

27 April 2018

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

By email

Dear Committee Members,

Re: Inquiry into Visa Cancellations on Criminal Grounds

We write this submission in our capacity as Lecturers at the Faculty of Law, University of Technology Sydney. We welcome the opportunity to submit to the inquiry into the review processes associated with visa cancellations made on criminal grounds.

In this submission, we address the following issues: first, the extremely broad decision making powers afforded to the Minister and Ministerial delegates under s 501 of the *Migration Act 1958* (Cth) ('the Act'); second, the critical importance of the availability of robust, independent judicial and administrative review mechanisms in light of these broad powers; third, concerns about double – or extended – punishment for the same conduct with inadequate judicial oversight; and finally, the rationale for and importance of the availability of merits review more generally, including how and why merits review enhances rather than diminishes the efficiency and quality of decision-making under the Act.

Our overarching concern is an identified trend of increased ministerial discretion with respect to non-citizens and their lives alongside the erosion of natural justice, decreased judicial oversight and independent review. We are equally troubled by the Commonwealth Government's characterisation of non-citizens as second class 'guests' and even 'outlaws'¹ in the Australian community; our concern is

¹ Peter Billings, 'Crimmigration Law in Australia: Exploring the Operation and Effects of Mandatory Visa Cancellation, Immcarceration and Exclusion' [2017] *SSRN* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3054277>.

that nationalistic – and at times xenophobic – rhetoric promotes the stigmatisation of immigrants and refugees and impedes, rather than facilitates their integration or resettlement in Australia.

A further primary concern, as detailed in our submission, is the Chair of the Joint Standing Committee on Migration, Jason Wood MP's use of the phrase 'actively trying to circumvent Australia's migration system'² to refer to persons exercising their legal rights to review their decisions in order to ensure the decisions were correctly decided at law. Similarly, we are troubled by the legal and policy effects of representations made by Wood to the *Herald Sun* that the current appeals system: 'seems to be all in favour of the offender on a visa rather than the victim, who is in most cases an Australian citizen'.³

Statements such as these distort and oversimplify the multitude of complex and competing factors that are taken into account when a judicial or administrative decision is made to overturn or review the initial decision; the need to consider the factors unique to each individual case; and to respond in a fair, just and proportionate manner. These ministerial statements also signify a pre-empting of the outcome of this inquiry and a fundamental disrespect for the separation of powers and an independent judiciary.

We also address in this submission problems associated with the phenomenon known as 'crimmigration'⁴ (see attached article): the increasing incursion of the immigration regime into matters once traditionally the subject of the criminal justice system, and the concomitant erosion of criminal justice and natural justice protections (such as the presumption of innocence, the criminal burden of proof of beyond reasonable doubt, the right to a fair, adversarial trial, full disclosure, written reasons, and open justice); and the subjection of non-citizens to double punishment for the same crime. We canvas each of these issues in further detail below.

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

By way of background, the Minister has the discretion to refuse to grant, or to cancel, visas on 'character grounds' under s 501 of the Act. This power has existed since 1992. Section 501 provides significant discretion to the Minister and Delegates to cancel or refuse the visas of a wide range of persons who have committed a crime; are *at risk of engaging in* criminal conduct; or on the basis of criminal association.

² *TimeBase - Parliamentary Committee To Hold Inquiries Into Migration Agents And Reviews Of Visa Cancellations* <<http://localhost:8080/news/2018/AT04628-article.html>>.

³ The Editor, 'Criminal Visa Reform Crucial' *Herald Sun*, 20 March 2018 20.

⁴ Juliet Stumpf, 'The The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 56 *American University Law Review* 367.

A summary of the relevant character test powers in s 501 is provided in the following table:

Table 1: The Character Provision

Subsection	Grounds for decision	Cancellation/ refusal to grant	Mandatory or Discretionary?	Do the rules of natural justice apply?	Who may exercise the power?
501(1)	Person does not satisfy Minister they pass character test	Refuse to grant	Discretionary	Yes	Minister or delegate
501(2)	Minister reasonably suspects person does not pass character test; and person does not satisfy Minister they pass character test	Cancellation	Discretionary	Yes	Minister or delegate
501(3)	Minister reasonably suspects person does not pass character test; and Minister is satisfied refusal or cancellation in the national interest	Cancellation or refusal to grant	Discretionary	No	Minister only
501(3A)	Minister satisfied person has substantial criminal record on basis of para (7)(a), (b) or (c); or person found guilty of sexually based offence involving child; and person serving full-time prison sentence	Cancellation	Mandatory	No	Minister or delegate

For example, pursuant to s 501(3), the Minister *may* cancel, or to refuse to grant, a visa 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 (in other words, it cannot be delegated),⁵ and the rules of natural justice do not apply.⁶

Mandatory cancellation

In December 2014, the Commonwealth Government introduced controversial changes to this section requiring mandatory cancellation in certain circumstances.⁷ Under s 501(3A), the Minister *must* cancel a visa if the Minister is satisfied that the person has been:

- i) sentenced to a term of imprisonment of 12 months or more; or
 - ii) found guilty of one or more sexually based offences involving a child; and
- the person is serving a sentence of imprisonment on a full-time basis in a custodial institution for an offence against a law of the Commonwealth, a State or a Territory.⁸

⁵Migration Act 1958 (Cth) s 501(4).

⁶Migration Act 1958 (Cth) s 501(5).

⁷Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth).

⁸Migration Act 1958 (Cth) s 501(3A).

This section was also introduced despite the lack of any evidence of the deterrent effect of visa cancellation on crime or criminal behaviour.

While cancellation under s 501(3A) is mandatory, the person can request that the Minister revoke the cancellation of their visa. As with a decision made under s 501(3), the rules of natural justice do not apply to a decision made under s 501(3A).⁹ The exclusion of natural justice ‘translates to no prior notice of the mandatory cancellation decision and no opportunity to be heard (to make oral or written representations) before the adverse determination.’¹⁰

The introduction of this mandatory power resulted in dramatic increase in cancellation decisions, and more people being detained in immigration detention than would otherwise have been the case.¹¹ The Commonwealth Ombudsman documented in 2016 that 983 visas were cancelled under s 501 in the year 2015-16.¹² This number has risen in the last financial year, in which 1284 visas were cancelled under s 501.¹³ New Zealanders made up the majority of the 1284, with nearly 700 cancellations.¹⁴

The character test

Section 501(6) provides that a person *does not* pass the character test if they fulfil one of a number of enumerated exhaustive criteria, including:

- the person has a *substantial criminal record* – this includes where the person has been sentenced to a term of imprisonment of twelve months or more, or the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity and as a result the person has been detained in a facility or institution;¹⁵
- the person has been convicted of an offence that was committed:
 - (i) while the person was in immigration detention; or
 - (ii) during an escape by the person from immigration detention; or

⁹ *Migration Act 1958* (Cth) s 501(5).

¹⁰ *Crimmigration Law in Australia Exploring the Operation and Effects of Mandatory Visa Cancellation, Immmcarceration and Exclusion* by Peter Billings SSRN, above n 1.

¹¹ Colin Neave, ‘The Administration of Section 501 of the Migration Act 1958’ (08/2016, Commonwealth Ombudsman, December 2016) 18 <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>; Santilla Chingaiepe, *Dutton uses visas as second criminal sentence* (31 March 2018) The Saturday Paper <<https://www.thesaturdaypaper.com.au/news/law-crime/2018/03/31/dutton-uses-visas-second-criminal-sentence/15224148006027>>.Chingaiepe, above n 10.

¹² Neave, above n 10.

¹³ Santilla Chingaiepe, *Dutton uses visas as second criminal sentence* (31 March 2018) The Saturday Paper <<https://www.thesaturdaypaper.com.au/news/law-crime/2018/03/31/dutton-uses-visas-second-criminal-sentence/15224148006027>>.Chingaiepe, above n 10.

¹⁴ Santilla Chingaiepe, *Dutton uses visas as second criminal sentence* (31 March 2018) The Saturday Paper <<https://www.thesaturdaypaper.com.au/news/law-crime/2018/03/31/dutton-uses-visas-second-criminal-sentence/15224148006027>>.Ibid.

¹⁵ Further, a person also has a substantial criminal record where: the person has been sentenced to 2 or more terms of imprisonment where the total of those terms is 12 months or more; the person has been sentenced to death or imprisonment for life; or, the person has been found by a court to not be fit to plead in relation to an offence and the court has nonetheless found that on the evidence available the person committed the offence and as a result, the person has been detained in a facility or institution. Also, for the purposes of the character test, if a person has been convicted of an offence and the court orders the person to participate in a residential drug rehabilitation scheme or a residential program for the mentally ill, the person is taken to have been sentenced to a term of imprisonment equal to the number of days the person is required to participate in the scheme or program: *Migration Act 1958* (Cth) s 501(7)-(9)).

(iii) after the person escaped from immigration detention but before the person was taken into immigration detention again;

- the person has been convicted of escaping from immigration detention;¹⁶
- the Minister reasonably suspects that the person is a member of a group or organisation, or has, or has had, an association with a group, organisation or a person, and that group, organisation or person has been or is involved in criminal conduct;
- the Minister reasonably suspects that the person has been or is involved in conduct constituting one or more of the following:
 - (i) an offence involving people smuggling, harbouring non-citizens or the presentation or making of false visa documents;¹⁷
 - (ii) an offence of trafficking in persons;
 - (iii) the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern;

whether or not the person, or another person, has been convicted of an offence constituted by the conduct;

- having regard to either or both of the person's past and present criminal, or their past and present general conduct, the person is 'not of good character';
- in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would:
 - (i) engage in criminal conduct in Australia; or
 - (ii) harass, molest, intimidate or stalk another person in Australia;¹⁸ or
 - (iii) vilify a segment of the Australian community; or
 - (iv) incite discord in the Australian community or in a segment of that community; or
 - (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way;
- a court in Australia or a foreign country has:
 - (i) convicted the person of one or more sexually based offences involving a child; or
 - (ii) found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction;
- the person has, in Australia or a foreign country, been charged with or indicted for one or more of the following:
 - (i) the crime of genocide;
 - (ii) a crime against humanity;
 - (iii) a war crime;
 - (iv) a crime involving torture or slavery;
 - (v) a crime that is otherwise of serious international concern;

¹⁶ *Migration Act 1958* (Cth) s 197A.

¹⁷ *Migration Act 1958* (Cth) ss 233A-234A.

¹⁸ Conduct may amount to harassment or molestation of a person even though it does not involve violence, or threatened violence, to the person; or it consists only of damage, or threatened damage, to property belonging to, in the possession of, or used by, the person: *Migration Act 1958* (Cth) s 501(11).

- the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security¹⁹; or
- an Interpol notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.

If none of the above extensive and remarkably broadly-stated criteria are satisfied, the person passes the character test.

Circumventing procedural safeguards

By attaching the migration consequence of visa cancellation – and the resultant detention in immigration facilities and/or deportation – to criminal (or a perceived risk of criminal) conduct, s 501 allows the Minister to circumvent the substantive procedural safeguards of the criminal justice system and core criminal law common law principles.²⁰

In many instances, s 501 reverses the burden of proof so that it is for the person whose visa may be cancelled to demonstrate that they pass the character test, or rather that they do not fulfil any of the criteria that form the basis for a finding of bad character. It is unclear how evidence given in relation to character decisions may be used in criminal proceedings, for example, whether the non-citizen might be compelled to forego their right to remain silent in order to defend visa cancellation decisions, and whether or not evidence disclosed by the person to immigration officials may be used in criminal proceedings against the defendant. The extent to which the departmental decision maker has regard to rules of evidence which limit the use of hearsay, opinion, unreliable evidence, or misleading, confusing and prejudicial information in s 501 and related decisions is also unclear.

In some circumstances, a person may have their visa cancelled under s 501 even if they have not been charged with, or convicted of, an offence against an Australian criminal law. For example, as set out above under s 501(6)(d), a person may not pass the character test if ‘there is a risk’ that the person ‘would engage in criminal conduct in Australia’ in the event the person were allowed to enter or to remain in Australia; or the person ‘incited discord in the Australian community’. A person may also have their visa cancelled on character grounds if the Minister ‘reasonably suspects’ they are or have been a member of, or even have or have had an association with, a group or organisation or person has been or is involved in criminal conduct’ (s 501(6)(b)).

¹⁹ Within the meaning of the *Australian Security Intelligence Organisation Act 1979* (Cth) s 4.

²⁰ Khanh Hoang and Sudrishti Reich, ‘Managing Crime through Migration Law in Australia and the United States: A Comparative Analysis’ (2017) 5 *Comparative Migration Studies* 12.

Notably, s 501 decisions are made on a very low standard of proof: the Minister or delegate need only have a ‘reasonable *suspicion*’ that the person does not pass the character test. This is far lower than the criminal burden of proof, where the prosecution must prove crimes beyond a reasonable doubt.

Double punishment

It is important to recognise that cancellation on character grounds where someone has already been subject to criminal penalty is in effect ‘double punishment’ by ‘imposing detention (often for prolonged periods) and removal upon people who have completed custodial sentences’.²¹ Detention or deportation may result in separation of family units and can adversely impact the children of the non-citizen. The displacement of long-term Australian residents to countries to which they no longer have any cultural, or linguistic attachment or familial support, and face uncertain employment prospects, can be described as ‘punitive’.²²

Case study: Ricardo Bolvaran had been a resident in Australia for over forty years. Bolvaran was born in Chile, but was raised in Australia from the age of one. He was imprisoned for more than a year in 2015 for drug-related offences. Bolvaran was subsequently deported to Chile. He had no family in Chile, little command of Spanish, and had to seek revocation of the decision to cancel his visa from Chile. After several months, Bolvaran eventually had the decision to cancel his visa revoked. He was able to return to Brisbane in 2016.²³

The duplicate punishments imposed on non-citizens by visa cancellation is neglected in one-sided, sensationalist political and media representations of AAT decisions. For example, a *Daily Telegraph* article dated 27 April 2018 alleged that the AAT’s ‘open door policy’ saved ‘foreign crims’ and ‘brutal thugs’ from deportation.²⁴ However the article neglected to acknowledge that such persons had already been held to account by serving the sentence imposed on them by a criminal court.

Wide discretion of initial decision maker and the appropriateness of oversight

Subject to s 501(4), decisions to cancel or refuse visas under s 501 may be made by the Minister personally or by a delegated decision-maker.²⁵ This decision-maker has a substantial amount of discretion to cancel a visa on character grounds.²⁶ Where a delegate makes a decision to cancel or

²¹ *Crimmigration Law in Australia Exploring the Operation and Effects of Mandatory Visa Cancellation, Immcarceration and Exclusion* by Peter Billings SSRN, above n 1.

²² Billings, above n 1.

²³ Ibid.

²⁴ Keith Moor, ‘AAT’s History Reveals Open Door Policy for Foreign Crims’ *The Daily Telegraph* (Sydney), 27 April 2018.

²⁵ The power to delegate is within the *Migration Act 1958* (Cth) s 496.

²⁶ Jason Donnelly, ‘Challenging Huynh: Incorrect Importation of the National Interest Term via the Back Door’ (2017) 24(1) *Australian Journal of Administrative Law* 99.

refuse to grant a visa under ss 501(1)-(2), they are bound to follow Ministerial Direction No. 65 ('Direction 65').²⁷ The Minister is not bound by Direction 65 for a decision made under s 501.²⁸

After a decision is made to cancel a visa, under s 189(1) of the Act, the person is deemed an 'unlawful non-citizen', detained, and eventually, 'removed to their country of origin, subject to completion of any custodial sentences imposed for criminal offending', and also subject to Australia's *non-refoulement* obligations.¹¹⁸

Read together, all of the above reveals that existing visa refusal and cancellation powers provide the Minister or the Minister's delegate with extremely broad decision-making powers. This discretion is especially broad, and recourse to independent review especially limited, where the Minister personally exercises specific powers to revoke or cancel a visa. Such broad powers call for strict administrative and judicial review processes and oversight. Administrative and judicial review of these powers are fundamental to ensuring that they are exercised according to law. They do not represent duplication of these processes but are inherent to them and to ensuring the accountability of the executive. The revocation process and the efficiency of the review process are each considered in further detail below.

Notice of Intention to Cancel

Where the decision is made by a delegate, they must issue a Notice of Intention to Cancel (NOIC). Where the decision is made by the Minister personally to cancel or refuse to grant a visa under s 501(3), the Minister need not provide natural justice.²⁹ The person is only able to apply for revocation of this decision within 7 days of the deemed receipt of the decision. Where a decision is made to mandatorily cancel a person's visa under s 501(3A), the department provides the person 28 days to request revocation of the decision to mandatorily cancel their visa.³⁰

Revocation of decisions

The Minister is also able to set aside or substitute decisions made under s 501, with or without natural justice.³¹ The following table summarises the various powers within the Act which the Minister may exercise in order to set aside or revoke s 501 decisions.

²⁷ *Migration Act 1958* (Cth) ss 496(1A) and 499.

²⁸ Jason Donnelly, 'Challenging Huynh: Incorrect Importation of the National Interest Term via the Back Door' (2017) 24(1) *Australian Journal of Administrative Law* 99, 101. Donnelly, above n 21, 101.

²⁹ Khanh Hoang and Kaldor Centre for International Refugee Law, 'Factsheet: Can Australia Deport Refugees and Cancel Visas on "Character Grounds"?'

³⁰ Department of Home Affairs, *Factsheet - The Character Requirement* <<https://www.homeaffairs.gov.au/about/corporate/information/factsheets/79character>>.

³¹ *Migration Act 1958* (Cth) s 501A.

Table 2: Revocation of decisions

Section	Application	Scope of revocation	Grounds
S 501A(2)	Where a delegate or the AAT decide not to exercise power conferred by ss 501(1) or (2)	Minister may set aside original decision and refuse to grant or cancel visa	Minister reasonably suspects person does not pass character test; person does not satisfy Minister they pass character test; and Minister satisfied that refusal or cancellation is in the national interest
S 501A(3)	Where a delegate or the AAT decide not to exercise power conferred by ss 501(1) or (2)	Minister may set aside original decision and refuse to grant or cancel visa	Minister reasonably suspects person does not pass character test; and Minister satisfied that refusal or cancellation is in the national interest
S 501B	Where a delegate decides to refuse to grant or cancel a visa under ss 501(1) or (2)	Minister may set aside original decision and refuse to grant or cancel visa	Minister reasonably person does not pass character test; person does not satisfy Minister they pass character test; and Minister satisfied that refusal or cancellation is in the national interest
S 501CA(4)	Where Minister decides to cancel a visa under s 501(3A)	Minister may revoke original decision to cancel visa	Person makes representations in accordance with invitation; and: Minister satisfied person passes the character test; or there is another reason why original decision should be revoked
S 501BA(2)	Where delegate or AAT decides under s 501CA to revoke a decision under s 501(3A)	Minister may set aside original decision and cancel visa	Minister satisfied person does not pass character test due to paras 501(6)(a), 501(7)(a), (b) or (c); or 501(6)(e); and Minister satisfied cancellation in the national interest.
S 501C(4)	Where Minister decides under ss 501(3) or 501A(3) to refuse to grant or cancel a visa	Minister may revoke the original decision	Person makes representations in accordance with invitation; and satisfies Minister they pass the character test

The Minister makes all revocation decisions personally.³² The revocation process has been criticised as being ‘at odds with natural justice principles’, which require that the affected party is made aware of ‘the nature and content of adverse material which the repository of power might take into account as a reason for coming to an unfavourable conclusion’³³ Contrary to this principle of natural justice, the revocation process, the non-citizen’s attention is only drawn to the general ministerial policy governing the exercise of discretion under s 501.³⁴

³² Colin Neave, ‘The Administration of Section 501 of the Migration Act 1958’ (08/2016, Commonwealth Ombudsman, December 2016) 3 <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>.

³³ Billings, *above n 1*.

³⁴ *Ibid.*

Review of decisions

A person can apply to the AAT for review of decisions of a delegate under s 501 (or decisions of a delegate of the Minister under subsection 501CA(4) not to revoke a decision to cancel a visa).³⁵ However, a complex set of existing statutory provisions already limits this right of review in a broad range of instances. For example, the Minister's (or delegate's) decision to cancel a visa under the mandatory grounds specified in s 501(3A) cannot be reviewed by the AAT.³⁶ Further, where a decision to refuse or cancel a visa is made by the Minister personally, there is no right of appeal to the AAT.³⁷ As well, a s 501 decision is not reviewable under Pt 5 or 7 of the Act,³⁸ and there is an absence of merits review for visa-cancellation decisions which are subject to a conclusive certificate by the Minister under section 339 of the Act. The Minister may issue such a certificate if the Minister believes it would be contrary to the 'national interest' to change a decision or for the decision to be reviewed.

In terms of the efficiency of the *review process*, statutory time limits on review function to limit the availability of merits review where it is available, in most cases where the applicant does not apply to the AAT within nine days of the cancellation notice. The Department of Home Affairs website in relation to cancellation on character grounds states:

- Applicants in Australia seeking reviews of decisions must apply to the AAT within nine days of being notified of the decision.
- For applicants outside Australia, the application for review must be lodged by a sponsor or nominator within 28 days of the day of being notified of the decision.
- The AAT will be deemed to have confirmed the decision if it does not make its own decision within 84 days of the date on which the applicant was notified of the original decision.³⁹

There are also strict timelines for judicial review of s 501 decisions. Where there is no appeal avenue available to the AAT, a person who has had their visa cancelled or refused may seek judicial review of the decision on the grounds that the decision was not lawfully made.⁴⁰ Such an application must be made within 35 days of the migration decision.⁴¹ As a result of judicial review, a judge cannot reinstate a person's visa. They can, however, find that the delegate failed to properly apply the law. For instance, the initial decision maker may not have factored in the best interests of the applicant's child or the separation of the family unit. As Professor Mary Crock has explained, even if the initial decision is found to be erroneous at law, 'It's [then] open to the government or the tribunal to go back and

³⁵ *Migration Act 1958* (Cth) s 500.

³⁶ *Migration Act 1958* (Cth) s 500(4A)(c).

³⁷ Department of Home Affairs, *Factsheet - The Character Requirement* <<https://www.homeaffairs.gov.au/about/corporate/information/factsheets/79character>>. Department of Home Affairs, above n 26.

³⁸ *Migration Act 1958* (Cth) 500(4)(b).

³⁹ Department of Home Affairs, above n 26.

⁴⁰ *Ibid.*

⁴¹ *Migration Act 1958* (Cth) s 477.

effectively make the same decision but in a legally correct way, taking into account all relevant considerations.⁴² Refugee lawyer David Manne has observed that due to the limits on the rights of judicial review of s 501 decisions, ‘in practice what we’ve seen is that successful appeals in the courts of these decisions have resulted merely in the minister cancelling [visas] while the person remains indefinitely detained.’⁴³

Accordingly, judicial and administrative powers to review visa cancellation and refusal decisions are already heavily circumscribed by the provisions of the Act. It is our view that the existing procedural and substantive constraints on both administrative and judicial appeal mechanisms do not support an argument for further limiting appeal mechanisms. Further, the existing statutory framework, rather than duplicating review processes, diminishes, limits or removes appeal rights altogether. These existing limitations and privative clause decisions, in a number of instances, actively undermine the procedural fairness, transparency and accountability of Government decision-making and should not be limited further.

Why is merits review important?

Merits review is the process by which a person or body, other than the initial decision-maker, reconsiders the facts, law and policy aspects of the original decision and determines what is the correct and preferable decision. In other words, the merits reviewer ‘steps into the shoes’ of the primary decision-maker.⁴⁴ The *Administrative Law Policy Guide* states that ‘[a]s a matter of policy, an administrative decision that will, or is likely to, adversely affect the interests of a person should be reviewed on the merits, unless there are factors justifying the exclusion of merits review’. This approach reflects the terms and standing requirements of the *Administrative Appeals Tribunal Act 1975* (Cth), that persons whose interests are affected by a decision may apply to the AAT for review of the decision.⁴⁵

While it is inappropriate to outline in full the history of, benefits of, and rationale for Australia’s comprehensive system of administrative review, a number of key factors should be considered in response to the terms of reference.

Firstly, as the Attorney-General’s Administrative Review Council has noted:

⁴² Michael Koziol, ‘Experts Say It’s Easy to Deport Non-Citizens’ *The Age*, 5 January 2018 4.

⁴³ Chingaipe, above n 10.

⁴⁴ A-G’s Department Administrative Review Council, *What Decisions Should Be Subject to Merit Review?* (1999) <<https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx>>.

⁴⁵ A-G’s Department Administrative Review Council, *What Decisions Should Be Subject to Merit Review?* (1999) <<https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx>>. Ibid.

Merits review also has a broader, long-term objective of improving the quality and consistency of the decisions of primary decision-makers. Further, merits review ensures that the openness and accountability of decisions made by government are enhanced.⁴⁶

In particular, as quasi-independent statutory decision-making bodies, one objective of administrative review is to provide arms-length review of government decisions. As Stephen Legomsky has stated in support of independent administrative review mechanisms, '[f]ew would deny that one core ingredient of any successful justice system is the independence of those who adjudicate cases'.⁴⁷ A robust form of merits review seeks to achieve independent, accessible and comprehensive review of departmental decisions. Further the requirement for such independence is heightened in relation to decisions that are both politically sensitive and 'high stakes' for the individual involved – as is the case with character cancellation decisions under s 501. Indeed, 'the review tribunal – whether it is an administrative tribunal or a general court – normally brings to the process a degree of independence that a politically accountable department of government simply cannot supply'.⁴⁸

While the accountability and consistency of merits review must be balanced against the cost of making comprehensive review available, it is critical to note that the '*mere prospect* of review can have a sobering effect on administrative officials'.⁴⁹ The availability of review enhances 'the quality of primary decisions', and this disciplining and quality control effect works across the board, not only in relation to minority of decisions that are subject to appeal.⁵⁰

The tendency to suggest that administrative appeals mechanisms duplicate government decision-making denies these fundamental attributes of both oversight and independence. While it is certainly the case that administrative review decision-makers may be at odds, or interfere, with the government's preferred outcome or policy, this must be considered to be a function rather than a failing of review bodies. The duty of tribunals – to make the correct or preferable decision and to apply government policy *but for* when there are 'clear and cogent' reasons to do otherwise include where it works an unjust outcome – ensures that government policy will not be applied blindly, or in circumstances that circumvent or conflict with the operation of the relevant statute.⁵¹

Merits review acts as an important check to a Minister bringing a closed mind to visa cancellation decisions. We note that Minister Dutton has made all-encompassing statements that all non-citizens who commit crimes deserve to be deported from Australia, such as Dutton's statement: 'If they don't

⁴⁶ A-G's Department Administrative Review Council, *What Decisions Should Be Subject to Merit Review?* (1999) <<https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx>>.Ibid.

⁴⁷ Stephen H Legomsky, 'Refugees, Administrative Tribunals, and Real Independence: Dangers Ahead for (1998) 76 *Washington University Law Quarterly* 13, 243–4.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ *Re Drake and Minister for Immigration and Ethnic Affairs* (No 2) (1979) 2 ALD 634

[abide by Australian laws] and they commit an offence against an Australian citizen then they should expect to be booted out of our country.’⁵² As Billings has argued, ‘uncompromising public statements about criminal non-citizens generate an apprehension that they are unlikely to bring a fair or balanced mind to the performance of their own statutory functions’.⁵³ It is for this reason that independent, judicial scrutiny of executive decision making is so very important.

In light of the above factors, merits review of s 501 character-based visa refusals or cancellations is in our view indispensable. As outlined above, the availability of merits review for character cancellations is already significantly limited under the Act. These existing limitations should be reviewed rather than expanded.

The efficiency of review processes

The Terms of Reference for the Inquiry state that the Committee will have particular regard to ‘[t]he efficiency of existing review processes as they relate to decisions made under section 501 of the Migration Act.’ While efficiency is a guiding principle of judicial and administrative decision-making, this principle must always be read alongside, and efficiency should not trump, the fundamental decision-making principles of just and fair decision-making.

It is our view that rather than erode the current system of administrative and judicial review, in which recourse to independent review and procedural fairness is already lacking, the Government should further strengthen procedural safeguards for applicants to achieve fair and just administrative decision-making which avoids unnecessary delays.

With regard to the subject of efficiency and the Department’s internal revocation processes, the evidence suggests that any increase in the number of people applying for review of visa cancellation decisions is largely a result of the upsurge in cancellation decisions after the introduction of the mandatory cancellation power in s 501(3A) in 2014, as well as delays and backlogs within the Department; and the fact that the Minister alone makes revocation decisions.⁵⁴ The increase in visa cancellations between 2013 and 2016 is staggering, with the Ombudsman finding that: ‘The number of people who have had their visas cancelled under s 501 has grown from 76 in 2013-14 to 580 in 2014-15 and 983 in 2015-16.’⁵⁵ The Ombudsman attributed this to the s 501(3A) mandatory cancellation

⁵² *Expect to Be Booted out’ Peter Dutton Talks Tough on Foreign Born Criminals* SBS News <<https://www.sbs.com.au/news/expect-to-be-booted-out-peter-dutton-talks-tough-on-foreign-born-criminals>>.

⁵³ Billings, above n 1.

⁵⁴ Neave, above n 10.

⁵⁵ *Ibid* 3.

provision combined with the large number of persons seeking revocation of their visa cancellation.⁵⁶ According to the Ombudsman in 2016: ‘66% [two thirds] of persons who have their visa cancelled under s 501(3A) apply for revocation with the average time to process and decide a s 501(3A) revocation request being 153 days although 21 cases have taken more than 12 months’.⁵⁷ This means that many people are detained or forced to reside in another jurisdiction for unnecessarily prolonged periods while their revocation request is being considered.

Large applicant numbers should not preclude merits review

The potential for, or actuality of, ‘a relatively large number of people ... seek[ing] merits review of decisions under a particular decision-making power does not justify excluding those decisions from review.’⁵⁸ As the Administrative Review Council notes, there ‘are other, preferable methods for containing the potential costs and delay of a high review rate.’⁵⁹ Relevantly, these methods include:

- ‘ensuring that the primary decision-making is of a high standard (merits review will in fact assist in achieving higher standards);
- implementing appropriate case management techniques; and
- creating an intermediate level of review that can operate speedily and informally.’⁶⁰

The Ombudsman in 2016 noted that the team responsible for identifying persons who may be in breach of s 501 and preparation of cancellation-related documents – the NCCC (National Compliance and Character Centre) – were under-resourced, which may lead to initial decisions being rushed and based on inadequate source information.⁶¹

A number of persons whose visas were cancelled under s 501 have reported struggling to understand the effect and details of the cancellation, revocation, detention and removal processes. A key reason for this is English language fluency or literacy problems.⁶² A person may also be prevented from having adequate access to legal representation and relevant documentation due to being deported at the time of a hearing. It is our view that, rather than exclude merits review for visa refusal or cancellation decisions made on character grounds, which would inevitably increase traffic to the Federal and Federal Circuit Courts of Australia, the Department of Home Affairs should strengthen the standard of primary decision-making, particularly where procedural fairness is concerned.

⁵⁶ Ibid 1.

⁵⁷ Ibid 3.

⁵⁸ A-G’s Department Administrative Review Council, *What Decisions Should Be Subject to Merit Review?* (1999) <<https://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx>>. A-G’s Department Administrative Review Council, above n 43. A-G’s Department Administrative Review Council, above n 44.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Neave, above n 10.

⁶² Ibid 20.

Conclusion

There are currently sweeping Ministerial powers to cancel visas on character grounds combined with inadequate procedural safeguards. This is despite the harsh – and often duplicate and disproportionate – punishments attached to visa cancellation, which include: the possible separation of families; long-term immigration detention; and deportation to a person’s country of citizenship (including in cases where that person has lived in Australia from a very young age, and has lost any prior attachment to that other country). The push to exclude merits review for decisions made on character grounds undermines the rule of law as well as the rights of non-citizens to fair, quick, economic and just review of executive decisions. Any further removal or erosion of judicial scrutiny will increase the ability of the executive to impose extrajudicial and double punishment on non-citizens with minimal accountability or independent scrutiny.

Sincerely,

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Encl.