COMMONWEALTH OMBUDSMAN

Righting Wrongful Detention

Report on people wrongfully detained by the Department of Home Affairs

1 July 2023 – 30 June 2024

August 2025

Contents

Acknowledgement of Country

The Office of the Commonwealth Ombudsman acknowledges the Traditional Owners and Custodians of Country throughout Australia and acknowledges their continuing connection to land, waters and community. We pay our respects to the people, the cultures, and the Elders past and present.

Summary

This report is part of the Ombudsman's ongoing own motion investigation into instances where the Department of Home Affairs (the Department) has detained people it suspects to be unlawful non-citizens, but later identifies they were not unlawful and releases them from detention. It covers **11 cases of wrongful detention** the Department identified between 1 July 2023 and 30 June 2024, including the **wrongful detention of an Australian citizen.** In one case, the person was wrongfully detained for one year and six months.

Under section 189 of the *Migration Act 1958* (the Act) an officer must detain a person they 'know or reasonably suspect' to be an unlawful non-citizen. While a decision to detain a person may have been lawful because an officer held the required reasonable suspicion at the time, in each of the cases considered in this report, their detention was **wrong** because that suspicion was later found to be incorrect.

Wrongfully depriving a person of their liberty is serious

We commend the Department's commitment to continually improving its policies and procedures to mitigate the risk of wrongful detention. However, since we began monitoring the issue in 2005, we have observed the **same types of errors** are causing people to be wrongfully detained.

In addition, the Department has not improved the way it **addresses its mistakes** with the individuals it has wrongfully detained. The Department does not offer people it has wrongfully detained any form of redress, formal apology, or financial compensation. Although the Department may identify and acknowledge the mistake to the individual, the onus is on the individual to navigate the complex and often costly process of lodging a civil claim to seek damages for unlawful detention through the judicial system. Furthermore, because affected individuals are only informed verbally (rather than in writing) that an error has occurred on their release, they may not be aware of their ability to make such a claim or have access to the information required to support it.

Of the 11 individuals who were wrongfully detained in this reporting period, only one has made a civil claim for unlawful detention.

Recommendations

Recommendation 1:

The Department require initial detaining officers complete the 'Mandatory Control Point 7 - Establishing and Maintaining Reasonable Suspicion' form with supervisor sign off, for all planned detention operations.

Recommendation 2:

The Department provide each affected individual (whether from previous or future reporting periods) with:

1. A personal apology, including an acknowledgement of wrongdoing and assurance as to remedial actions the Department has taken/intends to take to ensure these errors do not occur in future, and

2. Information about the Compensation for Detriment due to Defective Administration Scheme, including how to make an application.

This process should be formally embedded in the Department's policies and procedures.

Recommendation 3:

The Department draft a formal written factsheet, which it should provide to people it has wrongfully detained immediately upon release, which includes information in a language they understand about their rights to seek compensation through the Compensation for Detriment due to Defective Administration Scheme.

A note on language: the phrase 'wrongful detention'

In 2005, the High Court held in *Ruddock*[1] that *"what constitutes reasonable grounds for suspecting a person to be an unlawful non-citizen must be judged against what was known or* ***reasonably capable of being known at the relevant time****"*. This was later affirmed in *Thoms*[2] and *Pearson*[3]. The Department does not consider the cases in this report to be those of unlawful detention on the basis that they were detained *"in accordance with the obligation to do so under section 189 [of the Migration Act]"* and that any reasonable suspicion only ceased once errors were identified and confirmed.

This is why it uses the descriptor of 'detained and later released as not unlawful' to record when a person is found not to be an unlawful non-citizen or is later recognised as lawful and no longer detainable. We adopted this terminology in previous reports for consistency. We do not express a view in this report on whether the threshold of 'reasonable suspicion' was reached in accordance with the law in each case in this reporting period. This would require a much more extensive legal analysis of the facts in each case. We therefore agree it would be inappropriate to categorise these as cases of unlawful detention. In the cases identified in this reporting period, their detention may initially have been lawful because a detaining officer held a 'reasonable suspicion' as required by section 189 of the Act at the time.

However, **in every case the detention was wrong** because the Department later found that this suspicion was incorrect. Accordingly, we have chosen to depart from the language used by the Department and instead use the phrase 'wrongful detention' to better reflect the impact on the detained individuals. Australia does not have a formal definition of 'wrongful detention', [4] but in this report it has been used as an umbrella term to capture situations where detention may (or may not) be justified under law but we still consider was wrong or unjust.

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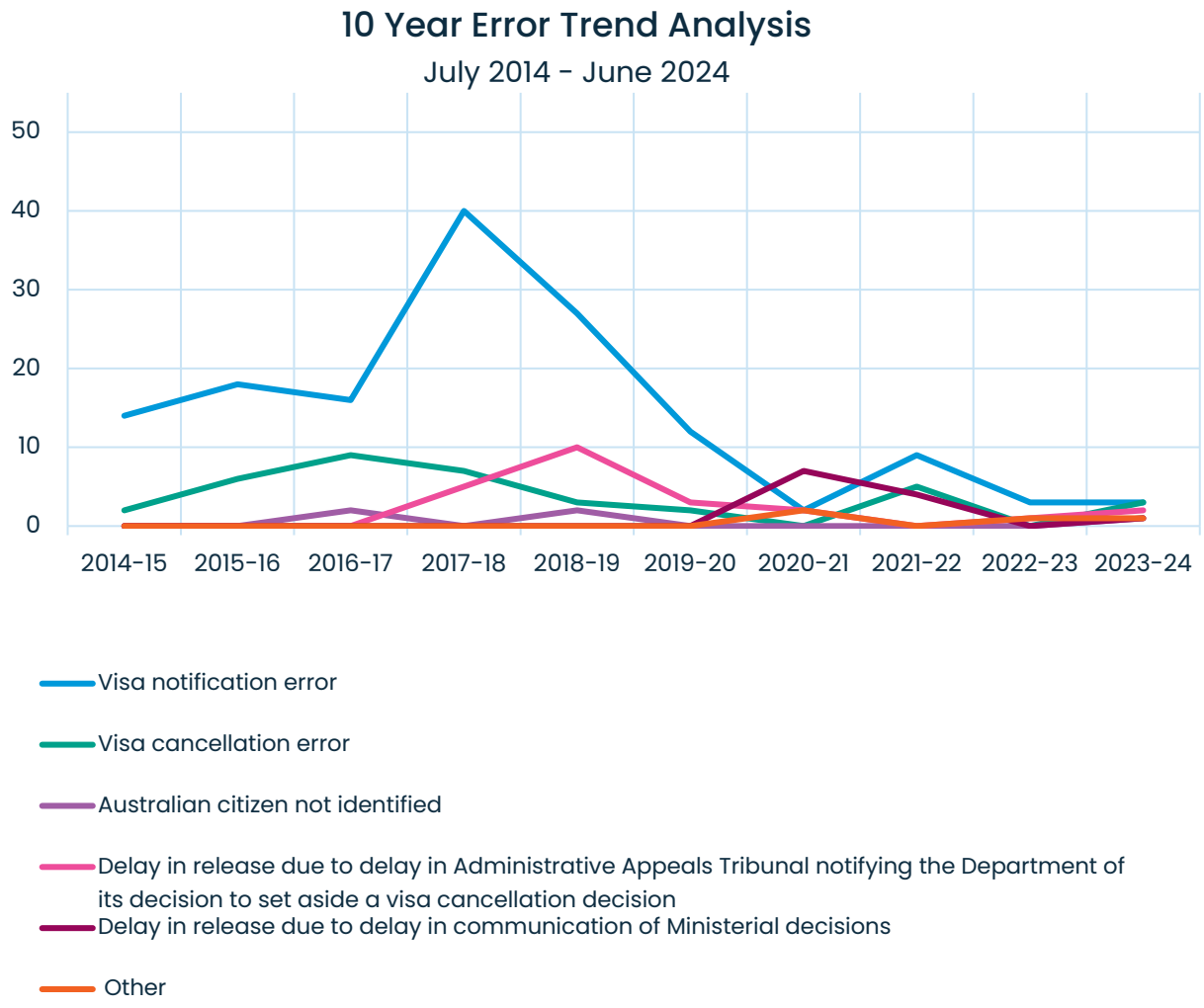
[1] *Ruddock v Taylor* [2005] HCA 48 (8 September 2005) [40]-[41]
[2] *Thoms v Commonwealth of Australia* [2022] HCA 20 (8 June 2022) [21]
3 Pearson v Commonwealth of Australia & Ors; JZQQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor; Tapiki v Micma; MHA & Anor v Pearson & Anor; Micma v Tapiki & Anor [2024] HCATrans 68 (10 October 2024)
[4] Senate Foreign Affairs, Defence and Trade References Committee, *'Wrongful detention of Australian citizens overseas'*, (2024), Parliament of Australia: 4-5

How does wrongful detention happen?

While there has been an overall decrease in cases of wrongful detention over the last 10 years, and general improvement by the Department since a spike in cases in 2017-18, there was a 82% increase in the rate of cases this reporting period compared to last. This highlights the need for the Department to further consider the underlying causes of errors[5] causing people to be unlawfully detained.



[5] Since July 2018, the Department has categorised errors that resulted in people being wrongfully detained as follows: errors associated with visa cancellation and refusal decisions, delay in communication of Administrative Appeals Tribunal (AAT) decisions, delay in communication of Ministerial decisions and the detention of Australian citizens. While earlier reports grouped cases under broader headings such as defective notifications and administrative deficiencies, for comparison purposes, we have reclassified older cases according to the Department's current data groupings.

Since 2005, our Office has conducted multiple reviews and identified several common themes as to why wrongful detention can occur.[6] Our work in this area came about as a result of the 2005 reports into the circumstances of the unlawful detention of Australian permanent resident, Cornelia Rau, and the removal of Vivian Alvarez Solon, an Australian citizen.[7]

Some of the themes we have identified in our reviews have been:

- **Communication breakdowns:** Delays in sharing important information, such as the timely communication and receipt of tribunal decisions or ministerial intervention decisions to the Department, can result in someone remaining in detention wrongfully, despite having been granted a visa or had their visa cancellation/refusal overturned.[8]

- **Data integrity and administrative errors:** Any outdated information or data entry errors in systems can undermine the accuracy and reliability of the data used to assess individuals' immigration status. Poor record keeping practices, the failure to reconcile inconsistent information and small administrative errors can have a significant detrimental impact on individuals.[9]

- **Failure to take personal responsibility for decision making and erroneous assumptions:** Assumptions can cause decision makers to discount relevant information or lines of enquiry or give disproportionate weight to unconvincing items of information.[10] A reasonable suspicion to detain a person, whilst subjective to a detaining officer, must be based on all relevant material, including material that could be reasonably discovered in the circumstances. Lawful detention requires that Departmental officers continue to hold a

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[6] The most substantive reports from these reviews are listed in the *Appendix*.

[7] Commonwealth Ombudsman, *Inquiry into the Circumstances of the Vivian Alvarez Matter*, Report of an inquiry undertaken by Mr Neil Comrie AO APM, (2005), Report 03/2005. Commonwealth Ombudsman, Canberra.
M J Palmer, *Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau* (2005), Commonwealth of Australia, Canberra.

[8] Commonwealth Ombudsman, *Report on People Detained and later Released as Not Unlawful 1 July 2021 to 30 June 2022*. (2023), Report 05/2023. Commonwealth Ombudsman, Canberra;
Commonwealth Ombudsman, *Report on people Detained and Later Released as Not Unlawful 1 July 2022 to 30 June 2023* (2024), Report 05/2024. Commonwealth Ombudsman, Canberra.

[9] Commonwealth Ombudsman, *Lessons for public administration: Ombudsman investigation of referred immigration cases* (2007), Report 08/2007. Commonwealth Ombudsman, Canberra;
Commonwealth Ombudsman, *Preventing the immigration detention of Australian citizens*. Investigation into the Department of Home Affairs' Implementation of the Recommendations of the Thom Review (2018), Report 07/2018. Commonwealth Ombudsman, Canberra.

[10] Ibid. Commonwealth Ombudsman, *Lessons for public administration: Ombudsman investigation of referred immigration cases* (2007)

reasonable suspicion that a person being detained is an unlawful non-citizen. If detaining officers do not exercise personal responsibility and judgement, and instead make assumptions based on previous decisions that have been made, then there is a risk a person will be wrongfully detained.[11]

- **Deficient notification of visa decisions:** When the Department makes a negative visa decision, it has a legal obligation to ensure that the affected individual is informed of the decision and given the opportunity to respond if they wish to do so. If a person is subsequently detained without being properly notified of their visa cancellation/refusal decision, this constitutes wrongful detention.[9]

- **Legal complexities:** The nature of Australia's migration regime poses significant challenges for decision makers, who must navigate complex policies, instructions and legislative provisions to make decisions that often require a level of subjective assessment. The regime is also subject to frequent litigation, legislation and policy amendments. This creates significant risk of erroneous decisions arising from misinterpretation or misapplication of the law.[12]

[11] Commonwealth Ombudsman, *Report into referred immigration cases: Detention Process Issues.* (2007), Report 07/2007. Commonwealth Ombudsman, Canberra.
[12] Ibid, Commonwealth Ombudsman (2007)

Most cases of **wrongful detention** in this reporting period:

10 cases (90%)

Were a result of errors previously known to the Department

7 cases (63%)

Were a result of planned detention operations

6 cases (54%)

Were identified through an initial post-detention review process, within 3 business days

10 cases (90%)

Could have been avoided if existing policies and procedures were properly followed

9 cases (81%)

Arose because officers did not take personal responsibility for forming reasonable suspicion in their own minds

Repetition of known errors

We found the issues which led to the people being wrongfully detained during this reporting period were, in almost all cases, not new. Mistakes occurred at key decision-making stages. Whether through administrative oversight during data entry or the failure to adhere to established procedures and communication protocols, these errors point to a more critical issue. They reflect an institutionalised mindset that places undue trust in historical decisions and prioritises swift action over careful deliberation.

The median duration of time that a person was wrongfully detained during this reporting period was 4 days. This was double the median duration of time from the 2022-23 report. The shortest amount of time a person was wrongfully detained for in this period was less than a day. The longest period of time involved an individual, Mx A, who was **detained for one year and 6 months** because of an **administrative error**.

Following Mx A's case (see timeline **on next page**), the Department uncovered an additional 24 instances in which visa validity dates had not been specified. We commend the Department for checking whether the error in this case pointed to a broader problem, and the Department identified that the error resulted in only Mx A being wrongfully detained.

However, it does raise broader concerns about whether procedural safeguards are sufficient. Although strictly the error in Mx A's case was in the Minister's decision not to set a visa validity length, it was the Department which mistakenly removed the visa validity length from the Ministerial submission.

The Department also bears responsibility for scrutinising the accuracy and completeness of the information it relies upon, particularly when such information directly informs decisions that can lead to detention or affect an individual's immigration status.

Case study of Mx A

Mx A **arrived in Australia** in April 1987 on a Visitor visa. In October 1987 the **visa expired** and Mx A began living in the community unlawfully.

In February 2012 police located Mx A and the Department **detained** them. In August 2012 Mx A was **granted a bridging visa** and **released** from detention.

In September 2012 Mx A was **granted a Tourist visa through ministerial intervention** (MI) under s 351 of the Act.

It is standard practice to include a visa validity length of 6 months for all Tourist visas. However, the individual's visa remained open ended after a case officer mistakenly removed the validity length on the MI submission. Due to the absence of an expiration date, there was **no legislative provision for the visa to have ceased** despite appearing expired in departmental systems.

In December 2017 the Department **cancelled** Mx A's bridging **visa** beacause they were serving a term of imprisonment.

In February 2022 Mx A was **re-detained** on their release from custody.

In August 2023 **the Department became aware that the Tourist visa** granted to Mx A in 2012 **remained in effect** and **released** them from immigration detention.

There appears to be a culture of 'act first, check later'

While the Department continually revises its policies and procedures in response to these reports – whether by updating training programs and quality assurance processes, revising standard operating procedures and instructions, or conducting case-by-case reviews – the issue seemingly lies not in what tools or frameworks exist, but in how they are applied.

We previously concluded in a 2007 report that the errors we had observed in cases of wrongful detention pointed to:

> **"a culture amongst compliance officers at the time of exercising the detention power either carelessly or prematurely"[13]**

The continued prevalence of errors arising from a lack of personal responsibility for decision making and a failure to follow policies and procedures (particularly in planned detention operations) indicate that this culture may still be present.

Policies and procedures are not being followed

In 10 of the 11 cases (90%), errors were caused by officers who failed to follow relevant policies and procedures. Many of these cases replicated previous errors the Department had attempted to address through changes to policies, procedures, and training.

For example, one case in this reporting period involved an individual who was wrongfully detained for a week because of an error with deficient notification of Partner visa refusal decisions that the Department had been aware of since March 2014. The issue was first identified when the Department discovered a suite of errors in the template used to draft letters notifying people their combined Partner visa application had been refused. The errors in the template meant that a number of notification letters did not correctly disclose the relevant legislative provisions under which the

[13] Ibid., Commonwealth Ombudsman (2007)

decision was being made. This rendered the notifications invalid, making any subsequent decisions to detain wrongful unless individuals were properly re-notified.

The issue was revisited in 2018 following the wrongful detention of 'Mr G', who was wrongfully detained for 4 years due to this same error. Mr G was the subject of a separate investigation report by our Office, which found that the Department's efforts to correct this error years prior were not sufficient.[14] Despite the recommendations made by our Office and the Department's efforts to implement them in practice, we saw this same error again during this reporting period.

[14] Commonwealth Ombudsman, *'Investigation into the circumstances of the detention of Mr G'*, (2018b), Report 02/2018

Officers are not exercising responsibilities with caution

In certain situations, the opportunity to conduct a thorough enquiry before deciding to detain an individual may be limited. For example, this is often the case in unplanned detention operations, such as those involving state or territory law enforcement, airport operations, or untargeted field operations. In these circumstances, the time available to question an individual before detaining them may be constrained, and officers may not have immediate access to records that are not digitally stored within Departmental systems.[15]

However, we observed that in this reporting period, **the majority of wrongful detention cases arose from planned detention operations**. A planned detention operation refers to a coordinated activity conducted by the Department – including the Australian Border Force (ABF) – to locate and detain individuals it identifies to be unlawful non-citizens. In doing so, detaining officers are responsible for assessing the person's circumstances and resolving the issues regarding their identity and immigration status as soon as possible.

The Department explains that during planned operations, "officers would generally have time to consider a range of information to form the suspicion that a person is an unlawful non-citizen prior to conducting a field operation [to detain them]". In some cases, these individuals appeared to have been living unlawfully in the community for many years or were known to the Department as unlawful non-citizens in criminal custody. This infers that the Department had sufficient time with planned operations to verify the individual's immigration status and, therefore should have been able to avoid wrongful detention in these cases.

After a person is detained, a 'Detention Review Manager' (DRM) conducts an initial post-detention review to check the decision is compliant with legislation and

[15] A 2018 review found many documents were not readily accessible through Departmental systems. In fact, the Department had 200 million documents stored in local network drives, 553,000 cartons (241 'shelf kilometres') of paper files and an 'unknown quantity' of records stored in emails.
Australian National Audit Office, '*The Integration of the Department of Immigration and Border Protection and the Australian Customs and Border Protection Service*', 2018, Report No. 45.

regulations. We observed in this reporting period that in 6 of the 11 cases (54.5%), the errors were identified by the DRM within 3 business days of initiating a review.

When we asked why the DRM was able to identify the errors so quickly after field officers had missed them, the Department told us that **"ABF Officers work within a high-tempo, reactive environment, of which immigration assessments are one of many elements"**. While this may be true, we do not believe this is an acceptable justification for wrongfully detaining someone, particularly when basic errors were made in planned detention operations.

One of our early reports on wrongful detention found that a key error in most cases was the Department's "failure to consider available information and take adequate steps to resolve a person's identity and/or immigration status" prior to forming a suspicion that a person is an unlawful non-citizen under s 198 of the Act.[16] This failure included not making attempts to resolve conflicting information, not conducting appropriate checks of Departmental systems, and not following legislative or policy requirements. It also highlighted a tendency to rely on a small piece of information suggesting a person was unlawful, even when there was significant evidence to the contrary.

As part of this report, we observed that the Department tended to focus on the words in section 189 that they "must detain" a person, without paying enough attention to the fact that the provision only operates if the officer has a "reasonable suspicion" that a person is an unlawful non-citizen. This threshold reflects the fact that depriving someone of their liberty is very serious and so it is appropriate that officers think carefully about their decision to detain a person. Detaining officers should take all reasonable steps to establish the required suspicion **before** exercising the power to detain, rather than the other way around.

In explaining its position, the Department cited the case of Mx B, a New Zealand citizen who was detained by an ABF officer in January 2024 without first conducting a basic systems check, which would have shown that Mx B held a valid visa at the time. Later that day, the initial detaining officer identified the issue through a systems check and escalated the matter. The next day, the DRM reviewed the case and found additional notification errors, confirming Mx B was not in the country unlawfully. The Department released them from detention the same day.

[16] Commonwealth Ombudsman, *Report into Referred Immigration Cases: Detention Process Issues* (2007), Report 7/2007. Commonwealth Ombudsman, Canberra.

In response to Mx B's case, the Department advised ABF's Western Australia Field Operations unit had implemented changes including a requirement for "supervisor sign off, followed by a systems check immediately prior to commencing operational activity to detain". Whilst we welcome this change, we are concerned that before this error was identified, officers were seemingly permitted to exercise the power to deprive persons of their liberty without making these basic checks.

While in some cases this may be more difficult to determine, by failing to conduct a basic systems check before commencing a planned operation to detain Mx B it is questionable as to whether the threshold for holding 'reasonable suspicion' was met.

> **"Given that deprivation of liberty is at stake [examination of relevant material] will include that which is discoverable by efforts of search and inquiry that are reasonable in the circumstances"[17]**

The Department advised that, unlike field officers, DRMs are required to complete the 'Mandatory Control Point 7 – Establishing and Maintaining Reasonable Suspicion' form. The aim of MCP 7 is to "provide an additional layer of assurance that a detention decision is lawful and appropriate (and to detect errors which may have led to the detention of persons who are Australian citizens [OR] lawful non-citizens)." Preventing unlawful detention in the first place is preferable to remedial actions after the fact.

This additional layer of assurance should be undertaken by field officers before exercising detention powers to ensure the threshold of reasonable suspicion needed to detain has been met.

Recommendation 1:

The Department require initial detaining officers complete the 'Mandatory Control Point 7 - Establishing and Maintaining Reasonable Suspicion' form with supervisor sign off, for all planned detention operations.

[17] Goldie v Commonwealth of Australia [2002] FCAFC 100

Continued detention of Australian citizens: Case study of Mx C

1989 Mx C was born in Australia in 1989 to New Zealand citizen parents.

1991 Under Australian citizenship law, children born in Australia automatically acquire citizenship on their 10th birthday if they have been residing in Australia since their birth. In accordance with this, Mx C was meant to have become an Australian citizen in 1999. However, this was **not reflected on Departmental records despite Mx C's movement records indicating they had spent the majority of their first 10 years in Australia.**

Poor record keeping

2010 On Mx C's most recent return to Australia, they were granted a Special Category visa (SCV) on arrival.

Feb 2023 Mx C was sentenced to a term of imprisonment and the Department began considering their SCV for mandatory visa cancellation under s 501(3A) of the Act.

Mx C was in criminal custody at the time and promptly emailed the Department a copy of their birth certificate, advising they were born in Australia and were a citizen.

Apr 2023 The Department sent Mx C a citizenship questionnaire, noting **there was an alert on their record stating they were born in Australia and spent the majority of their first 10 years in Australia.**

The Department then escalated the matter internally to its Citizenship Helpdesk, which considered 2 substantial periods of absence from Australia in Mx C's first 10 years, finding they were not ordinarily resident in Australia for their first 10 years and therefore not an Australian citizen. **At no point did the Department ask about the reasons behind Mx C's periods of absence from Australia in their first 10 years**.

Failure to consider all available information / take reasonable steps to resolve conflicting information

May 2023 The Department proceeded to cancel Mx C's SCV and they received the notification while in custody. The correctional facility replied to the cancellation notice, advising the Department:

> ***"when [Mx C] was served with [their] paperwork, [they were] very surprised … [Mx C] has always believed [they are] an Australian citizen".***

Instead of escalating the matter in line with its standard protocol for visa decisions in cases of claimed citizenship, the Department responded by reiterating the negative citizenship assessment outcome rather than reconsidering the circumstances of the case or turning their minds to whether reasonable suspicion still existed.

Reliance on previous decision without taking steps to verify, even when presented with conflicting information

Aug 2023

Mx C applied to have the cancellation revoked and in August 2023, their legal representative sent the Department an email explaining that Mx C was 'ordinarily resident' in Australia for their first 10 years, and therefore acquired citizenship in 1999. The email cited a legal precedent and included evidence that the substantial periods of absence were due to mitigating circumstances including the death of a family member and arranging for care of a family member with a disability. The departmental officer that read the email escalated it to their supervisor, who then escalated it to an Assistant Manager. The Assistant Manager conducted a systems check and noted the previous assessment by the Citizenship Helpdesk. **They mistakenly considered this was sufficient evidence to conclude Mx C was not a citizen, and the new information provided in the email had no bearing on the previous assessment.**

They also failed to note that Mx C was due to be imminently released from custody and to escalate the matter to the Citizenship Helpdesk in line with standard protocols.

Failure to conduct system checks and consider all available information

Sep 2023

Mx C was released from custody and detained under s 189 of the Act. That day, the Assistant Manager asked the Citizenship Helpdesk for assistance responding to the legal representative, **but did not seek a further determination on Mx C's citizenship status in light of the new information so the matter was not raised as urgent.**

The Department also claimed **relevant officers were not aware Mx C had been taken into immigration detention.**

Four days later, a DRM commenced a review of Mx C's case and requested urgent advice from the Citizenship Helpdesk to determine whether Mx C was an Australian citizen noting the new information provided by the legal representative, and that Mx C was currently in immigration detention. Within 9 hours, the Citizenship Helpdesk conducted an updated assessment confirming Mx C was in fact an Australian citizen and the Department released them from detention.

Mx C's case is almost identical to one of the two wrongfully detained Australian citizens identified in 2017, which were the subject of an independent review by Dr Vivienne Thom AM (the Thom Review).[18] Some key findings of the Thom Review included that officers consistently did not demonstrate the requisite knowledge, understanding and skills to fairly and lawfully exercise the power to detain and did not consider all relevant information or seek to resolve complexities.

In both cases, the Australian citizens provided critical information in the context of visa cancellation revocation requests which was not considered by any departmental officer, including those making detention decisions.[19]

The Thom Review also found that departmental **staff did not take personal responsibility for forming reasonable suspicion in their own mind**: officers "saw their job as implementing a decision to detain that had already been made by someone else" and assessed that there was "no expectation that officers would exercise personal responsibility and judgement".[20] This wasdemonstrated in the case of Mx C, where multiple officers, at multiple decision points, failed to critically engage with information contesting Mx C's status as an unlawful non-citizen. Instead of treating the formation of reasonable suspicion as a dynamic and individual responsibility, they uncritically accepted prior decisions as infallible.

In 2018, the Department identified it had wrongfully detained a further two Australian citizens, and our Office published a separate report into the implementation of the Thom Review's recommendations. The report highlighted several gaps where, in practice, the Department's remedial actions had not entirely met the intent of the relevant recommendation it was designed to address.[21]

During this reporting period, the Department implemented a range of measures to mitigate the risk of detaining further Australian citizens. These included comprehensive reviews of its escalation protocols and Citizenship Helpdesk procedures, the delivery of refresher training to staff, and amendments to eLearning modules and the citizenship questionnaire.

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18 V Thom (AM), '*Independent review for the Department of Immigration and Border Protection into the unlawful detention of two Australian citizens*', report to the Australian Government Department of Immigration and Border Protection, (2017).
19 Ibid. Thom (2017)
20 Ibid. Thom (2017)
21 Ibid. Commonwealth Ombudsman. *Preventing the immigration detention of Australian citizens*. Report 07/2018.

The revised questionnaire now directs officers to gather further information regarding whether an individual ordinarily resided in Australia during the first 10 years of their life, as well as the reasons for any offshore travel during that period

Additionally, the Department updated the DRM procedural instructions to prioritise reviewing cases involving individuals born onshore.

While our Office acknowledges that the Department has taken steps to improve officers' knowledge about fundamental citizenship issues this reporting period, it is concerning that almost two decades after the first occurrence, we are seeing the same errors that were identified in previous reports.

Redress pathways should be clear and accessible

When government agencies make mistakes that impact people, they owe it to the public to develop and implement remedies that are fair, proportionate, and timely. Exercising the power to deprive someone of their liberty brings with it significant responsibilities, and it is imperative that the Department acknowledges and takes accountability when it makes mistakes.

While we acknowledge the Department's commitment to implementing systemic remedial actions to correct and prevent recurrent errors, it is equally important to acknowledge and address the human impacts of these errors. When we asked a series of questions about what redress is offered/available to people who have been unlawfully detained by the Department, it advised: "*civil remedies for compensation require a claim to be filed and assessed*".

It is not fair to place the onus on individuals who have been wrongfully detained to seek justice through civil litigation when the Department is already aware of the errors it has made and its assurance activities have failed.

Being wrongfully detained can be an isolating and dehumanising experience, and cause significant emotional distress and psychological trauma.[22] There is also evidence regarding the severe harms caused by immigration detention more broadly, including the re-traumatisation of torture victims and exacerbation of existing physical and mental health issues.[23]

Australia is party to the International Covenant on Civil and Political Rights (ICCPR), which requires State Parties to make reparation to individuals whose rights have been violated.[24] The ICCPR obliges State Parties to "*establish the legal framework within*

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[22] Ibid. Senate Foreign Affairs, Defence and Trade References Committee (2024): 2-3; AT Grounds, *'Understanding the Effects of Wrongful Imprisonment'*, Crime and Justice, 32 (2005): 1-58

[23] M Bosworth, *'The Impact of Immigration Detention on Mental Health: Literature Review'*, *Review into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office by Stephen Shaw*, 2016, CM 9186, HMSO, London
M Peterie, *'Deprivation, Frustration, and Trauma: Immigration Detention Centres as Prisons'*, *Refugee Survey Quarterly*, 2018, 37(3): 279–306

[24] UN Human Rights Committee, *'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant'*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add. 13 (2004) [16]

which compensation can be afforded to victims [of unlawful or arbitrary arrest or detention], as a matter of enforceable right and not as a matter of grace or discretion. The remedy must not exist merely in theory, but must operate effectively and payment must be made within a reasonable period of time".[25]

The Compensation for Detriment due to Defective Administration Scheme (CCDA Scheme) has existed since 1995. It is a practical mechanism for compensating people who have suffered a detriment for which they may have no legal remedy. It is not clear why the Department does not provide people who have been wrongly detained with information about the Scheme, including how to make an application.

If however it is the Department's view that the CDDA Scheme does not apply to people who have been wrongly detained because the Department has a legal liability to those people, the Department should advise people wrongly detained of the process for making a legal claim and act promptly to seek to settle all of those claims in accordance with the Legal Services Directions, without requiring the claims to be litigated.

We consider it important that the Department promptly take the necessary steps to inform people wrongly detained of the procedure for seeking compensation and promptly consider all such claims, whether under CDDA Scheme or by settling legal claims.

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25 International Covenant on Civil and Political Rights (New York, 16 December 1996) [1980] ATS 23 (Articles 2(3); 9(4) and 9(5)); UN Human Rights Committee, *General Comment No 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (2014)[50]; UN WGAD, 'Deliberation No 10 on reparations for arbitrary deprivation of liberty', *Report of the Working Group on Arbitrary Detention*, UN Human Rights Council, 45th sess, UN Doc A/HRC/45/16 (24 July 2020), 29 [Annex I]

Accountability through apology

Following the reports into the circumstances of the detention of Cornelia Rau and Vivian Alvarez Solon, in July 2005, then Prime Minister John Howard and Minister for Immigration, Senator Amanda Vanstone, issued a formal apology:

> **"Both Cornelia Rau and Mrs Alvarez are owed apologies for their treatment and on behalf of the Government I give those apologies to both of those women, who were the victims of mistakes by the Department"**[26]

This apology was not hinged on an assessment of the lawfulness of their detention, but an acknowledgement of wrongdoing by the Department.

In the case of 'Mr G', who was unlawfully detained for 4 years before being involuntarily removed, even after completing a formal legal review the Department still chose not to write to 'Mr G' with an apology and the outcome of the review.[27]

It is disappointing that, in its reporting to the Ombudsman, the Department continues to acknowledge mistakes it has made but does not offer an apology to the people affected by them. An apology from an agency can send a powerful message about the agency's commitment to improving and making things right. Apologising demonstrates an acceptance of accountability.

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[26] JW Howard, *'Joint Press Conference with Senator the Hon Amanda Vanstone Minister for Immigration Parliament House, Canberra'*, [interview transcript], 14 June 2005, Department of the Prime Minister and Cabinet, Australian Government

[27] Commonwealth Ombudsman, *'Investigation into the circumstances of the detention of Mr G'*, Report 02/2018

People wrongfully detained are likely unaware of their rights and face additional barriers to accessing justice

The right to an effective remedy for individuals who have been wrongfully detained is fundamental to protecting human dignity, personal freedom, and the rule of law.[28]

Despite currently being the only form of individual remedy identified by the Department as available to people who have been wrongfully detained, the Department does not take any steps to address widely acknowledged barriers to accessing justice through civil litigation (e.g. high personal cost, lack of availability of legal aid).[29]

These barriers are compounded in the context of asylum seekers and recent arrivals to Australia, who often have experiences of torture and trauma, lack resources or understanding of Australian legal systems, poor health, and lack of English literacy.[30]

> **Only one of the individuals identified in this reporting period has sought a civil claim for unlawful detention.**

It is likely that many people who were wrongfully detained will not even contemplate seeking litigation, either because they are unaware of their rights or because they are just grateful to be released and want to get on with their lives.

This should not prevent the Department from proactively offering redress to victims who have suffered because of its wrongdoing.

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[28] United Nations General Assembly, *Universal Declaration of Human Rights*, 3rd sess, UN doc A/RES/217(III) (10 December 1948): (Article 8)
[29] Royal Commission into Institutional Responses to Child Sexual Abuse, *'Redress and Civil Litigation Report'*, Australian Government (2015)
[30] Law Council of Australia, *'The Justice Project: Final Report'* (August 2018)

Recommendation 2:

The Department provide each affected individual (whether from previous or future reporting periods) with:

1. A personal apology, including an acknowledgement of wrongdoing and assurance as to remedial actions the Department has taken/intends to take to ensure these errors do not occur in future, and

2. Information about the Compensation for Detriment due to Defective Administration Scheme, including how to make an application.

This process should be formally embedded in the Department's policies and procedures.

Written information must be provided on release

The Department has formalised procedures governing the process of releasing someone from detention, however we believe these could be strengthened with further requirements when a person is released when an error is identified.

The Department's current release process involves an officer *verbally* advising the individual that an error was identified, that they continue to hold a visa/citizenship, and that they are being released from immigration detention.

According to the UN Human Rights Committee, to facilitate effective review, people deprived of their liberty "should be afforded prompt and regular access to counsel and be informed, in a language they understand, of their right to take proceedings for a decision on the lawfulness of their detention".[31]

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[31] Ibid. UN Human Rights Committee, '*General Comment No 35*' (2014) [46]; UN WGAD, 'Report of the Working Group on Arbitrary Detention: UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court', UN General Assembly, 13th sess, UN Doc A/HRC/30/37 (6 July 2015) United Nations General Assembly, 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment', 43rd sess, UN Doc A/RES/43/173 (8 December 1988) (Principles 13-14)

We acknowledge that impacted individuals are at risk of not understanding crucial information about their legal rights, the detention process, or the procedures for challenging their detention.

These barriers can prevent individuals from effectively communicating with legal counsel or seeking justice for the wrongdoing they have suffered at the hands of the Department. As a result, impacted individuals may effectively be denied the opportunity to assert their rights.

We are of the view that verbal notifications alone are a deficient and inappropriate method of communicating details to people regarding their detention arrangements, acting as a barrier to individuals understanding or seeking civil remedy through litigation. Consistently, we recommend that:

Recommendation 3:

The Department draft a formal written factsheet, which it should provide to people it has wrongfully detained immediately upon release, which includes information in a language they understand about their rights to seek compensation through the Compensation for Detriment due to Defective Administration Scheme.

Appendix: Other relevant reports by the Commonwealth Ombudsman

Following the Palmer and Comrie reviews, the Australian Government referred 247 immigration detention cases covering 1993 to 2007 to the Commonwealth Ombudsman for review. The issues arising from these investigations formed the basis of 6 issues reports and 2 reports on individual cases. The reports highlighted errors made in many of the cases and pointed to systemic failures in immigration administration. These reports also formed the basis of a separate report drawing together 10 lessons for public administration.

- **Report on Referred Immigration Cases:** Mr T (Report No 04/2006)
- **Report into Referred Immigration Cases:** Mr G (Report No 06/2006)
- **Report into Referred Immigration Cases:** Mental health and Incapacity (Report No 07/2006)
- **Report into Referred Immigration Cases:** Children in Detention (Report No 08/2006)
- **Report into Referred Immigration Cases:** Detention process issues (Report No 07/2007)
- **Report into Referred Immigration Cases:** Data problems (Report No 08/2007)
- **Report into Referred Immigration Cases:** Notification issues (including cases affected by the Federal Court Decision in Srey (Report No 09/2007)
- **Report into Referred Immigration Cases:** Other legal issues (Report No 10/2007)
- **Lessons for Public Administration:** Ombudsman Investigation of Referred Immigration Cases (Report No 11/2007)

In 2007, after publishing the reports into the referred cases the Commonwealth Ombudsman commenced an own motion investigation to continue monitoring the issue. Under the investigation, the Department provides six-monthly reports detailing all instances where a person has been released from immigration detention as 'not

unlawful' during the period. Analyses of these cases has informed several reports as part of the Commonwealth Ombudsman's immigration and detention oversight activities, some of which have been made public.

- **The Department of Immigration and Border Protection:** The Administration of Section 501 of the Migration Act 1958 (Report No 12/2016)
- **Preventing the immigration detention of Australian citizens:** Investigation into the Department of Home Affairs' implementation of the recommendations of the Thom review (Report No 07/2018)
- **Investigation into the circumstances of the detention of Mr G:** Maintaining reasonable suspicion that a person is an unlawful non-citizen (Report No 02/2018)
    - **Did They Do What They Said They Would:** Reviewing our recommendations (Report 07/2020) - *Includes review of recommendations from the 'Investigation into the circumstances of Mr G' and 'Preventing the immigration detention of Australian citizens' reports.*
    - **Actions Speak**: Department of Home Affairs implementation of recommendations from our investigation into the circumstances of the detention of Mr G (Report No 10/2024)
- **Immigration Detention Oversight**: Review of the Ombudsman's Activities in Overseeing Immigration Detention - January to June 2019 (Report No 01/2020)
- **Monitoring Immigration Detention:** Review of the Ombudsman's Activities in Overseeing Immigration Detention - July to December 2019 (Report No 06/2020)
- **Monitoring Immigration Detention:** The Ombudsman's Activities in Overseeing Immigration Detention - January to June 2020 (Report No 04/2021)
- **Monitoring Immigration Detention:** The Ombudsman's Oversight of Immigration Detention - 1 July 2020 to 30 June 2021 (Report No 01/2022)

In 2023, the Office commenced a series of standalone reports on persons detained and later released as not unlawful. This report is the most recent in the series.

- **Report on People Detained and Later Released as Not Unlawful**: 1 July 2021 to 30 June 2022 (Report No 05/2023)
- **Report on people Detained and Later Released as Not Unlawful:** 1 July 2022 to 30 June 2023 (Report No 05/2024)

Australian Government
Department of Home Affairs

SECRETARY

EC25-003610

Mr Iain Anderson
Commonwealth Ombudsman
GPO Box 442
CANBERRA ACT 2601

Dear Mr Anderson Iain

Thank you for your correspondence of 27 June 2025, providing your draft report '*Righting Wrongful Detention: Report on people wrongfully detained by the Department of Home Affairs – July 2023 to June 2024*' (the Report).

The Department values your role, and that of your office, in influencing systemic improvement in government administration. Each of the Report's recommendations have been afforded careful consideration, and the Department has accepted each of the three recommendations. A full response, using the requested template, is attached to this letter. Additional information and clarification on a number of matters has also been included.

Should you or your staff wish to discuss any aspect of the response, please contact [redacted]. Alternatively, you are welcome to contact me directly if that is helpful.

Thanks for the additional time to allow us to get this right

Yours sincerely

[redacted]

Stephanie Foster PSM

31 July 2025

COMMONWEALTH OMBUDSMAN

Attachment A

Department of Home Affairs - Recommendation response

Recommendation	Entity response to recommendations	Action Home Affairs proposes to take and expected timeframes for implementation of recommendations
Recommendation 1: The Department require detaining officers complete the *'Mandatory Control Point (MCP) 7 - Establishing and Maintaining Reasonable Suspicion'* form and supervisor sign off for all planned detention operations.	**Accepted**	**Proposed action:** The Department **accepts** to review and strengthen processes that guide officers in establishing and maintaining reasonable suspicion for planned detention operations and as such **agrees** with the intent of this recommendation. The *'MCP 7 - Establishing and Maintaining Reasonable Suspicion'* (MCP 7) is used to conduct an independent desktop review of an initial detention decision. The Department **agrees** to review and strengthen the end-to-end process for detaining individuals, including the related mandatory control points that precede MCP 7, to ensure that the controls in MCP 7 are applied prior to detention. **Expected timeframes:** 31 December 2025 **Justification for timeframes:** To allow sufficient time to review processes, investigate impacts, relevant training, consultation and clearance processes.
Recommendation 2:	**Accepted**	**Proposed action:** The Department **accepts** this recommendation. A written notice is being drafted to provide to affected individuals from 31 August 2025 in circumstances

The Department provide each affected individual (whether from previous or future reporting periods) with: 1. A personal apology, including an acknowledgement of wrongdoing and assurance as to remedial actions the Department has taken/intends to take to ensure these errors do not occur in future, and 2. Information about the Compensation for Detriment due to Defective Administration Scheme, including how to make an application. This process should be formally embedded in the Department's policies and procedures.		where it is no longer reasonable for an officer to suspect they are an unlawful non-citizen. The letter will include an apology and provide details as to why they are being released from detention, and be accompanied by a factsheet about how claims can be made under the Compensation for Defective Administration (CDDA) Scheme. We will work with your office to develop an approach to notifying people in previous periods. The Department will also update the *Status Resolution – Detention Release Requirements* procedural instruction to include this process. **Expected timeframes:** 31 August 2025 **Justification for timeframes:** Preparation, consultation and clearance processes.
Recommendation 3: The Department draft a formal written factsheet, to be provided to people it has wrongfully detained immediately upon release, which includes information in a language they understand about their rights to seek compensation through the Compensation for Detriment due to Defective Administration Scheme.	**Accepted**	**Proposed action:** The Department **accepts** this recommendation. As noted above, a factsheet is being developed to provide information about how claims can be made under the Compensation for Defective Administration Scheme in English. While the factsheet will be written in English, an interpreter will be engaged as needed to explain the factsheet to impacted individuals at the time of their release from detention and copies will be provided to representatives where applicable. **Expected timeframes:** 31 August 2025 **Justification for timeframes:** Preparation, consultation and clearance processes.

Additional information/clarification

Statements in the report	Comments
Page 8: How does wrongful detention happen? *When the Department makes a negative visa decision, it has a legal obligation to ensure that the affected individual is informed of the decision and given the opportunity to respond if they wish to do so. When the Department fails to properly notify the affected individual, this undermines the legal basis of the visa decision, therefore making it invalid. If a person is subsequently detained based on an invalid visa cancellation/refusal decision, this constitutes wrongful detention.* **Page 11/12: Policies and procedures are not being followed** *The errors in the template meant that a number of notification letters did not correctly disclose the relevant legislative provisions under which the decision was being made, therefore rendering the decisions invalid.*	A defective notification does not result in an 'invalid' visa decision. It means that a non-citizen was not notified effectively about an immigration decision, therefore re-notification needs to occur. This does not alter or impact the visa decision that was made regarding the negative visa decision.
Page 10: Repetition of known errors *We found the issues which led to the people being wrongfully detained during this reporting period were, in almost all cases, not new.*	While the Department utilises the same five themes to assist with categorising the types of errors that occur (visa cancellation error, notification error associated with visa grants and refusals, Administrative Review Tribunal decisions, communication of Ministerial decisions and the detention of an Australian citizen), the errors identified are not all the same due to differing circumstances in which they occur.
Page 11: There appears to be a culture of 'act first, check later' *The continued prevalence of errors arising from a lack of personal responsibility for decision making and a failure to follow policies and procedures (particularly in planned detention operations) indicate that this culture may still be present.*	The Department does not agree with this view, noting that officers (including Field Officers for planned detention operations) do undertake checks in order to form reasonable suspicion that a person is an unlawful non-citizen. This includes undertaking systems checks prior to a detention, conducting an interview with the suspected unlawful non-citizen and

	providing a written record to support the officer's state of mind that the person is an unlawful non-citizen. Ongoing reasonable suspicion is also recorded in the Department's *Mandatory Control Point 7 – Establishing and maintaining reasonable suspicion*, throughout a person's period of detention.
Page 13: Officers are not exercising responsibilities with caution *Detaining officers should take all reasonable steps to establish the required suspicion before exercising the power to detain, rather than the other way around.*	Officers must and do establish reasonable suspicion that the person is an unlawful non-citizen prior to detaining under section 189 of the *Migration Act 1958*. There are several lines of assurances that are used to ensure officers are exercising their delegated powers lawfully and responsibly. As above, this includes undertaking systems checks prior to a detention, conducting an interview with the suspected unlawful non-citizen and providing a written record to support the officer's state of mind that the person is an unlawful non-citizen. Ongoing reasonable suspicion is also recorded in the Department's *Mandatory Control Point 7 – Establishing and maintaining reasonable suspicion*, throughout a person's period of detention.

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Contact us

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