



JOINT STANDING COMMITTEE ON MIGRATION

SUBMISSION ON REVIEW PROCESSES ASSOCIATED WITH VISA CANCELLATIONS MADE ON CRIMINAL GROUNDS

The Refugee Council of Australia (RCOA) is the national peak body for refugees, people seeking asylum and the organisations and individuals who work with them, representing over 190 organisations. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, people seeking asylum and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback on the review processes of visa cancellations made on criminal grounds. We have significant concerns about the adequacy and efficiency of these processes, and their impacts on people who need our protection.

RCOA has expressed its grave concerns relating to visa cancellations several times, especially since the introduction of legislation in 2014 that greatly increased the scope and effect of visa cancellations. As part of its work, RCOA helped form a Working Group on Visa Cancellations, which includes a broader range of stakeholders including migration agents, lawyers, and community groups and advocates. We have participated in the drafting of its separate submission and endorse its contents and recommendations.

In this submission, we wish to highlight the particular effect of visa cancellations made on criminal grounds on people who need our protection. This includes people on refugee, protection or humanitarian visas, and those who may be on other visas but have grounds to fear persecution upon return to their country of origin.

1 Effect on people in need of protection

The consequences of the visa cancellations regime

1.1 On 10 December 2014, Parliament passed the *Migration Amendment (Character Test and Visa Cancellation) Act* (2014 Act). The Act expanded the powers of the government to cancel visas, including through extension of the power under s 501 of the *Migration Act* to cancel visas on 'character' grounds, including because of past convictions.

1.2 The Refugee Council of Australia opposed the passage of this Act in its submission to the Senate Legal and Constitutional Affairs Committee, stating:

In particular, we believe that the Bill would allow visas to be cancelled unjustly or unnecessarily, potentially resulting in prolonged indefinite detention; provide the Minister with an inappropriate level of discretion to refuse or cancel visas and overturn decisions of tribunals; and permit sharing of sensitive information without due regard for privacy concerns. We also question the need for the proposed changes given that the Minister already has considerable existing powers to cancel visas under the Migration Act 1958.¹

1.3 We and other submitters, including the Australian Human Rights Commission,² raised the following concerns:

- The very real risk of prolonged indefinite detention, especially in relation to refugees who cannot be removed to their country of origin due to the risk that they may face persecution or other forms of serious harm in their country of origin, and stateless people who have no country which is obliged to accept them.
- The mandatory nature of the visa cancellation powers, which significantly decreases the capacity of the system to consider the individual circumstances of a case before a person is detained
- The very low thresholds for visa cancellation, which trigger visa cancellations even in the absence of a real risk to the community, and
- The continued trend towards increasing the personal discretionary powers of the Minister, including to reverse carefully made decisions by merits review tribunals.

Particular effect on people in need of protection

1.4 For refugees and people seeking asylum, the visa cancellations regime has more profound implications. Many people seeking asylum have already experienced prolonged indefinite detention at the hands of the executive. They are less likely to have strong support networks or access to good legal advice. Many in this group are disadvantaged because they are less likely to have the advanced English skills required to navigate the complex process.

1.5 We also observe that s 501(3A) requires mandatory cancellation of a visa where a person has committed an offence in, or while or after escaping immigration detention. This applies no matter how trivial the offence may be. This disproportionately punishes those in immigration detention, including people seeking asylum.

1.6 Returning refugees and people seeking asylum to their country of origin would be a breach of the Australian Government's international non-refoulement obligations. We note, however, that they could be removed in breach of those obligations as contemplated by s 197C of the *Migration Act*.

1.7 Ministerial Direction No. 65 guides decision-makers exercising the powers under s 501. It includes a list of primary and 'other' considerations for them to consider. International non-refoulement obligations are not primary considerations, but only 'other' considerations. The Direction expressly states that the existence of such obligations does not preclude a person from having their visa cancelled, because Australia will not remove them to a country in respect of whom the non-refoulement obligation exists.³

1.8 The Direction also provides that, if a person raises concerns about refoulement during the process, it is unnecessary to determine if those obligations are owed because a person can apply

¹ Refugee Council of Australia, *Submission on the Migration Amendment (Character and General Visa Cancellation) Bill 2014* (Submission, 4 March 2016) <<https://www.refugeecouncil.org.au/r/sub/1410-Character.pdf>>.

² Australian Human Rights Commission, *Inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014* (28 October 2014) <<https://www.aph.gov.au/DocumentStore.ashx?id=4944bb0c-8949-4295-a250-bb5fe185e5c7&subId=301394>>.

³ Direction No. 65 22 December 2014 (Cth), [10.1].

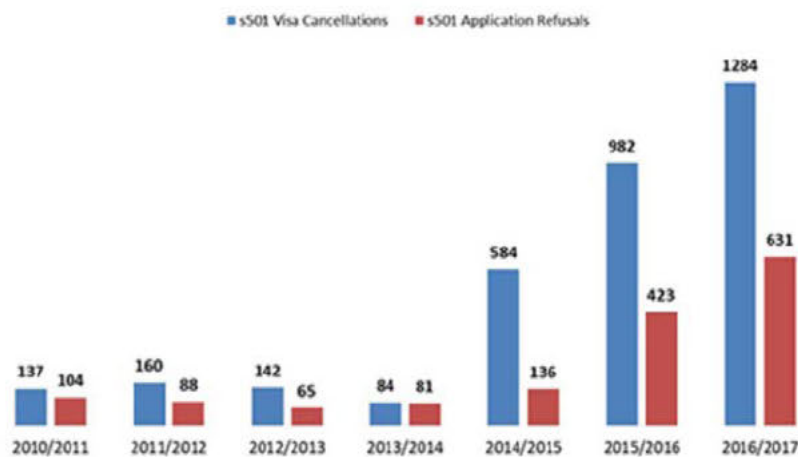
for a protection visa under s 501E. This does not apply if the visa being cancelled is a protection visa, because they are barred from making another application for a protection visa under the *Migration Act*. The decision-maker is required instead to seek an international treaty obligations assessment (ITOA) because of the risk of indefinite detention. Nevertheless, the Direction only requires a careful assessment of those obligations, and it is clear from the terms of the Direction that a person could validly have their visa cancelled and remain in indefinite detention as a consequence.⁴

1.9 An international treaty obligations assessment (ITOA) is a non-statutory process, conducted by a departmental officer. No interview is required in this process and the safeguards afforded in a statutory protection process, including access to merits review of this decision, do not apply. The Full Federal Court, however, has determined that procedural fairness does apply.⁵

1.10 Since the enactment of the 2014 Act, the Federal Court has considered a number of cases involving potential breaches of non-refoulement obligations. In general, the Court has sustained the general position indicated in the Direction, so that the legal consequences of indefinite detention must be considered only where the person cannot apply for a protection visa.⁶

Numbers of people affected

1.11 What we feared in 2014 has come to pass. There has been an explosive growth in s 501 cancellations, as is illustrated by the Department of Home Affairs's graph below:⁷



1.12 There has also been a comparable increase in recent years of people on protection or refugee visas whose visas have been cancelled under s 501. While fewer than five people on such visas had their visas cancelled under s 501 in the years before 2014-2015, those numbers have now risen considerably, as shown below:⁸

| Visa category | Protection | Refugee** |
|---------------|------------|-----------|
| 2010-11 | <5 | <5 |
| 2011-12 | <5 | <5 |

⁴ Direction No. 65 22 December 2014 (Cth), [10.1].

⁵ *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33.

⁶ *Minister for Immigration and Border Protection v Le* (2016) 244 FCR 56, [61] and cases cited therein.

⁷ 'Key visa cancellation statistics' *Department of Home Affairs* <<https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics>>. The graph shows figures up until 31 December 2017.

⁸ Question on Notice, Senate Estimates (Additional), AE18/084,

<<https://www.aph.gov.au/api/qon/downloadattachment?attachmentId=04727c4b-9dc8-4535-8f4f-0a76fb2437a3>>.

| Visa category | Protection | Refugee** |
|-------------------|------------|-----------|
| 2012-13 | 0 | <5 |
| 2013-14 | <5 | <5 |
| 2014-15 | <5 | 34 |
| 2015-16 | 18 | 45 |
| 2016-17 | 28 | 98 |
| 2017-18 (Jul-Feb) | 14 | 30 |

1.13 We also note that cancellations of visas under other grounds of the *Migration Act* for refugees have increased significantly during this period as well. The following table shows the total number of visas cancelled for those on protection and refugee visas by financial year, inclusive of all visa cancellations grounds.⁹

| Financial year | Protection | Refugee** |
|-------------------|------------|-----------|
| 2010-11 | <5 | 22 |
| 2011-12 | 8 | 15 |
| 2012-13 | 13 | 29 |
| 2013-14 | 18 | 54 |
| 2014-15 | 43 | 81 |
| 2015-16 | 118 | 118 |
| 2016-17 | 259 | 198 |
| 2017-18 (Jul-Feb) | 130 | 148 |

1.14 As at 28 February 2018, there were 124 people whose refugee or protection visas had been cancelled (on any of the available grounds) and were held in immigration detention facilities. Including those with bridging visas E (typically given to people seeking asylum who have come by boat), there were 166 refugees or people seeking asylum in held or community detention as a result of a visa cancellation.¹⁰

1.1 These 166 people are a very significant proportion of the 488 people overall in detention at 28 February 2018 as a result of a s 501 visa cancellation.¹¹ According to the Department of Home Affairs, from July to 30 September 2017 the average annualised cost of one person being held in immigration detention in Australia is \$346,178 (excluding departmental operational capital expenditure).¹²

Time spent in detention

1.2 For all people whose visas have been mandatorily cancelled under s 501, the average time spent in detention appears to be increasing significantly. On 29 February 2016, those waiting for a decision on revocation had been waiting for an average of 153 days in detention.¹³ On 17 October

⁹ Question on Notice, Senate Estimates (Additional), AE18/084,

<<https://www.aph.gov.au/api/qon/downloadattachment?attachmentId=04727c4b-9dc8-4535-8f4f-0a76fb2437a3>>.

¹⁰ Question on Notice, Senate Estimates (Additional), AE18/084,

<<https://www.aph.gov.au/api/qon/downloadattachment?attachmentId=04727c4b-9dc8-4535-8f4f-0a76fb2437a3>>.

¹¹ Department of Home Affairs, *Immigration and Community Detention Statistics Summary* (28 February 2018)

<<https://www.homeaffairs.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-28-feb-2018.pdf>>.

¹² Question taken on notice, Senate Estimates, SE17/215,

<<https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId6-EstimatesRoundId1-PortfolioId13-QuestionNumber214>>.

¹³ Commonwealth Ombudsman, *The Administration of Section 501 of the Migration Act 1958* (No 8, December 2016)

<http://www.ombudsman.gov.au/_data/assets/pdf_file/0027/42597/Own-motion-report-into-the-Administration-of-Section-of-the-Migration-Act-1958-final.pdf>, [1.4].

2016, they spent on average 274 days in detention.¹⁴ This increased to 298 days by 17 March 2017.¹⁵

1.3 The average time people seeking asylum or refugees had spent in detention was even longer, at an extraordinary 416 days.¹⁶ This is likely to be caused by the fact that such people cannot be returned to their country of origin. The result is that these people face prolonged and indefinite detention.

Non-refoulement obligations should preclude visa cancellation

1.4 If non-refoulement obligations are owed (whether or not a person has a refugee or protection visa that is cancelled), then the legal consequence is that the person remains indefinitely detained. This cannot serve any effective purpose in respect of deportation or removal. The purpose of protection of the community, including general and specific deterrence, has already been considered carefully through the process of criminal sentencing.

1.5 Therefore, detention of a person who is owed non-refoulement obligations serves no legitimate purpose. The perverse consequence is that, in the name of respecting its legal non-refoulement obligations, the Australian Government is also in serious breach of other important international legal obligations.

1.15 Most obviously, indefinite detention in these circumstances is a flagrant breach of Article 9 of the International Covenant on Civil and Political Rights (ICCPR), protecting against arbitrary deprivations of liberty. The UN Human Rights Committee has addressed this issue explicitly in General Comment No. 35:

When a criminal sentence includes a punitive period followed by a nonpunitive period intended to protect the safety of other individuals, then once the punitive term of imprisonment has been served, to avoid arbitrariness the additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of committing similar crimes in the future. States should only use such detention as a last resort, and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified. State parties must exercise caution and provide appropriate guarantees in evaluating future dangers. The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainees' rehabilitation and reintegration into society. If a prisoner has fully served the sentence imposed at the time of conviction, articles 9 and 15 prohibit a retroactive increase in sentence, and a State party may not circumvent this prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention.¹⁷

1.16 The consequence of breaching Article 9 was clearly pointed out by the Australian Human Rights Commission in its submission on the 2014 Act, along with other likely breaches of our obligations in respect of family life and the best interests of the children.¹⁸

¹⁴ Question on Notice, Senate Estimates, SE16/133,
<http://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/legconctte/estimates/sup1617/DIBP/index>.

¹⁵ Question on Notice, Senate Estimates, AE17/153,
<https://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/legconctte/estimates/add1617/DIBP/index>.

¹⁶ Question on Notice, Senate Estimates (Additional), AE18/084,
<<https://www.aph.gov.au/api/qon/downloadattachment?attachmentId=04727c4b-9dc8-4535-8f4f-0a76fb2437a3>>.

¹⁷ UN Human Rights Committee, *General Comment No. 35 (Article 9: Liberty and Security of the Person)* (CCPR/C/GC/35, 2014), [21].

¹⁸ *Inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014* (28 October 2014)
<<https://www.aph.gov.au/DocumentStore.ashx?id=4944bb0c-8949-4295-a250-bb5fe185e5c7&subId=301394>>, [16].

Recommendation 1

The Migration Act should be amended to prohibit the cancellation of visas for people who are owed non-refoulement obligations.

2 Inefficiencies and duplication of the review process

The existing review process

2.1 The review scheme for decisions under s 501 of the *Migration Act* is complex. Depending on the subsection under s 501 being exercised, there are differences in terms of:

- Whether the person is provided an opportunity to comment or given information or details
- Whether the decision is discretionary or mandatory
- Timelines to apply for revocation of mandatory cancellations
- Which decision makers are allowed to make decisions
- Access to merits review, and
- The power of the Minister to overturn the decision of the tribunal or delegate.

2.2 The following table sets out the different review processes that exist in relation to each subsection of s 501:¹⁹

| Scenario | Section | Outcome | Notes |
|--|------------|---|---|
| Your client does not satisfy the Minister that they pass the character test – s.501(1). | 501(1) | Possible refusal. | <ul style="list-style-type: none"> Your client will be given an opportunity to comment prior to the decision. |
| The Minister reasonably suspects your client does not pass the character test, and your client does not satisfy him that they do. | 501(2) | Possible cancellation. | <ul style="list-style-type: none"> Your client will be given an opportunity to comment prior to the decision. |
| The Minister reasonably suspects your client doesn't pass the character test and is satisfied that the decision is in the national interest. | 501(3) | Possible refusal or cancellation. | <ul style="list-style-type: none"> Your client will not be given an opportunity to comment prior to the decision, and may not be given details of why the decision was made. Your client can request that the decision be revoked (meaning reconsidered). Your client must request revocation within 7 days of receiving notice of cancellation. If the Minister or Assistant Minister makes a personal decision <i>not</i> to revoke the cancellation, your client will not have access to merits review. The decision can only be overturned if there was jurisdictional error. |
| Your client does not pass the character test because of their substantial criminal record or conviction for sexually based offences regarding a child, and your client is serving a full-time sentence of imprisonment. | 501(3A) | Mandatory cancellation. | <ul style="list-style-type: none"> Your client will not be given an opportunity to comment prior to the decision. Your client can request that the decision be revoked (meaning reconsidered). Your client must request revocation within 28 days of receiving notice of cancellation. If a delegate of the Minister makes a decision <i>not</i> to revoke the cancellation, your client can appeal to the Administrative Appeals Tribunal. If the Minister or Assistant Minister makes a personal decision <i>not</i> to revoke the cancellation, your client will not have access to merits review. The decision can only be overturned if there was jurisdictional error, or potentially if a Minister makes a different decision. If a delegate or the Tribunal decide to revoke the cancellation, the Minister can overrule that decision if he is satisfied that the cancellation is in the national interest. |
| A delegate of the Minister or the Tribunal decides <i>not</i> to refuse or cancel your client's visa under s.501(1) or (2). | 501A and B | The Minister can overrule that decision. | <ul style="list-style-type: none"> If the Minister is satisfied that refusal or cancellation is in the national interest, he or she may personally refuse or cancel your client's visa. Your client can request that the Minister's decision be revoked (meaning reconsidered). Your client must request revocation within 7 days of receiving notice of cancellation. Your client will not have access to merits review. The decision can only be overturned by a court if there was jurisdictional error, or potentially if a Minister makes a different decision. |
| A delegate of the Minister decides to cancel or refuse your client's visa under s.501(1) or (2). | | | |
| The Tribunal makes a decision in relation to application for or cancellation of a protection visa. | 501J | The Minister can substitute a more favourable decision. | <ul style="list-style-type: none"> If the Minister considers that it is in the public interest to do so, the Minister may set aside the Tribunal's decision and substitute a more favourable decision. |
| If information about your client resulting in possible refusal or cancellation has been supplied by law enforcement agencies or is confidential | 503A | Your client may not be given relevant information. | |

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¹⁹ Law Institute of Victoria, *Refusals and Cancellations under s 501: Information for Criminal Lawyers* (No Factsheet, February 2018) <<https://www.refugeecouncil.org.au/wp-content/uploads/2018/02/Section-501-Information-for-Criminal-Lawyers.pdf>>.

The problems

2.3 The current review processes are highly inefficient, especially in the consequence of prolonged indefinite detention, including of vulnerable people. The causes of this inefficiency and duplication include:

- Duplication of previous criminal processes
- Duplication of visa processes
- The removal of discretion in the original decision-making processes in s 501(3A)
- The transfer of original decision-making power from delegates to the Minister personally
- The transfer of the power of review from the Tribunal to the Minister
- The power of the Minister to overturn decisions of delegates and the Tribunal, and
- The shift from review by the Administrative Appeals Tribunal to the courts.

Duplication of criminal law and inequality of law

2.4 The visa cancellation process is itself duplicative, because the considerations relevant to the protection of the community, the risk of re-offending, and the seriousness of offences have already been considered by a criminal court. Criminal courts have access to all the evidence, have great experience in determining sentencing, and have the advantage of a well-developed fair criminal process.

2.5 Indeed, the changes to the visa cancellations law will make criminal law itself more inefficient. For example, many people are incentivised in the criminal system to plead guilty, which is key to making criminal justice more efficient. However, if a person is (correctly) advised that the consequence of even a minor offence will result in prolonged and indefinite detention, this will discourage a person from resolving their status quickly through the criminal courts.

2.6 The re-examination of all of these factors by an executive is not only duplicative and inefficient, but it also undermines one of the key principles of the rule of law, namely equality before the law. The simple fact is that non-citizens, by virtue solely of their migration status, are in effect punished twice because they are detained by the executive after their sentence is complete.

Duplication of visa processes

2.7 As discussed above, if people raise non-refoulement obligations in the course of a visa being cancelled, those who have a visa other than a protection visa can apply for a protection visa. Non-refoulement obligations are therefore not considered in the process of cancelling such visas.

2.8 This is clearly duplicative and inefficient, because such people will remain detained while they begin another visa application process. A much more efficient system would recognise that, if a person is owed non-refoulement obligations and cannot therefore be returned, then the cancellation of the visa serves no effective purpose and, ironically, would amount to a clear breach of our international obligations.

Removal of discretion in original decision

2.9 In general, legal processes are most efficient where the original decision-making process is robust, enables an examination of all relevant circumstances, and affords procedural fairness. Such a decision will be better informed, fairer, much less expensive than a court decision, and ultimately results in efficiencies in the review process because decisions will be more defensible. This basic principle underpins the rest of our review and appeal schemes to maximise both fairness and efficiency.

2.10 The efficiency of review processes cannot be assessed in isolation from the original decision-making process. The mandatory visa cancellation powers result in highly inefficient review

processes because there is no substantive consideration of relevant factors at the time the visa is cancelled. The result is that all of the considerations then fall to be considered at a (much) later stage of revocation, review and ultimately judicial review. This is a very inefficient use of resources, particularly given the cost of holding these people in detention.

Personal ministerial decisions

2.11 The inefficiency of review processes is especially marked because much of the prolonged delay arises from the fact that the Minister personally makes cancellation decisions or revocations in many cases. From 2014-2015 to 30 September 2017, the Minister personally made 199 decisions to cancel a visa under s 501.²⁰ In a 2016 report on the administration of s 501 cancellations, the Ombudsman reported that the Minister personally makes all decisions to revoke cancellations, as well as most cancellations. At 27 April 2016, the Minister had 492 requests for revocation before him, which was 75% of the total. The Assistant Minister had 12% of the cases and the Department only 13%. This is clearly a major source of delay and inefficiency.²¹

2.12 While we do not have current statistics on the delays caused by the revocation process, it is clear from the Ombudsman's report that this was a significant factor in the prolonged detention experienced by many people. In the period 1 January 2014 to 1 March 2016, 66% (805) of individuals whose visas had been cancelled under s 501(3A) sought revocation of the decision, but by 1 March 2016 only 178 of these had been finalised and 78% of revocation requests were pending.²² The average time required to process the request was 153 days on 29 February 2016, with 158 cases where people had waited for at least six months and 21 cases where people spent 12 months or more waiting for an outcome.²³

2.13 The general principle of administrative efficiency requires delegation to the appropriate level of decision-making. The continual expansion of the Minister's personal powers and discretions has led to an untenable situation in which the unavoidable delays in the Minister exercising those powers lead to people being deprived of their liberty unnecessarily. The Refugee Council of Australia is aware of other ministerial decisions that are delayed, such as the renewal of bridging visas, that have the effect of leaving highly vulnerable people either in detention or living unlawfully, through no fault of their own, in the community.

2.14 The ability of the Minister to substitute his own decision for that of delegates or the Administrative Appeals Tribunal is also administratively inefficient and duplicative. The Administrative Appeals Tribunal is a generalist merits review tribunal that routinely reviews the merits of many government decisions. It exists partly because such tribunals are much more efficient in reviewing government decisions than relying on the courts, but also because it is more appropriate for an independent body to review government decisions than to entrust such decisions to a politician.

2.15 In this context, we note that the reputation for independence of the Administrative Appeals Tribunal could be improved. Under both Liberal and Labor governments, the appointments of

²⁰ 2017-18 Supplementary budget estimates, Legal and Constitutional Affairs Committee, Immigration and Border Protection Portfolio, Question on notice no. 221, Portfolio question number: SE17/222, <<https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-Committeeld6-EstimatesRoundld1-Portfoliold13-QuestionNumber221>>.

²¹ Commonwealth Ombudsman, *The Administration of Section 501 of the Migration Act 1958* (No 8, December 2016) <http://www.ombudsman.gov.au/__data/assets/pdf_file/0027/42597/Own-motion-report-into-the-Administration-of-Section-of-the-Migration-Act-1958-final.pdf>, [4.16].

²² Commonwealth Ombudsman, *The Administration of Section 501 of the Migration Act 1958* (No 8, December 2016) <http://www.ombudsman.gov.au/__data/assets/pdf_file/0027/42597/Own-motion-report-into-the-Administration-of-Section-of-the-Migration-Act-1958-final.pdf>, [3.2]-[3.3].

²³ Commonwealth Ombudsman, *The Administration of Section 501 of the Migration Act 1958* (No 8, December 2016) <http://www.ombudsman.gov.au/__data/assets/pdf_file/0027/42597/Own-motion-report-into-the-Administration-of-Section-of-the-Migration-Act-1958-final.pdf>, [3.5].

people with links to the governing party and the refusal to renew appointments of unpopular members have undermined the perception of independence of the Tribunal. For example, the appointments to the AAT at the end of the 2017 financial year raised serious (albeit longstanding) concerns about the politicisation of the Tribunal.²⁴ Such politicisation should be remedied, as in the UK, through an independent appointments body that will take these decisions out of the hands of a government that is all too easily frustrated by limitations on its power.²⁵

2.16 This is consistent with the well-established political and constitutional principle of separation of powers, which recognises the potential for the conflict of interest in political decision-making. The existence of a robust merits review process, and access to the courts to review government decisions, also goes to the heart of the rule of law.

2.17 The rule of law requires that people are not detained by the caprice of the Minister. This is exactly what is happening as a result of the transfer of decision-making and review powers to the Minister. The rule of law also requires that all government decisions should be subject to the supervision of the courts, to ensure the legality of such decision-making.

2.18 The principle of the rule of law is even more flagrantly breached by the provisions of the Act which enable the Minister to overturn the decisions of the Administrative Appeals Tribunal and to remove the right to merits review by making a personal decision. Effectively, a person's right to liberty and to remain in a country, often with family, is now dependent on the whim of one man, not the rule of law.

2.19 Of even greater concern is the well-founded perception that the Minister is using such decisions for political advantage. The Minister has conducted numerous radio interviews boasting of his record on visa cancellations,²⁶ and is also on record criticising the Administrative Appeals Tribunal.²⁷ The former Attorney-General, George Brandis, observed before he left office:

*I have not disguised my concern that attacks upon the institutions of the law, upon the courts and those who practice in them. To attack those institutions is to attack the rule of law itself and it is for the Attorney-General always to defend the rule of law, sometimes from political colleagues who fail to understand it or are impatient of the limitations it may impose upon executive power.*²⁸

2.20 Limitations on executive power are a crucial element of a well-functioning democracy. They are not inefficiencies but rather important democratic safeguards, especially where those affected are vulnerable minorities, as in this case. In this respect, while the rule of law may mean that individual decision-making may take longer, overall the rule of law is efficient because it preserves the respect for the law that sustains a democracy.

²⁴ Michael Koziol, 'George Brandis clears out 'infuriating' Administrative Appeals Tribunal' *Sydney Morning Herald* (28 June 2017) <<http://www.smh.com.au/federal-politics/political-news/george-brandis-clears-out-infuriating-tribunal-20170628-gx0711.html>>.

²⁵ *Judicial Appointments Commission* <<https://jac.judiciary.gov.uk/>>.

²⁶ See, eg, 'Dutton chokes back tears over one-punch attack victim' *SBS News* (8 February 2018) <<https://www.sbs.com.au/news/dutton-chokes-back-tears-over-one-punch-attack-victim>>; Ray Hadley, *Interview with Ray Hadley, Radio 2GB-4BC* (5 April 2018) <<http://minister.homeaffairs.gov.au/peterdutton/Pages/Hadley-Ray.aspx>>; Eddie McGuire, *Interview on Triple M, 'The Hot Breakfast', Melbourne* <<http://minister.homeaffairs.gov.au/peterdutton/Pages/triple-m-070318.aspx>>; *Interview with Ray Hadley, Radio 2GB-4BC* (8 March 2018) <<http://minister.homeaffairs.gov.au/peterdutton/Pages/Had-Int.aspx>>; *Interview with Ray Hadley, Radio 2GB-4BC* <<http://minister.homeaffairs.gov.au/peterdutton/Pages/Hadley-R.aspx>>.

²⁷ Josh Butler, 'Law Council Slaps Down Peter Dutton Over Court Criticisms' *Huffington Post* (17 May 2017) <https://www.huffingtonpost.com.au/2017/05/17/law-council-slaps-down-peter-dutton-over-court-criticisms_a_22094642/>.

²⁸ Michael Koziol, 'George Brandis takes a swipe at Peter Dutton and 'right wing politics' in farewell speech' *The Sydney Morning Herald* (7 February 2018) <<https://www.smh.com.au/politics/federal/george-brandis-takes-a-swipe-at-peter-dutton-and-right-wing-politics-in-farewell-speech-20180206-p4yzi5.html>>.

2.21 Parliament and the courts play a critical role in scrutinising and checking the power of the executive. Nowhere is this more significant than when a person is being deprived of liberty by the executive. This role is even more significant where the person is a refugee or is seeking asylum, where that person cannot be returned to a country without breaching our international legal obligations.

Shifting the focus to the courts

2.22 The reduction of power at the delegate and Tribunal level has had the natural consequence of meaning more people are contesting their visa cancellations in the courts, which as part of their constitutional role retain the right to review decisions for jurisdictional error. As part of its work, the Refugee Council of Australia has been maintaining a database on visa cancellation decisions in the courts.²⁹ While not comprehensive, there are at least 23 Full Federal Court case decisions and 85 decisions at the Federal Court level in relation to visa cancellations. In at least four cases at the Full Federal Court, and 19 at the Federal Court, the Minister did not succeed.

2.23 Identifying jurisdictional error is very difficult, and virtually impossible without legal representation. Most people in this situation will struggle to afford legal representation, and pro bono support for refugees is also under severe strain because of competing demands in the asylum context. Courts do not have the right to review the merits of the decision, and the legislation is tightly framed to mitigate the risk of judicial review, so the success rate must be read in this context.

2.24 It is obviously inefficient to move resources from the primary decision at a departmental level to the much more expensive court system. More importantly, it is highly inefficient for those whose visas are cancelled, as they have to spend years in detention to resolve cases.

3 Scope of AAT to review ministerial decisions

3.1 We also take the opportunity to express concern about the third term of reference, the non-existent scope of the AAT to review ministerial decisions under s 501. We have set out the following table illustrating how the Minister's personal decision trumps that of the independent administrative tribunal in all cases under s 501.

| Power | Minister's role | AAT scope of review |
|----------------|--|---|
| S 501(1), (2) | If delegate makes decision, Minister can substitute own decision to refuse or cancel a visa (s 501B(2), (3)) | No AAT review if Minister substitutes own decision, even if subject to application before AAT before decision is substituted (s 501B(4), (5)) |
| S 501(3), (3A) | Minister personally makes the decision and can consider revoking it (s 501C, s 501CA) | No AAT review if Minister does not revoke (no jurisdiction over the making of the decision either) (s 501C(11), s 501CA(7)) |

3.2 As set out in the table above, if the Minister personally makes or substitutes his own decision for that of a delegate or the AAT, that decision is not subject to merits review by the AAT. Even if the AAT decides to affirm a cancellation of a visa, the Minister can set this aside for a more favourable decision under s 501J of the Act.

²⁹ 'Visa cancellations cases' *Refugee Council of Australia* <<https://www.refugeecouncil.org.au/resources/visa-cancellations-cases/>>.

3.3 As noted above, the ability of the Minister to personally trump the AAT in all cases involving s 501 is administratively inefficient and duplicative. More importantly, it goes to the heart of the rule of law. This is yet another instance of the extraordinary powers of the Minister.³⁰ These do not exist in any other area of administrative law and would not be accepted if exercised over Australian citizens.

3.4 These extraordinary powers effectively excise the general principle of merits review for this group of vulnerable people. All people, no matter their visa status, deserve the equal protection of our laws. This is especially so when those laws affect people who may have been living in Australia for most of their lives, and who have family in Australia.

3.5 The effects of these powers are especially draconian for people who came to Australia seeking safety and protection. Detention, and the fear of detention, can have profound consequences for their mental and physical health. Tragically and perversely, by attempting to honour its international legal obligations to protect such people from persecution or other serious harm, the Australian Government is breaching other important legal obligations by subjecting them to arbitrary detention, without due process or the equal protections of the law.

Recommendation 2

The Migration Act should be amended to streamline the process of visa cancellations under s 501 by:

- (a) Ensuring a robust initial decision-making process by the Department of Home Affairs, including through ensuring procedural fairness by enabling them to know and address the evidence against them*
- (b) Ensuring adequate timelines for review and appeal*
- (c) Restoring full merits review to the Administrative Appeals Tribunal, in accordance with general principles of administrative law*
- (d) Restoring the jurisdiction of the courts to review decisions according to the general administrative law grounds available under the Administrative Decisions (Judicial Review) Act, and*
- (e) Removing the extraordinary powers of the Minister to make personal decisions and to substitute his or her own decision for that of a delegate or Tribunal, other than where the decision is more favourable to the person involved.*

³⁰ Liberty Victoria's Rights Advocacy Project, *Playing God: The Immigration Minister's Unrestrained Power* (May 2017) <http://libertyvic.rightsadvocacy.org.au/wp-content/uploads/2017/05/YLLR_PlayingGod_Report2017_FINAL2.1-1.pdf>.