



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
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Management response to the
findings of:

Independent Review of Immigration New Zealand's Residence Deportation Liability processes

**SERVICE DESIGN AND PERFORMANCE BRANCH
MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT**

NEW ZEALAND

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1.0 Background

In November 2018, the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE), Carolyn Tremain, commissioned Mike Heron QC to carry out an independent review of the process by which INZ compiles and presents a file to decision makers who make residence deportation decisions. Specifically the independent review was to examine whether the process for preparation of a residence deportation case file, which contains the information provided to decision makers, is fit-for-purpose for decision making and to identify whether process improvements could be made.

The review was initiated in response to the Minister of Immigration making a decision in September 2018 to cancel the deportation liability of Karel Sroubek (also known as Jan Antolik) following consideration of the information contained in a case file prepared by Immigration New Zealand (INZ), which is part of MBIE.

The review has provided an opportunity for MBIE to review the current process for presenting cases to the Minister and other Delegated Decision Makers (DDMs) which has been in place for a number of years and, while it has not materially changed, regular refinements have been made to the process.

1.1 Objectives of the independent review

The objectives of the independent review were to assess a statistically representative sample of case file information with regard to:

1. Considering how case files are prepared, what information is included (at the point in time in which the decision is being made), and how information is presented to decision makers; and
2. Determining whether residence deportation case file information provided to decision makers (whether the Minister of Immigration or DDMs) is sufficient to allow decisions to be made, noting any applicable restrictions that may be required, such as the provisions and principles of natural justice, and subsequent grounds of appeal and review.

1.2 Scope

The scope of the independent review covered the processes and practices undertaken for case file preparation, to enable a decision-maker to consider exercising discretion over the deportation of a resident.

The scope of this review excluded:

- Examining the quality or robustness of the decision made by a decision maker.

- Other types of cases (non-resident deportation liability cases) or the broader work of the Resolutions Team.
- Case files prepared for decisions before 1 October 2016 or post 31 October 2018.

1.3 Key findings

The reviewer found that he is ‘... generally of the view that INZ’s processes are robust and consistent with their legislative and Ministerial mandate.’ These findings mean that the public can have confidence in the INZ Resolution function’s processes and procedures for the preparation and presentation of residence deportation liability files for decision makers.

Specifically, the reviewer found that:

- the processes and operational practices employed by INZ are generally sound (in the current settings),
- INZ’s staff, and its Resolutions team, are well placed to consider and appropriately decide issues regarding residence deportation liability,
- INZ collects the information necessary to enable decision-makers to make informed decisions, and
- INZ presents that information to decision-makers appropriately and professionally.

While the reviewer found there is scope for additional decision-making powers to be delegated by the Minister to DDMs, and for Resolutions to conduct further investigation in certain instances, he generally viewed INZ’s processes as robust and consistent with their legislative and Ministerial mandate.

However, a number of recommendations for policy and operational change were made. A summary of the recommendations for strengthening those processes are as follows:

- i. **Recommendation One:** Where a decision is to be made by the Minister (rather than a DDM) which has factual or legal complexities, or is unusual or novel, the Minister should request and receive advice from INZ (as and when the Minister considers necessary). INZ should consider and develop further guidance for the Minister on the types of cases warranting specific advice from officials.
- ii. **Recommendation Two:** INZ’s Resolutions team should have capability for a limited inquiry function that will enable it to check or corroborate the veracity of information provided to INZ if this is considered necessary by the decision-maker.
- iii. **Recommendation Three:** A simplified, two-stage process could be applied to criminal cases where the relevant offence is relatively minor

(for example a first driving offence without any other impact). A potential process is detailed in Appendix B of the Report. Given Parliament has created “automatic” grounds for liability, before such a process was adopted, it is recommended that the Minister review existing policy settings to ensure that they are fit for purpose.

- iv. **Recommendation Four:** Consideration should be given to shifting the DDM process in automatic liability cases (involving more serious offending) to after the IPT appeal option has been exercised (or lapsed). It is acknowledged that any such change would be subject to policy and resourcing considerations of INZ, the IPT and the Ministry of Justice.
- v. **Recommendation Five:** Other process changes could be made, including sending copies of relevant evidence to a client who faces deportation, obtaining a final Summary of Facts in relation to all criminal cases, and streamlining certain administrative processes (noted in the discussion below).

The reviewer also makes further recommendations relating to the choice of decision-maker and whether the process would benefit from greater delegation from the Minister to DDMs.

Key reviewer points and detailed recommendations are set out below (in the order in which they appear in the report), followed by the management response from INZ. The management response outlines the actions to be taken.

A summary of the recommendations and the responses from INZ are outlined in Appendix 1.

2.0 Key Issues and Recommendations

The reviewer identified five aspects for strengthening existing processes. In addition, the reviewer made further recommendations relating to the choice of decision maker, and whether the process would benefit from greater delegation from the Minister to DDMs.

2.1 Advice from officials

The reviewer concluded that advice or recommendations should not be given to DDMs in most cases, but should be considered for complex or unusual cases that are to be decided by the Minister.

In the case of DDMs, advice would normally be redundant. However, it could be requested if the DDM considered that advice was required.

In respect of cases to be considered by the Minister, the reviewer suggested that the arguments are stronger for having advice or recommendations. He noted the risk that the Minister's absolute discretion may be eroded by such a practice and that it creates judicial review susceptibility, but was not convinced that this concern (and issues around natural justice) should prevent such a practice in complex or unusual cases where the Minister is asked to make what will inevitably be a difficult decision.

Recommendations:

"Where a decision is to be made by the Minister (rather than a DDM) which has factual or legal complexities, or is unusual or novel, the Minister should request and receive advice from INZ officials (as and when the Minister considers necessary).

INZ should consider and develop further guidance for the Minister on the types of cases warranting specific advice from officials."

Management response:

We agree with the recommendation to provide the Minister with advice, upon the request of the Minister.

Ministers currently have the ability to request further information and / or advice. This is being positively used (as mentioned in the review) and more assistance is being provided.

INZ will also work with the Minister to determine how it could provide further guidance, including advising the Minister that he can seek advice as required when considering such cases.

2.2 Limited inquiry function for Resolutions

In the main, the reviewer suggested that the process should not be inquisitorial or investigative. He went further to say that the system relies on the client to provide the relevant information and notes that it is an offence to provide information that is not truthful or misleading (section 342 of the Act). The burden on INZ if every case required an investigation of all potentially relevant material would be far too great and would directly contradict section 11 in the case of consideration of suspension and cancellation. If policy and operational changes proposed by the reviewer relating to who the decision maker is were implemented (as well as when in the process cases would be considered by a decision maker), then there would be limited need for investigation of issues raised given the sequencing and personnel involved.

In the current system, however, the reviewer indicated that there should be some capability and resource to conduct reasonable inquiries, particularly into issues directly relevant to liability or which could reasonably impact on suspension or cancellation of

liability, and that ideally these issues would be identified and directed by the decision-maker (preferably a DDM but, if not, the Minister). He concluded that they should include situations where complex cases contain claims that are relevant to liability i.e. they could reasonably result in the decision-maker suspending or cancelling liability.

Recommendations:

“INZ’s Resolutions team should have capability for a limited inquiry function that will enable it to check or corroborate the veracity of information provided to INZ as and when this is considered necessary by the decision maker.”

Management response:

We agree with this recommendation.

There are currently inquiry functions (Country Research Unit and the Risk and Verification team) in INZ which may be able to support the Resolutions team by providing a limited inquiry function when this is requested by the decision maker. INZ would need to work through the implications for resourcing and timeliness of decision making.

2.3 Two stage process for minor criminal cases

The reviewer noted that first driving offences are invariably dealt with by the DDMs cancelling or suspending deportation liability. If that practice remains, then the reviewer proposes that INZ could consider adopting a streamlined process for establishing and considering liability in such cases.

The reviewer proposed a two stage process:

Stage One

The Resolutions Analyst (RA) produces a First Offence Driving Liability Assessment, which is given to a DDM. At this point the DDM could cancel or suspend liability (but not confirm it). Although it could be argued that suspending liability at this stage would breach a client’s right to natural justice (on the basis that the client has not been given the right to be heard) nothing presented to the DDM is open to interpretation; it is a summary of established facts. For that reason, there is nothing to be debated by the client and so no benefit would arise from having the opportunity to be heard. Presuming identification is established, the client’s liability for deportation is automatic. At the first stage, the DDM is only considering whether enough factors exist to offset the client’s liability. The DDM would not confirm a client’s deportation liability at this first stage.

Stage Two

If the DDM believes he or she does not have enough information, or believes the client may be at risk of deportation, the DDM should instruct the RA to prepare a full version of the case file (the current process), so that deportation can be fully considered in the round (at which point the client would be given an express right to comment).

The reviewer concludes that this two staged approach would allow seemingly predictable cases to be dealt with efficiently, while maintaining the rights of those affected.

Recommendations:

“A simplified, two-stage process could be applied to criminal cases where the relevant offence is relatively minor (a first driving offence without any other impact, for example). That process is detailed in Appendix B [of the Independent Review report]. Given Parliament has created “automatic” grounds for liability, before such a process was adopted, it is recommended that the Minister review existing policy settings to ensure that they are fit for purpose.”

Management response:

INZ welcomes any feedback to streamline our processes. We agree with looking at a simplified process for first time driving offences and will be looking from a process perspective at how this may be simplified by 30 June 2020. INZ is also considering strengthening the messages provided to approved migrants about the consequences, particularly in respect of deportation liability, of breaking the law.

Whether to change the threshold is a policy matter that would require legislative change. The Minister of Immigration has agreed that a policy review of the framework for the exercise of ministerial discretion take place in 2020. The Independent Review report will provide a useful resource for that review, noting that at this stage decisions have not been made about the scope of the review. We have, therefore, noted this part of the recommendation for consideration as part of the scope of the review.

2.4 Shifting the DDM process in automatic liability cases

The reviewer proposed that automatic liability cases involving non-minor offending could go direct to an Immigration and Protection Tribunal (IPT) appeal (if any) and then once that appeal had been exercised or lapsed, the DDMs could consider cases arising from that process. The reviewer noted that, subject to resourcing issues, this would seem to be the sequence envisaged by the Act and more logical given the IPT’s inquisitorial and adjudicative function. The reviewer concluded that the cases dealt with by DDMs would inevitably be reduced in number and likely to be more complex. Further consideration would need to be given to the resourcing implications for the IPT (noting that this would impact on the Ministry of Justice, as responsible agency for the IPT, as well as MBIE).

Recommendations:

“Consideration be given to shifting the DDM process in automatic liability cases (involving more serious offending) to after the IPT appeal option has been exercised (or lapsed). It is acknowledged that any such change would be subject to policy and resourcing considerations of INZ, the IPT and the Ministry of Justice.”

Management response:

This recommendation has implications which are broader than MBIE, as it requires policy analysis which will necessitate consultation with the Ministry of Justice. In particular the recommendation would have resourcing implications for the IPT. We have therefore noted this recommendation for consideration as part of the scope of the planned policy review in 2020.

2.5 Other process changes

The reviewer noted six administrative process changes that could be made. These are discussed in turn below.

2.5.1 Evidence sent to client with PPI letter and questionnaire

The reviewer noted that evidence that is central to establishing the prima facie liability of a client in a non-criminal case is not currently sent to the client with the Potentially Prejudicial Information (PPI) letter and questionnaire. The reviewer concluded that this information could be included with the PPI letter and questionnaire.

Management response:

We agree with this recommendation. We would, however, need to redact any sensitive / private information relating to other parties when providing this information to the client. We also note that PPI letters may be sent digitally which would reduce the risk of other people opening mail sent via the postal system.

2.5.2 Final Summary of Facts from NZ Police or Corrections

During the course of the review, the reviewer was advised INZ is not certain that it receives the final Summary of Facts from the Police or Corrections. Therefore, currently the decision-maker may be considering a Summary that the client did not plead guilty to. The reviewer concluded that this process could be improved by either confirmation from the Police or Corrections, or confirmation as part of the PPI that the Summary was final. The reviewer did however note that this is not an issue caused by INZ, rather it is a problem that INZ has to endure. Additionally, he goes on to state that a Summary is only relevant to the extent that it is accepted or proven, it ought not to be (and is not) treated as establishing deportation liability; it is the conviction that is most relevant.

Management response:

We accept the intent of this recommendation and will undertake work with the Courts to determine the most effective course of action.

2.5.3 Timeframes for completion of criminal and non-criminal files

The reviewer concluded that timeframes for the completion of criminal and non-criminal files could be revised to reflect that each case is unique. He notes that the straightforward nature of some criminal cases should be considered, as should the fact that some non-criminal cases are relatively complex.

Management response:

We agree with this recommendation. Given recommendation 2.1 above, we would expect a shorter timeframe for the criminal process and longer timeframes for non-criminal or complex cases, especially when INZ is asked to verify information by the decision maker.

2.5.4 SOP to include a section on how to prepare a preliminary assessment for a non-criminal file

The reviewer determined that INZ should augment the current Standard Operating Procedures (SOP) to include a section on how to prepare a preliminary assessment for a non-criminal file.

Management response:

We agree with this recommendation. Instructions will be added to the SOP on how to assess if there is a case and how to prepare a PPI. In addition, instruction on how to prepare a preliminary assessment is already provided in the induction training for a Resolutions Analyst (RA). Preliminary assessments are assessed by the Technical Specialist (TS), who provides ongoing feedback and training, as required, for the RA.

2.5.5 Formal evidential threshold be adopted for non-criminal cases

The reviewer recommends that a formal evidential threshold should be established for determining whether a non-criminal file should proceed after a preliminary assessment is completed.

Management response:

We agree with the substance of this recommendation. We can confirm that the Resolutions team already uses the balance of probabilities test as a formal evidential threshold. We will develop a more formal framework to document this.

2.5.6 Four precedent letters

The reviewer concluded that when presenting a file to a decision maker, a substitute for the four separate precedent letters should be found to streamline the documentation. He suggested that the Deportation Liability Statement (DLS) could include for noting by the decision-maker, the relevant decisions, for example:

- a) Deportation should proceed;
- b) Deportation liability should be cancelled;
- c) Deportation liability should be suspended for ____ years;
- d) No determination will be made until _____.

Management response:

We agree with the intent of the recommendation to be as streamlined as possible. This process will be reviewed with decision makers to ensure it is efficient and meets their needs.

2.6 Greater delegation from the Minister to DDMs

The reviewer is of the view that dedicated decision-makers, expert in the immigration area, are better placed to make decisions on complex and unusual cases in the first instance. He states that the exercise of the discretionary power to suspend or cancel deportation liability should be delegated to DDMs in all but the most sensitive cases, with the Minister maintaining the ability to intervene (as the statute provides) as a last resort. He recommends the Minister choose to remain uninvolved in the process until after the conclusion of any appeal to the IPT.

He also proposes that in non-criminal cases, the decision as to whether a resident is liable for deportation should be made by a DDM, with the next step in the process being an IPT appeal (if any), and only after any appeal has been determined should a DDM or (where necessary) the Minister decide whether to suspend or cancel liability.

This would involve reconfiguring the deportation liability process to delegate greater powers to DDMs. The reviewer propose the following process.

- a) The Minister having a policy of non-involvement until after any IPT appeal and then utilising absolute discretion with the benefit of advice in suitable cases only;
- b) That advice could include reference to other cases as relevant and any specific relevant considerations;
- c) In non-criminal cases, separating the liability determination (by a DDM), allowing any IPT appeal to take place, then having the remaining absolute

- discretion to cancel or suspend exercised by a DDM or the Minister (depending on complexity) if requested; and
- d) Allowing for the verification of facts presented to the Resolutions team in non-criminal cases as directed by the DDM.

Recommendations:

“The exercise of the discretionary power to suspend or cancel deportation liability should be delegated to DDMs in all but the most sensitive cases, with the Minister maintaining the ability to intervene (as the statute provides) as a last resort. It is recommended the Minister choose to remain uninvolved in the process until after the conclusion of any appeal to the IPT.

In non-criminal cases, the decision as to whether a resident is liable for deportation should be made by a DDM, with the next step in the process being an IPT appeal (if any). Only after any appeal has been determined should a DDM or (where necessary) the Minister decide whether to suspend or cancel liability.”

Management response:

This recommendation has implications which are broader than MBIE, as it requires policy analysis which will necessitate consultation with the Ministry of Justice. In particular the recommendation would have resourcing implications for the IPT. We have therefore noted this recommendation for consideration as part of the scope of the planned policy review in 2020, as directed by the Minister.

3.0 Conclusion

The reviewer acknowledged that ‘INZ’s staff, and its Resolutions team, are well placed to consider and appropriately decide issues regarding residence deportation liability. INZ collects the information necessary to enable decision-makers to make informed decisions and presents that information to decision-makers appropriately and professionally ... I am generally of the view that INZ’s processes are robust and consistent with their legislative and Ministerial mandate.’

The reviewer also reiterated that the public can have confidence in the INZ Resolution function’s processes and procedures for the preparation and presentation of residence deportation liability files for decision makers.

4.0 Management’s Overall Response

We agree with the reviewer’s findings and note that action is either already underway within INZ or is planned for the 2019/20 year. We will continue to seek the outcomes aimed for through improvements to the process for both the Minister and migrants

engaging in the process. Where policy / legislative changes are proposed we will work with other government agencies to develop options and advise Ministers.

5.0 Acknowledgements

We would like to acknowledge Mike Heron, QC and his team for undertaking this independent review, and the assistance of the management and staff of INZ and MBIE for their contributions.

Stephen Dunstan (on behalf of INZ)
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Immigration New Zealand
Ministry of Business, Innovation & Employment

Appendix A: Summary of recommendations and the responses from INZ

	Findings	Recommendations	Responses from INZ
2.1	Advice from officials	<p>Where a decision is to be made by the Minister (rather than a DDM) which has factual or legal complexities, the Minister should request and receive advice from INZ officials (as and when the Minister considers necessary).</p> <p>INZ should consider and develop further guidance for the Minister on the types of cases warranting specific advice from officials.</p>	<p>We agree with the recommendation to provide the Minister with advice, upon the request of the Minister. Ministers currently have the ability to request further information and / or advice. This is being positively used (as mentioned in the review) and more assistance is being provided.</p> <p>INZ will also work with the Minister to determine how it could provide further guidance, including advising the Minister in his delegations letter that he can seek advice as required when considering such cases.</p>
2.2	Limited inquiry function for Resolutions	INZ's Resolutions team should have capability for a limited inquiry function that will enable it to check or corroborate the veracity of information provided to INZ as and when this is considered necessary by the decision maker.	We agree with this recommendation. There are currently inquiry functions (Country Research Unit and the Risk and Verification team) in INZ which may be able to support the Resolutions team by providing a limited inquiry function when this is requested by the decision maker. INZ would need to work through the implications for resourcing and timeliness of decision making.
2.3	Two stage process for minor criminal cases	A simplified, two-stage process could be applied to criminal cases where the relevant offence is relatively minor (a first driving offence without any other impact, for example). That process is detailed in Appendix B [of the Independent Review report]. Given Parliament has created "automatic" grounds for liability, before such a process was adopted, it is recommended that the Minister review existing policy settings to ensure that they are fit for purpose.	<p>INZ welcomes any feedback to streamline our processes. We agree with looking at a simplified process for first time driving offences and will be looking from a process perspective at how this may be simplified by 30 June 2020. INZ is also considering strengthening the messages provided to approved migrants about the consequences, particularly in respect of deportation liability, of breaking the law.</p> <p>Whether to change the threshold is a policy matter that would require legislative change. The Minister of Immigration has agreed that a policy review of the framework for the exercise of ministerial discretion take place in 2020. The Independent Review report will provide a useful resource for that review, noting that at this stage decisions have not</p>

			been made about the scope of review. We have, therefore, noted this part of the recommendation for consideration as part of the scope of the review.
2.4	Shifting the DDM process in automatic liability cases	Consideration be given to shifting the DDM process in automatic liability cases (involving more serious offending) to after the IPT appeal option has been exercised (or lapsed). It is acknowledged that any such change would be subject to policy and resourcing considerations of INZ, the IPT and the Ministry of Justice.	This recommendation has implications which are broader than MBIE as it requires policy analysis which will necessitate consultation with the Ministry of Justice. In particular, the recommendation would have resourcing implications for the IPT. We have therefore noted this recommendation for consideration as part of the scope of the planned policy review in 2020.
2.5	Other process changes	Other process changes could be made, including sending copies of relevant evidence to a client who faces deportation, obtaining a final Summary of Facts in relations to all criminal cases, and streamlining certain administration processes.	<p>2.5.1 Evidence sent to client with PPI letter and questionnaire</p> <p>We agree with this recommendation. We would, however, need to redact sensitive / private information from other parties when providing this information to the client. We also note that PPI letters may also be sent digitally which would reduce the risk of other people opening mail sent via the postal system.</p> <p>2.5.2 Final Summary of Facts from NZ Police or Corrections</p> <p>We accept the intent of this recommendation and will undertake work with the Courts to determine the most effective course of action.</p> <p>2.5.3 Timeframes for completion of criminal and non-criminal files</p> <p>We agree with this recommendation. Given recommendation 2.1 above we would expect a shorter timeframe for the criminal process and longer timeframes for non-criminal or complex cases, especially when asked to verify information by the decision maker.</p> <p>2.5.4 SOP to include a section on how to prepare a preliminary assessment for a non-criminal file</p> <p>We agree with this recommendation. Instructions will be added to the</p>

			<p>SOP on how to assess if there is a case and how to prepare a PPI. In addition, instruction on how to prepare a preliminary assessment is already provided in the induction training for a Resolutions Analyst (RA). Preliminary assessments are assessed by the Technical Specialist (TS), who provides ongoing feedback and training, as required, for the RA.</p> <p>2.5.5 Formal evidential threshold be adopted for non-criminal cases</p> <p>We agree with the substance of this recommendation. We can confirm that the Resolutions team already uses the balance of probabilities test as a formal evidential threshold. We will develop a more formal framework to document this.</p> <p>2.5.6 Four precedent letters</p> <p>We agree with the intent of the recommendation to be as streamlined as possible. This process will be reviewed with decision makers to ensure it is efficient and meets their needs.</p>
2.6	Greater delegation from the Minister to DDMs	<p>The exercise of the discretionary power to suspend or cancel deportation liability should be delegated to DDMs in all but the most sensitive cases, with the Minister maintaining the ability to intervene (as the statute provides) as a last resort. It is recommended the Minister choose to remain uninvolved in the process until after the conclusion of any appeal to the IPT.</p> <p>In non-criminal cases, the decision as to whether a resident is liable for deportation should be made by a DDM, with the next step in the process being an IPT appeal (if any). Only after any appeal has been determined should a DDM or (where necessary) the Minister decide whether to suspend or cancel liability.</p>	<p>This recommendation has implications which are broader than MBIE. It requires policy analysis which will necessitate consultation with the Ministry of Justice. In particular, the recommendation would have resourcing implications for the IPT. We have therefore noted this recommendation for consideration as part of the scope of the planned policy review in 2020, as directed by the Minister.</p>

