



# Department of Immigration and Citizenship

ADMINISTRATION OF DETENTION  
DEBT WAIVER AND WRITE-OFF

April 2008

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

REPORT NO. **02|2008**

## Reports by the Ombudsman

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## EXECUTIVE SUMMARY

The *Migration Act 1958* (Migration Act) requires that a non-citizen who is detained is liable to pay the Australian government the costs of his or her detention. This liability includes costs for the transportation of the person to and from an immigration detention centre and the daily maintenance amount for each day the person spends in detention.

In certain circumstances, the Department of Immigration and Citizenship (DIAC) may write off a person's debt where it has been determined uneconomical to pursue. Additionally, a person may apply to the Department of Finance and Deregulation (Finance) to request a waiver of their debt. A write off does not extinguish the debt owing to the Australian government: it is merely an accounting entry and the recovery of the debt may be pursued at a later date. By contrast, a debt that is waived cannot be reinstated and is extinguished for all time.

A non-citizen who has a debt owing to the Australian government may be refused a visa and/or be prevented from entering Australia at a later date if the debt has not been paid or if appropriate arrangements have not been made to repay the debt. Detention and removal debts can be significant. It is therefore vital that DIAC's administration in this area is of a high standard.

Complaints to the Ombudsman's office highlighted some inconsistencies with DIAC's administration of debts. Some people complained about significant delay in processing a waiver request. In other cases there was a lack of comprehensive and timely information provided by DIAC about the debt waiver and write-off process.

In July 2007, the Ombudsman initiated an own motion investigation under s 5(1)(b) of the *Ombudsman Act 1976* to examine DIAC's administration of debt waiver and write-off. The investigation assessed whether DIAC's administrative processes and procedures are appropriate and whether they are applied reasonably and consistently across DIAC to individuals.

Overall, the Ombudsman's investigation found that DIAC is administering debt waiver and write-off according to the legislative and policy requirements. However, the investigation also found scope for improvement. In particular, DIAC can improve the information it provides to people, timeliness and prioritisation in processing cases, and the consistency and reasonableness of decisions on debt waiver and write-off.

Recommendations arising from the investigation together with DIAC'S responses are set out in *Part 4—Conclusion and recommendations* at the end of this report.

## PART 1—INTRODUCTION

1.1 In the year ended 30 June 2007, DIAC raised debts of \$28.96 million for the detention of unlawful non-citizens. The highest debt raised during that period was over \$340,000 for a family.<sup>1</sup> The Commonwealth Ombudsman has received several complaints in relation to detention debts charged to unlawful non-citizens. Many complaints alleged delay for a decision to be made on a debt waiver request, or accrual of a detention debt while a person was waiting for a travel document to facilitate their removal from Australia. Other complaints were that people were not adequately informed of the debt waiver and write-off process or were not aware that a debt had been written off rather than waived.

1.2 The costs charged to detainees vary among Australian immigration detention centres, but in most cases the daily fee exceeds \$100 per day. Detention debts are generally recoverable only at the end of a person's detention.

1.3 The table below shows immigration related debt waivers and write-offs for the year ended 30 June 2007.

Debt	Number	Amount
Detention debts waived	10	\$616,111
Detention debts written off	3,571	\$28,910,699
New detention debts raised	3,568	\$28,960,617
Detention debts reinstated	Unknown*	\$1,242,756

\* This figure is difficult to determine as a person can be invoiced more than once as detention costs change over time at the same detention centre or due to transfers to a different detention centre.

1.4 The total detention debts to the Australian government owed by 406 people amounted to \$8,095,271 at 30 June 2007. Of this amount, \$4.8m (or 60%) is more than 120 days overdue for payment and unlikely to be collected. For the year ended 30 June 2007, the largest debt waived was \$230,197 and the largest debt written off was \$293,669.

1.5 The decision to raise a detention debt is not reviewable on merit by an administrative tribunal. There are therefore few options open to a person who has accrued a detention debt. A person can either accept the debt liability or seek a waiver of the debt. DIAC also has the option of writing off a person's debt, which means it is not pursued but may be reinstated at a later time. Complaints to the Ombudsman's office indicate that the size of some debts cause stress, anxiety and financial hardship to many individuals who are now living lawfully in the Australian community, as well as for those who have left Australia.

### Scope and methodology

1.6 The aim of this investigation was to review DIAC's practices in administering detention debts and assess whether those practices:

- adhere to legislative and policy guidelines
- are consistently applied

<sup>1</sup> This included a debt of \$115,786 for the mother and \$112,288 for each of her two children. DIAC is currently considering a waiver submission for these debts.

- are consistent with good administrative practice
- indicate any gaps in policy.

1.7 The investigation did not focus on other immigration related debts that arise in relation to legal costs for court decisions (such as the Federal Magistrates Court) and tribunal decisions (such as the Refugee Review Tribunal), nor costs associated with removing a person from Australia, such as airfares and escort costs.

1.8 Under the Migration Act, carriers such as airlines and sponsors for non-citizens can be liable for debts to the Australian government incurred by a non-citizen. This investigation did not examine those instances, focusing only on debts incurred by detainees themselves.

1.9 The methodology for this investigation included:

- examining the legislation, policy and procedural guidelines for managing detention debts
- examining complaints to the Ombudsman's office about debt waiver issues
- meeting with DIAC to discuss policy guidelines for debt waiver and write-off processes, the preparation of waiver submissions to the Secretary of Finance and issues raised by complainants about debt waiver and write-off processes
- meeting with Finance to discuss its procedures, the decision-making process and its liaison with DIAC
- examining and analysing a small selection of DIAC files on individuals who had requested that their detention debt be waived, and examining documentation related to a small number of debt write-off cases.

## Legislative and policy framework

### ***Debts incurred through detention, removal and deportation of non-citizens***

1.10 If a person is within the Australian migration zone and is not an Australian citizen or does not possess a valid visa, the person is classed as an unlawful non-citizen under s 14 of the Migration Act. If an Immigration officer knows or reasonably suspects that a person is an unlawful non-citizen, the officer must detain the person under s 189 of the Migration Act, unless a Bridging Visa (BV) can be granted to the person at that time. An unlawful non-citizen must be detained until they are removed from Australia under s 198 or s 199, or deported under s 200, or granted a visa.

1.11 Under s 209 of the Migration Act an unlawful non-citizen who is detained is liable to pay the Australian government the costs of his or her detention. Similarly, s 210 imposes a liability on a person who is removed or deported to pay the costs of their removal or deportation. An unlawful non-citizen in an immigration detention centre is charged a set daily maintenance amount for the entirety of their detention.

1.12 Sections 216, 222, 223 and 224 provide mechanisms by which a debtor's property may be used to recover costs of detention, removal or deportation. As a last resort DIAC can recover a debt by applying to a court for a judgment in its favour. DIAC advised that it does not ordinarily take these steps because it is uneconomical to pursue recovery of many debts.<sup>2</sup>

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<sup>2</sup> Migration Series Instruction 396: *Liability of non-citizens to repay costs of detention, removal or deportation*, at paragraph 6.2.

1.13 According to departmental policy, detention costs are generally only recovered from an unlawful non-citizen when their detention ends and the total costs are calculable. This policy applies unless the detainee wishes to pay their costs before this time, either in part or in full, or valuables have been seized and applied towards the payment of costs. A non-citizen incurs liability for removal or deportation costs only when their removal or deportation has occurred. Therefore these costs cannot be pursued until the non-citizen has been removed or deported, unless valuables have been seized and applied towards the payment of those costs.<sup>3</sup>

1.14 There is no provision in the Migration Act that requires DIAC to notify a non-citizen of their detention, removal or deportation costs. However, DIAC policy is that a *Notice of Removal and Maintenance Costs* should be handed to a non-citizen as soon as possible after they are detained. This notice shows the daily maintenance amount for the particular detention centre and explains that a visa cannot be granted until the debt has been repaid or arrangements made to repay the debt to the Australian government. If deemed necessary, an interpreter is used by the DIAC officer to explain these details to the detained person.

1.15 Migration Series Instruction (MSI) 396<sup>4</sup> states that a *Notice of Detention Costs Incurred to this Date* 'may' be handed to a non-citizen in detention to provide them with a progressive invoice of their detention costs incurred to date.<sup>5</sup> MSI 234 states that 'as detainees are constantly accruing a debt to the Australian government, they should be provided with a statement of accrued liability on a weekly basis'.<sup>6</sup> MSI 396 also outlines that a *Notice in Respect of Detention and Removal or Deportation Costs* should be handed to a non-citizen when the costs of detention and removal or deportation are finally calculated.<sup>7</sup>

1.16 DIAC's Accounts Receivable Section is responsible for pursuing all debts owed by non-citizens arising from the costs of detention and removal or deportation from Australia. To encourage non-citizens to repay their detention and removal or deportation debts, DIAC will:

- send the person an accurate tax invoice once costs are finalised
- record debts on the Movement Alert List (MAL) thereby making this information available to all DIAC counter staff, airport staff, compliance staff and staff at overseas posts
- advise holders of Bridging E and F visas subject to Visa Condition 8507 that they must pay or make arrangements to pay the costs of their detention within a period specified by the Minister<sup>8</sup>
- advise non-citizen debtors who wish to apply for a visa that Public Interest Criterion (PIC) 4004 (see below) will prevent the grant of a visa unless the

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<sup>3</sup> MSI 396: *Liability of non-citizens to repay costs of detention, removal or deportation*, at paragraph 5.2.2.

<sup>4</sup> Ibid at paragraph 4.1.2.

<sup>5</sup> DIAC advised that they do not generally provide progressive invoices, but if a detainee wants to know their current debt balance, they can get their case officer to contact DIAC's Accounts Receivable Section for this figure.

<sup>6</sup> MSI 234: *General detention procedures*, at paragraph 21.3.

<sup>7</sup> MSI 396 at paragraphs 4.1.1 to 4.1.3.

<sup>8</sup> Visa Condition 8507 can be placed on a visa requiring a person to either pay or make arrangements to pay their debt.

Minister is satisfied that appropriate arrangements have been made to pay the debt.<sup>9</sup>

1.17 A debtor can enter an instalment arrangement with DIAC to pay off a debt, such as paying \$100 per month. DIAC policy requires that the terms of such arrangements are that the person would first need to pay a 25% deposit or \$2,000 (whichever is less) and the normal term of the agreement would be five years. DIAC advised that it liaises with people to make arrangements that do not put too high a financial burden on the person while they are repaying their debt.

1.18 DIAC advised that when a person is sent a notice of their detention debt, credit providers are not notified of this debt and thus a detention debt should not affect a person's credit rating.

### ***Public Interest Criterion 4004 and Visa Condition 8507***

1.19 Schedule 4 of the Migration Regulations 1994 (Regulations) stipulates the PIC that a visa applicant must satisfy in order to be granted a visa. Different subclasses of visas are affected by different sets of PICs. Nearly all visa subclasses require that applicants satisfy PIC 4004 which states:

The applicant does not have outstanding debts to the Commonwealth unless the Minister is satisfied that appropriate arrangements have been made for payment.

1.20 The debts referred to in PIC 4004 include all debts owed to the Australian government, not only those incurred through immigration matters.

1.21 Schedule 8 of the Regulations lists conditions that may be imposed on visas of various classes. Relevantly, Visa Condition 8507 states:

The holder must, within the period specified by the Minister for the purpose:

- (a) pay; or
- (b) make an arrangement that is satisfactory to the Minister to pay;

the costs (within the meaning of Division 10 of Part 2 of the Act) of the holder's detention.

1.22 If the debt owing is a debt that has been incurred through immigration detention, any granted visa is likely to have Visa Condition 8507 imposed requiring the visa holder to pay or make arrangements to pay the costs of detention within a period specified by the Minister.

### ***Notification of a debt on Movement Alert List***

1.23 When a person is notified of their detention debt, a notice is posted on DIAC's MAL system.<sup>10</sup> If a person applies for a visa at a later date or comes to DIAC's attention through another immigration matter, MAL will alert DIAC staff to this debt and the PIC 4004 requirements. Once the person has satisfied the PIC 4004 requirements the MAL notice is removed or amended as appropriate.<sup>11</sup>

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<sup>9</sup> MSI 396, at paragraphs 8.1.1 to 8.1.5.

<sup>10</sup> The MAL contains a list of persons known to DIAC who have previously breached their visa conditions, have incurred a debt owing to the Australian government, or other notable matters.

<sup>11</sup> See MSI 377: *Visa applicants with debts to the Commonwealth*, at paragraph 3.6.1.



1.24 DIAC policy is that if a debt is written off, there is no change to the MAL alert as the debt remains but is not pursued. However, if a person enters into a payment plan to pay off their debt by instalments, a note that a payment plan is in place should be posted on MAL. MAL does not record that a debt is in the process of being considered for either a waiver or a write off.

### **Debt waiver**

1.25 Section 34 of the *Financial Management and Accountability Act 1997* (FMA Act) confers authority on the Finance Minister to waive or postpone a debt owing to the Australian government, allow a debt to be paid in instalments, or to defer the time for payment of a debt owing to the Australian government.<sup>12</sup>

1.26 The Finance Minister or a delegate may waive the payment of a debt where there is no other viable mechanism to extinguish the debt (such as a waiver provision in the legislation administered by an agency) or where such a mechanism is available but has already been tested. Unlike a debt write-off, a debt that is waived is permanently expunged and cannot become payable at a later date.

1.27 The decision to waive, postpone or write off a debt is discretionary. The decision to waive a debt will be made on the basis that there is a moral, rather than purely legal, obligation to the person or body concerned.<sup>13</sup> The debt waiver mechanism is permissive, in that it enables a decision maker to approve a debt waiver but does not oblige them to do so.

1.28 Decision makers in both DIAC and Finance may decide that it is more appropriate to write off a debt than waive it.<sup>14</sup> In deciding if there is a moral obligation on the Australian government to extinguish a debt, consideration is given to whether repayment of the debt in a person's circumstances would be inequitable, or would cause undue ongoing financial hardship.

1.29 Financial hardship can exist where a person's financial circumstances are unlikely to improve to the point that they could repay the debt without suffering a reduction in living standards that are unacceptable by community standards.<sup>15</sup> Each person's capacity to repay a debt will be different depending on individual circumstances and the decision to waive a debt based on financial hardship will reflect those circumstances. There is no rule that debts of the same kind incurred by different persons will be treated the same in each case.

1.30 Any individual, company, or other organisation can submit a waiver request, either for themselves or a third party. A request can be submitted through the agency to which the claim relates, such as DIAC, or directly to Finance. There is no time limit on submitting a claim for a waiver request, although a lengthy period between the

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<sup>12</sup> Finance has provided guidance to Australian Government agencies in dealing with debt waiver requests in the Finance Circular No. 2006/05, *Discretionary Compensation Mechanisms*.

<sup>13</sup> Ibid, Attachment C, paragraphs 27 to 31.

<sup>14</sup> The power to waive a debt will not be applied to debts that have arisen through deliberate fraudulence or other illegal activities in which the claimant had a direct role and was aware of the consequences of their actions. Ibid, Attachment C, paragraph 18 to 23.

<sup>15</sup> Ibid, Attachment C, paragraphs 27–28. In determining financial hardship, a person's assets, future earning capacity, health and family circumstances would normally be taken into consideration.

alleged loss and the waiver request may make it harder to verify the issues involved or the quantum to be waived or written off.<sup>16</sup>

1.31 Finance processes and assesses requests for waiver of debts owing to the Australian government. Finance investigates each request in liaison with the agency to which the matter relates (in this case DIAC), and prepares a written submission and recommendation to the appropriate decision maker. The Parliamentary Secretary to the Finance Minister determines claims in excess of \$100,000, after having considered a recommendation from an Advisory Committee.

1.32 When a request for debt waiver is made directly to DIAC, the request is first examined to determine if it is more appropriate to write off the debt rather than forward a submission to Finance. DIAC advised that waiver is not generally considered a suitable action unless the continuation of a debt would be likely to have an adverse impact on the person in the future. Even where a claimant has specifically requested waiver of a debt, DIAC is not obliged by statute to prepare and forward a submission to Finance.

1.33 Decision makers in Finance rely largely on the expertise of agencies in providing advice on the merits of claims that come directly to Finance. If a request for debt waiver is made directly to Finance, the request will be forwarded to the relevant agency for consideration, in this case DIAC. Once again, if DIAC considers that a write off (or some other outcome) is more appropriate in the circumstances, that advice will be given to Finance. Generally, Finance will not grant a waiver unless it is supported by the relevant agency, though Finance is not obliged to grant a waiver even where it has an agency's support. Finance will notify DIAC and the claimant when it has made a decision either to support or reject a debt waiver request.

#### ***Debt write-off***

1.34 Section 47 of the FMA Act authorises agency Chief Executive Officers to 'write off' debts in some circumstances. A claimant who has had a debt written off will not be pursued for the debt in the immediate future but, depending on changes to his or her circumstances, may be faced with the debt at a later time.<sup>17</sup>

1.35 A person with an immigration debt generally does not request that their debt be written off as they are unlikely to know about this option. Most commonly, a person who feels aggrieved or unable to pay a debt requests that it be waived. Various considerations govern whether it is appropriate to pursue, write off or seek a waiver of the debt including:

- Are there equity or financial hardship considerations involved in recovering the debt?
- Is the debt legally recoverable?
- Would recovery of the debt leave the Australian government financially worse off than it would have been had recovery not been undertaken?
- Does the debtor reside overseas?
- Is the debtor destitute and there is no prospect of their financial situation improving in the foreseeable future?
- Will the outstanding debt impact on the debtor's visa status in Australia through PIC 4004?<sup>18</sup>

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<sup>16</sup> Ibid, Attachment C, paragraphs 2 to 4.

<sup>17</sup> Finance Circular No. 2006/05, paragraphs 38 to 41.

<sup>18</sup> See MSI 396 *Write Off Procedures*, paragraph 6.2.6.

## **PART 2—DIAC’S MANAGEMENT OF DEBT WAIVER REQUESTS**

2.1 DIAC has a responsibility to record a debt waiver request from a person and to process that request in a professional and timely manner, according to the Finance Circular 2006/05 and DIAC’s internal Migration Series Instructions. This investigation found that DIAC has adequate systems in place to record debt waiver requests and that it is researching and processing those requests in a comprehensive manner. However, the investigation identified cases where DIAC had not processed claims in a timely manner. There were also inconsistencies in the type, quality and timeliness of information provided to persons during the debt waiver process.

2.2 In many of the cases in this investigation DIAC had used its discretion to write off a detention debt rather than send it to Finance for consideration of a waiver. In these cases, DIAC had determined, sometimes in consultation with the person, that the person’s circumstances may change in the future, such that the debt would not have an adverse impact, and therefore decided to write the debt off instead. However, in some cases DIAC had not adequately informed a person of why a debt write-off was considered more appropriate than consideration of a waiver by Finance, nor the difference between the two.

### **DIAC systems to support debt waiver requests**

2.3 The DIAC database for detention debt waiver requests records the date of a request, the name of the person, the dollar amount requested, the date the submission was sent to Finance, the date of the decision and the date the debt was waived or written off. The investigation found that the recording of debt waiver requests by DIAC was adequate. One improvement that could be made is that timeliness standards could be incorporated in the system to prompt DIAC officers to progress cases and provide people with regular updates on their cases.

### **Information provided to people by DIAC about debts**

2.4 There is scope for improvement in the content, quality and regularity of information DIAC provides to clients about detention debts.

2.5 MSI 234 requires DIAC officers to provide detainees with weekly updates on the progressive amounts of debts. DIAC advised the Ombudsman’s office that it generally does not provide an update unless a person requests that information. There is also a discrepancy between MSI 234 and MSI 396, which advises that a notice of a detention debt ‘may’ be provided to a person in detention to give a progressive update of their debt. This discrepancy may contribute to the current inconsistent practices within DIAC.

2.6 The fact that a person can spend a lengthy period of time in detention and accrue a significant debt warrants a regular update to the person. This is important to ensure the person knows the amount of the debt and to inform their consideration of their circumstances and repayment options.

2.7 Our investigation also found that when DIAC provides a person with a notice and tax invoice of their final debt amount, there is no accompanying information about DIAC’s debt recovery actions, payment options or that the person may have options and rights, including information about what they can do if they are experiencing difficulty paying their debt.

2.8 Providing this information at the time a total debt is determined ensures that a person is better informed of the debt process and their related rights. It is important that the person has complete and accurate information about their situation and options available to them. It would also be useful if the *Notice in Respect of Detention and Removal or Deportation Costs* provided contact information for the Accounts Receivable Section of DIAC, so that a person can discuss their debt and individual circumstances, such as financial hardship issues and payment options.

2.9 When a person makes a request either to Finance or through DIAC to have a debt waived, DIAC generally prepares a detailed submission for Finance. It sometimes takes DIAC a significant amount of time to process these requests and to prepare appropriate documentation, due to the complexity of individual circumstances.

2.10 Our investigation identified cases in which DIAC can take up to 18 months to prepare a submission to Finance. In some cases no update was provided to a person on the status of their case. DIAC should consider implementing such a practice whenever there is a delay, to provide information to a person on the status of their matter and contact point to discuss the progress of their case.

### **DIAC's discretion not to pursue a waiver request with Finance**

2.11 Neither legislation nor the debt waiver guidelines require DIAC to send a waiver request to Finance. DIAC may decide that a debt is more appropriately written off. DIAC takes the view that a debt waiver is unnecessary where a person has been granted a permanent visa. DIAC has advised that if a person requests a debt waiver, it will send a submission to Finance for consideration, unless DIAC determines that the debt will have no impact on the person's future immigration status, such as being affected by PIC 4004. In these cases DIAC, often in consultation with the person, will instead write the debt off. Notwithstanding this position, it is important to note that a written off debt could be pursued by DIAC at a later time.

2.12 If a person who is granted a temporary visa requests a waiver of their detention debt and may later be affected by PIC 4004, DIAC will prepare a debt waiver submission for Finance's consideration. DIAC will not necessarily support the waiver request, solely because a temporary visa was granted.

2.13 Under the Migration Act the Immigration Minister can intervene in a person's case and grant a visa. In some such cases the Minister may recommend waiver of a detention debt; if so, DIAC prepares a waiver submission that is sent to Finance.

2.14 Our investigation highlighted the need for additional safeguards in the debt waiver process. First, where a person has specifically requested a waiver of their debt, this request should at least be notified to Finance and the person be notified of this action, even if DIAC has decided that write off is more appropriate. The number of requests handled each year (see paragraph 2.21) is not so large as to make this an impractical burden. Moreover, as the earlier discussion explains, there is a substantial legal difference between waiver and write off. It is open to any person to seek the waiver of a debt under s 34 of the FMA Act, regardless of the permanency or otherwise of their immigration status, and the appropriate course is to bring any such request to the attention of the decision maker in Finance. The responsibility then rests on the Finance officer to examine the request and to decide if further information or consideration is required. A person can be disadvantaged if this practice is not followed. This is highlighted in the *Waiver request not sent to Finance* case study.

**Case study: Waiver request not sent to Finance**

Mr A complained to the Ombudsman's office about an immigration detention debt. He was distressed by the amount of the debt, and because (in his view) his immigration detention had been unlawful.

After the Ombudsman's office had made enquiries of DIAC, Mr A later advised that DIAC had agreed to defer the debt until his circumstances improved. Given his age, he thought it unlikely that his circumstances would improve and he concluded that the debt would be deferred indefinitely.

There was no evidence in this case that Mr A's debt had been referred to Finance for consideration of a waiver. Nor was it clear that Mr A was informed of the distinction between a write off and a waiver. Though Mr A was content with the outcome, in fact he could be disadvantaged. Moreover, waiver may have been the appropriate option, given his age and circumstances.

2.15 A second procedural safeguard that is required, also illustrated by the case study of Mr A, is that DIAC should routinely inform people of the clear distinction between waiver and write off. It is once again important that people are properly informed of the ramifications of decisions affecting them, so they can decide whether further action is required.

2.16 There are also the special cases of people who incur a debt following a period of wrongful or unlawful detention. In these cases, DIAC should prepare a waiver submission for consideration by Finance.

2.17 As highlighted by the Ombudsman's investigation of 247 referred immigration detention cases,<sup>19</sup> there are instances of people being released from immigration detention after it was decided the person was not an unlawful non-citizen and should not have been detained. Equally, people have been released from detention following court decisions—such as *Srey*,<sup>20</sup> *Uddin*<sup>21</sup> and *Vean*<sup>22</sup>—which clarified that a person in detention in fact had lawful immigration status.

2.18 DIAC advised that these cases are usually identified either by compliance staff or by staff in the legal division; details are then forwarded to the area in DIAC responsible for preparing waiver submissions for Finance. This practice should be followed in all cases. All such cases should be dealt with in a consistent, appropriate and timely manner. DIAC should ensure that it has appropriate mechanisms in place, including clear instructions to all staff, to identify all cases and take the necessary action to have debts waived. The person's record should also be amended or flagged to ensure they are not prevented from re-entering Australia at a later time because of a detention debt that should not have been raised.

## Timeliness—preparing a submission to Finance

2.19 Information provided by DIAC shows that the time taken to prepare straightforward waiver submissions for Finance is generally reasonable. There were nevertheless some exceptions. Many submissions are prepared by DIAC within one

<sup>19</sup> These reports are available on the Commonwealth Ombudsman's website [www.ombudsman.gov.au](http://www.ombudsman.gov.au) including report numbers 04|2006, 06|2006, 07|2006, 08|2006, 07|2007, 08|2007, 09|2007 and 10|2007.

<sup>20</sup> *Chan Ta Srey v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 134 FCR 308; [2003] FCA 1292 (12 November 2003) (*Srey*).

<sup>21</sup> *Uddin v Minister for Immigration* [2005] FMCA 841 (7 June 2005) (*Uddin*).

<sup>22</sup> *Vean of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 204 ALR 80, [2003] FCAFC 311 (23 December 2003) (*Vean*).

to two months, while some cases can take up to 18 months to send to Finance for consideration.

2.20 Finance generally deals with debt waiver requests in a timely manner: in the period in question the majority were processed within one month. In more complex cases, such as those involving litigation, Finance may take longer. People were not always kept adequately informed about the progress of their matter.

2.21 According to information provided by DIAC, in the period 1 July 2006 to 30 September 2007, DIAC received 116 debt waiver requests. Following is a general description of this case load:

- nineteen requests were sent to Finance; of these, nine were approved (in three cases the Minister intervened to support the debt waiver), three were rejected and seven were still being considered
- three waiver requests were withdrawn by the applicant
- twenty-eight requests were written off by DIAC and not sent for waiver consideration
- three requests were from unlawful non-citizens who could not be located
- the remaining requests had not been finalised by DIAC as these were not considered priority cases
- four waiver requests had not been finalised by DIAC within 12 months.

2.22 Delays in processing debt waiver requests could be due to a number of reasons, including:

- time taken to correspond with the person to obtain financial details to support their claim of financial hardship
- difficulties faced by DIAC or Finance in locating and making contact with the person, who may have changed address
- time taken by DIAC to locate case files from various locations in order to complete a submission to Finance
- DIAC was jointly assessing a compensation claim and a debt waiver request.

2.23 The delay could be avoided in many cases. There is scope for DIAC to improve the time it takes to prepare waiver requests and to communicate with people about progress in their case. The following two case studies relating to delay in processing waiver requests provide examples.

***Case study: Delay in processing waiver requests (1)***

Mr B complained to the Ombudsman's office that DIAC had failed to prepare a submission to Finance to waive his family's detention debt. Following investigation by our office, the complaint was resolved with DIAC agreeing to submit a waiver request to Finance.

Six months later Mr B again complained to the Ombudsman's office that there had been no progress in his case. As well as the financial burden this imposed on him, the debt impeded his application for permanent residence in Australia. After contact from the Ombudsman's office, DIAC sent the waiver submission to Finance within a week.

**Case study: Delay in processing waiver requests (2)**

In August 2006 Mr C complained to the Ombudsman's office about delay in DIAC submitting a debt waiver request concerning his wife to Finance. Mr C had thought the matter was referred to Finance five months earlier. He said the delay was impeding processing of his wife's visa application.

Following enquiries by the Ombudsman's office, the waiver submission was provided to Finance five days later. The debt waiver was approved later that month and Mrs C's visa application was then approved.

2.24 In both those cases it is possible that a complaint to the Ombudsman could have been avoided had the person been kept properly informed of progress in their case. DIAC advised that in cases of substantial delay it does sometimes contact a person to provide an explanation. The following is an example of a letter, dated January 2007, in a case examined by the Ombudsman's office:

Debt waiver requests are assessed in the order in which they are received. The time taken to thoroughly assess a claim may be quite lengthy. You will be advised of the Finance Minister's decision once it is determined. Please note that the delay in processing your debt waiver request does not restrict you from lodging further visa applications to travel to Australia. However depending on the type of visa application you lodge, a visa may not be granted to you if you have an outstanding debt to the Commonwealth unless the Minister is satisfied that appropriate arrangements have been made for payment.

2.25 A letter of advice in those terms can be helpful, but DIAC should consider the further option of introducing timeliness standards and points at which a person will be given an update on the status of their matter. Specific information of this kind might reassure a person that their request has not drifted or been overlooked.

2.26 DIAC advised our office that it processes debt waiver requests in the order they are received, unless there are exceptional circumstances to vary that process. Cases are expedited where it is clear there is a moral obligation on the Australian government to waive a debt that is impeding a person's ability to remain in or return to Australia. It is possible that prioritisation should have occurred in the two case studies above, where a person's permanent visa application was affected by a debt.

2.27 DIAC advised that a matter may be expedited where the Immigration Minister has intervened in a case, granted a permanent visa and recommended that a debt waiver submission be sent to Finance. In these cases, DIAC does not generally notify the person of the waiver submission unless and until it is approved by Finance. A person is notified if the outcome of a debt waiver decision could materially affect their current situation, such as a visa application being affected by PIC 4004.

2.28 It is preferable that a person is notified that a submission has been sent to Finance, following a recommendation by the Minister. It is important in principle that a person is kept fully informed about the handling of their case. There can also be practical consequences. For example, the person may be saved the task of unnecessarily preparing and submitting their own debt waiver request to Finance, or of unnecessarily commencing repayments on their debt.

## Timeliness—length of detention

2.29 It is DIAC policy that a compliance officer must review a person's circumstances and resolve issues about their identity and immigration status as soon as possible.<sup>23</sup> The length of time spent by a person in detention will determine the amount of their detention debt. A delay in obtaining information about a person's identity or immigration status could unfairly increase their detention debt.<sup>24</sup> This is illustrated in the *Delay in resolving detention increases detention debt* case study.

### **Case study: Delay in resolving detention increases detention debt**

Ms D was detained in December 2006. There was a delay in DIAC obtaining her travel documents. Ms D believed this was because DIAC would not let her obtain them herself. She complained to the Ombudsman's office that she should not have to pay a debt to the Australian government for her time in detention when apparently no progress was being made on her case for a significant period—51 days in total.

The investigation showed that Ms D's travel documents could have been obtained sooner had she provided all the necessary information to her case officer. DIAC was not solely responsible for the delay in her case. It nevertheless highlighted the vulnerability of a person in detention to a delay that is beyond their control and the consequential impact on the size of the detention debt.

2.30 Delay in resolving a person's immigration status and detention has also been raised in reports prepared by the Ombudsman under s 486O of the Migration Act, concerning people in detention for two years or more. Delay can arise from causes that are not directly under DIAC's control, such as obtaining travel documents from another country to facilitate a person's removal from Australia, a person's unwillingness to cooperate, or a person instituting proceedings for tribunal or judicial review of an adverse decision. There is nevertheless an onus on DIAC to ensure that it takes prompt action to resolve a person's detention, and to keep cases under constant review. Additionally, as the case study *Tribunal review proceedings led to increased detention debt* highlights, the information provided to a person during detention is important and needs to be communicated in a form they can understand (such as through an interpreter).

### **Case study: Tribunal review proceedings led to increased detention debt**

Mr E complained to the Ombudsman's office regarding difficulties his wife (Ms F) was having with her visa application due to a detention debt. She had been detained while she awaited the outcome of an appeal to the Administrative Appeals Tribunal (AAT) in 2002. According to Mr E, had his wife been advised that she could depart Australia and still pursue her appeal in the AAT she may have done so and avoided detention and a debt.

The Ombudsman's investigation suggested that DIAC did advise Ms F of the circumstances and consequences of her detention, and she was provided with options within days of her detention. It was not clear whether she was advised that she could pursue her appeal to the AAT offshore or if the information was provided in a manner that she clearly understood.

<sup>23</sup> MSI 411 *Establishing immigration status—in the field and in detention*, at paragraph 11.1.

<sup>24</sup> See MSI 409 *Establishing identity—in the field and in detention*.



## Notification of a debt on the Movement Alert List

2.31 The Ombudsman's investigation did not examine in detail DIAC's recording of debt information on MAL, though some concerns were identified in relation to recording practices and updating of MAL records.

2.32 DIAC's policy states that:

... after the debt payment requirements of *Public Interest Criterion 4004* of Schedule 4 have been met, decision makers should without delay instruct the MAL Manager to remove the person from MAL, if appropriate, or to amend the record to indicate that the debt has been repaid, or an arrangement has been made to repay, allowing the visa to be granted.

2.33 Two internal DIAC audit reports<sup>25</sup> identified the following concerns:

- MAL entries had not been updated for the raising of a debt
- MAL entries had not been updated for the part payment of a debt or change in debt amount
- MAL entries had not been updated for the full payment of a debt
- there were delays between a person's debt being paid and the MAL record being amended to reflect this.

2.34 One DIAC report stated that 'these occurrences represent a significant risk to DIAC as it may result in a visa being granted to a person with a current debt to the Australian Government, or a person denied access to a visa for having a debt when it has already been extinguished'. DIAC's response at that time was that an examination of the roles and responsibilities for MAL entries would be undertaken.

2.35 Similar concerns were identified during our investigation. DIAC advised that if an officer is processing a visa application and identifies the PIC 4004 alert on MAL, the officer will phone the appropriate section to ascertain whether a payment plan has been entered into and whether PIC 4004 has been satisfied. This practice is not consistent with DIAC's policy on this issue, which states that the MAL record should be amended without delay to indicate that an arrangement has been made to repay the debt.<sup>26</sup>

2.36 DIAC should review its practices and procedures relating to the entry of debt alerts on MAL, to ensure consistency and policy compliance. Ideally, the MAL should be updated when a person enters into a payment arrangement, when a waiver of the debt is being considered, or when the debt is written off. This would ensure that DIAC officers both onshore and offshore are aware of the most up-to-date status of a person's debt. If MAL is going to be used to record the existence of a debt, the information it contains needs to be the most accurate and current information available. Further, DIAC should ensure that its other systems which record debt information are also updated with this type of information.

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<sup>25</sup> Onshore Assurance Reviews: Perth, Melbourne, Dandenong, Hobart, Cairns, Brisbane, Adelaide, Sydney and Parramatta; August 2005, paragraph 3.7.1 and 2005-06: Offshore Assurance Review: Financial Compliance in State and Territory Offices; May 2006, paragraph 3.6.

<sup>26</sup> MSI 377: *Visa applicants with debts to the Commonwealth*, paragraph 3.6.

2.37 DIAC indicated that these MAL processes had been improved since the two internal audit reports and updating MAL was no longer an ongoing issue. Regardless, these issues highlight the importance of DIAC ensuring that MAL entries are updated in a timely manner when the MAL alert relating to a detention debt is first raised, when there is activity in relation to the debt, and when the alert is no longer applicable to an individual.

## PART 3—DIAC'S MANAGEMENT OF DEBT WRITE-OFF

3.1 Our investigation found scope for improvement in DIAC's practices in debt write-off, in the following areas:

- DIAC does not advise people of the circumstances in which detention debts may be written off or that this is an option open to DIAC for consideration
- DIAC does not inform persons when a debt has been written off unless responding to a request for a waiver
- DIAC decides not to process a person's waiver request and instead writes the debt off, the person is not provided with adequate information to explain the difference.

### Decision to write off a detention debt

3.2 Unless there are equity or financial hardship concerns or a debtor's visa status is affected by a debt, DIAC will generally not submit a request for waiver to Finance. In all other circumstances DIAC will generally pursue the debt unless there is little prospect that the debt could be recovered in the foreseeable future or DIAC policy requires write off to be considered. Debts that are considered unrecoverable or uneconomic to pursue are written off.

3.3 Some detention debts are also routinely written off. For example, detainees who are subsequently granted a protection visa (PV) or a temporary protection visa (TPV) have their debt written off. The policy is that a detainee who is released from immigration detention on a PV or a TPV will not be issued with a tax invoice for the detention debt, which is not pursued while the PV or TPV remains valid. The *Notice of detention debt sent by DIAC in error* case study below provides an example of where this did not occur and highlights the importance of DIAC ensuring that its practices are consistent.

#### **Case study: Notice of detention debt sent by DIAC in error**

In August 2006 a complaint was made to the Ombudsman's office on behalf of Mr H who had a debt of over \$70,000. It was claimed that a tax invoice was sent to Mr H by DIAC, he was given 30 days to pay the debt in full and no information was provided about the option to pay off the debt by instalments. Mr H was upset about receiving this request as he claimed to have no means to pay the debt.

Enquiries with DIAC revealed that Mr H had been given a temporary protection visa and the tax invoice had been sent to him in error. DIAC stated that the debt had been written off and would not be pursued according to their guidelines.

3.4 The case of Mr H and others investigated by the Ombudsman's office raised a separate issue about the level of detail provided in tax invoices. Mr H had spent time in three different immigration detention centres and the tax invoice showed the total detention debt from the three centres as being accrued only at the Baxter Immigration Detention Centre. Ideally, an itemised tax invoice should be supplied to the person so they can check the calculation of the detention costs for time spent at each detention centre.

3.5 Finance advised that it does not need to see the details of cases where DIAC has decided that a detention debt waiver request is more appropriately written off. It was stated that a claimant who is unhappy with the outcome can again seek a waiver of the debt by applying directly to Finance or via DIAC. However, the main concern is

that many people who apply for a debt waiver may be unaware that their request has not been sent to Finance for consideration and unaware that DIAC has instead written off their debt. This information needs to be provided to a person so they are fully informed of their rights and options. DIAC advised that it would normally discuss these issues with the person directly. It is important that this process includes explaining the difference between debt waiver and write-off.

## Information provided by DIAC about a debt write-off

3.6 Complaints received by the Ombudsman's office and information obtained during this investigation showed that DIAC does not provide clients with sufficient information about write off decisions. The *Insufficient information about process and decision* case study below provides an example of a person applying for a debt waiver and not being informed that a debt was written off some years earlier.

### **Case study: Insufficient information about process and decision**

In September 2006, Mr J (a migration agent) wrote to DIAC on behalf of Mr K and his spouse Ms L requesting that their immigration detention debts totalling \$246,000 be waived. In July 2007 Mr J complained to the Ombudsman's office that Mr K's debt of \$126,000 was impeding his application for a permanent spouse visa and that neither his nor Ms L's debt waiver requests had been decided.

In September 2007 the Ombudsman's office wrote to DIAC requesting information. DIAC responded that there had been seven communications with Mr J between October 2006, when the request was acknowledged, and October 2007 when Mr J was informed that a submission had been sent to Finance in September 2007. DIAC's response to the Ombudsman's office also advised that Ms L's debt had been written off some years earlier and would not be sent for waiver consideration.

This information had not been communicated to Mr J, Mr K or Ms L during the process.

3.7 DIAC advised that if a detention debt is written off without any request from the person (for example, because the person has been granted a PV or TPV), there is no formal notification to the person that this has occurred. Nor does DIAC explain to the person the current status of their debt or that the debt could be pursued in future if the person's financial circumstances or visa status were to change. This lack of notification has caused some distress and confusion to people as evidenced in several complaints to the Ombudsman's office. It is recognised, however, that there are many write off decisions where it would not be practicable for DIAC to provide notification to the person. This could include those people who are offshore with no contact details available, illegal foreign fisherman who have been temporarily detained and removed within a short time frame and other people in the Australian community where no contact details are available.

3.8 In the case of Ms L (in the *Insufficient information about process and decision* case study), her request for a debt waiver remained unactioned for many months. This led to several unsuccessful requests for information by Ms L's representative and an eventual complaint to the Ombudsman's office.

3.9 Even when DIAC notifies a person that a debt has been written off, the information given tends to be incomplete or misleading. The letter set out on page 18 from August 2007, advising that a debt of \$101,678 has been written off, could convey the misleading impression that the debt was extinguished. The person may be surprised to learn that the debt still exists and can be pursued at a later date, for example, if the person's financial circumstances improve and they could pay off the debt by instalments.

Dear Mr X

Thank you for your letter dated X October 2006 requesting waiver of your debt to the Commonwealth consisting of immigration detention costs.

As the Minister granted you a Humanitarian (subclass XB202) Visa on X July 2007, departmental policy stipulates that **the costs of detention owed by you will not be pursued.**

Your detention debt has therefore been written off in accordance with section 47 of the Financial Management and Accountability Act. Departmental records have been updated accordingly.

Yours sincerely

Ms Y  
DIAC

3.10 Ideally, the letter should provide information about the difference between a debt being waived or written off and any options open to the person if they do not agree with the debt being written off rather than waived.

3.11 Where a detention debt is written off, DIAC should, in appropriate cases, explain to the person why it was decided not to submit a waiver request to Finance. The letter should give reasons to explain that DIAC decided the debt was more appropriately written off. The reason should be documented in DIAC's record-keeping systems. The letter should further explain that writing off a debt does not extinguish the debt and that it could be reinstated and pursued at a later date if the person's financial or other circumstances improve. The letter could also state that if the person disagrees with the decision they could apply directly to Finance for consideration of a waiver of the debt.

## PART 4—CONCLUSION AND RECOMMENDATIONS

4.1 Overall the Ombudsman’s investigation found that DIAC is administering debt waiver and write-off according to the legislative and policy requirements.

Nevertheless, the investigation found scope for improvement. DIAC can improve the information it provides to people, timeliness and prioritisation in processing cases, and the consistency and reasonableness of decisions on debt waiver and write-off.

4.2 The following recommendations are aimed at addressing these issues and ensuring that DIAC manages debt waiver requests and write-off procedures consistently, fairly and reasonably.

### Recommendation 1

DIAC should alter its policy and practices on the management of debt waiver requests, to include the following:

- regardless of the person’s immigration status, every request for waiver of a debt submitted to DIAC is notified to Finance, even if DIAC has decided to write off the debt
- timeliness standards are introduced to prevent unnecessary delay and to ensure people are advised at regular and appropriate intervals of progress in their case
- when a person is notified of their immigration detention debt, that complete and accurate information is provided about their debt, including repayment options such as payment by instalment, DIAC contact details if the person has concerns and information about the person’s rights or options including what they can do if they are experiencing difficulty paying their debt
- individual cases are prioritised to ensure matters are progressed in accordance with a person’s circumstances.

### Recommendation 2

DIAC should alter its policy and practices on the management of debt write-off, to include the following:

- in appropriate cases, notification of the write-off decision is given to the person
- the notification letter should fully explain the decision, that this does not extinguish the debt for all time, and provide options open to the person to seek waiver of the debt
- in appropriate cases, DIAC considers the option of writing off a debt, when a submission on debt waiver is being prepared for consideration by Finance.

### Recommendation 3

Where a person is in detention awaiting removal from Australia, DIAC should review the circumstances of the person’s detention to assess whether factors beyond their control led to a delay in resolving their detention, which should result in a reduction in their detention debt.

**Recommendation 4**

The 'Notice of Detention Costs Incurred to this Date' should be provided to people in detention at regular intervals during their detention.

**Recommendation 5**

Information on the Movement Alert List (MAL) and other relevant DIAC systems should be updated in a timely manner and in the following circumstances:

- when a payment plan has been entered into
- when a debt is subject to waiver consideration
- when the debt has been written off by DIAC
- when Finance decides to waive a debt.

MAL should notify DIAC officers to contact the relevant section in DIAC to ascertain up-to-date information about the status of a debt prior to a visa decision being made.

**Recommendation 6**

DIAC should review its policy and practices to ensure debt waiver is considered where a person is or was released from detention as 'not unlawful'.

## DIAC'S RESPONSE

### Recommendation 1

- **Notify Finance of every waiver request**

***Response—Agree***

The Department already complies with this recommendation as the Department of Finance is currently advised of all requests for waiver by way of a submission.

- **Timeliness standards**

***Response—Agree***

This will be addressed by DIAC in the context of overall improvements to the debt management function.

- **Notification of immigration detention debt**

***Response—Agree***

The notification letter to the client will incorporate comprehensive and clear information relating to payment options and will include departmental contact details should the client want additional information including what can be done if they are experiencing financial hardship.

- **Prioritise individual cases**

***Response—Agree***

The Department will investigate a prioritisation system which provides consistency and equity across all clients' requests.

### Recommendation 2

- **Alter policy and practices, notification of the write-off decision**

***Response—Agree***

DIAC will ensure that the letter advising of write off clearly states that the debt may be pursued at a later date if there is a change to the client's financial circumstances. DIAC will provide clients with clear and comprehensive advice about the options available to them.

- **Consider option of writing off a debt**

***Response—Agree***

DIAC will investigate whether it is possible to consider write off in parallel with a submission to waive given that the criteria are quite different.

### Recommendation 3

***Response—Agree in principle***

DIAC will assess the range of triggers that may cause a person in immigration detention awaiting removal to be held in detention for reasons beyond their control (for example, a foreign government refusing to issue travel documents) and will



review the policy and how the policies could be implemented in these specific instances.

## **Recommendation 4**

### ***Response—Agree in principle***

DIAC will consider the development of an efficient method of providing periodic advice to the client, subject to the detainee's individual circumstances. Consideration will also be given to alternative strategies other than an official invoice to remind people in immigration detention of the debt, given the low recovery rate. There is an apparent inconsistency between relevant MSIs (234 and 396) and, depending on the outcome of the above review, these will be updated and the appropriate amendments made.

## **Recommendation 5**

### ***Response—Agree in principle***

DIAC will ensure that its officers have access to up-to-date information about the status of clients' debts and that its officers are provided with clear instructions on how and when to update relevant systems on the status of clients' debts.

It would be preferable and of greater assistance to decision makers if ICSE rather than MAL was updated regarding the status of debt write-off or waiver consideration.

## **Recommendation 6**

### ***Response—Agree***

This is the current process.

## ATTACHMENT A—ACRONYMS AND ABBREVIATIONS

AAT	Administrative Appeals Tribunal
BV	Bridging visa
DIAC	Department of Immigration and Citizenship
Finance	Department of Finance and Deregulation
FMA Act	<i>Financial Management and Accountability Act 1997</i>
MAL	Movement Alert List
Migration Act	<i>Migration Act 1958</i>
MSI	Migration Series Instruction
PIC	Public Interest Criterion
PV	Protection visa
Regulations	Migration Regulations 1994
TPV	Temporary protection visa