



Department of Immigration and Citizenship

REPORT INTO REFERRED IMMIGRATION CASES:
NOTIFICATION ISSUES

Including cases affected by the
Federal Court Decision in *Srey*

June 2007

Report by the Commonwealth and Immigration Ombudsman,
Prof. John McMillan under the *Ombudsman Act 1976*

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Reports by the Ombudsman

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SCOPE OF THIS REPORT

In 2005 and 2006 the Australian Government referred to the Commonwealth Ombudsman the cases of 247 people who had each been detained by the Department of Immigration and Citizenship¹ (DIAC), and later released on the basis that they could not be detained any longer as an unlawful non-citizen. This office agreed to investigate and report to DIAC about each person's case under the Ombudsman's power to conduct an own motion investigation, as provided for in s 5 of the *Ombudsman Act 1976*.

For the purpose of analysis, the cases were divided into seven categories on the basis of preliminary information provided by DIAC.² This report deals with two of those categories: notification issues and cases affected by the Federal Court decision in *Srey*.³

Part 1 of the report deals with 21 cases classified as 'validity of notification' cases. In each case, a person was detained after a decision was made by DIAC either to refuse the person's application for a substantive visa, or to cancel the person's existing visa. The question arising in each case was whether there had been an error in notifying of either the decision to refuse or cancel a visa, or an essential preliminary step in making that decision. If so, it is possible that the visa refusal or cancellation decision was legally ineffective, and that the person could not lawfully be detained under the *Migration Act 1958* (the Migration Act).

Part 2 of this report deals with 57 cases that were affected by the decision of the Federal Court in *Srey*. In that case the court held that a Migration regulation that specified when a notice from DIAC was deemed to have been received by a person was invalid. As a consequence, notices relying on that regulation for their effectiveness were legally ineffective. In each of the 57 cases a person had been detained by DIAC following the despatch of such a notice.

The Ombudsman's office has provided an individual analysis of each of these 78 cases to DIAC, and these analyses will not be published. Instead, the systemic issues concerning immigration administration that arise from the individual investigations are addressed in this consolidated public report. A brief summary of each of the validity of notification cases is included in a section that follows Part 1 of this report.

The investigation of each case focused on establishing the facts that led to the detention of the person, the factors that contributed to notification errors by DIAC, and DIAC's response to the *Srey* decision. The investigation looked at systemic problems that impaired DIAC's ability to effectively administer its notification responsibilities and to deal with the *Srey* decision. While the investigation looked

¹ During the period covered in this report, DIAC was known as the Department of Immigration and Multicultural and Indigenous Affairs, and then the Department of Immigration and Multicultural Affairs.

² The cases were divided into the categories of mental health, children in detention, data problems, those affected by the Federal Court decision in *Srey*, notification issues, detention process and other legal issues: further, see Commonwealth Ombudsman, *Annual Report 2005–06* at p 83–84.

³ *Chan Ta Srey v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 134 FCR 308; [2003] FCA 1292 (12 November 2003) (*Srey*).

comprehensively at the relevant legislative requirements, we did not focus on DIAC's broader notification obligations and administrative processes.⁴ The methodology included consideration of:

- DIAC client files for individual cases
- the Integrated Client Services Environment (ICSE)⁵ for individual cases
- detention dossiers, where applicable, for individual cases investigated
- relevant sections of the Migration Act and Migration Regulations 1994
- the decisions of the Federal Court in *Minister for Immigration and Multicultural Affairs v Singh* [2000] FCA 377 (4 April 2000) (*Singh*) and *Chan Ta Srey v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1292 (12 November 2003)
- information from DIAC in relation to notification and Srey issues, provided in briefings to Ombudsman staff
- relevant DIAC policy documents.

The notification provisions impact upon the ability of the Migration Review Tribunal and the Refugee Review Tribunal (the tribunals) to carry out their statutory review functions. Accordingly, the tribunals have been consulted and have advised that they recognise the centrality of notification to their functions. Importantly, they have conducted training and have recently issued a new guideline dealing with these issues.

⁴ The Ombudsman's office is undertaking an own motion investigation into the quality of DIAC's notification of reasons for decisions and review rights for refused visa applicants.

⁵ ICSE is DIAC's primary database and provides a single reference point for all records of contact between clients and DIAC. The system supports onshore processing for citizenship, visas, assurance of support, sponsorship, nomination and compliance.

PART 1—OVERVIEW OF THE NOTIFICATION CASES

1.1 In each of the 21 cases investigated in Part 1 of this report, a person was taken into immigration detention under s 189 of the Migration Act. That section, which is discussed in detail in other Ombudsman reports,⁶ provides that a person must be detained if an officer knows or reasonably suspects that the person is an unlawful non-citizen. In all these cases a person was detained after DIAC made a decision to refuse the person a visa or to cancel their existing visa. However, in each of the cases an error occurred, at one or another stage of the process, in sending a notice to a person.

1.2 The Migration Act and Migration Regulations set out DIAC's statutory obligations in notifying of visa decisions. In essence, when DIAC decides to refuse to grant a visa, there is a statutory duty to notify the applicant of that decision in writing, and to include standard information and deliver the document by one of the methods provided for in the Migration Act and Migration Regulations. There are similar statutory requirements applying to a decision to cancel a person's visa.

1.3 The legislative and policy framework controlling the notification of decisions is comprehensive and provides clear guidance to DIAC staff. However, the investigation of the individual cases in this report highlighted some recurring problems in the way that DIAC officers implemented the legislative and policy requirements. These problems appear to stem from poor internal administrative processes, a lack of understanding by some DIAC officers of the notification requirements imposed by the legislation, and a failure by officers to identify notification deficiencies, and their implications, in a timely manner.

1.4 Three of the 21 notification cases concerned the cancellation of a person's visa. In two of those cases, DIAC did not follow the requisite process and as a result these visa holders were wrongfully detained. In the third case, the cancellation decision letter was sent to an incorrect address. Despite this error, the person was an unlawful non-citizen at the time of detention.

1.5 Eighteen of the 21 cases involved a visa refusal decision. In 16 of these cases there was an error in notifying a person of the decision. As noted later in this report, s 66(4) of the Migration Act provides that failure to notify of a visa refusal decision does not affect the validity of the decision. However, a notification failure can mean, for reasons explained later, that the time period in which a person may lodge a valid application for review of a refusal decision does not commence running. Until the expiration of the appeal period the person may continue holding a bridging visa that allows them to remain lawfully in the community. The DIAC database may nevertheless record—erroneously—that notification occurred, that no application for review was lodged, that the person's bridging visa ceased, and that the person became an unlawful non-citizen.

1.6 The following general description can be given of the 21 cases:

⁶ The *Inquiry into the circumstances of the Vivian Alvarez matter*, Report No. 03/2005, *The Reports into Referred Immigration cases: Mr T, Mr G*, (Report Nos. 04/2006, 06/2006 respectively); and the *Reports into Referred Immigration cases on Mental Health and Incapacity and Children in Detention* (Report Nos. 07/2006 and 08/2006). See also the *Report of inquiry into the circumstances of the immigration detention of Cornelia Rau*, Mick Palmer AO APM, July 2005.

- The detention of each person occurred between 2000 and 2005.
- The detention period ranged from one calendar day to six months.
- In 12 cases DIAC did not send notification letters to the correct address that the client had provided to DIAC for the purpose of communication.
- In three cases DIAC failed to send the notification letter to the authorised recipient nominated by the visa applicant.
- In one case DIAC sent the letter to a de-registered migration agent, despite the visa applicant having advised DIAC that the agent was no longer the person's authorised recipient.
- In 12 cases DIAC officers, having received information from a person that was sufficient to identify a notification error, either failed to act on that information prior to detaining the person, or failed to act on that information in a timely manner after detaining the person.
- In almost all cases a thorough file review was not conducted prior to the file being referred for compliance activity.

1.7 The notification deficiencies in these cases have occurred over a five-year period and on each occasion presented grave consequences for the DIAC client. It is of great concern that DIAC did not take a systematic and comprehensive approach to addressing the notification deficiencies and associated problems when they occurred. This may be indicative of a culture within DIAC at the time in which senior management were not briefed on such problems when they occurred.⁷ This meant that opportunities for systematic learning from errors were lost. Although the legislative and policy regime in relation to notification is highly prescriptive and provides a comprehensive guide to DIAC officers, DIAC could have done more. DIAC could have responded to this problem in a more timely manner to ensure that training and quality assurance measures, for example, were in place to complement the prescriptive statutory regime. DIAC could have alerted its staff to the potential consequences of such deficiencies.

1.8 The Ombudsman's office has not expressed a view on whether there was a period of unlawful detention in any of the cases under investigation. Although in 18 cases the person being detained held a visa at the time of detention, the decision to detain turns on whether an officer holds a 'reasonable suspicion' that the person is an unlawful non-citizen. This would require a more extended analysis (including consultation with the relevant parties) of the facts in each case. Ultimately, too, only a court of competent jurisdiction can decide whether there was a period of unlawful detention. Nevertheless, in each individual case the Ombudsman's office recommended to DIAC that it give further consideration to this issue, for the purpose of considering whether a remedy should be provided to the person to acknowledge or redress any suspected unlawful action.

Legal and policy framework

1.9 The Migration Act, the Migration Regulations and DIAC's procedures and policy outlined both in the Procedures Advice Manual (PAM) and in the Migration Series Instructions (MSIs), provide a comprehensive guide to the notification of visa decisions and cancellation processes. These requirements are summarised below, providing an overview of DIAC's statutory obligations in these matters.

⁷ This issue was highlighted in the Mr T report (see footnote 6) in paragraph 2.55.

Notification regime

1.10 Section 66 of the Act provides that a decision to grant or refuse a visa is to be notified in the prescribed way. If a visa is refused and the decision is reviewable, the notification letter must contain a statement to that effect, and give information about the time in which the application for review may be made, who can apply for the review and where the application for review can be made (s 66(2)(d)). Section 66(4) states that failure to give notification of a decision does not affect the validity of the decision. Nonetheless, the limited time period for lodging an application for review does not commence running until there has been legally effective notification; similarly, a bridging visa held by a person who is entitled to seek review of a visa refusal will not cease until the date for lodging a valid review application has passed.

1.11 A decision to refuse an application for a substantive visa must be notified to the applicant by one of the methods outlined in s 494B. When this is done, the deemed receipt provisions in s 494C are triggered. The table below outlines the different methods of notification and their associated receipt provisions.

Method of Notification (s 494B)	Date of deemed Receipt (s 494C)
Handing the document to the recipient	The day it is handed to person
Handing the document to another person at the last residential or business address provided to the Minister for purposes of notification	The day it is handed to the other person
Dispatching the document by pre-paid post within three working days of the date of the document to the last address for service, residential address or business address provided to the Minister for purposes of notification	7 working days after the date of the document, if the document is dispatched from a place within Australia and 21 days after the date of the document, in any other case
Sending the document by fax, email or other electronic means to the last address provided to the Minister for purposes of notification	At the end of the day on which the document is transmitted

1.12 Prior to the commencement of s 494C in August 2001, the deemed receipt time was stipulated in Migration Regulation 5.03. That regulation was held to be invalid, as discussed in Part 2 of this report.

1.13 Another relevant provision is s 494D, which provides that a person may advise DIAC of the name and address of another person (an authorised recipient) to receive documents on their behalf. If so, the authorised recipient must be notified of a visa decision by one of the methods specified above in s 494B. When that occurs, the visa applicant is taken to have received a document in accordance with the associated deemed receipt provisions. However, notification of an authorised recipient under s 494D does not preclude DIAC from also providing a copy directly to the visa applicant.

1.14 As a general observation, the prescriptive nature of the notification regime is a double-edged sword. Strict compliance by DIAC with the legislation will be enough to ensure legally effective notification, even if the letter remains unread or is lost in the post. Conversely, a small deviation from the requirements of the legislation can render the notice legally ineffective, even though the notice was received and read.

Bridging visa regime

1.15 A bridging visa allows a person who would otherwise be an unlawful non-citizen to remain lawfully in the community rather than be taken into immigration detention. Generally, a valid application lodged in Australia for a substantive visa also serves as an application for a bridging visa. In these circumstances, the bridging visa enables the person to remain lawfully in the community while their substantive visa application is processed.

1.16 Notification that a visa has been refused is the key trigger for cessation of the bridging visa. A bridging visa remains in effect until either the substantive visa is granted or 28 days has elapsed since notification of the refusal decision. If the applicant applies for merits review of the refusal decision by the Migration Review Tribunal (MRT) or Refugee Review Tribunal (RRT), the bridging visa will remain in effect until 28 days after notification of the relevant tribunal's decision.

1.17 If DIAC effectively notifies a person of the decision to refuse a visa and records this in its system, and no tribunal review application is lodged, the system will automatically show the person's visa as having ceased 28 days after notification occurred.

1.18 If, however, the notification of a visa refusal decision was ineffective, but is recorded in the system as having occurred, and a tribunal review application is not lodged, the system will similarly automatically commence a 28-day countdown, after which time the system will erroneously show that a person's bridging visa ceased. The applicant will incorrectly be shown as unlawful on DIAC's system and be vulnerable to detention.

1.19 Following effective notification, there are strict time limits within which a person must lodge a tribunal review application. The tribunals do not have jurisdiction over review applications lodged outside these time limits. Thus, effective notification is critical in ensuring that an applicant can exercise their right of review. Effective notification also has immediate consequences for the person's immigration status.

Implications of deficient visa refusal notices

1.20 The failure to effectively notify a person of a visa refusal decision can have adverse consequences, as outlined below:

- The person may remain unaware that a refusal decision has been made by DIAC.
- DIAC may assume that the notification has been effective.
- The cessation of an applicant's bridging visa will not be triggered and the person will remain a lawful non-citizen.
- If the person does not lodge an application for tribunal review, DIAC may wrongly conclude, based on the information recorded in its system, that the person's bridging visa has ceased and that they are an unlawful non-citizen.
- Based on an incorrect assumption that the person is an unlawful non-citizen, DIAC may take compliance action leading to the person's detention.

1.21 In practice these consequences can have a devastating impact on a person, resulting in their unlawful detention. The case below provides an example.

Case study: Detention following deficient notification

Mr A was detained on two separate occasions, for three weeks and six months respectively. Mr A's lawful status was not recognised by DIAC at the time of his detentions because the DIAC database indicated that he had been notified of decisions to refuse him both a student visa and a protection visa. In fact, DIAC's multiple attempts to advise Mr A of the refusal decisions did not accord with the legislation, and he could not be taken to have been notified. As such, he was a lawful non-citizen, holding a bridging visa during the entirety of both periods of detention.

Address issues

1.22 Instruction on how a visa applicant is to provide address information to DIAC is provided in s 52 of the Migration Act and in MSI 229: *Processing change of address notifications and applications for bridging visas with changed conditions and receipting visa applications not made in person*.

1.23 Section 52 requires a visa applicant to communicate with the Minister in the manner prescribed in the regulations. Regulation 2.13 specifies that communication to change a visa applicant's address must be in writing. However, the effect of s 52(3) is that if an applicant advises DIAC of a change to their address in a way other than the prescribed way and DIAC receives it, this has the same effect as written notification, and DIAC must use this new address in its communication with the client. It is therefore critical to effective communication with clients that DIAC's internal administrative systems and processes facilitate the accurate maintenance and identification of correct client contact details, such as addresses for notification purposes.

1.24 In 12 of the cases in this report, DIAC sent the visa refusal notification letter or cancellation documentation to an incorrect or incomplete address. This usually occurred in cases where the visa applicant had changed their address since lodging their visa application. The analysis of these cases revealed that two common problems were DIAC's failure to effectively process a change of address notification, and error on the part of the DIAC officer sending the correspondence. Examples of these errors were that a DIAC officer did not update the electronic record after receiving advice of a change of address, or failed to check the electronic record and relied on the address as it appeared in the original application.

1.25 The failure to send the notice to the correct address meant that the addressee was not effectively notified of their visa refusal decision in accordance with the Migration Act. For this reason, the deemed receipt provisions in s 494C were not triggered and the addressee could not be taken to have received advice of a decision. The person's bridging visa therefore remained in effect.

1.26 The case of Ms B provides an example of the consequences of a failure to send the visa refusal notification to the correct address.

Case study: Failure to send notice to correct address

Ms B was detained for 13 days as a result of DIAC failing to send a notification letter to the address that she had provided for the purpose of notification. Ms B had changed her address and advised DIAC in the appropriate way, yet the notification letter from DIAC to Ms B was wrongly sent to her old address. As DIAC was unaware of the notification error, Ms B's status on DIAC's system erroneously altered to that of unlawful. She was detained despite being the holder of a bridging visa.

1.27 Although these notification errors occur in only a small percentage of DIAC cases, the consequences for the individuals are serious, to the point of being wrongly detained. This outcome underscores the need for DIAC to ensure that its internal processes for updating client records are effective and rigorous. Staff must be adequately trained in notification obligations, including the need to review material and systems to ensure that the most up to date information is being utilised.

Authorised recipient issues

1.28 Section 494D of the Migration Act provides for a visa applicant to nominate an authorised recipient to receive documents on their behalf. In practice this is usually a migration agent. Migration agents are registered with the Migration Agents Registration Authority (MARA) and are authorised to provide immigration assistance to clients. If a visa applicant nominates an authorised recipient, DIAC is required to send all correspondence relating to that person's application to the authorised recipient. DIAC may also send a copy to the applicant.

1.29 In some of the cases covered by this report there was an error in communication with an authorised recipient. In three such cases, DIAC failed to send a visa refusal notification letter to an applicant's authorised recipient. As a result of this error, the deemed receipt provisions were not triggered, meaning that the bridging visa held by the visa applicant remained in effect. However, DIAC's system incorrectly showed that the visa applicant's bridging visa had ceased, and in each case the person was detained as an unlawful non-citizen.

1.30 The cases in which the notification letter was not sent to the authorised recipient were mostly the result of error or oversight within DIAC. The following case of Mr C illustrates how the same problem can arise when a migration agent is de-registered or otherwise ceases to act for an applicant.

Case study: Migration agents as authorised recipients

MARA de-registered Mr C's migration agent soon after the agent had lodged Mr C's permanent visa application. The migration agent's de-registration was not recorded against Mr C's database record. In addition, Mr C had advised DIAC that he no longer wanted the agent to represent him. Despite this, DIAC continued to send correspondence to the migration agent, including the visa refusal notification letter, and did not send copies to Mr C. As a result, Mr C did not receive the letter of refusal in accordance with the Migration Act, so his bridging visa remained in effect. DIAC's records, however, showed that Mr C had been notified and that his bridging visa had ceased; he was subsequently detained as an unlawful non-citizen for two calendar days.

1.31 This case prompted the Ombudsman's office to ask DIAC about its communication arrangements with MARA, and the processes in place to ensure that a client is not adversely affected if an agent they have nominated as an authorised recipient is de-registered or suspended by MARA. In response, DIAC explained that de-registration of a migration agent does not necessarily mean that the agent ceases to be a client's authorised recipient. MARA notifies DIAC by email and through a daily automated systems process of a decision to cancel or suspend the registration of an agent. This information is recorded in ICSE. An 'agent of interest' indicator in ICSE will alert officers that the agent is no longer registered. If a visa refusal decision has to be notified to a person, DIAC will make contact with the visa applicant to ascertain if the authorised recipient information requires amendment.

1.32 The relevant entry in MSI 400: *Migration agents and unregistered persons: Dealing with conduct of concern*, paragraph 3.4.5, states:

Regardless of whether the authorised recipient is registered or not, you are however required, under s 494D(1), to send all documents about the applicant's case to them, instead of the applicant—if you do not do this, the applicant will not have been correctly notified of any decision made by the Department. You can send a courtesy copy to the applicant as long as it is clear that it is a courtesy copy.

1.33 This instruction creates a risk that clients will be adversely affected when DIAC continues to send correspondence, including notification letters, to migration agents who have been de-registered or suspended. Alternatively, there is a risk that officers may erroneously believe that a migration agent who has been de-registered automatically ceases to be an authorised recipient to whom notification letters should no longer be sent.

1.34 DIAC has advised the Ombudsman's office that it is currently undertaking a review of this issue and its implications. In the meantime, a 'Frequently Asked Questions' document has been sent to staff to provide guidance in this area. This issue needs to be resolved as soon as possible to ensure that notification letters are properly addressed and that clients are not unnecessarily disadvantaged.

Failure to review information

1.35 An issue that arises prominently in these cases is whether the facts of a case were adequately reviewed within DIAC before compliance action was instituted.

1.36 A common pattern in the cases under investigation is that the relevant business area within DIAC forwarded a person's file to the Compliance section for action once the system showed that a notification letter had been sent and a bridging visa had ceased. In many cases the file was sent to Compliance without the business area first conducting a review of the case to ensure that DIAC had met its notification obligations. At a minimum, there should be a checklist to assist decision makers to ensure that these checking tasks are completed prior to a file being transferred to Compliance for action.

1.37 The Full Federal Court in *Goldie v Commonwealth*⁸ observed that it is unsatisfactory for officers, in forming a reasonable suspicion to detain a person as an unlawful non-citizen, not to conduct appropriate enquiries or to resolve conflicting information. The court held that 'the suspicion that a person is an unlawful non-citizen must be justifiable upon objective examination of relevant material ... such material

⁸ (2002) 188 ALR 708 at [4].

will include that which is discoverable by efforts of search and inquiry that are reasonable in the circumstances’.

1.38 In many of the cases in this study where notification was ineffective, the decision letter was ‘returned to sender’ by Australia Post and placed on the client’s file. This should have prompted DIAC to review the matter to ensure that:

- the correct residential address, as provided by the client for purposes of notification, had been used
- the notice was sent to an authorised recipient if one had been nominated by the client
- the client had not advised DIAC of a change to their address, either verbally or in writing
- if there was a migration agent, the agent had not since been de-registered or suspended.

1.39 Conducting a review and examining relevant material might have assisted DIAC officials to determine whether the notification of the substantive visa decision was in accordance with the legislation, and if the deemed receipt provisions had been correctly triggered. This analysis would have brought greater rigour to the formation of a reasonable suspicion under s 189 of the Migration Act, and may have prevented the unnecessary detention of lawful non-citizens.

1.40 In many cases it was not until after a person had been detained that DIAC conducted a review of the file to determine whether notification was effective. Ms D’s case below illustrates this problem.

Case study: Failure to review file before transfer to compliance for action

Ms D had correctly notified DIAC of a change to her address prior to her substantive visa application being decided. DIAC erroneously sent the visa refusal letter to Ms D’s solicitor who was not her authorised recipient. This letter was returned to DIAC marked ‘returned to sender’. DIAC then sent the notification letter to an old address of Ms D, which was also returned to sender. Ms D’s file was then transferred to Compliance for action without further review of her case to determine if the notification was effective. She was detained under s 189 for seven calendar days. Ms D was released from detention following a review of her file when the notification deficiency was identified.

1.41 In some other cases DIAC did not act in a timely manner upon information provided by a person in detention. In a typical case, during the record of interview with a suspected unlawful non-citizen the person would state that they had not been notified of the outcome to their substantive visa application. In some of these cases DIAC conducted a prompt review of the relevant files and released the person the following day. In other cases, people remained in detention for up to 13 days while DIAC verified the person’s claims and reviewed the file material.

1.42 The case of Ms B provides an example.

Case study 5: Failure to review file in timely manner

Ms B first alerted DIAC officials to the fact that she had not been notified of the outcome to her visa application when she was located prior to being detained. The DIAC official did not address the implications of this statement and failed to conduct any file search as a result. After being taken to a detention facility, Ms B was interviewed and stated that she had contacted DIAC three times and had been advised that her protection visa had not yet been decided. Ms B was interviewed three days later and again asserted to officials that she was unaware that her protection visa had been refused. DIAC did not act on her assertions. Nine days later, Ms B advised DIAC officers that she had informed DIAC of a change to her address after lodging her protection visa application. DIAC then arranged for her file to be checked at which time it was confirmed that Ms B had not been effectively notified of the decision to refuse her a protection visa.

1.43 In these cases, the DIAC officers should have acted on the information provided by a person to determine if they still held a bridging visa due to a deficient notification. An enquiry of that kind will ordinarily be essential before an officer can form a reasonable suspicion that a person is an unlawful non-citizen to be detained under s 189.

1.44 DIAC has now advised compliance officers of the danger inherent in relying solely on the information recorded in ICSE. MSI 411: *Establishing immigration status in the field and in detention*, issued in December 2005, instructs staff to conduct all reasonable systems checks and where possible arrange for a person's file to be reviewed.

Re-issuing of visa refusal decision letters

1.45 There were cases where DIAC identified that the original decision letter did not constitute effective notification and took steps to re-issue it. These steps coincided with the person's release from detention. The subsequent notification attempt was effective in most cases, but not all. There was one case where the second attempt, and another where multiple attempts, to notify were also deficient and legally ineffective. In both of those cases, the person was re-detained because DIAC once again erroneously believed that the notice had been effective.

Case study: Deficient re-notification letter

Mr A was sent six visa refusal decision letters relating to two separate visa applications, five of which did not constitute effective notification. He was detained on two occasions, however, owing to the notification deficiencies he was a lawful bridging visa holder during both detentions. The deficiencies included address errors, incorrect information given about the time in which Mr A could lodge a review application, and reliance upon a Migration regulation declared invalid in *Srey* (discussed later in this report).

1.46 The compound deficiency—in initial notification and re-notification—indicates confusion amongst some DIAC officers as to the obligations imposed by the migration legislation. This suggests that there is a need for clear policy and adequate training of DIAC officers in notification methods, and in the implications of deficient notifications.

1.47 In addition, the current form of the legislation is highly prescriptive and does not allow for further notification where the original notification met the requirements of the legislation. There are cases where, although the original notification was legally effective, exceptional or unforeseen circumstances have prevented the person from actually receiving it. The legislation currently does not allow for re-notification in these circumstances.

1.48 This issue is highlighted by two cases in which DIAC re-issued a visa refusal decision letter, despite the initial letter constituting effective notification. This subsequently had implications for the person's merits review rights.

Case study: Re-notification when original notice was legally effective

Mr E was a dependent applicant on his mother's protection visa application. By the time DIAC decided the application, seven years after it was lodged, Mr E had moved from his parents' home and advised DIAC of a change to his address in connection with a new substantive visa application. DIAC sent the protection visa refusal decision to Mr E's parents' address in accordance with the legislation. Mr E's parents had moved address three days prior and had not yet notified DIAC. As a result they did not physically receive the letter, but notification was legally effective. Mr E did not lodge an application for merits review and his associated bridging visa ceased 28 days after he was taken to have received the notice. Mr E was later detained and released after three days when DIAC decided to re-issue the visa refusal decision letter. Following receipt of the second letter, Mr E lodged an application for merits review, yet the RRT decided that the application was out of time, which was calculated from the time of notification to Mr E's parents.

1.49 In another case, DIAC decided to re-issue a refusal letter to an applicant for compassionate reasons. The visa applicant had a transient and problematic lifestyle. Although DIAC had sent the visa refusal decision to the correct address, the applicant did not physically receive it. The applicant was later detained as her associated bridging visa had ceased. DIAC decided to re-issue the refusal decision letter to the applicant and released her from detention. In this case the MRT determined that the review application had been made within time, despite the first decision letter constituting effective notification.

1.50 In these two cases, DIAC decided to re-notify these visa applicants of its refusal decision, despite not being legally empowered to do so. The RRT decided the review application lodged with it was out of time—calculating the time from the original notice, however in the other case, the MRT accepted the application—calculating from the second notice.

1.51 These cases illustrate that there may be a genuine and unavoidable reason that a person has not physically received a legally effective notice. Under the migration law, a legally effective notification, whether received or not, triggers a person's review rights. This highlights the need for DIAC to review this issue to determine whether legislative amendment is required to allow for re-notification in exceptional circumstances, particularly on compassionate grounds.

Notification of visa cancellation

1.52 The issue of correct notification also arises when a decision is being made to cancel a person's visa. Section 119 of the Migration Act provides that a visa holder must first be notified that DIAC is considering cancelling the person's visa. The notice must give particulars of the grounds for cancellation and invite the holder to show within a specified time why those grounds do not exist or why the visa should not be

cancelled. The methods of communicating with the visa holder, outlined in the regulations, are the same as in the s 494B table above.

1.53 If there is notification complying with s 119, a decision may then be made to cancel a person's visa after the visa holder has responded to the notice, the visa holder has told DIAC that they do not wish to respond, or the time for responding to the notice has passed (s 124). A decision to cancel the visa must be notified in the prescribed way and specify the ground of cancellation and whether the decision is reviewable (s 127). Section 127(3) provides that failure to give notification of a cancellation decision does not affect the validity of the decision. However the decision itself is invalid if the preliminary steps specified in s 119 were not followed.

1.54 Three of the cases covered in this report involved detention of a person following the cancellation of their visa. In two of the cases, there was an invalid notification process and the decision to cancel was therefore legally ineffective. The following case of Mr F provides an example.

Case study: Flaw in requisite cancellation process

DIAC wrote to Mr F notifying him that there may be grounds to cancel his visa. The letter was sent to Mr F's old address and he did not receive it. Hence, Mr F was unable to participate in an interview to provide information as to why the grounds for cancellation did not exist. Furthermore, the notice of intention to cancel did not comply with the requirements of the legislation, with the result that the power to cancel the visa could not be exercised. Mr F was subsequently detained for five calendar days.

1.55 The decision to cancel a person's visa has significant consequences for the visa holder. The person becomes an unlawful non-citizen, who can be detained and may lose their right to remain in Australia. The level of care and attention in the cancellation process should be commensurate with the seriousness of the decision being made. It is likewise important that there is proper notification that a visa has been cancelled. This enables the person to properly consider their options, which may include pursuing their review rights within the specified time period, seeking to regularise their immigration status or departing Australia.

Recommendation

This report has drawn attention to administrative deficiencies that occurred during 2000 to 2005 in the handling of the 21 cases covered by this investigation. Steps are currently being taken in DIAC to address these and other deficiencies that have been identified in previous reports of the Ombudsman and other internal and external enquiries. It is recommended that DIAC, as part of that process of reform, note the contents of this report and ensure that adequate measures are implemented to address the following problems identified in this report:

- Officers should be properly trained in relation to notification requirements, including that deficient notification can impair a decision to detain a person under s 189 of the Migration Act.
- Officers should be instructed to undertake a comprehensive file review to ensure that notification was effective so that any compliance activity is based on up to date and accurate information.

- Officers should be instructed to conduct further enquiries if a person in detention provides information that casts doubt on whether the relevant notification requirements have been met.
- Officers should be made aware of issues associated with migration agents, authorised recipients and third parties to ensure that notification obligations are met.
- Before a decision is made to detain a person who was the subject of a visa cancellation or refusal decision, the person should be questioned to help determine if the relevant notification requirements have been met.
- DIAC should review the adequacy of policy and procedural documents relating to processing change of address information.
- DIAC should review the practice of re-notifying a decision to a visa applicant, and consider whether there is a need for administrative or legislative clarification of the rules relating to re-notification.

Case summaries

Case summary 1

[See case studies on p. 7 and p. 11]

Mr A was detained by DIAC on two separate occasions, for three weeks and six months respectively (201 calendar days), following notification errors. Mr A's lawful status was not recognised by DIAC at the time of his detentions because DIAC's systems indicated that he had been notified of the decisions to refuse him two separate visas. In total, DIAC sent six notification refusal letters to Mr A, relating to two separate visa applications, which were legally ineffective. The deficiencies included address errors, being Srey affected and giving incorrect information about the time in which Mr A could lodge a review application.

As a result of these deficiencies, Mr A held bridging visas during the entirety of his two detentions.

Case summary 2

[See case studies on p. 8 and p. 11]

Ms B was detained by DIAC for 13 calendar days. Following the lodgement of her protection visa application, Ms B correctly notified DIAC of a change to her address. DIAC refused Ms B's protection visa and sent the decision letter to her old address, rendering the notification legally ineffective. DIAC did not recognise this error and Ms B's associated bridging visa erroneously showed as having ceased on ICSE, 28 days after she was taken to have received the notice. Ms B was subsequently located and detained by DIAC, given she showed as 'unlawful' on DIAC's system.

Following her detention, Ms B told DIAC officers that she had not been notified of the outcome to her protection visa. However DIAC did not take any immediate action in relation to this information. It took DIAC over two weeks to identify its error and release Ms B.

Case summary 3

[See case study on p. 8]

Mr C was detained by DIAC for two calendar days. DIAC sent a letter advising Mr C that a visa had been refused to his former migration agent. Mr C had earlier advised DIAC that he no longer wanted the agent to represent him. Moreover, by this time the agent had been de-registered and had been murdered. Prior to refusing the visa, DIAC wrote to the migration agent requesting further information to assist it in determining the application. Because the migration agent had been de-registered, reported missing and was later known to be deceased, Mr C was not aware of this request and therefore was not able to provide the extra information required.

Prior to being detained, Mr C advised the DIAC compliance officers that he thought he held a bridging visa and that he had not yet been notified of the outcome to his permanent visa application. The DIAC officers did not act on this information and detained Mr C under s 189. The following day, DIAC decided to re-notify Mr C, because of both the circumstances relating to his migration agent and that he had not received the notification. However DIAC did not take any action to address the fact that Mr C had not received the request for further information to assist DIAC in assessing the visa application.

Case summary 4

[See case study on p. 10]

Ms D was detained by DIAC for seven calendar days. Following the lodgement of her application for a spouse visa, Ms D correctly notified DIAC of a change to her address and requested that all future correspondence be sent to that address. The DIAC letter advising Ms D that she had been refused a spouse visa was sent to solicitors that formerly represented her (although never as an authorised migration agent). This letter was returned to sender and DIAC subsequently re-sent it to an old address of Ms D's.

The DIAC record system wrongly recorded that her bridging visa had ceased 28 days after which she was taken to have received the letter of notification. DIAC subsequently located and detained Ms D as an unlawful non-citizen. Ms D advised DIAC that she was unaware that a decision had been made refusing her a spouse visa. Through the efforts of her migration agent, DIAC later identified the error and released Ms D from detention.

Case summary 5

[See case study on p. 12]

Mr E was detained by DIAC for three calendar days. Mr E was a dependent on his mother's protection visa application and was granted a bridging visa in association with this application. DIAC did not decide this application until seven years after its lodgement. Prior to DIAC deciding this application, Mr E applied for a permanent residence visa and advised DIAC of a change to his address. DIAC then decided to refuse the protection visa application and sent the notification letter to Mr E's parents. His family did not receive the notification as they had moved address three days prior to the notification (and his parents had not, by that time, advised DIAC of the change of address). Subsequently, the family did not lodge an application for merits review and Mr E's bridging visa ceased to be in effect on DIAC's database, 28 days after he was taken to have received the notification letter.

Mr E was detained by DIAC, however he was released two days later as it was determined that because Mr E had previously correctly advised DIAC of a change to his address, DIAC would re-notify Mr E of its decision. In this circumstance, DIAC was not required to re-notify Mr E as the initial notification was legally effective in that the letter was sent to the most recent address that DIAC had for the purposes of notification. Following receipt of the re-notification letter, Mr E lodged an appeal with the RRT, however it decided that the application was out of time.

Case summary 6

[See case study on p. 13]

Mr F was detained by DIAC for five calendar days following the cancellation of his student visa. DIAC sent the notice of intention to cancel to an incorrect address. As a result, Mr F was not aware of DIAC's intention to cancel his visa and did not have the opportunity to respond to the grounds for cancellation. The deficient notification meant that the cancellation decision could not be made, as an essential preliminary step had not been completed.

After he was detained, Mr F told DIAC officers that he did not know that his visa had been cancelled. This took DIAC four days to confirm, at which time Mr F was released from detention.

Case summary 7

Mr H was held in immigration detention on two separate occasions, each time for three calendar days. The visa refusal notification letter sent to Mr H was deficient for two reasons—the decision in *Srey*, and because the letter was not sent to Mr H's authorised recipient. The re-notification letter sent to Mr H was also deficient in that it was faxed to him at the prison where he was serving a sentence. Communication by fax is a permissible notification method only where the applicant has expressly consented to this form of communication and has provided an electronic address for this to occur. This does not appear to have been the case for Mr H. It further appears that the notification could not be taken to have been delivered by hand by the prison authorities.

Mr H lodged a review application with the MRT, which determined that the application was out of time based on the deemed receipt provisions. That ruling by the MRT seems to be erroneous, as Mr H had not been effectively notified of the decision. Following the MRT ruling, a DIAC officer requested that the prison authorities hold Mr H in immigration detention rather than release him from prison. In fact, Mr H was still the holder of a bridging visa until 28 days after he had been notified of a decision of the MRT following his application for review.

Case summary 8

Mr J was detained for three calendar days. DIAC did not send its decision to refuse Mr J a protection visa to his authorised recipient. The deficient notification meant that Mr J's associated bridging visa did not cease and he was therefore a lawful non-citizen when detained. On the day Mr J was detained, his migration agent alerted DIAC to the fact that notification of the visa decision had not been received by the agent. However Mr J was not released until two days later.

Case summary 9

Ms K was detained for six weeks. A decision by DIAC to refuse Ms K a protection visa was not sent to her authorised recipient. As a result, the ICSE record erroneously showed that her bridging visa had ceased. She was later located and detained by compliance officers. Ms K applied for her DIAC file through Freedom of Information; on seeing that her protection visa had been refused, she lodged an application for review with the RRT. The RRT deemed that Ms K's application was within time given she had not been effectively notified of the refusal decision. On being advised of this by the RRT, DIAC released Ms K from detention. DIAC did not re-notify Ms K, but instead recorded the date that she was taken to have been notified as the date that she applied for her file through FOI. There is no legislative support for that approach.

Case summary 10

Mr L was detained by DIAC for two calendar days. DIAC sent its letter advising Mr L of the decision to refuse him a student visa to his residential address and not the postal address that he had nominated for the purposes of notification. As a result, the ICSE record erroneously recorded that his bridging visa had ceased and that he was an unlawful non-citizen. He was subsequently located and detained by DIAC.

Case summary 11

Mr M was detained for five calendar days. After lodging an application for a long stay business visa, Mr M notified DIAC of a change of address. However DIAC sent a letter notifying Mr M that his application was refused to the old address. This error was not noted by DIAC, and the DIAC record system wrongly recorded that his

bridging visa ceased 28 days after he was taken to have received the letter of notification. Mr M was subsequently located and detained by DIAC as an unlawful non-citizen.

During an interview with DIAC the day after he was detained, Mr M advised that he had not received the notification letter refusing him a business visa. DIAC took three days to confirm this, after which Mr M was released from detention.

Case summary 12

Mr N was detained by DIAC for 18 calendar days. Following the lodgement of his spouse visa application, Mr N correctly notified DIAC of a change to his address. The DIAC letter advising Mr N that he had been refused a spouse visa was sent to an old address. As a result, the ICSE record erroneously recorded that his bridging visa had ceased and that he was an unlawful non-citizen. He was subsequently located and detained by DIAC. When the MRT identified the notification error, Mr N was released from detention.

Case summary 13 (includes 2 cases)

Ms O and Ms P were detained by DIAC for 12 calendar days. Following the lodgement of their protection visa applications, they correctly notified DIAC of a change to their address. An entry to that effect was made on ICSE two weeks after DIAC was advised of the change of address. In the meantime, DIAC made a decision to refuse the protection visa applications and sent the notification letters to their old address. Ms O and Ms P did not receive the notification letters. The ICSE record erroneously showed that their bridging visas had ceased 28 days after they were taken to have received the letters, and that they were unlawful non-citizens from that date. They were both subsequently located and detained by DIAC.

Ms O and Ms P were not interviewed until three days after their detention, at which time they asserted that they had not been notified of the outcome to their protection visa applications. DIAC took a further nine days to clarify this error, after which they were released from detention.

Case summary 14

Ms Q was detained by DIAC for three calendar days following a deficient notification by the RRT. DIAC refused Ms Q a protection visa and Ms Q appealed this decision to the RRT. After she lodged an appeal with the RRT, Ms Q appointed a migration agent, migration agent A, and correctly notified DIAC. Migration agent A later advised the RRT that all future correspondence should be sent to another migration agent, migration agent B, within the same agency. Shortly afterwards migration agent A was de-registered by the Migration Agents Registration Authority.

The RRT affirmed DIAC's visa refusal and sent the decision notification letter to migration agent B. This migration agent had ceased practicing, and as such did not receive the notification and did not pass it on to Ms Q. Ms Q remained unaware that her merits review application had been decided and that her bridging visa had erroneously ceased on DIAC's database 28 days after she was taken to have received the RRT's decision notification letter.

Ms Q was detained by DIAC given she showed as 'unlawful' on DIAC's system.

Case summary 15

Mr R was detained by DIAC for six calendar days following the cancellation of his special category visa. DIAC followed the requisite cancellation process. However when it notified Mr R of the cancellation decision, it failed to send the letter to his migration agent's most recently advised address and only sent it to Mr R's address. The migration agent subsequently did not receive the notification letter.

Although Mr R was not notified in accordance with the Act, this did not affect the validity of the cancellation decision itself. DIAC officers released Mr R from detention on the erroneous belief that the notification error did invalidate the cancellation decision.

Case summary 16

Ms S was detained by DIAC for 25 calendar days. DIAC refused Ms S a combined spouse visa, following several attempts to obtain further information from her. DIAC sent the refusal decision letter to the most recently advised address that it had for Ms S. Due to Ms S's transient and problematic lifestyle, she did not receive DIAC's refusal letter. Despite this, her bridging visa ceased 28 days after she was taken to have received the letter. Ms S was later located and detained by DIAC as she showed as 'unlawful' on DIAC's system.

Although DIAC met its notification obligations, Ms S was released from detention on the grounds that due to her situation she had not received the original notification letter. DIAC subsequently re-notified Ms S of its decision to refuse her a combined spouse visa.

This would not normally have re-enlivened Ms S's review period, however the MRT accepted her appeal application.

Case summary 17

Mr U was detained by DIAC for a period of 23 months. Mr U was granted a bridging visa in association with a protection visa application. DIAC sent the visa refusal notification letter to Mr U, using an incorrect address. In addition to this, the letter was sent at a time when DIAC relied upon invalid regulation 5.03 for postal correspondence. The deficient notification was not identified by DIAC and as a result Mr U's bridging visa erroneously ceased on DIAC's system, 28 days after he was taken to have received the letter.

Almost eight years later, Mr U came to the attention of the police and was subsequently detained under s 189. Some 23 months after he was detained, DIAC released Mr U on the basis that he was Srey affected and therefore remained the lawful holder of a bridging visa in association with his protection visa application.

Case summary 18

Mr V was detained by DIAC for a period of four calendar days following an error in DIAC's cancellation process. Mr V was the holder of a business owner visa as a dependent of his father. DIAC sent a notice of intention to cancel Mr V's visa to an incomplete and incorrect address. Later, using the same address, DIAC sent the cancellation decision letter to Mr V and his visa subsequently ceased 28 days after he was taken to have received the notice.

Mr V was released from detention after DIAC identified this error.

Case summary 19

Ms W was detained by DIAC for five calendar days. Ms W was a dependent applicant for her mother's spouse visa application. A DIAC letter advising that the visa had been refused was sent to solicitors who had formerly represented Ms W's family. This notice did not meet the requirements of the legislation, as the solicitor was not Ms W's authorised recipient. DIAC did not identify this error and Ms W's associated bridging visa erroneously ceased on ICSE, 28 days after she was taken to have received the notice.

Ms W was later located and detained by DIAC, and released when DIAC identified the notification error. Ms W's brother was also detained by DIAC for the same reason, however he was not released for almost two months after DIAC had identified the notification deficiency. DIAC continued to plan for his removal despite being aware of the ineffective notification.

Case summary 20

Ms X was detained by DIAC for five calendar days. Ms X had advised DIAC that she had changed address while it processed her 1998 spouse visa application. Although DIAC had recorded the change of address on its system, it did not link the amended address to Ms X's records. DIAC decided to refuse the spouse visa and sent the refusal letter to the old address. This letter was eventually returned to DIAC unclaimed and Ms X's bridging visa erroneously ceased on ICSE. When Ms X was detained in 2003 she advised that she was unaware of the spouse visa refusal and gave the names of two DIAC officers whom she had informed of her change of address.

Ms X complained to the Ombudsman's office. An investigation officer from the Ombudsman's office enquired with DIAC about the possibility of there having been a notification error. DIAC identified the unattached address record in its system and released Ms X from detention. She was granted a permanent spouse visa in 2004.

PART 2—OVERVIEW OF THE IMPACT OF *SREY*

2.1 Part 2 of this report deals with 57 cases in which people were released from detention following two court decisions—the Full Federal Court decision in *Singh*⁹ and the Federal Court decision in *Srey*.¹⁰

2.2 Those 57 cases raise, in a different way, the issue of effective notification, dealt with in Part 1 of this report. The combined effect of *Singh* and *Srey* is that thousands of notification letters posted in Australia by DIAC over a period of nearly six years might have been defective. If so, administrative action that relied upon the fact of those notifications—including visa cancellation, detention, and removal from Australia—would be placed in doubt.

2.3 As explained in Part 1, s 66 of the Migration Act requires that a letter notifying a person of a visa refusal decision must state the time within which the person can apply to a tribunal for a review of that decision. A bridging visa held by the person will not cease until the period for lodging a review application has expired. If the notification of the visa refusal is legally ineffective, the period for applying for review does not commence running, and the person continues to hold a bridging visa. The holder of a bridging visa is a lawful non-citizen, and cannot be held in immigration detention under s 189 of the Migration Act.

2.4 *Singh* and *Srey* dealt with the operation of Migration Regulation 5.03, which was a deeming provision regarding the date on which a person was to be taken as having received a letter notifying them of a visa refusal. The period for applying for review (and for the cessation of a bridging visa) would commence running on that deemed date. The Full Court in *Singh* held that regulation 5.03 was invalid; and the Court in *Srey* held that a letter of notification that was framed relying on regulation 5.03 was therefore ineffective.

A snapshot of the interaction between *Singh*, *Srey* and lawful notification

Regulation 5.03 commenced operation on 1 September 1994. It provided that a person was taken to have received a visa refusal letter seven days after its date, provided that DIAC had posted the letter within seven days of the date of the letter. A person's right to seek review of the visa refusal would commence running from the deemed date of receipt.

In *Singh*, decided in April 2000, the Full Federal Court held by majority that regulation 5.03 was invalid. The basis of the decision was that a letter could be deemed by the regulation to have been received on the same day it was sent. By having that effect, the regulation detracted from the right of review conferred by the Migration Act, and was inconsistent with the Act.

Following *Singh*, regulation 5.03 was amended with effect from 1 July 2000. A person was thereafter taken to have received a visa refusal letter seven days after the date of the letter, provided that DIAC had posted the letter within three days of its date. This amendment remedied the problem identified in *Singh*.

In August 2001, regulation 5.03 was repealed and the rules on notification were enacted in ss 494B and 494C of the Act.¹¹

⁹ *Minister for Immigration and Multicultural Affairs v Singh* [2000] FCA 377 (4 April 2000).

¹⁰ *Chan Ta Srey v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 134 FCR 308; [2003] FCA 1292 (12 November 2003).

¹¹ These sections are detailed in Part 1 of the report.

In *Srey*, decided in November 2003, the Federal Court had to deal with the effect of a notification letter that was sent in May 2000, shortly after the decision in *Singh*. The letter advised Mr Srey, then the holder of a bridging visa, that his application to remain permanently in Australia was refused, that he could seek review of that decision within 28 days, and failing that should make arrangements to leave Australia. Mr Srey neither applied for review, nor left Australia. He was later taken into immigration detention on two separate occasions, and was in detention at the time of the Court's decision in November 2003.

The letter to Mr Srey had been framed relying on regulation 5.03. The Court held that the letter was ineffective in that it did not comply with the requirement imposed by s 66 that a person be advised of the time within which an application for review could be made. A further effect was that Mr Srey's bridging visa granted in 1998 was still in force, and as such he was a lawful non-citizen. The Court granted the writ of *habeas corpus* ordering that Mr Srey be released from detention forthwith.

2.5 The decision in *Srey* potentially applies to any letter sent by post in Australia during the period September 1994 to June 2000, notifying a person that a visa was refused, and giving advice that was framed relying on regulation 5.03. DIAC has advised the Ombudsman's office that as many as 35,500 letters potentially fit that description.

2.6 The defect in the notification letter would not have had a continuing adverse effect in all cases. It is likely that in some cases the recipient relied on the letter and applied for tribunal review within the specified time limit. DIAC has identified nearly 9,000 cases in which the letter recipient was later granted a temporary or permanent visa or Australian citizenship. On the other hand, it is likely that many people voluntarily left Australia, having accepted the advice that a visa had been refused and that their bridging visa would soon expire. Some of those people may face a continuing restriction on their right to return to Australia.

2.7 The Ombudsman's office has investigated only 57 of the cases. These were cases referred to the office for investigation, in which the file of a person who had been detained was marked with the descriptor 'released: not unlawful'.

2.8 In 16 of those cases the person was already in immigration detention when the *Srey* decision was handed down. It is to be expected that prompt action should have been taken for those people to be released from detention, to conform with the decision of the Federal Court to order that Mr Srey be released. However, there was considerable delay in 15 cases in recognising that as a consequence of *Srey* the person in detention was in fact a lawful non-citizen, and should be released. In one case, 18 months elapsed following *Srey* before the person was released.

2.9 In 36 other cases, people were detained after the *Srey* decision. In all of those cases, a proper consideration of DIAC's records would have revealed that as a result of *Srey* the person was not liable to be detained. The explanation for this damaging oversight seems to be that the detaining officers were not adequately informed and trained about the implications of *Srey*. This meant that officers were unable to recognise important information showing that people were affected by *Srey*. Many of those people were detained for extended periods of time.

2.10 Overall these cases demonstrate that DIAC did not develop a systematic response to the *Srey* decision. There was a lack of interconnectivity between key program areas that prevented DIAC from recognising the gravity of the situation. Not until April 2007 did DIAC release comprehensive policy guidance on *Srey* to all

officers across the department. A cross-divisional working group has also been established to identify and manage the implications of *Srey* on a broader level.

2.11 This saga illustrates how judicial decisions can have far reaching and unforeseen consequences for government agencies. Individual judicial decisions can cause additional and unexpected costs for agencies and impose a considerable administrative burden. This is a contemporary reality for government administration, particularly in areas of complex administration where there is frequent litigation. *Srey* illustrates the need for agencies to take a strategic and comprehensive approach to significant judicial decisions.

2.12 The following is a general description of the 57 cases that were investigated.

- In 54 cases the notice letter was defective because of the decisions in *Singh* and *Srey*.
- In 16 cases the recipient of the defective letter was detained before the *Srey* decision—15 remained in detention for an extended period of time after the decision.
- In 36 cases the recipient of the defective letter was detained after the *Srey* decision, despite being a lawful non-citizen—five people were still in detention more than 20 months after the decision.
- In two cases the person was a lawful non-citizen at the time of detention because of an administrative error unrelated to the *Srey* decision.
- In one case a person was incorrectly identified and released from detention as *Srey* affected, when he was actually an unlawful non-citizen.
- In two cases the person was detained and released prior to the *Srey* decision.
- The detention of each person occurred between 1997 and 2006.
- The time spent in detention ranged between two and 1,993 calendar days (almost five year and a half years), with the average time spent in detention being 340 calendar days.

2.13 As explained in Part 1 of this report, the Ombudsman's office has not expressed a view on whether there was a period of unlawful detention in any of the 57 cases. This would require a more extended analysis, including on whether there was a 'reasonable suspicion' to sustain the initial or continuing detention of a person.¹² Nevertheless, in the individual report on each case from the Ombudsman's office to DIAC, a recommendation was made (where applicable) that DIAC give further consideration to whether a remedy should be provided to the person to acknowledge or redress any suspected unlawful action.

DIAC's response to the *Srey* decision

2.14 DIAC has informed the Ombudsman's office that the following steps were taken in response to the *Srey* decision in November 2003:

¹² The Federal Court in *Srey*, while ordering Mr *Srey*'s release from detention, declined to express a view on whether his initial detention under s 189 was based on a reasonable suspicion that he was an unlawful non-citizen: see *Chan Ta Srey v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 134 FCR 308 at [54].

- In November 2003, information about the decision was distributed to relevant policy areas within DIAC. In late November 2003 the detention policy area identified a need to formulate a strategy for dealing with *Srey* affected cases, including systems interrogation to identify people affected by the decision.
- On 2 December 2003, an email was sent instructing detention centre managers to review their current detainee populations for people affected by *Srey* and noting that *Srey* was likely to impact on compliance activities.¹³ DIAC also interrogated its systems data in an attempt to identify people who were affected. Those searches focused on identifying people in detention in the belief that there would only be a small number of *Srey* affected cases.
- During 2004, DIAC responded to *Srey* affected cases as they came to DIAC's attention.
- In April 2005, DIAC further reviewed the detention population for people affected by *Srey*.
- On 17 May 2005, an outline of the *Srey* decision was emailed to managers in the protection visa area with advice about how to resolve and record *Srey* affected cases.
- In June 2005, State and Territory compliance officers were provided with a draft interim instruction on the implications of *Srey* and actions that compliance officers were required to take when a person affected by *Srey* was located, to avoid wrongful detention.
- In the second half of 2005 DIAC commenced training operational compliance staff about the lawful exercise of the power to detain, including the implications of *Srey*.
- As at February 2006, DIAC had identified approximately 35,500 cases in which a person had received a letter that is potentially defective as a result of *Srey*, and noted this on each person's record.

Shortcomings in DIAC's response

2.15 The *Srey* decision impacted on multiple areas in DIAC administration. As such, a timely and coordinated response to the decision and its implications was required. DIAC initially and incorrectly assumed that only a small number of people would be affected, limited to people already in detention. DIAC focused its attention solely on the detainee population.

2.16 DIAC's response to the decision was both delayed and insufficient. DIAC should have recognised that there were many people in the community who were also affected by *Srey* and were at risk of being detained. This failure to identify the implications of the decision, and the full range of affected cases, meant that DIAC failed in avoiding unwarranted detention, quickly bringing existing detentions to an end, and ceasing inappropriate removal activity. Those shortcomings will each be discussed in more detail.

Delay in recognising Srey affected cases in immigration detention

2.17 As outlined above, one of the first actions taken by DIAC following the *Srey* decision was a review of the detainee population. DIAC informed the Ombudsman's

¹³ Compliance activities include locating unlawful non-citizens in the community and ensuring that visa holders are complying with visa conditions.

office that as a result of this review a number of people were released from immigration detention (although an exact number has not been mentioned).

2.18 Not all people in detention who were affected by *Srey* were identified at this initial stage, probably because the action was narrowly focused and only certain officers with detention related responsibilities were informed of the implications of *Srey*. This is evident in 15 of the 16 cases referred to this office where the person was in detention when the *Srey* decision was handed down.¹⁴ Two of those people were released within a month of the decision (one at the insistence of their lawyer), but in the remaining 13 cases the detention continued for a further 13 to 18 months.

2.19 These ongoing detentions cannot be justified by the argument that the detaining officers, unaware of the *Srey* decision, continued to hold a suspicion under s 189 that these people were unlawful non-citizens. It is implicit in s 189 that a detainee's circumstances should be reviewed on an ongoing basis to ensure that a reasonable suspicion persists throughout the period of detention. A suspicion will only be reasonable if it takes account of all relevant information including contemporary case law.

2.20 The case of the AA family highlights the consequences of DIAC's failure to implement the effects of *Srey* in a timely manner.

Case study: Failure to recognise *Srey* affected cases

In the late 1990s, before they met and later became a de facto couple, Mr AA and Ms BB independently applied for protection visas (PVs). In association with these applications they were granted bridging visas. Mr AA and Ms BB were refused PVs by DIAC.

The letters to Mr AA and Ms BB advising of a visa refusal decision were framed in reliance on regulation 5.03. In accordance with *Srey*, this was not effective notification and did not trigger the cessation of their bridging visas. The letter sent to Mr AA was also ineffective because it was sent to an incorrect address. Mr AA and Ms BB had their first child in 1999 and their second child in 2002.

In early 2003, before the *Srey* decision was delivered, the family was located by DIAC. DIAC failed to recognise that Mr AA was a lawful non-citizen because the letter to him had been sent to the wrong address. Initially Mr AA was detained and Ms BB and the children were granted a bridging visa to allow them to remain in the community. However, when this bridging visa expired Ms BB asked to be detained with her husband because she could no longer support her family alone.

When the *Srey* decision was handed down the family was not released from immigration detention, despite all members being affected by the decision. In 2004 a third child was born in immigration detention. In April 2005, 512 calendar days after the *Srey* decision and 808 calendar days after Mr AA was detained, DIAC determined that the family was *Srey* affected and they were released from detention as lawful bridging visa holders. During their prolonged detention Mr AA was assaulted and Ms BB's mental health suffered. Ms BB and one child were subsequently found to be refugees.

Failure to recognise *Srey* affected cases before detention

2.21 There was a failure by DIAC to train and equip its officers to recognise that there were people in the community who were affected by *Srey* and were at risk of inappropriate detention. In 36 cases investigated, people in that situation were detained after the *Srey* decision was delivered. Five people were detained as long as 20 months after the decision, with the latest detention commencing in December 2005. These detentions were avoidable.

¹⁴ Not including the detention of Mr Srey who was released on the day of the *Srey* decision.

2.22 Although DIAC recognised as early as November 2003 that *Srey* had wider implications, it was not until May 2005 that key program areas met to facilitate a coordinated response. Prior to this only some areas within DIAC had been provided with information about the implications of *Srey*; the disconnect between program areas within DIAC meant that information was not widely disseminated to all relevant staff.

2.23 Instructions and training about *Srey* were not provided to frontline compliance officers until the second half of 2005, almost two years after the decision. Officers were consequently unable to recognise the significance of information that indicated a person was a lawful non-citizen as a result of *Srey*. This meant that officers were not adequately equipped to lawfully exercise the s 189 detention power.

2.24 The problems continued after people were detained. DIAC missed numerous opportunities—during interviews with detainees, in considering visa applications, in the course of tribunal processes and in the preparation of submissions concerning ministerial intervention—to recognise that people in detention were affected by the *Srey* decision. This is illustrated in the case of Mr CC.

Case study: Multiple chances to identify a Srey case

As a result of *Srey*, Mr CC was a lawful non-citizen when he was detained in 2004. He spent 351 calendar days in detention before his status was recognised. During that time, the opportunity arose many times to review Mr CC's circumstances and to recognise that his immigration status was affected by *Srey*:

- Mr CC was interviewed many times while in detention and removal checklists containing information about his immigration history were compiled.
- He made six bridging visa applications and applied to the MRT for review when those applications were refused. Each decision to refuse Mr CC a bridging visa contained detailed information about his immigration history, which included information about his two *Srey* affected visa refusals.
- Mr CC lodged a request for the Minister to intervene in his case and grant him a visa.

Failure to provide adequate information to staff about Srey

2.25 The failure to provide officers with adequate instructions about how to identify *Srey* affected cases meant also that some officers incorrectly identified people as *Srey* affected when they were not. This occurred in three of the cases investigated that arose more than a year after the decision. One of the three persons was an unlawful non-citizen at the time of his detention and was therefore liable to be detained. The other two people were lawful non-citizens due to defective notifications unrelated to the *Srey* decision.

2.26 The implications of *Srey* went beyond the issue of detention. Visa refusal notices that were known to have been defective as a result of *Srey* should have been re-issued. Bridging visas that were previously thought to have ceased should have been reinstated. It was apparent from the cases investigated by the Ombudsman's office that there was a considerable delay in those processes. This delay was compounded by a lack of clear direction as to which area had responsibility for notifying people affected by *Srey* and correcting their immigration status on DIAC's electronic system.

2.27 The failure to update the immigration status of some people affected by *Srey* left them at risk of unwarranted detention. As cases have come to the Ombudsman's attention, DIAC has been informed of the need to amend individual records.

Case study: Failure to correct immigration status

Mr DD was detained three weeks before the *Srey* decision. He was held in immigration detention for a further 17 months until it was realised that he was affected by *Srey*. His detention occurred in a prison as DIAC did not have a dedicated immigration facility in the region in which he was detained.

Upon Mr DD's release from detention, DIAC failed to correct his immigration status on its systems and he continued to be erroneously recorded as an unlawful non-citizen, leaving him at risk of further detention. Mr DD was granted permission to work, but DIAC also failed to record this on its systems.

More than 17 months after Mr DD was released from detention DIAC realised he was still recorded on the system as unlawful. He was erroneously granted a new bridging visa, although the appropriate response following *Srey* was to re-enliven his existing bridging visa. This error was compounded by a repeated failure to record that he had permission to work—an error that could have led to further unwarranted attention from compliance officers.

Removal and departure of lawful non-citizens

2.28 A person can only be removed from Australia under s 198 of the Migration Act if the person is an unlawful non-citizen. This investigation identified some instances in which people who were lawful non-citizens as a result of *Srey* were removed from Australia after *Srey* was decided. These removals appear to be contrary to the Migration Act and occurred as a result of DIAC's failure to educate officers involved in the removal of unlawful non-citizens about *Srey* and its implications. The case of Ms EE provides an illustration.

Case study: Removing lawful non-citizens

The case of Ms EE was referred to the Ombudsman's office for investigation as a case affected by *Srey*. In the course of investigation it was noted that Mr FF, Ms EE's spouse who was a dependent applicant on Ms EE's visa application, had been removed from Australia. As a result of *Srey*, both Ms EE and Mr FF remained lawful bridging visa holders and were not liable for either detention or removal. Mr FF's lawful status was not identified prior to his removal, which occurred 11 months after the *Srey* decision.

DIAC recognised in 2005 that Mr FF's immigration status was affected by *Srey*. According to the file material, DIAC has not taken any steps to redress this inappropriate removal.

2.29 There are potentially broader implications in those cases in which people affected by *Srey* were inappropriately removed from Australia or left voluntarily under the belief that they were required to do so. A person in that situation could be prevented from re-entering Australia because of an exclusion period, could have a debt relating to their removal or time in detention, or could be placed on DIAC's Movement Alert List (MAL) and be prevented from re-entering Australia. It is therefore imperative that DIAC's recently formed working group more widely review the implications of *Srey* and take appropriate action for those people affected.

Implications of Srey for the right to apply to the Migration Review Tribunal

2.30 It was noted earlier that many thousands of people were sent letters that were defective as a result of the *Srey* decision. One purpose of those letters was to notify each recipient of their right to seek review by the MRT of the visa refusal decision. Because of the defect in the letter, the duty to notify a person of that appeal right remains unperformed. A possible consequence is that if a person has not already exercised their right of review, they may have a continuing right to receive effective notification, which would then trigger their right to apply to the MRT.

2.31 The same issue also arises in another way. When the Migration Internal Review Office (MIRO) and the Immigration Review Tribunal were merged in June 1999 to form the Migration Review Tribunal, the enabling legislation provided that an application to MIRO that was not finalised became an application to the MRT. The requirements for effective notification of MIRO decisions were largely the same as those for DIAC decisions. Consequently, MIRO notifications that relied upon the former regulation 5.03 were also rendered legally ineffective following *Srey*. As a result, there are many people who are now to be treated as having an unresolved MRT application. It is likely that many of those people have not yet been identified as *Srey* affected and remain unaware of this MRT review right.

2.32 The first step is for those cases to be identified and then drawn to the MRT's attention. The MRT has advised that from April 2005 it understood that DIAC would transfer to it MIRO files that DIAC identified as being affected by *Srey*, so that the MRT could determine whether a person had an undecided MRT application. There appears to be no formal agreement between the Department and the MRT to facilitate this process.

2.33 In five of the cases that were investigated by the Ombudsman's office for the purpose of this report, there seem to be a variety of responses from DIAC officers to cases in which there was a defective MIRO notification. Those responses range from referring the file to the MRT with detailed notes, suggesting that the person contact the MRT, and providing a fresh notification to a person of their *Srey* affected MIRO decision.

2.34 The inconsistency in these responses shows that cases were referred to the MRT in an ad hoc and delayed manner. It also appears that the MRT failed proactively to address this issue in not seeking a coordinated process with DIAC. A coordinated approach between the two agencies, including clear instruction to DIAC officers, would have been more effective in ensuring that people who received a defective MIRO notification were still able to exercise their right to apply for review by the MRT of the visa refusal decision. The MRT has advised that it continues to liaise with DIAC on this issue.

Recommendations

2.35 DIAC's response to the *Srey* decision was inadequate and demonstrated a lack of rigour in DIAC's analysis of the implications of the case. The fact that the Federal Court had granted the writ of *habeas corpus* to order the release of a person from detention should have signalled the importance of the decision. DIAC's failure to respond appropriately, resulting in many problematic detentions, highlight the need for DIAC to review its processes, systems and internal responsibilities to ensure that it is able to respond efficiently and effectively to relevant court decisions, and make sure that its practices are consistent with relevant case law.

2.36 There are many specific issues that require continuing attention. In particular DIAC has a responsibility to take appropriate action to ensure that those persons affected by the *Srey* decision are able to regularise their immigration status and pursue appropriate options that may be available to them. Further, strategies are required to ensure that previous defective notices do not disadvantage those affected by the *Srey* decision.

The Ombudsman recommends that:

- DIAC reinforce the need for its officers, before detaining a person, to assess whether a person is affected by *Srey* and is a lawful bridging visa holder.
- DIAC consider the broader impact of the *Srey* decision and ensure that appropriate action is taken as people come to its attention. Consideration should be given to whether a remedy is appropriate or other action is required in those cases.
- Where it is identified that a person may have an unresolved application before the MRT as a result of the *Srey* decision, DIAC facilitate the referral of those matters to the MRT for its consideration.
- DIAC ensure that the agency-wide implications of court decisions are identified in a timely manner, that any response is coordinated and that all affected areas of DIAC are involved in this process.
- DIAC provide its officers with clear instructions, and where necessary training, about court decisions that have implications for the administration of the Migration Act.
- DIAC and the Tribunals work closely together to ensure that there is effective communication about matters, such as court decisions, that impact on both DIAC and the Tribunals.

ATTACHMENT A—RESPONSE FROM DIAC

Dear Dr Thom

Your report highlights the importance of ensuring that clients are correctly notified of decisions impacting on their immigration status and the significant consequences that can ensue when the legislative requirements are not complied with. Similarly, the impacts of court decisions, such as *Srey*, can be far-reaching and have the effect of retrospectively invalidating decision letters sent many years earlier.

It is therefore vital that departmental procedures and systems support staff to comply with the legislative requirements for notifying of decisions and ensuring fair and reasonable dealings with clients. As we have all learnt from the *Srey* decision, the department must be vigilant in assessing and addressing the broader implications of court decisions affecting the department's procedures and processes.

Accordingly, I agree with your recommendations and have provided examples of the steps the department has taken, and is taking, to address the issues you have raised in this report ([Attachment A](#)).

The details of the department's implementation of the recommendations in this report (along with the recommendations made in previous Ombudsman reports) will be monitored by the Departmental Audit and Evaluation Committee (DAEC). This committee, comprised of an independent external chairperson and member along with a number of the department's Senior Executives, is a crucial component of the corporate governance arrangements that I have introduced. One of DAEC's primary roles is to monitor the implementation of recommendations made in Ombudsman and Human Rights and Equal Opportunity Commission Reports to provide me with reassurance that the department is achieving its goals and objectives.

Once again, this report reminds me both of the achievements that my department has made to date, and the improvements that we will continue to make as part of our ongoing business transformation process.

Yours sincerely

(Andrew Metcalfe)

Attachment to Secretary's letter

The Department recognises the importance of validly and effectively notifying clients of visa cancellations and refusals, and establishing that clients have been properly notified when compliance action, or a decision to detain, is being considered. The following provides some examples, amongst others, of the measures the Department is implementing to ensure these outcomes:

- The department is currently developing governance arrangements, namely a Client Correspondence Framework. It will prepare standards and checklists in relation to maintenance, management, quality assurance and accountability for client correspondence, providing a framework to assist the business owners of correspondence.
- The forms used by compliance officers when interviewing people of interest, and at the Post-Location Detention Interview, prompt officers to consider notification issues. Checking the validity of notification also forms part of the ongoing reviews of detention decisions conducted by Detention Review Managers.
- The Department is aware that clients can be disadvantaged if there is not a clear understanding of notification requirements in relation to deregistered migration agents and authorised recipients. Accordingly, the instruction dealing with migration agents and unregistered persons is being simplified to make clear that notifications must be sent to the client's agent while the agent remains the authorised recipient, even if the agent is de-registered.
- The Department also recognises that there may sometimes be unavoidable reasons why a person has not actually received a legally valid notification. The Department is currently reviewing the administrative and legislative bases for notification. The question of compassionate re-notification is being considered as part of the review.
- A client of interest note has been placed on the computer records of clients who may be affected by the *Srey* decision. This alerts officers to the need to conduct a thorough check of the client's record if necessary to confirm their immigration status. The alert specifically advises staff not to detain unless completely satisfied that the person is not *Srey*-affected. DIAC staff assess possible *Srey*-affected cases as they present to the Department in any location, including offshore and in immigration clearance. This is now assisted by a network of *Srey* Processing and Contact Officers in State and Territory Offices, who act as the primary local contact for *Srey* assessments and issues.
- A new policy and procedural instruction has been issued covering the broader impact of the *Srey* decision and providing all staff with instructions on how to identify *Srey*-affected clients (onshore and offshore), the status of bridging visas, outstanding review rights, how to re-notify *Srey*-affected clients and address subsequent issues that may impact on their immigration status. This instruction also covers the referral of cases by DIAC to the Migration Review Tribunal where there is an unresolved application before that Tribunal.
- College of Immigration training for compliance and detention staff covers the requirements for correct notification (including the impact of recent court decisions) and emphasises the importance of thoroughly checking records and accessing all available sources of information in the context of forming and

maintaining a reasonable suspicion. The Department's *Good Decision Making* course, which covers the legislative requirements relating to notification of decisions and the implications of defective notification, is being reviewed with the aim to make the relevant parts of the programme more widely available as an 'on-line' package to staff processing visa applications in State, Territory and overseas offices.

- The Department analyses court decisions and provides fortnightly reports to the executive and relevant business areas, including analysis and recommendations for remedial action.

ATTACHMENT B—GLOSSARY

DIAC	Department of Immigration and Citizenship
ICSE	Integrated Client Services Environment
PAM	Procedures Advice Manual
MAL	Movement Alert List
Migration Act	<i>Migration Act 1958</i>
MIRO	Migration Internal Review Office
MRT	Migration Review Tribunal
MSI	Migration Series Instruction
RRT	Refugee Review Tribunal
the Tribunals	Migration Review Tribunal and Refugee Review Tribunal