The Chair
Joint Standing Committee on Migration
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Sir

Thank you for this opportunity to present our submission to the Committee on review processes associated with visa cancellations made on criminal grounds.

We wish to present our submissions within the context of a recent real life example. As migration agents we recently assisted a client with a visa cancellation made on criminal grounds.

Our client is a citizen of a European country. He held a Bridging Visa A (BVA) granted on the basis of his application for spouse visa. Our client is in a relationship with an Australian citizen.

Our client's BVA (associated with a spouse visa) was cancelled under the Migration Act on the basis that he had been charged with criminal offences.

Our client applied for a BVE and was granted it. A few days later the BVE was also cancelled. Our client was detained at BITA and subsequently transferred to Villawood.

He applied for review of the BVA cancellation at the AAT. We had provided initial advice to him and his spouse on the matter, but they felt at the time that they did not have the money to employ our services. Following the lodgement of the application for review they decided they would prefer our assistance, and they engaged our services.

The case was heard on April 4th 2018. On April 5th the Tribunal decided to set aside the decision under review and substitute a decision not to cancel the visa. We received the decision around 10.30am.

Around 3pm we received a call from our client's spouse to inform us that the Australian Border Force (ABF) would not release him, on the basis that his BVA had ceased. Our services had been completed, but we agreed to continue to assist on a pro bono basis.

The ABF explanation did not make sense to us. We contacted the responsible ABF officer ([redacted]) who said that the "guys in the legal team in Canberra" had advised him that the BVA could not be reinstated as it ceased when the BVE was granted. We responded this was ridiculous as the BVA had already ceased when it was cancelled (section 82 of the Migration Act 1958). It cannot be doubly ceased. In any case the grant of a BVE could not cease another bridging visa (especially one that had already ceased when it was cancelled) as a BVE can only have been

granted where an individual is already unlawful. This would be obvious to anyone with a basic understanding of the legislation.

[redacted] maintained that this was the advice he had been given and he quoted the Migration Regulations 010.511 (when the BVA is in effect) – which explains how a BVA ceases when another visa is granted.

We explained how this part of the Regulations was not relevant and asked to speak to someone in the legal team who had provided this false advice. [redacted] said he would try and have someone call back before the end of the day. We pointed out that at the moment, our client was being detained unlawfully. We subsequently emailed written advice to [redacted] explaining how their position was incorrect and untenable and no competent person could maintain such a position. The explanation was clearly a pretext designed to disguise the unlawful detention from ABF staff and the visa holder.

On 6 April we called [redacted] to follow up on contact from the legal team. He said the relevant person in the legal team was not in today and he would try and get someone else to call me.

By the middle of the day it became very apparent to us that the Department was simply stalling. At that point we contacted the Immigration Ombudsman and sent him information on the case. The Ombudsman called later in the afternoon and said that they had agreed to take on the complaint but that it would take weeks to have anything done. He asked if we could let me know when we got the legal opinion from ABF.

We were contacted by the Consulate of our client's country of passport and we briefed them on how their citizen was being unlawfully detained.

We phoned [redacted] of ABF and notified him that we had contacted the Ombudsman, and briefed the Consulate, and we informed him that unless our client was released we would apply to the appropriate court to order his release. We encouraged him to make his supervisor aware that their actions were unlawful. He confirmed that his supervisor was aware of our advice. We contacted a solicitor to initiate the necessary court proceedings.

About 5pm [redacted] of ABF called to say that we would have a written opinion from the legal section on Monday explaining why our client's ongoing detention was lawful. He said, despite his earlier advice, we could not get a verbal explanation.

Our client remained in detention over the weekend of 7/8 April.

On Monday 9th April we contacted [redacted] of ABF to see where the legal opinion was. It was not available. We proceeded to instruct a solicitor to apply for a court order to release our client from unlawful detention, and started to draft the necessary affidavits.

On Tuesday 10th April we were informed by our client's spouse that our client was about to be released from detention because he held a BVA. The written advice

provided by the legal team to [redacted] of the ABF contradicted what he had been saying to us for the last 5 days, and agreed with our original advice initially supplied by us to the department on April 5th. We requested a copy of the departmental advice, which was refused.

Following the news we were contacted again by the German Consulate who were preparing a letter to the Department expressing their concerns. We informed them that the Department had admitted that its earlier advice was false, and therefore the pretext they were detaining our client under was also false.

Our client was released at approximately 2pm on Tuesday April 10th. By the time of his release our client had been unlawfully detained for five days by the Australian Government in circumstances it had been informed were unlawful. During these five days the Department of Home Affairs stalled, refused to justify or explain the unlawful detention, and lied about the basis for the detention. On the fifth day it finally admitted it had no lawful basis for continuing to detain him.

If our client had not been represented, we can only conclude that he would still be unlawfully detained today.

In our submission this example shows a number of things:

> Current review processes have low efficacy if the Department can simply ignore them, or if applicants need to apply to the courts to enforce review outcomes.
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> Access to independent representation is essential to the integrity of migration processes, including review processes.
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> The Department of Home Affairs is prepared to flout the law it is supposed to administer, to achieve its desired outcomes.
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> The Department is in a position to be policeman, prosecutor, judge and jailor, and exploits these wide powers. It lacks suitable accountability in the administration of its powers.
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> In these circumstances, the Department should not be granted any wider powers, and review processes should not be further restricted, which might lead to even greater abuses.

We submit that the Department should be invited to explain to the committee:

> How many other times has it acted to detain somebody on the pretext of the initial, false advice?
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> Is it currently detaining anybody else on the pretext of the initial, false advice?
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> Who was responsible for the initial false advice, and how have they been held to account?

Will the initial false advice be relied upon again in the future?

Once again, we appreciate this opportunity to provide submissions to the committee.

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