COMMONWEALTH OMBUDSMAN

Our ref: 486N-000510-O3

12 August 2019

The Hon David Coleman MP
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs
Parliament House
CANBERRA ACT 2600

Dear Minister

Assessments under s 486O of the *Migration Act 1958*

In accordance with s 486O of the *Migration Act 1958* (the Act) I am forwarding my assessment of 10 cases on the schedule (Attachment A) regarding 19 individuals who fall within the reporting and assessment obligation imposed by Part 8C of the Act.

My Office has assessed the appropriateness of the immigration detention arrangements of the 10 cases on the schedule and has made a total of six recommendations in relation to five cases (Attachment B).

The Act also requires that I prepare this de-identified statement for tabling in Parliament.

As part of this assessment my Office reviewed information relating to each individual's case progression, detention placement, legal matters and health and welfare. When required, further information was requested under s 486Q of the Act or s 8 of the *Ombudsman Act 1976*. For the purposes of further assessment, my Office conducted an interview with one individual on the schedule, Mr X (1000319-O2).

Yours sincerely

Michael Manthorpe PSM
Commonwealth Ombudsman

Influencing systemic improvement in public administration

Attachment A

SCHEDULE

Assessments of people placed in immigration detention for more than two years

When coming to this assessment, the Office reviewed information relating to each individual's case progression, detention placement, legal matters and health and welfare. When required, further information was requested under s 486Q of the Act or s 8 of the *Ombudsman Act 1976.*

No	Ombudsman ID	Recs	Comments	Name	No. of People	Year of birth	Days in detention[1]	Detention status[2]	Date of 486N report	Date last assessment tabled
1	000510-O3	N	N	Mr X	1	1961	4,391	IDF	17 December 2018 and 20 June 2019	4 July 2019
2	1000023-O3	2	N	Mr X	1	1986	3,292	IDF	15 March 2019	26 November 2018
3	1000319-O2	1	N	Mr X	1	1987	3,288	IDF	26 March 2018, 2 October 2018 and 2 April 2019	9 May 2018
4	1002163-O3	N	N	Mr X	1	1989	2,012	IDF	21 March 2019	21 February 2019
5	1002177-O4	N	N	Mr X	1	1989	2,019	CF	10 April 2019	Awaiting tabling
6	1002334-O3	1	N	Mr X Ms X (wife) Master X (son)	3	1979 1986 2015	1,826 1,826 1,358	CD CD CD	5 September 2018 and 7 March 2019	15 October 2018
7	1002486-O2	1	N	Mr X Ms X (wife) Miss X (daughter) Master X (son)	4	1987 1984 2013 2015	1,648 1,648 1,402 1,158	CD CD CD CD	30 August 2018 and 6 March 2019	25 June 2018
8	1002522-O2	1	N	Mr X Ms X (wife) Mr X (son) Mr X (son) Master X (son)	5	1970 1975 1995 1999 2015	1,643 1,643 1,643 1,643 1,364	CD CD CD CD CD	8 October 2018 and 9 April 2019	15 October 2018
9	1002673-O2	N	N	Mr X	1	1961	1,277	Removed	12 November 2018	13 February 2019
10	1002986-O	N	N	Mr X	1	1981	914	IDF	15 October 2018 and 15 April 2019	First Assessment

[1] At date of the Department's latest report.

[2] Immigration Detention Facility (IDF), Community Placement (CD), Removed, Correctional Facility (CF).

Attachment B

RECOMMENDATIONS BY THE COMMONWEALTH OMBUDSMAN TO THE MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

Under s 486O of the Migration Act 1958

Name	Mr X
Ombudsman ID	1000023-O3

Mr X was detained in November 2009 after arriving in Australia by sea and has remained in an immigration detention facility for a cumulative period of more than nine years.

Mr X was found not to be owed protection through non-statutory processes in 2010 and 2011. His applications for judicial review were unsuccessful and the High Court refused his application for leave to appeal.

In June 2013 Mr X was convicted of rioting offences. He was released from criminal custody in October 2013 and was re-detained.

In February 2015 an International Treaties Obligations Assessment (ITOA) determined that the circumstances of Mr X's case did not engage Australia's *non-refoulement* obligations. Mr X lodged an application for judicial review of the negative ITOA with the Federal Circuit Court (FCC).

The Department of Home Affairs' (the Department) report of 8 March 2016 advised that Mr X's case was found to be affected by the High Court's judgment regarding ITOAs conducted as a result of the Department's data breach in 2014.

In March 2017 the FCC identified that Mr X's ITOA decision was affected by legal error and the matter was remitted to the Department for reconsideration.

In May 2018 the Minister lifted the bar under s 46A(1) of the *Migration Act 1958* to allow Mr X to lodge an application for a temporary visa.

In May 2018 the Minister intervened under s 46A(2) to allow Mr X to lodge an application for a subclass 050 bridging visa. Mr X lodged an application in October 2018. In November 2018 the Department refused the application because Mr X did not meet the criteria for a subclass 050 bridging visa.

In September 2018 Mr X lodged an application for a Safe Haven Enterprise visa (SHEV). In March 2019 Mr X was issued with a Notice of Intention to Consider Refusal of his SHEV application under s 501. The Department advised that Mr X provided a response in April 2019 and that his response was being considered.

Mr X sought review of the bridging visa refusal in the Administrative Appeals Tribunal (AAT). In November 2018 the AAT affirmed the Department's decision. However, the AAT acknowledged that the circumstances were unusual because the Minister intervened to allow Mr X to lodge an application for a particular subclass of bridging visa which was not applicable to his circumstances.

The AAT further acknowledged that the application of Australia's migration laws in Mr X's case may have had an 'unintended consequence' or have led to an 'unfair or unreasonable result'. For these reasons, the AAT stated that Mr X's case should be referred to the Department to be brought to the Minister's attention.

The Department's report advised that in November 2018 Mr X requested ministerial intervention under s 351. In November 2018 the Department found that Mr X's request did not meet the guidelines for referral and the matter was finalised.

Attachment B

Name	Mr X (continued)
Ombudsman ID	1000023-O3

The Ombudsman's previous assessment recommended that Mr X's case be referred to the Minister for consideration under s 197AB for the grant of a community placement, in light of his ongoing mental health concerns and the significant length of time Mr X has remained in detention.

On 21 February 2019 the Minister advised in a tabling statement that Mr X's case had been referred to him for consideration as to whether he would be inclined to intervene under s 195A to grant Mr X a bridging visa in association with his Protection visa application.

In February 2019 Mr X's case was included in a group submission referred to the then-Assistant Minister to brief her on a number of long term detention cases. The submission provided the then-Assistant Minister an opportunity to indicate whether she was willing to consider the cases on an individual basis. In February 2019 the then-Assistant Minister indicated that Mr X's case should not be referred for consideration under the Minister's personal intervention powers.

The Department's report of 10 September 2018 advised that Mr X's case was being considered under the s 197AB guidelines for a community placement. The Department's report of 15 March 2019 advised that following the then-Assistant Minister's decision on the long term detention submission the Department ceased its assessment of Mr X's case under the s 197AB process.

The Department's report further advised that Mr X remains in an immigration detention facility because he requires ministerial intervention to be granted a bridging visa.

The International Health and Medical Services (IHMS) report stated that Mr X received treatment for complex physical and mental health concerns.

IHMS advised that Mr X's detention placement was adversely affecting his physical and mental health.

The Ombudsman notes with concern the government's duty of care to detainees and the serious risk to physical and mental health prolonged immigration detention may pose.

The Ombudsman also notes the significant length of time Mr X has remained in detention and the absence of any recent behavioural or security concerns.

Recommendation

The Ombudsman recommends that:

1. The Department expedite its consideration of Mr X's SHEV application.
2. Mr X's case be referred to the Minister for consideration of granting a bridging visa under s 195A.

Attachment B

Name	Mr X
Ombudsman ID	1000319-O2

Mr X was detained in April 2010 after arriving in Australia by sea and has remained in immigration detention, in a detention facility and the community, for more than nine years.

Mr X was found not to engage protection obligations under the Refugee Convention in April 2011 through a non-statutory process. An Independent Merits Review (IMR) affirmed the decision. Judicial review in the Federal Magistrates Court set aside the IMR decision and in October 2012 the matter was remitted for reconsideration.

Mr X's community placement was revoked in January 2014 following criminal convictions.

In June 2015 reconsideration of the IMR decision found Mr X not to engage Australia's protection obligations.

The Department of Home Affairs' (the Department) report of 26 September 2015 advised that as Mr X had no outstanding matters before the Department, tribunals or the courts his case was referred for removal action. The Department's report of 26 March 2018 advised that Mr X did not hold a valid travel document and was unwilling to return to Country A voluntarily. The authorities of Country A are currently not cooperating with the involuntary return of its citizens and as a result Mr X cannot be removed.

In May 2018 Mr X lodged an application for judicial review of the IMR decision in the Federal Court (FC). In December 2018 the FC transferred his case to the Federal Circuit Court (FCC) for determination. The FCC adjourned the matter pre-hearing in April 2019.

The Ombudsman's previous assessment recommended that the Department expedite the consideration of Mr X's case under s 195A of the *Migration Act 1958* for the grant of a bridging visa on departure grounds, in light of the significant length of time he has remained in immigration detention.

On 9 May 2018 the Minister advised in a tabling statement that Mr X's placement had been reviewed and due to his classification as being of high risk to the Australian community, a placement in the community was not appropriate. The Department's report of 2 April 2019 advised that the Minister has declined on multiple occasions to intervene under s 195A to grant Mr X a bridging visa, most recently in May 2018.

In February 2019 Mr X's case was included in a group submission referred to the then-Assistant Minister to brief her on a number of long term detention cases. The submission provided the then-Assistant Minister an opportunity to indicate whether she was willing to consider the cases on an individual basis. In February 2019 the then-Assistant Minister indicated that Mr X's case should be referred for consideration under the Minister's personal intervention powers. The Department's report of 2 April 2019 advised that a submission will be prepared in due course for Mr X's case to be progressed.

The International Health and Medical Services report stated that Mr X received treatment for physical and mental health concerns.

The Ombudsman notes with concern the government's duty of care to detainees and the serious risk to physical and mental health prolonged immigration detention may pose.

Attachment B

Name	Mr X (continued)
Ombudsman ID	1000319-O2

The Ombudsman also notes the significant length of time Mr X has remained in detention and his history of mental health issues related to prolonged detention.

Recommendation

The Ombudsman recommends that:

1. The submission for Mr X's case be expedited and referred to the Minister for consideration of granting a bridging visa under s 195A.

Attachment B

Name	Mr X Ms X (wife) Master X (son)
Ombudsman ID	1002334-O3

Mr X and Ms X were detained in July 2013 after arriving in Australia by sea. They have remained in immigration detention, in a detention facility and the community, for a cumulative period of more than five years.

Mr X and Ms X were transferred to a Regional Processing Country (RPC) and returned to Australia for medical treatment. Their son, Master X, was born in Australia following their temporary transfer.

The Department of Home Affairs' (the Department) report advised that as Mr X and Ms X arrived after 19 July 2013 the family remain liable for transfer back to an RPC on completion of their treatment.

The Department's report advised that the family has undergone a Refugee Status Determination by the Government of an RPC and were found to be refugees.

The Department's report further advised that, while they have a child under the age of five who is not yet attending school, the family will not be considered for the grant of Final Departure Bridging visas under s 195A of the *Migration Act 1958*.

The International Health and Medical Services report advised that the family received treatment for complex mental health concerns.

The Ombudsman notes with concern that the family's ongoing uncertainty about their immigration status poses a significant risk to their health and welfare.

Recommendation

The Ombudsman recommends that the Department:

1. Explore options to address the prolonged detention of Mr X, Ms X and their son.

Attachment B

Name	Mr X Ms X (wife)
Ombudsman ID	1002486-O2

Mr X and Ms X were detained in September 2013 after arriving in Australia by sea. They have remained in immigration detention, in a detention facility and the community, for a cumulative period of more than four and a half years.

Mr X and Ms X were transferred to a Regional Processing Country (RPC) and returned to Australia for medical treatment. Their three children were born in Australia following their temporary transfer.

Due to the stateless status of Mr X and Ms X, their two elder children Miss X and Master X were granted Australian Citizenship by conferral in September 2018. An application for citizenship by conferral for their younger daughter, Miss X was being assessed by the Department of Home Affairs' (the Department). Miss X is not yet subject to reporting under s 486N of the *Migration Act 1958*.

The Department's report advised that as Mr X and Ms X arrived after 19 July 2013 they remain liable for transfer back to an RPC on completion of their treatment.

The Department's report advised that Mr X and Ms X have undergone a Refugee Status Determination by the Government of an RPC and were found to be refugees.

The Department's report further advised that, while they have children under the age of five who are not yet attending school, the family will not be considered for the grant of Final Departure Bridging visas under s 195A.

The International Health and Medical Services report advised that Mr X and Ms X received treatment for mental health concerns.

The Ombudsman notes with concern that the family's ongoing uncertainty about their immigration status poses a significant risk to their health and welfare.

Recommendation

The Ombudsman recommends that the Department:

1. Explore options to address the prolonged detention of Mr X and Ms X.

Attachment B

Name	Mr X Ms X (wife) Mr X (son) Mr X (son) Master X (son)
Ombudsman ID	1002522-O2

Mr X, Ms X and their two eldest adult children were detained in July 2013 after arriving in Australia by sea. They have remained in immigration detention, in a detention facility and the community, for a cumulative period of more than four and a half years.

Mr X, Ms X and their adult children were transferred to a Regional Processing Country (RPC) and returned to Australia for medical treatment. Their youngest son, Master X was born in Australia following their temporary transfer.

The Department of Home Affairs' (the Department) report advised that as the family arrived after 19 July 2013 they remain liable for transfer back to an RPC on completion of their treatment.

The Department's report advised that the family has undergone a Refugee Status Determination by the Government of an RPC and were found to be refugees.

The Department's report further advised that, while they have a child under the age of five who is not yet attending school, the family will not be considered for the grant of Final Departure Bridging visas under s 195A of the *Migration Act 1958*.

The International Health and Medical Services report advised that the family received treatment for complex physical and mental health concerns.

The Ombudsman notes with concern that the family's ongoing uncertainty about their immigration status poses a significant risk to their health and welfare.

Recommendation

The Ombudsman recommends that the Department:

1. Explore options to address the prolonged detention of Mr X, Ms X and their children.