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Committee Secretary
Joint Standing Committee on Migration
PO Box 6021
Parliament House
Canberra ACT 2600

Submission to the inquiry into the review processes associated with visa cancellations made on criminal grounds

Dear Committee Secretary

Thank you for the opportunity to make submission to this inquiry.

I am making this submission in my capacity as an Associate Lecturer in the School of Legal Practice, ANU College of Law and as a pro bono migration agent at the ACT Legal Commission Migration Clinic.

This submission addresses one of the inquiry's Terms of Reference (TOR), 'Efficiency of existing review processes as they relate to decisions made under s 501 of the Migration Act'.

Yours sincerely

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Introduction

In recent years, character related issues have gained prominence in Australian migration and citizenship laws influenced by a range of international and domestic challenges.[1] Statistically, there has been a dramatic increase in the number of visas cancelled on character grounds in the last two or three years. This has resulted in negative impacts on Australian families as well as additional caseloads for the federal tribunals and courts.[2]

The powers to cancel visas on criminal grounds are found in two areas of the *Migration Act 1958* (Cth) (the Migration Act), general cancellation powers in s 116 and character provisions under s 501. Point One of the TOR confines this inquiry on the review processes for character cancellations only. In practice, however, we have seen a growing number of visa cancellation decisions made on criminal grounds under s 116(1)(e) or (g) of the Migration Act.[3] Merits review of these cases is dealt with in the Migration and Refugee Division (MRD) of the Administrative Appeals Tribunal (AAT). I will leave the discussion on this for another submission.

Statutory framework

The character provisions sit above all other legislative provisions in migration law, with respect to visa grant, refusal and cancellation. For example, passing the character test[4] dictates if a visa is granted or refused, despite the fact that normally PIC 4001 is a 'time of decision criterion'[5] and that all other criteria

[1] Those challenges range from the on-going armed conflict in certain countries, an increasing number of people seeking asylum to the rise of terrorism, cyber-crime, human trafficking and drug related offences.

[2] According to Department of Home Affair's figures, 1,284 visas were cancelled on character grounds in the 2016-17 financial year, compared with only 84 in 2013/2014. See: Department of Home Affairs, 'Key visa cancellation statistics' <https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics>; Administrative Appeals Tribunal, *Annual Report 2016-17* (2017), 26; Federal Court of Australia, *Annual Report 2016-2017* (2017), 26, 28 and 120. Unfortunately, annual reports of the AAT and FCA do not specify the type of original migration decisions under review. Also see Natasha Robinson, 'New Zealand-born mother facing deportation over drug offences begs PM to let her stay in Australia' (17 October 2015) *ABC News* <http://www.abc.net.au/news/2015-10-16/jailed-mother-facing-deportation-to-nz-appeals-to-stay-australia/6861720>.

[3] This provision contains an extremely broad power that allows visa cancellation if 'the presence of the holder in Australia is or may be, or would or might be, a risk to: a) the health, safety or good order of the Australian community or a segment of the Australian community; or b) the health or safety of an individual or individuals'. Any merits review for s 116(1)(e) cancellations will be dealt with by the AAT's Migration and Refugee Division. Policy stipulates that s 116(1)(e) may be used to cancel visas held by non-citizens who are facing criminal charges. In making such a decision, Departmental officers would rely on information such as an arrest warrant, a police charge sheet which outlines the circumstances of the alleged offence, statement of facts which details the offences for which the visa holder has been charged, or an objection to bail affidavit; if applicable, where the police have provided reasons as to why a visa holder should not be granted bail. The non-citizen's criminal record may also be relevant. Under policy, charges relating to possession of child pornography, family violence and drug-related offences are listed in particular as being covered by s 116(1)(e) cancellations. A s 116 cancellation process begins with the visa holder being issued a 'Notice of Intention to Consider Cancellation' (NOICC) from the Department of Home Affairs and invited to comment. In the event that the Minister or the delegate decides to cancel, the non-citizen must be notified of the cancellation decision (s 127) and be advised of the merits review processes at the Migration and Refugee Division of the AAT. The non-citizen may access judicial review on the basis that the Tribunal has made a jurisdictional error. In *Cheryala v Minister for Immigration and Border Protection* [2018] FCAFA 43 (23 March 2018) the Full Federal Court upheld the validity of the regulations (reg 2.43 which is authorised by s 116(1)(g)) under which the appellant's bridging visa was cancelled. At time of the cancellation decision, the appellant was charged with criminal offences, but those charges were later dismissed. The Court held that reg 2.43(1)(p) and the relevant Schedule 1 criteria are valid and do not infringe any presumption of innocence or any common law right to liberty. The reason that the Court reached this conclusion was primarily the explicit expression used in reg 2.43(1)(p)(ii) that the Minister may cancel a bridging E visa if the person has been charged with an offence against a law of the Commonwealth, a State, a Territory or another country.

[4] The character assessment is specified in public interest criteria (PIC) 4001 of Schedule 4.

[5] Exceptions are those newly designed visa categories which place PIC 4001 in 'Primary criteria' > 'Common criteria' of Schedule 2. See for example, clause 187.213.

have been satisfied. Further, the character provisions place no time limit or territorial boundaries on the criminal offences committed or alleged to have been committed, and the Minister can exercise his or her personal powers to refuse or cancel visas and do so repeatedly either on the same ground or different grounds.[6]

History

The concept of a character test originated from the definition of 'prohibited immigrants in the *Immigration Restriction Act 1901* (Cth).[7] Since the beginning of the 20th century, there have been a few milestones in the development of the character related provisions in the Migration Act. One of those was the enactment of the *Migration (Offences and Undesirable Persons) Amendment Act 1992* (Cth) in which, for the first time, the Minister was given sweeping powers to exclude and expel undesirable and contentious non-citizens on the grounds of criminality, character and conduct.[8] In doing so, the Minister may have regard to not only the person's past criminal conduct but also the person's 'general conduct'. The second milestone came in 1998 where the character test regime was formally established with restricted merits review[9] and judicial review rights.

The most recent amendment to the character provisions of the Migration Act occurred at the end of 2014[10] which amended the legislation to allow a person's visa to be mandatorily cancelled in certain circumstances.[11]

Three types of character related visa cancellations

The kinds of cancellation powers available under s 501 of the Migration Act can be categorised in three categories. Each category has distinctly different review rights for the former visa holder and different statutory timeframes within which a valid review application may be lodged.

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[6] Migration Act, s 501(3). Also see for example, Harriet Aird, *Visa of Tasmanian bikie AJ Graham cancelled again, after High Court declares previous cancellation 'invalid'* (6 September 2017) *ABC News* (online) <http://www.abc.net.au/news/2017-09-06/visa-of-tasmanian-rebels-bikie-aj-graham-cancelled-again/8877028>. In *Graham v Minister for Immigration and Border Protection* [2017] HCA 33, the High Court held that a provision in the Migration Act was invalid because it prevented the Court from exercising jurisdiction under s 75(v) of the Constitution. Under s 503A(2)(c) of the Migration Act, the Minister is required not to provide certain information to a court in relation to certain character related decisions. Under s 503A(9), the Minister is authorised to gazette the national security and law enforcement agencies who would be the providers of that information. Plurality of the Court observed that 'the effect of s 503A(2) is effectively to deny the court evidence, in the case of the applicant the whole of the evidence, upon which the Minister's decision was based. It strikes at the very heart of the review of which s 75(v) provides'.[6] The Court concluded that Parliament would not have intended for a statute to breach the Constitution.

[7] The Immigration Restriction Act was re-named *Immigration Act 1901* (Cth) in 1912 which was repealed by the *Migration Act 1958* (Cth). See: Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (The Federation Press, 2011), [2.27]. The Act provided 'prohibited immigrants' included those who failed a dictation test, convicted of an offence or suffered from infectious diseases; the list also included the mentally ill and prostitutes. Specifically, under the Act 'any person who has within three years been convicted of an offence, not being a mere political offence, and has been sentenced to imprisonment for one year or longer therefor, and has not received a pardon' would be a prohibited immigrant and therefore excluded from entering Australia. The character test is used beyond migration, in citizenship applications, employment and national security assessment by ASIO, for example. See: Susan Harris Rimmer, 'The Dangers of Character Tests: Dr Haneef and other cautionary tales' (Discussion Paper No 101, The Australian Institute, October 2008) 4 – 6.

[8] *Migration (Offences and Undesirable Persons) Amendment Act 1992* (Cth), s 180A. Also see: Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (The Federation Press, 2011), [17.18] – [17.21].

[9] See: *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth). Limited merits review is available under s 500 of the Migration Act for character related cases at the Administrative Appeals Tribunal. It is important to understand that up until December 2014, the power to refuse or cancel visas under s 501 was discretionary.

[10] *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth).

[11] Migration Act, s 501(3A). If a person has a 'substantial criminal record' or has been charged or convicted of sexually based offences involving a child (therefore fails the character test) and, is serving a full-time sentence of imprisonment, s 501(3A) makes it mandatory for the Minister to cancel this person's visa without notice.

First category

The first category covers decisions that the Minister or a delegate can make and natural justice rules apply. The affected non-citizen would be notified of the Department's intention to cancel and be invited to comment.[12]

If the delegate decides to cancel, the non-citizen is then notified of the cancellation decision and informed of his or her review rights which are set out in s 500 of the Migration Act. The non-citizen may only have merits review rights at the Administrative Appeals Tribunal if he or she would otherwise have a review right under Part 5 or Part 7 of the Act had the visa cancellation decision been made on other grounds.

Second category

The second category of character related cancellation decisions involve the Minister exercising personal powers in the national interest.[13] Within this category, the Minister may cancel a visa (s 501(3)), set aside a cancellation decision of a delegate or the Tribunal which is favourable to the former visa holder (s 501A); or to set aside a cancellation decision of a delegate which would ordinarily be reviewable by the Tribunal, and substitute it with a personal decision. The new decision is not reviewable by the Tribunal (s 501B).

In cases where the Minister is exercising personal power to cancel, the non-citizen will receive no notification prior to the cancellation, but may request revocation after the cancellation decision. However, the only way that the former visa holder may be successful in having the original decision revoked is to satisfy the Minister that he or she passes the character test.[14] Whilst no merits review is available under this category of decisions, it is judicially reviewable.

Third category

The third category covers mandatory visa cancellations made under s 501(3A) of the Act where visas are cancelled without notice. The non-citizen has no merits review rights at the time of cancellation but he or she is invited to make a written request for revocation within 28 days and provide additional information.[15] The Minister may only revoke the original decision if the non-citizen makes representation in accordance with the invitation and the Minister is satisfied that: a) the person passes the character test; or b) there is another reason the original decision should be revoked.[16]

In cases where the request for revocation is declined, the non-citizen can then seek merits reviews on the Minister's decision not to revoke. If unsuccessful, the non-citizen may apply for Ministerial intervention but only if the cancellation is related to a protection visa,[17] or judicial review if a jurisdictional error by the AAT can be established.

In most cases, it is unlikely that the non-citizen will successfully demonstrate they pass the character test; or be ale to provide evidence on another reason not to cancel (unless the offence is less serious, the risk of

[12] Migration Act, 501(2).
[13] 'National interest' is not defined in the Migration Act. Gaudron and Kirby JJ in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 set out the 'national interest' requirements. Also see: Joanne Kinslor and James English, 'Decision-making in the national interest?' (2015) 79 *AIAL Forum* 35 – 51, 46.
[14] Migration Act, s 501C.
[15] Migration Act, s 501CA(3)(b) and reg 2.52(2)(b). In considering the person's request for revocation, and indeed for any other character related decisions, the Minister and the Tribunal are required to comply with Direction No. 65 made under s 499 of the Migration Act, which has the force of the law. See: Scott Morrison, 'Direction No. 65, Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA' (22 December 2014) <https://www.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf>.
[16] Migration Act, s 501CA(4).
[17] Migration Act, s 501J.

re-offending is low and/or there is compelling evidence to show significant impact on minor children living in Australia). Nevertheless, a submission for revocation needs to be addressed in accordance with Ministerial Direction No. 65.[18]

The Departmental statistics on key visa cancellation data for 2017 shows that less than half of the revocation requests on mandatory character cancellation were granted. The total number of requests received was 794 with 320 cancellation decisions revoked, 457 not revoked and 17 either withdrawn or invalid.[19] It is more than likely that most of the non-revoked cases would proceed to merits review.

Efficiency of existing review processes as they relate to decisions made under s 501 of the Migration Act

Over the years, merits review in either the generalist or specialist tribunals has mostly achieved the objectives by providing accessible, fair, economical, informal and quick *de novo* reviews.[20] It is considered a more efficient form of review than judicial review.

According to the AAT, there have been steady and significant increases in its caseload. It is noted in the AAT's 2016-17 annual report that they have been unable to keep up with the demand due to the availability of member resources in the Migration & Refugee Division, for example.[21] The General Division where character related cases are reviewed also has significant caseload pressures.[22]

As a general rule, most decisions made under s 501 of the Migration Act are merits reviewable, with the exception that if the Minister is exercising personal powers or, the cancellation decision was made while the non-citizen is overseas or in immigration clearance. An unsuccessful merits review applicant may seek subsequent ministerial intervention[23] or judicial review at the Federal Court or the High Court on questions of law.

In cases where constitutional issues are raised, such as the applicant challenging the validity of a statutory provision, those decisions would be reviewed by the courts, mostly by the High Court.

Ministerial intervention powers

Ministerial intervention is another form of merits review but only for cases of unique and compassionate circumstances. This power exists because of the recognition that the legislation cannot possibly cover every situation.

For character related cases, the ministerial intervention powers exist in s 501J but for protection visa[24] only. It allows the Minister to substitute an AAT decision with a more favourable decision to the review applicant if the Minister considers that it is in the national interest to do so. The Minister must also cause to be laid

[18] Authorised by s 499 of the Migration Act, Ministerial Direction No. 65 provides guidance for decision makers on visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA.
[19] Department of Home Affairs, 'Key visa cancellation statistics' (2017) <https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics>.
[20] *Administrative Appeals Tribunal Act 1975* (Cth), s 2A.
[21] Administrative Appeals Tribunal, *Annual Report 2016-17: Chapter 3 – Our Performance* <http://www.aat.gov.au/AnnualReports/201617/part-3.html> under the heading 'Migration and Refugee Division'.
[22] Ibid, 22.
[23] For protection visa related decisions only, s 501J.
[24] The meaning of a 'protection visa' is set out in s 36 of the Act.

before each House of the Parliament a statement that sets out the decisions of the AAT and the Minister referring in particular reasons of the Minister on issues of public interest.

The current ministerial guidelines set out a range of examples that should be brought to the Minister for possible consideration of intervention powers, including:[25]

- strong compassionate circumstances that if not recognised would result in harm and hardship to an Australian citizen or permanent resident;
- compassionate circumstances regarding the age, health and/or psychological state of the person that if not recognised would result in harm and hardship to the person;
- any exceptional economic, scientific, cultural or other benefit to Australia if the person remains; or
- unintended consequences of legislation.

Consequence of mandatory visa cancellation

It is hardly surprising that the mandatory cancellation regime has resulted in a large number of people being detained or removed from Australia. The Ombudsman's report on the operation of s 501 of the Migration Act found that between 1 January 2014 and 1 March 2016, 1,219 visas were cancelled under s 501(3A) and more than half of those were held by New Zealand citizens.[26] Another group which has been adversely affected by s 501(3A) are former holders of humanitarian or refugee visas. This group has been in immigration detention facing an uncertain future of being detained indefinitely.[27]

Moreover, s 501(3A) makes it mandatory for a person's visa to be cancelled even if this person is only in prison for a minor offence (e.g. traffic offences or failure to pay a fine) but has historical charges with no conviction. An example would be that a non-citizen had been charged with a 'sexually based offence involving a child'[28] but was later discharged without a conviction, but he or she is now serving a three-months imprisonment for a traffic offence. Under s 501(3A), this non-citizen's visa must be cancelled.

Issues in the review process

Process in the General Division disadvantages the applicant

For historical and other reasons, the process adopted by the AAT General Division (GD) is more formal and adversarial than that in the MRD where both the applicant and the Minister are normally, or expected to be, legally represented. Apart from guiding the proceedings, the Tribunal Member mostly takes a passive role of taking and hearing evidence. It is my observation that hearings in the GD are more like a narrow contest between two parties than an examination of the merits and processes of the relevant migration law decision making.

[25] PAM > POLICY – MIGRATION ACT > Ministerial powers instructions > Minister's guidelines on ministerial powers (s351, s417 and s501J) > 4. Unique or exceptional circumstances.
[26] Commonwealth Ombudsman, 'The Department of Immigration and Border Protection: The administration of section 501 of the *Migration Act 1958*' (December 2016), 7.
[27] Peter Billings, 'Whither indefinite immigration detention in Australia? Rethinking legal constraints on the detention of non-citizens' (2015) 38(4) *UNSW Law Journal* 1386, 1417. The Commonwealth Ombudsman is required under s 486O of the Migration Act to assess immigration detention arrangements for persons who have been detained for more than two years. These reports are to be tabled in each House of the Parliament by the Minister for Immigration, s 486P.
[28] The term 'sexually based offence involving a child' is not defined in the legislation. Ministerial Direction No.65 Annex A lists some examples.

It is also my observation that self-represented applicants are significantly disadvantaged in these proceedings where –

- there were significant linguistic and cultural barriers between the applicant/witnesses, respondent and Tribunal despite assistance from the interpreter
- the applicant/witnesses:
    - were unfamiliar with the Tribunal process
    - had insufficient understanding of the legal language or purposes of the questions
    - were unable to articulate clearly their version of the event or their side of the story
    - were unprepared for the questions
    - had evidence or documents that were poorly prepared and presented

On the other hand, the Minister has the resources to engage prestigious law firms as representatives with not only comprehensive submissions on the evidence but also supporting documents such as records from the police, the courts, correctional centres, immigration detention centres and other sources.

As a result, it was more than likely that the applicant was unable to obtain a fair hearing of their evidence which makes merits review a meaningless and wasteful exercise.

Issues concerning self-represented litigants have been raised and discussed over the years in various contexts especially in merits review and judicial review. Melinda Richards SC, for example, spoke in 2013 of her experience as a self-represented litigant in the Victorian Civil and Administrative Tribunal over a proposed development matter; and the areas that bear on the accessibility of merits review for self-represented litigants.[29] In particular, she spoke of the obligation of decision makers to assist self-represented litigants in inquisitorial versus adversarial justice.

She also made suggestions such as a self-help centre or outreach program for self-represented litigants. Although presently the AAT offers information and interpreter assistance to those applicants, there are practical difficulties including communication and accessibility issues with detainees in correctional or immigration detention centres.

Therefore, in order for the Tribunal to achieve its objective of providing a fair review in substance and procedure, it is imperative that the Tribunal informs the applicant's right to seek professional advice during the merits review process, facilitates the access to legal advice, and engages in inquisitorial questioning and research.

Recommendation 1

I recommend that referrals to pro bono legal services be provided to all applicants in the AAT's acknowledgment letter emphasising the importance of the applicant obtaining independent legal advice prior to the hearing.

Tribunal not having adequate evidence

The adversarial nature of proceedings in the GD makes it difficult for the Tribunal to fully inform itself with sufficient evidence in order to make correct and preferable decisions.[30] In assessing character related cases, the Tribunal is to consider competing factors outlined in Ministerial Direction No.65. However, it is

[29] Melinda Richards SC, 'Accessibility, Merits Review and Self-represented Litigants' in Debra Mortimer (ed), *Administrative Justice and Its Availability* (The Federation Press, 2015), 116 – 127. Those areas included: practical measures to improve accessibility, the role of the model litigant, the obligation to afford a fair hearing, and inquisitorial versus adversarial justice.
[30] *Drake v Minister for Immigration and Ethnic Affairs* (1979) FCA 39.

my observation that the Tribunal does not always have the necessary and in some cases critical evidence, from the perspective of the applicant, such as professional reports from employers, schools, family and community services organisations, psychologists, psychiatrists, social workers or medical professionals.

Again this issue is not new, Ms Richards argued that review tribunals may have a duty to seek out evidence in matters involving a self-represented litigant who is not presenting evidence that the tribunal need or believe may be relevant. She accepted that in doing so the distinction between assistance and advocacy may be crossed, but it is absolutely paramount that the Tribunal informs itself with sufficient evidence before reaching their decision.

Time and resources would be a significant restraint for the Tribunal in this regard. However, as noted by Ms Richards, the duty of the Tribunal to conduct its own inquiries so that it has sufficient evidence to form its own views has been confirmed judicially, including the High Court.[31]

Recommendation 2

I recommend that the General Division (at least for character related matters) of the Tribunal adopt an inquisitorial approach in the same way as the Migration and Refugee Division inquires about issues of credibility and criminality of the applicant, for example.

Ministerial intervention process onerous

The current design of legislative framework makes ministerial intervention powers available at the end of merits review.[32] It allows the Minister to exercise 'non-compellable' and 'non-reviewable' powers and substitute more favourable decisions than that made by the Tribunal, for non-citizens who have unique and exceptional circumstances. But it means that a non-citizen cannot have access to the Minister until merits review has already taken place. It places extraordinary burdens on the non-citizen without reasonable justification or achieving any purpose.

This type of cases also raise ethical dilemmas for migration advice professionals who are bound by the Code of Conduct. On the one hand, migration advice professionals are under an obligation to act in the lawful and legitimate interests of his or her client,[33] but at the same time, they are also required not to encourage the client to lodge applications that are vexatious or grossly unfounded.[34]

Case study

I can share one example which involved the Minister exercising powers under s 351 of the Migration Act. It was not a character related matter, but it demonstrates the incredible challenges that people seeking ministerial intervention have been, or would be, put through and the significant emotional and financial costs on them.

This case involves a female applicant who had spent nine years studying in Australia on a student visa, from high school to university. At university, she met a young man who was an Australian citizen. They were

[31] *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [26]. Also see: Richards, above n 28, 122 – 125.
[32] Migration Act, ss 351, 417 and 501J.
[33] Migration Agents Registration Authority, 'Code of Conduct for registered migration agents' (18 April 2017), clause 2.1.
[34] Ibid, clause 2.17.

from the same country of origin. They studied together, socialised together and eventually fell in love. They married in Australia and celebrated their marriage with families and friends overseas as well.

At that time, she was preparing documents for the lodgement of a partner visa application. Her husband travelled interstate and returned by bus in the early hours of one morning. As he was waiting for his mother to pick him up from a main city street, he was viciously attacked by two young men and died as a consequence.

When I met this young woman at the migration clinic and she told me the story, tears were streaming down her face. She was in the middle of an enormous grief, loss of her husband meant the loss of her world and the future they had planned together. There were also grieving relatives from his family she had to help; there were also the funeral, counselling, the police investigation, criminal proceedings in the courts – the list of things she had to do went on and on.

It was such a tragic story but I knew her visa application would be refused because she no longer had a partner visa sponsor. The only way she could ask the Minister to consider the case was to go through the application, refusal; tribunal, refusal; then ministerial intervention process.

I accompanied her at the Tribunal hearing, she was sobbing uncontrollably. The Tribunal Member was most sympathetic, he indicated that he had no choice but to affirm the Department's decision. However, he was prepared to refer the matter to the Minister.

Eventually the Minister granted her the permanent visa but it costed her thousands of dollars in visa application charges and Tribunal fees, and took at least two years.

This example demonstrates the need for reform in ministerial intervention powers. It follows that flexibilities should be built into relevant provisions in the Migration Act, to allow unique and exceptional circumstances be considered by the Minister without the applicants having to go through the entire visa application and merits review process. For instance, a direct application path to the Minister would result in cost savings for the Department and the Tribunal and shorter turnaround times. These changes would significantly benefit the client, the Department and the Tribunal which far outweigh the resulting increase in Ministerial staff workloads.

Recommendation 3

I recommend that sufficient flexibilities be built into provisions relating to ministerial intervention in the Migration Act to allow unique and exceptional circumstances be considered by the Minister without the applicant having to go through the entire visa application and merits review process.

Conclusion and recommendations

It is beyond controversy that merits review is an efficient form of review for administrative decisions including character related migration decisions. In practice though, there does not appear to be a great deal of difference between character decisions made with or without natural justice because the same high levels of anxiety, uncertainty and stress have been experienced by the clients and their families.

The Tribunal seems to be an efficient and hardworking organisation with dedicated staff. It may only be made more efficient in achieving its objectives by a more logically designed and effective legislative framework.

Recommendation 1

I recommend that referrals to pro bono legal services be provided to all applicants in the AAT's acknowledgment letter emphasising the importance of the applicant obtaining independent legal advice prior to the hearing.

Recommendation 2

I recommend that the General Division (at least for character related matters) of the Tribunal adopt an inquisitorial approach in the same way as the Migration and Refugee Division inquires about issues of credibility and criminality of the applicant, for example.

Recommendation 3

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[End of submission]