 27 October 2015 the minister agreed to intervene. Mr X was released from immigration detention on 29 October 2015 over 12 months after the charges had been dropped.

Case study four – indefinite detention after charges withdrawn

On 7 April 2015 the department cancelled Mr X's Bridging visa after he was charged with one count of engaging in unlawful sexual intercourse. When the decision was being made whether to cancel Mr X's visa, he told the decision maker 'they (the charges) are false and not true. My side of the story has not been heard. I believe this is not fair as I haven't been convicted of anything. I am a year 12 student and this is not fair on me. My family is here and culturally they will be disappointed with me. It will ruin my life.'

After three court appearances the Director of Public Prosecutions (DPP) withdrew the charges on 20 October 2015.

The minister intervened in Mr Mr X's case by lifting the bar to allow him to lodge an application for a temporary visa. He lodged an application for a Safe Haven Enterprise visa (SHEV) on 13 October 2015.

On 15 April 2016 the minister tabled a s 486O report in parliament from the Ombudsman which recommended that Mr Mr X be considered for a Bridging visa while the department processed his SHEV application. The minister responded that the department referred his case for consideration under s 195A in January 2016 and he had declined to intervene and that the case will be reconsidered later in the year.

The department advised in its latest s 486N report that it had again assessed Mr Mr X's case as meeting the guidelines for a referral to the minister. He was released from detention on 13 September 2016.

5.6 In the above Case Study, the submission to the minister from the department included:

> The Director of Public Prosecution withdrew all charges against Mr X and issued a 'white paper/certificate' which means that the matter did not proceed, as based on the evidence provided at the time, there no was reasonable prospect of conviction. The matter may go back to court in the future should further evidence be presented.

5.7 The department was advised on 23 October 2015 by Mr X's lawyer that the matter was not proceeding and provided a copy of the notice to the District Court from the Director of Public Prosecutions that it declined to file any information against Mr X. This meant that he was no longer required to appear in court, he was no longer on bail and he was not the subject of a current criminal charge. The department sought information from the South Australian Police (SAPOL) on 26 October 2016 about why the matter was not proceeding to assist in recommending to no longer monitor the court matter. The answer provided on 27 October 2016 was that a decision by DPP was based on there being little chance of proving the charge beyond

reasonable doubt. On 11 November 2015 an officer from the ABP wrote via email to the South Australian Police seeking further information:

> 'Is there any light you can shed on this? As a white paper was issued, rather than a complete withdrawal of the matter, surely that means the alleged victim is still wanting to press charges, and there is no DNA evidence that suggests he is definitely not guilty?'

5.8 The Ombudsman's office is unclear why the department was questioning DPP's decision to withdraw the charge and not proceed. But is it concerning that the submission to the minister on 4 January 2016, seeking Ministerial Intervention under s 195A, included; 'The matter may go back to court in the future should further evidence be presented.' There is no information provided to the Ombudsman's office that indicates DPP or SAPOL mentioned that their investigation into the matter was continuing. Therefore to advise the minister of this possibility is unsupported and possibly misleading. In any event, the minister declined at that stage to intervene and the person remain detained for a further nine months.

Two stage submission process

5.9 The process for getting a submission to the minister can also take many months to complete. In the previous version of the detention intervention guidelines, the minister requested that if a case met the guidelines for referral then it should be brought to his attention via a two-step submission process.

5.10 The purpose of the first submission was to seek the minister's permission to exercise his power and the second submission was for the grant of the visa. The overall process for getting the minister to exercise his detention intervention powers was lengthy and added to the time a person would spend in immigration detention awaiting a decision.

5.11 This is highlighted in Ms X's case (case study two). In October 2015, her representative wrote to the department seeking ministerial intervention. It was not until December 2015 when our office wrote to the department about Ms X's case that it did an assessment and found that her circumstances met the guidelines for a referral to the minister. There were further delays while the department prepared the submission and waited to have it considered by the minister before Ms X was able to be released on 30 March 2016 some five months after her representative requested that her case be reviewed.

Three month rule

5.12 The quality of information included in a submission by the department to the minister takes on further significance in light of the minister's instruction to the department not to re-refer cases to him within a three month period. Under the guidelines:

> If I have previously considered the exercise of my detention intervention power within the last three months in respect of that person, an officer of the department is to assess the new request and:
>
> - only refer cases to me that meet these guidelines and where new information is available or circumstances have changed.

5.13 The Ombudsman's office has heard from advocates that although the charges have been dropped, there is no transparency around the reasons why a person continues to be held in immigration detention.

Charges finalised

5.14 The Ombudsman is also concerned that the department is not promptly reviewing cases when charges have been dealt with by the court. The resolution of charges appears to be only one factor in determining suitability for ministerial consideration. A person's overall immigration status and behaviour in detention also impacts on this assessment.

Finally determined Irregular Maritime Arrivals

5.15 'Finally determined IMAs' refers to people who arrived in Australia by boat seeking asylum, who have exhausted their immigration pathways and have not been found to be a person to whom Australia has protection obligations. Under current policy, these people are not usually referred for consideration by the minister because they are on a removal pathway. Generally removal from Australia should occur relatively soon after a person's immigration outcomes are exhausted. However, due to a number of reasons, including the ability of the department to obtain travel documents, medical reasons or the situation in the country to which the person is to be removed, a person's removal can be protracted which may lead to indefinite detention.

Case study six – Indefinite detention: more than 12 months in detention after the Court decided a custodial sentence was inappropriate

Mr X was charged with shoplifting and his Bridging visa was cancelled on 15 April 2015. He was convicted and given a suspended sentence, a 12 month good behaviour bond and fined $300.

The department advised that his case was last escalated in June 2015. He is a 'finally determined IMA' so is not eligible for consideration of a grant of a Bridging visa by the minister.

As at 26 April 2016, Mr X was still in immigration detention more than 12 months after the charges had been resolved.

Submissions to the minister

5.16 The department's ministerial submissions for the cohort encompassed by this report were mainly bulk submissions which contained details relating to multiple people in detention. We understand that bulk submissions are used to streamline the process so like cases can be considered by the minister.

5.17 We understand that the Complex Case Resolution Section is meant to support the case management service by compiling detailed, individualised case submissions for the minister to consider. Individual submissions were rare. The majority of the submissions we reviewed related to management of the legacy caseload and not responding to a change in the individual's circumstances or to their charges.

The legacy caseload

5.18 A significant impost on the department and minister's ability to review individual circumstances are the 30,000 IMAs who arrived in Australia after 13 August 2012 who the department refer to as the legacy caseload. They are subject to a bar under s 46A which prevents them from lodging a valid visa application until the minister personally lifts the bar which then allows a person to lodge a valid visa application.

5.19 The department's case management processes appear overwhelmed by the number of people who require personal intervention by the minister in order to resolve their immigration status. Although the case management framework supports individualised assessments of a

case, this was not supported by the department's framework for preparing submissions, sometimes in relation to thousands of people at a time, for the minister to consider.

Delays in charges being heard

5.20 Under Direction 63, it is the Australian Government's view that if a Bridging visa holder is: charged with an offence; suspected of engaging in criminal behaviour; or suspected of being a security concern, there is an expectation that they should not have a Bridging visa while the criminal justice matters or investigations are ongoing. The department advised the Ombudsman's office that cases in this category will not be escalated to the minister until all of the law enforcement matters have been finalised.

5.21 Due to delays in local court systems, people may have to wait months in detention before their charges can be heard by the courts. This adds to the uncertainty these people face.

5.22 The Ombudsman notes that some of the people in this situation are facing serious criminal charges. However, we are referring to people released on bail who are then detained by the department. The department is not doing a full assessment of whether continued detention is warranted and we note that people who experience prolonged and indefinite periods of immigration detention are more prone to detrimental mental health.

Case study seven – deteriorating mental health in detention due to postponement of criminal hearing and indefinite nature of detention

Mr X was granted a Bridging visa on 22 November 2012. In May 2013, he was charged with affray and wounding a person causing grievous bodily harm. His Bridging visa was cancelled and he was re-detained on 9 October 2013.

In July 2014 the Refugee Review Tribunal remitted the decision to refuse his protection claims back to the department. The department advised that his case would not be progressed until the charges against him have been resolved.

Mr X told Ombudsman staff that his physical and mental health has deteriorated after hearing that his criminal case has been postponed. Although he has contact with his family, including his wife and children, he advised that he has lost motivation to see them due to the postponement of his criminal hearing and his prolonged detention. A psychologist noted that he has a history of torture and trauma and requires constant monitoring in detention due to his circumstances.

As at 30 June 2016, Mr X was still in immigration detention.

PART 6—CONCLUSION

6.1 The administration of Bridging visa holders, who have been re-detained due to the cancellation of their visa, highlights the ongoing challenges faced by the department in efficiently and appropriately responding to high numbers of people in detention.

6.2 This is compounded by the fact that many of the affected people require the personal consideration of the minister in order to facilitate any movement towards the resolution of their immigration status.

6.3 This investigation has highlighted two primary areas of concern:

a. the appropriateness of the department's cancellation decisions, and

b. the capacity of the case management service to effectively and efficiently manage the resolution of a person's immigration status.

6.4 During the investigation we encountered delays associated with receiving information from the department. It appears that in order to gather a complete picture of a person's immigration case, officers need to access various systems. This appears to underpin the department's fragmented approach to status resolution. It is concerning to the Ombudsman in this investigation and has been identified by the Ombudsman as an issue of concern in previous investigations into the department.

6.5 The change in regulations expanded the minister's power, and by extension that of the department, to cancel a Bridging visa on the basis of charges, convictions or concerns regarding a person's potential risk to the Australian community. However, the regulations also gave decision makers discretion to consider whether cancelling a visa is warranted in individual circumstances, in line with the policy intention of safeguarding the Australian community. The department was unable to provide examples of cases in which the decision was taken not to cancel a visa under these regulations.

6.6 Given that the consequence of cancellation for this cohort is mandatory immigration detention, the Ombudsman considers it imperative that the department provide its decision makers with proper training to ensure that such decisions are made with full consideration of all relevant factors.

6.7 While it would seem reasonable that the resolution of the charge that led to a person being re-detained would prompt a review of their circumstances, this investigation has established that this does not happen. In reality, people in this situation are dependent on the capacity of a poorly supported case management and escalation framework to adequately review the circumstances of their individual case. Release from detention for these people depends on whether they happen to fall within scope of the department's wider priorities.

6.8 The Ombudsman considers the ongoing detention of many individuals in this cohort to be inappropriate and has negatively impacted upon the mental health of many of these people. The department's case management system should be able to bring concerning cases to the attention of the minister but that system is overwhelmed beyond its capacity to efficiently progress cases.

6.9 The department has indicated that things have improved since our investigation so in line with our practice of following up on the recommendations we make, the Ombudsman will re-examine this situation sometime in the future to see if those improvements have been made.

ATTACHMENT A

MIGRATION ACT 1958 - SECT 116

Power to cancel

(1) Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:

… (g) a prescribed ground for cancelling a visa applies to the holder…

MIGRATION REGULATIONS 1994 - REG 2.43

Grounds for cancellation of visa (Act, s 116)

(1) For the purposes of paragraph 116(1)(g) of the Act (which deals with circumstances in which the Minister may cancel a visa), the grounds prescribed are:

… (p) in the case of the holder of a Subclass 050 (Bridging (General)) visa or a Subclass 051 (Bridging (Protection Visa Applicant)) visa--that the Minister is satisfied that the holder:

(i) has been convicted of an offence against a law of the Commonwealth, a State, a Territory or another country (other than if the conviction resulted in the holder's last substantive visa being cancelled under paragraph (oa)); or

(ii) has been charged with an offence against a law of the Commonwealth, a State, a Territory or another country; or

(iii) is the subject of a notice (however described) issued by Interpol for the purposes of locating the holder or arresting the holder; or

(iv) is the subject of a notice (however described) issued by Interpol for the purpose of providing either or both of a warning or intelligence that the holder:

(A) has committed an offence against a law of another country; and

(B) is likely to commit a similar offence; or

(v) is the subject of a notice (however described) issued by Interpol for the purpose of providing a warning that the holder is a serious and immediate threat to public safety;

(q) in the case of the holder of a Subclass 050 (Bridging (General)) visa or a Subclass 051 (Bridging (Protection Visa Applicant)) visa--that:

(i) an agency responsible for the regulation of law enforcement or security in Australia has advised the Minister that the holder is under investigation by that agency; and

(ii) the head of that agency has advised the Minister that the holder should not hold a Subclass 050 (Bridging (General)) visa or a Subclass 051 (Bridging (Protection Visa Applicant)) visa; …

ATTACHMENT B

DIRECTION NO. 63 - Bridging E visas
CANCELLATION UNDER SECTION 116(1)(G) - REGULATION 2.43(1)(P) OR (Q)

MIGRATION ACT 1958

DIRECTION UNDER SECTION 499

Bridging E visas- Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q)

I, Scott Morrison, Minister for Immigration and Border Protection give this Direction under section 499 of the Migration Act 1958.

Date: 4 September 2014

SCOTT MORRISON
Minister for Immigration and Border Protection

Preliminary

1. Name of Direction

This Direction is Direction No. 63 – Bridging E visas – Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q).

It may be cited as Direction 63.

2. Commencement

This Direction commences on the 12th day of September 2014.

3. Contents

This Direction comprises a number of Parts:

Part one

Contains the Objectives of this Direction, General Guidance for decision-makers and the Principles that provide a framework within which decision-makers should approach their task of deciding whether to exercise the discretion to cancel a non-citizen's visa under either:

- section 116(1)(g) – relying on the prescribed ground in regulation 2.43(1)(p); or
- section 116(1)(g) – relying on the prescribed ground in regulation 2.43(1)(q).

Part two

Identifies considerations relevant to Bridging E visa holders in determining whether to exercise the discretion to cancel a non-citizen's visa under 116(1)(g) and regulation 2.43(1)(p) or (q).

4 Part one

4.1 Objectives

(1) The Object of the *Migration Act 19*58 (the Act) is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.

(2) Under section 116(1)(g) of the Act, a decision-maker may cancel a visa if they are satisfied that a prescribed ground for cancelling a visa applies to the visa holder. The prescribed grounds are set out in regulation 2.43 of the *Migration Regulations 1994*. For the purpose of this Direction, only regulations 2.43(1)(p) and (q) are relevant.

(3) The purpose of this Direction is to guide decision-makers who are delegated to perform functions or exercise powers under the Act to cancel the visa of a non-citizen under section 116(1)(g) and regulation 2.43(1)(p) or (q). Under section 499(2A) of the Act such decision-makers must comply with a Direction made under section 499. This Direction also applies to Tribunal members reviewing visa cancellation decisions made under section 116(1)(g) and regulation 2.43(1)(p) or (q).

4.2 General Guidance

(1) The Government is committed to ensuring that non-citizens given the privilege of living in the Australian community on Bridging E visas behave in a manner that is in accordance with Australian laws and which respects Australia's community values and standards of democracy, multiculturalism, respect, inclusion, cohesion, tolerance, and cooperation. The principles below are of critical importance in furthering that objective.

(2) The Principles in this Direction provide a framework within which decision-makers should approach their task of deciding whether to cancel a non-citizen's Bridging E visa under section 116(1)(g) because a prescribed ground at regulation 2.43(1)(p) or (q) applies to the holder. The relevant factors that must be considered in making such decisions are identified in Part two of this Direction.

4.3 Principles

(1) Mandatory detention applies to any non-citizen who arrives and/or remains in Australia and who does not hold a visa that is in effect.

(2) All non-citizens residing in the community are expected to abide by the law. This is particularly relevant where the Minister for Immigration and Border Protection has used his personal non-delegable power to grant a non-citizen in immigration detention a visa in the public interest.

(3) The Australian Government has a low tolerance for criminal behaviour by non-citizens who are in the Australian community on a temporary basis, and do not hold a substantive visa. In the case of a non-citizen who, but for the Minister granting them a visa in the public interest, would be subject to mandatory detention, it is a privilege and not a right to be allowed to live in the community while their immigration status is being resolved.

(4) In order to effectively protect the Australian community and to maintain integrity and public confidence in the migration system, the Government has introduced measures that support the education of Bridging E visa holders about community expectations and acceptable behaviour. These measures encourage compliance with reasonable standards of behaviour and support the taking of compliance action, including consideration of visa cancellation, where Bridging E Visa holders do not abide by the law.

(5) Bridging E visa holders who have been found guilty of engaging in criminal behaviour should expect to be denied the privilege of continuing to hold a Bridging E visa while they await the resolution of their immigration status. Similarly, where Bridging E visa holders are charged with the commission of a criminal offence or are otherwise suspected of engaging in criminal behaviour or being of security concern, there is an expectation that such Bridging E visas ought to be cancelled while criminal justice processes or investigations are ongoing.

(6) The person's individual circumstances, including the seriousness of their actual or alleged behaviour, and any mitigating circumstances are considerations in the context of determining whether a Bridging E visa should be cancelled.

Part two - Section 116(1)(g) and regulation 2.43(1)(p)

5. Prescribed grounds under regulation 2.43(1)(p)

(1) Where more than one ground for cancellation under section 116(1) is relevant to the facts of the case, the decision-maker should consider cancellation under the most appropriate ground based on the evidence before the decision-maker. For instance, where there may appear to be non-compliance with condition 8564 because a visa holder has been charged with an offence against a State or Territory law, the ground at section 116(1)(g) and regulation 2.43(1)(p) would generally be the more appropriate cancellation ground, rather than the ground at section 116(1)(b), namely, non-compliance with a condition of the visa.

(2) The grounds for cancellation at regulation 2.43(1)(p)(i) and (ii) are enlivened when a visa holder is convicted of, or charged with, any offence, irrespective of the seriousness of the offence. However, the seriousness of the offence may be considered as a secondary consideration in the exercise of discretion under section 116(1).

(3) Where a Bridging E visa holder has been charged with an offence(s), but the charge(s) is/are dismissed, cancellation is not appropriate. Similarly, where a Bridging E visa holder has been charged with an offence but has been found by a court to be not guilty or the charge is otherwise dismissed, cancellation is also not appropriate.

5.1 How to exercise the discretion

(1) Informed by the Principles in paragraph 4.3, a decision-maker must take into account the primary and secondary considerations in Part two of this Direction, where relevant, in order to determine whether a Bridging E visa holder should have their visa cancelled.

(2) Both primary and secondary considerations may weigh in favor of, or against, cancellation of a Bridging E visa.

(3) The primary considerations should generally be given greater weight than any secondary considerations.

(4) One primary consideration may outweigh the other primary consideration.

(5) In applying the considerations (both primary and secondary), information and evidence from independent and authoritative sources should be generally be given greater weight than information from other sources.

6. Primary considerations

(1) In deciding whether to cancel a non-citizen's Bridging E visa under the prescribed grounds in regulation 2.43(1)(p) or (q), the following are primary considerations:

a. the Government's view that the prescribed grounds for cancellation at regulation 2.43(1)(p) and (q) should be applied rigorously in that every instance of non-compliance

against these regulations should be considered for cancellation, in accordance with the discretionary cancellation framework; and

b. the best interests of children under the age of 18 in Australia who would be affected by the cancellation.

6.1 The Government's view that the prescribed grounds for cancellation at regulation 2.43(1)(p) and (q) should be applied rigorously

(1) In weighing the Government's view that the prescribed grounds for cancellation at regulation 2.43(1)(p) and (q) should be applied rigorously, decision-makers should have regard to the principle that the Australian Government has a low tolerance for criminal behaviour, of any nature, by non-citizens who are in the Australian community on a temporary basis, and who do not hold a substantive visa. This is particularly the case for non-citizens who, but for the Minister granting them a visa in the public interest, would be subject to mandatory detention while their immigration status is being resolved.

6.2 The best interests of any children under the age of 18 in Australia who would be affected by the cancellation.

(1) Decision-makers must make a determination about whether cancellation is, or is not, in the best interests of any children under 18, who would be affected by the decision.

a. in considering the best interests of the child, decision-makers should have regard to the fact that the cancellation of a Bridging E visa under the prescribed grounds in regulation 2.43(1)(p) or (q) does not necessarily represent final resolution of a person's immigration status in Australia.

7. Secondary considerations

(1) In deciding whether to cancel a non-citizen's Bridging E visa, the following secondary considerations must be taken into account:

a. the impact of a decision to cancel the visa on the family unit (such as whether the cancellation will result in the temporary separation of a family unit);

b. the degree of hardship that may be experienced by the visa holder if their visa is cancelled;

c. the circumstances in which the ground for cancellation arose (such as whether there are mitigating factors that may be relevant, as well as the seriousness of the offence, the reason for the person being the subject of a notice (however described) issued by Interpol, or the reason for the person being under investigation by an agency responsible for the regulation of law enforcement);

d. the possible consequences of cancellation, including but not limited to, whether cancellation could result in indefinite detention, or removal in breach of Australia's *non-refoulement* obligations, noting that a decision to cancel a Bridging E visa does not necessarily represent a final resolution of a person's immigration status;

e. delegates may also consider any other matter they consider relevant.

ATTACHMENT C

Australian Government
Department of Immigration and Border Protection

Australian BORDER FORCE

04 November 2016

Mr Colin Neave
Commonwealth Ombudsman
GPO Box 442
CANBERRA ACT 2601

Dear Mr Neave

The administration of people who have had their bridging visa cancelled due to criminal charges or convictions and are held in immigration detention

Thank you for the opportunity to provide comment on the draft report '*The administration of people who have had their bridging visa cancelled due to criminal charges or convictions and are held in immigration detention*', which was sent to the Department of Immigration and Border Protection (the Department) on 7 October 2016. The Department's response to the five recommendations in the report is at **Attachment A.**

In general terms, the Department suggests that the application of Direction 63 has delivered the policy intent expected by Government, and over the past 12 months we have improved our capability in the use of the direction and our timeliness.

The Department has itself acknowledged there are some capability gaps around cancellations since integration which are being actively addressed at all levels. Peer review of the fifty cancellation decisions by the Character Assessment and Cancellation Branch, which has programme management responsibility for cancellation activity, has found that there is a need for the provision of more training to officers so that cancellation decisions can demonstrate clear consideration of Ministerial Direction 63 and clear assessment against cancellation grounds.

It should be noted that the ABF has matured since the investigation was undertaken and skill levels as well as broader familiarity with legislative and policy requirements is occurring across the ABF. Similarly, there is a greater awareness of the support mechanisms in place to assist officers with compliance activity.

That said, the Department believes that the cancellation process has not been accurately reflected in the report. One misunderstanding that features throughout the report is that non-adverse judicial outcomes are the sole basis for subsequent decisions to grant a visa and release an individual from held detention. In this regard, it is important to note that decisions to cancel visas are administrative decisions regarding the right of a non-citizen to continue to hold a particular visa. Under Migration Regulation 2.43(1)(p) cancellation grounds are enlivened with the laying of criminal charges. Decisions to cancel visas are made independently of any judicial process, including bail application. Non-adverse outcomes will inform subsequent visa grant decisions but there are a broader range of factors that are considered in visa grant decisions.

The Department does not accept the assessment that it 'is failing to prioritise the efficient progression towards status resolution for people in the cohort'. The Department has a governance framework to ensure all cases in detention are appropriately and regularly reviewed. Detention Review Managers review every held detention case (unless it is a rapid removal and does not involve either a cancellation or refusal decision) within 48 hours of a

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person entering a detention facility. Detention Review Committees separately review individual detainee circumstances on a monthly basis.

More recently the development and implementation of a Community Protection Assessment Tool will see a nationally consistent approach to assessing risks and the appropriate placement option for each detainee (i.e. in the community on a bridging visa, or as required, in held detention). This is a concerted effort to reduce the number of persons in held detention, but remains complex and time consuming.

The Department also rejects the statement that people are detained based on 'allegations alone'. Individuals who have only been charged but not convicted can have their visa cancelled. No cancellation decisions are made based on unsubstantiated allegations of criminal conduct. If the Ombudsman can identify instances where this has occurred, the Department would welcome the opportunity to look further into these cases.

The Department also notes that there are some factual errors in the report. The personal intervention of the Minister to grant Bridging E visas is only required for Illegal Maritime Arrivals (IMAs) who are barred under section 46A of the *Migration Act 1958* (the Act) from making a valid visa application. Case managers do not assess cases against the Minister's section 195A guidelines. These officers refer cases to the Complex Case Resolution Section (CCRS) for assessment against the guidelines. It is the case managers' role to identify circumstances which warrant assessment against the guidelines, for example significant health issues or length of detention.

Finally, the Department acknowledges the difficulties and delays your Office has encountered in sourcing information for this own motion. The lengthy delay in providing the requested information for this investigation is also in our view unacceptable, and we are very apologetic. We understand that all outstanding the information has since been provided to your Office on 11 October 2016.

At a recent meeting between Deputy Ombudsman Richard Glenn and Deputy Secretaries Michael Manthorpe and Jenet Connell and Deputy Commissioner Michael Outram, we agreed to re-establish regular and senior leadership meetings between the Department and your Office to address the previous instances of lack of responsiveness and to ensure other issues are addressed in a more constructive way.

The Department continues to value your role in reviewing the Department's compliance and detention operations, and is more than willing to discuss the issues raised in more detail. Thank you again for your ongoing oversight of immigration detention facilities and regional processing centres.

Yours sincerely

Kaylene Zakharoff
First Assistant Secretary
Community Protection Division
Visa and Citizenship Services Group

Kingsley Woodford-Smith
Assistant Commissioner
Detention Compliance and Removals
Operations Group

Response against recommendations:

In regard to the five recommendations, the department's response is as follows:

Recommendation:

1) That the person who is the subject of a Notice of Intent to Consider Cancellation of a visa under s 116 is given adequate time and resources to seek advice and present their reasons against the cancellation.

- The Department considers current legislation and procedural advice in regard to the time visa holders have to respond to Notices of Intention to Consider Cancellation (NOICC) appropriate.
- Section 121 of the Act sets out that a response to a NOICC must take place at a time specified in the invitation, being a time within a prescribed period or, if no period is prescribed, within a reasonable period. Departmental policy is that if the visa holder is invited to attend an interview in immigration clearance or during a field operation there should be at least 10 minutes between the time the visa holder acknowledges receipt of the notice and the time the interview commences. This is considered sufficient time in most cases involving the exercise of section 116(1)(g), Migration Regulation 2.43(1)(p) and (q) powers.
- The Department acknowledges that in some instances, visa holders may require longer than 10 minutes. For example, the visa holder's state of mind, capacity to understand what is going on, the complexity of the NOICC etc may be factors that call for periods longer than 10 minutes. However, the Department must ensure that decisions regarding the immigration status of an individual are finalised as efficiently and effectively as practicable, particularly during field activities, while being mindful of natural justice and the circumstances of the individual.

2) That the Department provide a person with a written notice of decision, including their review rights translated into their own language, when their Bridging visa is cancelled.

The notice should include information regarding:

a) The reasons for the decision to cancel their Bridging visa

b) Their rights to have the cancellation decision reviewed by the Administrative Appeals Tribunal

c) The applicable time frame for lodging an appeal with the tribunal

d) Details of how to contact the tribunal

e) Details of how the Department can facilitate contact with the tribunal and a legal representative.

- The Department provides written advice to non-citizens regarding the reasons a Bridging visa has been cancelled. Where a person cannot understand English or where the non-citizen requests interpreting assistance, an interpreter is provided through the Department's Translating and Interpreting Service.
- It is not practical to provide non-citizens with translated decision records. Translations, undertaken by accredited translators, can take several days to complete and will potentially have adverse effects on appeal timeframes.
- The Department acknowledges that it would be helpful to have standard documentation from the Administrative Appeals Tribunal (AAT) regarding review rights translated into several key languages, and will consider the feasibility of doing this.

3) That the Department:

a) Not transfer a person between detention facilities until the statutory time to lodge an appeal has expired (two days),

- The Department does not agree with this recommendation.
- The Department acknowledges that in making placement decisions, it should be alert to whether the detainee is within the statutory timeframe to make applications/appeals. Departmental staff can then engage with the detainee to discuss this further.
- The Department would welcome information from the Ombudsman in relation to paragraph 3.18. In particular, information regarding instances where detainees have been transferred within the statutory appeal timeframe which has resulted in them being unable to contact the AAT.
- The Department regularly undertakes detainee transfers within the network to ensure that individuals are accommodated in a facility that is best able to meet their health and safety requirements. The Department has a duty of care to ensure the safety of both the detainee and others, and also the good order and security of the facility. In determining placement, the consideration of a variety of factors is undertaken. The Department does not always have relevant information to inform immediate placement decisions and after risks are identified, transfer to a more suitable facility might be required. This will at times mean that a detainee may be in transit for a period of time and have limited access to telecommunications.

b) Ensure that all possible steps, in particular providing access to the Internet, are taken to ensure that a person can request a review of the decision to cancel

- Detainees are able to access legal representation in accordance with the Act. One of the means a detainee has available to them to make this contact is through the internet. Each immigration detention facility has a suite of computers available for access at most times as determined by the Department in conjunction with the facility services provider.

- All detainees have access to telephones and telephone interpreters. They also have access to departmental staff to discuss their immigration pathway or matters regarding appeals and reviews.

4) That the department:

a) Promptly seek the Minister's intervention to grant a visa for all cases where the cancellation decision is set aside by the Administrative Appeals Tribunal but the person cannot be released due to the natural expiration of their visa.

b) Identify all people in immigration detention whose cancellation decision was set aside by the Administrative Appeals Tribunal and, if not already done, brief the Minister about the circumstances of their case seeking the Minister's intervention to grant a new visa.

- The decision to release an individual from held detention is informed by a risk framework. Factors that will be considered in relation to whether an individual can be granted a Bridging E visa while their status is being resolved will include risk of harm to the community, removability and likelihood of engagement with the Department.
- In addition, cases are only referred to the Minister for consideration under section 195A if they meet the Minister's intervention guidelines.
- Where it is assessed that an individual can be managed in the community while their status is being resolved, the case will be forwarded to the relevant decision maker (departmental delegate or Minister).

- The Department has a number of governance mechanisms to ensure that non-citizens in immigration detention are regularly reviewed. These include: o Detention Review Managers review every held detention case (unless it is a rapid removal and does not involve either a cancellation or refusal decision).
    - on a monthly basis all detention cases are reviewed in Detention Review Committees.
    - systemic issues can be escalated to Regional Directors for attention.
    - other more recent initiatives have been set out in the General Response above.

5) That the department ensures its case management and escalation framework adequately supports the timely and efficient identification and referral of cases that meet the Minister's guidelines for consideration under s 195A.

- The Department has a case management framework to actively manage unresolved and complex cases. To strengthen this, the Department is establishing a more formal and nationally consistent framework to effectively and efficiently resolve cases. The Status Resolution Governance and Assurance Framework has clear lines of escalation and focusses on managing individual cases. The Framework provides mechanisms to refer matters, ensuring that speedy and appropriate action is taken by departmental officers. In support of this work, the Department has implemented the Community Protection Assessment Tool to deliver consistent, evidence-based, risk-informed and well-documented decisions on placement to inform Bridging E visa grants.