

An update from the Commonwealth Ombudsman Immigration Team

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Immigration Matters

The Commonwealth Ombudsman's quarterly
bulletin on immigration-related matters.

Welcome

I am pleased to introduce the first edition of the Commonwealth Ombudsman's quarterly bulletin from my immigration team. *Immigration Matters* is the revival of a regular bulletin that our Office had distributed and I welcome its return. This bulletin seeks to provide stakeholders and those interested in the work of the Commonwealth Ombudsman with an update on our work, complaint trends and information on topical immigration issues. I trust these quarterly bulletins will be useful and informative.

Doris Gibb

Acting Commonwealth Ombudsman

History of the Commonwealth Ombudsman's immigration function

In 2005, the then Department of Immigration and Multicultural Affairs became the focus of intense external scrutiny in the wake of revelations regarding its administration of two individual's cases:

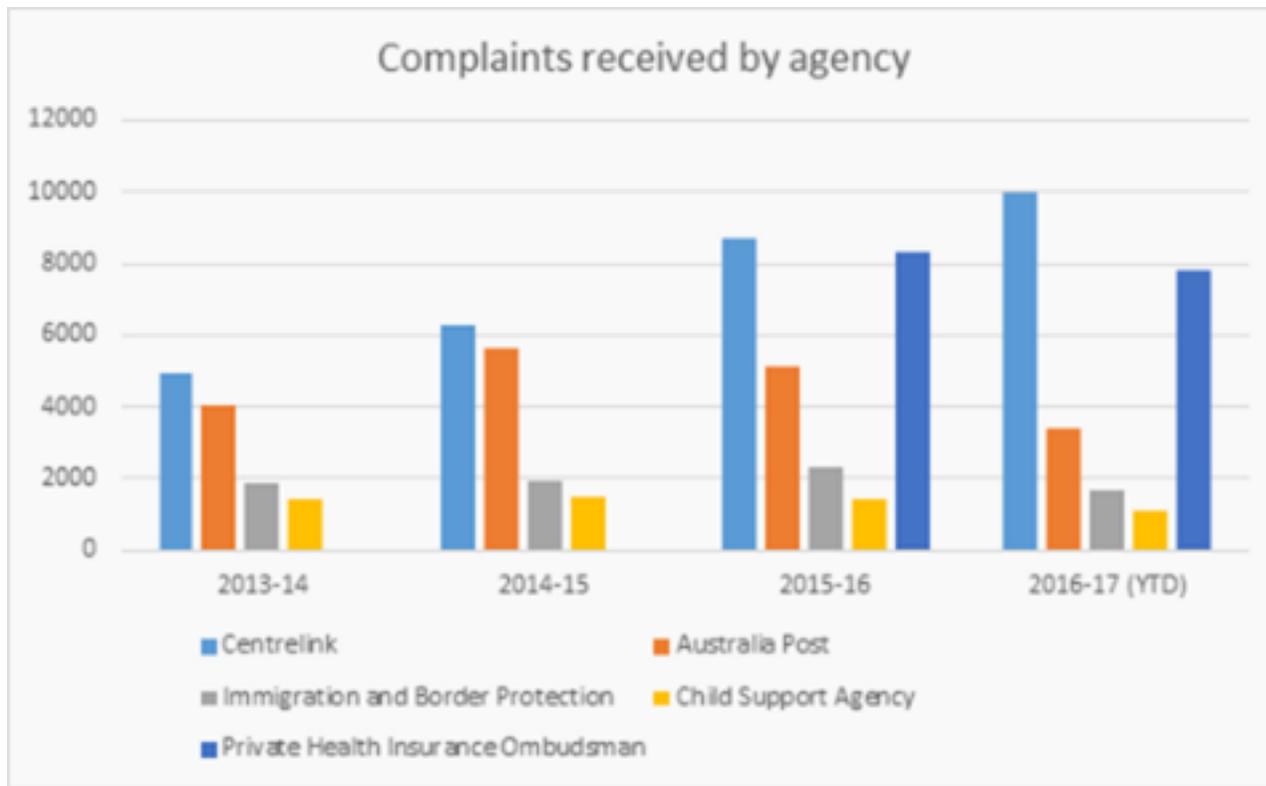
- Cornelia Rau, an Australian permanent resident who was illegally detained, and
- Vivian Alvarez Solon, an Australian citizen who was illegally removed.

Following inquiries into those cases, the government expanded the role of the Commonwealth Ombudsman to provide external scrutiny of the department to mitigate the likelihood of such mistakes recurring. The title of Immigration Ombudsman was conferred on the Commonwealth Ombudsman in 2005 and the Ombudsman's role expanded to include more intensive oversight of immigration administration.

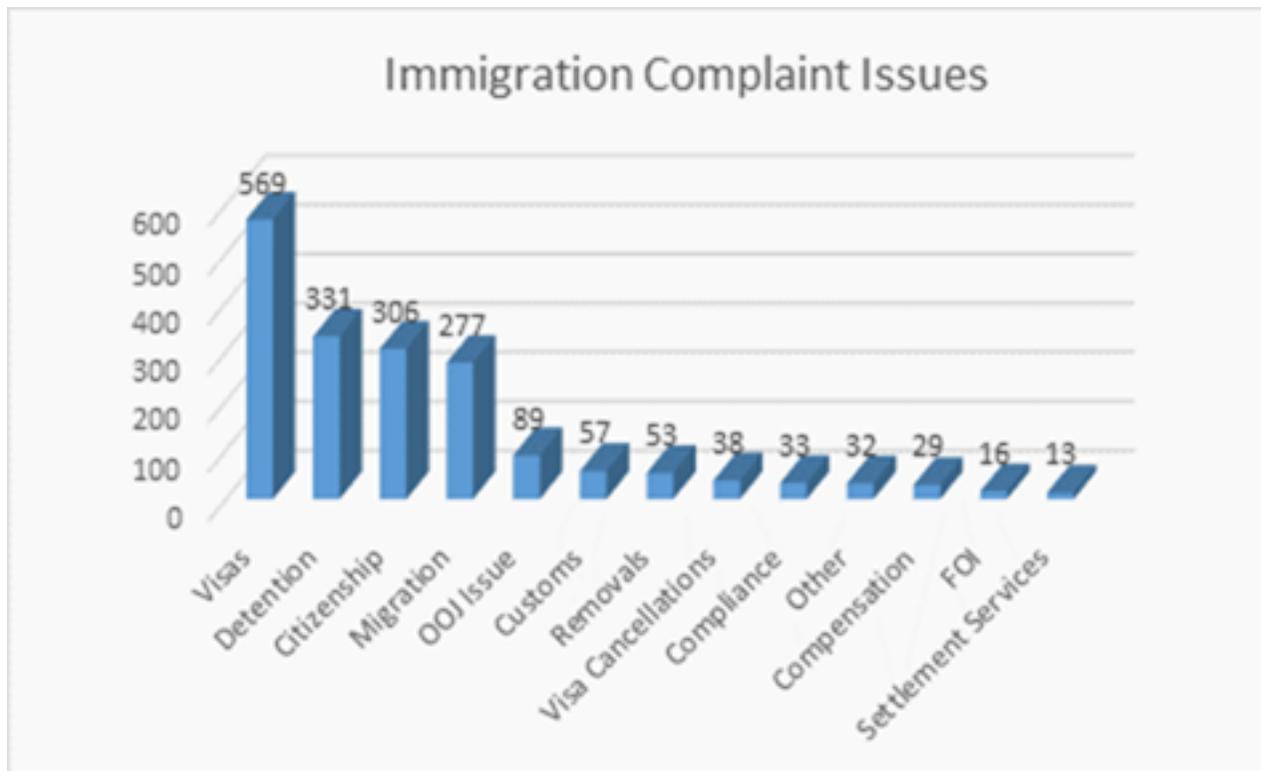
The Ombudsman's Office role expanded with the obligation under s 486 of the *Migration Act 1958* to report to the Minister for Immigration on the circumstances of people held in immigration detention for more than two years, and every six months thereafter, until they are released from immigration detention. We also established a program of visiting detention centres, monitoring immigration compliance activities and overseeing the use of coercive powers in the *Migration Act 1958*, such as the powers of search and entry under s 251.

Immigration complaint trends

During the period 1 January 2017 to 31 March 2017, we received 470 complaints relating to immigration and Australian Border Force (ABF) matters. Of these complaints, 92 were investigated and 44 have been finalised as at 13 April 2017.



Complaints received by Office of Commonwealth Ombudsman



Complaints received by Office of the Commonwealth Ombudsman regarding immigration issues.

Publications and Reports

The Ombudsman has recently published three reports into immigration related issues:

[Investigation into the processing of asylum seekers who arrived on SIEV Lambeth in April 2013](#)

Commonwealth Ombudsman: Investigation into apparent inconsistencies identified in the processing of irregular maritime arrivals (IMAs) by the Department of Immigration and Border Protection (the department). The department accepted our recommendations that it review the information recorded for this cohort, ensure that all relevant information is available to its staff, and more broadly consider any learnings from the review to improve its systems.

[The Administration of Section 501 of the Migration Act 1958](#)

Commonwealth Ombudsman: Own motion investigation report into s 501 of the Migration Act following the legislative change in December 2014 that made cancellation of a visa mandatory in some circumstances. This has increased the number of people placed into immigration detention after completing their prison sentence and has led to substantial delays in determining appeals to revoke the cancellation decision in order to remain in Australia. Please see the 'issue explained' section below or the full report for more details.

[Own motion investigation into people who have had their Bridging visa cancelled due to criminal charges or convictions and are held in immigration detention](#)

Commonwealth Ombudsman: Own motion investigation into people who have had their Bridging visa cancelled on the basis of a criminal charge, conviction, or the possibility that the person poses a threat to the Australian community. In particular, we are concerned about people who are detained based on allegations that lead to criminal charges and also those who are not released once the criminal charges against them have been resolved. We are concerned that the case management system is struggling to adequately manage the number of people in detention and who require the personal intervention of the minister for their immigration status to be resolved. The report's recommendations are aimed at encouraging the department to maintain a fairer visa cancellation process, and prioritise for ministerial consideration the people who have had their visa cancellation decision set aside at merits review (but cannot be released because the visa has naturally expired), or people who have since had the charges dropped or otherwise resolved. We will continue to monitor the issue with the department.

The full copies of the reports can be found at: www.ombudsman.gov.au/publications/investigation-reports

Visits to immigration detention facilities

Between July and December 2016 the Commonwealth Ombudsman's Office conducted inspection visits of each of the major immigration detention facilities on the mainland and Christmas Island. We have also commenced our 2017 round of inspections.

Facility	Location	Dates
Perth Immigration Detention Centre and Perth Immigration Residential Housing	Perth WA	8 August 2016
North West Point Immigration Detention Centre	Christmas Island	9 – 16 August 2016
Yongah Hill Immigration Detention Centre	Northam WA	19 – 23 September 2016
Adelaide Immigration Transit Accommodation	Adelaide SA	26 – 28 October 2016
Brisbane Immigration Transit Accommodation	Brisbane QLD	2 – 4 November 2016
Maribyrnong Immigration Detention Centre and Melbourne Immigration Transit Accommodation	Melbourne VIC	14 – 18 November 2016
Villawood Immigration Detention Centre and Blaxland High Security Compound	Sydney NSW	28 November – 2 December 2016
Yongah Hill Immigration Detention Centre	Northam WA	6 – 10 February 2017
Adelaide Immigration Transit Accommodation	Adelaide SA	16 – 17 March 2017
Brisbane Immigration Transit Accommodation	Brisbane Qld	3 – 7 April 2017

The inspections are conducted under the Ombudsman’s own motion powers (section 5(1)(b) of the *Ombudsman Act 1976*) and examine the administrative and operational actions of Australian Government agencies and contracted service providers in the management of the immigration detention network. Some of the aspects of administration examined include: accommodation and facilities, detainee property management, transport and escort, welfare services, complaints management, programs and activities, and health services, among others. After each inspection a report was submitted to the department that recorded our observations and suggestions.

Key areas of note in this cycle of visits were management of detainee property, transfers and placement decision making, incident reporting, use of restraints and management of internal complaints.

In addition to the inspection of detention facilities in Australia and Christmas Island, we also visited the regional processing centres located in the Republic of Nauru and on Manus Island in Papua New Guinea. During these visits we examined administrative actions of Australian officials and their contacted service providers. These visits were conducted with the concurrence and support of the Government of the Republic of Nauru and the Government of Papua New Guinea.

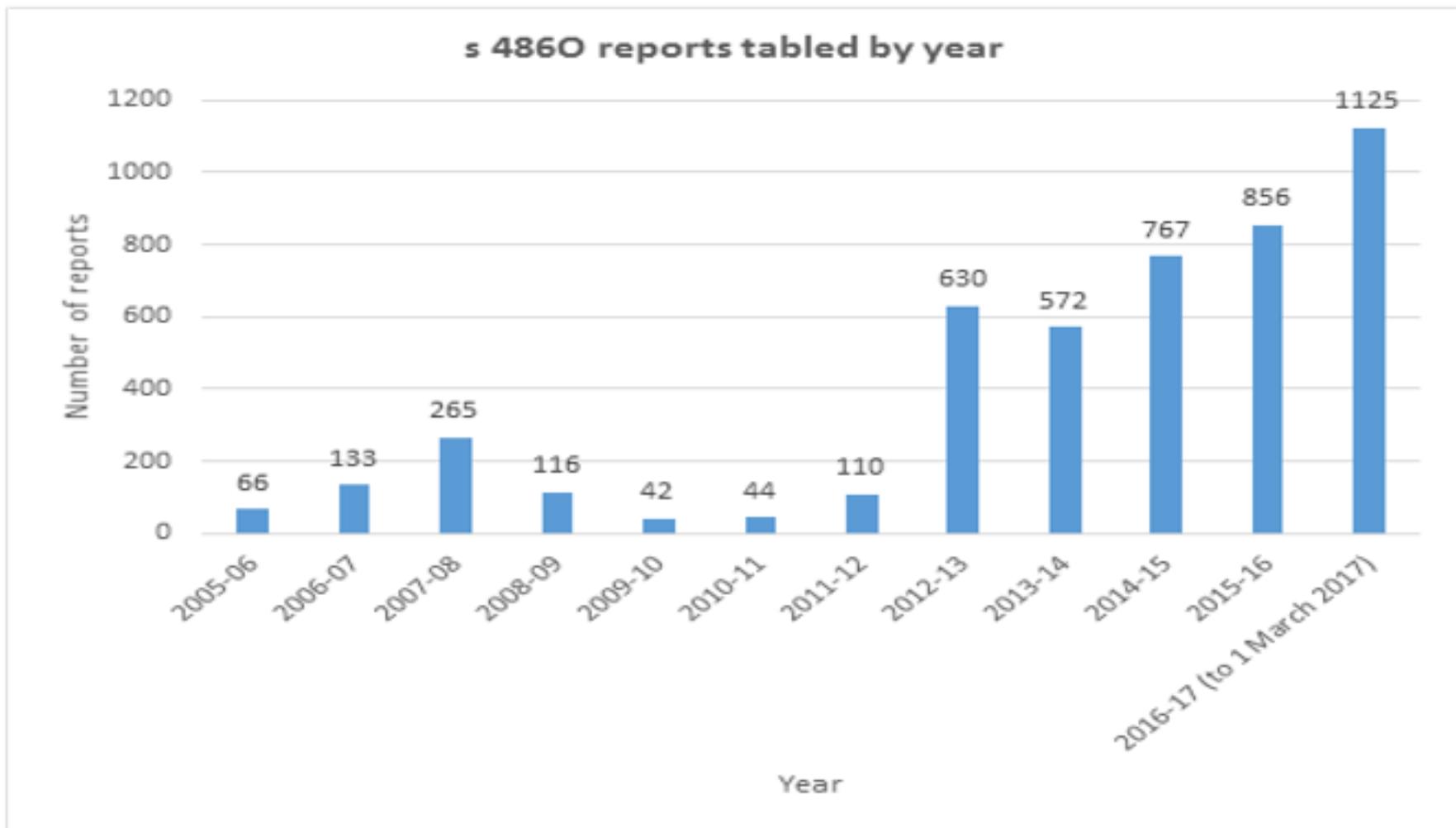
Two year detention review reports

After a person has been in immigration detention for a period of two years, and every six months thereafter, the Secretary of the department must give the Ombudsman a report about the circumstances of the person's detention. In response, section 486O of the *Migration Act* requires the Ombudsman to give the minister an assessment of the appropriateness of the arrangements for that person's detention.

The Ombudsman currently has over 650 cases of people in detention for two years or longer. As at 1 March 2017, 1,125 reports relating to 1,561 people were tabled in Parliament.

Key issues include:

- the length of time people spend in detention facilities and the impact this has on their mental health
- concerns arising as a result of the mix of the detainee population at certain centres
- cases of delays in resolving immigration status due to administrative drift
- placement decisions for detainees to be closer to family support
- cases where incomplete/inaccurate health records may have adversely affected a person's treatment
- people not owed protection but who are unwilling to return home and cannot be involuntarily returned
- delay in status resolution for certain groups of transitory persons
- continued detention of individuals with vulnerabilities.



Issue Explained — Section 501 of the *Migration Act 1958*

In December 2014, the *Migration Amendment (Character and General Visa Cancellation) Bill 2014* introduced changes including the insertion of s 501(3A) which requires mandatory cancellation in certain circumstances. Previously s 501 did

not require the mandatory cancellation of a visa. Persons subject to s 501 cancellation can request that the Minister for Immigration revoke the cancellation decision.

Section 501 allows the minister to refuse to grant a visa or to cancel a visa if the minister reasonably suspects that a person does not pass the character test. The minister may also refuse to grant a visa or cancel a visa if they are satisfied that it is in the national interest.

Non-citizens who wish to enter or remain in Australia must satisfy the character requirements under s 50. If a person fails the character test, s 501 provides:

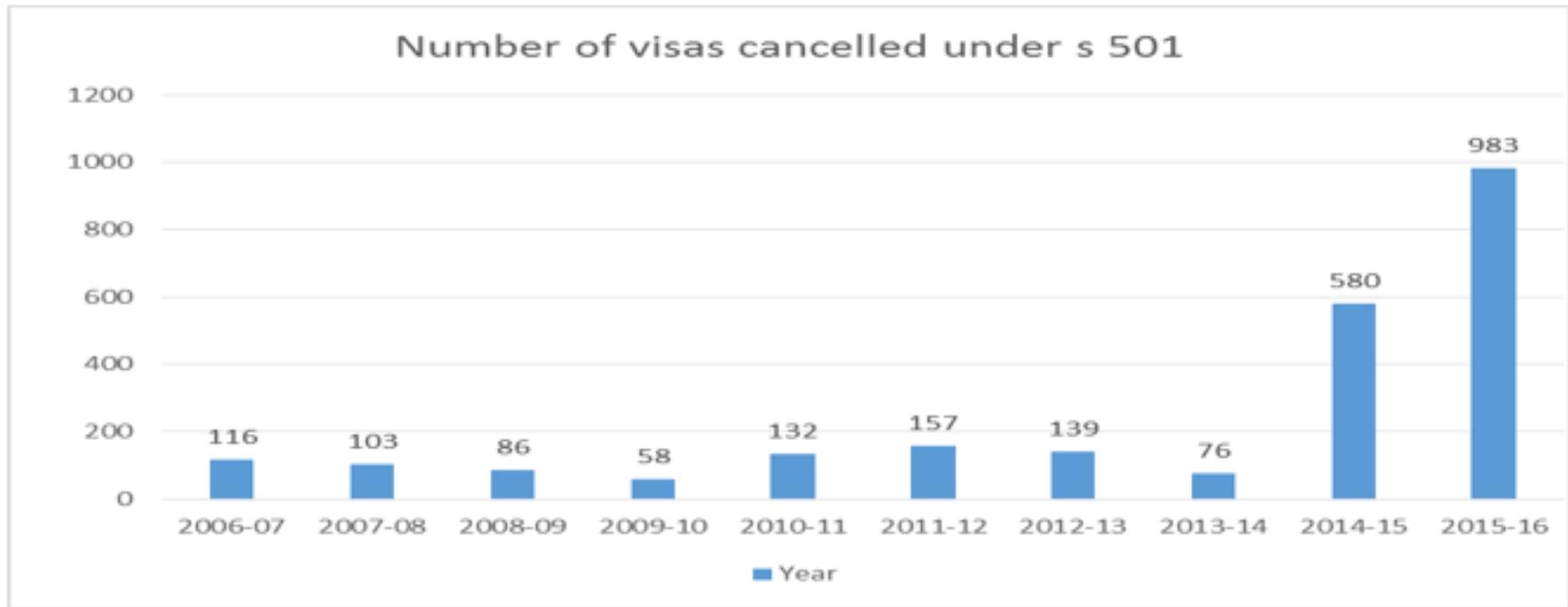
- a discretionary power to refuse a visa application (s 501(1) *with notice* or s 501(3) *without notice* – *minister only power*)
- a discretionary power to cancel visas (s 501(2) *with notice* or s 501(3) *without notice* – *minister only power*); and
- a mandatory cancellation provision (s 501(3A) *without notice*).

Section 501(3A) requires the minister to cancel, without notice, a visa if the minister is satisfied that the person does not pass the character test because of a death sentence, life sentence, a substantial criminal record, a sexually based offence involving a child or if the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a state or a territory. The section also specifies that the rules of natural justice do not apply to these decisions.

The amendments to the Act also inserted additional grounds on which a person will not pass the character test. The character test was strengthened to provide that a person will not pass the character test if there is a risk (as opposed to a significant risk previously) that the person would engage in serious criminal conduct and where they have been sentenced to two or more terms of imprisonment where the total of those terms is 12 months or more (rather than 24 months or more in the previous legislation).

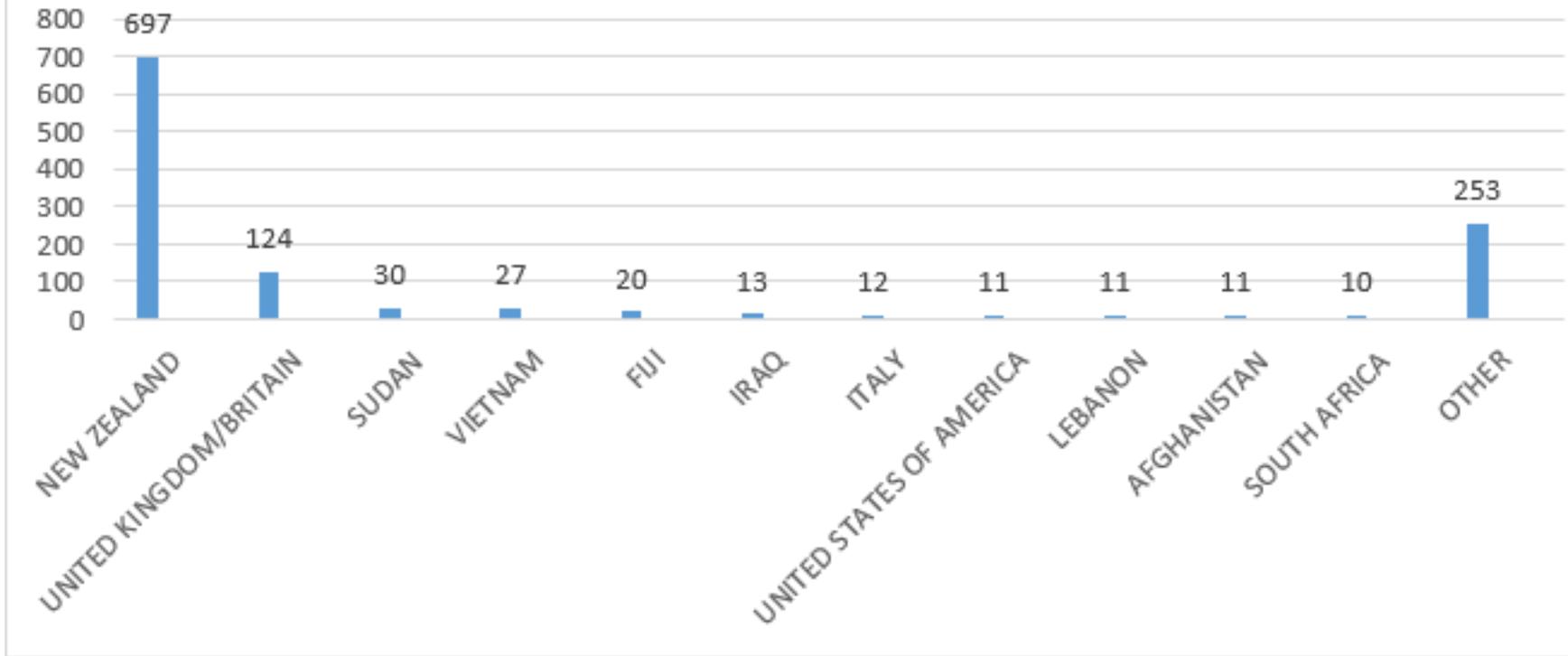
Other amendments include a new personal ministerial cancellation power. This allows the minister to cancel without notice, or to set aside a non-adverse decision, where it is in the public interest to do so. The amendments also provide that any decision made personally by the minister will not be subject to merits review. However, a person can appeal to the minister to revoke the decision to cancel their visa.

Since December 2014 the number of visas cancelled under s 501 increased substantially:



The majority of those affected by section 501 are New Zealand or United Kingdom nationals:

Nationality of people with visas cancelled under s 501



In the period 1 January 2014 to 1 March 2016 66 per cent (805) of individuals within the above group sought revocation of the s 501(3A) visa cancellation decision. As at 1st March 2016 only 178 of these had been finalised. Of those 178, 73 had cancellation decisions revoked (all of whom were mandatory cancellations), 15 were invalid (out of time), 21 were withdrawn by the non-citizen, and 69 were 'not revoked'.

On 1st March 2016, 78 per cent (627) of revocation requests made in the period 1 January 2014 to 1 March 2016 were pending decision. Of those cases 120 people are awaiting the outcome of their case overseas.

Following the passage of the legislation, complaints to the Ombudsman Office and observations from our compliance monitoring of the ABF's use of intrusive powers, and the inspection of immigration detention facilities raised concerns about the following aspects of the administration of s 501:

- the length of time a person spends in immigration detention waiting a revocation request outcome

- notification of a visa cancellation shortly before release from prison
- the impact of prolonged and interstate detention on detainees and their families
- the impact on immigration compliance operations and the detention network.

The department has a stated aim to cancel visas under s 501 well before the person's estimated date of release so that, where possible, any revocation process can be finalised while the person is in prison. To date, the department has failed to achieve this.

The Ombudsman has identified that the efficient administration of s 501 suffers from:

- a backlog in identifying persons subject to having their visas cancelled under s 501 which reduces the scope to conclude the cancellation/revocation process prior to the end of a prisoner's custodial sentence, and
- delay in deciding the outcome of revocation requests. This leads to former prisoners spending prolonged periods in immigration detention.

The delays and backlog stem from the increase in visa cancellations following the introduction of the s 501(3A) mandatory cancellation provision combined with the large number of people who seek revocation of their visa cancellation.

Other administrative problems exacerbating delays in identifying those subject to cancellation and concluding the revocation request process include:

- the informal links between the National Charter and Cancellation Centre (NCCC) and state and territory prison services
- slow response time from courts and police for records and transcripts
- the large number of cases decided personally by the minister
- limited scope to include family circumstance when prioritising cases
- complex record keeping and reliance on paper files for older cases.

The Ombudsman also interviewed a number of the people detained as a result of having their visa cancelled under s 501. Their key concerns were:

- the impact on their families if they are removed from Australia
- the length of time taken for a revocation request outcome

- what appeared to be inconsistent or quick revocation decisions for persons that did not appear to have exceptional circumstances
- being informed of their visa cancellation shortly before their release from prison
- uncertainty about what assistance would be provided if they awaited the outcome of their revocation decision overseas
- the debt incurred to the Commonwealth from being escorted overseas.

Many persons in immigration detention, as a result of having their visas cancelled under s 501, have also been moved interstate away from their families and support networks due to limited space in, or the low risk classification of, metropolitan immigration detention facilities. This has resulted in additional costs to the department and the enforced separation of detainees from their families, children and support networks with little chance of being able to receive visits. This, combined with the delays in deciding revocation requests, undermines the department's policy of giving primary consideration to the best interests of the minor children of persons subject to visa cancellation through prolonging family separation. Further, this separation impacts on the ability of the detainee to cope in immigration detention

Case study – missing property

A common complaint to the Ombudsman's Office relates to property that goes missing when a detainee is moved between immigration detention facilities.

The complainant advised our Office that their property, held in trust by the department's service provider, had not been returned to them when they were transferred between immigration facilities and then when they moved into the community on a visa.

They complained to DIBP. However, their property was not located and no compensation was offered for the missing items. We investigated the complaint and based on the response and documents provided put together a timeline relating to the movement of the property. During the investigation, the department located most of the

missing items and offered reimbursement to the complainant.

We highlighted to the department the deficiencies in its record keeping which hampered its own attempt to locate the 'missing' property when the complainant initially contacted the department regarding this issue.

This is an ongoing issue that is monitored during our inspection visits of the detention facilities.

Useful links

[Ombudsman Investigation reports](#)

[Ombudsman Immigration Detention Review Reports](#)

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