

24 July 2018

[REDACTED]

Committee Secretary

Joint Standing Committee on Migration

P.O. Box 6021, Parliament House, Canberra ACT 2600

RE: Invitation to make additional submissions — review processes associated with visa cancellations made on criminal grounds — introducing two-tiered merits review

Dear [REDACTED]

I write to provide your Joint Standing Committee with supplementary written submissions to assist the Committee's inquiry into review processes associated with visa cancellations made on criminal grounds.

These supplementary submissions respond to the Committee's request at its oral hearing in Sydney on 17 July 2018 for me to provide further written submissions on the question of introducing a two-tiered merits review process within the Administrative Appeals Tribunal (AAT) for decisions made under s 501 of the *Migration Act 1958* (Cth).

Yours sincerely,

Aidan Hammerschmid

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Joint Standing Committee on Migration — Supplementary Submissions — Two-Tiered Merits Review

1. These supplementary submissions respond to the Committee's invitation for further submissions about the potential introduction of a two-tiered merits review process within the Administrative Appeals Tribunal (AAT).
2. These submissions argue that considerations of both efficiency and justice favour introducing such a scheme.
3. A two-tiered review structure may operate as follows. Initially, all review proceedings would be heard by a single member of the AAT. The single member would be responsible for adjudicating cases involving the application of settled law to straightforward facts. On the application of any party, the member may exercise a discretion to remit the case to a multi-member review panel on any of the following grounds:
 - 3.1. *First*, if the case raises issues of general principle or public significance that are likely to have wider normative implications extending beyond the compass of the individual proceeding.
 - 3.2. *Second*, if the case raises complex issues of fact or substantial issues of law that are more appropriately adjudicated by an experienced multi-member panel with specialist legal training.
 - 3.3. *Third*, if the original decision is alleged to have involved manifest error in the finding of facts, in the interpretation of the law, or in the application of the law to the facts of the case.
4. Before July 2015, when the Migration Review Tribunal and the Refugee Review Tribunal were in operation, there existed a facility in ss 381 and 443 of the *Migration Act 1958* (Cth) for each tribunal to refer a case to a specially-constituted panel of the AAT, if the case raised 'an important principle, or issue, of general application'. These two statutory facilities were repealed in 2015 with the amalgamation of the specialist tribunals under the aegis of the AAT.¹ The result is that there exists only a single tier of AAT merits review of decisions made under s 501. All such cases are adjudicated in the AAT's General Division.
5. There are two justifications for introducing a two-tiered review procedure within the AAT for s 501 decisions.
 - 5.1. The first justification points to the potential efficiency gains that may accrue from a more specialised treatment of the s 501 caseload. Consistently with the AAT's statutory objects of economy and speed (*Administrative Appeals Tribunal Act 1975* (Cth) s 2A(b)), distributing the s 501 caseload across the two tiers would ensure that the case is heard by the forum with the most suitable expertise and resources.
 - 5.1.1. On the one hand are cases that involve straightforward questions of fact and law, such as whether a person has been convicted of and/or sentenced for a criminal offence of the type referred to in sub-ss 501(6)(a), (6)(aa), (6)(ab), (6)(e), and (6)(f). Whether or not a person has such a criminal record is the subject of clear judicial determination and would rarely require a lengthy fact-finding exercise.
 - 5.1.2. On the other hand are cases involving more complex issues of fact and law, such as where a person's character is sought to be discerned from their general conduct² (an opaque case-by-case determination), or where it is argued that the Minister reasonably suspects that a person belongs to an organisation involved in criminal conduct³ (no criminal conviction being necessary here).
 - 5.2. The second justification is that two-tiered review would promote both systemic and individual justice. Consistently with the AAT's statutory objects of providing a fair and just mechanism of review (*Administrative Appeals Tribunal Act* s 2A(b)), distributing the s 501 caseload between the two tiers would help ensure that the correct and preferable decision is reached by the facility most competent to adjudicate the case.
 - 5.2.1. Distributing the caseload between the two facilities would ensure that, for straightforward cases, settled legal principle is applied in a consistent manner to clear facts. This would vindicate the community's general interest in the equal treatment of persons.
 - 5.2.2. The residue of complex cases would receive nuanced appellate treatment according to the particular facts and issues raised by the case. This would aid in delivering individualised justice.
6. The Committee may gain further assistance from reading Chapter 8 of the following Report: Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995). Although the Report was published twenty years before the AAT was amalgamated in 2015, many aspects of its discussion of review panels continue to be relevant.

¹ *Migration Act 1958* (Cth) ss 381 and 443, as repealed by *Tribunals Amalgamation Act 2015* (Cth) sch 2 cll 68 and 113.

² *Migration Act 1958* (Cth) s 501(6)(c)(ii).

³ *Ibid* s 501(6)(b).