



**Australian
Human Rights
Commission**

Review processes associated with visa cancellations made on criminal grounds

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION
TO THE JOINT STANDING COMMITTEE ON MIGRATION**

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Joint Standing Committee on Migration in its inquiry into ‘review processes associated with visa cancellations made on criminal grounds’.
2. The Terms of Reference for the inquiry provide that the Committee shall have particular regard to:
 - The efficiency of existing review processes as they relate to decisions made under section 501 of the Migration Act.
 - Present levels of duplication associated with the merits review process.
 - The scope of the Administrative Appeals Tribunal’s jurisdiction to review ministerial decisions.
3. The Commission welcomes the opportunity to make a submission to this inquiry. This submission responds to all three of the Committee’s Terms of Reference.

2 Summary

4. Australia has a highly complex system for assessing whether someone is eligible for a visa to enter or remain in the country. Under international law, the Australian Government is entitled to place conditions on the grant of visas – including that visa holders abide by Australia’s criminal laws. It is reasonable for the community to expect that people temporarily in Australia who commit serious crimes may lose the right to remain in Australia. Some visa cancellations on criminal grounds are proportionate to legitimate public objects and are consistent with Australia’s international human rights obligations.
5. The decision to refuse or cancel a visa can also have serious impacts on the visa applicant or visa holder and on members of that person’s family. This is especially true of people who have been present in Australia for a long period of time, perhaps their whole lives, but who are not citizens. Removal of such people from Australia will have very significant personal impacts. It may result in people being removed from the only country they have known. It may result in families being split up.
6. For people who have been recognised as refugees, the personal risks of having a protection visa cancelled are particularly heightened. If they are returned to their country of origin, they may face a real risk of persecution. If they cannot be returned because of those risks, they face the prospect of prolonged and indefinite detention in Australia.
7. Removal of an individual from Australia can also have broader consequences. Where, for example, the individual is the main breadwinner in a family, there can be a profound effect on the individual’s dependants – some or all of whom might be Australian citizens. This, in turn, can increase the financial and other burden on the state to provide for those dependants. Removal can also affect the broader community in other ways. Sometimes this effect will be overall

positive; for example, in the removal of an individual who presents an intolerable risk to community safety. But sometimes, on balance, removal will have a negative effect on the community; for example, where the individual plays an important, positive role in community life.

8. Given the potential impact on individual rights, it is important that any decision to refuse or cancel a visa is properly made and takes into account all of the relevant circumstances. For the last 40 years, since the introduction of administrative law reforms including the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act), the Australian legal system has typically ensured that administrative decisions by government that are likely to affect significant interests of individuals are subject to independent merits review. The aim of merits review is to ensure that administrative decision-making is principled and consistent, and results in decisions that are correct and preferable. In a system as complex as Australia's migration system, merits review provides a vital safeguard in avoiding error.
9. The first two Terms of Reference require the Committee to have particular regard to the levels of inefficiency and duplication in the current merits review arrangements. There are a number of aspects of the current regime that involve inefficiencies and duplication.
10. First, the merits review process for decisions to refuse or cancel visas on character grounds is an 'expedited' process. This process provides fewer rights for applicants than the ordinary merits review process. For example, it involves: less detailed statements of reasons for decision; a short and inflexible period for review applications to be made; and a prohibition on review applicants raising relevant material during a hearing (whether orally or in writing) unless this has been provided to the Minister in writing two days in advance.
11. Under these circumstances, there is an increased risk of applicants being locked out of merits review or the wrong decision being made on review. The Commission considers that there are good reasons to dispense with the 'expedited' process and to provide the ordinary merits review rights to people subject to visa refusal or cancellation on character grounds. This is likely to lead to increased efficiencies including better decision-making at the merits review stage and lower rates of judicial review.
12. Secondly, there is currently a system for mandatory cancellation of visas in certain circumstances, with the onus put on applicants to request a revocation of the cancellation. This process leads to significant inefficiencies because up to 50% of all mandatory visas cancellations are ultimately revoked. Had decision-makers been able to exercise discretion in these cases, it is likely that a substantial number of visas may never have been cancelled, leading to a significant saving in administrative costs. The Commission recommends that the mandatory cancellation process be repealed.
13. Thirdly, after a primary decision has been made by a delegate of the Minister and it is reviewed by the AAT, the Minister is able to set aside decisions of the AAT if certain conditions are met. This represents a duplication of executive decision-making — first by a delegate and then by the Minister — and is

contrary to the ordinary process of merits review. Merits review is intended to provide a check on certain kinds of decisions by the executive to ensure robust decision-making. The current process provides the opposite: an executive check on independent tribunal decisions.

14. The last term of reference for this inquiry relates to the scope of the AAT's jurisdiction to review ministerial decisions. At present, personal decisions of the Minister are exempt from merits review. However, there is no reason to think that the person occupying the office of the Minister for Home Affairs from time to time is immune from making errors of fact. Given the significant impact on individual rights, decisions to refuse or cancel visas, even if made by a Minister, should be subject to merits review. Decisions of the AAT would continue to be subject to judicial review in the courts.

3 Recommendations

15. The Commission makes the following recommendations.

Recommendation 1

The Commission recommends that the Minister for Home Affairs amend Direction No. 63 to require decision-makers to consider cancelling a bridging visa under reg 2.43(1)(p)(ii) of the Migration Regulations 1994 (Cth) only when a person is charged with a serious offence.

Recommendation 2

The Commission recommends that the Minister for Home Affairs amend all Ministerial directions in relation to visa refusal or cancellation to include as a primary consideration whether Australia has international *non-refoulement* obligations to the person.

Recommendation 3

The Commission recommends that the Minister for Home Affairs amend Direction No. 65 to make clear that, in deciding whether to refuse or cancel a visa, considerations that must be taken into account are whether a person will be detained in immigration detention following refusal or cancellation, the likely length of any period of immigration detention, and whether the person faces the prospect of a prolonged and indefinite period in immigration detention.

Recommendation 4

The Commission recommends that the mandatory visa cancellation provisions in ss 501(3A) and 501CA of the *Migration Act 1958* (Cth) be repealed.

Recommendation 5

The Commission recommends that the Committee consider the impacts of:

- (a) the 12 week time limit for the expedited process in s 500(6L) of the Migration Act for review of decisions to refuse or cancel visas on character grounds; and
- (b) the fact that if a decision is not made in 12 weeks, the refusal or cancellation will be deemed to be affirmed

on:

- the ability of applicants to effectively prepare their case
- the ability of the AAT to deal properly with these cases
- the efficiency of the AAT's review processes in other cases.

Recommendation 6

The Commission recommends that:

- (a) the procedural requirements for the expedited merits review process set out in ss 500(6A) to (6K) of the Migration Act be repealed
- (b) decisions made under ss 501 and 501CA of the Migration Act be subject to merits review by the AAT under its ordinary processes.

Recommendation 7

The Commission recommends that the time limit for applying to the AAT for review of decisions to cancel a visa under s 116 of the Migration Act be extended to 28 days.

Recommendation 8

The Commission recommends that, where a bridging visa has been cancelled under s 116 of the Migration Act on the basis of criminal charges, the withdrawal of these charges or a non-adverse judicial outcome should automatically trigger a review of the decision to cancel the visa.

Recommendation 9

The Commission recommends that the Ministerial powers in ss 133C(1), 501A and 501BA of the Migration Act to set aside decisions of the AAT be repealed.

Recommendation 10

The Commission recommends that personal decisions by the Minister to refuse or cancel visas on character grounds be subject to merits review in the AAT.

16. If recommendations 9 and 10 above are not accepted, the Commission makes the following recommendations:

Recommendation 11

The Commission recommends that, if the Minister exercises a personal power under s 501 of the Migration Act to refuse or cancel a visa, the Minister be required to table in Parliament a notice setting out the decision and the reasons for the decision. The notice should not include the name or other identifying information of the person affected by the decision.

Recommendation 12

The Commission recommends that, if the Minister exercises a personal power under ss 501A, 501B or 501BA of the Migration Act to set aside an original decision and either refuse or cancel a visa, the Minister be required to table in Parliament a notice that:

- (a) sets out the original decision
- (b) states that the Minister has set aside the original decision
- (c) sets out the decision made by the Minister in connection with the decision to set aside the original decision
- (d) sets out the reasons for the Minister's decision to set aside the original decision.

The notice should not include the name or other identifying information of the person affected by the decision.

Recommendation 13

The Commission recommends that s 501CA(8) of the Migration Act be amended to require the Minister to set out the decision and the reasons for the decision in the notice to be tabled in Parliament when the Minister decides not to revoke a mandatory cancellation. The notice should not include the name or other identifying information of the person affected by the decision.

4 Background

17. The Terms of Reference for this inquiry appear to focus on cancellation of visas on character grounds under s 501 of the *Migration Act 1958* (Cth) (Migration Act). This includes mandatory cancellation of visas under s 501(3A). Accordingly, the Commission's submission focuses on the scheme for review of these decisions. The submission also refers to the general powers to cancel visas under s 116 of the Migration Act, which include the power to cancel certain visas if a person has been charged with a criminal offence or if the person might be a risk to the safety of the Australian community.

18. The Commission notes that the Minister and delegates of the Minister have the power to refuse protection visas on the grounds that: the person is a danger to Australia's security; the person has been convicted of a particularly serious crime and is a danger to the Australian community; or the person has committed another serious international crime, serious non-political crime or act contrary to the purposes and principles of the United Nations.¹ Given that these powers apply only to refusal of visas and not to cancellation of visas the Commission's submission does not deal with them on the basis that they are not within the Terms of Reference.

4.1 The character test

19. Under s 501 of the Migration Act, the Minister for Home Affairs (Minister) or a delegate of the Minister may refuse to grant a visa to a person or may cancel a visa that has been granted to a person on the basis that the person does not pass the 'character test'.² The Migration Act provides that a person does not pass the character test if they fall within any of the following categories:

- the person has a 'substantial criminal record', defined as having been:
 - sentenced to death, imprisonment for life, imprisonment for a term of 12 months or more, or imprisonment for more than one term totalling 12 months or more; or
 - detained in a facility or institution after being acquitted of an offence due to unsoundness of mind or insanity, or after being found to have committed an offence but being found not fit to plead
- the person has been convicted of an offence committed while the person was in immigration detention, or during or after an escape from immigration detention; or has been convicted of the offence of escaping from immigration detention
- the person is suspected of having an association with a group, organisation or person involved in criminal conduct; or being a member of such a group or organisation
- the person is suspected of involvement in people smuggling, trafficking in persons or a crime of serious international concern (including genocide, a crime against humanity or a crime involving torture or slavery), regardless of whether they have been convicted of such offences
- the person's past and present criminal and/or general conduct indicates that the person is not of good character
- there is a risk that the person, if they were allowed to remain in Australia, would engage in criminal conduct; harass, molest, intimidate or stalk another person; vilify a segment of the community; incite discord in the community or a segment of the community; or represent a danger to the community or to a segment of the community, including by becoming

involved in activities that are disruptive to the community or in violence threatening harm to the community

- the person has been found guilty or been convicted of a sexually based offence involving a child, in Australia or a foreign country
 - the person has been charged with or indicted for a crime of serious international concern
 - the person has been assessed by the Australian Security Intelligence Organisation to be a risk to security
 - an Interpol notice, from which it would be reasonable to infer that the person would present a risk to the community or a segment of the community, is in force in relation to the person.
20. As can be seen, it is not necessary for a person to have been convicted of a criminal offence in order to fail the character test. For example, a person could be found to have failed the character test based on an assessment of their 'general conduct'. However, almost all of the grounds for failing the character test require some level of involvement in criminal conduct, whether that be through having committed an offence (even if they are found not to be criminally responsible because of a mental or cognitive impairment), having an association with someone else involved in criminal conduct, or posing a risk of involvement in future criminal conduct.³

4.2 Visa refusals and cancellations on character grounds

21. If it is determined that a person does not pass the character test, the person's visa is not automatically refused or cancelled in most cases. Rather, the decision-maker must decide whether to exercise their discretion to refuse or cancel the person's visa.
22. Under s 501(1) of the Migration Act, a person's application for a visa may be refused if they do not satisfy the Minister that they pass the character test. Under s 501(2), a person's visa may be cancelled if the Minister reasonably suspects that the person does not pass the character test, and the person does not satisfy the Minister that they pass the character test. These powers can be exercised by the Minister personally, or by a delegate of the Minister. The rules of natural justice apply to decisions made under ss 501(1) and 501(2).⁴
23. Under s 501(3), a person's visa may be refused or cancelled if the Minister reasonably suspects that the person does not pass the character test, and the Minister is satisfied that the refusal or cancellation is in the national interest. This power can only be exercised by the Minister personally. The rules of natural justice do not apply to decisions made under s 501(3).⁵
24. In cases where a person has been sentenced to a term of imprisonment of at least 12 months or has committed a sexually based offence involving a child, and is serving a full-time sentence of imprisonment, the Minister is obliged under s 501(3A) of the Migration Act to cancel the person's visa rather than

exercising discretion.⁶ However, a person whose visa is automatically cancelled under these provisions may request revocation of that decision under s 501CA of the Act.⁷

25. In deciding whether to exercise their discretionary powers to refuse or cancel a visa on character grounds, or to revoke a mandatory visa cancellation, delegates of the Minister are required to take into account a range of considerations, as set out in a direction from the Minister made under s 499 of the Migration Act called Direction No. 65.⁸
26. Direction No. 65 stipulates that decision-makers considering whether to refuse or cancel a person's visa under s 501, or whether to revoke a mandatory visa cancellation under s 501CA, must take three primary considerations into account: the protection of the Australian community from criminal or other serious conduct; the best interests of minor children in Australia; and the expectations of the Australian community.⁹
27. The Direction also outlines a range of other considerations that may be relevant and, if so, must be taken into account in deciding whether to refuse or cancel a person's visa under s 501, or whether to revoke a mandatory visa cancellation under s 501CA. These considerations, which are generally to be given less weight than the primary considerations set out above, include Australia's *non-refoulement* obligations; the impact on Australian business interests; and impact on victims of the person's criminal behaviour and the family members of these victims.¹⁰
28. In the case of visa cancellations and revocations of mandatory visa cancellations, decision-makers must also consider (if relevant) the strength, nature and duration of the person's ties to Australia, including their length of residence in Australia and their social links with Australian citizens and residents; and the extent of any impediments that the person may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards.¹¹
29. The considerations in paragraph 28 above do not need to be taken into account in deciding whether to refuse a visa under s 501. However, decision-makers should take into account (if relevant) the impact of visa refusal on the person's immediate family members in Australia, where those family members are Australian citizens or permanent residents.¹²
30. The Minister is under no obligation to follow Direction No. 65 when making a personal decision to refuse or cancel a visa under s 501 or to refuse to revoke a mandatory cancellation under s 501CA.

4.3 Merits review of decisions made under ss 501 or 501CA(4)

31. In some circumstances, a person who has an application for a visa refused or a visa cancelled under s 501 may be able to apply to the Administrative Appeals Tribunal (AAT) for review of the merits of the decision. Whether the person can apply for merits review by the AAT depends on whether the decision was made by the Minister personally, or by a delegate of the Minister.

A decision made by a delegate is subject to merits review by the AAT, but a decision made by the Minister is not.¹³

32. When conducting merits review, the AAT considers the merits of the case again and determines whether the original decision is correct and preferable. The AAT can affirm, vary or set aside the original decision.¹⁴ If it sets the decision aside, the AAT can make a new decision itself or remit the decision to the original decision-maker, along with directions or recommendations for making the decision again. The merits review process is discussed in more detail in section 7.1 below.
33. The mere fact that a visa is subject to mandatory cancellation under s 501(3A) is not a decision that is reviewable by the AAT.¹⁵ However, a person may request revocation of a mandatory cancellation under s 501CA.¹⁶ Decisions made by delegates of the Minister regarding whether or not to revoke a mandatory cancellation are reviewable by the AAT, but decisions made by the Minister are not.¹⁷
34. AAT members reviewing decisions made under ss 501 and 501CA of the Migration Act must also take into account the considerations set out in Direction No. 65.
35. All decisions to refuse to grant or to cancel a person's visa under s 501, or to refuse to revoke a mandatory cancellation under s 501CA(4), whether made by a delegate, the AAT or the Minister, are subject to judicial review. Decisions made by delegates are reviewable in the Federal Circuit Court.¹⁸ Decisions made by the AAT or the Minister are reviewable in the Federal Court.¹⁹ In each case, the scope of judicial review has been narrowed by Part 8 of the Migration Act.²⁰ If a court finds that a visa refusal or cancellation decision was affected by jurisdictional error, the court can set aside the original decision and remit the case to the relevant decision-maker to be reconsidered.
36. There have been a number of media reports recently that suggest that the AAT has made mistakes in setting aside decisions by delegates of the Minister to refuse or cancel visas on character grounds. Typically, these reports focus on the nature of the criminal offending that led to the original refusal or cancellation of the visa. In some cases, these reports provide little or no detail of the reasons given by the AAT for coming to a different view from the original decision maker.
37. In a number of cases subject to recent media attention, factors considered by the AAT include: whether the person arrived in Australia as a child and has grown up in Australia, the time that they have spent in Australia, the period of time since the offending conduct, whether the incident was an isolated one, whether the person has demonstrated remorse, whether the person has demonstrated that they have engaged in rehabilitation, whether the person was suffering from a psychiatric illness at the time of the offending conduct that is now being treated, and the impact that removal from Australia would have on the person's children and other family members including Australian citizens. As decisions are made on a case-by-case basis, in assessing whether any particular decision was appropriate, the full reasons for that

decision setting out all of the relevant circumstances need to be taken into account.

38. Throughout this submission, the Commission has included a number of case studies that are drawn from recent media reports. These are all cases where there has been some highly critical media commentary of the AAT. The Commission acknowledges that cases singled out for media criticism represent only a small proportion of all AAT cases. The case studies in this submission attempt to present a more balanced assessment of the reasoning process undertaken by the AAT in each instance. The Commission does not suggest that the AAT is free from error. The Commission recognises the importance of the AAT being subject to public scrutiny, including through the media. It is also important that decisions of the AAT continue to be subject to judicial review. However, the case studies provide examples of difficult cases in which the AAT has sought to balance competing considerations in a way that is consistent with the directions given by the Minister for Home Affairs.
39. In making assessments about appropriate reform in this area, the focus should be on ensuring the best systemic outcomes. There needs to be a robust system that is able to correct errors and reach decisions that are correct and preferable. The focus should not be on the personalities of individual decision makers or on a small number of high profile, difficult cases. While it is important to examine how the system works in practice, the Commission suggests that the debate should not be limited to a few hard cases at the expense of an assessment of how the system works as a whole.

4.4 Ministerial powers to set aside and substitute decisions

40. The Minister has powers under ss 501A, 501B and 501BA in certain circumstances to set aside and substitute decisions made under s 501.
41. Under s 501A, if a delegate of the Minister or the AAT makes a non-adverse decision (that is, they decide that a person's visa should not be refused or cancelled under s 501), the Minister may set aside the decision and substitute it with their own decision to refuse or cancel the visa. These powers can be exercised if:
- the Minister reasonably suspects that the person does not pass the character test, the person does not satisfy the Minister that they pass the character test, and the Minister is satisfied that the decision is in the national interest
 - the Minister reasonably suspects that the person does not pass the character test, and the Minister is satisfied that the decision is in the national interest (in which case the rules of natural justice do not apply to the decision).²¹
42. These powers may only be exercised by the Minister personally, are non-compellable (that is, the Minister is under no obligation to consider whether to exercise these powers) and are not subject to review by the AAT.²²

43. Under s 501B, if a delegate of the Minister makes an adverse decision (that is, they decide that a person's visa should be refused or cancelled under s 501), the Minister may set aside the decision and substitute it with their own decision to refuse or cancel the visa. The effect of this is that the decision is then not subject to review by the AAT. This power can be exercised if the Minister reasonably suspects that the person does not pass the character test, the person does not satisfy the Minister that they pass the character test, and the Minister is satisfied that the decision is in the national interest.²³ The Minister may exercise this power even if the person has already applied to have the delegate's decision reviewed by the AAT.²⁴ This power may only be exercised by the Minister personally.²⁵
44. Under s 501BA, if a delegate of the Minister or the AAT makes a decision to revoke a mandatory visa cancellation, in some cases the Minister may revoke the decision and substitute it with their own decision to deny revocation of a mandatory visa cancellation. This power can be exercised if the Minister is satisfied that the person has been sentenced to a term of imprisonment of at least 12 months or has committed a sexually based offence involving a child, and that cancellation of the visa would be in the national interest.²⁶ This power may only be exercised by the Minister personally, and is not subject to review by the AAT.²⁷ The rules of natural justice do not apply to decisions made under s 501BA.²⁸
45. If the Minister makes a personal decision to refuse or cancel a visa under s 501(3), or to substitute a non-adverse decision with an adverse decision under s 501A(3), the person affected by the decision will be invited under s 501C to make representations to the Minister about revocation of this decision (unless they are excluded from doing so by way of regulations). The Minister may then consider whether or not to revoke the decision.²⁹ As with the powers discussed above, this power may only be exercised by the Minister personally and is not subject to review by the AAT.³⁰

4.5 Visa cancellations under s 116

46. In addition to the specific powers under s 501 to refuse or cancel visas on character grounds, s 116 of the Migration Act provides broader general powers of cancellation. In some cases, these general powers are used in connection with alleged criminal conduct (e.g. criminal charges) or criminal convictions that are not significant enough for a person to fail the character test.
47. Under s 116 of the Migration Act, the Minister or a delegate of the Minister may cancel a person's visa if they are satisfied that:
- the decision to grant a visa was at least in part based on a fact or circumstance that did not exist or no longer exists
 - the visa holder or another person has not complied with a condition of the visa

- the visa holder has provided incorrect information to support their visa application
 - the presence of the person in Australia might present a risk to the health, safety or good order of the Australian community or a segment of the Australian community; or the health or safety of an individual or individuals
 - the application for the visa was in contravention of the Migration Act or another Commonwealth law
 - in the case of student visa holders, the holder is not a genuine student, or has engaged or is likely to engage in conduct not contemplated by the visa
 - a prescribed ground for cancelling a visa applies to the holder.³¹
48. Two of these grounds are particularly relevant for the present inquiry. The first is that the person might present a risk to the health, safety or good order of the Australian community. Some visas have been cancelled on the grounds of apprehended risk to the safety of the community based on a prediction about the future risk of a person offending.
49. The second relevant ground is whether a ‘prescribed ground’ for cancelling a visa applies. A criminal charge is one of the prescribed grounds for cancelling a Bridging Visa E under s 116.³² A Bridging Visa E is a visa that allows a person to remain lawfully in Australia while they finalise an immigration matter, while they are waiting for an immigration decision, or while they are making arrangements to leave Australia.³³ Merely being charged with an offence, without being convicted of that offence, is a ground that can be used to cancel a Bridging Visa E.
50. In deciding whether to cancel a Bridging Visa E on the basis of criminal charges, delegates of the Minister are required to take into account the considerations set out by the Minister in Direction No. 63.³⁴ The Direction also applies to AAT members reviewing decisions made under s 116. The Direction says that the prescribed ground for cancellation is enlivened when a visa holder is charged with ‘any offence, irrespective of the seriousness of the offence’.³⁵
51. Direction No. 63 stipulates that decision-makers must take two primary considerations into account: (a) the Government’s view that the relevant prescribed grounds for cancellation ‘should be applied rigorously in that every instance of non-compliance against these regulations should be considered for cancellation’; and (b) the best interests of minor children in Australia who would be affected by the cancellation.³⁶ The first of these primary considerations effectively means that delegates must consider cancellation of a visa in relation to every charge, regardless of its seriousness.
52. The Direction also outlines a range of secondary considerations that must be taken into account. These considerations, which are generally to be given less weight than the primary considerations set out above, include: the impact of a decision to cancel a visa on the family unit; the degree of hardship that may be experienced by the visa holder if their visa is cancelled; the circumstances in

which the ground for cancellation arose (such as the seriousness of the offence and whether there are any mitigating factors); and the possible consequences of cancellation, including indefinite detention or removal in breach of Australia's *non-refoulement* obligations.³⁷

53. The Minister has a personal power under s 133C to cancel visas on the grounds set out in s 116, if the Minister is satisfied that it would be in the public interest to do so.³⁸ The rules of natural justice do not apply to decisions made by the Minister under these provisions.³⁹ The Minister may also set aside a decision of a delegate or the AAT not to cancel a visa under s 116 and substitute it with their own decision to cancel a visa, if the Minister considers that grounds for cancelling the visa exist, the visa holder does not satisfy the Minister that grounds do not exist, and the Minister is satisfied that it would be in the public interest to cancel the visa.⁴⁰
54. Decisions made by delegates of the Minister to cancel visas under s 116 are reviewable by the AAT. Decisions made by the Minister personally to cancel a visa under ss 116 and 133C are not reviewable by the AAT.⁴¹

Recommendation 1

The Commission recommends that the Minister for Home Affairs amend Direction No. 63 to require decision-makers to consider cancelling a bridging visa under reg 2.43(1)(p)(ii) of the Migration Regulations 1994 (Cth) only when a person is charged with a serious offence.

Case study 1: Alleged 'Apex gang' member⁴²

In September 2017, the *Herald Sun* reported that a 'dangerous Apex gang member who was due to be kicked out of Australia has been saved by the Administrative Appeals Tribunal'.⁴³

Evidence given by a senior police officer to the AAT was that 'the Apex gang is currently dissolved'. The young man referred to in the article denied being part of the Apex gang or any other gang. He had not been convicted of any gang-related activity. After considering evidence from the police, the AAT was not satisfied that he was or had been a member of the Apex gang.

The young man was 20 years old. He was born in New Zealand but had lived in Australia with his family since he was four years old. He said that he has no family, support or connections in New Zealand. He has a younger brother who was born in Australia and is an Australian citizen. He has a three-year-old son who was born in Australia and who he sees on a regular basis.

When he was 13 years old, the young man was charged with serious offences of armed robbery and recklessly causing injury. He was not convicted and was placed on probation for 12 months. He was diagnosed with bipolar disorder when he was 14 years old and had several admissions to hospital for his psychiatric condition. While he was still a juvenile, the young man was also charged with a number of shoplifting offences but again had no conviction recorded. He was either placed on probation or on a good behaviour bond.

As an adult, he had two convictions. The first was for possession and use of cannabis. The second related to an altercation with police in November 2015. The young man had missed his depot medication for his bipolar disorder and was stopped by police on a hot day when he was dehydrated and unsteady on his feet. He tried to push past the police and then struggled against officers who took hold of him, kicking out several times at them. He was convicted of a number of offences including contravening a direction to move on, resisting arrest and assaulting police. He was sentenced to a Community Corrections Order for 12 months, requiring him to undergo treatment and rehabilitation.

In February 2017, a delegate of the Minister cancelled the young man's visa under s 116(1)(e) of the Migration Act on the basis that he was or may be a risk to the health, safety or good order of the Australian community.

On review, the AAT was not satisfied that the young man was a risk to the safety of the Australian community because there had been no recent history of violence and his offending in 2015 was low level. However, the AAT undertook the necessary balancing exercise on the basis that he 'might' be a risk. The AAT found that the young man was subject to an involuntary treatment order which provided a level of treatment and support for him while living in the community. The AAT took into account the care he received from his mother. The AAT considered that it was in the best interests of the young man's three-year-old Australian son for him to remain in Australia and for them to continue to have close contact. As a result, the AAT decided that his visa should not be cancelled.

5 Human rights implications of character-related visa decisions

55. The consequences of having a visa refused or cancelled can be very serious. If a person's visa is refused or their visa is cancelled on character grounds, the person may become an unlawful non-citizen.⁴⁴ As a result, they would be subject to mandatory immigration detention and may be removed from Australia.⁴⁵
56. In addition, a person who has a visa refused or cancelled on character grounds will be prohibited from applying for another visa (other than a Protection Visa or a 'removal pending' Bridging Visa) while in Australia.⁴⁶ If they are removed from Australia following cancellation of their visa under ss 501, 501A, 501B or 501BA of the Migration Act, they will not be eligible to be granted most types of Australian visas (and therefore cannot return to Australia).⁴⁷
57. As a result, decisions to refuse or cancel a visa on character grounds may engage Australia's international human rights obligations under the *International Covenant on Civil and Political Rights* (ICCPR), *International Covenant on Economic, Social and Cultural Rights* (ICESCR), *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), *Convention on the Rights of the Child* (CRC), *Convention on the Rights of Persons with Disabilities* (CRPD) and *Convention relating to the Status of Refugees* (Refugee Convention). Particular provisions of these treaties are discussed below.

58. The way in which decisions are made about whether to refuse or cancel a visa and whether to deport or remove someone from Australia also raises human rights issues. These are discussed in more detail in section 7.1(c) below.

5.1 *Deportation and removal of long-term residents*

59. Prior to 1998, when the ‘character test’ was introduced into s 501 and the expedited merits review process commenced,⁴⁸ the deportation of non-citizens who had committed criminal offences was usually dealt with under ss 200 and 201 of the Migration Act.⁴⁹ Under these provisions, the Minister can only deport a non-citizen who has been convicted of a crime (punishable by imprisonment for one year or more) if the non-citizen has been resident in Australia for less than ten years.⁵⁰
60. The regime under ss 200 and 201 (which is still in force) recognises that long-term residents of Australia will have integrated into the community and that there are good reasons for treating them in the same way as citizens. Directions to decision-makers exercising powers under ss 200 and 201 provide that ‘it is less likely that potential deportees who have spent the greater proportion of their formative years in Australia will be deported’.⁵¹ Those who have been in Australia for more than ten years do not come within this regime at all.
61. Since 1998, s 501 has been the primary basis for the cancellation of visas of people convicted of criminal offences. The Department of Home Affairs (Department) says of the two regimes:
- This power [of deportation under s 200] is rarely used because there is now broad scope to refuse or cancel visas on character or security grounds under s 501 and to remove unlawful non-citizens from Australia under s 198.⁵²
62. Significantly, s 501 is now used to cancel the visas of permanent residents who have lived in Australia for more than ten years — including, in some cases, people who have lived in Australia for most or all of their lives.⁵³
63. A practical impact of the introduction of s 501 is that two people who have committed the same crime may be treated in very different ways if one is a citizen and the other is a long-term permanent resident. Under the criminal law, both individuals could be expected to receive the same penalty for their offending, regardless of their citizenship status. However, a non-citizen long-term resident may also be subject to additional consequences, such as immigration detention and deportation from Australia. In some cases, the period of immigration detention may be longer than the penalty that the person received as punishment for the relevant offence.
64. Removing long-term residents from a country in which they have lived for a long period of time, and perhaps for their whole lives, raises human rights issues. Under article 12(4) of the ICCPR, Australia has an obligation not to arbitrarily deprive a person of the right to enter their own country.⁵⁴ As noted by the Human Rights Committee, article 12(4) ‘does not distinguish between nationals and aliens’, thus Australia’s obligations under this article are not limited to Australian citizens.⁵⁵ The Human Rights Committee advises that

article 12(4) ‘embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien’.⁵⁶

65. In a case dealing with the removal from Australia of a permanent resident who was born in Sweden, who arrived in Australia when he was 27 days old, and who had remained in Australia ever since, the Human Rights Committee said:

There are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality. The words ‘his own country’ invite consideration of such matters as long standing residence, close personal and family ties and intentions to remain, as well as to the absence of ties elsewhere.⁵⁷

66. The man dealt with in this case was in his 30s when Australia sought to remove him to Sweden. He had no ties to Sweden and did not speak Swedish. The Committee found that Australia was ‘his own country’ within the meaning of article 12(4) and that the decision to remove him from Australia was arbitrary, contrary to article 12(4).

67. The Human Rights Committee further advises that the concept of arbitrariness in the context of article 12(4), ‘guarantees’ that:

even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable.⁵⁸

68. ‘One’s own country’ in this context extends to the country to which special ties or claims have arisen. Deporting long-term residents whose visas have been cancelled on character grounds may therefore lead to violations of Australia’s obligations under article 12(4), particularly if the person concerned has no meaningful connection to their country of origin.

69. Depending on the circumstances to which a person is returned, the deportation of long-term residents may also engage Australia’s obligations under article 11(1) of the ICESCR and article 28(1) of the CRPD to uphold the right to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions.⁵⁹ Australia also has a related obligation under article 27(1) of the CRC to ensure that children have a standard of living adequate for their physical, mental, spiritual, moral and social development.⁶⁰

70. Long-term residents whose visas are cancelled on character grounds may be deported to a country where they have spent little time (or have never lived); where they do not speak the language; and where they have few or no social or family connections. Those returned to these circumstances may face serious difficulties in securing safe housing and a source of income (due to factors such as language barriers and lack of social networks).

71. Under the instructions to Ministerial delegates in Direction No. 65, the length of time that the person has resided in Australia is one of the considerations that decision-makers must take into account when determining whether to cancel a visa under s 501 or revoke a mandatory visa cancellation under s 501CA.⁶¹ This is not described as a primary consideration and so is given less weight than a number of other identified primary considerations.

Case study 2: ‘Turkish drug dealer’⁶²

In May 2017, the *Herald Sun* reported that ‘a Turkish drug dealer convicted five times, including for peddling commercial quantities of heroin, ice, ecstasy and cannabis, was allowed to remain in Australia after the AAT quashed a decision to deport him’.⁶³

Mr Ahmet Candemir was born in Turkey, but was brought to Australia by his parents in 1969 when he was one year and eight months old. He has lived in Australia ever since and is a permanent resident. He is now 50 years old. He has visited Turkey three times in 1988, 1991 and 1998.

He met his wife on his first trip to Turkey and she migrated to Australia. They have two children, a daughter born in 1989 and a son born in 1998. His wife and children are Australian citizens and he has two Australian grandchildren. Mr Candemir never applied for Australian citizenship.

Mr Candemir started using marijuana when he was 15 years old. He started using heroin at 16 and subsequently became addicted. Between 1985 and 2015, he was sentenced on five occasions for drug possession and ‘street level’ supply offences for periods between ten months and three years and one month. The last occasion was in November 2015 and resulted in the mandatory cancellation of his visa under s 501(3A) of the Migration Act.

Mr Candemir applied for revocation of the cancellation of his visa. He did not pass the character test because of his convictions. The only question was whether there was another reason why the cancellation should be revoked.⁶⁴

The AAT applied the principles set out by the Minister in Direction No. 65. It considered the pattern of repeated offending and the substantial harm caused to the community through the supply of prohibited drugs. These factors weighed heavily against him.

One countervailing factor, as set out in Direction No. 65, was that ‘Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life’.

Another significant countervailing factor was that Mr Candemir’s 19-year-old Australian son has Joubert Syndrome, involving moderate to severe intellectual impairment and adaptive behaviours characteristic of a much younger child. His level of ataxia and other physical difficulties make acts such as walking down stairs and balancing to toilet himself challenging. He relies on his parents for care and has a plan for assistance approved under the NDIS.

The AAT accepted that, if the family were required to go to Turkey, he may not be able to access the level of assistance he needs.

On balance, and taking into account the needs of his Australian son, the AAT decided that it was appropriate to revoke the mandatory visa cancellation that would otherwise have applied under s 501(3A).

5.2 Separation of family

72. The removal of people from Australia pursuant to s 501 can have a significant impact on other people including Australian citizens. The person to be removed may have a partner, children or other dependants who rely on them. It is appropriate that the impact of removal on these other people be properly taken into account in cancellation decisions.
73. Australia has obligations under articles 23(1) of the ICCPR and 10(1) of the ICESCR to afford protection and assistance to the family as the natural and fundamental group unit of society; and under article 17(1) of the ICCPR and article 16(1) of the CRC not to subject anyone to arbitrary or unlawful interference with their family.⁶⁵ Consistent with interpretations of the concept of arbitrariness in relation to other obligations under the ICCPR (as cited above), the Human Rights Committee has stipulated that any interference with family life must be 'reasonable in the particular circumstances'.⁶⁶
74. Under the CRC, children have a range of specific rights relating to their family, including the rights: as far as possible, to know and be cared for by their parents; to preserve their identity (including family relations) without unlawful interference; and to maintain personal relations and direct contact with both parents on a regular basis, in cases where a child is separated from one or both parents or their parents reside in different countries.⁶⁷ The CRC also stipulates that, in all actions concerning children, the best interests of the child shall be a primary consideration.⁶⁸
75. In some circumstances, the refusal or cancellation of a person's visa on character grounds, leading to their subsequent detention and/or removal from Australia, could engage these obligations both in relation to the person themselves and their family members (especially minor children).
76. The detention of a person after their visa has been refused or cancelled could result in separation from family members residing in Australia, particularly if they are detained for a prolonged period of time or in a location where their relatives cannot visit them on a regular basis (such as in a different state or a remote area). Removal from Australia could similarly result in separation from family members. Furthermore, as noted above, a person whose visa is cancelled on character grounds will not be eligible to be granted most types of Australian visas, meaning that they may in effect be permanently excluded from Australia. Consequently, they would not be able to return to Australia to visit family members who remain in the country.⁶⁹
77. If a decision relating to visa cancellation on character grounds (including a decision to detain or deport a particular individual following a visa cancellation)

is considered to be arbitrary, unreasonable or disproportionate in the person's circumstances, there is a risk that any resulting separation of family may be contrary to Australia's obligations to protect the family and refrain from arbitrary interference with family life.⁷⁰

78. Under the Minister's instructions to Ministerial delegates in Directions No. 63 and 65, the best interests of minor children in Australia are one of the primary considerations that decision-makers must take into account when determining whether to cancel a visa under s 116, refuse or cancel a visa under s 501 or revoke a mandatory visa cancellation under s 501CA.⁷¹
79. Under Direction No. 65, the strength, duration and nature of any family or social links with Australian citizens or permanent residents must also be taken into account by decision-makers.⁷² Similarly, the impact on the family unit of a decision to cancel a visa is one of the considerations that decision-makers must take into account under Direction No. 63.⁷³ In both Directions, however, these are not described as primary considerations and so are given less weight than a number of other identified primary considerations.

Case study 3: 'Scottish hitman'⁷⁴

In May 2017, the *Herald Sun* reported that the AAT had revoked a decision to cancel the visa of a 'Scottish hitman who was jailed for 17 years after being convicted of murdering a Melbourne man by shooting him in the head with a sawn-off rifle because the murdered man's wife paid him \$2,000 to do so'.⁷⁵

Richard Bradley was born in Scotland. His family migrated to Australia in 1965 when he was ten months old and he has remained in Australia ever since. Mr Bradley's father was an alcoholic and his parents separated when he was a child. He was placed in foster care at the age of ten and later in a children's home, where he was subjected to sexual abuse. As a young man, Mr Bradley was convicted of a number of offences, including break and enter, theft and assaulting a police officer. None of these convictions resulted in a custodial sentence.

In 1999, a jury found that Mr Bradley had accepted a contract from a woman to kill her husband. The victim had been shot in the head and the bullet was linked to a sawn-off rifle owned by Mr Bradley. He was convicted of murder and sentenced to 17 years in prison with a non-parole period of 13 years. Mr Bradley maintained that he did not commit the murder. Shortly after being released from prison, Mr Bradley's visa was cancelled under s 501 on the basis of his 'substantial criminal record'.⁷⁶

In reviewing the decision to cancel Mr Bradley's visa, the AAT applied the considerations set out in Direction No. 41 (a precursor to Direction No. 65). The AAT found that Mr Bradley failed the character test by virtue of his substantial criminal record, describing his murder conviction as 'clearly a serious and abhorrent crime'.

In assessing the risk of Mr Bradley's reoffending, the AAT considered evidence that Mr Bradley had 'conducted himself as a model prisoner'. He was selected to participate in a 'highly sought-after' intensive re-integration

program, which allowed him to leave prison unescorted during the final months of his sentence. He was granted parole on his first eligible date and started working the day following his release on parole. The AAT found that the risk of Mr Bradley reoffending was low, but this on its own was not sufficient to outweigh the seriousness of his offence.

The AAT also considered that Mr Bradley was ten months old when he arrived in Australia, had only ever lived in Australia and had very strong family and social connections in Australia. He had no meaningful links to his country of birth and it would be difficult for him to re-establish his life in a country he left as an infant.

The AAT also considered the best interests of Mr Bradley's four year old Australian daughter. At the time of the review, Mr Bradley's wife was receiving treatment for bladder cancer and indicated that she would not accompany her husband if he was removed from Australia, as she did not want to risk changes to her treatment regimen. The AAT found that, should Mr Bradley be removed, his daughter would lose physical contact with her father and would likely face difficult circumstances in Australia, particularly if her mother passed away.

In light of Mr Bradley's low risk of reoffending, strong ties to Australia and lack of connections to his country of birth, along with the best interests of his Australian daughter, the AAT found that relevant considerations weighed in favour of his visa being reinstated.

5.3 Non-refoulement

80. Australia has an obligation under article 33 of the Refugee Convention not to *refoule* (that is, expel or return) a refugee to a country where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.⁷⁷ Australia also has obligations under article 7 of the ICCPR, article 37(a) of the CRC and article 15(1) of the CRPD not to subject anyone to cruel, inhuman or degrading treatment or punishment;⁷⁸ and under article 3(1) of the CAT not to return a person to another country if they would be in danger of being subjected to torture.⁷⁹
81. The *non-refoulement* obligation under the Refugee Convention does not apply if there are reasonable grounds for believing that a person would pose a danger to national security, or if a person has been convicted of a particularly serious crime and thus presents a danger to the Australian community.⁸⁰ In addition, people who have committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime outside the country in which they sought asylum or acts contrary to the purposes and principles of the United Nations, are excluded from refugee status (and the associated protection against *refoulement*).⁸¹
82. Some international human rights conventions (eg ICCPR article 4) permit States to derogate from, or not strictly comply with, certain obligations during periods of declared public emergency that threaten the life of the State.

Similarly, some human rights provisions in their terms are subject to limitations, for example to accommodate national security or public order. Australia's *non-refoulement* obligations under the ICCPR, CRC, CRPD and CAT, by contrast, are absolute. They may not be derogated from and are not expressed to be subject to exceptions. Consequently, the *non-refoulement* obligations apply in all situations, regardless of circumstances, and there are no grounds on which a person can be excluded from protection under these provisions.

83. Under the instructions to Ministerial delegates in Directions No. 63 and 65, Australia's *non-refoulement* obligations are one of the considerations that decision-makers must take into account when determining whether to cancel a visa under s 116, refuse or cancel a visa under s 501 or revoke a mandatory visa cancellation under s 501CA.⁸² However, *non-refoulement* obligations are not a primary consideration under either Direction, and thus will generally be given less weight in decision-making — despite the fact that some of Australia's *non-refoulement* obligations are absolute.
84. By contrast, a previous Ministerial direction under s 499 of the Migration Act in relation to visa refusal or cancellation under s 501 did list Australia's *non-refoulement* obligations as a primary consideration.⁸³ Direction No. 55 provided that a primary consideration in either refusing or cancelling a visa under s 501 was 'whether Australia has international *non-refoulement* obligations to the person'. This direction more closely reflected the nature of Australia's absolute obligation not to return people to situations of persecution.
85. Direction No. 65 explicitly states that the fact that Australia may owe a *non-refoulement* obligation to a person does not preclude a decision-maker refusing or cancelling their visa under s 501, or electing not to revoke a mandatory visa cancellation under s 501CA.⁸⁴ This gives rise to two very significant alternative impacts. People owed *non-refoulement* obligations whose visas are cancelled face either:
 - a. the risk of *refoulement*, or
 - b. the risk of indefinite detention.
86. Under s 197C of the Migration Act, a person may be removed from Australia irrespective of whether Australia has *non-refoulement* obligations towards them.⁸⁵ Further, an officer's duty to remove an unlawful non-citizen from Australia 'arises irrespective of whether there has been an assessment, according to law, of Australia's *non-refoulement* obligations'.⁸⁶ As the Government acknowledged when introducing s 197C in 2014, the plain meaning of the section is 'capable of authorising actions which may not be consistent with Australia's *non-refoulement* obligations'.⁸⁷ The Commission has previously made submissions about how this amended regime creates a real risk of *refoulement*.⁸⁸
87. The Minister says in Direction No. 65 that, although now legally permissible under the Migration Act, Australia would not, in practice, remove a person to a country where they faced a real risk of persecution. However, as the Minister acknowledges, the consequence of this is that if Australia cancels the visa of a

person to whom Australia owes *non-refoulement* obligations, the person faces the prospect of indefinite immigration detention.⁸⁹

88. From a human rights perspective, neither outcome meets Australia's obligations under the international conventions to which Australia is a party.

Recommendation 2

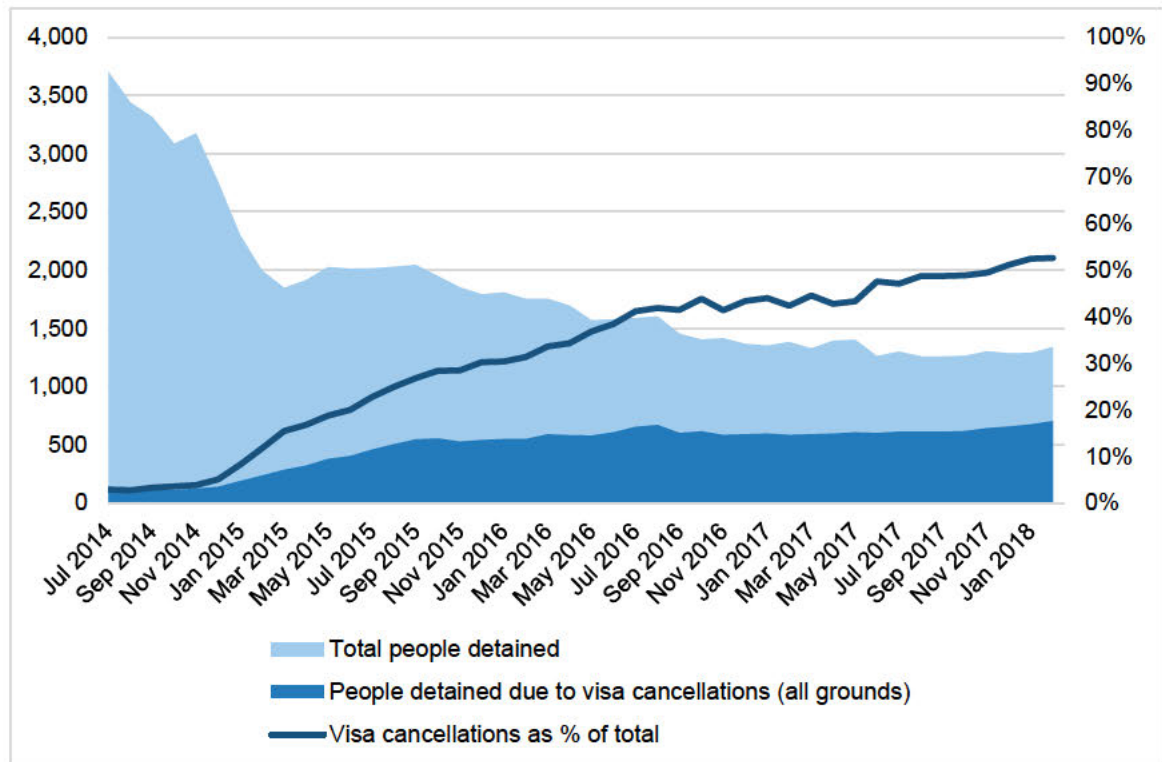
The Commission recommends that the Minister for Home Affairs amend all Ministerial directions in relation to visa refusal or cancellation to include as a primary consideration whether Australia has international *non-refoulement* obligations to the person.

5.4 Risk of arbitrary detention

89. Australia has an obligation under article 9(1) of the ICCPR not to subject anyone to arbitrary detention.⁹⁰ According to the United Nations Human Rights Committee, 'arbitrary detention' includes detention that, although lawful under domestic law, is unjust or disproportionate. In order for the detention of a person not to be arbitrary, it must be a reasonable and necessary measure in all the circumstances.⁹¹
90. Under the Migration Act, immigration detention is mandatory for all unlawful non-citizens, regardless of circumstances.⁹² A person who becomes an unlawful non-citizen as a result of having their visa refused or cancelled on character grounds will therefore be subject to mandatory immigration detention. Once detained, unlawful non-citizens must remain in detention until they are either granted a visa or removed from Australia.⁹³
91. The Minister also has the power to make a 'residence determination' in respect of a person in immigration detention which allows the person to live at a specified place in the community subject to conditions.⁹⁴ These arrangements are often referred to as 'community detention' and allow a person to be released from closed immigration detention facilities. In practice, this option is generally not available for people who have had their visas cancelled on character grounds. The Minister has issued guidelines in relation to community detention which provide that, where it is believed that a person presents character issues that indicate that they may fail the character test under s 501 of the Migration Act, the Minister would not expect the Department to refer the person's case to the Minister for consideration unless there are exceptional reasons or the Minister has requested it.⁹⁵
92. Since 2014, there has been a significant increase in visa cancellations on character grounds.⁹⁶ Consequently, while the total number of people in immigration detention has decreased, the number of people in immigration detention as a result of visa cancellation has increased. At the end of 2014, there were 140 people in immigration detention (comprising around 5% of the detention population) as a result of having their visas cancelled on any grounds, including under s 501.⁹⁷ As at 28 February 2018, there were 488 people in immigration detention (over a third of the detention population) as a result of having their visas cancelled under s 501.⁹⁸ The chart below shows the

number of people in immigration detention as a result of visa cancellation on *all* grounds (now more than half of the detention population) not just cancellations under s 501. The data has been presented in this way because, prior to July 2016, the Department did not separately publish the number of visa cancellations under s 501. Those who have had their visas cancelled under s 501 currently form the largest cohort of people in immigration detention.

People in detention due to visa cancellations, July 2014 to February 2018⁹⁹



93. Under the Migration Act there is no time limit on how long a person can be detained.¹⁰⁰ As a result, people who have had their visas refused or cancelled on character grounds may spend months, or even years, in immigration detention while their status is resolved (for example, while they seek review of the decision to refuse or cancel their visa, while travel documents are arranged, or while a claim for a Protection Visa is assessed). As at 28 February 2018, the average period of detention for people held in closed facilities was 426 days; and almost 20% of people held in closed facilities had been detained for more than two years.¹⁰¹

94. People towards whom Australia has *non-refoulement* obligations and people who are stateless are at particular risk of prolonged detention, as they cannot be readily returned to their country of origin. Under the Migration Act, however, they must remain in immigration detention until they are either granted a visa or removed from Australia. Unless they can meet the requirements for grant of a Protection Visa (which include satisfying the character test),¹⁰² or there is another country in which they can be resettled, they face the prospect of prolonged and indefinite detention. In these circumstances, there is a significant risk that detention may become arbitrary in violation of Australia's obligations under the ICCPR.¹⁰³

95. Detention may also become arbitrary in cases where closed detention is disproportionate or not justified in a person's particular circumstances, such as where a person does not pose a risk to the community, or an identified risk could be managed in a less restrictive or intrusive way. For example, closed detention may be a disproportionate measure in circumstances where a person has been convicted of a crime but received a non-custodial sentence; or where a person has committed a non-violent offence and does not pose a risk to the safety of others. Alternative ways of managing risk include community detention, curfews, travel restrictions, reporting requirements or sureties.
96. Under Direction No. 63, the possible consequences of visa cancellation, including whether cancellation could result in indefinite detention, is one of the considerations that decision-makers must take into account when determining whether to cancel a visa under s 116.¹⁰⁴ By contrast, while the prospect of indefinite immigration detention is referred to in Direction No. 65 as a potential consequence of visa refusal or cancellation, it is not clear that delegates of the Minister are directed to weigh this factor against other factors when assessing whether to refuse or cancel a visa on character grounds.¹⁰⁵ The Commission recommends that Direction No. 65 be clarified so that this issue is required to be taken into account by decision-makers.

Recommendation 3

The Commission recommends that the Minister for Home Affairs amend Direction No. 65 to make clear that, in deciding whether to refuse or cancel a visa, considerations that must be taken into account are whether a person will be detained in immigration detention following refusal or cancellation, the likely length of any period of immigration detention, and whether the person faces the prospect of a prolonged and indefinite period in immigration detention.

5.5 Reasonableness and proportionality of limitations

97. As outlined above, character-related visa decisions may result in significant limitations on the enjoyment of human rights. In order for these limitations to be compatible with Australia's international human rights obligations, they must be in pursuit of a legitimate objective and be a reasonable and proportionate means of achieving that objective.¹⁰⁶
98. A key objective of the *Migration Amendment (Character and General Visa Cancellation) Act 2014 (Cth)* was to enable the Australian Government to manage risks posed to the Australian community by non-citizens who have committed crimes.¹⁰⁷ Protection of public safety is a legitimate objective under international human rights law.¹⁰⁸
99. Australia also has an obligation under article 2(3) of the ICCPR to ensure that any person whose rights and freedoms under the ICCPR are violated has access to an effective remedy, regardless of whether the violation was committed by a person acting in an official capacity.¹⁰⁹ In some circumstances, this obligation may be engaged in relation to victims of particular crimes (such as crimes resulting in bodily harm).

100. The limitations on human rights resulting from visa cancellations on criminal grounds may therefore have a legitimate objective. In certain circumstances, these limitations may also be reasonable and proportionate.
101. For example, removing a non-citizen from Australia following a visa cancellation on criminal grounds may be reasonable and proportionate if the person had been residing in Australia on a temporary visa for a short period of time, had no meaningful connection to Australia, and could be safely removed to their country of origin. Similarly, where a person has been individually assessed as presenting a significant flight risk, a short period of immigration detention pending deportation or removal may be reasonable in some cases.
102. However, where a visa decision has more serious consequences — such as possible *refoulement*, prolonged immigration detention and separation from family — the limitations on human rights caused by the decision may not be reasonable or proportionate, even if they have a legitimate objective. What is required is an assessment of the seriousness of the potential consequences against the importance of the objective sought to be achieved to determine whether the limitation on human rights is reasonable and proportionate.
103. The nature of the conduct that gave rise to a visa cancellation is also relevant to assessments of reasonableness and proportionality. For example, where a visa is cancelled on the basis of a criminal charge, suspected criminal conduct or a relatively minor offence, there is a higher risk that any consequent limitations on human rights may be disproportionate in the circumstances.
104. Limitations on human rights may also be unreasonable and disproportionate if the identified objective could be achieved in a less restrictive way. This is particularly relevant to visa cancellations on criminal grounds given that criminal law already provides an alternative means to manage risks to public safety.
105. The directions given by the Minister to delegates about how they are to exercise their powers to refuse or cancel a visa on character grounds are an attempt to balance a number of countervailing considerations. Given the significance of these decisions and the detailed nature of this decision-making it is appropriate that the decisions be subject to merits review.

Case study 4: ‘Vietnamese cannabis-grower’¹¹⁰

In September 2017, the *Herald Sun* reported that the AAT had overturned the visa cancellation for a ‘Vietnamese immigrant’ who had been ‘jailed for 30 months after police discovered his suburban Melbourne home had been converted into seven separate hydroponic cannabis growing areas’.¹¹¹

Mr Quang Quyet Bui is a citizen of Vietnam. In 2012, when he was 55 or 56 years of age, he and his wife sold all their possessions and migrated to Australia along with their youngest daughter, to reunite with their oldest daughter who is a permanent resident and their two granddaughters who are Australian citizens.

In 2015, Mr Bui was charged with drug offences after police discovered a 'sophisticated hydroponic cannabis growing system' at his Melbourne home. Mr Bui pleaded guilty to the charges and was sentenced to two-and-a-half years in prison, with a non-parole period of 15 months. Due to the length of his sentence, Mr Bui was subject to mandatory visa cancellation under s 501(3A).

In determining whether to revoke the mandatory cancellation, the AAT applied the considerations set out in Ministerial Direction No. 65. Mr Bui told the AAT that his offending had been motivated by the need to repay his daughter for the significant expenses she incurred in securing visas for her parents and sister, totalling around \$140,000. Shortly after arriving in Australia, Mr Bui and his wife found employment on a mushroom farm in Mildura, but they were soon made redundant and they had been unable to secure further employment.

Mr Bui said that he was not responsible for setting up the hydroponic system. He said that he and his wife were only responsible for looking after the plants and were provided with food and basic necessities.

The AAT did not afford much weight to Mr Bui's explanation of the reason for his involvement, noting that it had not been raised by Mr Bui at his sentencing hearing. The AAT found that Mr Bui's offending was of a serious nature, and he was undoubtedly aware of the illegality of the cannabis-growing operation. However, the AAT noted that 'it appears that Mr Bui was preyed on because of his financial predicament and he succumbed to the temptation'. The AAT accepted that Mr Bui he not previously been involved in any breach of the law including while he was in Vietnam.

The AAT also considered evidence regarding Mr Bui's risk of reoffending. He had been a 'model prisoner' and had 'expressed remorse and a clear awareness of his wrongdoing'. Mr Bui's involvement in the operation appeared to have been 'limited to minding the crop'. There was no evidence that he made any substantial sums of money from the operation and the length of his sentence suggested that his crimes were 'at the lower end of the seriousness scale'. The AAT determined that the risk presented by Mr Bui to the Australian community was low.

The AAT noted that Mr Bui did not have extensive ties to Australia, but that those he did have — his wife, two daughters and two Australian citizen grandchildren — appeared to be strong. The AAT also considered the best interests of Mr Bui's young grandchildren, aged seven and four, noting he played an active role in their care and upbringing.

The AAT found that the Australian community would have a low tolerance for his offending. However, the AAT considered that 'if the Australian community were made aware of all of the circumstances which caused Mr Bui to offend ... there would be some sympathy' for his position. In light of the circumstances of his offending, low risk of recidivism and strong family ties in Australia, the AAT revoked the mandatory decision to cancel his visa.

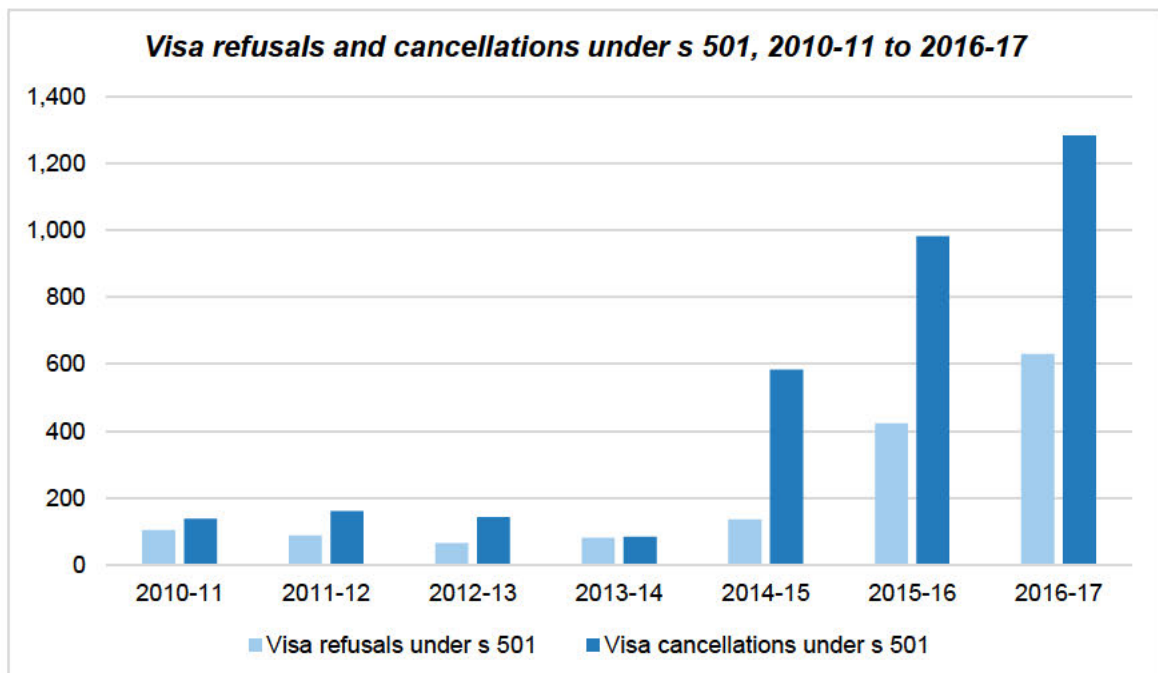
6 Efficiency of existing review processes

106. The first element of the Minister’s Terms of Reference for this inquiry asks the Committee to have regard to the ‘efficiency of existing review processes as they relate to decisions made under section 501 of the Migration Act’. Decisions made under ss 501 or 501CA(4) are subject to an ‘expedited’ merits review process. This section of the submission focuses on the efficiency of that process. The submission also makes reference to the process for review of decisions made under s 116.

6.1 Impact of mandatory cancellations

107. As noted above, there has been a significant increase in visa refusals and cancellations under s 501 since 2014. This increase has been largely due to changes introduced by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth). This legislation, which came into effect in December 2014, significantly broadened the scope of the character test under s 501, and introduced mandatory visa cancellations under s 501(3A).¹¹²
108. In the 2013–14 financial year, 84 visas were cancelled and 81 refused under s 501 of the Migration Act. In the 2016–17 financial year, 1,284 visas were cancelled and 626 refused under s 501.¹¹³ A significant proportion of these visa cancellations occurred under s 501(3A). For example, between December 2014, when mandatory cancellations commenced, and March 2016, 1,215 visas were cancelled under s 501. The vast majority of these (1,152, or 95%) were mandatory cancellations under s 501(3A).¹¹⁴

Visa refusals and cancellations under s 501, 2010–11 to 2016–17¹¹⁵



109. As noted above, while cancellations under s 501(3A) are not reviewable by the AAT, a person may request revocation of a mandatory cancellation.¹¹⁶ A decision to refuse to revoke a mandatory cancellation under s 501CA(4) is

reviewable by the AAT. Of the 1,152 people whose visas were cancelled under s 501(3A) between December 2014 and March 2016, 880 (76%) made a revocation request.¹¹⁷

110. Available data suggests that up to half of all mandatory visa cancellations are ultimately revoked. Of 220 revocation requests finalised between December 2014 and March 2016, for example, 93 cancellations were revoked, 93 were not revoked and 34 were either withdrawn or were considered to be invalid because they were lodged outside the 28 day timeframe provided for in the regulations.¹¹⁸ In the 2017 calendar year, out of 794 finalised revocation requests, 320 were revoked, 457 were not revoked and 17 were withdrawn or invalid.¹¹⁹
111. These figures suggest that mandatory visa cancellations under s 501(3A) have resulted in a significant number of cases progressing unnecessarily to review. Had decision-makers been able to exercise discretion in these cases, rather than a mandatory cancellation occur, it is likely that a substantial number of visas may never have been cancelled. This is of particular concern given the potentially serious consequences of mandatory visa cancellations.
112. Similarly, based on these figures, it seems likely that some people, who had their visas cancelled under s 501(3A) and who missed the deadline for seeking revocation, would have been able to establish that their visas should not have been cancelled. These people are now locked out of merits review of the mandatory cancellation and may face difficulties if they sought judicial review.
113. In 2016, the Commonwealth Ombudsman conducted an inquiry into the administration of s 501 of the Migration Act. The Ombudsman found that delays in finalising revocation requests resulted in some individuals spending significant periods of time in immigration detention, often separated from their family members. Between January 2014 and December 2015, for example, the average length of detention for people requesting revocation was 150 days, or around five months.¹²⁰ By 17 March 2017, the average length of detention for people who have had their visas cancelled on character grounds had doubled to 298 days, or around 10 months.¹²¹
114. The Ombudsman found that delays in finalising revocation requests 'primarily stem from the increase in visa cancellations following the introduction of the s 501(3A) mandatory cancellation provision combined with the large number of persons seeking revocation of their visa cancellation'. These factors, along with discretionary cancellations under s 501, had resulted in 'more people being in immigration detention than otherwise would be the case'.¹²²
115. The Commission considers that mandatory visa cancellations under s 501(3A) of the Migration Act impede the efficiency of review processes for decisions made under s 501. Through preventing decision-makers from being able to exercise discretion and thereby avoid unnecessary visa cancellations before cases progress to review, s 501(3A) has placed an avoidable administrative burden on the Department, with knock-on effects for other aspects of the Department's operations—particularly immigration detention. The unnecessary visa cancellations resulting from s 501CA also place Australia at

significant risk of breaching international obligations relating to arbitrary detention and interference with family life.

Recommendation 4

The Commission recommends that the mandatory visa cancellation provisions in ss 501(3A) and 501CA of the *Migration Act 1958* (Cth) be repealed.

6.2 Expedited merits review of decisions by the AAT

(a) Overview of expedited review process for decisions made under ss 501 and 501CA(4)

116. The character test was first introduced through the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth). This legislation also introduced an expedited merits review process for certain decisions made under s 501 of the *Migration Act*.¹²³ The expedited review process differs in a number of respects from the standard process of merits review contained in the *AAT Act*.

117. The expedited review process applies to decisions made by a delegate of the Minister to refuse or cancel a visa under s 501 and, since 2014, decisions made by a delegate not to revoke a mandatory visa cancellation under s 501CA(4). Decisions made by the Minister personally are not subject to merits review. Under this process:

- A person seeking review must lodge an application with the AAT within nine days after the day on which they were notified of the decision.¹²⁴ The AAT has no discretion to extend this timeframe.
- The applicant must provide the AAT with a copy of the document notifying the person of the decision, and a copy of every document that was relevant in the making of the delegate's decision (which delegates are obliged to provide to applicants under s 501G(2)), other than those containing non-disclosable information.¹²⁵
- Upon receiving the application, the AAT must notify the Minister that an application has been made.¹²⁶ Within 14 days of receiving this notification, the Minister must provide a copy of every document that was relevant to the making of the decision that contains non-disclosable information.¹²⁷ The AAT must not hold a hearing or make a decision on the case within this 14 day period.¹²⁸
- The AAT must not consider any information presented orally or any additional documents submitted to support the applicant's case, unless this information is also provided in writing to the Minister at least two business days before the AAT holds a hearing.¹²⁹
- If the AAT does not make a decision within 84 days (or 12 weeks) after the day on which the person was notified of the decision, the AAT is taken to have affirmed the decision under the review.¹³⁰

(b) *Increase in applications for review of character-related visa decisions*

118. The Commission notes that the number of applications to the AAT for review of character-related visa decisions has increased significantly since the introduction of mandatory cancellations in December 2014. In the 2013–14 financial year (prior to the introduction of mandatory cancellations), the AAT received 33 applications for review of character-related visa decisions and finalised 45 applications.¹³¹ In the 2016–17 financial year, the AAT received 183 applications and finalised 168.¹³² Almost half (46%) of the applications received were required to be dealt with under the expedited review process.¹³³ (It appears from the AAT’s Annual Report that the rest of the applications related to decisions to refuse or cancel a protection visa relying on ss 5H(2), 36(1C) or 36(2C)(a) or (b) of the Migration Act.)
119. Cases that are dealt with under the expedited review process are prioritised by the AAT over other types of reviews,¹³⁴ as these cases will otherwise automatically be affirmed if the AAT does not make a decision within the 12-week timeframe. Consequently, should the number of applications to the AAT for review of character-related decisions continue to increase, processing times for other types of reviews may also increase. The expedited review process may therefore lead to significant delays in the processing of non-character-related decisions that are subject to review by the AAT.
120. When the expedited review process was first considered in 1998, the Senate Legal and Constitutional Affairs Legislation Committee formed the view that review of refusal and cancellation decisions on character grounds should be expedited because ‘the affected person in a character case would be in detention’.¹³⁵ The Commission agrees that it is important for decisions to be made promptly if they have the potential to prolong the period that a person is required to stay in immigration detention. This applies not only to review of decisions to refuse or cancel visas on character grounds, but also to the process of assessing applications for protection visas. The Commission has recently provided a submission to another Committee that deals with the time taken to process protection visa applications.¹³⁶
121. However, while the Commission supports the prompt finalisation of these matters, it has a number of concerns about the current expedited process. First, the current process may not give applicants sufficient time to prepare their case. Secondly, if the number of these cases continues to increase, the AAT may be unable to deal with them as fully as required in the time allocated. Some meritorious applications for review may therefore be unsuccessful because they cannot be decided within 12 weeks. Thirdly, giving priority to this cohort of people in immigration detention may result in other people, including other people who are also in immigration detention, having their cases delayed.
122. There are other ways of structuring time limits that encourage prompt decision making by the AAT, without the harsh result of requiring an unfavourable decision for the applicant if the deadline is missed. For example, if a person seeks review of the refusal or cancellation of a bridging visa under Part 5 of the Migration Act and is in immigration detention because of that refusal or cancellation,¹³⁷ the AAT is required to make its decision on review and notify

the applicant of that decision within 7 working days after receiving the application.¹³⁸ However, the AAT may extend this period with the agreement of the applicant.¹³⁹

123. It appears that one of the most significant obstacles in being able to quickly and efficiently review mandatory cancellation decisions is the time taken for a primary decision by the Minister or the Minister's delegate. In December 2016, the Commonwealth Ombudsman reported that 66% of people who have their visas cancelled under s 501(3A) apply for revocation of cancellation. The average time taken for the Minister or a delegate to process and decide whether to revoke a mandatory cancellation was 153 days, or approximately 5 months. There were 21 cases where it took more than 12 months for a decision on revocation to be made.¹⁴⁰ The Ombudsman made a range of recommendations designed to ensure that revocation decisions were being made early, and well before a person's estimated date of release from prison, so that any revocation process could be completed while the person was still in prison and so that they would not spend prolonged periods in immigration detention after their sentence was complete. The increasing periods of time that people are in fact spending in immigration detention as a result of visa cancellation is discussed above.
124. Reform to the way in which primary decisions are made by the Minister and delegates of the Minister is likely to have the greatest impact on reducing the time that people spend in immigration detention.
125. In light of the increase in visa cancellations on character grounds since 2014, and the significant number of people applying for revocation of mandatory visa cancellations, it is likely that the volume of applications to the AAT for review of character-related visa decisions will continue to increase. The Commission therefore encourages the Committee to consider whether the current expedited review process may have a negative impact on the review of these decisions and on the efficiency of the AAT in dealing with the remainder of its caseload.

Recommendation 5

The Commission recommends that the Committee consider the impacts of:

- (a) the 12 week time limit for the expedited process in s 500(6L) of the Migration Act for review of decisions to refuse or cancel visas on character grounds; and
- (b) the fact that if a decision is not made in 12 weeks, the refusal or cancellation will be deemed to be affirmed

on:

- the ability of applicants to effectively prepare their case
- the ability of the AAT to deal properly with these cases
- the efficiency of the AAT's review processes in other cases.

(c) *Barriers faced by applicants*

126. The expedited review process imposes a significant burden on applicants when compared with the standard merits review process under the AAT Act. In addition, some of the people seeking review are likely to face barriers to engaging with review processes. These barriers may affect the efficiency of the review process through increasing the likelihood of applicants lodging invalid, incomplete or unmeritorious applications, and may consequently result in cases progressing unnecessarily to judicial review.

Limited statement of reasons

127. Decision-makers are not required to provide a full statement of the factual findings for decisions made under ss 501(1) or 501CA. Instead, decision-makers are simply required to provide the person with a written notice that 'sets out the reasons' for the decision.¹⁴¹ By contrast, the ordinary process of review under the AAT Act gives applicants the right to request a statement of reasons that sets out the findings on the material questions of fact and refers to the evidence on which those findings were based.¹⁴² Without access to these additional details, applicants may be unable to fully understand the reasons for the decision and thereby present all relevant information in support of their case.

Onus on applicants to provide documents to AAT

128. In an ordinary case under the AAT Act, the decision-maker is required to provide the AAT and the other party to the review with the documents that are relevant to the review.¹⁴³ The expedited process places the onus on the applicant of providing documents to the AAT (other than documents containing non-disclosable information). While the applicant would have been provided with a copy of the requisite documents by the decision-maker, this additional burden on the applicant of providing a set of documents to the AAT seems unnecessary. Depending on the volume, they may experience difficulties in sending this documentation to the AAT within the required timeframe.
129. For example, some applicants may experience difficulties with understanding the documentation provided to them (which may run into the hundreds of pages) or with navigating the expedited review process. During its 2016 inquiry, the Commonwealth Ombudsman found that a number of people whose visas had been cancelled under s 501 'struggled to fully understand the cancellation, revocation and removal process due to literacy problems'. These individuals reported that they found the process 'overwhelming' and 'lacked the ability to fully understand documentation' provided to them.¹⁴⁴
130. At the time the expedited review process was introduced, the AAT noted that it was 'highly unusual' to place the burden of providing documents on the applicant and suggested that it instead be placed on the Minister.¹⁴⁵ The AAT also suggested that the Migration Regulations be amended 'to provide that a person in immigration detention may lodge an application for review by giving the application to an Immigration officer at a detention centre'.¹⁴⁶

Strict timeframe for applications

131. In an ordinary case under the AAT Act, an applicant has 28 days from the date that they receive the reasons for decision to make an application for review.¹⁴⁷ The AAT has discretion to extend the time for making an application if it is satisfied that it is reasonable in all the circumstances to do so.¹⁴⁸ By contrast, under the expedited review process an applicant must lodge an application within nine days with no possibility of an extension, regardless of circumstances.
132. Applicants may face difficulties lodging an application and providing all of the relevant documentation within the mandatory nine-day timeframe if they are in immigration detention. This is likely to be a particularly significant barrier for people detained in remote facilities, such as the Christmas Island Immigration Detention Centre.
133. The nine-day timeframe also provides very limited time for applicants to seek legal advice prior to lodging an application. This may not only result in some applicants missing the opportunity to seek review of a decision or failing to comply with all relevant requirements, but may also lead to some applicants lodging applications that have little chance of success. At the time the expedited review process was introduced, for example, the then Administrative Review Council (ARC) noted that people ‘who were afraid of being excluded from merits review would lodge more unmeritorious applications’ due to being unable to secure legal advice on the merits of their case within the requisite timeframe.¹⁴⁹

Fees

134. People applying to the AAT for review of decisions made under ss 501 and 501CA must pay a standard application fee of \$884.00.¹⁵⁰ A reduced fee of \$100 is available for people who are in immigration detention or who are disadvantaged.¹⁵¹ However, even this reduced fee may be difficult for some individuals to meet if they lack social connections in Australia or have recently been in prison (and therefore may have limited financial resources or assets). The AAT may dismiss an application if the fee is not paid within six weeks of the application being lodged.
135. There is no application fee for a range of other decisions by the AAT, including certain Centrelink decisions, Commonwealth workers’ compensation decisions, FOI decisions, Military compensation decisions, NDIS decisions and Veterans’ entitlement decisions.¹⁵²

Other procedural restrictions

136. The Migration Act provides that the AAT must not consider any information or documents submitted to support the applicant’s case, unless they were also provided to the Minister in writing at least two business days before the hearing. The unstated assumption behind this requirement is that applicants will be able to determine in advance of the hearing every relevant aspect of their case and be in a position to communicate all of this information to the

Minister. For unrepresented applicants and those with limited literacy skills, it is highly unlikely that they will be in such a position.

137. As a result, the requirement has a tendency to prevent the AAT from being able to inquire into relevant matters that were not raised with the Minister in advance of the hearing, and to prevent applicants from being able to raise relevant information during the hearing. This is contrary to the usual inquisitorial process adopted by the AAT which is supposed to be informal and not bound by legal technicalities.¹⁵³

Result of procedural barriers to applications

138. As a result of the strict timeframe for making an application and the imposition of an onus on the applicant to provide the AAT with the relevant decision documents and pay a substantial application fee, the potential for an applicant lodging an invalid application has increased. Indeed, in the 2016–17 financial year, 18 applications for review of decisions under ss 501 and 501CA of the Migration Act (comprising more than 10% of the applications finalised that year) were finalised on the basis that the AAT did not have the jurisdiction to review the decision. All but two of these applications were either lodged outside the nine-day timeframe or dismissed due to non-payment of the lodgement fee. These applications were finalised without any substantive hearing on the merits. The Commission is concerned that these applicants were unable to take advantage of the expedited process at all.¹⁵⁴
139. It seems likely that there would also be another cohort of potential applicants who inadvertently missed the nine-day deadline for applications and then did not attempt to make an application out of time.
140. In its 2016 report on Commonwealth laws that encroach on traditional rights and freedoms, the Australian Law Reform Commission (ALRC) examined a range of migration law provisions that exclude procedural fairness. Concerns were raised with the ALRC about the exclusion of procedural fairness from decisions to refuse to grant or to cancel a visa (when these are made personally by the Minister) and in the mandatory cancellation of visas. The Migration Act uses the language of ‘natural justice’ rather than ‘procedural fairness’. This issue is considered in more detail in section 8.2 below.
141. Concerns were also raised about the exclusion of procedural fairness in the ‘fast track’ merits review process for visa applications lodged by asylum seekers who arrived in Australia by boat. The ALRC considered submissions that the fast track process ‘arbitrarily and unfairly excludes procedural fairness from protection visa application processes’.¹⁵⁵ It also considered a judgment of the England and Wales Court of Appeal in relation to review of a similar fast track process in the United Kingdom which found that the process was ‘structurally unfair and unjust’. The ALRC quoted the following findings by Lord Dyson:

in view of (i) the complex and difficult nature of the issues that are often raised; (ii) the problems faced by legal representatives of obtaining instructions from individuals who are in detention; and (iii) the considerable number of tasks that they have to perform ... the timetable for the conduct of these appeals is so tight

that it is inevitable that a significant number of appellants will be denied a fair opportunity to present their cases under the [Fast Track Rules] regime.¹⁵⁶

142. The barriers identified by Lord Dyson are similar to the barriers faced by individuals subject to the expedited review process for decisions under s 501, as outlined in this submission. The Commission agrees with the conclusion of the ALRC that these kinds of procedural restrictions encroach on the duty to afford procedural fairness.
143. For those who fail to lodge a valid application under expedited review process, or are unable to present relevant information that may otherwise have led to different outcome, the only remaining option for challenging a decision is judicial review. As a result, the expedited process may result in some cases progressing to judicial review (including cases that have little chance of success) when they could otherwise have been dealt with more efficiently at the merits review stage.
144. Through hampering a full and thorough consideration of the merits of a particular case, the expedited review process may paradoxically have the effect of prolonging the review process. This may in turn have significant human rights implications if applicants are subject to further periods of immigration detention or other consequences of visa cancellation, without having been afforded a reasonable opportunity to appeal the decision.

Recommendation 6

The Commission recommends that:

- (a) the procedural requirements for the expedited merits review process set out in ss 500(6A) to (6K) of the Migration Act be repealed
- (b) decisions made under ss 501 and 501CA of the Migration Act be subject to merits review by the AAT under its ordinary processes.

6.3 Review of visa cancellations under s 116

145. As noted above, decisions made by delegates of the Minister to cancel visas under s 116 are reviewable by the AAT. An application for review of the decision to cancel a bridging visa must be lodged with the AAT within two working days if the person is in immigration detention, or within seven working days if the person is being held elsewhere (such as in prison).¹⁵⁷ An application for review of a decision to cancel a substantive visa must be made within seven working days.¹⁵⁸
146. A 2016 inquiry by the Commonwealth Ombudsman into Bridging Visa cancellations on criminal grounds found that the very short application timeframe for review of decisions made under s 116 had a significant impact on access to review:

A common issue raised with our office is that people were not aware that they could seek merits review of the cancellation decision and by the time they became aware that they could, they were out of time to appeal.¹⁵⁹

147. The Ombudsman also highlighted the shortcomings of current review processes in cases where bridging visas are cancelled under s 116 on the basis of criminal charges that are subsequently withdrawn, or of which the person is acquitted. As a result of these shortcomings, people in this situation may remain in immigration detention (potentially for a prolonged period of time), even though the reasons for their visa being cancelled have effectively ceased to exist:

While it would seem reasonable that the resolution of the charge that led to a person being re-detained would prompt a review of their circumstances, this investigation has established that this does not happen. In reality, people in this situation are dependent on the capacity of a poorly supported case management and escalation framework to adequately review the circumstances of their individual case. Release from detention for these people depends on whether they happen to fall within scope of the department's wider priorities.¹⁶⁰

148. The Ombudsman further noted that merits review may not offer an effective means of resolving such cases. Specifically, if the AAT reviews and affirms the decision before the relevant criminal charges are finalised, 'there is no opportunity for the decision to be revisited if the charges are later withdrawn or the person is acquitted of the offence'.¹⁶¹
149. The Commission shares the Ombudsman's view that, where bridging visas are cancelled under s 116 on the basis of criminal charges, 'a non-adverse judicial outcome should be a trigger for an urgent review of a person's circumstances'.¹⁶²

Recommendation 7

The Commission recommends that the time limit for applying to the AAT for review of decisions to cancel a visa under s 116 of the Migration Act be extended to 28 days.

Recommendation 8

The Commission recommends that, where a bridging visa has been cancelled under s 116 of the Migration Act on the basis of criminal charges, the withdrawal of these charges or a non-adverse judicial outcome should automatically trigger a review of the decision to cancel the visa.

7 Duplication associated with current merits review process

150. The second element of the Minister's Terms of Reference for this inquiry asks the Committee to have regard to 'present levels of duplication associated with the merits review process'.
151. The Commission's primary submission in relation to this element is that the provision of both merits review and judicial review does not, of itself, amount to duplication, because the two review processes deal with different issues. For decisions about visa cancellation, merits review remains important and should be retained.

152. However, when considering the existing merits review process, there are two kinds of duplication that it is useful for this Committee to reflect upon:
- a. duplication in the kinds of merits review: the expedited process on the one hand and the standard merits review process on the other
 - b. duplication in executive decision-making: given the current ability for the Minister to set aside certain decisions of the AAT.

7.1 Provision of both merits review and judicial review does not amount to duplication

(a) Merits review and judicial review

153. For the past 40 years, Australia has had a strong and robust system for seeking external merits review of decision-making by government. This system seeks to ensure that administrative decision-making is principled and consistent.
154. A wide range of government decisions are subject to merits review by independent tribunals. Merits review is a process by which a person or body:
- a. other than the primary decision maker
 - b. reconsiders the facts, law and policy aspects of the original decision; and
 - c. determines what is the correct and preferable decision.
155. This process is often described as ‘stepping into the shoes’ of the primary decision maker. The principal object of merits review is to ensure that administrative decisions are correct and preferable. A ‘correct’ decision is one made according to law. A ‘preferable’ decision is the best decision that could be made on the basis of the relevant facts.
156. If there are factual errors made by a primary decision maker, merits review provides an opportunity to correct these errors. Typically, a review tribunal may also take into account new information that was not before the original decision maker and that is relevant to consider. As a result, a review tribunal may come to a different decision based on new information.
157. The mode of operation of tribunals also differs from that of primary decision-makers. Primary decision-makers typically conduct a desk review of relevant documents and may obtain written submissions from interested parties. If the primary decision maker is a Minister, they will typically make a decision based on a written submission from their department. Tribunals typically conduct hearings where evidence can be tested and additional evidence can be presented orally. These hearings ordinarily take place in public. Parties to the matter appear before the tribunal, make submissions and answer questions from the tribunal member. Tribunals typically prepare detailed reasons for their decisions.

158. Tribunals tend to deal with a lower volume of decisions than primary decision makers and can therefore devote more time and resources to the consideration of individual cases. Those cases that are heard by a tribunal are typically considered in more depth and with a greater involvement by affected parties. All of these factors give tribunals a greater prospect of coming to the best possible (preferable) decision.¹⁶³
159. The usual stages available in review of administrative decisions involve:
- a. an original decision, for example by a Minister, a delegate of a Minister, or another public official with power to make decisions
 - b. merits review of that decision by an independent tribunal
 - c. judicial review, if it is alleged that there were legal errors in the decision of the tribunal.
160. Judicial review is different from, and not a substitute for, merits review. Judicial review allows for correction of legal errors in the making of a decision, but does not consider the *merits* of the decision. If there have been errors of fact by a primary decision maker (whether by a Minister, a delegate or another official), these cannot usually be corrected by judicial review. By contrast, if merits review is available, errors of fact can be corrected because the body undertaking merits review effectively makes the decision again having regard to all of the relevant facts.
161. In addition, merits review processes are intended to provide a mechanism for reviewing administrative decisions in a manner that is not only fair, but also less onerous than judicial review. The core objective of the review process administered by the AAT is to provide a mechanism of review that is accessible, fair, just, economical, informal and quick.¹⁶⁴ By design, merits review aims to provide a means of reviewing administrative decisions without needing to resort in the first instance to a more complex, costly and potentially lengthy judicial review process.
162. The then ARC noted that ‘review tribunals make a strong contribution to openness and accountability of government by providing persons affected by government decisions with a fair and open process for testing those decisions’.¹⁶⁵ The former Chief Justice of Australia described merits review extra-judicially as ‘in a way more important than judicial review because it can offer a complete answer, not available through the courts, to a person affected by a decision’.¹⁶⁶
163. The availability of both merits review and judicial review of decisions to refuse or cancel visas on character grounds does not amount to a ‘duplication’. Each kind of review plays a different role and is necessary to ensure that decision-making is robust.
- (b) *Decisions that should be subject to merits review*
164. Prior to its abolition in 2015, the ARC published guidelines on the classes of decisions that should be subject to merits review.¹⁶⁷ The guidelines brought

together a number of principles that had been developed by the ARC in the course of advising the Attorney-General about merits review. The starting point is that an administrative decision that is likely to affect the interests of a person should ordinarily be subject to merits review.

165. In order to overcome this presumption and not provide merits review, the benefits to be gained must outweigh the adverse consequences of not providing merits review. These adverse consequences will generally involve the risk of reaching decisions that are not correct or preferable. This may involve adverse consequences for the individual whose rights are affected, and also consequences for the overall quality of government decision-making.
166. The ARC recognised that merits review costs money and that ‘it would obviously be inappropriate to provide a system of merits review where the cost of the system would be vastly disproportionate to the significance of the decision under review’.¹⁶⁸ By way of example, it said that merits review of a decision not to waive a filing fee of, say, \$150 may be difficult to justify on an economic basis. This is because the cost of conducting a review of the decision would be disproportionate to the adverse consequence to the individual (paying the fee of \$150). However, where significant individual rights were affected, then merits review should ordinarily be provided.
167. The ARC identified factors that it considered do *not* justify excluding merits review of a decision that should otherwise be subject to review. These include:
- a decision involves matters of national sovereignty, such as the question of who is admitted to enter Australia;¹⁶⁹
 - a decision is exercised by reference to a government policy;¹⁷⁰ or
 - there is a potential for a relatively large number of people to seek merits review of decisions.¹⁷¹

(c) *Human rights principles relevant to review of migration decisions*

168. The ICCPR contains a specific provision relating to the right of ‘aliens’ (that is, non-citizens) to review of decisions to expel them from a country. Article 13 of the ICCPR provides:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

169. There are several relevant elements to this right. It includes lawful decision-making, the right to make submissions, the right of a review involving a hearing and the right to representation.

170. Article 14 of the ICCPR provides more general due process guarantees in relation to legal proceedings. It relevantly provides:

All persons shall be equal before the courts and tribunals. In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

171. The right of access to courts and tribunals and equality before them, is not limited to citizens. The Human Rights Committee has said that it must also be available to all individuals, regardless of nationality or statelessness who find themselves in the territory of a state and includes asylum seekers, refugees, migrant workers and unaccompanied children.¹⁷² The concept of 'suit at law' encompasses judicial procedures aimed at determining civil rights and obligations as well as equivalent notions in the area of administrative law.¹⁷³
172. In cases where article 13 is applicable, the Human Rights Committee has considered the requirements of article 13 and not separately considered whether there was a breach of article 14.¹⁷⁴ However, the procedural guarantees of article 13 should be interpreted in the light of the due process provisions of article 14.¹⁷⁵ A court or tribunal responsible for deciding cases about expulsions or deportations should guarantee equality before courts and operate in accordance with principles of impartiality, fairness and 'equality of arms' (that is, ensuring that both parties have the same procedural rights).¹⁷⁶
173. In the past, the Australian Government has argued that article 13 does not apply to 'unlawful maritime arrivals' because it is directed only to people 'lawfully' in the territory of a State.¹⁷⁷ A similar argument may be made that article 13 no longer applies to a person once their visa is cancelled because they then become an 'unlawful non-citizen'.¹⁷⁸ The argument is less persuasive in the case of the cancellation of visas because a person holding a visa is a lawful non-citizen¹⁷⁹ and the act of cancellation may be the relevant act that is assessed against the requirements of article 13.
174. If article 13 is not applicable, then the rights in article 14 are apt to apply to administrative decisions either to refuse or cancel a visa. A key aspect of the hearing required by article 14 is that it is fair. In order for a hearing to be fair, it is essential that the person concerned 'has a reasonable opportunity of presenting his case'.¹⁸⁰ This will include a reasonable opportunity to make relevant submissions and give evidence.¹⁸¹

(d) *Migration decisions should be subject to merits review*

175. In 1983, the then Human Rights Commission (a body that predated the current Australian Human Rights Commission) conducted an inquiry into *Human Rights and the Deportation of Convicted Aliens and Immigrants*.¹⁸² At the time, the Human Rights Commission was chaired by the Hon Dame Roma Mitchell, a former Judge of the Supreme Court of South Australia and later Governor of South Australia. The report considered the powers of the Minister, in what were then ss 12 and 13 of the Migration Act, to order the deportation of aliens and immigrants who had been convicted in Australia of certain offences. People who were subject to a deportation decision could appeal the decision

to the AAT. The AAT had the power to affirm decisions of the Minister, but if it disagreed with the decision of the Minister it only had the power to remit the matter for reconsideration with a recommendation that the deportation order be revoked.

176. The Human Rights Commission raised questions about whether this limited process of review was consistent with article 13 of the ICCPR.¹⁸³ Some members of the Commission considered that the fact that the AAT was limited to making non-binding recommendations where it disagreed with a primary decision meant that there was no proper review of expulsion decisions, as required by article 13. The Commission drew an analogy to the case of *X v United Kingdom* heard by the European Court of Human Rights.¹⁸⁴ The Mental Health Review Tribunal in the UK was limited to giving advice about whether X should be detained at Broadmoor Hospital, and lacked the competence to decide whether the detention of X was lawful. This was held to be inconsistent with the rights of X under article 5(4) of the European Convention on Human Rights to have the lawfulness of detention determined by a court. Functions that were merely advisory did not meet the necessary requirements for a lawful review.
177. Other members of the Human Rights Commission noted that, in practice, the Minister rarely disagreed with the AAT and would routinely revoke deportation decisions based on the recommendations of the AAT. The Minister's willingness to accept the views of the AAT was said to support the view that the requirements of article 13 were being met. All members of the Commission considered that there was no doubt that if the power to revoke decisions was entrusted to the AAT, the requirements of article 13 would be met and that this would provide consistency with the way in which the AAT operated in all other cases.¹⁸⁵
178. The question of how migration decisions should be made and reviewed was considered comprehensively by the ARC in a report to the Attorney-General in 1986.¹⁸⁶
179. The ARC was strongly of the view that there was a need for a system of external review on the merits for migration decisions. A key reason for this was that 'very significant personal interests' may be affected by migration decisions.¹⁸⁷ This was particularly true in relation to decisions relating to entry to, and stay in, Australia. The ARC said:

An adverse decision may, for example, impinge upon the individual's capacity to maintain family or other close relationships with persons living in Australia and may prevent, or interfere with, the pursuit of important personal goals relating to such matters as employment or education. Moreover, the refusal of entry to, or permission to remain in, Australia may affect significant interests of members of the Australian community with whom the person directly affected by the decision has close ties of a family, personal, business or employment nature.¹⁸⁸
180. As the ARC recognised, the impact of different classes of migration decisions on significant personal interests may vary depending on the personal circumstances of the person affected by the decision. For example:

- a decision to refuse migrant or temporary entry is likely to have a greater impact on significant individual interests if the affected person has some family or other close ties with Australia
 - a decision to deport a person who has resided in Australia for a lengthy period, whether as a permanent resident or as a prohibited non-citizen, is likely to have a more severe impact on such a person than on one who has not been long in Australia, since the former is more likely to have established strong links with Australia through family and employment
 - a decision to deport may be more significant, in terms of its effect on individual interests, than a decision to refuse entry.¹⁸⁹
181. The ARC concluded that, although there may be variation in individual cases, those classes of migration decision which are capable of having significant consequences for those affected by them should be subject to effective external review on the merits.¹⁹⁰
182. The interests affected by migration decisions were ‘no less vital to the persons concerned than decisions made in other areas of government administration’ where merits review was available, such as social security decisions reviewable by the AAT.¹⁹¹
183. External review would ‘guard against arbitrary or defective administrative action’ and was important to ensure that decisions were made ‘fairly, on the basis of existing fact and in accordance with the requirements of law’.¹⁹²
184. Section 5 of this submission identifies the significant personal interests at stake in a decision to refuse or cancel a visa on character grounds. Given the nature of interests affected, these decisions should continue to be subject to merits review.

7.2 *Duplication of merits review processes: expedited process vs ordinary AAT review of other migration decisions*

185. While it is important to have both merits review and judicial review of migration decisions because of their impact on individual rights, it is appropriate for this Committee to consider whether there is currently a duplication of merits review processes.
186. At the moment, the ‘expedited’ process for review of decisions to refuse or cancel visas on character grounds under ss 501 or 501CA of the Migration Act duplicates the standards merits review process in the AAT, but provides more limited rights for applicants. The limitations of the merits review process are discussed in section 6.2 above. These limitations include: no requirement for a decision-maker to set out the factual findings underlying a decision to refuse or cancel a visa; a short and inflexible period for review applications to be made; and a prohibition on applicants raising relevant material during a hearing (whether orally or in writing) unless this has been provided to the Minister in writing two days in advance. These requirements are all at odds with the standard merits review process in the AAT.

187. There are good reasons to consider that this expedited process should be dispensed with and that all merits review should be treated in the same way. This is the subject of recommendation 6 considered above.

7.3 Duplication of executive decision-making on single application: opportunity for Minister to set aside decision of AAT

188. At present, the system for considering whether to refuse or cancel a visa on character grounds provides multiple opportunities for executive decision-making in relation to the same application.
189. If a delegate of the Minister makes a decision to refuse or cancel a visa under s 501, or a decision not to revoke a mandatory cancellation under s 501CA(4), these decisions can be reviewed by the AAT. The AAT has the power to affirm, vary or set aside the original decision. If it sets the decision aside, the AAT can make a new decision itself or remit the decision to the original decision-maker, along with directions or recommendations for making the decision again. This is the standard process in merits review of administrative decision-making.
190. However, if the AAT makes a new decision, the Minister has the power to set aside the new decision and substitute their own decision. The Minister may set aside a decision of the AAT under s 501 not to revoke or cancel a visa if the Minister reasonably suspects that a person does not pass the character test and the Minister is satisfied that the refusal or cancellation is in the public interest.¹⁹³ The Minister may set aside a decision of the AAT under s 501CA(4) to revoke a mandatory cancellation of a visa if the Minister is satisfied that the person does not pass the character test on the grounds that give rise to mandatory cancellation and that the cancellation is in the national interest.¹⁹⁴
191. As noted in paragraph 53 above, the Minister has an equivalent power under s 133C(1) to set aside decisions of the AAT not to cancel a decision under s 116.
192. There are real concerns with giving the executive the power to set aside decisions of an independent merits review tribunal. The Commission is not aware of any other situations in which a Minister is given the power to set aside a decision of the AAT. In 2014 and again in 2017, the Government proposed extending this kind of Ministerial discretion to decisions about citizenship.¹⁹⁵ The Senate's Scrutiny of Bills Committee warned against this, saying:

Any system of independent merits review runs the risk that a tribunal may reverse a decision preferred by the original decision-maker or the Minister. However, overriding a decision by an independent decision-maker poses a risk to community perceptions about the availability of independent merits review and the risk that individual cases may be unduly influenced by political considerations.¹⁹⁶

193. Giving the Minister the power to set aside decisions of the AAT inverts the ordinary process of merits review. Merits review is intended to provide a check

on certain kinds of decisions by the executive to ensure principled and consistent decision-making. The current process provides the opposite: an executive check on independent tribunal decisions.

194. Decisions of the AAT are subject to judicial review (see paragraph 35 above). If the Minister or the Department considers that there has been a legal error in a decision by the AAT (including a legal error in the application of Direction No. 65), it is open to them to seek judicial review of that decision. The Commission considers that this is a more appropriate course than giving the Minister a discretionary power to set aside decisions by the AAT after a review of the case on the merits.

Recommendation 9

The Commission recommends that the Ministerial powers in ss 133C(1), 501A and 501BA of the Migration Act to set aside decisions of the AAT be repealed.

Case study 6: Misreporting of AAT decisions about removals from Australia

A number of cases heard by the AAT have been reported in the press in a way that is likely to mislead an ordinary reader. Two such cases are described below.

Deportation of 'sex creep' allegedly thwarted

In June 2017, the *Herald Sun* reported that 'Administrative Appeal Tribunal boss John Logan has thwarted Immigration Minister Peter Dutton by again saving sex creep Jagdeep Singh from deportation'.¹⁹⁷

However, while the Tribunal granted Mr Singh a bridging visa, this was not for the purpose of preventing Mr Singh from being removed from Australia. Rather, it was for the purpose of preventing Mr Singh from being in immigration detention while he made arrangements to leave Australia voluntarily.¹⁹⁸

Mr Singh had pleaded guilty to a charge of indecently assaulting a woman. The Court had granted him bail prior to the hearing and, following the guilty plea, did not impose a custodial sentence. The AAT was satisfied that Mr Singh intended to leave Australia within six weeks and that it was unlikely that he would reoffend during this period of time.

Mr Singh sought a bridging visa so that he could be released from immigration detention in order to sell his car, collect documents from a university and reclaim the bond on his rental property which required about 4 weeks' notice. His wife also wanted to give appropriate notice to her employer. This was the basis upon which a bridging visa was granted by the AAT.

In any event, the grant of the visa could not properly be described as 'thwarting' any plan of the Minister because, within two days of the AAT

granting the visa, the Minister reportedly had cancelled it, with the result that Mr Singh was required to return to immigration detention.

Deportation of paedophile allegedly thwarted

In May 2017, the *Herald Sun* reported that ‘AAT bureaucrats thwarted’ a decision by a delegate of the Minister to remove from Australia a ‘paedophile from New Zealand who was convicted of 18 child pornography offences’.¹⁹⁹ This statement was entirely inconsistent with the facts.

Mr Jeffrey Chadwick had sought review of a decision to cancel his visa.²⁰⁰ He had been convicted of 18 child pornography offences, including taking photographs of children in his care under 12 years old who were at his house to play with his own children and who were made to pose in a sexually explicit way.

When the matter first came before the AAT, the AAT accepted a submission by the Minister that it did not have jurisdiction to hear the matter because Mr Chadwick had not applied for review within 9 days of receiving notice of cancellation.²⁰¹ The AAT said that, if it had jurisdiction, it would have affirmed the decision to cancel Mr Chadwick’s visa because this ‘would accord with the standards, values and expectations of the Australian community’.

The Minister was required to give notice of cancellation to Mr Chadwick again as a result of a decision of the Federal Court in another matter.²⁰² When Mr Chadwick’s matter came before the AAT a second time, the AAT affirmed the decision to cancel his visa.²⁰³ The AAT placed significant weight on the facts that: the offences were serious; they were committed against minors who are vulnerable members of the community; and there was an unacceptable risk that Mr Chadwick would commit further offences. These factors outweighed other considerations including the strength of Mr Chadwick’s family ties to Australia.

It is plainly wrong to say that the AAT ‘thwarted’ the delegate’s decision to remove Mr Chadwick from Australia.

8 AAT jurisdiction to review ministerial decisions

195. The third element of the Minister’s Terms of Reference for this inquiry asks the Committee to have regard to the scope of the AAT’s jurisdiction to review ministerial decisions.
196. At present, the AAT does not have any scope to review personal ministerial decisions in relation to visa refusals and cancellations on character grounds. This is unusual. The AAT has jurisdiction to review decisions under more than 400 Commonwealth Act and legislative instruments.²⁰⁴ This typically includes decisions made by Ministers, departments and agencies. A full list of decisions subject to review by the AAT is published on its website.²⁰⁵

197. This section deals with two issues:
- a. the exclusion from merits review of personal decisions of the Minister in relation to visa refusals and cancellations on character grounds
 - b. the current accountability mechanisms in relation to these ministerial decisions.

8.1 Personal decisions of Minister excluded from merits review

198. Personal decisions of the Minister under ss 501, 501A, 501B, 501BA and 501CA of the Migration Act are not subject to merits review in the AAT. Decisions by delegates of the Minister under ss 501 or 501CA(4) are reviewable in the AAT.²⁰⁶
199. In 2014 and 2017, the Government proposed extending immunity from merits review to personal decisions made by the Minister in relation to applications for citizenship.²⁰⁷ The justification given by the Government for removing independent merits review for such decisions was that, as an elected Member of Parliament, the Minister has ‘a particular insight into Australian community standards and values and what is in Australia’s public interest’ and that the Minister’s personal decisions should be protected from ‘an unelected administrative tribunal’.²⁰⁸
200. However, this proposition seems to ignore the extent to which administrative tribunals will have regard to government policy. Justice Brennan, in his then capacity as the President of the AAT, considered this issue in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634. In that case, his Honour said (at 644–645):
- When the Tribunal is reviewing the exercise of a discretionary power reposed in a Minister, and the Minister has adopted a general policy to guide him in the exercise of the power, the Tribunal will ordinarily apply that policy in reviewing the decision, unless the policy is unlawful or unless its application tends to produce an unjust decision in the circumstances of the particular case. Where the policy would ordinarily be applied, an argument against the policy itself or against its application in the particular case will be considered, but cogent reasons will have to be shown against its application, especially if the policy is shown to have been exposed to parliamentary scrutiny.
201. As set out in section 4.2 above, the Minister has issued Direction No. 65 that applies to visa refusal and cancellation under s 501 and revocation of mandatory cancellation of visas under s 501CA. Direction No. 65 sets out the primary considerations and other considerations that decision-makers are to take into account in exercising discretions to refuse, cancel or revoke the cancellation of visas on character grounds. It also sets out a range of general policy principles to guide decision-making. The direction is detailed and runs to 33 pages. Both primary decisions makers and the AAT on review are required to comply with Direction No. 65.²⁰⁹
202. In 1999, the ARC prepared guidelines on the classes of administrative decisions that should be subject to merits review. The ARC said that, as a

matter of principle, an administrative decision that will or is likely to affect the interests of a person should be subject to merits review.²¹⁰

203. There is a limited range of factors that may justify excluding merits review for particular decisions. However, factors that do *not* justify excluding merits review include:

- a. the fact that the decision-maker is an expert; and
- b. the fact that a decision-maker is of a high status.²¹¹

204. In relation to the second of these categories, the ARC said:

The status of the primary decision-maker is not a factor that, alone, will make decisions of that person inappropriate for merits review.

For example, the fact that the decision-maker is a Minister or the Governor-General, is not, of itself, relevant to the question of review. Rather, it is the character of the decision-making power, in particular its capacity to affect the interests of individuals, that is relevant.²¹²

205. The Commission submits that, due to the significant impact on individual rights, decisions to refuse or cancel visas, even if made by a Minister, should be subject to merits review. There is a real prospect that in a high volume decision-making environment errors of fact will occur. While the volume of personal decisions made by a Minister is likely to be fewer than those made by ministerial delegates, there is no reason to think that the person occupying the office of the Minister for Home Affairs from time to time will be immune from error. Merits review allows for the correction of error.

206. Ensuring that personal decisions of the Minister are amenable to merits review would also make the scheme under the Migration Act consistent with other legislation. For example, as noted above, decisions about whether to refuse, cancel or revoke citizenship under the *Australian Citizenship Act 2007* (Cth), even if made by the Minister for Home Affairs, are subject to merits review.

207. The breadth of matters that fall within the scope of the character test means that decisions to refuse or cancel a visa on character grounds could not be said, for this reason alone, to ‘involve consideration of matters of the highest consequence to government or major political issues’.²¹³ For example, a visa can be cancelled on character grounds without a person having been convicted of any offence. Adverse decisions can be made based on the assessment of a person’s ‘general character’.

208. A more nuanced review regime exists under the *Australian Passports Act 2005* (Cth) (Passports Act) which requires particular decisions of a more significant nature that are made personally by the relevant Minister to be treated differently on review by the AAT.

209. Under the Passports Act, the AAT has the jurisdiction to review certain decisions made either by the Minister for Foreign Affairs personally, or by a delegate of the Minister, to refuse to issue an Australian travel document or to cancel an Australian travel document.²¹⁴ In limited circumstances, the Minister

may certify that a decision involves matters of international relations or criminal intelligence.²¹⁵ These circumstances include, for example, that a person is the subject of an arrest warrant in another country in respect of serious foreign offence;²¹⁶ or that a relevant authority reasonably suspects that if a person were issued a travel document the person would be likely to engage in certain kinds of serious criminal conduct.²¹⁷ If the Minister issues such a certificate, the decision is still reviewable by the AAT, but the AAT is limited to making a decision that either affirms the Minister's decision or remits the decision to the Minister for reconsideration in accordance with any directions or recommendations of the AAT.²¹⁸

210. This is an example of a targeted limitation on the powers of the AAT to provide certain remedies following a review of certain highly significant Ministerial decisions. The types of decisions are those involving a high degree of specialised expertise (ie, decisions that affect Australia's international relations) or where an independent assessment has been made about relevant risks. The decisions are still subject to merits review but with more limited remedies for review applicants.
211. By contrast, under the Migration Act, decisions made by the Minister are entirely exempted from review by the AAT and cover a much broader range of conduct. The scope of the exemptions from merits review under the Migration Act is not appropriate, given the breadth of decisions that can be made under s 501.

Recommendation 10

The Commission recommends that personal decisions by the Minister to refuse or cancel visas on character grounds be subject to merits review in the AAT.

8.2 Accountability mechanisms on personal Ministerial decisions are insufficient

212. The Migration Act currently provides a very limited accountability mechanism when the Minister makes personal decisions to refuse or cancel visas in the national interest.
213. The Minister has a personal power under s 501(3) to refuse or cancel a visa if the Minister reasonably suspects that the person does not pass the character test and if the Minister is satisfied that the refusal or cancellation is in the national interest. Similarly, the Minister has a personal power under s 501A(3) to set aside a decision by a delegate or by the AAT not to refuse or cancel a visa and to make a new decision refusing or cancelling the visa. Again, the Minister may exercise this power if the Minister reasonably suspects that the person does not pass the character test and if the Minister is satisfied that the refusal or cancellation is in the national interest.
214. When exercising the personal powers in ss 501(3) or 501A(3), the rules of natural justice do not apply. Instead, s 501C sets out a process whereby the Minister is required to:

- a. give the person a written notice setting out the decision and the reasons for making the decision (subject to a number of exceptions)
 - b. invite the person to make submissions about whether the Minister's decision should be revoked
 - c. consider whether or not to revoke the decision based on submissions from the person.
215. This process is a more limited process than would be required if ordinary principles of natural justice applied.
216. The accountability mechanism is set out in s 501C(8). It provides that if the Minister decides not to revoke the decision on the basis of submissions from the person affected, the Minister must table a notice in Parliament. However, there is no requirement that these notices set out the reasons for the Minister's decision.
217. A review of notices actually tabled by the Minister shows that they do not contain enough information to evaluate whether the power was exercised properly. Based on a search of tabled documents, the Commission identified one notice tabled in 2002 and six notices tabled between 2014 and 2017 pursuant to s 501C(8). Copies of these notices are contained in **Annexure A** to this submission. These notices were not on the website of the Parliament of Australia and had to be requested from tabling officers in the Senate. What is most noticeable about these notices is the lack of detail that they contain. The notices are generally limited to statements that the Minister has decided either to revoke or not to revoke the decision.
218. There is no equivalent requirement to table a notice when the Minister makes a personal decision under s 501BA(2) to set aside a decision of the AAT to revoke a mandatory cancellation in the national interest. It is not clear why this power is not subject to the same tabling requirement, especially because, in this case, the rules of natural justice are also excluded. There is also no requirement for a statement to be tabled in Parliament when the Minister exercises other personal powers under ss 501(2), 501A(2), 501B or 501CA(4) which are not reviewable by the AAT.
219. A more robust accountability regime was proposed by the Government when it sought to extend these kinds of Ministerial powers to decisions about citizenship. The Bill proposed that, if the Minister made a decision that was not reviewable by the AAT, the Minister would be required to table in Parliament a statement that set out:
- a. the Minister's decision; and
 - b. the reasons for the Minister's decision.²¹⁹
220. Similarly, if the Minister made a decision setting aside a decision of the AAT, the Bill provided that the Minister would be required to table in Parliament a statement that:
- a. set out the AAT's decision

- b. stated that the Minister has set aside the AAT's decision
 - c. set out the decision made by the Minister in connection with the decision to set aside the AAT's decision
 - d. set out the reasons for the Minister's decision to set aside the AAT's decision.²²⁰
221. The Explanatory Memorandum for the Bill provided that the reason for including such information in the statements to be tabled in Parliament was to 'ensure that such decisions remain transparent, accountable and open to public comment'.²²¹
222. The Commission considers that the accountability regime proposed in the Bill in relation to citizenship sets out a significantly more robust mechanism for scrutinising decisions by the Minister than the regime currently provided for in relation to visa refusals and cancellations on character grounds. As set out in recommendations 9 and 10 above, the Commission's primary position is that personal decisions of the Minister should be subject to review in the AAT and that the Minister should not have the power to set aside decisions of the AAT. However, if the Minister is to retain the power to:
- a. make personal decisions to refuse or cancel visas on character grounds that are not reviewable in the AAT; and
 - b. set aside decisions of the AAT in relation to refusal or cancellation of visas on character grounds,

then these powers should be subject to greater scrutiny than they are at present.

Recommendation 11

The Commission recommends that, if the Minister exercises a personal power under s 501 of the Migration Act to refuse or cancel a visa, the Minister be required to table in Parliament a notice setting out the decision and the reasons for the decision. The notice should not include the name or other identifying information of the person affected by the decision.

Recommendation 12

The Commission recommends that, if the Minister exercises a personal power under ss 501A, 501B or 501BA of the Migration Act to set aside an original decision and either refuse or cancel a visa, the Minister be required to table in Parliament a notice that:

- (a) sets out the original decision
- (b) states that the Minister has set aside the original decision
- (c) sets out the decision made by the Minister in connection with the decision to set aside the original decision

(d) sets out the reasons for the Minister's decision to set aside the original decision.

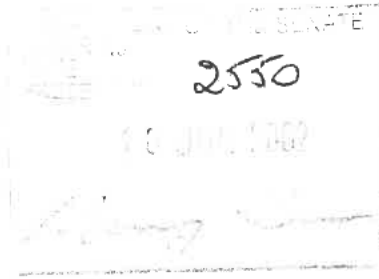
The notice should not include the name or other identifying information of the person affected by the decision.

Recommendation 13

The Commission recommends that s 501CA(8) of the Migration Act be amended to require the Minister to set out the decision and the reasons for the decision in the notice to be tabled in Parliament when the Minister decides not to revoke a mandatory cancellation. The notice should not include the name or other identifying information of the person affected by the decision.

Annexure A

Notices tabled in Parliament pursuant to s 501C(8) of the Migration Act.



NOTIFICATION TO PARLIAMENT UNDER SECTION 501C(8)

I, Philip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs, having considered all representations made by or on behalf of the applicant in relation to a decision made by me under section 501(3) of the Act, hereby notify Parliament that I have decided to exercise my power under subsection 501C(4) of the *Migration Act 1958*, and my original decision

• ~~IS REVOKED~~

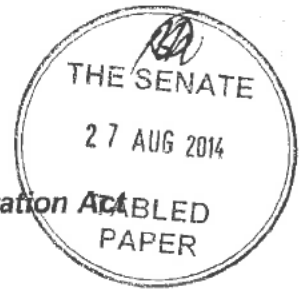
• IS NOT REVOKED

Dated this day 28th of May 2002

A large, handwritten signature in cursive, written in black ink. The signature is written over the date line and extends upwards and to the right.

Philip Ruddock
Minister for Immigration and Multicultural and Indigenous Affairs

Submission 5043
DATE PRESENTED 27 AUG 2014
Rosemary Lay



Notice of the making of a decision under section 501C of the *Migration Act 1958*

On 18 July 2014, acting under section 501C(4) of the *Migration Act 1958*, I decided not to revoke a decision made by me under section 501(3) of the *Migration Act 1958* on 13 June 2014.

Scott Morrison
Minister for Immigration and Border Protection

18 July 2014

Notice of the making of a decision under section 501C of the *Migration Act*
1958



Acting under section 501C of the *Migration Act 1958*, I have today decided [not] to
revoke a decision made under section 501(3) of the *Migration Act 1958*.

A handwritten signature in black ink, appearing to read "Peter Dutton".

Peter Dutton
Minister for Immigration and Border Protection
Date 13 April 2015.

**Notice of the making of a decision under section 501C of the *Migration Act*
1958**



Acting under section 501C(4) of the *Migration Act* 1958, I decided to revoke a decision made under section 501(3) of the *Migration Act* 1958.

A handwritten signature in cursive script, appearing to read "Peter Dutton".

PETER DUTTON
Minister for Immigration and Border Protection
28 / 08 /2015

**Notice of the making of a decision under section 501C of the *Migration Act*
1958**



Acting under section 501C(4) of the *Migration Act 1958*, I decided not to revoke a decision made under section 501(3) of the *Migration Act 1958*.

A handwritten signature in cursive script, appearing to read "Peter Dutton".

PETER DUTTON
Minister for Immigration and Border Protection
17/03/2016

Notice of persons not making representations about revocation of a decision under section 501(3) of the *Migration Act 1958*



Pursuant to section 501C(9) of the *Migration Act 1958*, notice is given that six persons whose visas were cancelled by me under subsection 501(3) of the Act did not make representations in accordance with the invitation given to them under section 501C(3).

A handwritten signature in black ink, appearing to read 'Peter Dutton'.

Peter Dutton
Minister for Immigration and Border Protection

12 October 2016



Notice of the making of a decision under section 501C of the *Migration Act 1958*

Acting under section 501C of the *Migration Act 1958*, I have today decided [not] to revoke a decision made under section 501(3) of the *Migration Act 1958*.

A handwritten signature in black ink, appearing to read "Peter Dutton".

THE HON PETER DUTTON MP
Minister for Immigration and Border Protection
Date: *18/07* 2017

Endnotes

- ¹ *Migration Act 1958* (Cth), ss 5H(2), 36(1C) and 36(2C).
- ² *Migration Act 1958* (Cth), ss 501(1), 501(2).
- ³ *Migration Act 1958* (Cth), s 501(6).
- ⁴ *Migration Act 1958* (Cth), ss 501(1), 501(2).
- ⁵ *Migration Act 1958* (Cth), s 501(5).
- ⁶ *Migration Act 1958* (Cth), s 501(3A).
- ⁷ *Migration Act 1958* (Cth), s 501(CA).
- ⁸ Minister for Immigration and Border Protection, *Direction No. 65 under section 499 of the Migration Act 1958 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (22 December 2014). At <https://www.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf> (viewed 28 March 2018).
- ⁹ Minister for Immigration and Border Protection, *Direction No. 65 under section 499 of the Migration Act 1958 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (22 December 2014), Section 2, Part A [9(1)], Part B [11(1)], Part C [13(2)]. At <https://www.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf> (viewed 28 March 2018).
- ¹⁰ Minister for Immigration and Border Protection, *Direction No. 65 under section 499 of the Migration Act 1958 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (22 December 2014), Section 2, Part A [10(1)], Part B [12(1)], Part C [14(1)]. At <https://www.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf> (viewed 28 March 2018).
- ¹¹ Minister for Immigration and Border Protection, *Direction No. 65 under section 499 of the Migration Act 1958 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (22 December 2014), Section 2, Part A [11(1)], Part C [14(1)]. At <https://www.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf> (viewed 28 March 2018).
- ¹² Minister for Immigration and Border Protection, *Direction No. 65 under section 499 of the Migration Act 1958 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (22 December 2014), Section 2, Part B [12(1)]. At <https://www.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf> (viewed 28 March 2018).
- ¹³ *Migration Act 1958* (Cth), s 500(1)(b).
- ¹⁴ *Administrative Appeals Tribunal Act 1975* (Cth), s 43(1).
- ¹⁵ *Migration Act 1958* (Cth), s 500(4A)(c).
- ¹⁶ *Migration Act 1958* (Cth), s 501CA.
- ¹⁷ *Migration Act 1958* (Cth), s 500(1)(ba).
- ¹⁸ *Migration Act 1958* (Cth), s 476.
- ¹⁹ *Migration Act 1958* (Cth), s 476A(b) and (c).
- ²⁰ This issue is considered in detail in the submission by the Australian Human Rights Commission to the Senate Legal and Constitutional Affairs Legislation Committee in relation to the Migration Amendment (Clarification of Jurisdiction) Bill 2018. At <https://www.aph.gov.au/DocumentStore.ashx?id=a62b50cc-c67f-4158-87a7-2f1e0b673175&subId=564701> (viewed 6 April 2018).
- ²¹ *Migration Act 1958* (Cth), ss 501A(2), 501A(3), 501A(4).
- ²² *Migration Act 1958* (Cth), ss 501A(5), 501A(6), 501A(7).
- ²³ *Migration Act 1958* (Cth), s 501B(2).
- ²⁴ *Migration Act 1958* (Cth), s 501B(5).
- ²⁵ *Migration Act 1958* (Cth), ss 501B(3), 501B(4).
- ²⁶ *Migration Act 1958* (Cth), s 501BA(2).
- ²⁷ *Migration Act 1958* (Cth), ss 501BA(4), 501BA(5).
- ²⁸ *Migration Act 1958* (Cth), s 501BA(3).
- ²⁹ *Migration Act 1958* (Cth), ss 501C(3), 501C(4).
- ³⁰ *Migration Act 1958* (Cth), ss 501C(5), 501C(11).
- ³¹ *Migration Act 1958* (Cth), s 116(1).
- ³² Migration Regulations 1994 (Cth), reg 2.43(1)(p)(ii).

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- ³³ Department of Home Affairs, *Bridging visa E – BVE (subclass 050-051)*. At <https://www.homeaffairs.gov.au/trav/visa-1/051-> (viewed 19 April 2018).
- ³⁴ Minister for Immigration and Border Protection, *Direction No. 63 under section 499 of the Migration Act 1958 – Bridging E visas- Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q)* (4 September 2014). In Commonwealth Ombudsman, *The administration of people who have had their Bridging Visa cancelled due to criminal charges or convictions and are held in immigration detention* (December 2016) 23–27. At https://www.ombudsman.gov.au/data/assets/pdf_file/0026/42596/December-2016_Own-motion-investigation-into-people-who-have-their-Bridging-visa-cancelled-following-criminal-charges.pdf (viewed 18 April 2018).
- ³⁵ Minister for Immigration and Border Protection, *Direction No. 63 under section 499 of the Migration Act 1958 – Bridging E visas- Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q)* (4 September 2014), Part 2 [5(2)]. In Commonwealth Ombudsman, *The administration of people who have had their Bridging Visa cancelled due to criminal charges or convictions and are held in immigration detention* (December 2016) 26. At https://www.ombudsman.gov.au/data/assets/pdf_file/0026/42596/December-2016_Own-motion-investigation-into-people-who-have-their-Bridging-visa-cancelled-following-criminal-charges.pdf (viewed 18 April 2018).
- ³⁶ Minister for Immigration and Border Protection, *Direction No. 63 under section 499 of the Migration Act 1958 – Bridging E visas- Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q)* (4 September 2014), Part 2 [6]. In Commonwealth Ombudsman, *The administration of people who have had their Bridging Visa cancelled due to criminal charges or convictions and are held in immigration detention* (December 2016) 26–27. At https://www.ombudsman.gov.au/data/assets/pdf_file/0026/42596/December-2016_Own-motion-investigation-into-people-who-have-their-Bridging-visa-cancelled-following-criminal-charges.pdf (viewed 18 April 2018).
- ³⁷ Minister for Immigration and Border Protection, *Direction No. 63 under section 499 of the Migration Act 1958 – Bridging E visas- Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q)* (4 September 2014), Part 2 [7]. In Commonwealth Ombudsman, *The administration of people who have had their Bridging Visa cancelled due to criminal charges or convictions and are held in immigration detention* (December 2016) 23–27. At https://www.ombudsman.gov.au/data/assets/pdf_file/0026/42596/December-2016_Own-motion-investigation-into-people-who-have-their-Bridging-visa-cancelled-following-criminal-charges.pdf (viewed 18 April 2018).
- ³⁸ *Migration Act 1958* (Cth), s 133C(3).
- ³⁹ *Migration Act 1958* (Cth), s 133C(4).
- ⁴⁰ *Migration Act 1958* (Cth), s 133C(1).
- ⁴¹ *Migration Act 1958* (Cth), s 338(3).
- ⁴² 1702551 (*Migration*) [2017] AATA 1415.
- ⁴³ Keith Moor, 'Administrative Appeal Tribunal overturns ministerial decision to deport Apex gang member' *Herald Sun* (online), 21 September 2017.
- ⁴⁴ *Migration Act 1958* (Cth), ss 13, 14, 501F. Under s 501F of the Migration Act, once a person's application for a visa is refused or their visa is cancelled under s 501, all visas issued to that person, except a Protection Visa or a type of visa specified in the *Migration Regulations 1994* (Cth) are cancelled, and all applications for visas other than a Protection Visa are deemed to be refused. There are currently no other visas specified in the Migration Regulations for the purposes of s 501F.
- ⁴⁵ *Migration Act 1958* (Cth), ss 189(1), 196(1), 198.
- ⁴⁶ *Migration Act 1958* (Cth), s 501E. Under s 501E(2), a person may still apply for a Protection Visa or a visa specified in the Migration Regulations. At the time of writing, the only visa specified in the Regulations was the 'removal pending' Bridging Visa R (see *Migration Regulations 1994* (Cth), reg 2.12AA). However, see s 48A of the Migration Act, which may prevent a person from making an application for a Protection Visa while in Australia if they have already had a Protection Visa application refused, or a Protection Visa cancelled.
- ⁴⁷ See Migration Regulations 1994 (Cth), Schedule 5, clause 5001(c) and (d). The effect of this clause is that a person who has been removed from Australia following cancellation of their visa under sections 501, 501A, 501B or 501BA, and has not subsequently had that cancellation revoked or been granted a visa by the Minister personally, will not be eligible to be granted any visa to which the 5001 criteria apply.
- ⁴⁸ *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth).

- ⁴⁹ Sections 202 and 203 of the *Migration Act 1958* (Cth) provide for deportation in a narrower range of cases: where a person had been the subject of an adverse security assessment by ASIO, or where the person had been convicted of a narrow range of very serious offences including treachery, sabotage, inciting mutiny, assisting prisoners of war to escape, treason, urging violence in certain contexts, advocating terrorism or advocating genocide.
- ⁵⁰ See *Migration Act 1958* (Cth), s 201.
- ⁵¹ Minister for Immigration and Multicultural Affairs, *General Direction No. 9 – Australia’s Criminal Deportation Policy* (21 December 1998) at [22(b)]. This direction is still in force.
- ⁵² Department of Home Affairs, *Procedures Advice Manual, PAM3: Act - Character and security - Criminal deportations*.
- ⁵³ See, for example, Commonwealth Ombudsman, *Administration of s 501 of the Migration Act 1958 as it applies to long-term residents* (February 2006) [2.10]. At http://www.ombudsman.gov.au/data/assets/pdf_file/0023/26267/investigation_2006_01.pdf (viewed 19 March 2018).
- ⁵⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12(4).
- ⁵⁵ United Nations Human Rights Committee, *General Comment No. 27: Article 12 (Freedom of Movement)*, 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [20].
- ⁵⁶ United Nations Human Rights Committee, *General Comment No. 27: Article 12 (Freedom of Movement)*, 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [20].
- ⁵⁷ *Nystrom v Australia*, Communication No. 1557/2007, UN Doc CCPR/C/102/D/1557/2007 (18 July 2011) [7.4]. See also *Warsame v Canada*, Communication No. 1959/2010, UN Doc CCPR/C/102/D/1959/2010 (21 July 2011) [8.5].
- ⁵⁸ United Nations Human Rights Committee, *General Comment No. 27: Article 12 (Freedom of Movement)*, 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [21].
- ⁵⁹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 11(1); *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 28(1).
- ⁶⁰ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 27(1).
- ⁶¹ Minister for Immigration and Border Protection, *Direction No. 65 under section 499 of the Migration Act 1958 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (22 December 2014), Section 2, Part A [10(2)], Part C [14(2)]. At <https://www.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf> (viewed 28 March 2018).
- ⁶² *Candemir and Minister for Immigration and Border Protection* [2017] AATA 531.
- ⁶³ Keith Moor, ‘Administrative Appeals Tribunal welcomes illegals, drug dealers to Australia’ *Herald Sun* (online), 17 May 2017.
- ⁶⁴ *Migration Act 1958* (Cth), s 501CA(4)(b)(ii).
- ⁶⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 23(1), 17(1); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 10(1); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 16(1).
- ⁶⁶ United Nations Human Rights Committee, *General Comment No. 16: (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation)*, 32nd sess, UN Doc HRI/GEN/1/Rev.9 (Vol I) (8 April 1988) [4].
- ⁶⁷ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 7(1), 8(1), 9(3), 10(2).
- ⁶⁸ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(1).
- ⁶⁹ See *Migration Regulations 1994* (Cth), Schedule 5, clause 5001(c) and (d). The effect of this clause is that a person who has been removed from Australia following cancellation of their visa under ss 501, 501A, 501B or 501BA, and has not subsequently had that cancellation revoked or been granted a visa by the Minister personally, will not be eligible to be granted any visa to which the 5001 criteria apply.
- ⁷⁰ See, for example, *Nystrom v Australia*, Communication No. 1557/2007, UN Doc CCPR/C/102/D/1557/2007 (18 July 2011) [7.7–7.11]; *Brown v Commonwealth of Australia* (*Department of Immigration and Citizenship*), Case No. AusHRC 51 (March 2012) [120–127].

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- ⁷¹ Minister for Immigration and Border Protection, *Direction No. 63 under section 499 of the Migration Act 1958 – Bridging E visas- Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q)* (4 September 2014), Part 2 [6]. In Commonwealth Ombudsman, *The administration of people who have had their Bridging Visa cancelled due to criminal charges or convictions and are held in immigration detention* (December 2016) 23–27. At https://www.ombudsman.gov.au/_data/assets/pdf_file/0026/42596/December-2016_Own-motion-investigation-into-people-who-have-their-Bridging-visa-cancelled-following-criminal-charges.pdf (viewed 18 April 2018); Minister for Immigration and Border Protection, *Direction No. 65 under section 499 of the Migration Act 1958 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (22 December 2014), Section 2, Part A [9(1)], Part B [11(1)], Part C [13(2)]. At <https://www.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf> (viewed 28 March 2018).
- ⁷² Minister for Immigration and Border Protection, *Direction No. 65 under section 499 of the Migration Act 1958 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (22 December 2014), Section 2, Part A [10(2)], Part B [12(2)], Part C [14(2)]. At <https://www.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf> (viewed 28 March 2018).
- ⁷³ Minister for Immigration and Border Protection, *Direction No. 63 under section 499 of the Migration Act 1958 – Bridging E visas- Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q)* (4 September 2014), Part 2 [7(1)(a)]. In Commonwealth Ombudsman, *The administration of people who have had their Bridging Visa cancelled due to criminal charges or convictions and are held in immigration detention* (December 2016) 27. At https://www.ombudsman.gov.au/_data/assets/pdf_file/0026/42596/December-2016_Own-motion-investigation-into-people-who-have-their-Bridging-visa-cancelled-following-criminal-charges.pdf (viewed 18 April 2018).
- ⁷⁴ *Bradley and Minister for Immigration and Citizenship* [2011] AATA 646.
- ⁷⁵ Keith Moor, 'Administrative Appeal Tribunal saves scores murderers, rapists, paedophiles from deportation', *Herald Sun* (online), 22 May 2017.
- ⁷⁶ Mr Bradley's visa cancellation occurred prior to the introduction of s 501(3A) of the *Migration Act 1958*, under which the Minister must cancel a person's visa if they are sentenced to a period of imprisonment of 12 months or more.
- ⁷⁷ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 33(1).
- ⁷⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37(a); *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 15(1).
- ⁷⁹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) art 3(1).
- ⁸⁰ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 33(2).
- ⁸¹ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 1(F).
- ⁸² Minister for Immigration and Border Protection, *Direction No. 63 under section 499 of the Migration Act 1958 – Bridging E visas- Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q)* (4 September 2014), Part 2 [7(1)(d)]. In Commonwealth Ombudsman, *The administration of people who have had their Bridging Visa cancelled due to criminal charges or convictions and are held in immigration detention* (December 2016) 23–27. At https://www.ombudsman.gov.au/_data/assets/pdf_file/0026/42596/December-2016_Own-motion-investigation-into-people-who-have-their-Bridging-visa-cancelled-following-criminal-charges.pdf (viewed 18 April 2018); Minister for Immigration and Border Protection, *Direction No. 65 under section 499 of the Migration Act 1958 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (22 December 2014), Section 2, Part A [10(1)], Part B [12(1)], Part C [14(1)]. At <https://www.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf> (viewed 28 March 2018).
- ⁸³ Minister for Immigration and Citizenship, *Direction No. 55 under section 499 of the Migration Act 1958 – Visa refusal and cancellation under s 501* (25 July 2012), Section 2, Part A [9(1)(d)] and Part B [11(1)(c)].

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- ⁸⁴ Minister for Immigration and Border Protection, *Direction No. 65 under section 499 of the Migration Act 1958 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (22 December 2014), Section 2, Part A [10.1(2)], Part B [12.1(2)] and Part C [14.1(2)]. At <https://www.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf> (viewed 28 March 2018).
- ⁸⁵ *Migration Act 1958* (Cth), s 197C(1).
- ⁸⁶ *Migration Act 1958* (Cth), s 197C(2).
- ⁸⁷ Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), Statement of Compatibility with Human Rights, p 7. At http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5346_ems_a065619e-f31e-4284-a33e-382152222022/upload_pdf/14209b01EM.pdf;fileType=application%2Fpdf (viewed 17 April 2018).
- ⁸⁸ Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, pp 7-10 [11]-[29]. At <https://www.humanrights.gov.au/submissions/migration-and-maritime-powers-legislation-amendment-resolving-asylum-legacy-caseload> (viewed 11 April 2018).
- ⁸⁹ Minister for Immigration and Border Protection, *Direction No. 65 under section 499 of the Migration Act 1958 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (22 December 2014), Section 2, Part A [10.1(6)], Part B [12.1(6)] and Part C [14.1(6)]. At <https://www.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf> (viewed 28 March 2018).
- ⁹⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9(1).
- ⁹¹ Human Rights Committee, *Van Alphen v Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (23 July 1990) [5.8]. At <http://www.refworld.org/docid/525414304.html> (viewed 7 December 2016); Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) [9.4]. At <http://www.refworld.org/docid/3ae6b71a0.html> (viewed 7 December 2016).
- ⁹² *Migration Act 1958* (Cth), s 189.
- ⁹³ *Migration Act 1958* (Cth), s 196.
- ⁹⁴ *Migration Act 1958* (Cth), s 197AB.
- ⁹⁵ Minister for Immigration and Border Protection, *Minister for Immigration and Border Protection's Residence Determination Power under section 197AB and section 197AD of the Migration Act 1958* (21 October 2017), section 10.
- ⁹⁶ Department of Home Affairs, *Key visa cancellation statistics* (n.d.). At <https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics> (viewed 16 April 2018).
- ⁹⁷ Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary* (31 December 2014) 6. At <http://www.homeaffairs.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-dec2014.pdf> (viewed 29 March 2018).
- ⁹⁸ Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (28 February 2018) 4. At <http://www.homeaffairs.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-28-feb-2018.pdf> (viewed 29 March 2018).
- ⁹⁹ Figures compiled from the Department of Home Affairs' immigration detention statistics summaries, available at <https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/live-in-australia/immigration-detention> (viewed 16 April 2018). Prior to July 2016, the Department did not publish specific statistics on visa cancellations under s 501. For the sake of consistency, the statistics on visa cancellations presented in this graph include people who have had visas cancelled on any grounds, not only those who have had visas cancelled under s 501.
- ¹⁰⁰ *Migration Act 1958* (Cth), s 196.
- ¹⁰¹ Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (28 February 2018) 11. At <http://www.homeaffairs.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-28-feb-2018.pdf> (viewed 29 March 2018).
- ¹⁰² *Migration Regulations 1994* (Cth), Schedule 2, clause 866.225, and Schedule 4, reg 1.03, Part 1.
- ¹⁰³ See, for example, *M.M.M. et al v Australia*, Communication No. 2136/2016, UN Doc CCPR/C/108/D/2136/2012 (25 July 2013) [10.3–10.4]; *F.K.A.G. et al v Australia*, Communication No. 2094/2011, UN Doc CCPR/C/108/D/2094/2011 (26 July 2013) [9.3–9.4].

- ¹⁰⁴ Minister for Immigration and Border Protection, *Direction No. 63 under section 499 of the Migration Act 1958 – Bridging E visas- Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q)* (4 September 2014), Part 2 [7(1)(d)]. In Commonwealth Ombudsman, *The administration of people who have had their Bridging Visa cancelled due to criminal charges or convictions and are held in immigration detention* (December 2016) 27. At https://www.ombudsman.gov.au/_data/assets/pdf_file/0026/42596/December-2016_Own-motion-investigation-into-people-who-have-their-Bridging-visa-cancelled-following-criminal-charges.pdf (viewed 18 April 2018).
- ¹⁰⁵ Minister for Immigration and Border Protection, *Direction No. 65 under section 499 of the Migration Act 1958 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (22 December 2014), Section 2, Part A [10.1(6)], Part B [12.1(6)] and Part C [14.1(6)]. At <https://www.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf> (viewed 28 March 2018).
- ¹⁰⁶ Human Rights Committee, *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add. 13 (26 May 2004), [6]. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en (viewed 26 April 2018). See also UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4Annex (28 September 1984). At <http://www.refworld.org/docid/4672bc122.html> (viewed 26 April 2018).
- ¹⁰⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 2014, 10325–10327 (Scott Morrison).
- ¹⁰⁸ For example, articles 18(3), 21 and 22 of the ICCPR permit the limitation of the rights to freedom of religion, assembly and association in order to protect national security, public safety, public order, public health or morals, or the rights and freedoms of others.
- ¹⁰⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2(3).
- ¹¹⁰ *Bui and Minister for Immigration and Border Protection (Migration)* [2017] AATA 1330
- ¹¹¹ Keith Moor, 'Administrative Appeals Tribunal overturns more criminal visa decisions', *Herald Sun* (online), 28 September 2017.
- ¹¹² *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth), Sch 1, clauses 8, 10–16.
- ¹¹³ Department of Home Affairs, *Key visa cancellation statistics* (n.d.). At <https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics> (viewed 16 April 2018).
- ¹¹⁴ Department of Immigration and Border Protection, information released under the *Freedom of Information Act 1982*, 31 March 2016. At <https://www.homeaffairs.gov.au/AccessandAccountability/Documents/FOI/20160722-FA151100966-Documents-Released.pdf> (viewed 29 March 2018).
- ¹¹⁵ Department of Home Affairs, *Key visa cancellation statistics* (n.d.). At <https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics> (viewed 16 April 2018).
- ¹¹⁶ *Migration Act 1958* (Cth), s 501CA.
- ¹¹⁷ Department of Immigration and Border Protection, information released under the *Freedom of Information Act 1982*, 31 March 2016. At <https://www.homeaffairs.gov.au/AccessandAccountability/Documents/FOI/20160722-FA151100966-Documents-Released.pdf> (viewed 29 March 2018).
- ¹¹⁸ Department of Immigration and Border Protection, information released under the *Freedom of Information Act 1982*, 31 March 2016. At <https://www.homeaffairs.gov.au/AccessandAccountability/Documents/FOI/20160722-FA151100966-Documents-Released.pdf> (viewed 29 March 2018). *Migration Regulations 1994* (Cth), reg 2.52(2)(b).
- ¹¹⁹ Department of Home Affairs, *Key visa cancellation statistics* (n.d.). At <https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics> (viewed 16 April 2018).
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