



Department of Immigration and Citizenship

NOTIFICATION OF DECISIONS AND REVIEW RIGHTS
FOR UNSUCCESSFUL VISA APPLICATIONS

December 2007

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

REPORT NO. **15|2007**

Reports by the Ombudsman

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EXECUTIVE SUMMARY

The obligation on public officials to explain the reasons for a decision is integral to the transparency and accountability of government. Reasons contribute to good public administration by focusing the decision maker's mind on the legislative and policy requirements of a decision. Reasons also promote public confidence in government by showing that a decision was not made arbitrarily or influenced by speculation or bias.

The Department of Immigration and Citizenship (DIAC) has a statutory obligation under the *Migration Act 1958* (Migration Act) to provide an unsuccessful visa applicant with a statement setting out the criterion or the legislative provision that prevented the grant of a visa. If the applicant has the right to merits review of a decision by a tribunal, the statement must also set out the reasons for the decision, advise on their review rights, state who can seek the review, where an application for review can be made and the timeframe for applying for a review.

The migration regime is complex and involves multiple visa categories, classes and criteria. Decisions on visa applications are made by a large number of DIAC officers at various locations, both onshore and offshore. These complexities present significant challenges for DIAC in effectively notifying visa applicants of refusal decisions and ensuring notification letters are of good quality and meaningful to applicants.

The information provided in a notification letter can be important. It may inform a person's decision to remain in or depart Australia, it may impact on their immigration status in Australia, and it may influence the person's decision to reapply for a visa or to apply to have it independently reviewed.

Complaints to the Ombudsman's office suggest that notification letters from DIAC can be contradictory or confusing for visa applicants, or fail to meet the requirements of the legislation. Concerns have been raised that it was not clear which visa criteria had been assessed by DIAC before making a decision to refuse a visa and people were unsure whether or not they had a right of review.

On 30 June 2006, the Ombudsman initiated an own motion investigation under s 5(1)(b) of the *Ombudsman Act 1976* (Ombudsman Act) to examine notification of decisions and review rights that are provided to unsuccessful visa applicants. The investigation assessed whether DIAC's advice to applicants that their visa application had been refused complied with the notification requirements in the Migration Act, and demonstrated good practice on communicating with clients of the Australian Government.

Scope of investigation

The aim of this investigation was to assess the quality of DIAC's notification letters and whether they accorded with the requirements of the Migration Act. Using a sample of notification letters and reviewing DIAC's practices and procedures, the investigation specifically assessed whether:

- notification letters stated the criterion the applicant did not satisfy or the legislative provision that prevented the grant of a visa

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- applicants with a right to merits review of a visa refusal decision received a statement of reasons for the decision and information about how and when to access review rights
- notification letters and statements of reasons were consistent with best practice principles such as the use of plain English and clear communication of information
- notification letters provided to applicants without merits review rights were informative and useful to applicants.

The investigation did not focus on DIAC's method of notification and the associated deemed receipt provisions.¹ Nor did the investigation consider notification letters announcing a decision to cancel a visa.

The methodology adopted in this investigation is outlined in Part 1 of this report.

Summary

This investigation found that DIAC's overall management of notification of adverse decisions is not coordinated or consistent. There was significant variation in the quality of information presented in notification letters, many of which fell considerably short of best practice standards. In some instances, this limited a visa applicant's ability to seek review or successfully reapply. In other instances, the information was overly complex, confusing and poorly presented.

A coordinated approach to this fundamental area of DIAC business will improve DIAC's communication with its clients and also assist applicants to respond appropriately to adverse decisions.

Three recommendations arising from the investigation together with DIAC's responses are set out at the end of this report. DIAC accepted all of the recommendations and has outlined strategies it already has in place to address the issues identified in this report.

¹ Methods of notification and deemed receipt provisions are outlined in ss 494B and 494C of the Migration Act. Issues associated with DIAC's compliance with these sections were identified in many of the immigration detention cases referred to the Ombudsman. See the Commonwealth Ombudsman's *Report into Referred Immigration Cases: Notification issues*, Report No. 9/2007.

PART 1—INTRODUCTION

1.1 DIAC processes 12,000 applications for visas every day.² These visa applications may relate to 140 different visa categories, with visa refusal notifications being issued from around 80 offices located both onshore and offshore.

1.2 The volume of applications that are refused varies significantly across visa classes. In 2005–06 for example, DIAC received 3,300 applications for protection visas and refused 62%,³ while two million electronic visitor visa applications were lodged and less than 1% were refused.⁴

1.3 Against this background, DIAC is required to advise all visa applicants whether their application has been granted or refused. The Migration Act outlines the information that must be contained in visa refusal notification letters and when DIAC must provide a statement of reasons for the decision. There is also a range of other material providing guidance to decision makers on notification letters and statements of reasons for decisions. Additionally DIAC has specific procedures and a good decision making guide to assist its officers to assess, decide and notify applicants of visa decisions.

Terminology

1.4 The term ‘notification’ refers to the letter that informs the applicant of the outcome of their visa application. A statement of reasons may be an attachment to a notification, or it may be incorporated in the notification letter.

1.5 The meaning of the term ‘statement of reasons’ adopted in this report refers to a statement that:

- sets out the decision and the reasons for the decision
- lists the findings on material facts
- refers to the evidence for the findings.

Scope and methodology

1.6 This investigation assessed whether DIAC’s advice to applicants that their visa application had been refused complied with the notification requirements in the Migration Act and demonstrated good practice regarding communicating with clients of the Australian Government. Other aspects of DIAC’s notification obligations including cancellation decisions and notification methods were not considered as part of this investigation.

1.7 The Migration Act has three areas that impose a duty on the Immigration Minister to notify an applicant of a decision to refuse to grant a visa:

² Mr Andrew Metcalfe, Plenary address at the Transformations Conference 2006, Federation of Ethnic Community Councils of Australia, Canberra (29 November 2006), www.immi.gov.au/about/speeches-pres/_pdf/2006-11-29_FECCA_Secretarys_plenary_address.pdf

³ Department of Immigration and Multicultural Affairs Annual Report 2005–06, p 118.

⁴ From figures provided by DIAC to the Ombudsman’s office for the purposes of this investigation.

- **s 66:** general refusal to grant a visa
- **s 500A (10):** refusal to grant a temporary safe haven visa made under subsections 500A (1) and (3)
- **s 501:** refusal to grant a visa for 'character concern' reasons.

1.8 This investigation focused on the general obligations under s 66 of the Act. The duties in this section are applicable to notifications issued for most visa classes, and are therefore an area of administration that affects a large number of people.⁵

1.9 The methodology of this investigation included:

- Assessing a sample of 1,800 notifications and statements of reasons against the relevant statutory requirements and best practice standards.⁶

The sample of notifications was selected from DIAC offices in Australia and overseas, and from business areas that process applications for student, humanitarian, family, business and protection visas. All requested notifications were issued between August and November 2006.

- Consulting with business areas and specialist visa processing teams⁷ to gain an understanding of the processes in place to ensure legislative compliance of the notifications issued from these offices, and for developing and maintaining notifications.
- Consulting with immigration legal centres, migrant resources centres and legal aid organisations to gain an understanding of the key issues encountered by DIAC's client group when provided with notifications of decisions and statements of reasons.

1.10 Part 2 of this report describes the legal and policy framework within DIAC relating to decision letters. Part 3 of this report focuses on notification letters in general and assesses whether DIAC met the legislative requirements outlined in s 66 and best practice standards.

1.11 DIAC's obligation to provide an unsuccessful visa applicant with a statement of reasons is discussed in Part 4 of this report. Part 5 focuses on review rights.

⁵ The investigation did not examine whether letters were sent to the correct people and the correct address, or accurately reflected recent court decisions on these matters (for example, *Chan Ta Srey v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 134 FRC 308). These issues are discussed in the Commonwealth Ombudsman's *Report into referred immigration cases: Notification issues, including cases affected by the Federal Court Decision in Srey*, Report 09/2007, available on the Commonwealth Ombudsman's website.

⁶ Statutory requirements outlined in the Migration Act and associated Migration Regulations, the Procedures Advice Manual (PAM) 3 (GenGuide A), the Department's *Good Decision Making: Training for DIMA Decision Makers*, the Client Services Charter, and guidance provided by the *Administrative Review Council Decision Making Best Practice Guide 4: Reasons*.

⁷ Consultations occurred with DIAC's National Office and the Melbourne, Adelaide and ACT state and territory offices.

PART 2—BACKGROUND

2.1 A range of legislative, policy and best practice guides combine to provide the framework for DIAC officers issuing decision letters to unsuccessful visa applicants.

Legislation

2.2 The *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and the *Administrative Appeals Tribunal Act 1975* (AAT Act) outline a requirement for a statement of reasons to be provided on request for a reviewable administrative decision. In addition to the AAT and ADJR Acts, specific legislation such as the Migration Act may also impose a duty on decision makers operating in a particular area of government to provide people with a notice of the reasons for a decision, irrespective of whether the notice was requested.

2.3 Legislation may indicate which decisions should be accompanied by a statement of reasons, the time limits for requesting and providing the statement of reasons, and its scope or content. These obligations enable people to more effectively use tribunals and other external review agencies such as the Ombudsman. Reasons are therefore integral to the effective review of administrative decisions.

2.4 A failure by an agency to provide a notification that conforms to the statutory requirements can prompt a review body to order an agency to remedy the oversight. Courts and tribunals can also view a defective statement of reasons as a sign of a defective decision, an error of law or a failure to take account of relevant considerations.

2.5 The requirement to provide a visa applicant with notification of a decision is outlined in s 66 of the Migration Act, which states:

Section 66 — Notification of decision

- (1) When the Minister grants or refuses to grant a visa, he or she is to notify the applicant of the decision in the prescribed way.
- (2) Notification of a decision to refuse an application for a visa must:
 - (a) if the grant of the visa was refused because the applicant did not satisfy a criterion for the visa—specify that criterion; and
 - (b) if the grant of the visa was refused because a provision of this Act or the regulations prevented the grant of the visa—specify that provision; and
 - (c) unless subsection (3) applies to the application—give written reasons (other than non-disclosable information) why the criterion was not satisfied or the provision prevented the grant of the visa; and
 - (d) if the applicant has a right to have the decision reviewed under Part 5 or 7 or section 500—state:
 - (i) that the decision can be reviewed; and
 - (ii) the time in which the application for review may be made; and
 - (iii) who can apply for the review; and
 - (iv) where the application for review can be made.

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- (3) This subsection applies to an application for a visa if:
- (a) the visa is a visa that cannot be granted while the applicant is in the migration zone; and
 - (b) this Act does not provide, under Part 5 or 7, for an application for review of a decision to refuse to grant the visa.

2.6 In essence, a decision maker must inform a visa applicant of the specific criterion or legislative provision that was not satisfied or which prevented the grant of the visa. If the applicant has the right to merits review, the decision maker must also provide the applicant with a statement of reasons that lists the findings on material facts and refers to the evidence for the findings, and the details for accessing merits review.

2.7 The Migration Act specifies which visa applicants are entitled to merits review by the Migration Review Tribunal (MRT) or the Refugee Review Tribunal (RRT). It is those applicants who are entitled to a statement of reasons for an adverse visa decision. These are:

- onshore refugee claimants (now permanent or temporary protection visas)
- onshore cancelled visa holders (except a person whose visa is cancelled at the border)
- onshore applicants for a visa (except a person who is detected at the border)
- Australian sponsor⁸ of an offshore applicant for a visa.

2.8 Offshore applicants without sponsors are not entitled to merits review. Notification letters to these applicants are therefore only required to outline the decision, the criterion that the applicant failed to meet and any legislative provisions that prevented the grant of the visa. The difference in these letters is that there is no legislative requirement to provide reasons for the decision or why the applicant did not satisfy a certain criterion.

Additional guidance for decision makers

2.9 Decision makers in the immigration portfolio are also guided by the Procedures Advice Manual, and *Good Decision Making: Training for DIMA*⁹ *Decision Makers* guide ('the Guide'). These documents provide detailed instructions for assessing and deciding visa applications, and for developing a letter and statement of reasons for the applicant. Specific instructions from the Guide and the PAM are cited elsewhere in this report.

2.10 DIAC also has a Client Service Charter which sets out its stated commitment to treat clients with courtesy and respect, to be fair and reasonable and to provide clear and accurate information. Because English is a second language for many of DIAC's clients, the immigration law and policy is complex, and most visa applicants have a limited understanding of the Australian legal system and government

⁸ Sponsors include an Australian citizen, a company or partnership operating in Australia, the holder of a permanent visa or a New Zealand citizen who holds a special category visa.

⁹ The Department of Immigration has had a name change since the introduction of this guide.

processes, the Charter provides visa decision makers with guidance on how to communicate effectively with clients.

2.11 Additionally, the Administrative Review Council's *Practical Guidelines for Preparing Statements of Reasons*¹⁰ and the recently published *Decision Making Best Practice Guide 4: Reasons*¹¹ set out a number of guidelines to assist administrative decision makers to communicate decisions. Generally notifications should:

- identify the decision maker and provide information that will enable the recipient to contact the decision maker to clarify the notice or decision
- specify the rights of the person affected and others involved in the process (for example, a sponsor or parent), as well as the availability of any relevant internal or external complaint avenues
- specify the timeframe in which the review rights may be exercised, associated lodgement fees, and any waiver or conditions on these terms
- direct the person affected to sources of information about the review process and assistance that may be available to them, such as contact details for translators.

2.12 For the purposes of this investigation, it is important to note that each of these guides emphasises the need to communicate in plain English. Plain English may be described as:

The use of language and design features so that a document is appropriate to its purpose, the subject matter, the relationship between reader and writer, the document type and the way the document is used.¹²

2.13 The resources, guides and legislation relevant to notification letters and reasons for decisions informed a set of guiding principles for this investigation, tailored to the function of providing notification of decisions. The principles are:

- a visa applicant should be informed of the legislative framework under which a decision maker has made a decision
- a visa applicant should be informed whether they have any review rights
- a visa applicant with a review right should easily be able to assess whether to exercise that right to merits review, and how to initiate the process in the correct timeframe
- a visa applicant without a right to merits review should be able to assess what criterion they failed and what further action they can take
- it should be clear what criteria were applied and matters taken into account in making the decision
- a visa applicant should be able to contact the decision maker to discuss the decision, and be provided with directions for accessing further information
- a decision maker should communicate professionally, using plain English and demonstrating courtesy and respect.

¹⁰ Released by the Administrative Review Council in 2002.

¹¹ Released by the Administrative Review Council in August 2007.

¹² Australian Language and Literacy Council, *Putting it Plainly* (1996), p 11.

DIAC's approach

2.14 DIAC processes visa applications at various processing centres around Australia and at offshore locations. The way in which notification letters are developed by DIAC varies significantly. Notification letters for some visa classes are centrally controlled by the relevant policy area in the National Office, others are developed locally by individual processing centres or by individual decision makers.

2.15 Decision makers often use templates and standard paragraphs when completing notification letters and statements of reasons for unsuccessful visa applicants. Templates can be in a variety of formats, ranging from pre-populated name, address and decision-maker information, to specific tick box formats which have the criteria for the particular visa outlined against each box. Templates can also include standard headings that may act both as a guide for the decision maker and to more clearly present the information to the visa applicant.

2.16 Templates often include standard paragraphs, which can either be added as required by the decision maker or may be set as part of the template. Standard paragraphs may relate to the explanation of certain legislative provisions or criteria, or provide generic information about review rights and processes. DIAC officers can access standard paragraphs from the DIAC intranet or individual visa processing centres. Alternatively, decision makers may create and use their own standard paragraphs.

2.17 These templates and standard paragraphs are usually developed by the relevant specialist policy areas and the legal section, and distributed electronically to offices or made available on the intranet for decision makers to access. When the templates were used, it appeared that the particulars of the applicant were either automatically populated by a central database or directly by the decision maker.

2.18 The assessment of notification letters in the course of this investigation highlighted that there is wide variation in the use of templates and standard paragraphs in a given visa class. In the spouse visa category, for example, Brisbane, Melbourne, Perth and Sydney offices each use different templates and standard paragraphs. In addition there were different templates used within these offices. The templates also included a variety of formats including 'tick a box' and tables, and there were also variations in the information included in the templates.

2.19 Additionally, templates and standard paragraphs were found to be stored and maintained both on DIAC's central database or kept locally by individual decision makers. This has led to a wide degree of variation in how templates are used, including how they are updated and populated. This suggests that the development, circulation, use of and retirement of templates and standard paragraphs is not coordinated and has caused the proliferation in the variations and standards in letters.

2.20 DIAC undertakes some quality assurance techniques for notification letters. These techniques vary and include processing centres conducting sample testing of notification letters from other processing centres, and National Office policy areas reviewing and updating standard paragraphs. Additionally, training and policy development contributes to DIAC's quality assurance in relation to notification of decisions. Quality assurance of notification letters is generally the responsibility of the visa policy area. Some visa classes do not have formal quality assurance processes established for notification letters.

2.21 DIAC has developed a range of strategies to improve communication with clients, including the Client Service Charter, the Letter Improvement Process and Client Correspondence Principles. Combined, these strategies provide useful and client-focused guidance for DIAC officers in developing quality letters to clients. However, this investigation found that these principles and guidelines are not being consistently applied for notification letters of visa refusal decisions.

PART 3—NOTIFICATION OF ADVERSE DECISIONS

How the legislation is explained

3.1 It is a principle of good administration that a decision maker should refer to the legislation under which a decision has been made. Additionally, the Migration Act requires the decision maker to advise the applicant of the criterion or legislative provision that prevented the grant of a visa. The inclusion of this type of information in the visa refusal notification letter requires the decision maker to include and explain often complex legislative provisions.

3.2 The notification letters considered in this investigation generally appeared to meet these requirements, although the quality and format varied significantly. The letters reviewed showed that the way in which decision makers outline the criteria considered and other relevant legislation varies across DIAC. These include:

- extracts of legislation included in the body of the letter, ranging from the insertion of one clause to pages of many clauses and criteria
- extracts of legislation within the letter, followed by a short explanation of the relevance to the applicant's circumstances
- relevant legislation, clauses and sub clauses being referred to in the letter and full details included as an attachment
- plain English summaries of the specific criterion included in the body of letters.

3.3 DIAC's Guide to Good Decision Making instructs decision makers to use the specific wording of the criterion and not to substitute any other form of words. It states that:

Using words other than the words of the legislation will always give a disappointed applicant a chance to argue that the decision maker did not understand the proper legal test. The Department will then have to try to convince a court that the decision maker did understand the proper test even though it contains different words to the test that was apparently applied in the decision record.¹³

3.4 This is consistent with the ARC's *Decision Making Best Practice Guide 4: Reasons*,¹⁴ which states that paraphrasing the legislation is unwise because the meaning might be inadvertently changed. It is important for DIAC officers to outline accurately the relevant legislation to ensure that applicants are provided with meaningful and comprehensive information. This is important to enable unsuccessful applicants to consider their options, including assessing whether to apply for another visa, addressing the reason they failed a particular criterion before re-applying or seeking further advice or assistance.

3.5 If decision makers are summarising or providing plain English explanations of the criterion failed, which appears to be a common practice, it is important that such explanations are cleared by the relevant policy or legal areas. The legislative provision that is being paraphrased should be identified, and consideration given to

¹³ DIMA, *Good Decision Making: Training for DIMA Decision Makers* (February 2006), p 67.

¹⁴ Administrative Review Council *Decision Making Best Practice Guide 4: Reasons* (August 2007).

attaching an extract of the relevant criteria to the letter. This approach will ensure the visa applicant is provided with comprehensive and accurate information.

3.6 The investigation found that references to legislation in the notification letter were not usually included as an attachment. The exclusion of such information may lead an applicant to be misinformed or confused about the specific legislative basis for the decision or what exactly prevented the grant of the visa.

3.7 There were also examples where the legislative provisions outlined in letters were outdated and had been amended prior to the letter being provided to the applicant. In one case the criterion included had been amended two years prior to the letter being sent, yet the amendment had not been incorporated into the existing template. The visa assessment scheme, in which different criteria may be assessed at the time of application and at the time of decision, makes it important for decision makers to state the legislative provisions correctly. This is particularly important when there has been a delay between the application, assessment and decision stages. Decision makers need to ensure that the criteria included are up-to-date, correct and relevant. Additionally, quality assurance and oversight mechanisms need to address this issue.

3.8 By way of example, below is an extract from a letter informing an applicant of the criterion failed. The parts that are underlined, which appear to be inactive hyperlinks from extracts copied from an online source, are not included or explained in the notification. It demonstrates that, without interpretation by the decision maker or attachment of all relevant legislation, direct extracts from legislation can be meaningless and may not be in a complete form. Further, without the inclusion of all relevant information, an unsuccessful visa applicant will miss key information that may assist them to make an informed decision about appropriate further action.

457.212

- (1) If the applicant is the holder of a Student Temporary (Class TU) visa and is a fully funded student within the meaning given by clause 5A103, the Minister is satisfied that it would not be detrimental to Australia's policies in relation to overseas students to grant the visa.

- (2) Subclause (1) does not apply to an applicant who meets the requirements of subclause 457.223 (3) or (10).

3.9 In order to provide meaningful references without confusing the applicant with volumes of legislation, it may be appropriate to include the referenced materials in an attachment to the notification letter and also to provide a plain English summary of the legislative extracts. In the letter extract above, it would have been preferable for the decision maker to summarise the meaning of a fully funded student and also to attach the relevant clause. This approach will ensure that information provided to the unsuccessful visa applicant is accurate, complete and meaningful.

3.10 For most people, legislation is complex and uses unfamiliar language. Recognising, however, that decision makers have an obligation to communicate this information, DIAC is encouraged to undertake user testing to find the most effective way of meeting this obligation.

What criteria were considered by the decision maker

3.11 A DIAC decision maker has a statutory obligation to specify the criterion on which a visa application fails. Once the decision maker identifies a criterion that the applicant has failed to satisfy, a decision can be made to refuse the visa. The decision maker is not required to assess the application against all criteria. DIAC's Procedural Advice Manual and Good Decision Making Guide both remind decision makers to be careful not to suggest that the applicant meets other criteria if these were not assessed.

3.12 In some cases the notification letters examined in this investigation explained to the applicant that they failed a particular criterion and that the assessment of their application then stopped. More commonly, however, the notifications did not explain that the application had not been assessed against other relevant criteria referred to in the notification letter. It was therefore not always clear whether the applicant:

- met all criteria, except that which had been ticked or cited as having failed
- failed other criteria as well as that which had been ticked or cited as the failed criterion
- was not assessed against other criteria.

3.13 A complaint investigated by this office illustrates the impact that insufficient, inaccurate or misleading information about the criteria assessed can have on an individual.

Case study

Ms A applied for a student visa to study in Australia. Ms A's sister and brother-in-law set aside funds in their joint bank account to support Ms A's stay in Australia. DIAC rejected this application on the basis that Ms A did not have sufficient funds and that the funds had not been held in the account for long enough. The rejection letter did not include any other reasons for the decision. The letter invited Ms A to reapply should the reasons for rejection of the first application be rectified.

The appearance of the letter, which was in a tick box template format, involved two boxes being ticked under the heading of 'financial capacity' with the corresponding reasons being that the funds had not been held in a bank account for the required minimum time of six months and that the funds were insufficient. There was a third criterion outlined under this heading that funds were not from an acceptable source. This box had not been ticked and it appeared in between the two boxes and corresponding criteria that had been ticked. The letter could be read as intimating that the source of the funds was not considered to be a problem by the decision maker.

Based on this refusal letter, Ms A's sister and brother in law increased the funds set aside in their account and Ms A made a further application for a student visa and outlaid a further application fee. Ms A's second application was rejected on the basis that the funds were not from an acceptable source as defined by the Migration Regulations 1994. The decision maker advised in the refusal letter that Ms A's brother in law was not an 'acceptable individual' and the funds were therefore considered tainted.

Ms A's brother-in-law made a complaint to the Ombudsman's office that the information in the first rejection was misleading. The complaint was upheld on investigation.

3.14 The visa refusal letter provided to Ms A was misleading in a number of respects:

- it did not make clear which criteria were considered by the decision maker and which were not
- it did not state that DIAC discontinued the assessment of the application once it had found a failure to satisfy a single criterion
- the tick box approach was misleading as it implied that the boxes not ticked were assessed as being met
- the letter advised that a further application should address the reasons for this visa refusal, however it is apparent that not all reasons were provided.

3.15 Issues similar to these were identified in many of the notification letters reviewed as part of this investigation.

3.16 An applicant should be informed not only of the criterion they failed to satisfy, but also of other criteria they are required to satisfy, whether they were assessed and if so, whether they satisfied these criteria. It is also important that an applicant is made aware that a future change to policy or a different decision maker means that the same assessment of a subsequent application cannot be guaranteed. If given this information, an unsuccessful visa applicant will be better able to decide how they might respond. This might include re-applying for the same visa after attempting to address the failed criterion, or applying for a different class of visa, if they were not eligible for the type originally applied for.

Quality and consistency

3.17 Many of the notifications examined in this investigation had one or more of the following:

- spelling errors and sloppy cut and paste actions
- incomplete sentences and grammatical errors
- used different versions of the Departmental and Australian Government letterhead
- included options or instructions for the decision maker that were presumably meant to be deleted before the notification was sent
- lacked formatting which resulted in a notification letter comprising pages of compacted text.

3.18 In some notification letters it was evident that the error in spelling or formatting was embedded in the template and may not have been correctable by the decision maker completing the notification. DIAC officers have indicated that these errors can remain in place for long periods of time (in one instance a year) because it is believed that changes to templates on the central database are not allocated a high priority by the area responsible.

3.19 These elements should be part of an effective quality control strategy adopted by DIAC and individual policy areas, with a focus on ensuring that errors embedded in templates are rectified immediately.

Use of templates

3.20 As discussed earlier, the use of templates varies significantly and many inconsistencies exist. Templates may be a useful way to ensure that all necessary information is provided to the applicant, the information is clearly presented and the information is accurate and up to date. However, this investigation found that the way in which templates are currently being accessed, maintained, populated and reviewed does not achieve some of these benefits.

3.21 As noted elsewhere, it is important that the notification clearly indicates to the applicant whether they were assessed against all or only some of the requirements, and the extent to which they meet these. In the tick box example below, the applicant may be left wondering whether the other criteria not ticked had been assessed, specifically whether the form of evidence they have chosen to supply is from an acceptable source, or is fully sanctioned.

3.22 While the use of templates may assist decision makers to meet their legislative obligations in relation to notifications and improve the quality of information in notification letters, it is important for templates to enable decision makers to make effective use of spaces for additional comments or similar to explain to applicants the reasoning on key areas of judgement such as 'genuine relationship' or 'compassionate grounds'. Space should also be made for explaining a decision maker's reasoning in giving particular consideration or weighting to information provided by the applicant.

The tick box approach

3.23 The 'tick box' format of notification letters, discussed in the case study on page 12, demonstrates one model of a template. One advantage of the tick box approach is that information is presented in a clear and consistent manner, criteria are set out in a comprehensive and easy to understand format, and the applicant is advised of which criteria were and were not assessed.

3.24 The two examples below show, by comparison, how complex information can be better presented in a tick box format. Example 1 provides an extract from a letter that cited a provision in the Migration Act the decision maker decided was not met by the applicant. Specifically the decision maker decided that the applicant did not have the financial capacity to undertake a course of study in Australia. The letter is unhelpful as it replicates the relevant criterion and does not provide further information about what specifically is assessed by the decision maker to determine a person's financial capacity.

Example 1

573.223

- (2) An applicant meets the requirements of this subclause if:
 - (a) the applicant gives to the Minister evidence, in accordance with the requirements mentioned in Schedule 5A for Subclass 573 and the assessment level to which the applicant is subject, in relation to:
 - (b) the financial capacity of the applicant to undertake each of those courses of study without contravening any consideration of the visa related to work.

3.25 Example 2 uses a tick box format to list the evidence or 'tests' that the decision maker uses in reaching the decision about the applicant's financial capacity to study in Australia. This example provides the applicant with a greater understanding of how the decision was reached or the criterion that was not met. However, for the tick box format to be useful for an applicant it must indicate which

criteria were actually assessed or what evidence is required to be provided in support of a fresh application. Additionally, a copy of Schedule 5A 508 should have been attached to this letter as the information below is a summarised version of the schedule.

Example 2

FINANCIAL CAPACITY (Schedule 5A, Clause 5A508)

- The evidence of funds that you have submitted are not held in or loaned from an institution, which is an acceptable financial institution within the definition in the Migration Regulations. Information about Indian and Nepalese institutions that have, to date, demonstrated a history of meeting the definition is available on the website www.india.embassy.gov.au
- The evidence of funds you have provided is not from an acceptable source.
- You have not demonstrated that the required amount of funds has been held for the three months immediately before the date on which the application was made.
- The loan(s) you have submitted as evidence of financial support is not fully sanctioned – it has only been sanctioned in principle and is therefore unacceptable.
- You have not provided acceptable evidence that the amount of funds you have is sufficient to meet course fees, living costs and school costs in Australia.
- The evidence of funds you have provided is not consistent with the demonstrated regular income of the provider of the funds.

The need for plain English

3.26 The ARC Best Practice Guide¹⁵ advises that a statement of reasons should ‘use plain English, keep sentences short and to the point, avoid generalities and vague terms, and avoid technical terms and abbreviations if they are not likely to be readily understood by the person concerned’.

3.27 A plain English approach is also advocated in DIAC’s procedures and the Client Service Charter. It is an effective way to communicate legislation and reasons for decisions in a clear and understandable way. A plain English approach recognises the information priorities of the receiver and considers the language, structure and formatting required to effectively communicate with this audience.

3.28 It is important to recognise that English may be a second language for many recipients of notification letters, and that most visa applicants will have a limited understanding of the Australian legal system and government processes. Consultations revealed that some groups of applicants are reliant on community-based organisations and legal aid centres for assistance in understanding documents received from DIAC.

3.29 This investigation found that there is scope for DIAC to improve its communication with clients by incorporating the principles of plain English. The investigation found that letters could be simplified and more clearly presented and

¹⁵ Administrative Review Council, *Decision Making Best Practice Guide 4: Reasons* (August 2007), p.9.

explained, even though it can be acknowledged that the legislation being applied is complex. DIAC decision makers are encouraged to review notification letters to ensure that the plain English principles outlined above are incorporated.

Demonstrating courtesy and respect

3.30 DIAC's Client Service Charter commits decision makers to treat clients with courtesy and respect and to be fair and reasonable. In written communication these aims may be met by using a professional and respectful tone that recognises the importance and impact of the decision for the recipient.

3.31 Some visa processing offices have tailored the notification to lessen the impact of the adverse decision, although such examples were found to be rare:

I regret that I do not have better news for you.

I regret to advise you that your migration visa application has been refused.

Thank you for your application. I'm sorry to inform you ...

If you require any further information, or need any of the above matters clarified please contact this office on (08) XXXXX.

3.32 Notification letters that are written in plain English, have a humane and respectful element, and provide contact details for queries or clarification, are likely to assist DIAC to improve its relationship with its clients and to help clients better understand the information that is being provided to them. These strategies will assist DIAC to meet the service principles it has committed to in its Client Service Charter.

Identifying the decision maker

3.33 Both the Procedures Advice Manual and DIAC's Good Decision Making Guide inform decision makers of the importance of identifying themselves. According to the manual:

It is of critical importance ... that the actual visa decision maker is identifiable. Not recording the name or other identifier of the actual decision maker risks causing confusion as to who actually made the visa decisions, and that could give rise later to problems in relation to judicial review of the visa decision or internal case auditing.

3.34 The Guide adds that:

... in order to establish that you were a delegate at the time of the decision, you must also insert:

- your name
- your position number ... on the day of the decision
- your signature
- date of the decision.

3.35 The investigation found that this standard is inconsistently applied within and across visa processing posts. It was not uncommon for the decision maker not to provide their name or to provide their first name only, and for the notice not to be issued on Departmental letterhead and include the standard footer containing Departmental contact details. Some processing locations routinely provide the case

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and client identity numbers, and a phone number for direct contact with the decision maker (as opposed to a general national line).

3.36 In some cases there may be good reason for the decision maker not to include their full name, in which case the position number and the team name could be included. However, in addition to enabling review bodies to ensure the decision maker had valid ministerial delegation, poor identification of the decision maker and the source of the decision makes it difficult for applicants to effectively access DIAC's channels of enquiry.

PART 4—EXPLANATION OF VISA REFUSAL DECISIONS

4.1 An explanation as to why a visa was refused is essential if an applicant is to be able effectively to respond to that decision. It is recognised that DIAC is not obliged in all cases to provide an applicant with an actual statement of reasons, however this investigation found that there is scope for DIAC to improve the way in which decisions are explained both in statements of reasons and in standard notification letters.

Statements of reasons

4.2 Where an unsuccessful visa applicant has the right to merits review, the notification letter must provide written reasons for the decision. The purpose in exploring the reasons for the decision is to enable the person to decide whether to exercise their rights of review and appeal, and, if so, to act in an informed manner.¹⁶

4.3 Overall, this investigation found that there were many variations in how statements of reasons were completed. While the majority of statements that were reviewed met the requirements of the legislation, some fell short of best practice standards. Among the problems were that statements:

- were lengthy, complex and confusing
- were poorly presented and contained errors
- lacked adequate explanation
- failed to demonstrate the decision maker's consideration of the evidence
- failed to outline the facts on which the decision was based
- did not provide adequate explanation of relevant legislation and criteria
- did not specify the decision maker and their delegation.

4.4 These observations reinforce the need for DIAC to review the way in which notification letters and statements of reasons are completed. They also point to the need for effective quality assurance and oversight mechanisms to be introduced to ensure that reasons given to unsuccessful visa applicants are meaningful and are in line with the statutory and best practice requirements.

4.5 The ARC guide suggests that letters be structured with the following headings:

- the decision
- the findings on material facts
- the evidence or other material on which those findings are based
- the reasons for the decision.

4.6 The following three examples, drawn from the student visa category, illustrate the variation in the quality of reasons applicants may receive. The decision in each case could be appealed to the MRT, and the comprehensiveness and the quality of the notification letter was therefore important.

¹⁶ Administrative Review Council, *Decision Making Best Practice Guide 4: Reasons* (August 2007).

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Example 1

The applicant did not satisfy Regulation 572.221 for the following reasons:
Application was lodged on 28/03/2006 visas ses

Example 2

You did not satisfy Regulation 572.221 for the following reasons:
You were requested on 03/04/2006 to present to DIMA within 28 days with the following information: Medical report and xray assessment All aademic transcripts and attendance certificates for semesters of previous study and current courses prior to your Diploma of IT &Commerce/Diploma of Business. to Show evidence of \$4121.00 to support yourself during your studies and the extention of your visa. Court/Police documents regarding your pending court case, or courcome of the case/conviction if completed.

Example 3

On X July 2005 the client attended an interview with the Department where he lodged a Student visa application. The client was requested on the day to provide evidence of Overseas Student health Cover (OSHC). On X November an Officer from the Department wrote to the client at their last know address requesting evidence of OSHC for a period of 1 year to be provided by X November 2005. On X February 2006 the client was again requested to provide evidence of adequate health cover. On X March 2006 the client provided the requesting Departmental Officer with a letter giving his OSHC membership number without any evidence of expiry. The same Departmental Officer again contacted the client and requested that he provide a receipt of OSHC or his membership card. On X June 2006 and X June 2006 I contacted the client and left several messages regarding the outstanding OSHC.

Regulation 573.225 requires that the applicant must produce evidence of adequate arrangements in Australia for health insurance during the period of the applicant's intended stay in Australia. To date, the applicant has not submitted evidence of having paid for OSCH.

On the evidence provided, I am not satisfied that the applicant meets regulation 573.225.

4.7 In terms of effectively informing the applicant of the reasons for the adverse outcome and enabling them to choose to reapply or seek review, the third example is clearly the most useful. It provides a summary of interactions between DIAC and the applicant, which can be verified or countered by the applicant. There is also a clear statement of the regulation the applicant has failed and a clear statement of findings. Unlike the other examples, it is also free of spelling and other errors.

4.8 The investigation found that in some visa classes it is common for the statement of reasons to be 10 to 15 pages in length, or cite long tracts of legislation that appear to have no bearing on the applicant. An example is a lengthy extract from legislation defining 'dependent child', when there was no child included in the application.

4.9 The following extract from the business visa category demonstrates how a notification can provide a succinct and personalised explanation of the reasons why an applicant did not meet a specific criterion. The letter summarises the legislative framework, provides an overview of the relevant criteria, and then provides a brief statement of the assessment against each of the criteria.

Assessment of the Principal Applicant under Primary Criteria for subclass 457 – Regulation 457.223:

The prescribed criteria for a Temporary Business Entry (Class UC) Subclass 457 Business (Long Stay) visa in subclass 457 are set out at Part 457 of Schedule 2 of the Migration Regulations. Among the criteria to be satisfied at time of decision is Regulation 457.223, which states as follows: 457.223 (1) The applicant meets the requirements of subclause (2), (3), (4), (5), (7), (7A), (8) or (9).

Each subclause of Regulation 457.223 relates to a different 'category' of 457 visa, namely: (2) Labour Agreements, (3) Regional Headquarters Agreements, (4) Sponsorship by Australian businesses, (5) Sponsorship by Overseas Businesses (7) and (7A) Independent Executives, (8) Service Sellers, (9) Persons accorded certain Privileges and Immunities.

I have assessed the applicant against each of these categories.

457.223 (2) The principal applicant has not been nominated by a party to a labour agreement. Therefore the applicant does not satisfy the criteria of this subclause.

457.223 (3) The applicant has not identified that s/he is to be employed in relation to a Regional Headquarters Agreement. Therefore, the applicant does not satisfy this criteria of this subclause.

457.223 (4) The applicant has not been nominated by an employer who is an approved business sponsor. Therefore, the applicant does not meet the criteria of this subclause.

(And so on against the criteria.)

4.10 This letter included a detailed explanation of the legislative framework under which the decision was made, a clear outline of the decision maker's assessment of each of the subclauses and some information about the evidence considered. There were many examples of this standard reviewed during this investigation. On the other hand it was evident that this approach is not consistent and the standard varied significantly across visa classes, processing centres and decision makers.

4.11 DIAC is encouraged to review the way in which statements of reasons are prepared to ensure that:

- headings as recommended by the ARC Best Practice Guide¹⁷ are included and adequately addressed in all decision records
- templates currently being used are updated to reflect this suggested format
- user testing occurs within visa classes to ensure the information included in a statement of reasons is comprehensive and meaningful to the applicant
- paraphrasing or summarising legislation is reviewed and cleared by the legal section
- the evidence considered is not just listed in the letter but rather is outlined against each criterion with information about its relevance and credibility
- the findings against each criterion are supported by proper reasons

¹⁷ Administrative Review Council, *Decision Making Best Practice Guide 4: Reasons* (August 2007).

- clear and accurate information is provided about review rights
- templates are consistent, standardised and frequently updated and reviewed
- appropriate quality assurance and monitoring strategies are in place.

Where there is no legal requirement to provide a statement of reasons

4.12 As noted earlier, applicants for visas that do not attract merits review are not entitled to a statement of reasons under the Migration Act.¹⁸ Normally, visa applicants who are outside Australia and cannot demonstrate the requisite connection with Australia through appropriate sponsorship or nomination do not have the right to merits review. Nor do offshore students and humanitarian applicants.

4.13 In some visa classes, decision makers provide applicants with an outline of why their application failed, despite no legal obligation to do so. The following extract from a notification letter in response to a student visa application lodged offshore illustrates how instructive this can be for the applicant.

The applicant did not satisfy Regulation 571.223(2)(a)(i)(B) for the following reasons: Funds provided are insufficient to meet proposed study plan. Total funds provided AUD 41,667. Funds required for both s/c 571 & 580 AUD \$83,097. Shortfall of funds is AUD 41,430. I have checked through application & found that the fund...provided do not have sufficient 6 months saving history. Application does not meet regulation 571.223(a)(i)(B) & requirements of schedule 5A305(1)(a) funds provided insufficient to meet proposed study plan.

4.14 Another letter reviewed in this investigation simply advised the applicant that they did not satisfy regulation 571.223 because 'insufficient funds and stocks are not accepted'. While both examples provide some reason as to why the applicant did not meet the criterion, the fuller explanation is the most useful for the applicant to understand the decision and respond accordingly.

4.15 In the humanitarian visa stream, offshore applicants are informed that 'merits review of this decision is not available and there is no requirement to provide written reasons why the criteria were not satisfied' and that 'the attached page shows the criteria not met by you (or anyone else included in your application) for each of the subclasses'.

4.16 The text below is attached in all of the letters for unsuccessful humanitarian visa applicants.

200.222, 201.222, 203.222 and 204.222

The Minister is satisfied that there are compelling reasons for giving special consideration to granting the applicant a permanent visa, having regard to:

- a) the degree of persecution to which the applicant is subject in the applicant's home country; and
- b) the extent of the applicant's connection with Australia; and
- c) whether or not there is any suitable country available, other than Australia, that can provide for the applicant's settlement and protection from persecution; and

¹⁸ The ADJR Act s 13, which confers a right to reasons in respect of decisions challengeable under that Act, does not apply to most decisions made under the Migration Act.

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- d) the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia.

202.222

The Minister is satisfied that there are compelling reasons for giving special consideration to granting the applicant a permanent visa, having regard to:

- a) the degree of discrimination to which the applicant is subject in the applicant's home country; and
- b) the extent of the applicant's connection with Australia; and
- c) whether or not there is any suitable country available, other than Australia, that can provide for the applicant's settlement and protection from persecution; and
- d) the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia.

451.222

The Minister is satisfied that there are compelling reasons for giving special consideration to granting the applicant a temporary visa, having regard to:

- a) the extent of the applicant's connection with Australia; and
- b) if the applicant continues to meet the requirement in subparagraph 451.211 (a) (i) – the degree of persecution to which the applicant is subject in the applicant's home country; and
- c) if the applicant continues to meet the requirement in subparagraph 451.211 (a) (ii) – the degree of discrimination to which the applicant is subject in the applicant's home country; and
- d) if the applicant continues to meet the requirement in subparagraph 451.211 (a) (iii) – whether the applicant has the protection of a male relative and is in danger of victimisation, harassment or serious abuse because of her sex; and
- e) whether there is any suitable country available, other than Australia, that can provide for the applicant's stay and protection from persecution, discrimination, victimisation, harassment or serious abuse; and
- f) the capacity of the Australian community to provide for the temporary stay of persons such as the applicant in Australia.

447.222

The Minister is satisfied that there are compelling reasons for giving special consideration to granting the applicant a temporary visa, having regard to:

- a) the extent of the applicant's connection with Australia; and
- b) if the applicant continues to meet the requirement in subparagraph 447.211 (a) (i) – the degree of persecution to which the applicant is subject in the applicant's home country; and
- c) if the applicant continues to meet the requirement in subparagraph 447.211 (a) (ii) – the degree of discrimination to which the applicant is subject in the applicant's home country; and
- d) if the applicant continues to meet the requirement in subparagraph 447.211 (a) (iii) – whether the applicant has the protection of a male relative and is in danger of victimisation, harassment or serious abuse because of her sex; and
- e) whether there is any suitable country available, other than Australia, that can provide for the applicant's stay and protection from persecution, discrimination, victimisation, harassment or serious abuse; and
- f) the capacity of the Australian community to provide for the temporary stay of persons such as the applicant in Australia.

4.17 While this approach might appear to provide the applicant with a detailed list of where the application fell down, this is not the case. Set out below are specific problems with a letter of this type.

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- This list of criteria failed is given to *all* unsuccessful humanitarian visa applicants with no attempt to tailor it to the individual's circumstances
- The applicant may not be aware that this list of criteria is the first of many that would need to be satisfied before a visa is granted. That is, even if the applicant met these criteria there are other criteria to be met, such as health requirements.
- The applicant is not advised of which visa class they were being assessed against. For example, one visa subclass is specifically for women and there are different visa subclasses for people who are within their home country and for those who are outside.
- The letter advises applicants that they did not satisfy a criterion in *each* of the subclasses. This is misleading, as applicants are in fact required to satisfy all of the criteria in only *one* of the subclasses.

4.18 The result is that a person receiving a letter such as this is unlikely to understand properly why they were refused this visa, what specific criterion they did not meet and what they should do next. It is recognised that DIAC is not required to provide reasons for its decision in these circumstances. However, DIAC is required to specify the criteria failed and arguably this is not being achieved with these types of letters.

4.19 In an internal audit of the processing of humanitarian visas, undertaken in January 2006, DIAC found that the lack of an obligation to provide applicants with reasons for a decision, coupled with the pressures to decide a high volume of cases, resulted in poor documentation of decisions. The ability of program managers to assess and monitor the quality of decision-making was therefore limited.

4.20 During this investigation DIAC officers suggested that unsuccessful visa applicants could request information about the decision under freedom of information legislation. Officers also indicated that applicants without review rights could address adverse outcomes by reapplying. However, to decide whether to reapply, and to improve the chance of success in a subsequent application, an applicant needs greater clarity about the assessment of their application than is provided.

4.21 More recently DIAC has responded to the audit findings by introducing new templates for documenting decisions for humanitarian visas, for internal purposes only. DIAC is encouraged to also make this information available to applicants in notification letters and to consider a wider application of this approach to other visa categories.

4.22 Complaints from unsuccessful visa applicants investigated by this office have shown other examples of letters providing limited or no explanation about why the visa was refused, when DIAC's internal records have held detailed information about the assessment and reasons for the refusal decision. Where possible, extra information, of the type already recorded and stored internally by DIAC, should be included in the notification letter. This would greatly assist the unsuccessful visa applicant to understand the decision, decide whether to reapply and if so what extra information they should provide. This approach will reduce the number of unnecessary and unchanged re-applications that DIAC receives and may also alleviate the volume of requests that DIAC receives for files under freedom of information.

Notification letters where review rights are not available

4.23 This investigation found that in some instances, despite no legislative requirement to do so, DIAC provided failed visa applicants with an explanation as to why they did not get a visa. These examples ranged from a brief two or three word reason to paragraphs detailing an explanation. In an environment where thousands of visa applications are refused every year in decisions made by hundreds of officers around the world, it is recognised that a full explanation will not always be possible.

4.24 Nevertheless DIAC should consider developing some standard and consistent requirements for decision letters where there is no legislative requirement to provide a statement of reasons. Acknowledging that the legislation only requires a notification letter in these circumstances to contain the decision, the criterion failed and any provision that prevented the grant of the visa, DIAC's Client Service Charter commits decision makers to 'provide clear and timely reasons for our decisions' and to 'provide accurate, helpful and timely responses that are relevant to your needs'. In order to meet these standards and communicate effectively with clients, some minimum or standard requirements should be set by DIAC to assist its decision makers in preparing notification letters.

4.25 In addition to the decision and the criterion or legislative provision that the applicant failed, these could include:

- where possible, a brief explanation about why the applicant did not meet a certain criterion or why a certain provision prevented the grant of the visa
- a clear and consistent statement that the decision is not reviewable and how the applicant can obtain further information
- the decision maker's details and contact number so that the applicant can discuss the application or process if required
- the criteria that were not assessed, or a statement that not all criteria were assessed
- where practicable, attachments that outline the legislation and criteria to assist the applicant to understand the decision.

4.26 In some circumstances DIAC may also be in a position to outline what information was considered by the decision maker, what was relevant or irrelevant to the decision and how the decision maker made the decision.

PART 5—INFORMATION ABOUT REVIEW RIGHTS

5.1 Where an unsuccessful visa applicant has the right to merits review, the notification letter must provide written reasons for the decision, advise the applicant that the decision can be reviewed, the time in which the review application must be made, who can apply for review and where the application for review can be made.

5.2 The notification letters reviewed as part of this investigation generally met these requirements. However, there was room for improvement in providing information that could assist the applicant to understand and respond to the review right available to them.

Explaining rights to merits review

5.3 In general, access to merits review before the MRT or the RRT depends on the applicant being inside the migration zone, and having a sponsor or nominator in Australia. The method by which the applicant or authorised recipient receives the notification letter from DIAC (by fax, hand or post) determines the time period in which they are deemed to have received their notice, and in turn the time period in which they can lodge an application for merits review.

Correct notification

5.4 The investigation found a small number of letters in the student and business visa categories that failed to correctly inform the applicant of their review rights. In the student category, there were two concerns:

- applicants were informed they did not have review rights, when in fact they did
- notifications were incomplete or misleading.

5.5 An example in the business category is a letter which informed an applicant:

You have a right of review of this decision. If you have decided to exercise this right of review you must do so by [Date review right expires].

5.6 This example, which was not an isolated incident, was caused by the decision maker not completing the template. The failure to enter a correct date may have significant consequences for the person's ability to effectively exercise their right of review within the required timeframe.

5.7 In some instances the error in the notification letter was caused by the system that stores the templates. Other failures were on the part of the decision maker or were the result of inaccurate information contained within standard paragraphs. In either case, an effective quality assurance mechanism would enable these errors to be identified and remedied.

5.8 An incorrect notification or failure to notify a review right does not affect the validity of the decision, yet the time period for lodgement of a review application may not have commenced. This has implications for the validity of an applicant's bridging visa and lawful status in Australia, and in turn the applicant's exposure to detention and removal.

Effectively communicating the right to review

5.9 The timeframes in which to apply for merits review are legislated and the review tribunals cannot accept late applications for review. It is therefore critical that applicants understand the timeframes in which they need to act. The following two extracts from the business visa category illustrate how confusing this information can be for the applicant if the information has not been tailored to their individual circumstances.

Example 1

If this letter is sent by registered post or by other prepaid means to an address in Australia, the visa applicant will be deemed to have received this letter in [7] working days, from the date of this letter. In any other case where this letter is sent by registered post or by other prepaid means, the applicant will be deemed to have received this letter in [21] calendar days, from the date of this letter. Once the applicant has been deemed to have received this letter (i.e. the [7] working days or [21] calendar days has expired) the applicant has an additional [21] calendar days to lodge the application for review. In any other instance, the applicant has [21] calendar days, from the date of this letter, to lodge the application for review.

Example 2

PERIOD IN WHICH TO APPLY FOR REVIEW – ONSHORE APPLICANTS

- 21 calendar days from the day after this was handed to you (if decision notification letter is handed to the person); OR
- 21 calendar days from the day after this letter was transmitted to you (if decision notification letter is sent by electronic means); OR
- 7 working days plus 21 calendar days after the date of this letter (if decision notification letter is delivered by prepaid post to an Australian address); OR
- 42 calendar days after the date of this letter (if decision notification letter is delivered by prepaid post to an overseas address).

Please note “working day” means any day that is not a Saturday, a Sunday or a public holiday in the place in which the letter is received.

5.10 In these examples the decision maker does not directly inform the applicant of the time period in which they can apply for review and relies on a template paragraph that covers all eventualities. This places the responsibility on the applicant to work out what scenario and time period applies to them. These examples, it should be noted, were infrequent and generally DIAC decision makers selected the option most relevant to the applicant.

5.11 The investigation also found that some notification letters do not explain the difference between working and calendar days, or use them inconsistently. For example, in the protection visa category, in which applicants have review rights with the RRT, the stated period for receiving the decision letter was seven working days or seven days after the date of the letter (in some instances both day references were used). This is misleading and directly affects an applicant’s ability to exercise their right to merits review.

Understanding who has the right to review

5.12 Difficulties in understanding if and when to apply for review were compounded by confusing explanations as to who had the right to apply for review, or misleading suggestions that applicants ‘may’ have a review right.

5.13 A complaint investigated by this office provides an example of misleading information being given to a visa applicant about their review rights.

Case study

Mr B applied for a skilled independent regional visa which was refused by DIAC. It was a mandatory requirement of the visa application that Mr B was sponsored by a State or Territory Government agency in Australia. Under the Migration Act, a State or Territory Government agency is not a sponsor with review rights. As Mr B was an offshore applicant he did not have a right to merit review of this refusal decision.

The refusal letter sent to Mr B by DIAC indicated that Mr B may be entitled to merits review by the MRT. The letter stated 'this decision may be reviewable by the Migration Review Tribunal. The sponsor will have a period of 70 days after they are taken to have been notified of the decision to apply to the Migration Review Tribunal for a review of the decision'.

This advice was misleading, as Mr B's sponsor was not eligible to seek review. The use of the term sponsor in the letter was not explained to Mr B.

DIAC advised the Ombudsman's office that this letter is a standard proforma and that it is up to the client to determine whether they want to take further action after a refusal. DIAC claimed that it facilitated this with its provision of the MRT information to the client.

5.14 In this example, DIAC should either have advised Mr B that he did not have a right to merits review, or should have been silent on the issue. The onus should not be placed on the applicant to interpret Australia's migration legislation and merits review rights information in order to determine whether or not they can apply for review of the decision.

5.15 DIAC should not be using standard proformas which include general information about merits review when the information contained in them is not directly relevant to an applicant's individual circumstances. DIAC advised this office that it does not have a complete and consolidated list of the visa classes and the corresponding review rights for each visa. Given that there are prescriptive circumstances, as outlined in the legislation, in which an unsuccessful applicant can access review mechanisms, it should be a straightforward process to develop a resource of this type. Such a resource would both assist decision makers to be more accurate and specific in explaining whether or not a person has review rights but would also serve as a useful guide to applicants, migration agents and other DIAC officers.

5.16 Below is an extract from a notification letter in the business visa category. The letter provides generic information about review rights, but leaves it up to the applicant to determine how it applies to their individual circumstances.

REVIEWABLE DECISION — OFFSHORE APPLICANTS

This decision is a reviewable decision for the following applicant/s:

- Mr X and Ms Y

If it was a criterion for grant of the above named applicant/s that they were sponsored or nominated by a company/partnership operating in the Migration Zone (ie. in Australia); the sponsor or nominator is entitled to apply for a review of the decision.

5.17 The expectation of s 66 of the Migration Act is that a notification should make it clear to an applicant whether they have a right to review, the timeframe to seek review and where to apply. Preferably the applicant should also be informed of the implications for their immigration status if they do or do not seek review. The above examples and related discussion show that these s 66 requirements are not always met or can be confusing and misleading for applicants.

5.18 The types of errors identified highlight the need for DIAC to have improved monitoring and quality assurance over its notification letters and for DIAC decision makers to be adequately trained in the importance of relaying accurate information about a person's review rights and subsequent immigration status. The consequences that can arise when there is a failure to do so were highlighted in the Ombudsman's referred immigration cases report on notification issues.¹⁹

Enabling the applicant to respond effectively

5.19 An applicant in Australia, who is refused a visa, may be at risk of becoming an unlawful non-citizen. The investigation found that some notification letters provided excellent follow-up information for failed applicants, while others provided minimal practical guidance, as the following two examples demonstrate:

Example 1

What is your immigration status now?

When your application to remain in Australia was lodged, you were granted a bridging visa to provide lawful status during processing of the application. That bridging visa will remain in effect until 28 days after this notification is received.

After that time, you are obliged to depart Australia, unless by then you

- Have lodged a valid application for review of this decision (if you do that, your bridging visa will continue to be valid until you are notified of the outcome of that review)
- Hold another valid visa authorising your continued stay in Australia
- Have any other valid application for a visa still pending or
- Have court proceedings in progress in relation to a visa decision.

If you cannot depart Australia by the time your current visa expires (and you hold no other visa), you should contact the Department's Compliance Section (by approaching the Compliance counter directly or telephoning 03 XXXXXX – Melbourne Office; or 03 XXXXXX) to resolve your migration status.

Example 2

If you hold a bridging visa that has been granted to you in association with your application, and commence review proceedings within the time allowed, you will continue to hold that bridging visa while your application for review is under consideration.

5.20 Unlike Example 1, Example 2 does not outline the applicant's options, nor does it provide specific information that will assist the applicant to ensure they have a lawful right to remain in Australia.

¹⁹ Commonwealth Ombudsman's *Report into Referred Immigration Cases: Notification issues*, Report No. 9/2007.

PART 6—CONCLUSION AND RECOMMENDATIONS

6.1 With a few isolated exceptions, the investigation found that the basic statutory requirements to notify an applicant of the outcome of the application and the criterion failed are being met. The investigation consistently found, however, significant variation in the quality of the information presented in notification letters. Consequently, in some instances the letter did not effectively communicate the decision and the reasons, in turn limiting an applicant's ability to seek review or successfully reapply. In other instances, the information was overly complex, confusing and poorly presented.

6.2 The investigation found that DIAC's notification letters often fell short of the commitments of the Client Service Charter and government best practice on the notification of adverse decisions. Without simple, clear and well-delivered information, applicants will struggle to understand and respond to the information contained in a notification letter. For applicants in Australia, this information may be critical to a person's immigration status.

6.3 The investigation also found significant variation in the content and format of the notification letters issued for different visa classes and, more surprisingly, within specific visa subclasses and visa processing offices. Consultations with visa processing offices around Australia indicated a highly devolved approach to the development, maintenance and monitoring of the content for notification letters.

6.4 A coordinated approach to this fundamental area of DIAC business will improve DIAC's communication with its clients and also assist applicants to respond appropriately to adverse decisions. This approach should include:

- developing some standard and consistent requirements for decision letters where there is no legislative requirement to provide a statement of reasons
- reviewing the way in which statements of reasons are prepared and developing some consistent guidelines to assist decision makers to properly and comprehensively explain reasons for the decision
- a quality assurance and monitoring process, which involves regular reviews, user testing and strategic oversight.

6.5 Practices adopted in other Australian Government agencies for improving the communication of decisions made under complex legislation should be considered. These strategies commonly include a specialist team that is responsible for monitoring quality, and regularly testing and reviewing notification letters from across business areas. Another common practice is the review of written communication against plain English guidelines. DIAC is strongly encouraged to examine these strategies as a means of addressing the recommendations in this report.

6.6 At a late stage of the investigation DIAC informed the Ombudsman's office that it had established a Client Correspondence Process Section (formerly known as the Client Communication Taskforce). This may be an appropriate forum to address the recommendations of this report.

Recommendation 1: Management of notification letters

It is recommended that DIAC conduct a comprehensive review of the management of notification letters, taking account of the issues identified in this report, and to:

- review and develop appropriate governance arrangements for the management of notification letters, including guidelines about the content, the use and approval process of templates and standard paragraphs
- review notification content against plain English principles, and regularly test and review notification letters and statements of reasons with client groups
- develop resources for supervisors and team leaders to support them in undertaking checks on the quality and accuracy of all notifications.

Recommendation 2: Notification of adverse decisions

Where a statement of reasons is not required, it is recommended that DIAC note the contents of this report, and:

- where possible, include a brief statement that explains why the applicant did not meet the criteria for the visa
- develop further minimum standards that are consistently applied across DIAC.

Where DIAC is required to provide a statement of reasons, it is recommended that DIAC note the contents of this report, and:

- develop templates with consistent headings to assist decision makers to provide the required information.
- develop further minimum standards that are consistently applied across DIAC.

Recommendation 3: Notification of review rights

It is recommended that DIAC:

- develop a list of visa classes and corresponding review rights to assist decision makers to provide this type of information accurately and specifically when required
- improve the description of how and when to access merits review and for whom the right of review is available and not available, and provide a specific timeframe for review and a clear explanation of who can apply for review.

DIAC'S RESPONSE

Dear Prof. McMillan

Thank you for the opportunity to respond to your report about the outcome of your investigation into Notifications of Decisions and Review Rights for Unsuccessful Visa Applications, which you commenced in June last year.

Your report highlights the difficulties of delivering services to a large volume of clients at various locations, both onshore and offshore. I agree with all three recommendations in your report and wish to reassure you that the department has made, and will continue to make, improvements to the management of notification letters as part of its ongoing commitment to service delivery excellence. Steps being taken to address the issues raised in these recommendations include:

- In June 2007 the department released its Client Correspondence Framework and Better Practice Guide, providing for the administration and ongoing improvement of client correspondence, including key principles for drafting correspondence and quality assurance processes.
- A significant part of this framework for managing client correspondence is the creation of a Community of Practice, the forum for relevant departmental business areas to review and provide feedback on proposals for standard letters and model paragraphs. This group, which is scheduled to meet quarterly, and includes representatives from overseas posts, state and territory offices and policy areas, had its first meeting in October 2007.
- This Community of Practice is also the forum for reviewing the progress of the Letter Improvement Programme. Standard text is being developed to ensure that correspondence is consistent, friendly and effective. A suite of standard letters and paragraphs is in the process of being endorsed and usability testing is scheduled to commence in December 2008. This is the beginning of an ongoing process of review and quality assurance to ensure our letters meet clients' needs.
- The implementation of consistent letter templates will commence in early 2008, when a schedule for rolling out template letters begins. Priority will be initially given to notification letters. The proposed letter templates contain a covering letter that meets the Administrative Review Council's (ARC's) *Practical Guidelines for Preparing Statements of Reasons* and the recently published ARC/DIAC *Best Practice Guide on Decision Making: Reasons* by providing a plain English explanation of the visa decision and reasons for that decision. The department will also undertake a review of statements of reasons attached to decision notification correspondence.
- The implementation of an automated correspondence technology through *Systems for People* will assist in embedding business rules into the correspondence function and reflect the new governance and change management practices.

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- The department will revise and extend its information about review rights for visa classes into one consolidated list to provide assistance for decision makers in advising clients of review rights.

As with other reforms that have been made in the past two years, good governance is vital so that we can be assured that our goals are being met. The Departmental Performance Management Committee will provide me this reassurance by overseeing the progress of the change processes for consistent notifications, which will be driven by the Client Correspondence Process Section (formerly known as the Client Communication Taskforce).

Yours sincerely

(Andrew Metcalfe)