COMMONWEALTH OMBUDSMAN

FOR CONSUMERS

Taking Liberties

Investigation into the appropriateness of Department of Home Affairs' and Australian Border Force's policies and procedures for the timely removal of unlawful non-citizens from Australia

February 2024

Overview

The right to liberty is one of the most important and basic human rights. Where a government has the power to deprive someone of their liberty for a lawful purpose, the impact of that deprivation of liberty should be front of mind of those administering that detention. Policies and procedures governing removals should clearly acknowledge that, with each passing day of a removal process, a person remains deprived of their liberty.

The *Migration Act 1958* (Cth) (the Migration Act) requires unlawful non-citizens, being people who are not Australian citizens and do not hold a visa, to be held in immigration detention pending either obtaining a visa or being removed from Australia.[1] The Migration Act requires removal to take place 'as soon as reasonably practicable'.[2] Holding a person in immigration detention, even for a lawful purpose, is a deprivation of liberty.

In this investigation, we wanted to understand how the Department of Home Affairs' (Home Affairs) – including Australian Border Force (ABF)[3] – policies and procedures ensure the timely removal of unlawful non-citizens from Australia. By a timely removal, we mean a removal process where every single step in the process (including in the planning stages) is prioritised and actively progressed in the knowledge that a person is being deprived of their liberty and therefore the quickest action possible must be taken at all times.

This was prompted in part by strong criticism of Home Affairs' lack of planning for removal of Mr Sami by Justice Mortimer of the Federal Court in *Sami v Minister for Home Affairs* [2022] FCA 1513 ('*Sami*'). We wanted to see what changes Home Affairs and ABF made following *Sami* to ensure people are removed 'as soon as reasonably practicable', and not deprived of their liberty for any longer than necessary.

We found, however, that Home Affairs and ABF did not review or update any policies and procedures for removal in response to *Sami*. This was all the more surprising in light of similar adverse commentary in an earlier Federal Court case,[4] in which Justice Wigney noted the lack of meaningful and material steps taken by Home Affairs to remove a person who had been in immigration detention for over 8 years.

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[1] The Migration Act s 189.

[2] Ibid s 198.

[3] ABF is part of Home Affairs but is operationally independent (see Department of Home Affairs 2022-23 Annual Report, page v).

[4] *BHL19 v Commonwealth of Australia (No 2)* [2022] FCA 313 (31 March 2022).

Departments and agencies are expected to pay specific and serious attention to the decisions, findings and reasoning of superior courts, given the role of such courts in reviewing the legality of the actions of executive government bodies such as departments. The rule of law requires appropriate respect for the decisions and reasoning of superior courts. Given there were many other people in immigration detention in similar circumstances to Mr Sami, it was particularly incumbent on Home Affairs and ABF to actively engage with the very strong criticisms by the Federal Court of their processes. While Mr Sami appealed the Federal Court's decision and that appeal was subsequently withdrawn after Mr Sami was deported, the obligation on Home Affairs and ABF to consider how to engage with Justice Mortimer's findings did not go away simply because Mr Sami's immigration detention had ended.

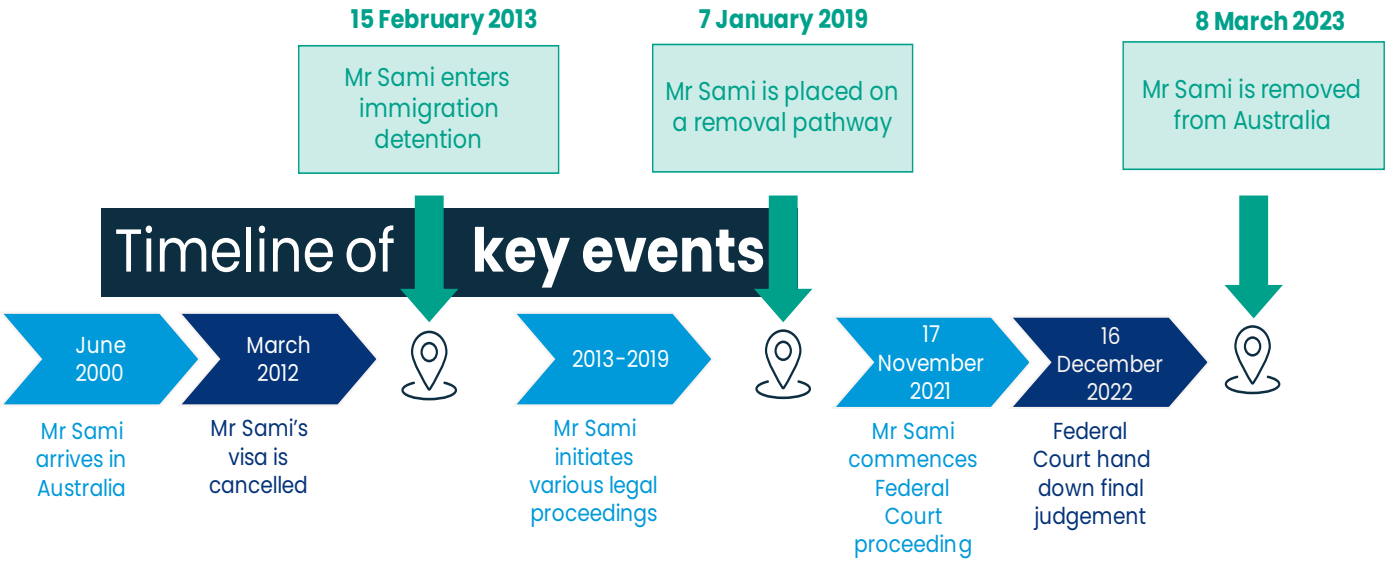
Our investigation found that some aspects of Home Affairs' and ABF's existing policies and procedures for removal are not appropriate to ensure timely removal, including because the removal process does not contain timeframes for steps or otherwise adequately reflect the significant impact of any delay upon a person's liberty.

During the course of our investigation, the High Court of Australia published the reasons for its unanimous judgment in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 (*'NZYQ'*). The Court held that immigration detention is unlawful if it is for the purpose of ensuring removal of the person from Australia but there is no real prospect of that removal occurring in the reasonably foreseeable future. While *NZYQ* has already led to some changes to immigration detention, the use of detention pending removal will likely continue. Home Affairs and the ABF therefore need to ensure that they act on the court decisions in both Sami and NZYQ to improve and expedite the removal process, including to ensure that removal is progressed in an active and timely manner so that people are not unlawfully deprived of their liberty.

As a result of our investigation, we made **3 recommendations** to Home Affairs and the ABF to improve and expedite the removals process.

Home Affairs and the ABF accepted all 3 recommendations. We will continue to discuss anticipated timeframes for implementation of the recommendations with Home Affairs and the ABF and return to assess the action taken.

Why did we investigate?



On 16 December 2022, Justice Mortimer delivered her judgment in *Sami*. Mr Sami entered immigration detention in 2013 following his visa being cancelled due to Mr Sami's criminal convictions. After exhausting all avenues of appeal against his visa cancellation, Mr Sami was placed on a removal pathway in 2019.[5] The removal process was still underway 3 years later at the time of the judgment. In the proceeding, Mr Sami sought to be released, or a declaration that his continued detention was unlawful.

Mr Sami's applications were refused by Justice Mortimer, and he was ultimately removed from Australia in March 2023. However, the outcome for Mr Sami does not detract from Justice Mortimer's highly critical observations about the lack of planning and timeframes for effecting Mr Sami's removal. Justice Mortimer observed [our emphasis]:

> In my view, the evidence strongly suggests that departmental officers take their own time in making arrangements. **There is not one skerrick of evidence suggesting any planning to a timeframe.** There are no schedules or work plans. Subject to one finding I make below, the evidence consists of little more than a series of emails and somewhat random inquiries, with no objective basis for their timing, conducted it would seem **entirely at the discretion of the officer responsible** for a given removal. Replies and responses are similarly timed at the discretion of the officer concerned. There is **no apparent consciousness that each day, a person like Mr Sami remains deprived of his liberty** not because he is under any punishment or any sentence of imprisonment that has a known

[5] When the person's immigration matters are finally determined and they are unable to legally remain in Australia, Home Affairs refers to them as on a *removal pathway*.

> end date, but because he is being held for a single purpose. Pursuit of that purpose appears somewhat leisurely and without any real attention being paid to the fact the time taken by the officers involved is directly and causally related to a person's continued deprivation of liberty. If the legislative scheme of mandatory detention can be said to have achieved any objective since its introduction in 1992, **it has achieved the altogether disgraceful objective of officers who are otherwise no doubt conscientious and honest becoming apparently immunised to the incarceration of individuals** like Mr Sami for years. All so that an activity that thousands of free individuals undertake every day in Australia – leaving on a plane to fly to another country – can be arranged.[6]

In January 2023 the Ombudsman raised Justice Mortimer's findings with the Associate Secretary Immigration in Home Affairs and noted the Office's keen interest in what the department was going to do in response. In April 2023, the Office formally raised Justice Mortimer's comments with ABF and sought information about the administration of removals of detained persons. Home Affairs responded in June 2023. However, as the response did not provide assurance that Home Affairs and ABF had addressed Justice Mortimer's criticisms in *Sami*, the Ombudsman commenced an own motion investigation under s 5(1)(b) of the *Ombudsman Act 1976* on 1 September 2023.

Our investigation assessed the appropriateness of Home Affairs' and ABF's policies and procedures to ensure the timely removal of unlawful non-citizens from Australia, focusing on whether any changes had been made following *Sami*, and how they monitor compliance with and continuously improve their removal policies and procedures. Home Affairs and ABF responded to our questions and provided a range of policy and procedures governing the removals process. We reviewed these documents and discussed the removals process with senior staff at Home Affairs and ABF.

We note that in focusing on Home Affairs' and ABF's policies and procedures, our investigation did not consider any specific examples or case studies, other than Sami, of how those policies and procedures operate in practice.

What did we find?

Home Affairs and ABF did not review or update policies and procedures for removal following Sami

In our view, Justice Mortimer's highly critical commentary of the removal process in *Sami* – which followed similar criticism by Justice Wigney in *BHL19 v Commonwealth of Australia (No 2)* [2022] FCA 313 (31 March 2022) – should have prompted Home Affairs

[6] *Sami* [2022] FCA 1513 at [53].

and ABF as a matter of urgency to review the removals process to address the concerns raised about the lack of planning and timeframes, and provide assurance that their policies and procedures are appropriate to effect timely removals.

Indeed, agencies should, as a matter of good public administration, integrity and respect for the rule of law, actively consider judicial and tribunal criticism of their programs and practices, including what changes or improvements should be made to processes to address such concerns or criticisms. Even if a decision is appealed, an agency needs to actively consider whether it needs to change or vary the criticised practices in the meantime.

Moreover, Home Affairs' and ABF's own existing departmental policies required a review of the policies and procedures for removal. Home Affairs' existing *Policy and Procedure Control Framework—Procedural Instruction (SM-5419)* – which all SES officers are required to follow – requires policies and procedures be reviewed in full either every 3 years or following changes to the operating environment, which specifically includes 'recent Australian judicial decisions or tribunal decisions'.[7]

We were advised by Home Affairs that there was no review, report, assessment, or other documented consideration of the Sami decision.

While Home Affairs and ABF say they commenced a project to improve the removal process – including taking lessons from complex cases like Mr Sami's – we consider a review and changes to improve the process should have happened much sooner. At the time of writing this report, it has been a full year since Justice Mortimer's comments were made.

Home Affairs and ABF do not have a process to ensure compliance with internal requirements to review policies and procedures

Our investigation also found that, despite the requirement in *Policy and Procedure Control Framework—Procedural Instruction (SM-5419)* to review policies and procedures regularly, there is limited oversight of whether this actually happens as scheduled (i.e. every 3 years or following events such as judicial decisions), and for a number of policies and procedures applying to removals there had not been any review for more than three years.

[7] Policy and Procedure Control Framework - Procedural Instruction (SM-5419) page 5.

The failure to ensure compliance with Home Affairs' own policy for reviewing policies and procedures means opportunities to implement learnings from judicial and tribunal commentary and ensure continuous improvement may be lost or significantly delayed. Further, we consider that the required review in SM-5419 of policies and procedures following 'recent Australian judicial decisions or tribunal decisions' should occur even whether the judicial decision was ultimately in favour of Home Affairs and ABF but judicial criticism was made (as was the case in Sami).

Most concerningly, in the case of Home Affairs' and ABF's policies and procedures for removal, the failure to seize the opportunity presented by Sami may have resulted in individuals being deprived of their liberty for much longer than necessary.

Home Affairs and ABF did not capture learnings following Mr Sami's removal

Our investigation found that Home Affairs and ABF have in place some established processes for capturing learnings from individual removals, through a post-removal debrief or an after-action review resulting in a post activity report.[8]

However, the decision about whether to hold a debrief is discretionary. The Procedural Instruction states a debrief ***can*** be held in particular circumstances. Additionally, the circumstances in which a debrief can be held appear to be focused on events surrounding the physical removal of the individual, rather than the history of the individual's time in immigration detention, or the planning and timeframes leading up to the removal.

[8] Procedural Instruction 'Removal from Australia- Post-removal procedures' (BE5500) provides for a post-removal debrief which is a '*detailed after-action review*' that '*can be held*' in a number of cases including where '*sensitive legal, policy, procedural, inter-government or other issues arose during the planning, preparation or conduct of the removal.*'

Reviewing the whole case from a person's entry into immigration detention to their removal would provide important lessons to guide future removal planning. Without a review process encompassing the entire removal process, there is a gap in oversight and opportunities for improvement are effectively ignored.

These processes were also in place at the time of Justice Mortimer's judgment in *Sami*. However, neither the post-removal debrief or after-action review occurred following Mr Sami's removal from Australia. Home Affairs and ABF advised us that this was because Mr Sami's removal went according to an endorsed operational plan and the actual removal occurred quickly, notwithstanding that several years had been spent before then seeking to progress the removal.

Home Affairs and ABF officers do not have a clear roadmap of the removals process

Our investigation identified 28 documents across Home Affairs and ABF governing the legislative and procedural requirements to effect the removal of a detained person from Australia. We found these 28 documents to be fragmented and difficult to navigate.

Several problems flow from this, including:

- the lack of a clear overarching roadmap for the removal process, which identifies all of the steps that must be taken from the time a person enters immigration detention to the time of their removal
- a lack of clarity about roles and responsibilities with respect to each step in the removal process, including the division of work between Home Affairs and ABF, and
- inconsistent messaging to staff throughout the different documents.

We acknowledge that Home Affairs and ABF have commenced work to revise the number of policies and procedures from 28 down to 4.

From our review, the existing policies and procedures largely focus on the specific actions that must be taken to effect a removal once it is approved to happen, with some guidance about appropriate timeframes for those actions. There is a lack of guidance or direction in an overarching sense on planning and timeframes (including structured

workplans and schedules), in relation to the steps that must be taken by Home Affairs and ABF staff prior to a removal being approved to happen.

We consider clearer guidance and directions on the removal process are essential to minimise the length of time individuals spend in immigration detention where they are being deprived of their liberty.

While the *Removal from Australia - Commencing a removal procedural instruction (BE-5490)* notes that, where possible, removal officers are expected to begin developing a removal plan prior to a person entering detention, it is not clear what this looks like and we found some inconsistency in the procedures regarding when removal planning should start. This is particularly important noting the length of time people can spend in immigration before being considered to be on an active removals pathway.

Home Affairs and ABF do not use data effectively to monitor the timeliness of removals

During the course of our investigation, we sought information from Home Affairs and ABF about the timeliness of removals, including expected timeframes for key milestones in a removal.

ABF told us that between 1 July 2021 and 30 June 2023, 2,047 detained persons were removed from Australia, of whom 74% were removed within 6 months of their removal process commencing. However, a removal process for the purpose of this statistic does not necessarily commence at the time a person enters immigration detention.

As was seen in *Sami*, people may remain in immigration detention for years before being placed on a removal pathway. We wanted more information about the time a person spends in detention before being removed from Australia so we requested information on the average length of time a person who has been removed in Australia was in immigration detention prior to their removal, which was provided by ABF during the investigation.

ABF told us that for the period 1 July 2021 to 30 June 2023 the average length of time a person spent in immigration detention prior to their removal was 320 days with the shortest time being 1 day and the longest, 4091 days (over 11 years).

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ABF advised that as at 14 September 2023 there were 162 active removals cases being managed for persons whose removal service commenced 2 or more years ago. We understand that this data is not routinely extracted and was prepared by ABF at our request. As such, this data is not being used by ABF to monitor whether removals are progressing in timely manner.

While noting the United Nations' criticism of a lack of maximum limits for detention in law, we acknowledge that the Migration Act does not prescribe a timeframe for removal beyond 'as soon as reasonably practicable'. Having regard to both this and the judicial commentary in Sami, we consider there are good reasons for Home Affairs and ABF to have internal, indicative key milestones with timeframes for the purpose of removals planning, and to track individual cases against those milestones and timeframes as a method of monitoring progress and actively mitigating any delays.

There are express obligations on staff in some policy and procedural documents to proactively address barriers to resolution. Staff are instructed to progress other elements of removal planning while waiting on resolution of barriers and are given practical guidance on common barriers and action that can be undertaken to overcome them. However, this is not consistent across the policy and procedures. For example, a key procedural instruction provides in one part that removal is to occur as soon as reasonably practicable, while another procedure states that barriers to removal in many cases are temporary and can be resolved in 'due course'. This enables a passive attitude to be taken where resolution of the barrier is allowed to play out. Further, it is difficult to see how all action can be taken to progress other elements (while waiting for resolution of barriers) in the absence of a clear overall roadmap of the removals process. While there are escalation pathways and requirements for regular case review of persons in

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[9] Timeframes are accumulative and include all periods the person was in immigration detention. It captures the period from the date the person was detained under s 189 of the *Migration Act* to when their removals service was closed in ABF's case management system. ABF notes that the detention timeframe is not indicative of the timeframes for which an individual is liable for removal under s 198 of the Act and that the obligation to remove an unlawful non-citizen under s 198 of the Act is engaged when the person requests removal or their immigration matters are finally determined.

detention, these do not always include clear direction on when a removal case should be escalated.

We understand the removals processes can be complex and involve barriers extending the time for removal and that cannot always be predicted.

However, we were not assured that existing policies and procedures are appropriate to ensure that removals are progressed with priority and in the knowledge that, every day that passes, someone is continuing to be deprived of their liberty.

In summary, we found that HA's and ABF's policies and procedures for people on a removal pathway:

- do not consistently and clearly identify the deprivation of a detained person's liberty as a principal reason why it is important to progress their removal in a timely manner – often the focus seems to be simply on complying with procedural obligations rather than acknowledging the very real impact on people
- do not provide staff with a clear map of the overall removals process (including planning) with indicative timeframes for key milestones in the process as a measure to monitor whether removals are progressing in a timely manner
- do not always include clear direction on when a removal case should be escalated, notwithstanding that there are escalation pathways and requirements for regular case review of persons in detention
- do not include clear guidance on how to develop schedules and workplans for removals planning (beyond specific processes such as the immediate physical removal process)
- do not use all available data to monitor whether removals planning is progressing in a timely manner from the time a person enters immigration detention, and[10]
- are not subject to any process to ensure regular reviews are being conducted, despite this being a departmental requirement for all policies and procedures.

The cumulative effect of this is that there is no clear overall roadmap of the removal process from end to end, beginning with a person's entry to immigration detention and

[10] Removals data from Home Affairs' and ABF's case management system is used for operational planning and visibility of the status and progress of removal cases but only captures active removal cases.

ending with their removal from Australia. While there are processes such as case conferences for reviewing removal cases on hand, a lack of data on key milestones means cases requiring attention and escalation may be harder to identify and action.

What do we recommend?

The longer the time in immigration detention, the greater the potential for significant detrimental impacts on the person detained. We recommend Home Affairs and ABF improve and expedite the removals process. The goal of our recommendations is to minimise the amount of time that detained persons on a removal pathway are deprived of their liberty pending removal from Australia.

Recommendation 1

We recommend the Department of Home Affairs (Home Affairs) and Australian Border Force (ABF) ensure the entire process to remove a detained person from Australia, including planning, is given priority to achieve the quickest removal process possible, including through the use of milestones, review and escalation processes.

In implementing this recommendation, Home Affairs and ABF must consider the findings of this report.

Recommendation 2

We recommend that Home Affairs and ABF ensure that policies and procedures are reviewed after every applicable judicial and tribunal decision, as is required by the department's instruction SM-5419.

Recommendation 3

We recommend that Home Affairs and ABF ensure that post-removal debriefs and/or after-action reviews are held in all significant cases, and that they consider the entire period from commencement of detention through to the finalisation of removal or the release from held detention and not merely the removal operation itself.

OFFICIAL: Sensitive

EC24-000059

Mr Iain Anderson
Commonwealth Ombudsman
Office of the Commonwealth Ombudsman
GPO Box 442
CANBERRA ACT 2601

Dear Mr Anderson

Thank you for the opportunity to review the draft report *Taking Liberties - Investigation into the appropriateness of Department of Home Affairs' and Australian Border Force's policies and procedures for the timely removal of unlawful non-citizens from Australia*, provided to the Department of Home Affairs (the Department) on 5 January 2024. The Department's response to the draft report is at **Attachment A.**

Immigration detention is an important element in the management and integrity of Australia's borders and to address potential threats to the Australian community, including where there are national security and character risks. Unlawful non-citizens must be detained until their immigration status is resolved, either through the grant of a visa or removal from Australia.

Detaining someone in an immigration detention centre is a last resort for the management of unlawful non-citizens. If a person does not present an unacceptable risk to the safety and good order of the Australian community, the Government's preference is to manage them in the community wherever possible. In January 2023, Christine Nixon AO, APM, undertook a review of exploitation in Australia's visa system, the *Rapid Review into the Exploitation of Australia's Visa System*. In response to the review, the immigration compliance and removals functions currently delivered by the Department and the Australian Border Force (ABF) are being bought together within the Department. This recognises the importance of those functions within the immigration status continuum, and an increased focus on the removals function.

I acknowledge the concerns raised in your review relating to the apparent lack of immediate systemic response to the judicial findings, and the lack of timeliness in some instances in the removals process. I am committed to addressing these concerns, including through the measures already underway outlined in our attached response.

Yours sincerely

Stephanie Foster

Stephanie Foster PSM
Secretary

1 February 2024

OFFICIAL: Sensitive

EC24-000059 - Attachment A

The Department of Home Affairs (the Department), including the Australian Border Force (ABF), welcomes the opportunity to respond to the Commonwealth Ombudsman's draft report *Taking Liberties - Investigation into the appropriateness of Department of Home Affairs' and Australian Border Force's policies and procedures for the timely removal of unlawful non-citizens from Australia.* The Department values the working relationship it has with the Commonwealth Ombudsman, and acknowledges the important role the Ombudsman plays in improving public administration.

As noted in the Department's response to the request for information (Ref OHR 23-00128) and in discussions with officers from the Commonwealth Ombudsman's office, section 198 of the *Migration Act 1958* (the Act) provides the power under which the ABF may remove an unlawful non-citizen from Australia. As the Ombudsman has acknowledged, the Act does not prescribe timeframes within which removal is to occur, but it does require officers to remove unlawful non-citizens as soon as reasonably practicable.

This power is not enlivened merely by the detention of a unlawful non-citizens under section 189 of the Act, but rather is enlivened either when a person requests removal from Australia (a voluntary removal), or in the case of involuntary removals, at the conclusion of certain visa and associated merits review processes. In involuntary removal cases, it is a matter of policy that the ABF does not generally commence removal process before all outstanding immigration matters relating to the visa status of a person are resolved. Following the *NZYQ* judgment, the Department is reviewing processes to ensure that consideration of removal prospects is an active process embedded in regular case reviews, and one that occurs prior to the s198 obligation being enlivened.

The Department reiterates that removal powers are not always enlivened for the duration a person is detained, and in many cases will never be because the person becomes a visa holder and is released from detention. Even where the powers are enlivened, removal often cannot occur due to processes within the control of the person and not the Department such as review applications and appeals, or a failure by the person to cooperate with removal efforts where that is required e.g. *ASF17 v Commonwealth of Australia* [2024] FCA 7.

The Department and ABF assure the Commonwealth Ombudsman that while there are no prescribed timeframes, departmental and ABF officers work to resolve the immigration status of detainees as quickly as possible, whether through visa processes or removal from Australia. The Department and ABF are acutely aware of the impact detention can have on an individual, and regularly review detention cases to ensure status resolution processes are progressing as quickly as possible. Information regarding these reviews was provided to the Commonwealth Ombudsman's office as part of the Own Motion Investigation.

As noted in the Department's response, the majority of removal cases are progressed in reasonable timeframes from the time at which the duty to remove under section 198 is enlivened. The data provided to the Commonwealth Ombudsman's office supports this statement – showing that of the 2,047 unlawful non-citizens removed in the 2022/23 financial year, 1,513 individuals (approximately 74 per cent) were removed within six months from the time they were available for removal. The ABF progressed the removal of a further 309 individuals (approximately 15 per cent) within six to 12 months from the time they were available for removal.

The Department's view, supported by the data provided, is that Mr Sami's case, which did take an extended period to resolve, is not representative of the majority of removals progressed by the ABF. However, the Department does acknowledge that there can be more complex barriers in some cases, including barriers outside of the Department's control relating to processes of foreign governments, which can extend removal timeframes. For example, in Mr Sami's case, there were difficulties in obtaining a travel document from the Egyptian authorities. The Department also notes Mr Sami's removal was impacted by the COVID-19 pandemic, which caused delays in many removals. Such cases are appropriately escalated within the Department so that alternative options may be considered. The Department is also developing a number initiatives to enhance the

process to remove unlawful non-citizens from Australia, including considering opportunities to streamline collaboration with foreign governments, as outlined further below.

The Department and ABF appreciate the Commonwealth Ombudsman's acknowledgement of the work underway to review and revise the operational policy and procedural documents related to the Removals Program. The Department notes that following the High Court decision in NZYQ, additional work is underway in the Department that will impact the removal process. The Department is happy to brief the Commonwealth Ombudsman's office on that work in due course.

Editorial Comments:

Page/paragraph	Commonwealth Ombudsman's statement	Home Affairs comments
Page 9	*We wanted more information about the time a person spends in detention before being removed from Australia.*	Data was provided to the Ombudsman's Office relating to removal timeframes as part of the Department's response on 22 September 2023. Further data was provided on 28 November 2023, following a request from the Ombudsman's Office for the original data to be verified that could be published in the Ombudsman's report, and for additional data to be provided showing the average length of time a person who has been removed from Australia was in immigration detention prior to their removal. No further requests for data or other information relating to removal timeframes or length of time in detention were received by the Department or ABF. Had the Ombudsman's Office requested additional information, the Department and ABF would have provided relevant information where available, or developed a data product that would assist.
Page 10	*We understand this data is not routinely extracted and was prepared by ABF at our request. As such, this data is not being used by ABF to monitor whether removals are progressing in a timely manner*.	While this statement is correct in that the data provided in response to the Own Motion Investigation was produced for the purpose of the investigation, the Department did provide the Ombudsman's Office with detailed information on the case review processes conducted by the Department and ABF. As noted in the response to OHR 23-00128, comprehensive planning processes are conducted for each individual removal. The Department also provided detailed information regarding the assurance processes conducted by the Department and ABF to monitor case progression and ensure an individual's immigration status is resolved as quickly as possible (please see the Department's response to question 3 of OHR 23-00128). The response also referred to the Removal Complexity Index (RCI), which is a report comprised of data pulled from the Compliance, Case Management and Detention (CCMD) Portal, which is used for operational planning and visibility of the status and progress of removal cases (with a focus on timeliness).

The Department's response to the Commonwealth Ombudsman's recommendations

Recommendation 1
We recommend the Department of Home Affairs (Home Affairs) and Australian Border Force (ABF) ensure the entire process to remove a detained person from Australia, including planning, is given priority to achieve the quickest removal process possible, including through the use of milestones, review and escalation processes. In implementing this recommendation, Home Affairs and ABF must consider the findings of this report.

The Department **agrees** with this recommendation and has taken steps to mitigate the risks associated with the removals process.

As part of the implementation of recommendations of the *Rapid Review into the Exploitation of Australia's Visa System*, the Minister for Home Affairs approved the establishment of a new Immigration Compliance function within the Department in October 2023, focussing immigration compliance and removals efforts.
The Status Resolution Branch, within the new Immigration Compliance Division, is establishing a sustainable model for the ongoing case coordination of individuals in immigration detention on a removal pathway, to progress an immigration outcome. This team will bring together case officers from removals, compliance field operations, visa cancellation, international and status resolution officers. The centralisation of this work with experienced personnel will ensure the Department has the required resources and the ability to undertake proactive assessment and focussed progression of an individual's situation, in particular where a person in immigration detention fails to cooperate with their removal, with the aim to reduce an individual's time in immigration detention. The model is expected to be established in first quarter 2024.

In addition, on 29 January 2024, the removals functions shifted from a blended regional model to a centralised national model within the new Immigration Compliance Division. This provides oversight and consistency across the delivery of removal processes. This realignment also ensures a seamless focus on the delivery of an end to end immigration compliance and removals function.

Informing this realignment, ABF undertook a project to map the current end to end removals process in each region to identify key milestones in removals planning, and develop a nationally consistent process. A key outcome has been to identify improvements and efficiencies in delivering removal operations in a nationally consistent manner, to better support meeting legislative requirements, allow for consistency in the management of complex cases, and simplify reporting requirements and senior executive decision making. It is anticipated this will improve and expedite the removal process. This preliminary mapping activity supports the shift to a national model, which will result in a more holistic and consistent removals process across regional functions to strengthen program governance.

The ABF notes the Ombudsman's commentary regarding the existing removal procedural documents and lack of an overarching roadmap for the removal process. As the Ombudsman's report notes, the ABF is revising the relevant operational policies and procedural documents, and will take into account the Ombudsman's commentary through this review process.

The ability of the immigration detention network to manage unlawful non-citizens remains a key aspect of maintaining the integrity of Australia's migration programme. The Department makes every effort to remove such non-citizens as soon as reasonably practicable, however the complexities of each individual's circumstances means that removal planning timeframes do vary, and where individuals do not cooperate with the Department's removal planning, some cases can become protracted.

In conjunction with the strengthened governance outcomes of the abovementioned project, removal officers continue to maintain effective internal controls to monitor case progression and identify any current or potential barriers to removal, to provide guidance on case resolution, make decisions regarding priorities and resource allocations, and undertake quality assurance on system entries. Following review, complex or protracted issues are escalated to relevant forums and senior officers, as outlined in the information provided to question 3 of OHR 23-00128. Similar case review processes are conducted by the Status Resolution Program, and the Department and ABF also note the existing detention review processes required under section 486 of the Act.

The Department is also developing a number initiatives to enhance the process to remove unlawful non-citizens from Australia, including opportunities to improve collaboration with foreign governments. Facilitating removals from Australia is significantly impacted by the diversity of foreign jurisdictions' procedures, such as passport issuance and identity verification. Furthermore, this facilitation is more challenging in the many circumstances where a person in immigration detention fails to cooperate with a planned removal.

Recommendation 2
We recommend that Home Affairs and ABF ensure that policies and procedures are reviewed after every applicable judicial and tribunal decision, as is required by the department's instruction SM-5419.

The Department **accepts and is addressing** this recommendation. The Policy and Procedures Control Framework (PPCF) materials will continue to be maintained in accordance with PPCF - Policy Statement (SM-5418) and PPCF - Procedural Instruction (SM-5419). On provision of an applicable judicial or tribunal decision, the Department will review its operational policy documents in line with the PPCF requirements. The Department accepts that following judicial decisions, genuine administrative issues can be identified, and that there is a need to consider and implement a review of policies and procedures to ensure that adequate changes occur in a timely manner.

The current PPCF has been in place since the amalgamation of Immigration and Customs in 2015. Since then the Department has gone through significant change. The Department is currently reviewing the PPCF to identify improvements. The review will consider improvements including how business areas can be more responsive to changes in legislation or legal decisions and the management of subsequent updates to policy.

The Department already takes steps to consider the appropriateness of existing internal frameworks that govern removals when they are potentially impacted by judicial and tribunal decisions. After the recent High Court ruling in *NZYQ*, which is mentioned on page 3 of the Ombudsman's draft report, the Department engaged other Government stakeholders to assist with its development of a response to the judgment and review of its existing immigration removals procedures, particularly as they relate to collaboration with foreign governments to facilitate removals. This engagement with other stakeholders was initiated prior to the Department's receipt of the Ombudsman's draft report.

The Department will continue to use applicable court or tribunal findings, and Commonwealth Ombudsman reports, to initiate and inform reviews of its existing policies and procedures in addition to the review process specified by instruction SM-5419.

Recommendation 3

We recommend that Home Affairs and ABF ensure that post-removal debriefs and/or after-action reviews are held in all significant cases, and that they consider the entire period from commencement of detention through to the finalisation of removal or the release from held detention and not merely the removal operation itself.

The Department **accepts and is addressing** this recommendation.

The ABF conducts a post-removal debrief if there are unique or sensitive elements to a removal, such as sensitive legal or inter-governmental issues, application of use of force, an unprecedented issue occurs during a removal, or if the requirement for 48 hours' notice of removal is waived. The post-removal debrief is a detailed after-action review of an activity, incident or occurrence to establish the facts related to the sequence of events, actions, reactions, counteractions, decisions and outcomes. The decision to conduct a debrief is made by removal officers or the removal operation lead, and is dependent on the factors of the removal. The ABF will continue to conduct post-removal debriefings on significant cases, noting that the focus of these debriefs is to focus on the removal operation.

There are a number of existing review processes conducted by Departmental and ABF officers relating to the management of detainees and timeliness of status resolution outcomes. As noted in response to Recommendation 1, removal officers continue to maintain effective internal controls to monitor case progression and ensure removals progress in a timely and efficient manner, and similar review processes exist in other business areas. The Status Resolution System Control Framework is a Departmental framework outlining requirements regarding the regular review, escalation and referral points to ensure that people are in the most appropriate placement to manage their health and welfare, and the resolution of their immigration status is appropriately progressed. Detention cases are also subject to mandatory reviews at regular intervals by the Department and Commonwealth Ombudsman, as required under section 486 of the Act.

It is through these multiple layers of review that barriers are identified and addressed in individual cases. However, the Department recognises there are limited review mechanisms that cover the end to end immigration compliance continuum, including removal processes. The establishment of the new Immigration Compliance Division and a renewed nationally consistent approach to removals will allow the Department and ABF to observe the process end to end, with a view to identifying steps and processes that should be improved or sustained.

COMMONWEALTH OMBUDSMAN

Our Ref: A2386965

5 February 2024

Ms Stephanie Foster PSM
Secretary, Department of Home Affairs
[redacted]

Mr Michael Outram APM
Commissioner, Australian Border Force
[redacted]

Dear Secretary and Commissioner

Final Report - Taking Liberties: Investigation into the appropriateness of Department of Home Affairs' and Australian Border Force's policies and procedures to ensure timely removal of unlawful non-citizens from Australia

Thank you for the Department of Home Affairs' (the Department) and response provided on **2 February 2024** to the report regarding my Office's investigation into the appropriateness of the Department's and Australian Border Force's policies and procedures to ensure timely removal of unlawful non-citizens from Australia. On 2 February 2024 the Department advised my Office the response is also on behalf of ABF and no separate response will be provided.

I am pleased the Department and ABF have accepted all recommendations. My Office will monitor the Department's and ABF's action in implementing the recommendations. We will be in contact in due course to seek timeframes for when the recommendations will be implemented.

I note that the Department provided editorial comments in its response. My Office does not accept editorial comments on our reports, only advice on errors of fact. The first "editorial comment" also seems to be a misunderstanding of the report, so for clarity I have included additional text in the report confirming that my Office requested information about time in detention from the Department and ABF during the investigation.

As foreshadowed in my letter of 5 January 2024, my Office will publish the report which will include the Department (and ABF's) formal response. The published report will also include a copy of this letter. Under embargo copies of the final report and my media release are attached. The report and media release remain private and must not be shared outside the Department and ABF without my express written agreement, until they are published. My Office will advise your staff when this has occurred.

I have also written to the Minister for Home Affairs, the Hon Clare O'Neil MP, presenting her with a copy of the final report, as required under s 15(6) of the *Ombudsman Act 1976*.

I wish to thank you and your staff for your co-operation with the investigation. If you would like to speak to me directly, I am available on [redacted]. Alternatively, if your staff wish to discuss the report, they may contact Ms Katrina Dwyer, Acting Senior Assistant Ombudsman, Defence, Investigations, ACT & Legal Branch on [redacted] or [redacted].

Yours sincerely

Iain Anderson
Commonwealth Ombudsman

Attachment A - UNDER EMBARGO Final Report: Taking Liberties- Investigation into the appropriateness of Department of Home Affairs' and Australian Border Force's policies and procedures for the timely removal of unlawful non-citizens from Australia

Attachment B - UNDER EMBARGO Media release