MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

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

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Final report 25 September 2019

Michael Heron QC

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EXECUTIVE SUMMARY

A. This report was commissioned by the Ministry of Business, Innovation and Employment ("**MBIE**") to consider by way of independent review the process by which Immigration New Zealand ("**INZ**") compiles files for decision-makers who make residence deportation liability decisions.

B. The impetus for this review lies in the controversy that surrounded the cancellation of the deportation liability of Karel Sroubek ("**Sroubek**") by the Minister of Immigration following a review of the case file prepared by INZ. Although Sroubek was liable for deportation under the Immigration Act 2009 ("**Act**"), the Minister exercised absolute discretion to cancel that liability. What followed was a period of intense media and public scrutiny of the case and the process involved.

C. I was instructed by MBIE to complete this review in accordance with the Terms of Reference of 9 November 2018 contained in Appendix A. The review focuses on the processes employed by INZ to prepare a case for the Minister and/or delegated decision-makers who make deportation decisions under the Act, and the question of whether those processes are fit for purpose.

D. The Act gives the Minister the power to determine whether a New Zealand resident who has become liable to be deported under the Act should have that liability cancelled or suspended. In circumstances where the resident has become liable for deportation due to criminal offending, this power is commonly exercised by delegated decision-makers ("**DDMs**") within INZ, under a delegated authority from the Minister. In non-criminal cases or "mixed cases" (like Sroubek), the Minister personally decides whether the person is liable for deportation and whether deportation liability will be suspended or cancelled.

E. Under the terms of the Act the Minister's decision-making power (to suspend or cancel liability) is a matter of absolute discretion. The Minister is not required to consider any particular case or, if he or she does so, to consider any particular factors, make further enquiries, or receive or consider the advice of officials.

F. The Act provides the basis for the exercise of decision-making in relation to deportation liability and its cancellation or suspension. I have considered how INZ sources, collates, analyses, and presents information relevant to decisions under the Act. This involved a desk-top review of information provided to me by MBIE as well as a series of interviews with MBIE personnel. With the assistance of others, I reviewed 30 case files (including the Sroubek file) prepared by INZ.

G. The issue of whether the current processes support fit for purpose decision-making necessarily involves consideration of not only the processes themselves but also who is the relevant decision-maker. That has resulted in my indirect consideration of whether it is sensible to have the Minister involved personally in decisions such as these.

H. From my review I have concluded the processes and operational practices employed by INZ are sound in the current settings. INZ's staff and its Resolutions team are well placed to

consider and appropriately decide issues regarding residence deportation. INZ collects the information necessary to enable decision-makers to make informed decisions and presents that information to decision-makers appropriately and professionally. Although I consider that there is scope for additional decision-making powers to be delegated to DDMs by the Minister and for Resolutions to conduct further inquiries in certain instances, I am generally of the view that INZ's processes are robust and consistent with their legislative and Ministerial mandate.

I. There is, however, room for improvement. On occasion, the current process leaves INZ and the Minister exposed to an unnecessary level of risk. In cases which go to the Minister, the processes are not completely fit for purpose because the Minister is personally involved in decision-making on complex cases without having the benefit of departmental advice or an assurance that the information upon which the Minister might rely is reliable or complete.

J. The focus of this review has been to consider existing processes and whether they are fit for purpose. Recommendations for strengthening those processes are set out in full in Appendix B of this report. To summarise, I recommend:

   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. Given Parliament has created "automatic" grounds for liability, before such a process is 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).

K. Further recommendations are discussed in Appendix B relating to the choice of decision-maker and whether the process would benefit from greater delegation from the Minister to DDMs.

INTRODUCTION & PROCESS

1. In 2003 Karel Sroubek, a national of the Czech Republic, entered New Zealand with a passport in the name of Jan Antolik. In 2008 he gained residence under this alias. In 2011, he was found guilty by a jury of possessing a false passport and supplying false information to INZ. At sentencing, the trial judge discharged him without conviction. In 2014 Sroubek was convicted of being a party to the manufacture of a Class C drug (in 2011). That drug conviction was later quashed on appeal and a retrial was not proceeded with.

2. Sroubek was known to Police in his home country. He was wanted by Czech Police to serve a sentence of 54 months imprisonment in connection with assaults in 1999 and in relation to an incident in 2003 where a person was shot and killed. In his 2011 immigration trial, Sroubek gave a detailed account of his innocent involvement in the shooting incident and the reason he had to flee his home country and come to New Zealand. Sroubek alleged Czech Police were forcing him to make a false statement in relation to the killing of the person and threatening to charge him in relation to the murder if he did not. He refused to do so and thought he would be killed by the Czech Police if he remained or returned there. This appeared to be the reason the trial judge discharged him without conviction.

3. In September 2014, Sroubek assisted in the importation of 4.9 kilograms of MDMA (ecstasy) into New Zealand. After being convicted by a jury, Sroubek was sentenced to five years and nine months imprisonment in June 2016. The drugs had a street value of approximately $375,000.00. Sroubek appealed against his conviction and in December 2017 the Court of Appeal dismissed his appeal. This conviction meant Sroubek was automatically liable for deportation from New Zealand. The previous successful prosecution for use of a false passport and supplying false information to INZ also meant that there was a prima facie case for a finding of deportation liability on the basis of holding a visa in a false identity.

4. The INZ Resolutions team assessed the case and notified Sroubek's lawyer that he was liable for deportation on those grounds. His lawyer provided detailed submissions and information in support of suspension or cancellation of deportation liability. Resolutions prepared Sroubek's file in the conventional manner and detailed the information above in a memorandum for the Minister of Immigration. As was usual, no recommendation or advice was given to the Minister. Any decision as to cancelling or suspending liability was left to his absolute discretion, in accordance with the terms of the Act.

5. The memorandum dated 18 September 2018 (and accompanying file) was taken by hand to the Minister's office. Following a meeting with officials, the Minister cancelled Sroubek's deportation liability on 19 September 2018. The Minister granted Sroubek a residence class visa under section 72(3) of the Act in his true identity (subject to conditions).

6. The publication of this decision by the Sunday Star Times led to intense scrutiny from the New Zealand news media. Since then, the media has published information about Sroubek which was available through a variety of sources, including in the public domain. One aspect was highlighted. Despite his professed fear of returning to the Czech Republic, Sroubek had informed New Zealand Customs and the New Zealand High Court (prior to the discovery of his true identity) that he had in fact returned to the Czech Republic and he intended to do so again. This information may have cast doubt upon the claims which appeared to convince the Minister to cancel liability for deportation.

7. Upon further investigation of Sroubek's case and the confirmation of the convictions in the Czech Republic, the Minister found Sroubek liable for deportation on the basis that he was an excluded person and was granted residence as a result of administrative error.

8. The Terms of this review were finalised on 9 November 2018. The review was to examine "*whether the process for the preparation of a residence deportation case file… is of sufficient process quality to support fit for purpose decision-making*" by the Minister or a delegate.

9. In summary, the Terms asked me to consider:
   a) How case files are prepared;
   b) What information is included in them;
   c) How they are presented to decision-makers;
   d) Whether the information given to decision-makers is sufficient; and
   e) What restrictions exist on information presented to decision-makers.

10. The Terms also requested that I make recommendations, where warranted, to strengthen case file preparation. Examining the quality or robustness of the Sroubek decisions was excluded from the scope of this review.

Case review

11. I was also tasked with reviewing a statistically representative sample of complex case files. There were 30 files in total (29 were selected in addition to Sroubek's file). These 29 cases came from 6 categories, being:
   a) Case files prepared for the DDMs between 1/11/16 – 31/10/17 (DDM year one);
   b) Case files prepared for the DDMs between 1/11/17 – 31/10/17 (DDM year two);

c) Non-criminal case files prepared for the Minister between 1/11/16 – 31/10/17 (MOI year one non-criminal);
d) Non-criminal case files prepared for the Minister between 1/11/17 – 31/10/18 (MOI year two non-criminal);
e) Non-criminal and criminal case files prepared for the Minister in year one between 1/11/16 – 31/10/17 (MOI year one mix); and
f) Non-criminal and criminal case files prepared for the Minister between 1/11/17 – 31/10/18 (MOI year two mix).

12. In selecting the case files from the relevant categories, I conducted the random sampling from an anonymised list. I was assisted in the review of the files by Steven Bird and Anna Zam.[1]

Interview process

13. Following the review of the case files, interviews were conducted with Resolutions team members, supervisors, legal team members and other relevant officials. Depending on the wishes of the individuals, some of the interviews were recorded, and in others only notes were taken. No one was required to speak to me, however, all MBIE personnel accepted an invitation to interview.

Report

14. I produced an early consultation draft and then a formal draft report to MBIE on 26 July 2019 and invited comments on it.[2] A final draft dated 19 August 2019 was provided to MBIE for checking. Where appropriate, this final report reflects the substance of the comments I received.

[1] Employed barristers.
[2] With assistance of Charlotte Agnew-Harington, employed barrister in my chambers.

BACKGROUND: BEAGLEHOLE REPORT

15. This report is not the first to consider the exercise of discretion by the Minister and DDMs under the Act. On 4 December 2014, John Beaglehole presented a Report into the Ministerial use of discretion in individual cases in the immigration system to MBIE ("**Beaglehole Report**").

16. The Beaglehole Report "was commissioned to examine whether the ability of the Minister of Immigration to exercise discretion in individual immigration cases, outside the regular visa application framework, raises questions of integrity or propriety."[3] Mr Beaglehole's review was not concerned with a particular case, but rather with "current legislative design, administrative practice, and the risks that these create", particularly for Ministers.

17. The Beaglehole Report considered the statutory context that governs the Minister's discretionary decision-making powers, the processes that INZ and the Minister employ to facilitate that decision-making, and the roles various actors play in that process. It also outlined the approach and processes adopted in other jurisdictions.

18. The Beaglehole Report thoroughly canvassed the relevant issues, commented on policy where necessary and made various recommendations as to the how the exercise of discretionary power under the Act could be safeguarded. The Beaglehole Report considered the processes and weighed countervailing arguments for and against how the discretionary powers are and should be exercised.

19. The Beaglehole Report concluded that "taking into account the variety of outcomes the immigration system is called upon to deliver, and the almost infinite variety of human circumstances, my view is that some level of discretion is sensible".[4] Recommendations made in the Beaglehole Report included the following:[5]

    a) There was no need to change the Act;
    b) The Minister should delegate "all matters" to DDMs, while also retaining the power to step-in and make decisions where appropriate;
    c) Where a case is put before the Minister to decide (rather than a DDM), "it should contain guidance for the Minister, with a recommendation from officials as to the appropriate course of action." The recommendation should be accompanied by the underlying assumptions;[6] and

[3] See the Beaglehole Report at page 5.
[4] At page 8.
[5] Other recommendations were also made (see pages 10 to 12 of the Beaglehole Report). I include only those recommendations that are relevant to this report, my findings and recommendations.
[6] The Beaglehole Report also notes that it may be appropriate for officials to make a number of recommendations and to be clear on the reasons why weighing assumptions differently may lead to different outcomes.

d) The existence and exercise of the discretionary powers under the Act should be made more transparent.

20. The Beaglehole Report also noted that three key steps could be taken to ensure that the immigration system is seen to be fair and transparent, and to operate efficiently. The proposed steps were:[7]
    a) Substantially limiting the involvement of the Minister;
    b) Providing guidance to the Minister, where the Minister personally is to exercise discretion; and
    c) Creating greater transparency around the existence of the discretion and how it has been exercised.

21. Following the release of the Beaglehole Report, MBIE considered the report alongside other options that could be implemented to improve the system. On 10 April 2015, MBIE put a number of proposals to the then Minister and Associate Minister of Immigration,[8] including:
    a) Legislative change was not required;
    b) All decision-making on individual cases should be delegated where the Act permits;
    c) Officials "may" need to provide more support for Ministers, but that explicit recommendations should not be provided in the case notes;
    d) Limited public information should be provided in relation to the Minister's ability to intervene in an individual case; and
    e) Information should be published on the exercise of Ministerial discretion (subject to further advice).

22. The then Minister did not adopt the recommendations of MBIE following the Beaglehole Report.

[7] See pages 59-60.
[8] See *Report into the role of Ministerial Discretion: Next Steps* dated 10 April 2015 addressed to the Minister and Associate Minister of Immigration by INZ Policy advisors.

CONTEXT

23. As set out in the Terms of Reference (see Appendix A), Part 6 of the Act sets out the grounds under which certain persons may be liable for deportation. It contains grounds for deportation liability: some require a determination by a decision-maker, others do not.

24. The Minister of Immigration is responsible under the Act for making decisions on deportation liability of residence class visa holders (and cancellation or suspension of that liability). In most cases, this power can be delegated to immigration officers.[9] Residence class visa holders become automatically liable for deportation following certain criminal convictions ("**automatic liability for deportation**"). Other grounds for liability require a determination by the Minister that the person satisfies certain criteria, such as breaching conditions of their residence visa, or when their residence application is found to have included false or misleading information ("**non-automatic liability for deportation"**).

25. A person who is a New Zealand resident who is convicted of a criminal offence becomes automatically liable for deportation under section 161 of the Act ("**criminal cases**"). Liability depends on when the person first held a residence class visa, the date of the offending, and the sentence received or potential sentence the Court could impose. There is a "sliding scale" for liability; the longer a person has held a residence class visa, the greater the gravity of the offence that is needed to trigger liability for deportation.[10]

26. On 26 November 2014, the previous Minister of Immigration delegated to named DDMs the Ministerial power under the Act to make certain decisions on criminal cases. This power does not relate to whether the person is in fact liable for deportation (that is automatic) but to whether the absolute discretion to cancel or suspend liability (with or without conditions) should be exercised.[11] This delegation remains in force, regardless of a change in government, unless and until it is revoked or replaced. The current Minister has not revoked or replaced the delegation.

27. Ministerial power to decide whether or not a residence class visa holder falls under one of the grounds for non-automatic liability was not delegated to DDMs. The Minister considers these cases personally. They include cases where:

[9] Section 380 of the Act. The only deportation decision-making power that is unable to be delegated is the power to certify that a person constitutes a threat or risk to security under section 163.

[10] As stated in the Beaglehole Report at page 7.

[11] Section 172(5) of the Act.

a) A person may be holding a residence visa under a false identity (section 156(1)(b)) – as was the case with Sroubek;
b) A person may have provided fraudulent, forged, false, or misleading information or concealed information in relation to a residence application (section 158(1)(b));
c) A person may have breached the conditions of a residence visa (section 159); or
d) New information relating to a person's character that was relevant at the time the residence visa was granted becomes available (section 160).

These are referred to by the Resolutions team as "non-criminal" cases because the person's liability for deportation does not necessarily arise from a criminal conviction. This report will therefore adopt that language and refer to these cases as "**non-criminal cases**", notwithstanding that the grounds for potential liability may relate to criminal activity in some circumstances.

28. Sometimes, as in the Sroubek case, these cases involve people who are also automatically liable for deportation under section 161 ("**mixed cases**"). In such cases the Minister also decides deportation liability and whether it should be cancelled or suspended.

29. The Minister's role in relation to non-criminal cases includes deciding whether to make an individual liable for deportation (a discretionary decision), and then whether to cancel or suspend that liability. It is only the latter which is an absolute discretion. These decisions (liability and suspension/cancellation) do not need to be taken simultaneously.

30. At present, the Minister retains decision-making power in relation to non-criminal and mixed cases. The dual determinations involved tend to mean the cases are more complex, although not universally. While some cases will be relatively straightforward and others more difficult, all cases require careful consideration of how the Act applies, as well as the specific circumstances of the client and any other relevant considerations (such as humanitarian considerations or obligations under international law).

31. Residents who are liable for deportation have a right of appeal on the facts (in cases where a liability determination has been made by the Minister) and on humanitarian grounds (in criminal and non-criminal cases) to the IPT.

32. The question of why the Minister is involved in such decisions or why certain decisions are delegated to DDMs is not central to this review but is relevant to it. That is a policy decision which I understand is being examined by others. The specific decision-maker responsible for a particular type of case is relevant to the process which is adopted and whether it is fit for purpose for quality decision-making. For that reason, I am bound to comment on the choice of decision-maker, given its impact on the process required to be adopted.

33. The DDM's role is to either cancel, suspend, or confirm deportation liability. The Minister's role is to first determine liability and then decide whether to cancel, suspend or confirm that liability. No reasons for suspension or cancellation are provided by either decision-maker, nor are they provided with recommendations or advice by officials on those decisions.

34. Decisions to cancel or suspend a person's liability are at the absolute discretion of the Minister (or DDM) and no reasons need be recorded or provided.[12] Section 11 describes what "absolute discretion" means in this context:

> **11 Meaning of absolute discretion of the decision maker**
>
> (1) If a provision of this Act provides that a matter or decision is in the absolute discretion of the decision maker concerned, it means that—
>
> (a) the matter or decision may not be applied for; and
>
> ***(b) if a person purports to apply for the matter or decision, there is no obligation on the decision maker to—***
>
> ***(i) consider the purported application; or***
>
> ***(ii) inquire into the circumstances of the person or any other person; or***
>
> ***(iii) make any further inquiries in respect of any information provided by, or in respect of, the person or any other person; and***
>
> (c) whether the purported application is considered or not,—
>
> *(i) the decision maker is not obliged to give reasons for any decision relating to the purported application, other than the reason that this section applies; and*
>
> *(ii) privacy principle 6 (which relates to access to personal information and is set out in section 6 of the Privacy Act 1993) does not apply to any reasons for any decision relating to the purported application; and*
>
> *(iii) section 27 of this Act and section 23 of the Official Information Act 1982 do not apply in respect of the purported application.*

35. Section 11 needs to be seen in its statutory context, taking into account the framework and intention of the Act as a whole. In many instances, the Act sets out strict criteria that must be met in order to produce (or preclude) certain outcomes. Section 11 therefore represents an exception to the Act's basic framework by replacing strict or formulaic processes in instances where an infinite variation of factors may need to be considered, or where rigid approaches are inappropriate.

36. The absolute discretion provided in section 11 is therefore a mechanism for recognising that a statutory formula will on occasion be inappropriate, in which case decisions should be made using an alternative and less fettered process. The discretion sits outside of the Act's typical approach, given that:

[12] Section 172(5).

a) It cannot be applied for (and the decision-maker is not obligated to consider any purported application for the exercise of the discretion);
b) no formal policy factors or instructions apply;
c) there are no stated statutory criteria that must be factored into its exercise; and
d) there are no formal rights of appeal.

HOW ARE CASE FILES PREPARED?

37. As noted in the Terms of Reference, the current process followed by the Resolutions team relating to residence visa deportation cases has been in place since the Act came into force in November 2010. It was devised with input from the Legal Services team of the then Department of Labour.

38. The terms of section 11 have a significant influence on the process adopted, in that no advice is given on suspension or cancellation (because the decision is made with absolute discretion) and no or limited investigation is undertaken into the information provided by or on behalf of the client on those issues (refer section 11(1)(b) of the Act, above).

39. Case files are prepared by the Resolutions team in INZ. The deportation file contains a case file summary entitled Deportation Liability Summary (called a DLS) and its annexures. It includes:

a) Basic biodata and brief information about the deportation liability;
b) An introductory (overview) section;
c) Immigration history of the client;
d) How the case came to the attention of Resolutions;
e) Detail about any criminal conviction(s) creating automatic liability - including the criminal history record, any pre-sentence report, the judge's sentencing notes, whether the conviction was appealed (and if so, the outcome) and if provided, any parole board decisions;
f) Detail about any non-criminal matters which may create liability and a conclusion about whether there is a prima-facie case for liability;
g) The client's response to the notice that they are or may be liable, including any documents submitted;
h) Information about the relevant immigration legislation;
i) The personal circumstances of the client including family, skills and employment, health, finances and character;
j) The effect of deportation as commented on by the client and/or their representative;
k) A reminder to consider New Zealand's international obligations;
l) An overview of the role of the decision-maker and the options available to him/her;
m) A record of decision sheet;
n) A schedule of the documents tagged on the file; and
o) Documentation relating to each of the options presented e.g. a Deportation Liability Notice, a cancellation of liability letter and a suspension of liability letter.

40. Information is provided under each of these sections in order to provide the decision-maker with a full account of the case for deportation liability and, in particular, the circumstances of the client that may be relevant to any consideration about suspending or cancelling their liability for deportation. Most of the information about the client's immigration history is sourced from INZ's Application Management System ("**AMS**"). Travel movement information is also taken from AMS. The record shows details of the last embarkation and disembarkation points. It does not record the ultimate destinations. In Sroubek, outbound and inbound travel was noted and no further inquiries were made on the subject.

41. Referrals for potential deportation cases come to the Resolutions team from a variety of sources, including:
    a) A data match agreement with the Department of Corrections, under which INZ is notified each week of those who have been sentenced to home detention or imprisonment in the last seven days. This is not a 100% match as many people are not captured due to differences in the name they are convicted under and the name INZ holds.
    b) INZ Visa Services, when a person declares a recent conviction (usually in an application for a permanent residence visa). Applicants can apply for permanent residence after 2 years of holding a resident visa.
    c) INZ Visa Services, Compliance or the Fraud Investigations teams when they become aware (for example, via informants) that a particular applicant may have provided false information in their residence application.
    d) INZ's Refugee Status Branch, when a resident's refugee status is cancelled and INZ receives information from Police or Corrections regarding conviction(s).

42. Once a non-criminal file has been received, a preliminary assessment of the client's liability is undertaken by a Resolutions team analyst ("**RA**"). This preliminary assessment is checked by a Technical Specialist ("**TS**").[13] If the TS agrees the client may be liable for deportation a case file is generated. If there is insufficient evidence to proceed the file is sent back to the referring party. In all cases a RA reviews the information and determines whether the client is or may be liable for deportation.[14]

43. If the client is not liable for deportation, the case file is closed.[15] If the client is or may be liable for deportation the case file is given to the team leader who administratively prepares the case. Once this is done the file is given to the Resolutions team support officer who is responsible for compiling all the supporting documents for the file. These documents can include the Police Summary of Facts (generally provided by the arresting officer), a pre-sentence report and the Judge's sentencing notes (where appropriate).[16] This can cause significant delay as it can

[13] If a case is particularly difficult the legal team will be consulted.
[14] The TS is a sounding board for difficult cases.
[15] If the client is a New Zealand citizen the file is automatically closed.
[16] If the case involves sexual or other serious offending which involves a victim, the support officer will also consult the victim's register.

often take months for the Courts or other organisations to provide the required documents.

44. Once the documents are received the Resolutions team leader allocates the case to a RA (who can be new to the file). When the RA receives the file they:
    a) Double check the client's liability for deportation; and
    b) Ensure all the information they require is there (documents requested by the Resolutions team support officer). If documents are not on the file they are requested.

Potentially Prejudicial Information letter and questionnaire

45. If the RA concludes the client is or may be made liable for deportation and all required information is on the file, the RA prepares a Potentially Prejudicial Information letter ("**PPI**") and a questionnaire that accompanies the PPI.[17] The letter is sent to the client, who is given two weeks to respond. This appears to be challenging for some clients if they do not have convenient access to evidence required to back up the information they provide. Further, clients who wish to instruct lawyers or advisers are often unable to meet this deadline. As such, Resolutions generally grants requests for extensions.

46. The questionnaire is a standard template which can be modified to suit the specific client.[18] Resolutions provides the client with the opportunity to provide additional information if they wish.

47. The questionnaire template is evolving and improving. The client is told that they do not have to fill it out - rather, it can be viewed as a guide to the type of information that may have a bearing on decisions. If the client instructs a lawyer or immigration adviser, they will often provide a written report and a completed questionnaire.

48. The questionnaire templates are slightly different depending on why the client is liable for deportation.[19] RAs will usually personalise questionnaires that are sent to clients who have non-criminal liability. Generally, a non-criminal case file will reference evidence that establishes an apparent case that the client may be made liable for deportation.[20] The actual documentary evidence (if any) is not sent with the PPI and questionnaire to the client. This approach could be re-examined in order to improve the current process. In short, readily available evidence could be provided to the client to comment on. An example is given below in the Discussion section and included in the recommendations in Appendix B.

49. In a criminal case file summary the following text is often included:

[17] Interpreters are organised by the Resolutions team when required.
[18] For example, if the client has health issues that the RA would like to know more about.
[19] The differences being non-criminal liability and criminal liability.
[20] An example of this could be a previous visa application form where the client asserted a fact that has been later shown to be potentially untrue by another document.

> The Police Summary of Facts is tagged A. This summary may not be the final version that was pleaded guilty to and therefore should be considered a draft. It should be read in the context of any other Court document provided.

50. As the above extract suggests, a Summary of Facts ("**Summary**") can have many iterations. It is initially drafted by the prosecutor and is often subject to negotiation and refinement before it is accepted and provided to the Court. A potential natural justice issue arises if the Summary that is included in the case file is not the final Summary that was ultimately provided to the Court or if the facts established at trial differ from the Summary.

51. It is possible that a decision-maker could read the Summary and be influenced by aggravating factors that were not in the final Summary, or were not proven during the trial or relevant to the conviction. For example, an earlier version of the Summary may have aggravating factors that are not accepted or proven. This proposition was put to many interviewees. It was widely accepted that the current system is not best practice. However, there are two points worth noting:

a) This issue is not caused by INZ, rather, it is a problem INZ has to endure. If the entity providing the Summary was able to give INZ the final Summary, the issue would resolve; and

b) Any prejudice arising is unlikely to be significant. The conviction is the important information (establishing liability), and as one DDM stated it is unlikely that aggravating factors set out in a Summary will change the decision on a client's deportation status.

52. Nevertheless, as mentioned, aggravating factors may create an unhelpful impression and the current system could be improved. This sentiment is reflected in the Recommendations in Appendix B.

53. Given 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. As noted above, it is the conviction that is most relevant.

File preparation

54. Once the RA receives the completed questionnaire and/or submission back from the client, he or she prepares a first draft of the case file summary.[21] The case file summary is drafted in an objective manner with all relevant facts being presented.

55. Every case file summary my team reviewed was drafted fairly and objectively. They were all prepared thoroughly and professionally. Case file summary templates assist

[21] In some cases the client expresses that they want to be deported. This does not alter the approach of the RA in the preparation of the case file as a client can change his or her mind later.

with drafting and they are also constantly evolving and improving (like the questionnaire template).

56. The RA prepares two files, a working file and a final file (the file that goes to the decision-maker). The final file contains the case file summary and the documents referred to in it. In theory both files should be the same, however, irrelevant correspondence is often removed from the final file. This practice of creating two files stemmed from the need to have a back-up file, either when the file was with the legal team or if the file was misplaced.

57. Once the first draft is completed it is sent to the TS to check. The file then oscillates between the RA and the TS until it is ready for legal review. When the legal team receives the file it is given to a lawyer with the relevant expertise and experience for that particular file. Another check of the client's deportation liability is undertaken along with a review of the legal aspects of the file.

58. Following the legal team's review the file is returned to the RA, who can make changes taking into account suggestions from the legal team. The RA then gives the file to the team leader for a final review before it is sent to the DDM or Minister.

Timeframes, caseloads and prioritisation

59. A RA has four months to get a file ready for a decision-maker. Files are often with the legal team for approximately one month and the client is given two weeks to respond to a PPI and questionnaire (which often overruns). Given these constraints the RA can have limited time to draft the case file summary. In the trade-off between quality and meeting a timeframe, it is primarily the timeframe that is compromised. However, it was mentioned that the quality of initial drafts can suffer at times. Ultimately, the TS and legal team improve the quality of the case file summary with their input.

60. Timeframes were once four to five months per case, which dropped to three to four months per case and now the timeframes are four months per case. It was expressed to me that every year the expectations seem to increase. However, the present timeframes are generally viewed as achievable. Four months for a first-offence drink-driving case is seen as adequate time, however, more time could be allocated for the completion of non-criminal cases - particularly if the client is represented by a lawyer or adviser, as this can impact the timeline.

61. In the past, there was a peer review system in place. This system would involve RAs reviewing the work of other RAs before that work was sent to the TS. This generally added to the length of time required to complete a case file. Most interviewees viewed this step as unnecessary given the number of checks a case file currently receives.

62. Due dates inform the prioritisation of cases amongst the team. For example, if a late response is received from a client that will necessarily be prioritised over an earlier response so that deadlines are managed. Criminal cases are also prioritised given the nature of the conduct (or if there is an impending parole or sentencing date, for instance).

Investigative process

63. The Resolutions team has limited capability to inquire into matters asserted by a client and no functional responsibility to investigate factual matters generally. As noted in the Terms of Reference, Resolutions' role is primarily focused on considering and preparing cases, rather than investigation. As such, Resolutions does not routinely attempt to verify client submissions. INZ states that the role of the Resolutions team is not to prove or disprove a client's submission. Rather, the role of the team is to present the case for deportation and the response of the client. The decision-maker must balance the information relevant to liability or potential liability (and potential cancellation or suspension) against the client's case and, at his or her absolute discretion, reach a decision.

64. As a matter of general practice, therefore, Resolutions does not verify claims made by clients or other relevant parties (informants for example). Claims made by clients or others are therefore noted in the case summary in appropriately indefinite language (for example, "it is alleged that").

65. In my interviews with INZ personnel it was made clear that in practice Resolutions has limited capacity to carry out any investigative activities, and that it rarely verifies (or inquires into) information provided to it. The lack of a distinct investigative function was viewed as a weakness by some. However, it was widely viewed that if there were to be any expansion of the Resolutions team's investigative function further resources and increased capability would be required. There is a tension between efficient and thorough decision-making in this area. Efficient decision making is made possible by combining absolute discretion with little to no verification of the narrative provided by the client. More thorough decision-making, on the other hand, would require inquiring into the veracity of statements made to the Resolutions team and potentially investigating factual matters asserted.

66. It is in the non-criminal (or mixed) case arena where the tension between these two objectives poses greater risk. Here the case file summary is even more important, given the two separate considerations. The first consideration is whether there are grounds for deportation liability; then humanitarian or other factors may create a further question as to whether deportation should proceed. The presence of humanitarian and/or other factors inevitably adds complexity to each case.

67. The Minister has by statute an absolute discretion to suspend or cancel deportation liability based on factors which do not need to be expressed and is not guided by any

official advice. A Minister may have less time and less experience than a DDM (who will have many years of immigration experience). Decisions can, as in the Sroubek case, become of significant media or public interest.

68. There are no timeframes (minimum or maximum) that dictate when a decision-maker must make a decision. Before the events arising in the Sroubek case INZ would, on occasion, provide the relevant Minister with the file and a decision would be made at the same meeting. In such situations, the Minister's knowledge could have been limited to the information presented in the oral briefing only (depending on the nature of the file and the events of the day in question). That practice, sensibly, has changed.

69. It is well understood that Ministers are not only responsible for determining the policy direction and priorities for their respective departments but also for collectively directing the executive branch of government.[22] Ministers are supported by and direct officials in their departments and are accountable to Parliament for their performance. While individual decision-making is a feature of many Ministerial portfolios, it is ordinarily supported and assisted by free and frank quality advice from officials. Such advice is absent in the context of absolute discretion decisions. This kind of decision-making involving relatively complex issues, absolute discretion and no advice from officials, is very rare outside the context of the Immigration Act.[23]

70. The Minister can, of course, take more time with the file, seek further information and ask for advice on any relevant matters. There are no time limits governing this. One has to be realistic, however, as to the demands on a Minister's time and the natural inclination to want to deal with such matters promptly if possible.

71. It is obvious to state that a process which allows a Minister to make a quick decision on a complex case with as little as an oral briefing and no advice, is fraught with risk.

Quality and timeliness

72. The discussion above also illustrates a wider issue relating to the quality and reliability of the information provided to the decision-maker. Inevitably, quality issues will arise due to the credibility of the source material supplied, particularly on behalf of the client. For example, the material submitted is not uniformly verified by way of affidavit or the like (although there is a legitimate question as to whether this would necessarily assist the process). Resolutions does not generally verify or

[22] Cabinet Manual, paragraph 2.22.

[23] I have not made a complete survey of the field but absolute Ministerial discretions appear only to exist in the Education Act 1989 (establishment of a school), the Maori Trust Boards Act 1955 (suspension of payments of public money), the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (for the Attorney-General to initiate removal of a sitting Judge) and the Continental Shelf Act 1964 (mining for minerals on the continental shelf). As can be seen, only one of those would seem to involve an identifiable individual subject to the absolute discretion decision. That reinforces the rarity in my view.

investigate the propositions made on behalf of a client and therefore the propositions are only as good as the relevant source material.

73. Timeliness also affects the reliability of the information provided given that information may become dated. For example, an expression of support (or otherwise) from the partner of the client or an offer of employment. Given the lengthy timeframes that can be involved in preparing a case file (caused, for example, by the need to wait for the Court system) a partner may have changed their position on support (or otherwise) for a client's application.

Standard Operating Procedure ("SOP")

74. The SOP is a set of step-by-step instructions that assists RAs in their preparation of the case file summary. The majority of interviewees stated that the SOP was followed and was helpful. However, it was not widely required given the experience of many of the team members. Rather, it was used as an aid when needed.

75. The current SOP is silent on how to undertake a preliminary assessment for a non-criminal file. The expertise and protocol for this task is currently retained by certain team members only. The effect of this lack of recording is likely insignificant. However, it would be prudent to codify an agreed way to undertake such a preliminary assessment. This would ensure that institutional knowledge is retained and prevent poor practice developing.

The role of the Technical Specialist

76. A TS is involved with a case from start to finish. They check liability in criminal and non-criminal cases and are used as consultants throughout the preparation of case files. They are now involved in all discussions with the Minister.

77. The TS determines whether non-criminal files should proceed. However, there is no formal evidential threshold that must be met to justify or guide their decisions. The current way in which preliminary assessments are created, combined with the lack of a specified evidential threshold, creates a potentially fluid process to determine whether a non-criminal case file should proceed. Along with recording the process for undertaking a preliminary assessment for a non-criminal file, a prescribed evidential threshold or test could be documented to ensure non-criminal case files are dealt with consistently.

78. For example, a useful test could be "if the RA/TS is satisfied that there are reasonable grounds to believe that each element of liability is satisfied on the balance of probabilities, then the case can proceed". I am advised this is in fact the threshold applied by INZ.

WHAT INFORMATION IS INCLUDED?

79. All case file summaries follow the structure noted above. Foundational information is included on the first page, including the client's name, date of birth, nationality, details of their offending (for criminal cases), residence category, employment status and any family they have in New Zealand (among other details). The narrative aspect of the summary then commences.

80. Following an overview of the client's details, the client's immigration history is detailed. This will cover when the client entered New Zealand and what class and type of visas were granted. Criminal and non-criminal files diverge at this point. In criminal files, details of the client's offending are given. A history of non-liable offences (if any), is also presented. In non-criminal files the evidence of liability for deportation is presented and discussed by the RA. For example, for a section 158(1)(b) case (fraudulent, forged, or misleading information), the RA will describe the information that was initially submitted to INZ in the residence application, the information that has since come to light, and the responses from the client and their representatives (if any). While minimal inquiry is undertaken, the RA will assess the credibility of the different sources of information and reach a conclusion as to the most likely explanation of events.

81. As noted, active charges against the client are also recorded in the case file summary. In both criminal and non-criminal files, comments that the client has provided (in response to the PPI letter) on their offending or their potential liability are submitted. These comments are limited to either the offending or the non-criminal reasons for their liability for deportation. Legal submissions, if provided, are included at this point as well. The personal circumstances of the client, including details about their family (in particular New Zealand born children), skills and employment, finances, health and character, are also set out.

82. The case file summary then records the effect of deportation on the client and those related to him or her. This can include information from the client's family and employer. Any letters of support will also be noted. The final section of the case file summary reminds the decision-maker to consider New Zealand's international obligations in making the decision, the role of the decision-maker, and his or her possible options (confirming, cancelling or suspending deportation liability).

83. In writing criminal case summaries, RAs fully record the details of the offending and draw out all mitigating and aggravating factors identified by the Judge.

84. The supporting documents are also included on the file. These most commonly include:

a) A conviction history report;
b) Previous documents filed with INZ if applicable (non-criminal files);
c) Court records;
d) PPI letter and deportation liability questionnaire and response;
e) Correspondence and submissions from a lawyer or immigration adviser;
f) Immigration instructions (non-criminal files);
g) Letters of support;
h) Birth certificates of New Zealand born children (if provided); and
i) Medical records (if provided).

85. Again, the veracity of the information that is provided is not tested. While that information is often signed and dated, it is not often verified on oath (for example by statutory declaration). The final paragraph of the covering note to the deportation liability questionnaire does note that:

> It is an offence under section 342(1)(b) of the Immigration Act 2009 (the Act) to supply any information to an immigration officer knowing that it is false or misleading in any material respect. This should be noted by you and anyone else making submissions on your behalf or in support of your case.[24]

86. As can be seen, there is an inevitable tension between not having to consider or inquire into the client's circumstances and the requirement on a decision-maker to be fair in reaching a decision which significantly affects the individual, their family and the public. There is a risk in such a process in relying on information which is not verified.

[24] Prosecutions under s 342(1)(b) are relatively common in the context of false identities and the provision of false information in visa applications.

HOW ARE CASE FILES PRESENTED TO DECISION-MAKERS?

87. Files are presented differently to the Minister compared to DDMs. This is due to DDMs only receiving criminal files and the Minister receiving both non-criminal files and mixed files. Naturally, an incumbent Minister may not have as much experience in immigration matters as DDMs. For this reason, the TS (or the relevant INZ official based in the Minister's office) is involved in presenting a given case file to the Minister. A legal team member will also assist in the presentation of a case file to the Minister (since the Sroubek case, this has become standard practice).

88. I also understand that since Sroubek, the delivery and presentation of files to the Minister is separated in time from any meeting at which a decision is reached. This ensures the Minister has time to review the file and consider carefully the issues arising.

89. DDMs on the other hand are given a criminal file to consider in their own time and are likely to be able to assess each case more thoroughly.

90. In both cases the decision-maker is presented with a case file summary, the supporting documentation and precedent decision letters. These are standard-form letters that INZ uses to notify a client of the outcome of the decision-making process. The four letters given to the decision-maker represent the three different decisions available to that decision-maker plus a letter recording that no determination has been made. This means that one letter will notify the client that his or her deportation liability has been cancelled, another will cover a suspension of liability for a certain number of years, and another will affirm a client's deportation liability. The fourth will record any lack of determination. INZ informed me that this practice is designed to promote efficiency by avoiding the need to send documents and instructions back and forth.

91. Hence, the Minister is given multiple versions of letters and attachments. The versions which are not signed are stamped with the words "not signed". It would seem relatively simple for the Minister or DDM to signal the option desired on a briefing note and for the required letter to be prepared (perhaps with an electronic signature where appropriate), as opposed to continuing with the four-letter model. The administrative burden of drafting at least four letters for each case seems unnecessary and I am not convinced that this approach is efficient (although that ultimately is a matter for Resolutions and INZ).

92. For example, instead of presenting the DDM with four letters, only one of which they are to sign, DDMs could be presented with one document with all options presented. It could state:[25]

Possible options include deciding that:

1) Deportation should proceed;
2) Deportation liability should be cancelled;
3) Deportation liability should be suspended for ____ years; or
4) No determination will be made until _____.

93. The DDM can then select the option they wish and, if it is to suspend liability, they can enter the length of the suspension themselves. If they do not consider that they can make a determination, they can provide the reasons why and/or request that further work be done. This means the RA simply prepares one letter. There can be no suggestion of pre-determination. I am not convinced that this would be less efficient than the current system of four letters.[26]

Timeframes, meetings and alternatives

94. There are no timeframes within which a decision-maker has to make their decision (although in certain situations there are statutory timeframes for completion of deportation liability processes – I understand that in practice these are not problematic). It was emphasised by the DDMs that they do not feel pressured to come to decisions quickly.

95. DDMs have formal and informal calibration meetings regarding their decision-making. Formal calibration meetings occur with the Minister where summaries of different case files are considered and participants compare how they would have decided the specific case. This is viewed as a helpful step in maintaining consistency between the decision-makers. It also assists in understanding the approach the Minister wishes to take as a matter of policy. This is important given that the power that is being exercised is a delegated one and the Minister retains the ultimate responsibility for its exercise despite the delegation. DDMs will also have informal discussions between themselves and with legal advisors on difficult files.

96. There are various ways case files could be presented to decision-makers. In summary, the decision-makers could be presented with a:

a) File only;
b) Case summary and the supporting documents (the status quo);
c) Case summary, generic advice (such as statistics relating to similar cases) and the supporting documents;
d) Case summary, specific advice and the supporting documents; and

[25] This is a slight amendment to the current version the DDM is presented with.

[26] Previously, if the letter was pre-populated with "two years" (a common time for suspension) and the DDM wished to make it three years, the DDM would sign the second page and then the analyst would alter the first page of the letter in line with the DDM's decision.

e) Case summary, specific advice (including as a result of specific inquiries) and the supporting documents.

97. Presenting the decision-maker with the file only would mean that there could be no suggestion of bias. However, the disadvantages and inefficiency of this approach would outweigh any benefits. My review of the case files did not reveal any bias and DDMs reported that they do not detect evidence of bias in case summaries. The time it would take a DDM or Minister to extract important and relevant information would be unduly burdensome. It was unanimously viewed that the case file summary performs a valuable function accurately condensing the relevant points from the underlying documents. One minor drawback of the case file summary is that it may not be able to convey the full colour of the underlying documents. This is unavoidable and can be mitigated by the relevant decision-maker reading the attached documentation on an as required basis.

98. The other options differ from the status quo either in the provision of advice (general or specific), or the undertaking of inquiries. These subjects are discussed further below.

IS THE INFORMATION PROVIDED TO DECISION-MAKERS SUFFICIENT?

99. All DDMs stated that they receive sufficient information to make their decisions (i.e., to make decisions in criminal cases in line with their delegated authority), and most had no suggestions for additional information they would like to receive.[27] I did not speak to the Minister to ascertain whether the information received was sufficient for the Minister. From the files reviewed, the case file summary and file itself normally contained sufficient information.

100. The Sroubek case file summary did not contain the information about Sroubek's statements regarding return to the Czech Republic. It would have been optimal for such information to have been available to the Minister when he was considering the case (specifically if the Minister had indicated that the fear of returning to the Czech Republic was a relevant consideration). The case file summary omitted that he was an excluded person and was granted a visa as a result of administrative error. Ideally this would have been included also. That said, the discretion to suspend or cancel liability is an absolute one and whether this would have made a difference is not for me to comment.

101. In rare cases a DDM will require clarification of information or further information on a point they consider important. In such situations the DDM will approach the RA, TS or team leader for assistance. Such situations are exceptional and rely on the experience of the DDMs to identify where material might be lacking.

102. In the unusual case where a file is returned from a DDM to a RA it is generally not because information is missing, rather it is because a DDM cannot see a link between information that has been presented and the decision that the DDM is being asked to consider.[28]

103. The case files provide DDMs with comprehensive information that may lead them to consider that the client's liability for deportation has been offset. There was no class of information that DDMs wanted to see more or less of.

104. In summary, for the ordinary case (criminal or simple non-criminal), the information provided in the case file summary is sufficient to enable DDMs to make informed decisions. The process is thorough, professional and adequate as far as it goes. In more complex cases, the key issues are around the lack of specific advice and the

[27] One DDM suggested inserting questions in the questionnaire that relate to whether the client's case was supported by their partner.

[28] This is understandable given the complexity of some files.

lack of investigation or inquiry into the claims which are advanced by the client in support of their case for cancellation or suspension. Other than Sroubek, no case file summary we reviewed was missing relevant details. In only a few of the cases reviewed did further inquiries assist.

WHAT RESTRICTIONS EXIST ON INFORMATION PRESENTED TO DECISION-MAKERS?

105. Four main restrictions relating to the information presented to decision-makers exist:
   1) The lack of advice given to the Minister;
   2) The lack of an investigative function;
   3) The requirements of natural justice; and
   4) Privileged or classified information.

The lack of advice given to the Minister

106. Certain decisions on residence class visa deportation cases are at the absolute discretion of the decision-maker and no reasons need to be recorded or provided. Each decision has appeal rights attached (on facts and/or humanitarian grounds depending on the type of case). As mentioned, the Minister has delegated some decision-making powers (suspension or cancellation of deportation in criminal cases). As such, DDMs exercise the Minister's absolute discretion, although the Minister retains the power to exercise the discretion as well.[29]

107. Decision-makers are not required to provide any reasons for any decision made, nor can the reasons be accessed under the Official Information Act 1982 or the Privacy Act 1993. The Court of Appeal has held that even if reasons are discoverable in judicial review proceedings, this does not expand the scope of challenge beyond *Wednesbury* unreasonableness.[30]

108. While there is no official prohibition on doing so, INZ officials do not provide specific advice on absolute discretion decisions, on the basis that a Court may find that any advice recorded on the file could amount to the "reasons" for the decision and would therefore make the decision more susceptible to judicial review.

109. INZ submits that although a successful judicial review is unlikely (see below), officials should not be seen to be "fettering" or otherwise influencing the Minister's absolute discretion, which is not appropriate when section 11 leaves those decisions to decision-makers in their absolute discretion. It is also concerned that the inclusion

[29] Section 380(3) of the Act.

[30] *Zhang v Associate Minister of Immigration* [2016] NZCA 361 at [25]. In *Cao v Chief Executive of Ministry of Business, Innovation and Employment* [2014] NZHC 1551, the High Court ordered discovery of reasons, where they existed, about a decision made under absolute discretion. In *Singh v Associate Minister of Immigration* [2016] NZHC 2888 the Court explained that *Wednesbury* unreasonableness "is conduct falling only within the narrow scope of a decision so unreasonable that no reasonable authority could ever consider imposing it" at [8]. The Court referred to *Wellington City Council v Woolworths New Zealand Ltd* [1996] 2 NZLR 537 (CA) as authority for the application of the *Wednesbury* test in New Zealand at [9].

of advice may allow an appellant to challenge decisions on the basis that the advice was biased, or that the provision of advice fettered or dictated the exercise of the absolute discretion. For those reasons, neither the DDM nor the Minister receives advice on what decision they should make.

110. DDMs are selected on the basis that they have extensive experience within the business of INZ. They are knowledgeable individuals with significant subject matter expertise. The Minister relies on such individuals to exercise their judgement. As was mentioned to me many times, while many files share similar characteristics, no two are the same. This prevents an algorithmic solution to the decision-making problem. Because of this, a DDM is in their role to exercise judgement based on their knowledge, expertise and relevant experience.

111. Given the context DDMs operate in (a thorough and professional review of a criminal case) there is little to be gained by advice being given to a DDM. The DDM can of course ask questions and cause further inquiries to be made if necessary. The DDM is party to regular calibration sessions and able to consult with colleagues as required. There is little, if anything, to be gained in this context by adding advice to the process. The conclusion that DDMs are unlikely to be assisted by advice or recommendations is consistent with that reached in the Beaglehole Report.[31]

112. In addition, many of the cases which DDMs are asked to decide are relatively straightforward (for example, first offence driving cases, which are discussed further below). Advice in those cases is unnecessary. The remaining cases may have more complexity and require a balancing of factors to determine whether a client's liability for deportation has been offset by personal factors. In those cases, it is the experience and expertise of the DDM that is best applied to the judgement exercise. Advice is unlikely to assist the DDM here either.

113. DDMs were asked whether it would be helpful to be provided with statistics instead of advice.[32] There were a range of responses. First, statistics are referred to at calibration meetings of DDMs. Second, as mentioned above, no two case files are the same. Therefore, it is difficult to decide where to draw statistical lines. While an individual may be a first-offence drink-driver, they may have a variety of other convictions that have not made them liable for deportation. On balance, the provision of statistics within case files was seen as having limited utility.

114. The discussion above considers specific advice to DDMs. That is, advice on a particular case. While it was widely viewed that the addition of specific advice would not improve the quality of the decisions made, it was considered that general advice (as discussed and provided in the calibration meetings) was valuable and should remain.

[31] Recommendation iv.
[32] An example of useful statistics could be the percentage of first, second and third offence drink-drivers that are deported.

115. The lack of specific advice provided to the Minister is less straightforward. In other contexts, a Minister usually receives free and frank advice from officials to assist with almost all decision-making. The Minister has a duty to give fair consideration and due weight to that advice.[33] As outlined above, neither the Minister nor DDMs are required to be provided with, nor to act upon, any advice from officials when making decisions under section 11.

116. Concerns expressed by MBIE and INZ that the provision of advice may invite greater scope for judicial review in this context are perhaps overstated. A review of relevant case law indicates that the Courts commonly refuse to engage in judicial review of decisions involving absolute discretion unless and until the Court finds that the decision was "unreasonable" on the basis set down in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation.*[34]

117. In 1996, the Court of Appeal applied the *Wednesbury* unreasonableness test in *Wellington City Council v Woolworths New Zealand Ltd (No 2)*.[35] In that case, the city council was empowered by the relevant legislation to "make its own judgement as to what is appropriate and equitable" when making choices about rates.[36] Richardson P explained that a discretion that is not absolute is to be exercised to "promote the policy and objectives of the statute", and that the *Wednesbury* grounds require decision-makers to:[37]

a) act within the powers conferred by Parliament and the purposes and criteria specified in the relevant legislation;
b) consider any matters that they are bound by statute to consider and exclude considerations that are extraneous; and
c) make decisions only for purposes that are contemplated by the relevant legislation.

118. If the outcome of the exercise of discretion is "irrational or such that no reasonable body of persons could have arrived at the decision, the only proper inference is that the power itself has been misused."[38] Richardson P (adopting language used in earlier cases) concluded that for "the ultimate decisions to be invalidated as "unreasonable"… they must be so "perverse", "absurd" or "outrageous in [their] defiance of logic" that Parliament could not have contemplated such decisions being made".[39] Applying these rules has led the Courts to refuse to judicially review decisions made in the exercise of an absolute discretion under the Act.

119. Applications for judicial review of decisions made under a power of absolute discretion have commonly arisen in relation to section 61 of the Act. Under section

[33] Cabinet Manual, paragraph 3.8.
[34] [1948] 1 KB 223; [1947] 2 All ER 680.
[35] [1996] 2 NZLR 537 (CA).
[36] At 545.
[37] At 545.
[38] At 545.
[39] At 552.

61(1) of the Act, the Minister is given discretion to "grant a visa of any type" to a person who is unlawfully in New Zealand and not subject to a deportation or removal order. Section 61(2) provides that that decision "is in the Minister's absolute discretion." Although section 61 is not in issue in this review, case law on the exercise of discretion under this section is informative.

120. In *Zhang v Associate Minister of Immigration*,[40] Mr Zhang wrote to the Minister seeking the Minister's intervention under section 61 of the Act as he was unlawfully in New Zealand and therefore liable for deportation. The Court made it clear that under section 61 "it is entirely up to the Executive (through the Minister) to decide whether or not" to grant a visa, and that the Courts could not intervene in the decision-making under that section "in the absence of any extraordinary circumstance going to *Wednesbury* unreasonableness".[41] The Court of Appeal commented that the definition of absolute discretion in section 11 "gives bleak prospects for judicial review unless *Wednesbury* unreasonableness can be identified".[42]

121. Similarly, in *Singh v Associate Minister of Immigration*,[43] the High Court was asked to consider the exercise of discretionary power following Mr Singh's request under section 61 of the Act. The Associate Minister of Immigration refused that request. Mr Singh sought judicial review of that decision but was unsuccessful, given that the decision was not unreasonable.[44]

122. Accordingly, in my view there are situations where the Minister would benefit from receiving advice (even in general terms) particularly where the case is a complex one. Advice could be given as to (for example): how a particular decision would sit with other government priorities (in relation to crime for example); how a particular decision would sit against similar decisions made in the past; or what risks were associated with a particular decision.

123. The decision-making process could also benefit from the Minister or DDM making further inquiries where these are warranted. Such inquiries might include whether the assertions made by a person were consistent with publicly available material (for example Court decisions), and whether there was publicly available information which tended to contradict the assertions of the applicant. The additional risk of reviewability is in my view slight and ought to be weighed against the utility and protection of such advice or further inquiries.

124. There is no statutory guidance, immigration instruction or prescribed formula for exercising the absolute discretion under section 11. Each case must of course be considered on its own facts and invariably there are differences in those facts. In my

[40] [2016] NZCA 361.
[41] At [31].
[42] At [14].
[43] [2016] NZHC 2888.
[44] At [22].

view, however, this supports (rather than relieves) the need for the Minister to be given specific advice to assist such complex decisions. For practical reasons, INZ and DDMs are better placed to investigate and fully consider questions of deportation liability (and cancellation or suspension) than the Minister, and as such the provision of advice to them is not as important.

The lack of investigation/inquiry

125. The Resolutions team has only a limited investigative function and is not trained to investigate or inquire into information that has been provided to it.[45] The team deals with this constraint by using suitable qualifying language.[46] It is apparent to all involved that a client facing deportation may fabricate statements in an attempt to stay in New Zealand. Without at least some inquiry, it is challenging to determine whether statements made by or on behalf of a client are truthful or reliable. If it is later discovered that relevant statements were untrue or incomplete, that may embarrass the decision-maker and INZ.

126. Answers to (at least) the following questions in the template questionnaire can be manipulated to provide a picture that is substantially different from reality:

19) Are your children dependent on you for financial support?

20) Are there any custody matters with respect to any of your children?

21) Are you in good health? If not, please provide details, including the treatment or medication you require or receive.

24) Have you ever received counselling or other assistance for a drug or alcohol problem?

27) Have you ever been convicted of any offence against the law in another country? If so, please provide details.

29) What type of employment were you in before you came to New Zealand?

31) What type of employment do you intend to undertake in the future?

34) Do you own any significant assets? If so, please provide details.

35) Do you have any debts? If so, please provide details, including how these are being repaid.

37) If you have been convicted, have you completed any rehabilitative or counselling programmes that have helped you to address your offending?

39) If you are deported, how would that affect you personally?

[45] For convenience, I use investigate to mean using conventional investigative methods to ascertain primary facts. I use inquire to mean verification of facts asserted or cross-checking the existence of facts or circumstances (for example from publicly available information or from contacting sources).
[46] "Mr X asserts that…"

40) If you are deported, how would that affect your family?

127. The solution to this problem is not straightforward. If the Resolutions team were to have an increased investigative function they would require more and different resources (or would have to draw on resources of other teams with investigative skills). Determining the extent of any investigation is also a difficult question, as are the natural justice consequences (discussed further below). At least in the situations where the Minister currently makes decisions, the lack of an inquiry or investigative function provides a restriction on the confidence one can have in the veracity of the information that is presented. Where absolute discretion is involved, it must be remembered that there is no obligation to make such inquiry.

128. I note that in very different contexts under the Act there is a duty to inquire into information presented by applicants. For example, the Courts have held that the IPT has a duty to inquire into the information presented when deciding appeals before it, even where the Act expressly requires the applicant to put all information to be considered as part of the appeal before the IPT.[47] Case law also indicates that allegations that Resolutions case files are deficient are generally not successful, and that additional inquiry or investigation seems unlikely to invite greater judicial scrutiny.[48]

129. In another different context under the Act, some verification of information is contemplated. Section 72 of the Act provides:

> 72 Decisions on applications for residence class visa
>
> (1) Where the Minister or an immigration officer makes any decision in relation to an application for a residence class visa, that decision must be made in terms of the residence instructions applicable at the time the application was made and any discretion exercised must be in terms of those instructions.
>
> (2) No application for a residence class visa that is received by an immigration officer may be referred to the Minister for decision at first instance, unless the Minister gives a special direction to that effect.
>
> (3) Nothing in this section prevents the Minister, in his or her absolute discretion, from making any decision to grant a residence class visa as an exception to residence instructions in any particular case.

130. The relevant residence instruction is R5.10(b):[49]

[47] See, for example *Hai v Minister of Immigration* [2019] NZCA 55 and *Minister of Immigration v Wu* [2016] NZHC 3194.
[48] See, for example *Singh v Associate Minister of Immigration* (above); *Dean v Minister of Immigration* [2019] NZCA 343; and *Kartseva v Associate Minister of Immigration* [2018] NZHC 1115.
[49] It is noted that this is not a rule or criteria for determining eligibility. Rather, it sets out administrative duties in respect of processing an application. Residence applications are not absolute discretion decisions and accordingly rights to fairness and natural justice apply alongside defined procedural requirements.

b. Immigration officers have a general obligation to take such steps as are necessary or appropriate to verify any documentation or information relevant to any decision under immigration instructions, whether or not a particular provision enables or obliges them to do so.

131. In the context of a residence application the residence instructions require INZ officers to take necessary or appropriate steps to verify relevant documentation or information. There is no such requirement expressed in the Act or instructions for deciding deportation liability. The intention is that the processes for determining deportation liability (and cancellation or suspension) and applications for residence class visas are separate and distinct. It is unlikely, therefore, that the Act intended to imply any obligation to take steps to verify documentation or information in the deportation context (especially in the areas of absolute discretion).

132. In my view the more persuasive point is that to protect the Minister and INZ, decision-makers should not (where practicable) base a decision on incomplete or unreliable information. Cases like Sroubek are complex and the risk is that the Minister could rely on unreliable or dated information, without the benefit of advice or further inquiries on those issues. As discussed, the lack of advice or recommendations combined with the current process contributes to undue risk of a decision which might be based on erroneous factual material (as opposed to any error of law or unreasonableness).

133. I accept that reliability and currency of information will always be an issue to some extent. One way to mitigate this is to use expert and experienced decision-makers to ensure the relevant issues are inquired into sufficiently to ensure the decision is a robust and fair one. Where the case is a complex one and the decision-maker is the Minister, the Resolutions team could be enabled to do more by ensuring specific issues are inquired into and expert advice given so that such decisions are more likely to be robust and able to withstand both legal and public scrutiny. Ideally this would be done in response to the Minister's request for advice or further information (so as to reduce unnecessary effort on a file).[50]

134. Ministers are treated no differently from other decision-makers. Ministerial decisions must be based on logically probative material. Factual decisions made by the Minister in deciding liability for deportation (under the various sections identified above) are subject to an appeal to the IPT on the facts and on humanitarian grounds if the person holds a residence class visa.[51] The person has the protection of an inquisitorial appeal before the IPT.[52]

[50] For example, if the Minister considered a submission persuasive, officials could provide advice as to whether the submission was consistent with information from official sources or otherwise publicly available. Where the Minister considered a case was complex, or had unusual features, or involved a novel situation, or was particularly difficult, advice from officials could be sought. Further guidance could be given to the Minister by INZ on the situations warranting advice.
[51] Sections 155(4)(a), 156(3)(b), 158(3)(b), 159(2), and 160(3) of the Act.
[52] Sections 218(2)(a) and 218(2)(c) of the Act.

135. In conclusion, inquiry into matters upon which the decision-maker might base a decision to suspend or cancel liability is not required under the Act, but in certain cases may be a sensible practice in order to reduce the risk of decisions which might reflect adversely on the Minister or the Ministry.

The principles of natural justice

136. Adherence to the principles of natural justice influence the information a decision-maker receives. One of those principles is "*audi alteram partem*", translated into English as "hear the other side". This means that if an adverse inference can be drawn from evidence or information, that material should be put to the person it could affect for their comment.[53] The decision-maker in turn ought to take that comment into account. The PPI process described above is designed to meet this natural justice requirement.

137. As a general rule, decisions made by Ministers or their delegates are subject to the principles of natural justice (or fairness), as varied according to the statutory and other relevant context.[54] This adherence results in a "positive restriction" on the information presented to a decision-maker. If it is possible to draw a negative inference from evidence or information, it should not be presented to the decision-maker without the client being given the opportunity to comment on it.[55] This in turn means that if material adverse matters are discovered from further inquiry (or investigation), it may be necessary to revert to the applicant to get the applicant's view. This of course involves greater time and potential delay in the process.

Classified or privileged information

138. Classified information is defined in section 7 of the Act. Classified information may be relied on in making decisions under the Act if the Minister determines that the classified information relates to matters of security or criminal conduct.[56] To date, no issues have arisen regarding the use of classified information in the deportation decision-making process.

139. Information protected by privilege (legal professional) or confidential information (doctor-patient) may also be relevant in the decision-making process.

140. The template questionnaire included as part of the PPI process includes specific questions as to the health of the client. If a client who is not in good health answers "yes" to such questions, he or she would arguably be providing misleading

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[53] *Daganayasi v Minister for Immigration* [1980] 2 NZLR 130 was approved and followed in *Auckland City Council v New Zealand Fire Service* [1996] 1 NZLR 330 and more recently, *A v Attorney-General* [2013] 3 NZLR 630.

[54] Natural justice is fairness of procedure. The New Zealand Bill of Rights Act 1990, section 27(1), provides for every person to have the right to the observance of the principles of natural justice by a public authority.

[55] *AY (Pacific Access)* [2017] NZIPT 204005. The Tribunal cited INZ Operational Manual, A1.5, which sets out general instructions on fairness. For a decision to be considered fair depends on many factors such as "whether the applicant is given a reasonable opportunity to respond to harmful information".

[56] Section 33 of the Act.

information in contravention of section 342 of the Act. At the same time, the person is not obliged to disclose personal medical information. There is, therefore, a theoretical risk that information relevant to the decision-making process may not be obtained by the decision-maker. However, this was not seen to be an issue by those I interviewed. Rather, it seems that most clients were willing to share their medical information with INZ and that INZ handles this information sensitively and appropriately. The client has control over what information they provide and, provided that the client does not mislead INZ, that control does not appear to hinder or thwart the process. INZ is able to request further information about, or verification of, medical conditions as necessary.

141. Similar comments could be made about legally privileged information. Issues regarding the disclosure of legally privileged information were not seen as a significant issue in the decision-making process. Like medical information, legally privileged information (for example, instructions and advice given in the context of a prosecution) can be released by the client with a waiver or limited waiver. The control over the information lies with the client. Much of this information will not be relevant to the deportation liability process. For those reasons it does not appear to provide a significant limit on the quality of the process.

DISCUSSION

Is the process fit for purpose – considering each relevant decision-maker

142. As discussed above, the current process in non-criminal cases risks not being fit for purpose for quality decision-making. A Ministerial decision-maker can make decisions without receiving any advice or recommendations and without any verification of the reliability of the information on which a decision to suspend or cancel deportation liability could be based. This process puts both the Minister and INZ at risk.[57] Whilst Sroubek is an unusual case, it does provide an example of the manifestation of that risk. The grounds contained in the case file summary were understood by most to be sufficiently powerful such that the original decision of the Minister was unexpected. Given the process described, decisions made under absolute discretion can (on occasions at least) be unpredictable.

143. In my view the current process is adequate for criminal cases, although it could be improved. Expert, experienced and dedicated DDMs are preferable as decision-makers. The current process does, however, appear to be possibly misplaced in the sequence of matters and therefore DDMs are not best utilised. The DDMs are involved in criminal cases only and decide issues of cancellation or suspension where deportation liability is automatic and a right of appeal on humanitarian grounds is available to the client via the IPT. Deportation liability that arises on account of minor criminal convictions (first-time driving offences) is almost always suspended or cancelled. There is a question, therefore, as to whether the significant DDM resource is appropriately used in those cases. This is a question for the Minister to consider, upon advice from relevant officials.

144. In my view a more sensible system would involve greater delegation to DDMs. I consider that the role of DDMs could be expanded to non-criminal cases by giving DDMs power to make determinations in non-criminal and mixed cases. If, however, the Minister wishes to continue with the current settings, then a streamlined process for minor convictions (which should still be handled by DDMs) could reduce the workload for those cases. In the remaining cases of automatic liability, I recommend no Minister or DDM involvement until after the IPT process has concluded (see further the discussion in Appendix B).

145. These changes would arguably better utilise the DDM resource, streamline the process and enhance the quality of decisions. This is consistent with the recommendations in the Beaglehole Report that almost all Ministerial discretions be delegated.

[57] This is consistent with the conclusions of the Beaglehole Report and with the comments of Elizabeth Proust in her report on the Australian position - *Report to the Minister for Immigration and Citizenship on the appropriate use of ministerial powers under the Migration and Citizenship Acts and Migration Regulations,* 31 January 2008.

146. My reasons, in summary, for these recommendations are as follows:

a) Automatic liability cases are just that – automatic. Parliament has stated in careful gradations of time and seriousness which persons are automatically liable to be deported. The standard applied is the criminal one (proof of each element of the offence beyond a reasonable doubt) with all its attendant safeguards. Those persons have an appeal to the IPT on humanitarian grounds and that can be exercised without intermediate consideration of cancellation or suspension of deportation liability by the Minister or a DDM. If the Minister wishes the current practice in respect of first time driving offences to continue, then the DDM process can be streamlined and fast tracked so as to save time, resource, and stress for the client. DDM resource is too valuable to use in an area where it is arguably not needed. The IPT can perform the humanitarian assessment on appeal and can adopt an inquisitorial approach.

b) Assessments of non-criminal liability can be complex, require careful and thorough consideration of the file, and ought to proceed only on reliable information. Dedicated and experienced personnel are better placed to give these questions appropriate consideration.

c) As seen in Sroubek, decisions can bring intense pressure on the Minister. The Minister should not be placed in such a situation of risk given his or her importance in the system.

d) The Minister retains the discretion in any event, which can be used as and when he or she desires, with such support from INZ as required. The Minister will remain "above the fray" but able to intervene as necessary to suit the policy of the government of the day. This would be well suited to unusual cases which might have broader implications for international commitments or the like.[58]

e) Further inquiries are better instigated by a DDM, with the benefit of experience and expertise to know where the information might be lacking or unreliable, and which aspects could potentially make a difference.

147. A possible option for improving the current process is outlined in a diagram in Appendix B**,** along with a more fulsome outline of my recommendations. Such a process requires determination of wider policy considerations and responses and is beyond the Terms of Reference. Suffice to say, in my view the Sroubek case and those like it give rise to the need to re-examine whether the Minister should be placed at such risk and how processes might be improved to avoid such situations re-occurring. The significant percentage of driving related cases would also seem to require a separate assessment as to whether the DDM resource is being best utilised. This is discussed below.

[58] As noted in the INZ briefing to the Minister of 26 February 2015 at page 5, which accompanied the Beaglehole review.

FIRST OFFENCE DRIVING CASES

148. If a client is convicted of certain driving charges,[59] they become liable for deportation. The number of clients liable for deportation because of these charges is significant. In total, the Resolutions team deals with the following number of files:

Year	Criminal Case Files	Non-Criminal Case Files	Criminal & Non-Criminal Case Files	Total Number of Decisions
2018	339	133	7	**479**
2017	300	79	8	**387**
2016	356	115	4	**475**

The following table illustrates how many of these cases were first-offence driving cases, and what the outcome was for these cases:

Year	No. of first time driving offences[60]	Percentage of total case load	Cancelled	Suspended	Deported
2018	97	20.25 %	0	96	1
2017	112	28.94 %	0	112	0
2016	116	24.42 %	2	113	1

149. On average, over the last three years first-offence driving cases have comprised 24.5% of the Resolutions team's case load. In total, there have been 325 cases over the three years. In 321 of those cases, the DDM decided to suspend liability. Put another way, in less than 1.25% of cases did the result differ from a suspension.

150. This raises the question of whether case files for first-offence drivers could be presented in a more streamlined fashion, given the apparent predictability of the decisions. Currently there is only a minor difference in the preparation of a case file for a first-offence drink-driver and a more serious offender.[61] Streamlining this process for first-time offenders would result in the Resolutions team being able to

[59] These include but are not limited to: careless, dangerous or inconsiderate driving (including driving causing death or injury); driving a transport service vehicle with excess breath alcohol; driving while disqualified or with a suspended or revoked licence; driving under the influence or with excess breath or blood alcohol, including while under 20 years of age; operating a vehicle carelessly or with unnecessary speed; failing or refusing to permit a blood specimen, including upon request; and unlawfully taking a motor vehicle.

[60] These cases are exclusively criminal – not "mixed" cases.

[61] The difference is that cases involving first time drink-driving, careless driving and driving in breach of a licence suspension are not sent to the legal team for their review.

allocate more resources to the strengthening of case file preparation in more complex cases.

Current process

151. The current process for first time drink-drivers followed by the Resolutions team is as described in the SOP. In brief, the client gets referred to the Resolutions team, an assessment of their liability is undertaken and, if they are liable for deportation, they are sent a PPI and questionnaire in order to provide them with the opportunity to outline why deportation liability should be offset. Upon receipt of the client's response, the RA compiles the case file and presents it to the DDM.

Proposed process

152. The aim of the proposed process is to expedite case files that may not require the same level of analysis as cases involving more complex facts or offending. I recommend that INZ implement a two-stage test for determining cases involving first time drink-driving offenders which would empower DDMs to decide deportation liability on the basis of the established facts without necessarily requiring the RA to prepare a case file summary. The DDM could request preparation of a case file summary if the DDM considered that this was necessary but would not be necessary at the first step of the analysis. I outline the suggested process in Appendix B.

SUMMARY OF CASE FILES

153. In preparing this report I reviewed, with my team, 29 case files in addition to Sroubek's.[62] The key themes are summarised below.

Non-criminal cases

154. The review included five non-criminal cases. In four cases, the Minister exercised the power to suspend deportation liability for a period of three years. Deportation liability was cancelled by the Minister in one case.

155. In four of the five cases, the question of deportation liability arose under s 158(1)(b)(ii) of the Act because the client failed to disclose relevant information to INZ during the residence application process. Deportation liability was suspended in each of these cases. In each instance, the Resolutions team undertook minimal investigations to establish the factors that determined liability under the section. In one instance, the client's deportation liability was appealed to the IPT, which found against the applicant. Two of the cases involved situations where persons granted residence were in undisclosed relationships that would have made them ineligible for residence as dependent children (being the basis on which their initial applications proceeded).

156. In one instance, liability arose under section 159(1)(a) or section 159(1)(b) for breach of the conditions attaching to a visa. In this case, the client failed to commence work in New Zealand within the three-month timeframe required. The client's employer provided a letter in support and stated that the client would have been able to commence work sooner had the parties been aware of the three-month restriction. The Minister cancelled the client's deportation liability but imposed certain other temporary restrictions.

157. I am satisfied that, in each instance, the Resolutions team's actions were appropriate and met the standard necessary to enable decision-makers to consider each case properly.

Criminal cases

158. Fifteen of the case files I reviewed were criminal cases. Eleven of those cases resulted in deportation; IPT appeals were lodged in two of the cases. Deportation liability was suspended in several instances.

159. The eleven cases that resulted in deportation involved various types of offending. Many clients had committed multiple driving offences, although the offences

[62] The case files that were reviewed are not a representative sample of all case files. Rather, as stated in the Introduction and Process section, they are a representative sample of the case file sub-pools.

committed also included sexual offending, assault, burglary, theft, forgery, and other crimes. Some clients had also been convicted of other offences that did not make them liable for deportation.

160. Offenders commonly attested that their mental well-being would be affected by deportation, and cited detriment to their families (including children) as reasons why they should not be deported.

161. Three cases involved clients who wanted to leave New Zealand: two indicated that they wanted to be deported, while a third agreed with INZ that he would leave voluntarily.

162. INZ concluded further investigations in relation to these files where this was appropriate in the circumstances. At a high-level, the case files indicated that INZ did not conduct further investigations where clients made it clear that they wished to be deported, and in instances where the offending was violent or repeated.

163. Criminal case files commonly included letters in support from family, friends, employers and colleagues, although there is no discernible link between the provision of such letters and the ultimate outcome reached by the decision-maker. This suggests such letters are helpful aids to determining the level of a person's community support but are not on their own decisive.

Criminal (drink-driving) cases

164. Four of the case files I reviewed related to drink-driving offences (which generally meant that a client became liable for deportation under section 161(1)(a)(iii) of the Act). In each instance deportation liability was suspended (for a period of either two or three years).

165. In two of the four instances the client told INZ that they had not been aware that a drink-driving conviction would result in deportation liability and that had they known this was the case they would have addressed the relevant criminal charges differently.

166. No further investigations were conducted by INZ in any of these cases, given the nature of the offending and the responses provided. In each case, the client made submissions to INZ as to the detrimental effect that deportation would have on them, and the clients appeared to understand the seriousness of their offending.

167. The process adopted in these cases (i.e., no further investigation by INZ) was appropriate, although the outcomes tend to suggest that first time drink-driving cases end with the suspension or cancellation of liability in the vast majority of cases. Given this, I consider that a streamlined process could be adopted to deal with them.

Mixed (criminal and non-criminal) cases

168. Five of the case files reviewed were mixed cases where deportation liability arose on account of both criminal and non-criminal behaviour. Such cases generally involved clients who failed to disclose certain criminal convictions to INZ as part of the immigration process. The facts and circumstances arising in each are complex, but a common feature of the cases is that the clients withheld information on the belief that disclosure would hinder the success of their applications.

169. In two of these cases the Minister decided that the client should be deported, while in the other three the Minister suspended deportation liability (for periods of three, four, and five years).

170. In three of five cases, no investigation was required as it was clear that the client had failed to disclose information to INZ during the immigration process. The remaining two cases incorporated minimal inquiries to the extent necessary to establish that the grounds for finding deportation liability existed. The fact that the cases ended in different determinations indicates both that outcomes are highly fact specific, and that a range of options are available to the Minister without the need to refer to any advice or earlier precedent.

Conclusion on case summaries

171. The case files were a sample of files considered by the Minister and DDMs between 1 November 2016 and 31 October 2018.[63]

172. In all of the cases the RAs followed the prescribed process. This resulted in a balanced and informative case file summary. An important consideration is whether inquiries or investigation into the facts presented to the RA would have assisted in improved decision making.[64] In some instances, I consider that inquiries or investigation into the facts put forward by clients in response to the PPI letter and/or the questionnaire may have assisted. Foremost among those are criminal cases where deportation liability was suspended or cancelled on the basis of mitigating factors. Currently, the existence or extent of those mitigating factors is not investigated or verified.

173. For example, one client's liability for deportation was suspended for five years after he was convicted of three driving offences. In support of his application, the client provided letters of support from his wife, son, Reverend, colleague, former client and friend, and niece. His wife was presented as being employed in a permanent role, and he represented himself as working for the same company (where he was a valued member of staff) for 12 years. However, no verification process was undertaken. Accordingly, the extent to which these mitigating factors existed or

[63] The sampling process is detailed in the Introduction and Process section.
[64] Considering the counter-factual may never be known, any assessment is largely theoretical.

ought to be believed is unclear. While it may be cynical to consider some aspects of a client's application may be exaggerated or fabricated, it is more pragmatic to approach such situations with the understanding that not all assertions made by clients will be true, and as such could (at least) be tested by a certain level of inquiry by INZ.

174. In another example, a male client was convicted of assaulting a female (a separate conviction over and above common assault). When the offending occurred, the client and his wife were involved in a domestic dispute. The client's lawyers submitted that he and his wife had been through restorative justice and wished to continue their relationship and seek marriage counselling. This representation was not inquired into to determine whether this was in fact the position. Nor was the position verified as at the date of the decision by the DDM. It may be that simple inquiries with independent sources could verify this information.

175. As outlined above, I have concluded that certain changes could be made to make the preparation and review of case files more fit for purpose. That said, if the status quo is maintained, I suggest that the decision-making process that applies in serious criminal cases could be improved by taking some steps to inquire into the assertions made by clients, where appropriate. For example, lawful checking of other government or public information to corroborate. Given that suspension or cancellation is relatively rare for such criminal offences, the burden created by this may not be onerous.

APPENDIX A - TERMS OF REFERENCE

The Terms of Reference dated 9 November 2018 relevantly provide:

1. The independent review will examine whether the process for the preparation of a residence deportation case file information provided to decision makers (whether the Minister of Immigration or Delegated Decision-Makers) is of sufficient process quality to support fit for purpose decision-making, whilst still accommodating any applicable restrictions [including but not limited to: the protection of natural justice; consideration of subsequent grounds of appeal and review], or whether process improvements could be made. The independent review will assess how case files are prepared, what information is included, and how information is presented to decision-makers. The assessment will note any applicable restrictions that apply to the information that can be provided to the decision-maker, such as the provisions and principles of natural justice.

2. Specific recommendations, where merited, are sought for strengthening existing processes, where existing processes are not fit for purpose.

Background

3. As part of its commitment to operate as a learning organisation, INZ seeks an independent examination of the residence deportation liability case file preparation process to ensure that it: results in the production of well-prepared and presented case files for decision-makers; is fit for purpose and consistently provides decision-makers (whether the Minister of Immigration or Delegated Decision-Makers) with sufficient robust information to support decision-making, whilst still accommodating any applicable restrictions [including but not limited to: the protection of natural justice; consideration of subsequent grounds of appeal and review] or what is reasonably practicable.

Objectives

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

    a. 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

    b. Determining whether residence deportation case file information provided to decision-makers (whether the Minister of Immigration or Delegated Decision-Makers) 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.

Scope / limitations

5. The review will look at processes and practices for case file preparation to enable a decision-maker to consider exercising discretion over the deportation of a resident.

    Excluded from scope:

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

7. Other types of cases (non-residence deportation liability cases) or the broader work of the Resolutions Team.

8. Case files prepared for decisions before 1 October 2016 or post 31 October 2018.

Approach

9. The following approach will be taken in conducting this review:

- Review a statistically representative sample of complex case file requests for considering exercising discretion over residence deportation prepared. The sample will be a proportional representation of case files decided by the Minister of Immigration and delegated decision-makers, from a pool of cases decided between 1 November 2016 and 31 October 2018. The case files will be selected on a random basis from an anonymised list by the lead reviewer.
- Review the case file information prepared for the NZ resident Jan Antolik / Karel Sroubek request for discretion over the deportation.
- Interviews with Resolutions staff including management, DDMs employed by MBIE, relevant MBIE staff who support the function such as Legal, and any other stakeholders as agreed.
- Review case file preparation processes, guidelines, and practices to prepare recommendations, where warranted, to further strengthen case file preparation.
- The Terms of Reference for this review can be amended at any time with mutual agreement from both parties.

Deliverables

10. A draft report will be prepared containing the results of the review, summarising the findings and providing recommendations for any process improvement. The draft report will be issued to obtain feedback.

11. A final report will be issued to the Review Sponsor in accordance with agreed project timeline milestones.

APPENDIX B - PROCESS CHANGE RECOMMENDATIONS

1. Lord Steyn said, "in law context is everything".[65] The same is true of decision-making. Whether the current process for preparation of case files is of sufficient process quality to support fit for purpose decision-making depends on (i) who the relevant decision-maker is and (ii) which type of decision and case is being considered. The following discussion comprises my suggested process changes if the decision-maker remains the same as present, as well as recommendations for broadening the role of DDMs in deportation liability, suspension and cancellation decision-making.

Recommendations One and Two: Advice to Minister and investigation/inquiries

2. If the Minister is to remain the first line decision-maker to determine liability in non-criminal or mixed cases, then the process could be improved by ensuring that (at least) in complex cases the Minister is fully apprised of information relevant to the determination of liability and to the absolute discretion decision to cancel or suspend it.

3. This involves changes to the timing of decision-making (although I understand that such changes have already been implemented by INZ), possibly some change to the information that is provided to the Minister, and changes to the way that Resolutions considers and verifies information. For example, where a fact is asserted and the Minister is proposing to rely on that assertion to cancel or suspend liability, the Minister should ensure that INZ has made reasonable inquiries to verify that assertion.

Should advice or recommendations be given?

4. My preliminary conclusion is that specific advice or recommendations should not be given to DDMs and is best reserved for situations of complex or unusual cases that are to be decided by the Minister. In the case of DDMs, advice would normally be redundant. However, if it was required, it could be requested. In the case of the Minister, the arguments are stronger for having advice or recommendations. While I am conscious of the risk that the absolute discretion will be eroded by such a practice, I am 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.

5. In complex and unusual cases presented to a Minister, such as in Sroubek, in my view advice should be given in order to protect the Minister (and as requested by the Minister). This is consistent with the Beaglehole Report recommendations as already noted. The decision remains one of absolute discretion, but this would help ensure it is well informed.[66] In the Sroubek case, for example, advice could have been given to the Minister as to INZ's expected or preferred outcome, how similar cases had previously been decided, any risks involved in suspension or cancellation, and which decision would best reflect current policy settings and priorities. INZ could develop further guidance for the Minister as to suitable types of cases where the Minister ought to request advice. Examples are complex, novel, unusual or difficult cases which might trigger the Minister to request such specific advice.

[65] *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26 [2001] 2 AC 532 at [28].
[66] Such advice could include the matters raised in paragraph 122 above.

6. I understand that historically there have been difficulties with recommendations being made by officials and applicants or their counsel seeking to negotiate or debate those. That is not useful or appropriate and can be avoided by not entertaining such approaches given the limited scope for such involvement.

7. Moreover, the Courts have made it clear that the exercise of an absolute discretion is generally not amenable to judicial review except in cases of clear unreasonableness.[67] The Courts have been asked to review the exercise of such discretion under the Act on multiple occasions and have made the following comments:
    a) when a decision-maker exercises an absolute discretion under the Act, that decision-maker's "only obligation" is to note that section 11 of the Act applies;[68]
    b) the "availability of judicial review as a remedy is very limited", and only *Wednesbury* unreasonableness will be sufficient to invite such scrutiny;[69]
    c) if written reasons for a discretionary decision exist, the Court can only require discovery of those reasons for the purpose of enabling it to consider whether *Wednesbury* unreasonableness exists;[70]
    d) applicants for judicial review are not entitled as of right to discovery of written reasons;[71]
    e) the "very essence" of administrative absolute discretion is the ability of decision-makers to take "whatever relevant considerations" he or she thinks appropriate into account and to place such weight on those considerations as he or she chooses;[72] and
    f) "judicial review proceedings should not be brought simply because a reasonable decision-maker might have come to a different decision", particularly in cases where the decision is at the absolute discretion of the decision-maker.[73]

8. As discussed above, the Courts are reluctant to inquire into the mechanisms or reasons that sit behind a decision made under a power of absolute discretion. I do not think it likely that the Courts' willingness to do so will increase merely because INZ staff provide more specific advice to the Minister to assist him or her in exercising that discretion.

9. The practice of calibration and the giving of more generic advice outside of specific cases is sensible and should continue.

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[67] Although judicial review may be available in respect of other discretions exercisable under the Act, for example see *Matua v Minister of Immigration* [2018] NHC 2078.
[68] *Zhang v Associate Minister of Immigration* (above) at [23].
[69] *Zhang v Associate Minister of Immigration* (above) at [23]; *Singh v Associate Minister of Immigration* (above) at [6]. See paragraphs 107 and 116 - 121 above for discussion of *Wednesbury* unreasonableness and its application in New Zealand.
[70] *Zhang v Associate Minister of Immigration* (above) at [25].
[71] *Zhang v Associate Minister of Immigration* (above) at [26].
[72] *Dean v Minister of Immigration* (above) at [45].
[73] *Ning v Minister of Immigration* [2016] NZHC 1856 at [14]. This case dealt with the issue of costs following Ms Ning's attempt to seek judicial review of the Minister's decision not to grant her a visa (an exercise of absolute discretion under the Act).

Should the process be inquisitorial or investigative?

10. In the main, I suggest the process should not be inquisitorial or investigative. The system relies on the client to provide the relevant information and requires that information to be truthful and not 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 suspension and cancellation). If structural changes along the lines suggested were made, then there would be limited need for investigation of issues raised given the sequencing and personnel involved.

11. In the current system, however, 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. Ideally these issues would be identified and directed by the decision-maker (preferably a DDM but, if not, the Minister). They should include situations (like in Sroubek) where complex cases contain claims that are relevant to a decision-maker suspending or cancelling deportation liability.

12. Decision-makers will from time-to-time make unexpected decisions influenced by factors which were not predicted to be influential. Neither the Minister nor the department should be expected to make a decision in circumstances where the Minister did not have the relevant information upon which to judge an issue.

13. I anticipate the general public would expect an INZ team member to conduct a preliminary search of publicly available material to provide the decision-maker with information on an issue that might be critical to a decision. Information that is in the public domain for example from government websites, Court decisions or media articles from reliable sources, would be expected to be assessed, at least in relation to an issue that might reasonably sway a decision-maker.

Recommendations Three and Four: Use the DDM resource more efficiently in criminal cases

14. As discussed, DDM involvement in this process is sensible and beneficial. It enables expert and professional decision-making in a complex area, free from allegations of political influence. To optimise that within the existing delegations, DDM expertise should be applied where it is most useful. On current settings, that would appear to be in non-minor criminal offending.

15. First driving offences (as discussed above) are invariably dealt with by cancellation or suspension. If that policy setting remains, then it is sensible to streamline the process so that Resolutions and DDM time is spent on more serious matters. A streamlined process should be adopted as discussed (and outlined further below).

16. Given the role of the IPT, automatic liability cases involving non-minor offending could go direct to an IPT appeal (if any) without prior consideration of cancellation or suspension of deportation liability. Once that appeal has been exercised or lapsed, then the DDMs could consider cases arising following that process. 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 cases dealt with by DDMs would inevitably be reduced in number

and would be likely to be more complex. Naturally, further consideration would need to be given to the resourcing implications for the IPT (which requires further consideration by MBIE, the IPT and the Ministry of Justice).

Recommendation Five: Administrative changes

17. In addition to the above, the process for assembling case files could be amended to incorporate the following process changes. These changes would make that process more robust and ensure that the information presented in case files is appropriate in the circumstances.

18. Evidence that is central to establishing the prima facie liability of a client in a non-criminal case is not currently sent with the PPI letter and questionnaire to the client. This information could be included with the PPI letter and questionnaire.

19. It appears more efficient for INZ to provide pertinent evidence to a client at the outset, rather than waiting for the client to request that evidence. For example, if it is alleged that the client provided INZ with a false birth certificate, the client will likely request a copy of that document. Instead of waiting for a request or application, the Resolutions team could send the evidence it has to the client. This would have the following beneficial effect:
    a) It would prevent later Privacy Act 1993 requests, which take up time and resources (of both the client and INZ);
    b) It would allow a non-liable client to more expeditiously provide an explanation for the documents;
    c) It could mean a liable client more readily accepts that they could be deported after seeing the evidence against them; and
    d) It improves the fairness of the process, given the client can more accurately understand the allegation against them.

20. One possible drawback that was raised regarding the sending of evidence with PPI letters is that clients may be transient, leading to other people opening their mail and a privacy breach occurring. This could happen. However, given it is an offence to open someone else's mail without reasonable excuse,[74] the starting point should be that mail will be opened by the intended recipient rather than assuming the mail will be intercepted and opened. Additionally, the prejudicial information will often be the proposition that the client is liable, not necessarily the evidence supporting that proposition. Given that prejudicial information is currently sent to the client, the inclusion of supporting evidence does not meaningfully increase the chance of a prejudicial privacy breach occurring.

21. INZ is not certain that it receives the final Summary of Facts from the Police or Corrections. Currently, the decision-maker may be considering a Summary that the client did not plead guilty to. This process could be improved by either confirmation from the Police or Corrections, or confirmation as part of the PPI.

[74] Section 23 of the Postal Services Act 1998.

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

23. INZ should augment the SOP to include a section on how to prepare a preliminary assessment for a non-criminal file. A formal evidential threshold should be established for determining whether a non-criminal file should proceed after a preliminary assessment is completed.

24. When presenting a file to a decision maker, a substitute for the four separate precedent letters should be found to streamline the documentation. The case file summary could include for noting by the decision-maker the relevant decisions, for example:
    1) Deportation should proceed;
    2) Deportation liability should be cancelled; or
    3) Deportation liability should be suspended for ____ years; or
    4) No determination will be made until _____.

Other Recommendations: Change in Decision-Maker

25. For reasons discussed above, I am of the view that dedicated decision-makers, expert in the immigration area, are better placed to make deportation decisions in the first instance. 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 Act 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.

26. 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).[75] At that stage, the IPT should require the appellant to put forward any arguments as to grounds for deportation liability on the facts, and whether humanitarian or other factors exist such that deportation liability ought to be suspended or cancelled (such that both points can be considered by the IPT in the same appeal).[76] Only after any appeal has been determined should a DDM or (where necessary) the Minister decide whether to suspend or cancel liability.[77]

27. In my view this would involve reconfiguring the deportation liability, cancellation and suspension process to delegate greater powers to DDMs. A straw-man is set out for consideration below.

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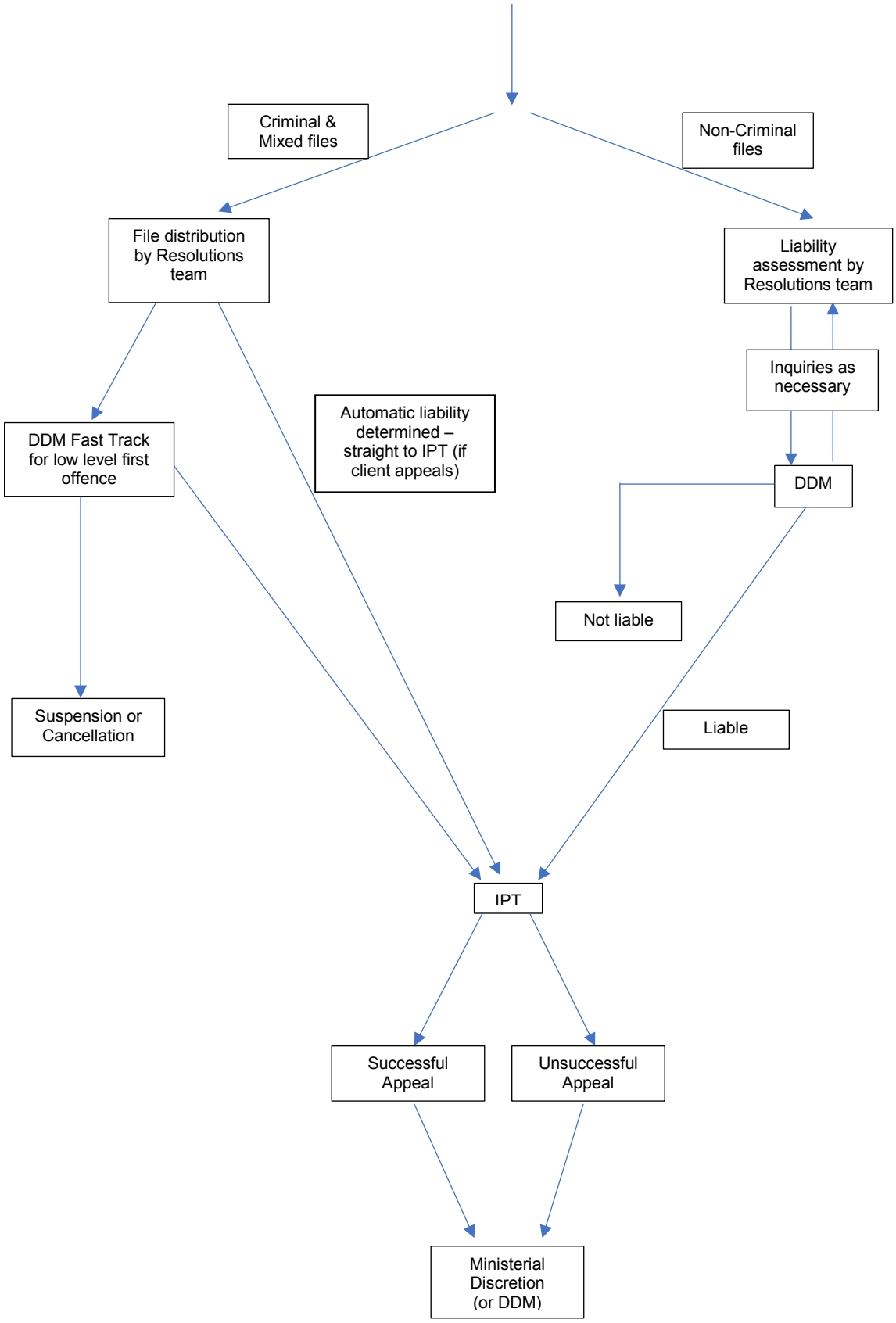
[75] Under section 201 of the Act a person can appeal to the IPT on the facts and on humanitarian grounds if it has been determined that they are liable under section 155, section 156(1)(b), section 158(1)(b), section 159, or section 160. Under section 206, a person who is liable for deportation under section 161 can only appeal to the IPT on humanitarian grounds.

[76] It is acknowledged that this will require the IPT to reconfigure its processes and is, therefore, subject to policy and resourcing constraints. That being said, I do not consider that this would be inconsistent with the IPT's powers and function under the Act, given that section 222 of the Act allows the IPT to regulate its procedures as it sees fit, subject to the Act and any applicable regulations (such as the Immigration and Protection Tribunal Regulations 2010, which would not appear to preclude this change to the IPT's process). Moreover, section 223 allows the chair of the IPT to direct that appeals or matters be heard together; "frivolous or vexatious" appeals can be dismissed under section 224 of the Act; and appeals can be struck out (including where they are an abuse of process) under section 224AA.

[77] Given that absolute discretion decisions are not, strictly speaking, able to be applied for or requested.

28. This would involve:
    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.

Proposed reconfigured process



Proposed new process for first-time driving offenders

29. As outlined above, given that most criminal cases where liability arises on account of a client committing their first driving offence result in cancellation of liability, INZ could consider adopting a streamlined process for establishing and considering liability in such cases. A proposed simplified approach is set out below.

30. Upon receiving a case file from the support officer, the analyst could complete the following table (or one similar to it):

FIRST OFFENCE DRIVING LIABILITY ASSESSMENT			
Client Name	Mr Smith	**DOB**	2/3/1965
Nationality	English		
Offence	Driving with excess breath alcohol	**Maximum Penalty**	Three months imprisonment or a fine of $4,500; must be disqualified from driving for six months or more
Sentence	Fined $550 plus court costs; disqualified from driving for six months		
Offence date	6 October 2018	**Sentence date**	29 January 2019
Residence Category	Partnership	**First held residence**	4 February 2012
Location	Auckland	**Employment**	Carpenter – full time and permanent
Family in New Zealand	Wife (44) one son (17) and one daughter (15).		
If Drink driving, recorded blood or breath alcohol level	468 micrograms of alcohol per litre of breath	**Legal standard**	400 micrograms of alcohol per litre of breath
Non-Liable offences	None		
DECISION (sign in white box provided and delete other two options with an x)			
Suspend liability for ___ years			
Cancel liability			
Proceed with full assessment			

31. This First Offence Driving Liability Assessment could then be given to a DDM. At this point a DDM could cancel or suspend liability (but not confirm it), acknowledging that suspension of liability has serious consequences.[78]

32. 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), although I note that nothing presented to the DDM is open to interpretation; it is a summary of established

[78] Those consequences include preventing a person from obtaining a permanent residence visa or citizenship, and limiting their ability to sponsor or support partners or other family members.

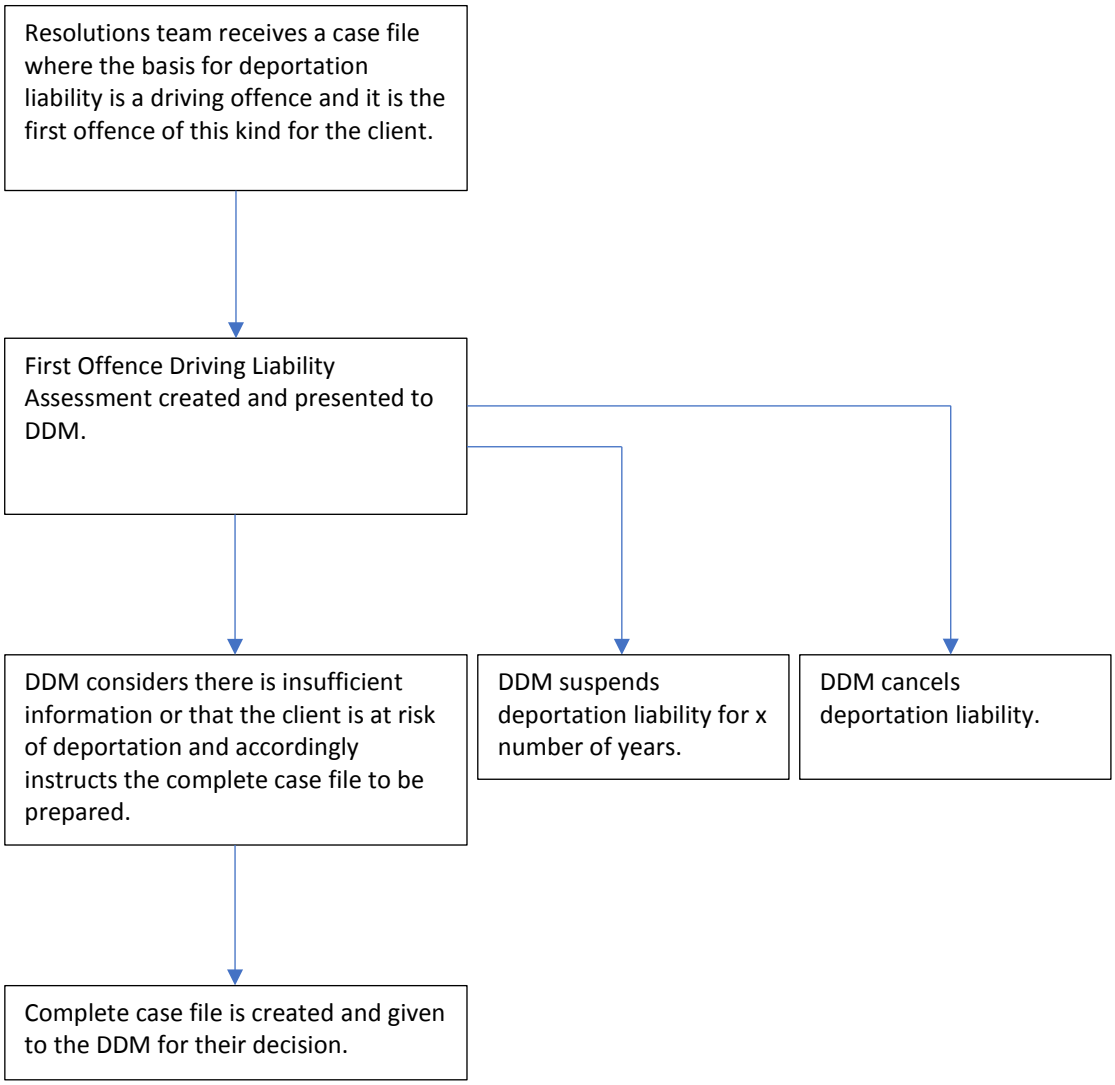
facts. Arguably there is nothing to be debated by the client and so little benefit would arise from having the opportunity to be heard. Presuming identification is established, the client's liability for deportation is automatic. At the first stage, the DDM is only considering whether enough factors exist to offset the client's liability. Suspension of liability does, however, have flow-on considerations so the natural justice implications of this suggestion require further consideration.

33. The DDM would not confirm a client's deportation liability at this first stage. 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). This is the second stage of the two-stage process.

34. This process allows seemingly predictable cases to be dealt with efficiently, while maintaining the rights of those affected.

35. Ultimately, this option needs to be considered as part of broader policy considerations and determination by the Minister (in consultation with stakeholders). In my opinion, work ought to be done to determine whether the current processes are fit for purpose, or whether the proposed streamlined process would be more effective.

Diagram of proposed process



APPENDIX C - COMPARATIVE PROCESSES

1. The approaches taken overseas to deportation decisions are instructive for the purposes of this review. To that end I have considered, in general terms, the processes used in Australia, the United Kingdom and Canada for determining the treatment of individuals who have been granted residence but have become liable for deportation due to their conduct. As well as a general overview of their processes, whether these countries verify the facts obtained from pre-departure information gathering exercises was also researched.

2. These processes and procedures were summarised following a desktop review of publicly available information. I did not receive any specific advice from experts in the relevant jurisdictions and accordingly these summaries should not be regarded as definitive.

Australia

3. Australia's Migration Act 1958 (Cth) ("**Migration Act**") is broadly similar to New Zealand's Immigration Act.[79] Under the Australian system, the Department of Home Affairs ("**DOHA**"), which has subsumed the Department of Immigration and Border Protection, is responsible for the deportation of liable persons.

4. Sections 200 and 201 of the Migration Act provide the Minister of Immigration with the ability to deport any person who is not an Australian citizen and who has been convicted in Australia of an offence for which the person was sentenced to imprisonment for life or to imprisonment for a period of not less than one year, but only if:
    (a) The person had been in Australia as a permanent resident either for a period of less than 10 years, or for periods which (when added together) total less than ten years, at the time when the offence was committed; or
    (b) The person is a New Zealand citizen who has been in Australia as an exempt non-citizen or as the holder of a special category visa for a period of less than 10 years, or for periods which (when added together) total less than ten years, when the offence was committed.

5. A deportation decision will not be made until all the information that is reasonably necessary for making the decision is received. In normal circumstances, the decision will be made towards the end of the potential deportee's sentence and will allow time for a decision and appeal prior to release from custody.

6. Previously, in deciding whether to deport a potential deportee, a decision-maker would have had regard to the importance placed by the government on two primary considerations. Those considerations were:
    (a) The expectations of the Australian community; and
    (b) In all cases involving a parental relationship between a child or children and the potential deportee, the best interests of the child or children.

[79] The relevant provisions of the Migration Act 1958 relating to deportation are Division 9 sections 200 to 206.

7. There were also other considerations that were relevant in individual cases. Two of the most common were:
    (a) The degree of hardship which may reasonably be expected to be suffered by the potential deportee; and
    (b) The degree of hardship to Australian citizens or permanent residents that would reasonably be expected to flow from deportation.

8. A person will usually be interviewed before a deportation order is signed (or removal takes place). The interviewing officer is informed as accurately as possible of dates of any entry or re-entry into Australia, and particularly of the circumstances of family or other relationships in Australia, including any de facto spouse. The interview may occur while a person is serving a term of imprisonment.

9. Direction 65 is the latest departmental Direction, which now gives greater consideration of the person's individual circumstances, including 'both good and bad conduct'.[80] The three primary considerations are now:
    (a) The protection of the Australian community from serious criminal or other harmful conduct, particularly crimes involving violence;
    (b) Whether the person was a minor when they began living in Australia; the length of time that the person has been ordinarily resident in Australia prior to engaging in criminal activity or other relevant conduct; and
    (c) Relevant international obligations.

10. Australia also has international obligations not to return a person to a country where there is a serious risk of violation of their fundamental human rights.

11. From my review of the Australian deportation process, it appears that there is no "fact-checking" of information provided to DOHA.

United Kingdom

12. UK Visas and Immigration ("**UKVI**"), a division of the Home Office department, is responsible for controlling migration and processing administrative removals from the UK.

13. Pursuant to section 32 of the UK Borders Act 2007, the Secretary of State is obliged to make a deportation order where a non-citizen is convicted of a crime and sentenced to imprisonment for a term of one year or more unless an exception applies.[81] The most commonly argued exception to automatic deportation is that the deportation would amount to a breach of the Human Rights or Refugee Conventions. A non-citizen can also be deported if the Secretary of State deems the deportation to be "conducive to the public good".[82]

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[80] Alan Freckelton, *Administrative Decision-Making in Australian Migration Law*, available online at https://press-files.anu.edu.au/downloads/press/p318861/html/cover-1.xhtml?referer=&page=0#_idParaDest-1 accessed 24 July 2019.
[81] However, there are exceptions to this rule, including if deportation would breach the UK's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings.
[82] Section 3(5)(a) of the Immigration Act 1971 (UK).

14. The Secretary of State will determine whether the individual is liable for deportation and will ask the potential deportee to make submissions as to why they should not be deported. In cases of "automatic" deportation the Secretary signs a deportation order and issues a letter giving reasons for deportation. In cases where deportation is found to be "conducive to the public good" the Secretary signs a notice of intention to deport with reasons for deportation.

15. The UK has a similar process to New Zealand in that it gives a person who is deemed liable for deportation the opportunity to give evidence as to why they should be able to stay in the UK. Persuasive reasons to stay may include:
    (a) The person has strong connections and family in the UK (deporting would go against their human rights, particularly Article 8 of the Human Rights Act 1998 which provides for the right to respect for private and family life);[83] and
    (b) Returning to the person's home country would be dangerous (the person has the opportunity to apply for asylum).

16. As of August 2008, The UKVI was under no legal obligation to send a Notice of Intention to Deport to criminals. For persons who are not liable for 'automatic deportation' – that is, non-criminal clients – case workers must provide a suitable notice.

17. If deportation will mean that a family is separated, there is a process which requires case workers to record their considerations and decisions at each stage of the separations process. This is to:[84]

> …ensure information is accessible to other business areas that may need to re-assess the separation decision at a later date, as family dynamics may alter as the case moves towards removal. In all cases where children are involved, you must clearly document any best interest considerations, and any welfare and safeguarding considerations made under section 55 of the Borders, Citizenship and Immigration Act 2009. The duty to safeguard and promote the welfare of children, under section 55, requires you to evidence your consideration of the child's best interests. Without this, the decision may be open to legal challenge on that basis alone, even if the right conclusion was reached.

Canada

18. Immigration, Refugees and Citizenship Canada ("**IRCC**") or the Canada Border Services Agency ("**CBSA**") can issue three types of removal orders: departure orders, exclusion orders, and deportation orders.

19. There is an interview process after a removal order is issued. However, this is not mandatory. In addition to the removal orders, there is also a process called a Pre-Removal Risk Assessment ("**PRRA**"). A PRRA ensures that people that are removed from Canada are not sent to a country where they would be in danger or at risk of persecution. The PRRA is an opportunity for people who are facing removal from Canada to seek protection by describing, in writing, the risks they

[83] Paragraphs 398 to 399A of the Immigration Rules set out when a foreign criminal's private and/or family life will outweigh the public interest in deporting them.

[84] Immigration Returns, Enforcement and Detention General Instructions, 'Family Separations', page 25, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/666491/family_separations.pdf accessed 2 April 2019.

believe they would face if removed. An immigration officer decides whether a person is eligible to apply for a PRRA. There is limited public guidance on what factors are considered when determining if a client is eligible for a PRRA. Persons whose PRRA applications are approved may stay in Canada.

20. Based on a review of the client's case and the availability of travel documents, an officer will determine when it would be most appropriate to notify the person of the opportunity to apply for a PRRA. If a person is found to be eligible for a PRRA, they will be given an application form, a guide, and 15 days to apply. In the majority of cases it is recommended that notification is given in person.

21. Written documents, such as documents that present facts relating to the alleged risks, may be used to support a person's submissions. A person may also present written statements of family members, friends, neighbours or others. The following are examples of documents that are suggested as being useful as evidence:[85]
    - Magazine or newspaper articles describing the situation in the client's country;
    - Legal documents;
    - Police documents;
    - Medical documents;
    - Personal documents;
    - Written testimonies; and
    - Personal letters.

22. Information provided to Canadian immigration officers may be scrutinised.[86]

23. The applicant must provide truthful, accurate information. Processing will stop immediately if the person gives false or misleading information. It is an offence under section 127 of the Immigration and Refugee Protection Act to knowingly make a false statement in an application.

24. In assessing a person's PRRA application, the immigration officer will consider:
    - The information on the completed application for a PRRA;
    - The applicant's immigration file;
    - The written submissions and any new evidence that has been submitted; and
    - If the applicant has had a refugee protection claim heard by the Immigration and Refugee Board, the decision and reasons the refugee claim was refused, as well as any documents completed by the Immigration and Refugee Board in its assessment of the claim.

[85] Government of Canada, Guide 5523 – Applying for a Pre-Removal Risk Assessment, https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-5523-applying-removal-risk-assessment.html accessed 24 July 2019.

[86] Government of Canada, Completing the forms section, <https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-5523-applying-removal-risk-assessment.html accessed 9 April 2019.

25. Additionally, the PRRA officer may refer to sources of information that are publicly available. The following are examples of publicly available sources of information that might be reviewed (although other publicly available sources of information may also be taken into account):[87]
    - Human Rights Package;
    - Contextual Package;
    - Index Media Review;
    - Weekly Media Review;
    - U.S. Department of State Country Reports on Human Rights Practices;
    - Lawyers Committee for Human Rights;
    - Amnesty International reports;
    - Doctors Without Borders reports;
    - World Europa and Human Rights World Reports; and
    - Internet research

Conclusion on comparative processes

26. The deportation systems of these commonwealth "five eyes" partners have many similarities to our own. They are all directed by natural justice, the welfare of the individual, family and the child, and the considerations of the citizens of the host country. While the review of our partners' systems was not detailed or conclusive, I would make the following comments.
    a) Both Australia and the United Kingdom require a criminal to be convicted of an offence where they can be imprisoned for over one year before they can be deported. This is different from our position of a term of imprisonment of 3 months or more (section 161(1)(a) of the Act). The possible length of incarceration and its impact on the ability for a non-citizen to be deported is a policy consideration outside the terms of this review. Nevertheless, this might provide some support for a streamlined process for offenders convicted of low-level offences.
    b) Canada's deportation system provides for the investigation of information offered by a client should the situation require it. This includes reviewing sources of information that are publicly available. Instead of having a blanket rule against investigation, Canada's approach appears suitably pragmatic. A similar approach may be worth considering in a New Zealand context, at least in situations where a decision-maker and the decision-making process would benefit from such investigation.
    c) The UK system in relation to "automatic" liability is similar to that of the more streamlined system proposed in this report, in that the Secretary signs a deportation order and issues a letter giving reasons for deportation as opposed to conducting a process to determine whether deportation liability is offset. This gives some support to both a streamlined process for low-level offending and a reconfiguration of the process so that automatically liable clients go directly to the IPT on a humanitarian appeal, as opposed to going through the current process that culminates in a decision by a DDM.

[87] Government of Canada, Guide 5523 – Applying for a Pre-Removal Risk Assessment (above).