ASRC
Asylum Seeker Resource Centre

Committee Secretary
Joint Standing Committee on Migration
PO Box 6100 Parliament House
Canberra ACT 2600

27 April 2018

Dear Committee Secretary,

RE: Submission on the Inquiry into review processes associated with visa cancellations on criminal grounds

We welcome the opportunity to participate in this Inquiry into review processes associated with visa cancellations on criminal grounds. We endorse the submission made by the Law Council of Australia and the Refugee Council of Australia on these matters. In our view there is undoubtedly enormous scope for cancellation laws and procedures to be improved to achieve a better balance between both maintaining public safety while ensuring consistency, fairness and protection of individual rights and the integrity of the system itself.

Over the past twenty years, the legislature has seen fit to relentlessly expand powers to cancel visas on character grounds, [1] which combined with a zealous commitment to exercise these powers to the maximum extent possible, has resulted in a massive spike in the numbers of people who have had their visas cancelled.[2] This trend widely evidenced in our legal practice.

There is undoubtedly a need and place for careful scrutiny of character considerations in relation to the grant or continuance of visas in order to protect communities in Australia from genuine threats to security. However, there is also a need to ensure that such actions are taken based on principles of the rule of law and with adequate oversight, checks and balances and procedural safeguards in place to ensure that manifest injustices to individuals are avoided and to protect basic freedoms that we expect and value in a democratic and free state.

We are concerned that this balance between the need to protect the community from genuine threats while maintaining the integrity of the basic legal protections that are the hallmarks of democratic states, is already well out of kilter in relation to character visa cancellation processes and we are alarmed by the prospect that further incursions upon legal protections, may be in the offing. We are particularly concerned by the suggestion that merits review of cancellation decisions may be further intruded upon.

We would like to bring the following key concerns and issues to the Committee's attention. If invited to provide evidence before the Committee, we would be pleased to share case studies, which further highlight many of the concerns we highlight in our comments below.

Aspects particular to people to whom Australia owes protection obligations

1. The threat of visa cancellation is always a very serious one for any visa holder. If a visa is cancelled (and the cancellation not revoked), a person is then unable to apply for almost any other kind of

[1] Commencing in 1998 when the law was changed by introducing section 501 of the Migration Act 1958 (Cth) which allows the Minister to cancel a person's visa if satisfied they did not pass the 'character test'.
[2] Between the 2013–14 and 2016–17 financial years, the number of visa cancellations on character grounds increased by over 1400 per cent. See https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics due to December 2014 legislative amendments to the *Migration Act 1958*.

visa.[3] They become by operation of law an 'unlawful non-citizen' and subject to mandatory immigration detention,[4] and 'removal', from Australia 'as soon as practicable',[5] usually with no prospect of ever returning to Australia.

2. Our primary concern relates to the impact of cancellation procedures on persons to whom Australia owes protection obligations. While these most commonly arise under the *Convention relating to the Status of Refugees*,('the Refugee Convention'), complementary protection obligations are also relevant and arise under other conventions binding upon Australia, such as the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('the Convention against Torture'), the *International Covenant on Civil and Political Rights* ('the ICCPR'), and the *Convention on the Rights of the Child* ('the CRC'). These treaties create *non-refoulement* obligations, a principle also embedded in customary international law, which prohibits states from expelling people to countries where they may face persecution or serious harm.

3. Notably, the Refugee Convention already provides exceptions to *non-refoulement* obligations on character grounds where 'there are reasonable grounds for regarding that person as a danger to Australia's security, or if that person, having been convicted by final judgment of a particularly serious crime, constitutes a danger to the Australian community.'[6] Thus, there is a strong argument that refugees should not be subject to character-based visa cancellation laws at all, as the Refugee Convention already defines the persons owed protection obligations and the permissible exceptions to Australia's obligation to provide protection from *refoulement.* If Convention exceptions are not applicable, then Australia should not impose further restrictions, but rather should provide such refugees with the usual rights to protection. Under Australian law, these rights are manifested in the form of the grant of a protection visa.

4. It is troubling that the 'character grounds' on which a person's visa can be refused or cancelled under sections 501 or 116 of the Migration Act, are much broader than the exclusion clause provided for under the Refugee Convention. This creates a potent legal vacuum, where the person owed protection obligations cannot be returned to their home country without breaching Australia's international human rights obligations, but nor are they eligible to hold a visa, therefore casting them into indefinite legal limbo.

5. While in exercising discretion to refuse to grant or to cancel a visa, a decision maker must consider 'the specific circumstances of the case[7] and 'take into account' Australia's non-refoulement obligations,[8] the fact that a person is owed protection obligations, does not prevent their visa from still being refused or cancelled on character grounds. This is clarified by s 197C of the Migration Act, which clearly states that notwithstanding a person is owed protection obligations, they can still be deported or removed to a country where they may face persecution or other serious harm.[9] In

[3] Other than a 'removal pending' bridging visa or a protection visa if they have not previously applied for one.
[4] *Migration Act 1958 (Cth)* s 189.
[5] *Migration Act 1958 (Cth)* s 198.
[6] *Convention relating to the Status of Refugees, 1951*, Article 33(2).
[7] ibid preamble 6.1(2).
[8] Ibid Part A, 10
[9] s 197C states: "it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen". In fact, s 197C (2) goes so far as to say that an officer's duty to remove an unlawful non-citizen under s 198 "arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen".

our view, it diminishes every Australian to have such an outright repudiation of Australia's most fundamental human rights obligation under several treaties, stated in an Australian statute.

6. This legal morass creates a scenario that can have only two outcomes, both of which are entirely unacceptable. Either, the person is subject to *refoulement*, in breach of Australia's obligations, most commonly under Article 33(1) of the Refugee Convention or Article 3 of the Convention against Torture. Alternatively, the person is left to perish in a form of legal 'purgatory' through being subjected to indefinite immigration detention.[10] This outcome is contrary to the Migration Act itself, which requires by operation of law that such a person be removed 'as soon as practicable'. More relevantly, an outcome of indefinite detention, is clearly in breach of basic human rights standards, as provided for in Article 9(1) of the ICCPR, which prohibits arbitrary detention.

7. Thus, the clear conclusion is that the application of visa cancellation and refusal regimes to persons to whom Australia owes protection obligations, inevitably and necessarily, creates outcomes that are at odds with Australia's most fundamental obligations under international human rights law. This should not be tolerated and demands immediate legislative action to realign the Migration Act with human rights law.

8. The Courts have recently grappled with these issues in the case of *DMH16 v Minister for Immigration and Border Protection.*[11] This case concerned a Syrian national refused a protection visa on character grounds. The Court quashed the decision to refuse the visa on the basis that the Minister had an incorrect understanding of the legal consequences of the refusal. The Court found that contrary to the Minister's position that the consequence of the refusal was indefinite detention, (in itself, an appalling position for any Minister to take and seek to defend in a court of law), the true legal consequence of the decision, was to subject the applicant to immediate removal back to Syria, notwithstanding that he had been found to be owed non-refoulement obligations.[12]

9. As noted above, this legal predicament requires an urgent and decisive solution by amending our laws to ensure they are compliant with Australia's protection obligations. We urge the Committee to take up this challenge and submit that this would be best achieved by entirely excluding people to whom Australia owes protection obligations, from the character-based visa cancellation regime.

10. There are also other serious human rights issues commonly raised in visa cancellation processes, which frequently work to rip Australian families apart and indefinitely separate children from their parents or other family members. These kinds of outcomes can result in a multitude of other breaches of international human rights standards, including the provisions of the ICCPR that protect the right to family unity and non-interference in family life.[13] Visa cancellation decisions that adversely impact on the 'best interests' of affected children, can also breach provisions of the Convention on the Rights of the Child, which obliges all Australian authorities (including Departmental delegates and the Minister), to give *paramount consideration* to any affected child's 'best interests' in any actions taken concerning the child.[14] In addition, such decisions must be taken in accordance with other human rights protections specific to children, including a child's right to

[10] By operation of s 189 and 196 of the *Migration* Act 1958 (Cth).
[11] (2017)FCA 448.
[12] The Court found that the effect of section 197C was to require the removal of the applicant back to Syria *notwithstanding* that he is owed non-refoulement obligations.
[13] See Articles 17 and 23.
[14] Convention on the Rights of the Child, 1990, Article 3(1).

'know and be cared for by his parents';[15] be protected from being 'separated from his parents against his will';[16] and being protected from discrimination, including on the basis of the visa status or criminal justice status, of his or her parents.[17]

11. The serious human rights issues raised by the exercise of character-based visa cancellation powers - especially in relation to people owed protection obligations - combined with the complex interaction between international and domestic legal obligations, underline the crucial importance that visa cancellation processes are governed by proper oversight, accountability and afford both substantive and procedural fairness to applicants.

12. Within such protective legal architecture, merits review processes, such as those afforded by the Administrative Appeals Tribunal, play an especially important safeguarding role to ensure that decisions are made lawfully, and that the AAT is able to fulfil its responsibility, without interference, to arrive at the 'correct or preferable' decision based on the material before it.[18] Several aspects of the Tribunal's powers in relation to visa cancellation matters, and suggestions for how further efficiencies could be achieved and duplication of processing avoided, are discussed in further detail below.

The Tribunal's jurisdiction and merits review

13. The Tribunal's jurisdiction (or lack thereof) to review Ministerial decisions is a particularly concerning aspect of the character cancellation regime. The Tribunal is expressly excluded from reviewing most decisions made by the Minister or the Assistant Minister personally,[19] and an applicant's only avenue for review in those circumstances is to seek judicial review in the Federal Court of Australia,[20] which is a complex and potentially expensive process.

14. The Minister's personal discretionary powers to cancel a visa on character grounds which are not reviewable by the Tribunal are extraordinarily broad. For example, the Minister may set aside a decision of a delegate or the Tribunal itself not to cancel a visa, and substitute his own decision to cancel the visa if he considers it is in the national interest to do so.[21] Further, where a delegate of the Minister makes a decision to cancel a visa, the Minister may substitute that decision with a cancellation decision made in his personal capacity so as to avoid a person's right to merits review, notwithstanding that the person may have already lodged an application for review by the Tribunal.[22]

15. In essence, under the current legislative regime the Minister has the power to overrule the independent Tribunal or to remove a person's right to merits review altogether. We consider this to be a concerning departure from the rule of law and an overreach by the Executive aimed at avoiding proper and necessary accountability for government decision making.

16. Where the Tribunal does have jurisdiction with respect to cancellation decisions, merits review by the Tribunal must not be considered 'duplication'. Rather, it is an essential aspect of ensuring the proper administration of Australian migration law. The Tribunal is a formally established

[15] Ibid, Article 7(1).
[16] Ibid, Article 9(1)
[17] Ibid, Article 2(1) and (2).
[18] Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577, 589.
[19] *Migration Act 1958* (Cth) s 500.
[20] *Migration Act 1958* (Cth) s 476A.
[21] *Migration Act 1958* (Cth) s 501A.
[22] *Migration Act 1958* (Cth) s 501B.

independent specialist body, comprised of members with appropriate legal qualifications and experience or special knowledge and skills that enable them to provide considered reasons as to the factual basis for any decision. While the Tribunal may have regard to Government policy, it is not bound by it, other than where policy is contained in formal directions under s 499 of the Act.

17. These characteristics make Tribunal members distinct from Ministerial delegates, who are employees of the Minister and therefore are not independent, and may not hold the same skills and experience as appointed Tribunal members.

18. The application of s 501 of the Act, including consideration of Ministerial Direction 65 and judicial authority, is a complex task. Cancellation decisions require the consideration of a range of evidence and legal argument, and the weighing up of mandatory and non-mandatory considerations. In our view, this is a task which Ministerial delegates can and often do get wrong, making merits review by the Tribunal all the more important.

19. A review of publically available decisions of the Tribunal from this year alone shows that the Tribunal set aside a decision of a delegate made under s 501 of the Act on at least 17 occasions between January – April 2018.[23] The Tribunal substituted the delegate's decisions on various grounds including that the delegate likely misunderstood evidence, gave incorrect weight to relevant factors, required more evidence in order to make a proper decision, or simply did not reach the preferable decision. We submit that this is a clear indication of the importance of merits review of cancellation decisions.

20. We submit that the role of the Tribunal in the character cancellation process is essential and under no circumstances should the scope of the Tribunal's jurisdiction to engage in merits review be narrowed.

Minister's personal powers and duplication

21. More appropriate changes to the cancellation regime may be to expand the Tribunal's jurisdiction and to narrow the discretionary powers vested in the Minister personally. The scope of the Minister's existing powers are concerning in light of the manner in which they are often exercised.

22. The powers are often exercised to make repeat cancellation decisions on the basis of the same adverse information. It is frequently the case that, immediately following a decision by the Federal Court to quash a previous decision on the basis of legal error, or a decision of the Tribunal to set

[23] *BFXK and Minister for Immigration and Border Protection (Migration) [2018] AATA 886; WXDX and Minister for Immigration and Border Protection (Migration) [2017] AATA 2851; Uluikavoro Qoro and Minister for Immigration and Border Protection (Migration) [2018] AATA 56; Duar Te Do Pateo Fernandes and Minister for Immigration and Border Protection (Migration) [2018] AATA 348; JL and Minister for Immigration and Border Protection (Migration) [2018] AATA 754; MAH and Minister for Immigration and Border Protection (Migration) [2018] AATA 416; Jayba and Minister for Immigration and Border Protection (Migration) [2018] AATA 385; Campbell and Minister for Immigration and Border Protection (Migration) [2018] AATA 383; Azizi and Minister for Immigration and Border Protection (Migration) [2018] AATA 669; Mahu and Minister for Immigration and Border Protection (Migration) [2018] AATA 161; CBYQ and Minister for Immigration and Border Protection (Migration) [2018] AATA 91; JSQF and Minister for Immigration and Border Protection (Migration) [2018] AATA 305; Maikantis and Minister for Immigration and Border Protection (Migration) [2018] AATA 40; FTYC and Minister for Immigration and Border Protection (Migration) [2018] AATA 20; GXNY and Minister for Immigration and Border Protection (Migration) [2018] AATA 17; BHKM and Minister for Immigration and Border Protection (Migration) [2018] AATA 3; Gordon and Minister for Immigration and Border Protection (Migration) [2018] AATA 39.*

aside a delegate's cancellation decision, the Minister or Assistant Minister will make another cancellation decision in their personal capacity on the same factual basis.

23. The powers are also often exercised to make quick decisions unsupported by adequate reasons. The Minister and Assistant Minister have been found by the courts to have failed to give "proper, genuine and realistic" consideration to relevant matters in cancellation decisions, such that the decisions were not made in accordance with law.[24] We stress that while the Minister and Assistant Minister are not bound by Ministerial directions, they are still required to give proper consideration to the exercise of their powers and, as noted by the Federal Court, the use of "stock standard" or "formulaic" reasons cannot be invoked with a view to shielding a reasoning process from scrutiny.[25]

24. Repeated use of the Minister's personal cancellation powers, and decisions made with superficial consideration and reasoning, give rise to duplication in the work of applicants and their representatives in defending multiple cancellation attempts or seeking costly judicial review in order ensure that lawful decisions are made. The manner in which the Minister's powers are exercised in practice demonstrates that these discretionary powers ought to be narrowed.

25. It is of further concern that, in light of the decision of the Federal Court in *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96 and the disposition of the Minister's application for special leave to appeal that decision to the High Court of Australia, Ministerial Direction 65 is now plainly inconsistent with the terms of the Act, and cannot be binding on delegates or the Tribunal with respect to the consideration of non-refoulement obligations. Despite this, the Minister has not sought to vary or revoke Direction 65 and continues to argue that the Direction should apply to decision makers.

26. In our view, the manner in which the Minister and Assistant Minister chose to exercise their powers, and their failure to adhere to the guidance of the courts, is a significant cause of inefficiency and duplication in the current character cancellation regime.

Other areas of duplication – mandatory cancellations and revocation requests

27. The terms of reference suggest that the Joint Standing Committee on Migration seeks to increase efficiency in the review process of decisions made under s 501 of the Act.

28. We note that the timeframe for an applicant to provide comment or information in response to a notice of intention to consider cancellation, or in support of a revocation request, is 28 days. It is then often a period of many months before a decision is made by the Minister or a delegate. In that sense, we suggest that efficiencies might be achieved by examining the Department's internal processes for dealing with character matters.

29. Further, we note that the number of cancellations initiated by the Department has drastically increased in recent years. Efficiencies could be achieved by the Department taking a more considered approach to the application of s 501 of the Act and a more nuanced understanding of the 'expectations of the Australian community'.

30. Upon review at the Tribunal, s 500(6L) requires that cancellation matters be decided by the Tribunal within 84 days after the day on which the applicant was notified of the cancellation decision, failing

[24] *Buadromo v Minister for Immigration and Border Protection* [2017] FCA 1592; *Sabharwal v Minister for Immigration and Border Protection* [2018] FCA 10.
[25] *Berryman v Minister for Immigration and Border Protection* (2015) 235 FCR 429 at 437; *Roesner v Minister for Immigration and Border Protection* [2015] FCAFC 132 at [40]; *Malek Fahd Islamic School Ltd v Minister for Education and Training (No 2)* [2017] FCA 1377 at [48].

which the Tribunal is deemed to have affirmed the decision on review. This provision operates such that cancellation matters proceed to hearing before the Tribunal significantly faster than protection visa review matters, for example. In our view, this is already an efficient process. We do not consider that any restriction on the merits review function of the Tribunal would be acceptable, including for reasons of increased efficiency.

31. One potential area for reform may be the handling of mandatory cancellation matters under s 501(3A). Where a person's visa is mandatorily cancelled under s 501(3A), the person is then invited to provide submissions as to why the cancellation decision should be revoked.[26] That decision may be made by the Minister or a delegate.

32. While data is not available to indicate how frequently revocation requests under s 501CA are granted, in the ASRC's experience, whatever criminal charges have triggered a mandatory cancellation will almost always lead the Minister or his delegate to refuse a revocation request. The Tribunal, however, frequently reaches a different conclusion to on review. This may be on account of the Minister and his delegates' interpretations of policy guidelines, or because 28 days does not allow a person adequate time to prepare a case in support of revocation. There is insufficient time for an applicant to gather evidence such as medical reports, psychiatric reports, witness statements and country information, particularly given the person is incarcerated throughout the process. Applicants for revocation requests are rarely afforded a hearing.

33. If the chances of an applicant succeeding in a revocation request to the Department are next to none, it may be more appropriate for the matter to proceed directly to the Tribunal for review. Before the Tribunal, an applicant will have the time and procedural framework to properly present his or her case. Given an applicant remains in detention, it is in the interests of all parties to have mandatory cancellation matters determined expeditiously, and for unnecessary steps in the process to be removed.

34. Efficiencies may be gained by abolishing the process of revocation requests, and making all mandatory cancellation decisions under s 501(3A) reviewable directly by the Tribunal. This provides the added benefit of ensuring the Minister's personal powers are not improperly exercised in such cases.

35. If such changes were made, it would be essential for the Act to provide for an adequate period of time in which a person could seek review by the Tribunal. The current requirement to lodge an application within 9 days of notification should be extended, and the Minister's Department must ensure that a person is informed of their right to review and provided with contact details for migration lawyers.

Recommendations

The Committee should recommend that the following actions be taken:

1. Amend the Migration Act to ensure it is compliant with Australia's protection obligations, including in relation to non-refoulement. In particular, exclude people to whom Australia owes protection obligations from the character-based visa cancellation regime and abolish mandatory immigration detention, especially of those owed protection obligations.

2. Amend the Migration Act to ensure it is compliant with Australia's international obligations to families and children, including in relation to preservation of family unity; for children's 'best interests to be made a paramount consideration in all matters that affect them including visa cancellation or refusal

[26] *Migration Act 1958* (Cth) s 501CA.

decisions; and for their rights to be upheld, including to be cared for by their parents, protected from separation from their parents, and protected from discrimination based on the visa status or criminal justice status of their parents.

3. Reject any proposed incursion or narrowing of the jurisdiction of the AAT to conduct merits review of decisions concerning visa cancellations and refusals.

4. Abolish Ministerial powers to overturn decisions of the AAT.

5. Remove Ministerial powers to cancellation or refuse visas based on character, and invest jurisdiction to review these matters in the AAT.

6. Provide free and specialised legal assistance to people to whom Australia owes protection obligations in relation to any processes that could lead to decisions to refuse or cancel protection visas, or not revoke decisions to cancel protection visas.

7. Increase the time allowed for applicants to respond to Notices of Intention to Consider Refusal from 28 days to 60 days

8. Provide strict time limits within which the Department must make its decisions, or cause visa cancellation notices to lapse

9. Reduce protracted detention of people awaiting visa cancellation decisions.

Yours faithfully,

Kon Karapanagiotidis

OAM, Chief Executive and Founder