Australian Government
Department of Home Affairs

Submission

For decision
PDMS Ref. Number: MS22-002716
Date of Clearance: 22/12/2022

To **Minister for Immigration, Citizenship and Multicultural Affairs**

Subject **Ministerial Direction on character related visa decision making - New Primary Consideration**

Timing Not time critical

Recommendations

That you:

1. note s. 34(3) agreed to a new common-sense approach to character related visa decision making for non-citizens of all countries, including New Zealand citizens; — (noted) / please discuss

2. agree, to the contents of new Ministerial Direction 99 (MD 99) (**Attachment A**) introducing a new primary consideration of non-citizen's strength, nature and duration of ties to Australia for character-related visa decision-making; — (agreed) / not agreed

3. note, the Department of Home Affairs (the Department) will provide you a clean finalised copy of MD 99 for your signature once an announcement date has been finalised, for you to sign on the date of the announcement; — (noted) / please discuss

4. note, that on the date of signature and announcement, the Department will publish the signed MD 99 on LEGEND.com (an electronic database of migration and citizenship legislation and policy documents, available to the public); — (noted) / please discuss

5. note, that following your signature and announcement of MD 99, a further period of six weeks is required prior to commencement of these changes, to enable a smooth transition between the old and new Ministerial Direction. For example, if you sign and announce the new Ministerial Direction on 17 January 2023, the commencement date of MD 99 will be 1 March 2023; — (noted) / please discuss

6. note, upon you signing MD 99, to ensure procedural fairness, that the Department must provide the MD 99 to the Administrative Appeal Tribunal (AAT) at least six (6) weeks prior to commencement to enable management of the AAT caseload on hand and notification to impacted review applicant where identified; — (noted) / please discuss

7. note, the Department will continue to engage with you on issuing a further new Ministerial Direction to address family violence-related concerns; and	(noted) / please discuss
8. note, the Department will work closely with your office on arrangements for announcement of these changes in consultation with the office of the Minister for Home Affairs.	(noted) / please discuss

Minister for Immigration, Citizenship and Multicultural Affairs

Signature..... **Date**: 20 / 1 / 2023

Minister's Comments

Key Issues

1. s. 34(2) s. 34(2) agreement to a new common-sense approach to character related visa decision making for non-citizens of all countries, including New Zealand citizens. This is to be implemented through a new Ministerial Direction under section 499 of the *Migration Act 1958* (the Act), which will make long-term residence in Australia a primary consideration in character-related visa decision-making.
2. s. 34(3) agreed to the proposed common-sense approach. As such, the Department is providing you a finalised draft of MD 99 for your agreement (see **Attachment A** – amendments tracked for ease of reference).
3. As explained under Client service implications below, the Department recommends that you sign and announce MD 99 on the same date, followed by a period of at least six (6) weeks prior to commencement of these changes to ensure there is a smooth transition between old and new arrangements, and to guarantee procedural fairness for cases considered by the AAT.

MD 99 elevates long-term residence in Australia to be one of five primary considerations for character-related decision-making

4. MD 99 incorporates changes to ensure that long-term residence in Australia is given stronger consideration in character-related visa decision-making.
5. In making a decision under section 501(1), 501(2) or 501CA(4) of the Act, MD 99 requires decision-makers to take into account the following primary considerations (new text in **bold** below):
   - protection of the Australian community from criminal or other serious conduct;
   - whether the conduct engaged in constituted family violence;
   - **the strength, nature and duration of ties to Australia;**
   - the best interests of minor children in Australia;
   - expectations of the Australian community.
6. As outlined in **Attachment B**, this will mean that in character-related visa refusal, discretionary visa cancellation and revocation of mandatory visa cancellation decision-making, decision-makers would need to weigh in the non-citizen's favour, the length of ordinary residency in the Australian community, particularly in instances where the non-citizen spent their formative years in Australia.
7. Decision-makers would also need to consider the impact that the decision would have on dependent children who are Australian citizens, permanent residents or have an indefinite right to remain in Australia.

8. This consideration would need to be balanced against other considerations including the seriousness of the conduct, recidivism and expectations of the Australian community.

MD 99 is expected to benefit cases with relatively low sentence length and where there is no serious offending or family violence

9. In recent months, the Department conducted a desktop exercise to examine the impact MD 99 will likely have on character decision-making. You were briefed on the findings (**Attachment C** refers).

10. Adverse decisions (e.g. to not revoke visa cancellation) are more likely in cases involving serious offending or family violence, despite the person having resided in Australia for a considerable period.

Other changes to MD 99 are required to achieve intended outcomes

11. In addition to including a new primary consideration, MD 99 also includes:

- amendments to reflect the passage of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* and clarify that decision-makers do not need to consider non-refoulement obligations unless explicitly raised by the non-citizen concerned, or the circumstances suggest a non-refoulement claim; further, in those cases, where the visa is not a protection visa, it is open to defer assessment of whether non-refoulement obligations are engage on the basis that it is open to the non-citizen to apply for a protection visa;
- amendments to address minor grammatical and formatting errors and include subsection 8.1.1(l)(h) which was part of previous Ministerial Directions and was inadvertently omitted when Ministerial Direction 90 was drafted; and
- amendments to address the Full Federal Court's judgment in *Au v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affair*s [2022] FCAFC 125, where the Court found the AAT did not address as it should have done, whether it was or was not satisfied of the existence of "another reason" for revocation of the cancellation decision, for the purposes of s 501CA (4) of the Act. Instead, the AAT treated the matter as one of the exercise of a discretionary power to revoke or not revoke the cancellation decision.
    - In reaching its decision, the Full Federal Court observed that the references to the exercising of "discretion" within the AAT's reasons might be attributed to the terms of Direction 79. Although this was amended in Ministerial Direction 90, s. 42(1) s. 42(1) s. 42(1) .
- an inclusive definition of 'member of the person's family' (only) for the purposes of the definition of 'family violence' in the context of MD 99. This does not impact the definition of the member of the persons family for migration purposes.

- The purpose of the proposed new definition would be to include, as a 'member of the person's family', and thus as a potential victim of 'family violence' as defined in the Ministerial Direction, a person who has, or has had, an intimate personal relationship with the relevant person, for example a current or an ex-girlfriend. This was the situation dealt with in a recent Full Federal Court decision, *Deng v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 115. In that case, the Full Court quashed a decision of the AAT on the ground that the AAT had misunderstood the definition of "family violence" in Ministerial Direction 90. This was because the AAT had wrongly concluded that the violence perpetrated by the applicant on a person who had been in an intimate relationship with the perpetrator was "family violence" for the purposes of the Ministerial Direction, notwithstanding that the person was not a family member within the definition of "family violence".
- This is separate to the changes to the Ministerial Direction that the Department is progressing early next year to address family violence-related concerns (**Attachment D**).

12. s. 33(a)(iii)

Background

13. The Department previously provided you with a draft of the new MD 99 to replace Ministerial Direction 90 - *Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (MS22-001434).

14. Section 499 of the Act provides that the Minister may give written directions to a person or body who has functions or powers under the Act. The directions must be about the performance of those functions or the exercise of those powers. Delegates of the Minister, and AAT members that conduct merits review of reviewable character decisions, must comply with directions made under section 499 of the Act. The Minister for Immigration, Citizenship and Multicultural Affairs, and any other Minister involved in visa decision-making, is not bound by these directions.

- There are limitations to a Ministerial Direction made under section 499 of the Act.
- The Minister cannot give a direction that is inconsistent with the Act or the *Migration Regulations 1994.*

15. Section 501 prescribes failure to satisfy the character test as a condition precedent to the exercise of the discretion to refuse or cancel (subject to the special provision for mandatory cancellation in certain circumstances). The section does not create any presumption as to the way in which that discretion should be exercised, that is, whether to refuse or cancel the visa of a non-citizen who does not pass the character test.

16. Ministerial Directions can require a decision-maker exercising powers under section 501 (including a delegate of the Minister and the AAT) to take into account certain factors when exercising their discretion and generally to give more weight to certain considerations or less weight to other considerations. They cannot, however, direct a decision-maker to make a particular decision.

17. Once a new Ministerial Direction comes into effect, the previous Ministerial Direction ceases, and all character decisions made from that date will be under the new Ministerial Direction. Cases that were being considered under the previous Direction would then need to be considered under the new Ministerial Direction.

Consultation – internal/external

18. Status Resolution and Visa Cancellation Division, Immigration Programs Division, ABF North and Detention Division, AGS Special Counsel and Legal Group were consulted on the draft MD 99 and this submission.

Consultation – Secretary

19. The Secretary was not consulted on the approach in the submission.

Client service implications

20. To implement MD 99, the Department will need to review the current caseload of over 5,000 cases to identify affected cases. The Department anticipates around 2,800 cases will need to be renotified.

21. There will be a significant reduction in the number of cancellation, refusal or revocation decisions finalised in the first few months of the commencement of the MD 99. This will impact cases currently under consideration as impacted non-citizens would need to be issued a new notice of intention to consider visa cancellation or refusal or a natural justice letter (in revocation cases) with the 28 day natural justice period before a decision can be made and giving them an opportunity to comment, having regard to the new Ministerial Direction. A copy of the new Ministerial Direction will be provided to these individuals.

22. Any undecided cases with your office awaiting decision will need to be recalled and amended to reflect the new Ministerial Direction. In addition, any urgent decisions that have to be made within the 28 days after the Ministerial Direction comes into effect, would need to be referred to you under your personal power to refuse or cancel without natural justice (section 501(3)).

23. In light of the above the implementation of any new Ministerial Direction on character-related visa decision-making will extend the period of time impacted non-citizens are detained while awaiting a revocation or merits review outcome.

24. The Department has provided you a draft of MD 99 (**Attachment A**). If you agree to the contents of the Ministerial Direction, the Department will provide you a finalised copy with an agreed commencement date. This will ensure that regardless of when the Ministerial Direction is signed, the Department can provide the AAT the necessary lead times (minimum of 4 weeks and preferably at least 6 weeks) to enable management of the caseload on hand and to ensure procedural fairness is afforded to impacted applicants, where identified.

25. Once MD 99 has been signed and announced, the AAT will request a copy of the Ministerial Direction so the AAT can consider how to organise and prioritise hearings where the 84th day (the day by which the AAT must hand down its review decision) will be either shortly before or after the commencement of the new Ministerial Direction.

26. In line with section 499 of the Act, MD 99 will be tabled before each House of Parliament within 15 sitting days after its commencement.

27. s. 34(3) agreed to the Announcement of Institutional Reform to Australia's system of Administrative Review s. 34(2) s. 34(2). This package of reforms includes measures to reduce the backlog of matters before the AAT. The Department will continue to engage closely with AGD to ensure alignment and cohesion between the institutional reform and the Government's migration priorities.

Risks and Sensitivities

28. Any amendments to character settings generally attract scrutiny from the international community, advocacy groups and human rights bodies. Given the undertakings made by Prime Minister Albanese at the Australia – New Zealand Leaders' Meeting in July 2022, the New Zealand Government and media will be especially vigilant regarding any changes to the character framework and policy settings, as New Zealand citizens are among the largest expatriate population and constitute around a third of all temporary entrants into Australia.

29. To facilitate open dialogue with New Zealand, the Department is preparing 'Whole of Government' talking points to address how the new primary consideration will require decision-makers to give stronger consideration to the strength, nature and duration of all non- citizens' ties to, and residence in, Australia in character related visa decision making.

30. s. 33(a)(iii)

Financial/systems/legislation/deregulation/media implications

31. Amendments to visa cancellation legislation or policy settings are likely to receive significant media attention. The Department will work with your office to prepare communications (including talking points and web content updates) to support issuance of the new Ministerial Direction.

Attachments

Attachment A MD 99 – amendments tracked for ease of reference

Attachment B MS22-001434 – New Ministerial Direction 99 on character-related visa decision-making – Minister signed

Attachment C MB22-001127 – Background Brief on Ministerial Direction 99 (Desktop exercise outcomes)

Attachment D MS22-001638 – Follow up on roundtable discussion with community advocates on Ministerial Direction – Minister signed

Authorising Officer
Cleared by: Tara Cavanagh First Assistant Secretary Immigration Integrity, Assurance and Policy Division Date: 22 December 2022 s. 22(1)(a)(ii)

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DIRECTION NO. 99

MIGRATION ACT 1958

DIRECTION UNDER SECTION 499

Visa refusal and cancellation under section 501
and
revocation of a mandatory cancellation of a visa under section 501CA

I, Andrew Giles, Minister for Immigration, Citizenship and Multicultural Affairs, give this Direction under section 499 of the *Migration Act 1958*.

Dated 23 JANUARY 2023

Minister for Immigration, Citizenship and Multicultural Affairs

Part 1 Preliminary

1. Name of Direction

This Direction is 'Direction no. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA'.

It may be cited as Direction no. 99.

2. Commencement

This Direction commences on 3 March 2023.

3. Revocation

Direction no. 90, given under section 499 of the *Migration Act 1958* (the Act) and commenced on 15 April 2021, is revoked with effect from the date this Direction commences.

4. Interpretation

Note 1: A number of expressions used in this Direction are defined in section 5 of the Act, including ***immigration detention, minor, non-citizen, remove, substantive visa, visa applicant, visa holder***.

Note 2: The following expressions have the same meaning as in the Act: ***character test, visa.***

(1) In this Direction:

decision-maker means a delegate of the Minister, or a body (such as the Administrative Appeals Tribunal), making a decision under section 501 or 501CA of the Act.

family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the **family member**), or causes the family member to be fearful. Examples of behaviour that may constitute family violence include:

a) an assault; or
b) a sexual assault or other sexually abusive behaviour; or
c) stalking; or
d) repeated derogatory taunts; or
e) intentionally damaging or destroying property; or
f) intentionally causing death or injury to an animal; or
g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
i) preventing the family member from making or keeping connections with his or her family, friends or culture; or
j) unlawfully depriving the family member, or any member of the family member's family, or his or her liberty.

forced marriage is taken to have occurred where a party to the marriage (the **victim**):

a) entered into the marriage without freely and fully consenting:
    i. because of the use of coercion, threat or deception against the victim or another person; or
    ii. because the victim was incapable of understanding the nature and effect of the marriage ceremony; or
b) was under 16 when the marriage was entered into.

member of the person's family, for the purposes of the definition of the definition of **family violence**, includes a person who has, or has had, an intimate personal relationship with the relevant person.

(2) In this Direction, ***serious conduct*** includes behaviour or conduct of concern that does not constitute any criminal offence.

Examples: public act that could incite hatred towards a group of people who have a particular characteristic, such as race; intimidatory behaviour or behaviour that represents a danger to the Australian community; involvement in activities indicating contempt or disregard for the law or human rights, or a history of serious breaches of immigration law.

5. Preamble

5.1 Objectives

(1) The objective of the Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens. Relevantly, a non-citizen who does not pass the character test (see Annex A for explanation) is liable for refusal of a visa or cancellation of their visa.

(2) Specifically, under subsection 501(1) of the Act, non-citizens may be refused a visa if they do not satisfy the decision-maker that they pass the character test. Under subsection 501(2), non-citizens may have their visa cancelled if the decision-maker reasonably suspects that they do not pass the character test, and the non-citizens do not satisfy the decision-maker that they do pass the character test. Where the discretion to refuse to grant or to cancel a visa is enlivened, the decision-maker must consider the specific circumstances of the case in deciding whether to exercise that discretion.

(3) Under subsection 501(3A) of the Act, the decision-maker must cancel a visa that has been granted to a person if the decision-maker is satisfied that the person does not pass the character test because of the operation of paragraph (6)(a) (on the basis of paragraph (7)(a), (b) or (c) or paragraph (6)(e)) and the non-citizen is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory. A non-citizen who has had their visa cancelled under section 501(3A) may request revocation of that decision under section 501CA of the Act. Where the decision-maker considering the request is not satisfied that the non-citizen passes the character test, the decision-maker must consider whether there is another reason to revoke the cancellation given the specific circumstances of the case.

(4) The purpose of this Direction is to guide decision-makers in performing functions or exercising powers under section 501 and 501CA of the Act. Under section 499(2A) of the Act, such decision-makers must comply with a direction made under section 499.

5.2 Principles

The principles below provide the framework within which decision-makers should approach their task of deciding whether to refuse or cancel a non-citizen's visa under section 501, or whether to revoke a mandatory cancellation under section 501CA. The factors (to the extent relevant in the particular case) that must be considered in making a decision under section 501 or section 501CA of the Act are identified in Part 2.

(1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.

(2) Non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.

(3) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether the non-citizen poses a measureable risk of causing physical harm to the Australian community.

(4) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, or by other non-citizens who have been participating in, and contributing to, the Australian community only for a short period of time.

(5) With respect to decisions to refuse, cancel, and revoke cancellation of a visa, Australia will generally afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life, or from a very young age. The level of tolerance will rise with the length of time a non-citizen has spent in the Australian community, particularly in their formative years.

(6) Decision-makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation. In particular, the inherent nature of certain conduct such as family violence and the other types of conduct or suspected conduct mentioned in paragraph 8.55(2) (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measureable risk of causing physical harm to the Australian community.

Part 2 Making a decision

6. Making a decision

Informed by the principles in paragraph 5.2, a decision-maker must take into account the considerations identified in sections 8 and 9, where relevant to the decision.

7. Taking the relevant considerations into account

(1) In applying the considerations (both primary and other), information and evidence from independent and authoritative sources should be given appropriate weight.

(2) Primary considerations should generally be given greater weight than the other considerations.

(3) One or more primary considerations may outweigh other primary considerations.

8. Primary considerations

In making a decision under section 501(1), 501(2) or 501CA(4), the following are primary considerations:

(1) protection of the Australian community from criminal or other serious conduct;

(2) whether the conduct engaged in constituted family violence;

(3) the strength, nature and duration of ties to Australia;

(4) the best interests of minor children in Australia;

(5) expectations of the Australian community.

8.1 Protection of the Australian community

(1) When considering protection of the Australian community, decision-makers should keep in mind that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. In this respect, decision-makers should have particular regard to the principle that entering or remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they are, and have been, law abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community.

(2) Decision-makers should also give consideration to:

a) the nature and seriousness of the non-citizen's conduct to date; and

b) the risk to the Australian community, should the non-citizen commit further offences or engage in other serious conduct.

8.1.1 The nature and seriousness of the conduct

(1) In considering the nature and seriousness of the non-citizen's criminal offending or other conduct to date, decision-makers must have regard to the following:

a) without limiting the range of conduct that may be considered very serious, the types of crimes or conduct described below are viewed very seriously by the Australian Government and the Australian community:

i. violent and/or sexual crimes;

ii. crimes of a violent nature against women or children, regardless of the sentence imposed;

iii. acts of family violence, regardless of whether there is a conviction for an offence or a sentence imposed;

b) without limiting the range of conduct that may be considered serious, the types of crimes or conduct described below are considered by the Australian Government and the Australian community to be serious:

i. causing a person to enter into or being party to a forced marriage (other than being a victim), regardless of whether there is a conviction for an offence or a sentence imposed;

ii. crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government representatives or officials due to the position they hold, or in the performance of their duties;

iii. any conduct that forms the basis for a finding that a non-citizen does not pass an aspect of the character test that is dependent upon the decision-maker's opinion (for example, section 501(6)(c));

iv. where the non-citizen is in Australia, a crime committed while the non-citizen was in immigration detention, during an escape from immigration detention, or after the non-citizen escaped from immigration detention, but before the non-citizen was taken into immigration detention again, , or an offence against section 197A of the Act, which prohibits escape from immigration detention;

c) with the exception of the crimes or conduct mentioned in subparagraph (a)(ii), (a)(iii) or (b)(i) above, the sentence imposed by the courts for a

crime or crimes;

d) the frequency of the non-citizen's offending and/or whether there is any trend of increasing seriousness;

e) the cumulative effect of repeated offending;

f) whether the non-citizen has provided false or misleading information to the Department, including by not disclosing prior criminal offending;

g) whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware, in writing, about the consequences of further offending in terms of the non-citizen's migration status (noting that the absence of a warning should not be considered to be in the non-citizen's favour).

h) where the offence or conduct was committed in another country, whether that offence or conduct is classified as an offence in Australia.

8.1.2 The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct

(1) In considering the need to protect the Australian community (including individuals, groups or institutions) from harm, decision-makers should have regard to the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.

(2) In assessing the risk that may be posed by the non-citizen to the Australian community, decision-makers must have regard to, cumulatively:

a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and

b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:

i. information and evidence on the risk of the non-citizen re-offending; and

ii. evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken).

c) where consideration is being given to whether to refuse to grant a visa to the non-citizen — whether the risk of harm may be affected by the duration and purpose of the non-citizen's intended stay, the type of visa being applied for, and whether there are strong or compassionate reasons for granting a short stay visa.

8.2 Family violence committed by the non-citizen

(1) The Government has serious concerns about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia. The Government's concerns in this regard are proportionate to the seriousness of the family violence engaged in by the non-citizen (see paragraph (3) below).

(2) This consideration is relevant in circumstances where:

a) a non-citizen has been convicted of an offence, found guilty of an offence, or had charges proven howsoever described, that involve family violence; and/or

b) there is information or evidence from independent and authoritative sources indicating that the non-citizen is, or has been, involved in the perpetration of family violence, and the non-citizen being considered under section 501 or section 501CA has been afforded procedural fairness.

(3) In considering the seriousness of the family violence engaged in by the non-citizen, the following factors must be considered where relevant:

a) the frequency of the non-citizen's conduct and/or whether there is any trend of increasing seriousness;

b) the cumulative effect of repeated acts of family violence;

c) rehabilitation achieved at time of decision since the person's last known act of family violence, including:

i. the extent to which the person accepts responsibility for their family violence related conduct;

ii. the extent to which the non-citizen understands the impact of their behaviour on the abused and witness of that abuse (particularly children);

iii. efforts to address factors which contributed to their conduct; and

d) Whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware by a Court, law enforcement or other authority, about the consequences of further acts of family violence, noting that the absence of a warning should not be considered to be in the non-citizen's favour. This includes warnings about the non-

citizen's migration status, should the non-citizen engage in further acts of family violence.

8.3 The strength, nature and duration of ties to Australia

(1) Decision-makers must consider any impact of the decision on the non-citizen's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.

(2) In considering a non-citizen's ties to Australia, decision-makers should give more weight to a non-citizen's ties to his or her child and/or children who are Australian citizens, Australian permanent residents and/or people who have a right to remain in Australia indefinitely.

(3) The strength, duration and nature of any family or social links generally with Australian citizens, Australian permanent residents and/or people who have a right to remain in Australia indefinitely.

(4) Decision-makers must also consider the strength, nature and duration of any other ties that the non-citizen has to the Australian community. In doing so, decision-makers must have regard to:

a) the length of time the non-citizen has resided in the Australian community, noting that:

i. considerable weight should be given to the fact that a non-citizen has been ordinarily resident in Australia during and since their formative years, regardless of when their offending commenced and the level of that offending; and

ii. more weight should be given to the time the non-citizen has resided in Australia where the non-citizen has contributed positively to the Australian community during that time; and

iii. less weight should be given to the length of time spent in the Australian community where the non-citizen was not ordinarily resident in Australia during their formative years and the non-citizen began offending soon after arriving in Australia.

8.4 Best interests of minor children in Australia affected by the decision

(1) Decision-makers must make a determination about whether cancellation or refusal under section 501, or non-revocation under section 501CA is, or is not, in the best interests of a child affected by the decision.

(2) This consideration applies only if the child is, or would be, under 18 years old at the time when the decision to refuse or cancel the visa, or to not revoke the mandatory cancellation of the visa, is expected to be made.

(3) If there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.

(4) In considering the best interests of the child, the following factors must be considered where relevant:

a) the nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);

b) the extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;

c) the impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;

d) the likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways;

e) whether there are other persons who already fulfil a parental role in relation to the child;

f) any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);

g) evidence that the child has been, or is at risk of being, subject to, or exposed to, family violence perpetrated by the non-citizen, or has otherwise been abused or neglected by the non-citizen in any way, whether physically, sexually or mentally;

h) evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

8.5 Expectations of the Australian Community

(1) The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has engaged in serious conduct in breach of this expectation, or where there is an unacceptable risk that they may do so, the Australian community, as a norm, expects the Government to not allow such a non-citizen to enter or remain in Australia.

(2) In addition, visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not be granted or continue to hold a visa. In

particular, the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of the following kind:

a) acts of family violence; or

b) causing a person to enter into, or being party to (other than being a victim of), a forced marriage;

c) commission of serious crimes against women, children or other vulnerable members of the community such as the elderly or disabled; in this context, 'serious crimes' include crimes of a violent or sexual nature, as well as other serious crimes against the elderly or other vulnerable persons in the form of fraud, extortion, financial abuse/material exploitation or neglect;

d) commission of crimes against government representatives or officials due to the position they hold, or in the performance of their duties; or

e) involvement or reasonably suspected involvement in human trafficking or people smuggling, or in crimes that are of serious international concern including, but not limited to, war crimes, crimes against humanity and slavery; or

f) worker exploitation.

(3) The above expectations of the Australian community apply regardless of whether the non-citizen poses a measureable risk of causing physical harm to the Australian community.

(4) This consideration is about the expectations of the Australian community as a whole, and in this respect, decision-makers should proceed on the basis of the Government's views as articulated above, without independently assessing the community's expectations in the particular case.

9. Other considerations

(1) In making a decision under section 501(1), 501(2) or 501CA(4), the considerations below must also be taken into account, where relevant, in accordance with the following provisions. These considerations include (but are not limited to):

a) legal consequences of the decision;

b) extent of impediments if removed;

c) impact on victims;

d) impact on Australian business interests

9.1 Legal consequences of decision under section 501 or 501CA

(1) Decision-makers should be mindful that unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable in the circumstances specified in that section, and in the meantime, detention under section 189, noting also that section 197C(1) of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has *non-refoulement* obligations in respect of an unlawful non-citizen.

(2) A *non-refoulement* obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm. Australia has *non-refoulement* obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT), and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR). The Act, particularly the concept of 'protection obligations', reflects Australia's interpretation of *non-refoulement* obligations and the scope of the obligations that Australia is committed to implementing.

(3) International *non-refoulement* obligations will generally not be relevant where the person concerned does not raise such obligations for consideration and the circumstances do not suggest a *non-refoulement* claim.

9.1.1 Non-citizens covered by a protection finding

(1) Where a protection finding (as defined in section 197C of the Act) has been made for a non-citizen in the course of considering a protection visa application made by the non-citizen, this indicates that *non-refoulement* obligations are engaged in relation to the non-citizen.

(2) Section 197C(3) ensures that, except in the limited circumstances specified in section 197C(3)(c), section 198 does not require or authorise the removal of an unlawful non-citizen to a country in respect of which a protection finding has been made for the non-citizen in the course of considering their application for a protection visa. This means the non-citizen cannot be removed to that country in breach of *non-refoulement* obligations, even if an adverse visa decision under section 501 or 501CA is made for the non-citizen and they become, or remain, an unlawful non-citizen as a result. Instead, the non-citizen must remain in immigration detention as required by section 189 unless and until they are granted another visa or they can be removed to a country other than the country by reference to which the protection finding was made.

(3) Decision-makers should also be mindful that where the refusal, cancellation or non-revocation decision concerns a protection visa, the person will be prevented by section 48A of the Act from making a further application for a protection visa while they are in the migration zone (unless the Minister determines that section 48A does not apply to them – see sections 48A and 48B of the Act). Further, as a result of a refusal or cancellation decision under section 501 or a non-revocation decision under section 501CA, the person will

be prevented from applying for any other class of visa except a Bridging R (Class WR) visa (see section 501E of the Act and regulation 2.12AA of the Regulations.

9.1.2 Non-citizens not covered by a protection finding

(1) Claims which may give rise to international *non-refoulement* obligations can also be raised by a non-citizen who is **not** the subject of a protection finding, in responding to a notice of intention to consider cancellation or refusal of a visa under section 501 of the Act, or in seeking revocation of the mandatory cancellation of their visa under section 501CA. Where such claims are raised, they must be considered.

(2) However, where it is open to the non-citizen to apply for a protection visa, it is not necessary at the section 501/section 501CA stage to consider *non-refoulement* issues in the same level of detail as those types of issues are considered in a protection visa application. The process for determining protection visa applications is specifically designed for consideration of *non-refoulement* obligations as given effect by the Act and where it is open to the person to make such an application a decision-maker, in making a decision under section 501/section 501CA, is not required to determine whether *non-refoulement* obligations are engaged in respect of the person. Having considered the person's representations, the decision-maker may choose to proceed on the basis that if and when the person applies for a protection visa, any protection claims they have will be assessed, as required by section 36A of the Act, before consideration is given to any character or security concerns associated with them.

(3) *Non-refoulement* obligations that have been identified for a non-citizen with respect to a country, via an International Treaties Obligations Assessment or some other process outside the protection visa process, would not engage section 197C(3) to preclude removal of the non-citizen to that country. In these circumstances, in making a decision under section 501 or 501CA, decision-makers should carefully weigh any *non-refoulement* obligation against the seriousness of the non-citizen's criminal offending or other serious conduct. However, that does not mean an adverse decision under section 501 or 501CA cannot be made for the non-citizen. A refusal, cancellation or non-revocation decision will not necessarily result in removal of the non-citizen to the country in respect of which the *non-refoulement* obligation exists. For example, consideration may be given to removal to another country, or the Minister may consider exercising his/her personal discretion under section 195A to grant another visa to the non-citizen, or alternatively, consider exercising his/her personal discretion under section 197AB to make a residence determination to enable the non-citizen to reside at a specified place in the community, subject to appropriate conditions. Further, following the visa refusal or cancellation decision or non-revocation decision, if the non-citizen makes a valid application for a protection visa, the non-citizen would not be liable to be removed while their application is being determined.

9.2 Extent of impediments if removed

(1) Decision-makers must consider the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:

a) the non-citizen's age and health;

b) whether there are substantial language or cultural barriers; and

c) any social, medical and/or economic support available to them in that country.

9.3 Impact on victims

(1) Decision-makers must consider the impact of the section 501 or 501CA decision on members of the Australian community, including victims of the non-citizen's criminal behaviour, and the family members of the victim or victims, where information in this regard is available and the non-citizen being considered for visa refusal or cancellation, or who has sought revocation of the mandatory cancellation of their visa, has been afforded procedural fairness.

9.4 Impact on Australian business interests

(1) Decision-makers must consider any impact on Australian business interests if the non-citizen is not allowed to enter or remain in Australia, noting that an employment link would generally only be given weight where the decision under section 501 or 501CA would significantly compromise the delivery of a major project, or delivery of an important service in Australia.

ANNEX A - Application of the character test

Section 1 Overview of the character test

Discretionary visa cancellation or refusal

(1) Under section 501 of the Act, a person may be refused a visa if the non-citizen does not satisfy the decision-maker that they pass the character test. A person may have their visa cancelled if the decision-maker reasonably suspects that the person does not pass the character test, and the person does not satisfy the decision-maker that they pass the character test.

(2) Persons who are being considered under section 501 of the Act must satisfy the decision-maker that they pass the character test set out in section 501(6) of the Act. In practice, this requires the decision-maker to determine, on the basis of all relevant information including information provided by the person, that the person does not pass the character test by reference to section 501(6) of the Act.

(3) Section 501(6) of the Act prescribes the circumstances in which a person does not pass the character test. A person need only be found to not pass one ground, in order to not pass the character test.

(4) In considering a person with unresolved criminal matters, decision-makers should note:

a) where a person already fails the character test, any other outstanding criminal matters would not generally prevent consideration of their case under section 501;
b) a person who does not already fail the character test, and is the subject of criminal charges in Australia, which have not yet been finalised before the relevant court, would not generally be considered under section 501 until the charges have been finally determined;
c) where a person is in Australia, and they are facing charges in another country, and the charges will not be resolved in absentia, the conduct that is the subject of those charges may be considered in the context of section 501(6)(c)(i) and/or (ii).

(5) If the person does not pass the character test, section 501(1) of the Act enables a visa to be refused and section 501(2) of the Act enables a visa to be cancelled.

Mandatory visa cancellation

(1) Under section 501(3A), a person's visa must be cancelled if:

a) the decision-maker is satisfied that the person does not pass the character test because of the operation of:
i. paragraph 501(6)(a) (substantial criminal record), on the basis of paragraph 501(7)(a), (b) or (c) (the person

has been sentenced to death, imprisonment for life, or to a term of imprisonment of 12 months or more); or

ii. paragraph 501(6)(e) (sexually based offences involving a child); and

b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

(2) In considering whether a person is liable for mandatory cancellation, decision-makers should note:

a) that the term 'serving a sentence of imprisonment, on a full-time basis' does not include periodic detention or home or residential detention. However, a person who has been serving a sentence of imprisonment on a full-time basis and who is participating in a work release scheme, or is permitted home visits is liable for mandatory cancellation;

b) that mandatory cancellation is not enlivened unless and until a delegate makes a finding that they are satisfied that the requirements as set out in section 501(3A)(a) and (b) are met. Once a delegate is satisfied that these requirements are met, the delegate must cancel the person's visa.

(3) The purpose of mandatory cancellation of the visas of certain visa holders who are in prison is to ensure that persons who pose a risk to the safety of the Australian community remain either in criminal or immigration detention until that risk has been assessed. In this context, there are some circumstances in which it may not be appropriate for a decision-maker to consider whether a person does not pass the character test (and is therefore liable for the cancellation of his or her visa). These circumstances include where a non-citizen is serving a sentence of imprisonment but will not have a visa which is in effect at the end of that sentence. This situation may arise:

a) where a person in prison has been granted a Bridging E visa (BVE) in order to maintain their lawful status while in prison. In circumstances where the BVE will cease upon the person's release from prison, it is not recommended that mandatory cancellation consideration be commenced.

b) where a person is the holder of a criminal justice visa (CJV). CJVs are granted to non-citizens whose entry and/or continued presence in Australia is required for the purposes of the administration of criminal justice. A criterion for a CJV is that a criminal justice stay certificate (CJSC) or a criminal justice stay warrant (CJSW) about the non-citizen is in force. If the CJSC or CJSW is cancelled any CJV granted because of the CJSC or CJSW is cancelled by operation of section 164 of the Act. The only other power under which CJVs may be cancelled is on character grounds under section 501 of the Act. However, in circumstances where the CJV holder is serving a sentence of

imprisonment, this is unlikely to be appropriate.

Section 2 Application of the character test

1. Substantial criminal record (section 501(6)(a))

(1) A person does not pass the character test if the person has a substantial criminal record. The term 'substantial criminal record' is defined in section 501(7) of the Act.

(2) For the purposes of the character test, a person has a substantial criminal record if:

a) the person has been sentenced to death; or
b) the person has been sentenced to imprisonment for life; or
c) the person has been sentenced to a term of imprisonment of 12 months or more; or
d) the person has been sentenced to 2 or more terms of imprisonment where the total of those terms is 12 months (if a person has been sentenced to 2 or more terms of imprisonment to be served concurrently (whether in whole or in part), the whole of each term is to be counted in working out the total of the terms)**; or
e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or
f) the person has been found by a court to not be fit to plead, in relation to an offence; and as a result, the person has been detained in a facility or institution.

** Example: A person is sentenced to 2 terms of 3 months imprisonment for 2 offences, to be served concurrently. For the purposes of the character test, the total of those terms is 6 months.

2. Immigration detention offences (section 501(6)(aa) & (ab))

(1) A person does not pass the character test if the person has been convicted of an offence that was committed;
a) while the person was in immigration detention; or
b) during an escape by the person from immigration detention; or
c) after the person escaped from immigration detention but before the person was taken into immigration detention again.

(2) A person does not pass the character test if the person has been convicted of an offence against section 197A.

3. Membership/Association (section 501(6)(b))

(1) A person does not pass the character test if the Minister reasonably suspects:

a) that the person has been or is a member of a group or organisation, or has or has had an association with a group, organisation or person; and

b) that the group, organisation or person has been, or is, involved in criminal conduct.

(2) A suspicion is less than a certainty or a belief, but more than a speculation or idle wondering. For a suspicion to be reasonable, it should be:

a) a suspicion that a reasonable person could hold in the particular circumstances; and
b) based on an objective consideration of relevant material.

(3) A member is a person who belongs to a group or organisation. The evidence required to establish reasonable suspicion of membership of a group or organisation will depend on the circumstances of the case. Decision-makers should note that failure of this limb of the character test does not require an assessment that the person was sympathetic with, supportive of, or involved in the criminal conduct of the group or organisation. It is sufficient under this element of the test that the decision-maker has a reasonable suspicion that:

a) the person has been, or is a member of a group or organisation; and
b) the group or organisation has been, or is, involved in criminal conduct.

(4) In establishing association, the following factors are to be considered:

a) the nature of the association;
b) the degree and frequency of association the person had or has with the individual, group or organisation; and
c) the duration of the association.

(5) Decision-makers should note that in order for a person to fail the association limb of the character test, the delegate must have a reasonable suspicion that the person was sympathetic with, supportive of, or involved in the criminal conduct of the person, group or organisation – mere knowledge of the criminality of the associate is not, in itself, sufficient to establish association. In order to not pass the character test on this ground, the association must have some negative bearing upon the person's character.

(6) In some cases the information concerning association will be protected from disclosure under the Act. In all cases, great care should be taken not to disclose information that might put the life or safety of informants or other people at risk.

4. Involvement in certain criminal activities (section 501(6)(ba))

(1) A person does not pass the character test if the Minister reasonably suspects the person has been, or is involved in, conduct constituting one or more of the following:

a) an offence of people smuggling (as described in sections 233A to 234A of the Migration Act;
b) an offence of trafficking in persons;
c) the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern.

(2) In order to fail this limb of the character test, a person is not required to have been convicted of an offence constituted by the conduct.

5. Not of good character on account of past and present criminal or general conduct (section 501(6)(c)(i) and (ii))

(1) A person does not pass the character test if the person is not of good character, having regard to their past and present criminal and/or their past and present general conduct.

(2) The concepts of criminal conduct and general conduct are not mutually exclusive. Conduct can be both general and criminal at the same time or it may be either general or criminal conduct: *Wong v Minister for Minister Immigration and Multicultural Affairs* [2002] FCAFC 440 at [33].

(3) In considering whether a person is not of good character, all the relevant circumstances of the particular case are to be taken into account to obtain a complete picture of the person's character.

a) In *Godley v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 83 ALD 411, Lee J said at [34] 'the words "of good character" mean enduring moral qualities reflected in soundness and reliability in moral judgement in the performance of day to day activities and in dealing with fellow citizens. It is not simply a matter of repute, fame or standing in the community but of continuing performance according to moral principle. A person of ill repute by reason of past criminal conduct may nonetheless, on objective examination at a later stage in life, be shown to be a person reformed and now of good character.'

(4) In order to fail this limb of the character test, a person need not necessarily have a recent criminal conviction, or have been involved in recent general conduct which would indicate that they are not of 'good character'. However, the conduct in question must be sufficient to indicate a lack of enduring moral quality that outweighs any consideration of more recent good behaviour.

a) In Godley, Lee J went on to say 'For a finding to be made under section 501(6)(c) that a person is not of good character it is necessary that the nature of the conduct said to be criminal , be examined and assessed as to its degree of moral culpability or turpitude. Furthermore, there must be examination of past

and present criminal conduct sufficient to establish that a person at the time of decision is not then of good character. The point at which recent criminal conduct, (as the term 'present criminal conduct' is to be understood), becomes past criminal conduct must be a matter of judgement. If there is no recent criminal conduct that circumstances will point to the need for the Minister to give due weight to that fact before concluding that a visa applicant is not of good character'.

'Before past and present general conduct may be taken to reveal indicia that a visa applicant is not of good character continuing conduct must be demonstrated that shows a lack of enduring moral quality. Although in some circumstances isolated elements of conduct may be significant and display lack of moral worth they will be rare, and as with consideration of criminal conduct there must be due regard given to recent good conduct.

5.1 Past and present criminal conduct

(1) In considering whether a person is not of good character on the basis of past or present criminal conduct, the following factors are to be considered:

a) the nature and severity of the criminal conduct;
b) the frequency of the person's offending and whether there is any trend of increasing seriousness;
c) the cumulative effect of repeated offending;
d) any circumstances surrounding the criminal conduct which may explain the conduct such as may be evident from judges' comments, parole reports and similar authoritative documents; and
e) the conduct of the person since their most recent offence, including:
    i. the length of time since the person last engaged in criminal conduct;
    ii. any evidence of recidivism or continuing association with criminals;
    iii. any pattern of similar criminal conduct;
    iv. any pattern of continued or blatant disregard or contempt for the law; and
    v. any conduct which may indicate character reform.

5.2 Past and present general conduct

(1) The past and present general conduct provision allows a broader view of a person's character where convictions may not have been recorded or where the person's conduct may not have constituted a criminal offence.

a) in considering whether the person is not of good character, the

relevant circumstances of the particular case are to be taken into account, including evidence of rehabilitation and any relevant periods of good conduct.

(2) The following factors may also be considered in determining whether a person is not of good character:

a) whether the person has been involved in activities indicating contempt or disregard for the law or for human rights. This includes, but is not limited to:
   i. involvement in activities such as terrorist activity, activities in relation to trafficking or possession of trafficable quantities of proscribed substances, political extremism, extortion, fraud; or
   ii. a history of serious breaches of immigration law, breach of visa conditions or visa overstay in Australia or another country; or
   iii. involvement in war crimes or crimes against humanity;

b) whether the person has been removed or deported from Australia or another country and the circumstances that led to the removal/deportation; or

c) whether the person has been:
   i. dishonourably discharged; or
   ii. discharged prematurely;
   from the armed forces of another country as the result of disciplinary action in circumstances, or because of conduct that, in Australia would be regarded as serious.

(3) Where a person is in Australia and charges have been brought against that person in a jurisdiction other than an Australian jurisdiction, and those charges will not be resolved *in absentia*, the conduct that is the subject of those charges may be considered in the context of its impact on the person's overall character.

6 Risk in regards to future conduct (section 501(6)(d))

(1) A person does not pass the character test if, in the event that the person were allowed to enter or remain in Australia, there is a risk that the person would engage in any of the conduct specified in section 501(6)(d) of the Act. The types of conduct specified are discussed below.

(2) The grounds are enlivened if there is evidence suggesting that there is more than a minimal or remote chance that the person, if allowed to enter or to remain in Australia, would engage in conduct specified in section 501(6)(d) of the Act.

(3) It is not sufficient to find that the person has engaged in conduct specified in paragraph 501(6)(d) of the Act in the past. There must be a

risk that the person would engage in the future in the specified conduct set out in section 501(6)(d) of the Act.

6.1 Risk of engaging in criminal conduct in Australia (section 501(6)(d)(i))

(1) A person does not pass the character test if, in the event that the person were allowed to enter or remain in Australia, there is a risk that the person will engage in criminal conduct in Australia.

(2) The reference to criminal conduct must be read as requiring that there is a risk of the person engaging in conduct for which a criminal conviction could be recorded.

6.2 Risk of harassing, molesting, intimidating or stalking another person in Australia (section 501(6)(d)(ii))

(1) A person will not pass the character test if, in the event that the person were allowed to enter or remain in Australia, there is a risk that the person will harass, molest, intimidate or stalk another person in Australia.

(2) 'Harassment', 'molestation' 'intimidation' and 'stalking' are to be given their ordinary meaning. Section 501(11) of the Act clarifies the scope of conduct amounting to harassment or molestation. Conduct and behaviours that may fall under this category include, but are not limited to, the following:

a) conduct that could be construed as harassment or intimidation (whether or not it breaches the terms of an Apprehended or Domestic Violence (or similar) Order);
b) conduct that potentially places children in danger, such as unwelcome and/or inappropriate approaches, including, but not limited to, approaches made through electronic media; or
c) conduct that would reasonably cause an individual to be severely apprehensive, fearful, alarmed or distressed regarding the person's behaviour or alleged behaviour towards the individual, any other individual, or in relation to their property or that of any other individual.

6.3 Risk of vilifying a segment of the community, of inciting discord or of representing a danger through involvement in disruptive and/or violent activities (section 501(6)(d)(iii), (iv) and (v))

(1) In deciding whether a person does not pass the character test under section 501(6)(d)(iii), (iv) or (v) of the Act, factors to be considered include, but are not limited to, evidence that the person:

a) would hold or advocate extremist views such as a belief in the use of violence as a legitimate means of political expression;
b) would vilify a part of the community;
c) has a record of encouraging disregard for law and order;

Note: For example, in the course of addressing public rallies.

d) has engaged or threatens to engage in conduct likely to be incompatible with the smooth operation of a multicultural society;

Note: For example, advocating that particular ethnic groups should adopt political, social or religious values well outside those generally acceptable in Australian society, and which, if adopted or practised, might lead to discord within those groups or between those groups and other segments of Australian society.

e) participates in, or is active in promotion of, politically motivated violence or criminal violence and/or is likely to propagate or encourage such action in Australia;

f) is likely to provoke civil unrest in Australia because of the conjunction of the person's intended activities and proposed timing of their presence in Australia with those of another individual, group or organisation holding opposing views.

(2) The operation of section 501(6)(d)(iii), (iv) and (v) of the Act must be balanced against Australia's well established tradition of free expression. The grounds in these sub-paragraphs are not intended to provide a charter for denying entry or continued stay to persons merely because they hold and are likely to express unpopular opinions. However, where these opinions may attract strong expressions of disagreement and condemnation from the Australian community, the current views of the community will be a consideration in terms of assessing the extent to which particular activities or opinions are likely to cause discord or unrest.

7 Sexually based offences involving a child (section 501(6)(e))

(1) A person will not pass the character test if a court in Australia or a foreign country has convicted them of one or more sexually based offences involving a child or found them guilty of such an offence, or found a charge proven against them, even if the person was discharged without conviction.

(2) Sexually based offences involving a child include, but are not limited to offences such as:

a) child sexual abuse;
b) indecent dealings with a child;
c) possession or distribution of child pornography;
d) internet grooming; and
e) other non-contact carriage service offences.

(3) This provision applies irrespective of the level of penalty or orders made in relation to the offence.

8 Crimes under International Humanitarian Law (section 501(6)(f))

(1) A person will not pass the character test if the person has, in Australia or a foreign country, been charged with or indicted for one or more of the following:

a) the crime of genocide;
b) a crime against humanity;
c) a war crime;
d) a crime involving torture or slavery;
e) a crime that is otherwise of serious international concern.

9 National security risk (section 501(6)(g))

(1) A person will not pass the character test if the person has been assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*)

10 Certain Interpol notices (section 501(6)(h))

(1) A person will not pass the character test if an Interpol notice in relation to the person is in force, and it is reasonable to infer from that notice that the person would present a risk to the Australian community or a segment of that community.

Australian Government
Department of Home Affairs

Submission

For decision
PDMS Ref. Number: MS22-001434
Date of Clearance: 08/08/2022

To **Minister for Immigration, Citizenship and Multicultural Affairs**

Subject **New Ministerial Direction 99 on character-related visa decision-making**

Timing *By 22 August 2022.*

Recommendations

That you:

1. note the draft Ministerial Direction (Ministerial Direction 99) which makes long-term residence in Australia a primary consideration in character-related visa decision-making (changes tracked in **Attachment A** for ease of reference); — noted / please discuss

2. agree to the Department testing this draft Ministerial Direction through a desktop exercise; — agreed / please discuss

3. note that a final version of the Ministerial Direction will be provided for your signature by the end of September 2022, s. 34(3) [redacted], with a proposed commencement date of 1 December 2022; and — noted / please discuss

4. note that, as requested by your office, the Department of Home Affairs (the Department) will separately advise you on a timeline of further consultation to address concerns raised by community stakeholders regarding the unintended consequences of the family violence-related consideration in Ministerial Direction 90. — noted / please discuss

Minister for Immigration, Citizenship and Multicultural Affairs

Signature... **Date**: 17 8 /..../2022

Minister's Comments				
Rejected Yes/No	**Timely** Yes/No	**Relevance** ☐ Highly relevant ☐ Significantly relevant ☐ Not relevant	**Length** ☐ Too long ☐ Right length ☐ Too brief	**Quality** Poor 1.....2.....3.....4.....5 Excellent **Comments:**

Key Issues

1. At the recent Australia New Zealand Leaders' meeting, the Prime Minister committed to a "common sense approach" to the removal of New Zealand citizens long-term resident in Australia. Noting the Prime Minister's public statement that character-related visa refusal / cancellation under section 501 of the *Migration Act 1958* (the Migration Act) "will stay in place", Minister O'Neil agreed for the Department to work with you to issue a new Ministerial Direction - *Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* to ensure that long-term residence in Australia is given stronger consideration in character-related visa decision-making (MS22-001194 and MS22-001518 – **Attachment B** and **Attachment C** refer).

Ministerial Direction 99

2. The Department has been in discussions with your office to prepare Ministerial Direction 99, which makes long-term residence in Australia a primary consideration.
   - This will mean that in character-related visa refusal, discretionary visa cancellation and revocation of mandatory visa cancellation decision-making, decision-makers would need to weigh in the non-citizen's favour, the length of ordinary residency in the Australian community, particularly in instances where the non-citizen spent their formative years in Australia.
   - Decision-makers would also need to consider the impact that the decision would have on dependent children who are Australian citizens, permanent residents or have an indefinite right to remain in Australia.
   - This consideration would need to be balanced against other considerations including the seriousness of the conduct, recidivism and expectations of the Australian community.

3. Subject to your agreement, the Department proposes to test the draft Ministerial Direction using case studies to ensure that it achieves the desired policy outcomes and does not create unintended consequences. s. 34(3)

4. Following the desktop exercise, and any feedback your office might provide, the Department will provide you with a final draft Ministerial Direction. The Department could then support you to provide a briefing to Minister for Home Affairs on the Ministerial Direction, ahead of her [redacted] s. 34(3)

5. Ministerial Direction 99 also includes:

   - amendments to reflect the passage of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* and clarify that decision-makers do not need to consider *non-refoulement* obligations unless explicitly raised by the non-citizen concerned, the circumstances do not suggest *non-refoulement* issues or it is open to the non-citizen to apply for a protection visa;
   - amendments to address minor grammatical and formatting errors and include subsection 8.1.1(1)(h) which was part of previous Ministerial Directions and was inadvertently omitted when Ministerial Direction 90 was drafted; and
   - an inclusive definition of 'member of the person's family' (only) for the purposes of the definition of 'family violence'. The purpose of the proposed new definition would be to include, as a 'member of the person's family', and thus as a potential victim of 'family violence' as defined in the Ministerial Direction, a person who has, or has had, an intimate personal relationship with the relevant person, for example a current or an ex-girlfriend. This was the situation dealt with in a very recent Full Federal Court decision, *Deng v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 115. In that case, the Full Court quashed a decision of the Administrative Appeals Tribunal (AAT) on the ground that the AAT had misunderstood the definition of "family violence" in Ministerial Direction 90. This was because the AAT had wrongly concluded that the violence perpetrated by the applicant on a person who had been in an intimate relationship with the perpetrator was "family violence" for the purposes of the Ministerial Direction, notwithstanding that the person was not a family member within the definition of "family violence".
     - This is separate to the changes to the Ministerial Direction that will be progressed later this year to address family violence-related concerns.

6. These amendments have been tracked in **Attachment A** for ease of reference.

7. You may wish to consider an official visit to New Zealand along with the Minister for Home Affairs, following [redacted] s. 34(3). This visit would provide an opportunity to discuss with your counterpart your policy approach [redacted] s. 33(a)(iii)

Addressing family violence-related concerns

8. On 19 July 2022, you met with community advocates who expressed their concerns around the unintended consequences of the current Ministerial Direction which commenced on 15 April 2021 and introduced family violence as a primary consideration. You indicated your willingness to enhance the Ministerial Direction to mitigate impacts on victims of family violence. The Department understands from your office that these amendments would be pursued later this year by way of a new Ministerial Direction. Outcomes of the roundtable with community advocates and a work program to amend the Ministerial Direction to address their concerns will be progressed to you under cover of MS22-001638.

Commencement of the new Ministerial Direction

9. s. 34(3)

- Non-citizens whose cases are under consideration at the time need to be renotified of the new Ministerial Direction and given an additional opportunity to comment, having regard to the new Ministerial Direction. As a result, there is a reduction in the number of cancellation, refusal or revocation decisions finalised in the first few months of the commencement of a new Ministerial Direction. Any urgent decisions that have to be made within the 28 days after a new Ministerial Direction comes into effect would need to be referred to you under the your personal power to refuse or cancel without natural justice (section 501(3)).
- The AAT will also have an onhand caseload at review that will need to be re-notified and provided natural justice following the commencement of a new Ministerial Direction. Noting the statutory requirement for the AAT to make a decision on the review of character decisions by the 84th day after the day on which the review applicant was notified of the character decision, this will require careful handling. The Department will work closely with the AAT to ensure this can be managed in a timely manner
- More information on the impact of the issuance of a new Ministerial Direction on the caseload currently on-hand is under "Client Service Implications".

Background

10. Section 499 of the Act provides that the Minister may give written directions to a person or body who has functions or powers under the Act. The directions must be about the performance of those functions or the exercise of those powers. Delegates of the Minister, and AAT members that conduct merits review of reviewable character decisions, must comply with directions made under section 499 of the Act. The Minister for Immigration, Citizenship and Multicultural Affairs, and any other Minister involved in visa decision-making, is not bound by these directions.
    - There are limitations to a Ministerial Direction made under section 499 of the Act.
    - The Minister cannot give a direction that is inconsistent with the Act or the Migration Regulations 1994.
11. Section 501 prescribes failure to satisfy the character test as a condition precedent to the exercise of the discretion to refuse or cancel (subject to the special provision for mandatory cancellation in certain circumstances). The section does not create any presumption as to the way in which that discretion should be exercised, that is, whether to refuse or cancel the visa of a non-citizen who does not pass the character test.

12. Ministerial Directions can require a decision-maker exercising powers under section 501 (including a delegate of the Minister and the AAT) to take into account certain factors when exercising their discretion and generally to give more weight to certain considerations or deem the weight to be given to a particular factor or consideration. They cannot, however, direct a decision-maker to make a particular decision.

13. Once a new Ministerial Direction comes into effect, the previous Ministerial Direction ceases, and all character decisions made from that date will be under the new Ministerial Direction. Cases that were being considered under the previous Direction would then need to be considered under the new Ministerial Direction.

Consultation – internal/external

14. Status Resolution and Visa Cancellation Division, International Division, AGS Special Counsel, Legal Group were consulted on the draft Direction 99 and this submission.

Consultation – Secretary

15. The Secretary was not consulted on the approach in the submission.

Client service implications

16. To implement Ministerial Direction 99, the current caseload of over 5,000 cases will need to be reviewed to identify affected cases. The Department anticipates around 2,800 cases will need to be renotified. This will extend time spent in immigration detention for non-citizens currently detained and awaiting decision on their cases.

17. At a bilateral meeting between the Department and the AAT on 5 July 2022, the AAT advised that it had received the highest number of annual applications for merits review during the 2021/22 program year, with one third of those applications for review lodged during May and June 2022. The introduction of a new Ministerial Direction would have a significant impact on the AAT's capacity to finalise cases, noting that as a result of the recent significant surge, AAT has already diverted more of its resources to decide character matters.

18. The AAT also advised that should a new Ministerial Direction be issued, it would need to consider whether to prioritise for an earlier decision under Ministerial Direction 90, cases where the 84th day (the day by which the AAT must hand down its review decision) will be shortly after the commencement of the new Direction. The AAT has a general preference for the Department to avoid deciding cases where the 84th day falls over the Christmas/New Year holiday period when most members are on leave.

19. The 1 December 2022 commencement date for the Ministerial Direction 99 will provide the necessary lead times and will enable management of the caseload on hand and mitigate the concerns raised by the AAT.

Sensitivities

20. Amendments to character settings generally attract scrutiny from the international community, advocacy groups and human rights bodies.

21. Non-citizens who are long-term resident in Australia who meet the thresholds for mandatory cancellation of their visa will continue to have their visas cancelled. As unlawful non-citizens they will be liable for detention while awaiting a revocation decision under the new Ministerial Direction.

Financial/systems/legislation/deregulation/media implications

22. Amendments to visa cancellation legislation or policy settings are likely to receive significant media attention. The Department will work with your office to prepare communications (including talking points and web content updates) to support issuance of the new Ministerial Direction.

Attachments

Attachment A Ministerial Direction 99 - amendments tracked for ease of reference

Attachment B MS22-001194 - ANZ Leaders Meeting: Ongoing work on pathways for long-term resident New Zealand citizens and visa cancellation settings

Attachment C MS22-001518 - Update on work underway on issues relating to New Zealand

Authorising Officer
Cleared by: Tara Cavanagh First Assistant Secretary Immigration Integrity, Assurance and Policy Division Date: 8 August 2022 Ph s. 22(1)(a)(ii)

Contact Officer s. 22(1)(a)(ii), Acting Assistant Secretary, Compliance & Community Protection Policy Branch, Ph: s. 22(1)(a)(ii)

Through Deputy Secretary, Immigration and Settlement Services Group

CC
Minister for Home Affairs, Minister for Cyber Security
Secretary
Commissioner, ABF
Deputy Secretaries
Deputy Commissioners, ABF
AGS Special Counsel
First Assistant Secretary Legal Division
First Assistant Secretary, Status Resolution and Visa Cancellation Division
First Assistant Secretary, International Division
Assistant Secretary, Americas, Europe, Middle-East, Africa and Pacific Branch
Assistant Secretary Character & Cancellation Branch
Assistant Secretary Migration & Citizenship Law Branch
Assistant Secretary Legislation Branch
Assistant Secretary Legal Strategy and Services

~~PROTECTED: Cabinet~~

Australian Government
Department of Home Affairs

Background Brief

For information

PDMS Number: MB22-001127

To: **Minister for Immigration, Citizenship and Multicultural Affairs**

Subject: **Briefing on Ministerial Direction 99**

Purpose

This brief has been prepared for you to personally brief Minister O'Neil on these matters ahead of the s. 34(2) s. 34(2) .

Background

1. On 17 August 2022, you noted the draft Ministerial Direction 99 **(Attachment A)** that makes long-term residence in Australia a primary consideration in character-related visa decision-making (MS22-001434, **Attachment B** refers). You also agreed that the Department of Home Affairs (the Department) test the draft Direction through a desktop exercise involving a sample of cases.

    - The Department is continuing to refine the draft Ministerial Direction 99 in consultation with your office and the Department's legal division. For example, small changes to the 'principles' section of the new direction are currently being drafted to reflect the Government's intent.

2. Ministerial Direction 99 will mean that in character-related visa refusal, discretionary visa cancellation and revocation of mandatory visa cancellation decision-making, decision-makers would need to weigh in the non-citizen's favour, the length of ordinary residency in the Australian community, particularly in instances where the non-citizen spent their formative years in Australia.
3. Decision-makers would also need to consider the impact that the decision would have on dependent children who are Australian citizens, permanent residents or who have an indefinite right to remain in Australia.
4. These considerations would need to be balanced against other considerations including the seriousness of the conduct, recidivism and expectations of the Australian community.
5. A final version of the Direction will be provided for your signature following s. 34(3) s. 34(3) , with a proposed commencement date of 1 December 2022.

Key Issues

Case study exercise

6. Following your agreement, the Department conducted a desktop exercise to examine the impact Ministerial Direction 99 would have on character decision-making. To conduct this exercise, 10 cases that had been decided against the current Ministerial Direction 90 were chosen (eight were adverse decisions and two were favourable). These cases were selected to provide a cross-section of cancellation scenarios with varying characteristics, all of which include individuals who have been in Australia for a reasonable period of time to effectively show how the new primary consideration is balanced against current primary and other considerations.
7. The outcomes of the exercise were as follows:
    - of the eight adverse decisions, two (or 25 per cent) saw the decision changed from 'not revoked' (where the visa cancellation decision remains in place) to 'revoked' (where the visa cancellation decision no longer stands)
    - the two changed decisions both had relatively low sentence length (12 months and 18 months), had lived in Australia since they were children and did not involve family violence
    - the two favourable decisions remained unchanged, but it was noted that they became a relatively more straightforward decision to revoke the cancellation.
8. It was noted that the change in the Direction did not have a substantive effect on decision-making in cases that had serious offending or family violence, or where, despite the person having resided in Australia for a considerable period of time, they did not have significant ties or have a record of contribution to the Australian community.
9. Of the ten cases tested, delegates considered that the principles associated with long term residence applied to seven, with six having spent at least some part of their formative years in Australia. For the remaining three cases the delegates considered the principle of long term residence did not apply, as even though they had been in Australia for a considerable period of time (up to 18 years) the period did not constitute the majority of the person's life nor had it included any of the person's formative years.
10. Of the three cases where long term residence applied and an adverse outcome remained, two involved very serious offending (a child sex offence and murder) while the other involved long term recidivistic offending (some violent). It is important to note that none of those three cases had any family ties and only one had some employment history.
11. It should be noted that the sample size of this exercise was very small and targeted to cases where the revised Direction would impact the decision being made. While the outcome of the exercise showed a statistically significant change in decisions (25 per cent of adverse decisions were changed), given the complexity and variability of the caseload overall, it would not be expected that this level of change could be applied across the entire caseload.

Prioritisation of mandatory cancellation action

12. s. 47C(1) [redacted]

13. Mandatory cancellation under 501(3A) currently accounts for the majority of visa cancellation activity undertaken pursuant to section 501 of the Migration Act 1958 (the Migration Act). Triaging cases prior to mandatory cancellation will allow cases which present a lower risk to be de-prioritised for cancellation action.

14. In order to consider where an appropriate risk threshold would lie, the Department has been conducting analysis of historical mandatory cancellation outcomes to determine common characteristics of cases that resulted in revocation of the mandatory visa cancellation decision.

Preliminary Analysis

15. The Department has reviewed 794 mandatory cancellation cases made from 2018-2019 involving New Zealand citizens. Of these cases, 160 mandatory cancellation decisions had been revoked. Preliminary analysis of this *revocation* caseload has identified:

    - 148 of those involved lower level offending (which excludes offending involving organised crime, serious violence, serious sexual assault etcetera), and
    - a close correlation between the length of residence in Australia and revocation outcome, with 68 of the revocations being for non-citizens who had been resident in Australia for over 10 years.

16. The analysis identified five characteristics most closely aligned with revocation decisions:

    - Criminality/type of offending
    - Length of Residence in Australia
    - Age on arrival
    - International Non-refoulement obligations
    - Gender.

17. These characteristics have formed the basis of an initial draft triage tool that can be used to identify cases that present with a combination of factors associated with a higher likelihood of revocation which would allow mandatory cancellation action to be re-prioritised.

18. The Department has tested the draft triage tool on the current mandatory cancellation pipeline of 60 cases. Applying the triage tool to these cases identified seven cases (12 per cent) which would be de-prioritised based on their characteristics. Of these, five are New Zealand citizens.

19. s. 47C(1)

20.

21. A revised Ministerial Direction, as well as the triaging of cases could have a reasonably significant impact overall on decision-making. While only a small sample size was used in the case study exercise to test the revised Direction, a 25 per cent change in decision-making is significant when considering the totality of the caseload. Although, as noted above, cases were chosen for this exercise based on having lived in Australia for a considerable period of time. Therefore, it would not be expected that the same level of change would be maintained across the entire caseload.

Consultation

22. Status Resolution and Visa Cancellation Division.

Client service implications

23. Through reducing the number of character related visa cancelations and refusals, and increasing the percentage of favourable revocation decisions, changes to the Ministerial Direction and related work is expected to result in a reduction in merits review applications made at the Administrative Appeals Tribunal (AAT) for character related visa decisions.

24. In the short-term, the introduction of Ministerial Direction 99 will require the current caseload of over 5,000 cases to be reviewed to identify affected cases. The Department anticipates around 2,800 cases will need to be renotified.

Sensitivities

25. In accordance with our long standing practices, should you wish for unclassified media lines to be prepared in relation to this issue please contact the Home Affairs Media Coordination team – media@homeaffairs.gov.au.

26. Amendments to character settings generally attract scrutiny from the international community, advocacy groups and human rights bodies.

Attachments

Attachment A: Draft Ministerial Direction 99 – changes tracked

Attachment B: MS22-001434 – New Ministerial Direction 99 on character-related visa decision-making – Minister signed

Authorising Officer	**Contact Officer**
Tara Cavanagh Frist Assistant Secretary Immigration Integrity, Assurance and Policy 24/09/2022 Ph: s. 22(1)(a)(ii)	David Gavin, A/g Assistant Secretary Compliance and Community Protection Policy Ph: s. 22(1)(a)(ii)

CC: Deputy Secretary, Immigration and Settlement Services Group
Special Counsel
FAS Status Resolution and Visa Cancellation Division
FAS International Division

Australian Government
Department of Home Affairs

Submission

For decision
PDMS Ref. Number: MS22-001638
Date of Clearance: 08/08/2022

To Minister for Immigration, Citizenship and Multicultural Affairs

Subject Outcomes from roundtable discussion with community advocates on Ministerial Direction 90

Timing *At you convenience*

Recommendations

That you:

1. note the outcomes of the roundtable discussion with community advocates on Ministerial Direction 90 **(Attachment A)** and that the Department of Home Affairs (the Department) will now seek written submissions regarding the key issues raised in this forum; and — noted / please discuss

2. agree to the proposed work plan to consult and prepare the new Ministerial Direction reflecting the family violence related amendments so that it can commence on 8 March 2023 **(Attachment B)**. — agree / not agree / please discuss

Minister for Immigration, Citizenship and Multicultural Affairs

Signature. **Date** 17 / 8 / 2022

Minister's Comments

Rejected	Timely	Relevance	Length	Quality
Yes/No	Yes/No	☐ Highly relevant ☐ Significantly relevant ☐ Not relevant	☐ Too long ☐ Right length ☐ Too brief	Poor 1.....2.....3.....4.....5 Excellent **Comments:**

Key Issues

1. On 19 July 2022, you held a roundtable discussion with community advocates to discuss and better understand their concerns about the unintended consequences of Ministerial Direction 90 - *Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA,* for victims of family violence. The outcomes of this discussion are at **Attachment A**.

2. We understand that you wish to use insights from your meeting with the community advocates to amend the Ministerial Direction to mitigate the unintended consequences of Direction 90 and enhance the protection of victims of family violence. The Department has invited submissions from community advocates and is engaging further to obtain case studies to better understand these impacts and others on the protection of women and children. This evidence-based approach will inform the review of the Ministerial Direction, particularly noting other ongoing work in the context of the *National Plan to Reduce Violence against Women and their Children*. The Department will also engage with the Department's Legal Group and character decision-makers to workshop possible amendments and test feasibility, so that the new Ministerial Direction is ready for your consideration later this year, with a proposed commencement date of 8 March 2023. A proposed work plan is at **Attachment B**.

3. As the new Ministerial Direction would enhance safeguards for victims of family violence, the Department recommends its commencement on 8 March 2023 to mark International Women's Day and the lead-up to Harmony Week (15-21 March 2023). Issuance of the Ministerial Direction during this time would send a strong message to the community regarding the Government's commitment to combat family violence and protect women, particularly those from culturally and linguistically diverse (CALD) communities. We understand from consultations with community advocates that women from CALD communities are particularly vulnerable to the abuse of migration and legal systems by perpetrators of family violence and therefore reluctant to report family violence. Harmony Day events could become an avenue to raise awareness among CALD communities about Australian society's zero tolerance of family violence and counter misinformation.

4. The Department will communicate to the Attorney-General's Department on concerns raised by community advocates around Australian jurisdictional definitions on domestic/family violence, for instance, inconsistency in the definition of family violence in State and Commonwealth legislation. The Department will also consider community advocates recommendations around enhancing the visa settings and further support visa holders experiencing family violence.

Consultation – internal/external

5. Status Resolution and Visa Cancellations Division, Immigration Programs Division, Legal Group.

Consultation – Secretary

6. The Secretary was not consulted on the approach in the submission.

Client service implications

7. Adopting an evidence-based approach to amending the Ministerial Direction will provide better outcomes for victims of family violence.

8. Each time a new Ministerial Direction is issued, affected cases under consideration at the time would need to be renotified of the new Ministerial Direction and given an additional opportunity to comment, having regard to the new Ministerial Direction. In the case of a new Ministerial Direction to address unintended consequences for victims of family violence, the affected caseload is likely to be limited.

   - There will be a reduction in the number of cancellation, refusal or revocation decisions finalised for the affected cohort in the first few months of the commencement of a new Ministerial Direction. Any urgent decisions for cases in the affected cohort that have to be made within the 28 days after a new Ministerial Direction comes into effect would need to be referred to you under the your personal power to refuse or cancel without natural justice (section 501(3)).
   - Generally, under the *Migration Act 1958* (the Act), the Administrative Appeals Tribunal (AAT) must make a decision on the review of character decisions by the 84th day after the day on which the review applicant was notified of the character decision. If a decision is not made, the Act deems the Tribunal to have made a decision to affirm the decision under review. When the new Ministerial Direction is issued, the AAT will also need time to consider the impact of a new Ministerial Direction on its caseloads and administrative processes.
     - If the AAT is required to re-notify all review applicants of the commencement of a new Ministerial Direction, this impacts on their ability to meet legally mandated timeframes to make character-related decisions.
     - This may open the Department to litigation risk as those decisions may be challenged in court. To mitigate this risk, the Department will notify the AAT when the new Ministerial Direction is signed.

9. To implement a new Ministerial Direction, the current on-hand caseload will need to be reviewed to identify affected cases. This will extend time spent in immigration detention for affected non-citizens currently detained and awaiting decision on their cases.

Risks and Sensitivities

10. A primary concern raised by community advocates regarding Ministerial Direction 90 is the absence of consultation during its development. Community advocates acknowledge that the introduction of a primary consideration regarding family violence was well intentioned, but claim there is no evidence that the current Ministerial Direction is an effective tool to combat family violence. Therefore, the Department will continue to engage with community advocates to mitigate future criticism and ensure that the amended Ministerial Direction achieves its objective in relation to family violence.

Financial/systems/legislation/deregulation/media implications

11. Amendments to character settings generally attract scrutiny from the international community, advocacy groups and human rights bodies. An article regarding your roundtable meeting appeared in The Australian newspaper on 20 July 2022. When the family violence related concerns are addressed in the future Ministerial Direction, the Department will work with your office to provide you media talking points and prepare a media release.

Attachments

Attachment A Roundtable outcomes

Attachment B Proposed work plan

Authorising Officer
Cleared by: Tara Cavanagh First Assistant Secretary Immigration Integrity, Assurance and Policy Division Date: 08 August 2022 Mob: s. 22(1)(a)(ii)

Contact Officer Maria Fernandes Dias, A/g Assistant Secretary, Compliance and Community Protection Policy Branch, Ph: s. 22(1)(a)(ii)

Through Deputy Secretary, Immigration and Settlement Services Group

CC Minister for Home Affairs, Minister for Cyber Security
Secretary
ABF Commissioner
Deputy Secretary, Immigration and Settlement Services Group
General Counsel / Group Manager Legal
FAS, Immigration Programs
FAS, Status Resolution and Cancellation

Australian Government
Department of Home Affairs

2 February 2023

Documents Officer
Senate Table Office
SG25
Parliament House
CANBERRA ACT 2600

TABLING OBLIGATION – DIRECTION NO. 99 UNDER SECTION 499 OF THE MIGRATION ACT 1958

Under section 499 of the *Migration Act 1958*, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs has made Direction No. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA.

The purpose of Direction 99 is to guide decision makers performing functions or exercising powers under section 501 or 501CA of the Act when considering the refusal or cancellation of a visa and when reviewing requests to revoke the cancellation of a visa.

Under subsection 499 of the *Migration Act 1958*, the Minister shall cause a copy of any direction given to be laid before each House of the Parliament within 15 sitting days of that House after that direction was given.

The Direction is not a disallowable instrument. Direction No. 99 was signed by the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs on 23 January 2023.

Two copies of Direction No. 99 are attached. Please make the necessary arrangements to table Direction No. 99 as a clerk document.

s. 22(1)(a)(ii)

Director
Ministerial and Parliamentary Branch
Department of Home Affairs
s. 22(1)(a)(ii)