# Submission to the Independent Detention Case Review

## The Ombudsman's role as Immigration Ombudsman

The Office of the Commonwealth Ombudsman (the Office) has the specific title of Immigration Ombudsman and undertakes the following functions as part of that role:

1. Investigating complaints
2. Conducting own motion investigations
3. Conducting regular inspections of all immigration detention facilities
4. Undertaking a specific statutory reporting function to report to the Minister about people who have been detained for more than two years.

Collectively, these give the Office the opportunity to not only observe and comment on individual matters of concern but also to identify, and bring to the attention of the Department of Home Affairs and the Australian Border Force, systemic issues across the detention network. This function also provides independent assurance and transparency on immigration matters to the public.

Related to the above roles, on 21 December 2017, Australia ratified the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). In ratifying OPCAT, the Australian Government announced the Office as the National Preventive Mechanism (NPM) Coordinator and on 1 July 2018, this Office was appointed as the NPM for places of detention under the control of the Commonwealth. This includes Defence detention facilities, immigration detention facilities and Australian Federal Police cells including the ACT Police City watch house.

As the Coordinator, the Office is responsible for facilitating and coordinating the Commonwealth, State and Territory NPMs. This includes collecting information, facilitating information sharing, providing secretariat functions and preparing reports. It also requires that signatories accept visits from the United Nations Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

The purpose of an OPCAT compliant inspection is to identify processes, procedures, actions and activities within the operations of a detention facility that impact or have the potential to impact on the rights and wellbeing of detainees. The process is preventive in nature and does not rely on complaints or other prompts to initiate an inspection.

## The statutory reporting process under ss 486N and 486O of the *Migration Act 1958*

The Department is required to provide the Ombudsman with a report for each person who has been detained in immigration detention for more than two years, and every six months thereafter. This report includes details of the detainee's visa and detention history, case progression, criminal history, incident history and medical details.

The Ombudsman is then required to make an assessment on the circumstances of people who have been detained for more than two years to provide independent assurance that a person is not in held detention for any longer than necessary, and that such detention is lawful. This assessment is

then provided to the Minister who is required to table a de-identified copy in parliament within 15 sitting days of receiving it.

In making the assessment, the Ombudsman considers the Department's report as well as information obtained from the detainee and their advocates, and any complaints received by the Office. The Ombudsman reviews the detainee's immigration or removal pathway, including any established delay points or complexities, such as delays in obtaining travel documents, administrative or judicial review action and subsequent outcomes. The Ombudsman also reviews the detainee's incident and other relevant behaviour history, as well as information relating to the detainee's mental and physical health and welfare. Staff may also interview the detainee if there are additional complexities.

The Ombudsman also considers issues that affect detainees based on their specific cohort, such as people returned to Australia from Regional Processing Countries for medical treatment, and people who have had their visas cancelled under the character provisions of the Act.

In some circumstances, the Ombudsman will make recommendations to address issues of concern identified as part of the assessment. The Migration Act empowers the Ombudsman to make recommendations to the Minister; however, the Minister is not bound by any such recommendations.

All assessments (de-identified versions) and the Minister's responses are publically available on the Ombudsman's website. The Ombudsman also provides a copy of the full assessment to the detainee.

## The Detention Capability Review

The *Detention Capability Review*[1] conducted in 2015 (reported in 2016) identified that the "current approach to the management of individuals while their immigration status is being resolved is disjointed and suboptimal." Following this review, the department introduced a four tier detention placement model. Our primary concerns remain with unlawful non-citizens held in Tier 3 high security detention when their circumstances indicate that they could be:

- granted a bridging visa
- placed in a Tier 1 community placement (the default placement position) or
- placement in a Tier 4: Specialised detention facility such as nursing homes or other specialist residential facility as appropriate to their circumstances.

We note that the Australian Border Force has had success in placing detainees with less complex cases, for example, nursing home placements for terminally ill detainees or specialist community care facilities for cognitively impaired detainees, but highly complex cases are more difficult to find appropriate placements for. In part, this is due to the shortage of these providers in the community in general.

The review recognised the need for support for decision-makers to determine the risk an individual poses to the community, and that will guide the management of those who are vulnerable. It stated that the process lacked a robust framework supported by a multi-faceted and rigorous decision-support tool, noting that an individual's risk and needs rarely remain static over time. While noting the work the Department has put into the implementation of the review, it is our view that more work needs to be done to ensure the intent of the review's recommendations are met.

[1] https://www.homeaffairs.gov.au/reports-and-pubs/files/dcr-final-report.pdf

## Common issues of concern

The most common issues of concern that arise in the Ombudsman's assessments are:

- the protracted nature of the detainee's detention
- the reason for the detainee's continued detention
- the detainee's placement within the detention network
- apparent delays in progressing the detainee's status resolution.

Our Office is also mindful of a number of active cases where detainees are seeking judicial review of decisions taken by the Department and/or the Minister as it relates to their status resolution.

## Case studies

The case studies below serve to illustrate a number of the concerns the Ombudsman has in relation to the long-term immigration detention of individuals.

## Case study 1 – s 47E, s 47F

*Case progression*

s 47E, s 47F

*Medical issues*

s 47E, s 47F

*Placement*

s 47F, s 47E

*Ombudsman's concerns*

The primary concerns with Mr s 47F, s 47Es case are the length of time he has been detained and the appropriateness of his placement. s 47F, s 47E It is difficult to understand how the Department could recognise in s 47E, s 47F and earlier that placement in an IDC was inappropriate, and yet, more than five years later, he is still there. The length of time taken to secure a Tier 4 placement is also a concern. Now the Minister has refused Mr s 47F, s 47E's visa, we are concerned he is now facing apparently indefinite detention. We also note the s 47F, s 47E court decision that found the Minister's refusal of Mr s 47F, s 47E's protection visa was invalid, and we will be monitoring the effect of this decision, and any appeal, on his case and the wider IMA cohort.

## Case study 2 – s 47F, s 47E [redacted]

*Case progression*

s 47E, s 47F [redacted]

s 47E, s 47F [redacted]

[redacted]

*Ombudsman's concerns*

This case highlights the cumbersome and protracted nature of the process of referring people to the Minister for him to consider using his powers to grant a bridging visa. There have been no concerns regarding Mr s 47F, s 47E's security or behaviour, either in detention or while he was living in the community, and on the face of it, he would appear to meet the requirements to be granted a BV. However, with two submissions to the Minister being either returned or withdrawn, through no fault of Mr s 47F, s 47E, he has now remained in held detention for two and a half years since he first requested to be returned to s 47F, s 47E

## Case study 3 – s 47F, s 47E [redacted]

[redacted]

*Case progression*

s 47F, s 47E

[redacted]

[redacted]

*Medical issues*

s 47F, s 47E

[redacted]

*Ombudsman concerns*

Mr [redacted] s case highlights the damage that is caused to detainees and their families, both by prolonged detention and family separation. While noting the serious offence Mr [redacted] has been convicted of, we are of the view that in cases such as Mr [redacted] s, it should be possible to place the family together in the community, with the appropriate visa conditions and monitoring to ensure the safety of the Australian community.

While immigration detention is administrative, not punitive, in nature, in reality there is little difference. If Mr [redacted] has served his time and has been seen fit by judicial and correctional authorities to be released from prison, the question needs to be asked as to why he continues to be held in detention.

## Case study 4 – s 47F, s 47E [redacted]

[redacted]

### *Case progression*

s 47E, s 47F [redacted]

### *Medical issues*

s 47F, s 47E [redacted]

### *Ombudsman concerns*

Mr s 47F, s 47E's case highlights the apparent indefinite detention for IMAs who now hold QSAs but have not been granted BVs. The Ombudsman has made numerous recommendations for this cohort, including that the Department look at options for the management of such detainees.

The Ombudsman acknowledges that there is a process in place for ASAs to be reviewed, and in many cases these have been subsequently revised by ASIO to QSAs. As there is no mandatory requirement for holders of QSAs to be held in detention, many have been granted visas and released into the Australian community.

Noting that the decision to grant Mr s 47F, s 47E a bridging visa rests with the Minister for Home Affairs, the Ombudsman remains concerned that such a visa, with appropriate conditions, has not been granted, so that Mr s 47F, s 47E can live in the community while his immigration status is resolved.

Case study 5 – s 47F, s 47E [redacted]

[redacted]

*Case progression*

s 47F, s 47E [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

*Ombudsman's concerns*

We note that in refusing Mr s 47F, s 47E's TPV application, the Minister has rejected the finding of the AAT that Mr s 47F, s 47E's offences took place s 47E years ago and was linked to his state of mind at the time, and those circumstances no longer exist. However, we remain concerned that this criminal history will be given disproportionate weight in assessing him against the guidelines for the grant of a bridging visa. It is the Ombudsman's intention to recommend that the Department have an independent assessment of Mr s 47F, s 47E' security risk assessment undertaken as part of its guidelines assessment.

Case study 6 – s 47E, s 47F [redacted]

[redacted]

*Case progression*

s 47F, s 47E

[redacted]

[redacted]

*Ombudsman's concerns*

While we have not received copies of the court judgments and AAT decision, and the delegate's decision to grant him a visa, we do have records of Mr [redacted] criminal history and detention incidents. Noting that every case is determined on its own merits, this case does highlight the apparent inconsistencies in decision making that can have the effect of keeping individuals in immigration detention while other detainees with similar circumstances are released.

## Case study 7 – s 47F, s 47E [redacted]

[redacted]

### *Case progression*

s 47F, s 47E [redacted]

[redacted]

### *Ombudsman concerns*

The Ombudsman has recommend on two occasions that Mr s 47F, s 47E [redacted] be referred to the Minister for the grant of a bridging visa, and on one occasion that the Department expedite the preparation of a submission to the Minister for the grant of a Bridging visa. In s 47E, s 47F [redacted] the Minister advised he had declined to intervene. The most recent report from the Department advised in August 2019 that in s 47F, s 47E [redacted], he was found to meet the guidelines and the Department was preparing a submission. IHMS has reported that Mr s 47F, s 47E [redacted] has a history of torture and trauma, and detention fatigue. While the Ombudsman notes that Mr s 47F, s 47E [redacted] has had a number of incidents while in detention, he has no criminal history, and would benefit from living in the community, in line with the Detention Capability Review that recommends bridging visas or a community placement, while he waits for his status to be resolved.

## Case study 8 – s 47E, s 47F [redacted]

*Case progression*

s 47F, s 47E [redacted]

*Security and behavioural concerns*

s 47E, s 47F [redacted]

*Medical concerns*

s 47F, s 47E [redacted]

*Ombudsman's concerns*

Ms [redacted]'s case illustrates the problems in housing people with serious mental health and behavioural issues. While her current placement is at the least restrictive level, we note that her likely case progression is having her visa refused by the Minister, and then being placed on an involuntary removal pathway to [redacted] This means she faces the prospect of indefinite detention in a facility that is likely to either exacerbate the deterioration of her mental health, or at least, not improve it.

## Case study 9 – s 47F, s 47E [redacted]

*Case progression*

s 47F, s 47E [redacted]

*Ombudsman concerns*

Our Office has not been provided with the judge's sentencing remarks nor the delegate's decision to grant Mr s 47F, s 47E a visa so we are unable to consider any particular aspects of his case, which might have influenced the decision. However this does appear to show the apparent arbitrariness of decisions, where people with a significant criminal history are granted visas, and others with lesser criminal histories, or none at all, have their applications refused, either by a delegate or the Minister.

## Summary of concerns

The Ombudsman remains concerned at the number of people who remain in high security immigration detention who could in accordance with the DCR be released on a bridging visa or placed in the community

In many instances, it is only the Minister who may grant a visa. The process for a person to be considered for ministerial intervention to grant a bridging visa is slow and cumbersome and can result in a person continuing to be detained for longer than is reasonable.

The QSA cohort is one notable group that appears to be subject to apparent indefinite detention. In most cases, they have been found to be owed protection obligations and now their visa applications have been refused. As they cannot be returned to their home country, and it appears that third country resettlement options are not available, there is no obvious outcome for them. The Ombudsman continues to make recommendations that will allow these individuals to live in the community while a permanent solution can be found.

Vulnerable individuals, particularly those with severe mental health concerns, continue to be placed in IDCs when there is considerable medical opinion stating that this is detrimental to their health. We understand that these can be complex cases for which there is no easy solution; however, it is unacceptable that situations like this can continue for years without resolution.

We hope that this independent detention case review can further identify issues with people being detained in inappropriate conditions, or for longer than is necessary, and propose practical solutions that will help ensure that individuals are released from immigration detention as soon as practicable.