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# REVIEW PROCESSES ASSOCIATED WITH VISA CANCELLATIONS MADE ON CRIMINAL GROUNDS

*Submission to the Inquiry by the  
Joint Standing Committee*

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VISA  
CANCELLATIONS  
WORKING GROUP

# ABOUT THE VISA CANCELLATIONS WORKING GROUP

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The Visa Cancellations Working Group (the Working Group) is a national group with significant expertise in the area of visa cancellations and migration more generally.

Its membership is comprised of individuals from private law firms, not-for-profit organisations, community legal centres, and tertiary institutions, including:

- The Refugee Council of Australia;
- The Law institute of Victoria;
- Justice Connect;
- Salvos Legal;
- Victoria Legal Aid;
- Monash University;
- Slater & Gordon;
- Jesuit Refugee Service (JRS) Australia;
- The Australian Human Rights Commission;
- Multicultural Development Australia;
- AUM Lawyers;
- Carina Ford Immigration Lawyers;
- The Kaldor Centre;
- Welcome Lawyers;
- Clothier Anderson Immigration Lawyers;
- Refugee Advice & Casework Service;
- Asylum Seeker Resource Centre;
- Brigidine Asylum Seekers Project;
- Flemington Kensington Community Legal Centre;
- The Settlement Council of Australia;
- Russell Kennedy;
- Abode Migration;
- Darebin Community Legal Centre;
- Kah Lawyers;
- MYAN Australia;
- Foundation House, and
- Australian Red Cross (observer status).

The views in this submission are not necessarily endorsed in their entirety by all members of the Working Group.

## INTRODUCTION

The Working Group welcomes the establishment of a Joint Standing Committee on Migration inquiry into the review processes associated with visa cancellations made on criminal grounds (**the Inquiry**). We thank the Committee for the opportunity to make submissions on this vital issue.

It is the function of Australia's migration program to regulate the movement of non-citizens in Australia. The Working Group accepts that, in some cases, cancellation of a dangerous individual's visa, resulting in their departure from Australia, may be warranted. There are undoubtedly cases where a person should forfeit their right to remain in Australia.

However, we have significant concerns about the operation of the present legislation regarding visa cancellations on criminal grounds.

The Working Group consider that people affected by this legislation are likely to be vulnerable, particularly in terms of education and resources. The seriousness of the consequences of cancellation means that appropriate review mechanisms and protections must be enshrined in the legislation to ensure that a just outcome is reached.

The power afforded to the Administrative Appeals Tribunal (**the AAT**) to enact *de novo* merits review of certain cancellation decisions is, in our view, appropriate and necessary for good administration.

The Working Group is very concerned with preventing any further erosion of protections for affected individuals. In the absence of justification for changes to the present legislation, which is already extraordinarily broad and stringent, it is unacceptable to countenance reform that would further erode appropriate protections.

The Working Group is concerned to prevent the instigation of unwarranted community panic and anti-migrant sentiment that can arise where public commentary is ill-informed or politicised. The integration of migrants, and the cohesion of Australian society more broadly, is not served by increasing divisions between citizens and non-citizens.

Indeed, the Working Group cautions against the increasing politicisation of migration matters, and in particular, character matters. Already, there appears to be significant erosion of due respect and facilitation of the administrative law procedures that have stood to strengthen and protect the integrity of legal systems where individual rights are involved.

Rather than reduction of the protections available to individuals facing cancellation of their visas, it is the Working Group's position that additional protections should be put into place to ensure the integrity of the decision-making process.

An effective review tribunal improves the quality of decision-making at all levels, including through its normative impact, its independence, and through the publication of its decisions. It enhances

all aspects of the administrative law system, and does not lead to duplication or inefficiency. To the contrary, it is a response and efficient system that alleviates the pressure on Australian courts, provides transparency, and increases public trust in the legal system.

Whilst the efficiency, consistency and fairness of the review process can be improved, for example by increased resourcing, the availability of the review process itself must be sacrosanct.

In making these submissions, the Working Group emphasises to the Committee its experience of devastating situations visited upon individuals by visa cancellation.

Cancellation does not occur only to repeat offenders, to career criminals, to child sex offenders, and to violent offenders. Rather, it impacts young people who have known no other home than Australia and have one assault conviction. It affects struggling fathers who, naively and for little personal reward, agree to live in a house where cannabis is grown for a period as brief as three days. It affects parents whose miscalculations when driving result in harm to another. It affects people who misrepresent goods they are selling. It happens to mothers who retaliated against family violence aggressors and who now have severely ill children. It affects grandfathers, wives, sons and daughters; people who have no prior histories; people who have been in Australia since the age of 4; people who offended only after the death of a loved one; people who have made mistakes but by no means present any risk to this country.

Often, they are people who have striven to rehabilitate themselves and to contribute to Australian society. They have been through Australia's criminal law system and have undertaken rehabilitative programs and reflected deeply on their conduct.

These people are spending months and years in remote detention facilities in Australia where they are routinely denied their basic needs.<sup>1</sup> They are kept indoors for up to twenty-two hours per day. They are denied medical treatment, Their Australian families are beyond heartbroken; there is despair and incomprehension. Often, these individuals have no idea what has happened to them, and no idea what to do. They struggle with the existing processes and often feel hopeless and overwhelmed.

In particular, where the Minister personally makes an unfavourable decision, purposefully removing their access to merits review, they and their families are desolate.

The 'fair go' is central to Australian identity. Merits review is just that: a fair go, a protection, a chance to prove oneself. More than that, it is fundamental to a properly functioning administrative legal system such as ours. Without merits review, we have administrative decree that is subject

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<sup>1</sup> See the own-mot on reports by the Commonwealth Ombudsman: The administration of section 501 of the *Migration Act 1958*, December 2016; The administration of people who have had their bridging visa cancelled due to criminal charges or convictions and are held in immigration detention, December 2016.

to challenge only where there are certain kinds of legal error, and for no other reason. This is an unwarranted concentration of power.

The Australian community is best served by administrative decisions that are lawful, transparent, consistent, rational, and fair. The rights and interests of individuals should be properly safeguarded.<sup>2</sup> The rule of law is fundamental to our community and is assumed by our Constitution,<sup>3</sup> which assumes strict separation of administrative and judicial power. Moreover, as Article 26 of the ICCPR states:

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.*

Existing legal processes such as merits review should proceed without interference, noting that the Working Group welcomes measures for increased efficiency of review bodies. In the vast majority of cases, well-reasoned, sound and comprehensive decisions are reached. If the Minister considers that a decision has been vitiated by jurisdictional error, he has available to him review of that decision in the Australian courts.

Members of the Working Group have participated in the drafting of the submission by the Law Council of Australia through its association with the Law Institute of Victoria. It endorses the content of the submission of the Law Council of Australia and adopts its recommendations, except insofar as they diverge from the contents of this submission.

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<sup>2</sup> Rob n Creyke, John McM an and Mark Smyth, *Control of Government Action* (Lex sNex s Butterworths, 4th ed, 2015) 24; See also John McM an, Ten Challenges for Adm n strat ve Justice [2010] AlAdm nLawF 5; (2010) 61 *Australian Institute of Administrative Law Forum* 23 , 26-7.

<sup>3</sup> See, for exampl e, *Plaintiff S157/2002 v Commonwealth* [2003] 211 CLR 476.

## RECOMMENDATIONS

1. The Working Group adopts the recommendations in the submissions of the Law Council of Australia.
2. The Working Group recommends that a cautious approach to removal of protections in the area of visa cancellations be adopted, given the severity of the consequences for individuals, for their families, and for their communities. The Working Group recommends that access to merits review is preserved at its current level in full, and that restrictions currently in place be eased.
3. The Working Group recommends that the AAT should continue to adjudicate on the merits without interference, and that the rule of law should be protected. The Working Group welcomes increased resourcing for the AAT to improve efficiency. The Working Group recommends that all steps be taken to avoid the concentration of administrative power by the removal of merits review.
4. The Working Group recommends that the Minister be exhorted to substantially reduce, or to cease, the making of personal decisions regarding cancellation. The intention in establishing our system of merits review was that all decisions affecting an individual's interests would be subject to merits review. The effect of a personal decision is that no merits review is available, and the decision does not need to follow the guidelines established in Direction no. 65, leading to significant uncertainty and inefficiency.
5. The Working Group recommends that, if and when the Minister makes a personal decision regarding cancellation, given that doing so denies an individual access to merits review, the exercise of that power should be transparent and more susceptible to Parliamentary and public scrutiny.
6. The Working Group recommends that steps be taken to avoid duplication within the cancellation process, including:
  - Removal of the Minister's explicit power to overrule the Tribunal;
  - Review of potential overlap between ss.501 and 116 of the Act, and
  - Review of the overlap between the criminal and administrative jurisdictions.
7. The Working Group recommends that no cancellation of a visa on the basis of charges alone should proceed under s.501. Alternatively, if such cancellations do proceed, the Working Group recommends that legislative protections for individuals who are cleared of charges be instituted.

## BACKGROUND

1. The *Migration Act 1958* (Cth) ('the Act') has for many years included strong powers to cancel the visa of persons who are not citizens of Australia because they have committed serious crimes.
2. Variations on the current power have been in use for close to two decades. In 1998, s. 501 was introduced, allowing the Minister to cancel a person's visa if satisfied they did not pass the 'character test', referring to their past or present criminal or general conduct.
3. On 10 December 2014, the Migration Amendment (Character Test and Visa Cancellation) Bill 2014 received assent. It was intended to reflect the Government's, and the Australian community's, "low tolerance for criminal, non-compliant or fraudulent behaviour".<sup>4</sup>
4. The Act expanded the powers of the government to cancel visas, including through the introduction of mandatory visa cancellation without notice for certain visa holders, and the strengthening of ministerial decision-making powers such that the minister could make personal decisions unable to be merits reviewed. These powers also meant the minister could make decisions that essentially overruled the findings of Australian courts and Tribunals, making the review process extremely uncertain and somewhat moot. The legislation also rescinded protections for those suffering certain mental health issues.
5. There was significant opposition to this expansion of powers due to concerns about the impact on human rights, the low thresholds involved, the concentration of power in the administrative, and the unprecedented power vesting in the Minister. There was concern about the lack of opportunity for meaningful review, and an environment of increased uncertainty for visa holders and their families. The legislation also removed some natural justice protections.
6. The seriousness and size of these changes must be emphasised. In considering further changes, the Working Group exhorts the Committee to have regard to this context of extraordinary and recent sweeping reform.
7. Notably, discretion to cancel a visa had always existed. However, the permissiveness and stringency of the reforms clearly changed the environment in which such discretions would be executed, as is borne out by figures regarding visa cancellations.
8. Section 501 can affect any Australian visa holder, permanent or temporary, or applicant for a visa. It applies regardless of how long a person has held their visa, even if they came to Australia as a child or were born here. Direction No. 65 provides directions for matters which must be considered in determining whether to cancel or revoke an individual's visa.

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<sup>4</sup> Commonwealth, *Parliamentary Debates* House of Representatives, 24 September 2017, 10325 (Scott Morrison).

9. A visa cancellation has serious and often devastating consequences for individuals and their families, including detention (sometimes indefinite), separation from families, and removal from Australia.
10. This was expressly contemplated in the Explanatory Memorandum to the legislation. A person whose visa is cancelled under s.501 is ineligible to apply for a bridging visa and must therefore either remain in immigration detention until a decision is finalised or leave the country. The Explanatory Memorandum inaccurately explained that such people would have “been found to pose an unacceptable risk to the Australian community” to justify this detention. By operation of the law, no such finding has been made: for mandatory cancellations, the cancellation is simply the operation of the legislation.
11. By way of summary of the operation of the law, we refer to the fact sheets (attached) published by the Law Institute of Victoria in respect of such cancellations.
12. Although this Inquiry appears to be limited to s.501 of the Act, we include the fact sheet published by the Law Institute of Victoria regarding s.116 cancellations, which also relate to criminal offending, by way of comparison and to highlight existing duplications within the law.
13. We refer to and adopt the summary of the legislative framework contained in the submissions to this Inquiry made by the Law Council of Australia.

## PRACTICAL IMPACT OF THE 2014 CHANGES

14. Since the amending law came into effect, the number of individuals whose visas have been cancelled on criminal grounds has skyrocketed. Information published by the Department of Home Affairs demonstrates as follows:<sup>5</sup>

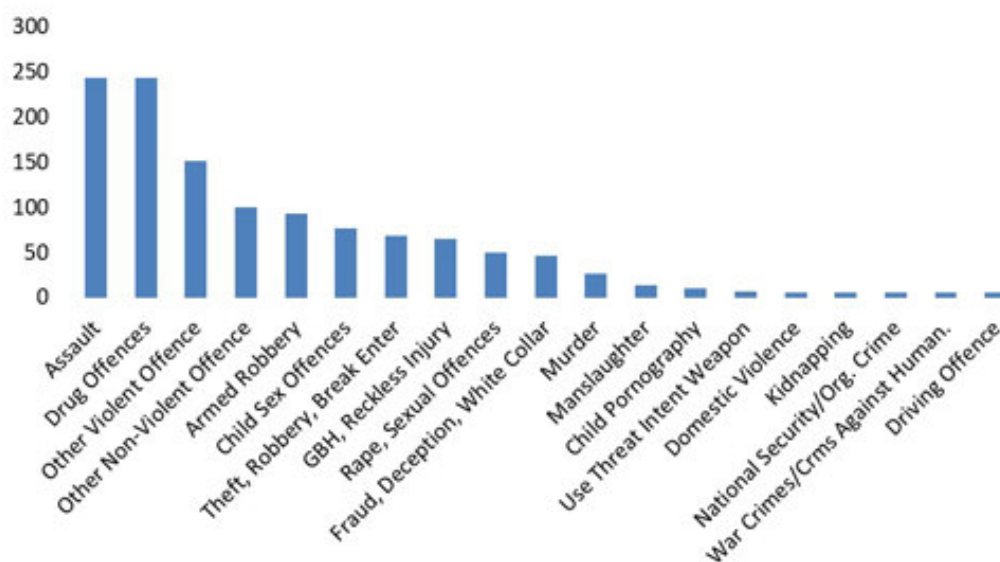
Financial year	Visas cancelled under s.501
2011/2012	160
2012/2013	142
2013/2014	84
2014/2015	584
2015/2016	982
2016/2017	1284

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<sup>5</sup> Key v sa cance at on stat st cs , Department of Home Affa rs, ava ab e at <https://www.homeaffa rs.gov.au/about/reports-pub cat ons/research-stat st cs/stat st cs/key-cance at on-stat st cs>.



15. In other words, in the three financial years prior to the introduction of the legislation, 386 visas were cancelled under s.501. In the three financial years from introduction, 2,850 visas have been cancelled under s.501, an increase of over 738%.
16. As the Refugee Council of Australia has noted in its submission to this Inquiry, people on protection or refugee visas have been seriously affected: while fewer than five holders of these respective visas had their visas cancelled under s 501 in the years before 2014-2015, since July 2015, 189 holders have had their visas cancelled.
17. The Department has published statistics regarding offence types for cancellations effected between 1 January 2017 and 31 December 2017.<sup>6</sup> The figures demonstrate that it is not just murderers, child sex offenders, and members of criminal motorcycle gangs being removed from Australia. Rather, the offences attracting cancellation are, in ascending order in terms of number of visas cancelled, as follows:



18. These offences, even within a category, vary enormously in seriousness:
  - 18.1. Assault includes non-aggravated assault, and threats of assault, which is the direct or indirect application of force.

<sup>6</sup> Key visa cancellation statistics, Department of Home Affairs, available at <https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-visa-cancellation-statistics>.

- 18.2. Drug offences includes possession, cultivation, and trafficking. Again, these offences vary enormously in seriousness, from a brief instance of cannabis crop-sitting to importation of commercial quantities of heroin or methamphetamine.
  - 18.3. 'Other violence offences' may include affray or negligently causing injury. Again, these offences vary enormously in seriousness.
  - 18.4. 'Other non-violence offences' may include obtaining property or financial advantage by deception, possession of a firearm or stolen property, and public nuisance. Again, these offences vary enormously in seriousness. As these statistics show, contrary to popular opinion, it is not child sex offences, organised crime offences, or murders that lead to the bulk of visa cancellations.
19. Whilst the offence of assault, for example, is to be condemned, it is not always of such a level of seriousness that warrants detention and deportation, particularly when the criminal process has already considered the case and has allocated penalty, and the person has served their time and is rehabilitated.
  20. Similarly, the Working Group has seen cases of one-off crop-sitting by parents who are subsequently separated from their Australian infant children as a result of the cancellation.
  21. It is also the case that visa cancellation will not be an appropriate outcome for serious offenders, depending on the facts of the case.
  22. Given the rather extraordinary breadth of offences that can cause the mandatory cancellation of, or enable the discretionary cancellation of, a person's visa, it is critical that appropriate protections apply to ensure that the enormous discretions are applied appropriately and fairly.

## EXISTING REVIEW PROCESSES

23. The Working Group adopts the summary provided by the Law Council of Australia of review processes available regarding s.501 cancellation decisions, and to the submissions regarding impact of removal of merits review.
24. The Working Group refers also to the attached fact sheets, which summarise review processes.
25. The terms of reference for the Inquiry are broad, and it is unclear what has prompted the Minister's request for an inquiry to proceed. If changes to the review process are being contemplated, those changes ought to be made on the basis of evidence of what is and is not working with the current process.

26. At the outset, the Working Group emphasises the distinction between merits and judicial review. They are separate and wholly distinct processes with wholly distinct outcomes. The argument, sometimes put, that a person without access to merits review nonetheless has access to judicial review is therefore misleading. Merits are distinguished from legality, except where there is overlap, such as in the case of unreasonableness.
27. The task of the AAT, in conducting merits review, is to consider all the relevant material before it, apply Direction no. 65, and reach the correct or preferable decision.<sup>7</sup>
28. Merits review provides a safeguard to ensure the correct and, where there is discretion, preferable decision is reached.<sup>8</sup> It is a *de novo* decision: that is, it is considered afresh by an independent review body. The AAT applies the law to an individual's circumstances. It ensures a proper chance for evidence and arguments to be put. It allows a decision-maker to ask questions of a review applicant. It may involve an assessment of competing facts and views, and the selection of one legally available view over another.
29. Conversely, judicial review protects against jurisdictional error: that is, where a decision-maker made a decision it was outside of their power to make. Moreover, the court generally has no power to determine the ultimate outcome of the matter. To paraphrase, the courts determine whether the choice made by the decision-maker was available to them.<sup>9</sup>
30. The courts generally do not direct that a particular decision be made or that particular findings ought to be made. If jurisdictional error is made out, a person does not have their visa restored: rather, the original decision-maker must make a new decision, essentially getting another chance to make a legally sound decision.
31. As Brennan J, in *Attorney-General (NSW) v Quin* [1990] HCA 21, said:

*The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government ... The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error...*

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<sup>7</sup> *Visa Cancellation Applicant and Minister for Immigration and Citizenship* [2011] AATA 690.

<sup>8</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589.

<sup>9</sup> Robertson, A an, What Is Substantive Judicial Review? Does It Intrude On Merits Review In Administrative Decision-Making? [2016] AIAdm nLawF 20; (2016) 85 AIAL Forum 24.

*The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise. ...*

32. It would appear central to the Committee's task that it recognise the differences between these forms of review. One does not and cannot replace the other.
33. It may be the case that, like the courts, the media, individuals, and politicians do, the AAT gets it wrong on occasion. If this occurs, the Minister is able to appeal to the Federal Court of Australia on the basis that the AAT was legally wrong in the making of its decision. Appropriate checks are in place to protect the integrity of decisions at each level.
34. **Advantages of merits review**
  - 34.1. The Working Group considers that merits review is an essential and inviolable component of Australian administrative law, the function of which is to ensure that administrative decisions are correct and preferable.
  - 34.2. The Working Group adopts the submissions of the Law Council of Australia regarding the importance of merits review.
  - 34.3. The objectives of the AAT are set out in s.2A of the *Administrative Appeals Tribunal Act 1975* (Cth): the AAT must pursue the objective of providing a mechanism for review that is accessible, is fair, just, economical, informal and quick, is proportionate to the complexity of the matter, and promotes public trust and confidence in the decision-making of the AAT.
  - 34.4. There is a statutory timeframe for finalization of these matters by the AAT of 84 days. There is no such time limit for the courts or for Departmental decision-makers.<sup>10</sup>
  - 34.5. AAT review is less formal and more flexible than judicial review. It is a space of innovation and efficient outcomes. It benefits users and promotes social harmony, helping shape norms of conduct that enable disputes to be avoided or quickly resolved.<sup>11</sup> In turn, this permits a "drastic reduction in transaction costs in the economy".<sup>12</sup>
  - 34.6. The AAT is also a specialist decision-maker in this area. Section 501 decisions are complex, serious and time-consuming. Given the complexity of these matters,

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<sup>10</sup> Sect on 501.(6L)(c) of the Act.

<sup>11</sup> McCabe, Bernard --- "Perspectives On Economy And Efficiency In Tribunal Decision-Making" [2016] AIAdm nLawF 21; (2016) 85 AIAL Forum 40.

<sup>12</sup> *Ib d.*

there is a higher scope for error at the primary stage, which can be addressed by merits review far more efficiently than it can by the courts.

34.7. It is also intended to promote good governance:

*External review is only effective if it infuses the corporate culture and transforms it. The AAT's function of inducing improvement in primary administration would not be performed merely by the creation of external review. Bureaucratic intransigence would not be moved unless errors were clearly demonstrated and a method of reaching the correct or preferable decision was clearly expounded.*<sup>13</sup>

34.5 The AAT has been conducting merits review at the federal level for over four decades, having commenced operation on 1 July 1976, the Kerr Committee Report<sup>14</sup> having identified the need to develop a comprehensive, coherent and integrated system of administrative review. At the time, Brennan J wrote that the issues encompassed in the AAT's charter "concern the balance between the interests of the citizen and the government, a balance which is critical in a free society".<sup>15</sup>

34.6 The merits review process has features which enhance its ability to reach the correct and preferable decision. For example, the AAT is obliged to invite a review applicant before it to be heard, prior to any negative decision. There is no such right at the primary stage, or will any court hear an applicant on merit. Hearing of an applicant is central to the conduct of merits review, and there is no other opportunity for hearing elsewhere in the cancellation space. The Working Group considers this crucial in matters requiring assessment of character. It is not appropriate for a person to be excluded from a country without even being interviewed.

34.7 Similarly, a review tribunal is able to engage with and enquire of a review applicant, satisfying itself of the facts in the context of its expertise and the law on the basis of the case presented to it by each of the review applicant and the Minister.

34.8 The AAT enhances accountability, acts in a corrective function, and reduces unsustainable pressure on Australian courts.

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<sup>13</sup> "Twentyeth Anniversary of the AAT" in J McMahan (ed) *The AAT – Twenty Years Forward* (1998, AIAL), at 11-12.

<sup>14</sup> Commonwealth Administrative Review Committee, *Parliamentary Paper No 144*, 1971.

<sup>15</sup> Administrative Review Council, *Administrative Review Council Annual Report 1976-77*, 1977, Brennan J, Foreword.

### 35. Disadvantages of curtailing merits review

- 35.1 The disadvantages of removing or curtailing merits review are numerous and serious, and include untenable pressure on the courts, incorrect decision-making, decreased accountability, and inappropriate concentration of administrative power in the hands of the few.
- 35.2 The Working Group refers with approval to the submissions of the Law Council of Australia in this respect, and in particular notes the effect of existing efficiency measures.
- 35.3 In addition, further limiting the scope of merits review will not only add additional pressures on courts, it will also create a greater, and indeed unsustainable, demand for *pro bono* assistance in federal jurisdictions. Bodies such as Justice Connect receive numerous requests for pro bono referrals and are unlikely to be able to meet demand should further restrictions occur. Already, many go unrepresented or do not have access to important information about their situation, increasing the risk that a wrong or unlawful decision is made, increasing the burden on review bodies, and the cost to the community.
- 35.4 Similarly, those affected will receive a lower threshold of procedural fairness from primary decision-makers such as delegates or the Minister personally. They are unlikely to be interviewed, and in most cases will be given one opportunity to present their case in writing. The responsibility felt by a decision-maker is decreased when they do not see a person face-to-face, and equivalence of justice is more difficult to attain given the hardship for many visa holders of putting their case in writing.
- 35.5 The Working Group also notes that in the case of mandatory cancellations where revocation may be requested, the only time discretionary consideration is given is by the decision-maker on revocation. If that decision-maker is the Minister, he or she can be confident that no merits review of their decision is possible. Given the case law, and the Working Group's experience of hasty non-revocation decisions that demonstrably did not involve due consideration, this is an unacceptable risk.
- 35.6 Moreover, there is an increased risk of the presence of jurisdictional error warranting judicial review where a primary process is not subject to merits review. In the Working Group's experience, such instances - for example, cancellations in immigration clearance, or in the case of the limited review available to the Legacy Caseload - are often rife with jurisdictional error. As the Law Council of Australia has noted, not only does this place burden on the courts, but it costs the Department significantly in terms of legal costs of defending such matters and paying successful applicants' legal costs.

- 35.7 By way of illustration, the Federal Circuit Court Annual Report 2016 - 2017 notes an increase in migration-related filings from 3544 in 2015-2016 to 4987 in 2016-2017.<sup>16</sup> This is the highest increase in filings across all the areas of federal law that the FCC deals with. In 2012-2013, just 1982 migration actions were filed.<sup>17</sup>
- 35.8 During the same period, the number of finalisations of the same matters decreased from 3192 to 3175 cases. In 2014/2015, just 1390 migration cases were decided.
- 35.9 This burden is such that matters in the Federal Circuit Court are frequently listed for as far in the future as mid-2020.
- 35.10 Aggrieved individuals without recourse to efficient merits review, and who do not understand the nature of judicial review, are likely to proceed to judicial review regardless of the substantive prospects of success of their case. They do not understand jurisdictional error and the process is likely to be costly, time-consuming, distressing, and without satisfaction.

### **36. Methods for increased efficiency in merits review**

- 36.1 The Working Group endorses commentary regarding increased efficiency in merits review advanced by the Law Council of Australia.
- 36.2 The Working Group notes that, in the significant majority, appointees to the AAT perform their function in an ethical manner and are highly qualified.
- 36.3 In particular, the Working Group emphasises the need for an independent, appropriately resourced AAT whose processes and decisions are respected by the government. The Committee will be aware of recent comment by the executive regarding the AAT's functions. These undermine the integrity of the process and appear to the public as an attack. The AAT must be supported and properly resourced in performing its valuable function.
- 36.4 Appointments and reappointments to the AAT must be seen to be non-political to ensure public confidence. Similarly, experienced members should be retained to ensure efficiency, retain expertise and reduce cost and timeframes.
- 36.5 In addition, the Working Group understand that the AAT is in the process of considering and improving its processes. A number of means of improvement have

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<sup>16</sup> Federal Circuit Court of Australia, Annual Report 2016-2017, available at [http://www.federalcircuitcourt.gov.au/wps/wcm/connect/e5a73789-f067-45cb-b39a-a74067d6636b/2743-Federal\\_Circuit\\_Court\\_of\\_Australia\\_Annual\\_Report\\_2016\\_17\\_WEB.pdf?MOD=AJPERES&CVID=](http://www.federalcircuitcourt.gov.au/wps/wcm/connect/e5a73789-f067-45cb-b39a-a74067d6636b/2743-Federal_Circuit_Court_of_Australia_Annual_Report_2016_17_WEB.pdf?MOD=AJPERES&CVID=).

<sup>17</sup> Federal Circuit Court of Australia, Annual Report 2013-2014, available at <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/0128706e-1931-4473-a00f-a388aba3a37d/1314.pdf?MOD=AJPERES&CVID=>.



been discussed, and their implementation is expected to have a significant impact on efficiency. The Working Group considers the proposals are likely to be effective, and practitioners in the area are eager to support the AAT in achieving its aims.

## GROUNDS FOR RETAINING PROTECTIONS

37. The Working Group considers it essential that the review rights that exist at present be preserved in full.
38. The Working Group recognises the importance of “independence and perspective (which may sometimes be compromised by proximity) and the need for accountability”<sup>18</sup> in good government.
39. The following are examples of why protections such as effective merits review are essential to the administration of justice in this area.

### 40. **Complexity of the law**

- 40.1 Visa cancellations are of a strict administrative nature. Where a cancellation is mandatory, revocation must be requested within a strict timeframe or the right to request revocation is extinguished. Similarly, where a Notice of Intention to Consider Cancellation is issued, a response must be provided within a strict time frame.
- 40.2 Many individuals, particularly those who cannot access representation due to remote detention, financial hardship or other reasons, struggle to deal with these timeframes and struggle to understand what is required of them. In the Working Group’s experience, they will simply not know what information to put in support of their case.

### 41. **Consequences for refugees**

- 41.1 The Explanatory Memorandum accompanying the 2014 legislation stated:

*My department recognises these non-refoulement obligations are absolute and does not seek to resile from or limit Australia’s obligations. Non-refoulement obligations are considered as part of a decision to cancel a visa under character grounds. Anyone who is found to engage Australia’s non-refoulement obligations during the cancellation decision or visa or Ministerial Intervention processes prior to removal will not be removed in breach of those obligations.*

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<sup>18</sup> McCabe, Bernard --- "Perspectives On Economy And Efficiency In Tribunal Decision-Making" [2016] AIAL Forum 21; (2016) 85 AIAL Forum 40.



- 41.2 The effect of this, it has been seen, is often indefinite detention. Holders of protection and refugee visas are increasingly being exposed to character cancellation, placing them in a situation where they cannot be returned to their country of origin, but they also cannot be released.
- 41.3 We refer with approval to, and adopt, the submissions in respect of refugees made by the Refugee Council of Australia.

## 42. Vulnerability of affected individuals

- 42.1 The Working Group again emphasises that many people whose visas are cancelled are very young, aged, vulnerable, suffering mental illness or disability, coming from backgrounds of trauma, or without support or education.
- 42.2 The Working Group endorses the submissions made by MYAN Australia in respect of the need for a youth justice approach regarding youth offending.
- 42.3 The Working Group emphasises the clear procedural injustices being perpetrated on these people. For example, an affected individual may be called into a Department office before a shut-down period such as Christmas or Easter, been asked to remain in a waiting room until close of business, and then transported to an immigration detention facility. They have enormous difficulty meeting the relevant timeframes and accessing support such as legal representation or case workers.
- 42.4 Further, victims of family violence may not report the violence because they fear the perpetrator will be deported based on the strictness of the present law and its failures to take into account the best interests of children, leading to a lack of support for the children and numerous other consequences.<sup>19</sup>
- 42.5 Unrepresented individuals are also severely disadvantaged where no merits review is available. They may miss deadlines and struggle to cope with their situation. In an inquisitorial environment such as the AAT, they receive protections to ensure they are able to tell their story.

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<sup>19</sup> Le L evre, K., Trapped: m grant women s v sas prevent ng them from seek ng he p for domest c v o ence , the Canberra Times, 7 Apr 2018, available at [www.canberratimes.com.au/act-news/trapped-m-grant-womens-v-sas-prevent-ng-them-from-seek-ng-he-p-for-domest-c-v-o-ence-20180405-h0ydzh.htm](http://www.canberratimes.com.au/act-news/trapped-m-grant-womens-v-sas-prevent-ng-them-from-seek-ng-he-p-for-domest-c-v-o-ence-20180405-h0ydzh.htm) .

#### 43. **Effects on families, children and Australia's international obligations**

- 43.1 The Working Group considers that the separation of Australian family units as a result of the legislation is an extremely serious consequence. Such separation goes to Australia's international obligations under the CRC and the ICCPR.
- 43.2 The Working Group considers that merits review is essential for the protection of this right, particularly given that a hearing will be given to affected families.
- 43.3 We have observed a rise in cancellation of the visas of very young people and children. Again, this underscores the need for merits review.
- 43.4 The Working Group adopts the submissions of the Law Council of Australia regarding the effect of cancellation on children.

#### 44. **Issues of proportionality**

- 44.1 The Committee, in considering the 2014 legalisation prior to its assent, stated that questions of proportionality would be resolved by way of comprehensive policy guidelines on matters to be taken into account when exercising the discretion.<sup>20</sup>
- 44.2 Unfortunately, Direction No. 65 has been an inadequate protection. The Working Group has observed numerous instances of imbalance arising from the application of the legislation and Direction No. 65. The protection of the community is often, without sufficient explanation, given primacy over all other considerations, in circumstances where that is not morally or logically appropriate.
- 44.3 The Working Group adopts the Law Council of Australia's submissions in this respect.
- 44.4 As the Law Council of Australia has suggested, the Working Group can provide the Committee with numerous examples of s.501 being used in instances that do not align with reasonable community expectations, and do not match the rhetoric regarding serious offenders being removed from the community.
- 44.5 The Working Group notes the following examples:
- An eighteen-year-old humanitarian visa holder with no prior offending received notice of intention to cancel his visa after he was charged (without any hearing having proceeded) for being involved in a minor assault with a group of other teenage boys.

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<sup>20</sup> Explanatory Memoranda, Migration Amendment (Character and General Visa Cancellation) Bill 2014.

- A man received a NOICC on the basis of a driving offence history and a conviction for a drunken altercation with a member of the police force in another country that did not result in any injury.
- A man of over 70 years in age had a s.501 visa cancellation. He arrived in Australia before he was 10. He has a number of part-Aboriginal children and grandchildren. He suffered road accidents leaving him with permanent brain damage. He was detained for months.
- A man who arrived in Australia at the age of five, now in his fifties with an acquired brain injury and numerous other health issues, had his visa cancelled in 2016 and was detained on Christmas Island. He cannot be removed because of his health. His elderly mother died during his detention.
- A man with a history of two offences of crop-sitting (cannabis cultivation limited to living on premises) with sentences of below 12 months, committed over seven years earlier, voluntarily departed Australia to lodge a Partner visa to return to be with his wife and young children. He was refused. Although this is a refusal and not a cancellation, it demonstrates the situations of affected families.
- A man with a pending application for Australia's protection, who has five young children in Australia also seeking protection, has his visa automatically cancelled under section 501(3A) on the basis of a conviction relating to misrepresenting details of used cars for sale.
- A woman whose dangerous driving, based on a misunderstanding of road rules and no other factors, resulted in a process causing harm to another, had her visa mandatorily cancelled.
- An Aboriginal man, son to an Aboriginal mother, whose parents are both Australian citizens, is a New Zealand citizen according to a quirk of his birth. He committed an aggravated burglary and his visa was cancelled.
- A father with claims for protection is twice convicted of misrepresenting items for sale has his visa mandatorily cancelled.
- A refugee from a civil war who was kidnapped and forced to become a child soldier in his home country was granted protection in Australia as a permanent resident. He had intellectual and mental health difficulties. He used drugs and became homeless, and as an 18-year-old was involved in a serious incident. He has no family in his home country and cannot return there.
- A young man witnessed extraordinary violence against his family and community, including the murder of his father, in his home country, and consequently suffers PTSD. After being imprisoned, he actively tried to better himself, completing courses and

counselling. He has no family in his home country and cannot return there.

- A young man was accused of inappropriately touching a woman at a nightclub. He was placed in criminal custody for 13 months, after which all charges were dropped as irrefutable evidence demonstrated the man had not been near the woman at any stage. He was transferred to immigration detention, where he remained for 5 further months until the Minister allowed his release.
- A man lost his family to a massacre in his village. He was charged with an offence, but the charges were dropped. His visa had nonetheless been cancelled, and he remains in detention.

44.6 These examples demonstrate the human consequences of cancellations. As practitioners or service providers, the Working Group sees first-hand the devastation that visa cancellations wreak on Australian families and those whom Australia has committed to supporting under its humanitarian program.

44.7 The Working Group urges the Committee to inform itself regarding the nature of character cancellations and their serious human consequences. We are in a position to provide further examples if it would assist the Committee.

44.8 The room for error and the consequences mean that every protection must inhere in the process.

#### **45. Potential for exploitation**

45.1 The Working Group is aware of situations in which employers, debt collectors, or personal acquaintances have threatened visa holders with false reports of criminality in order to exert control because of fear of visa cancellation. For example, if a person complains of underpayment, an employer might threaten to call the police or the Department and make an accusation the person was stealing from the till. Such threats are particularly effective where the consequences are severe and if minimal protections are in place.

45.2 Again, these risks mean that every protection should be in place to ensure correct and preferable decisions.

#### **46. Association cancellations**

46.1 The Committee will be aware that, as a result of the 2014 amendments, character cancellation can proceed where individuals are reasonably suspected of being, or having been, members of, or otherwise involved or associated with, a listed group or organisation or class of group or organisation, or are reasonably suspected of being, or having been, involved in certain listed activities or types of activities.

- 46.2 The breadth and imprecision is substantial. It allows cancellations to proceed without the provision of particulars to the person affected.
- 46.3 In such circumstances, again, it is imperative that a person whose visa may be cancelled have an opportunity to put their case to an expert independent reviewer.
- 46.4 There may also be international political consequences arising from restrictive policy. Other nations are likely to be concerned with a policy that returns convicted individuals to its shores despite their having lived most of their lives, and attended school, in Australia.

## MINISTERIAL POWERS

- 47. A personal decision to cancel a visa, or to refuse to revoke a cancellation, made by the Minister is little more than an explicit and intentional denial of access to merits review. This is the only discernible reason a personal decision would be made. This sits very uneasily with the severity of the consequences of cancellation, with the Australian administrative law system, and with Article 26 of the ICCPR, which enshrines the principle that all persons are entitled without any discrimination to the equal protection of the law.
- 48. It also sits uneasily with the nature of Ministerial decision-making, which has come under public scrutiny and which has been observed by Working Group members. Evidence suggests that there are instances where Ministerial decision-making has occurred without the appropriate care or consideration. This has been borne out in litigation (for example, *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 and *Burgess v Minister for Immigration and Border Protection* [2018] FCA 69) and in review of client files under the *Freedom of Information Act 1982* (Cth), where it has been seen that the Minister will quickly sign off on a number of cancellation decisions during a brief visit.
- 49. The High Court of Australia, in *Plaintiff M47/2012 v Director General of Security* [2012] HCA 46, found that some personal decisions by the Minister under section 501 of the Act were reviewable by the AAT. The 2014 legislation, according to the Explanatory Memorandum, restored the intended position that no decisions made by the Minister personally under section 501 of the Act are reviewable by the AAT.
- 50. The justification for this position is contained in the Explanatory Memorandum: “Any decision made by the Minister... will continue to be subject to judicial review and therefore consistent with Article 13 [of the ICCPR].”<sup>21</sup> As set out above, this is an unsatisfactory and insubstantial justification.

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<sup>21</sup> Explanatory Memoranda, Migration Amendment (Character and General Visa Cancellation) Bill 2014.

51. The Working Group notes that, when the AAT was established, it was intended that any administrative decision that will, or is likely to, affect the interests of a person should be subject to merits review. Matters considered unsuitable for merits review were 'legislation-like decisions' and 'decisions that automatically follow from the happening of a set of circumstances'.<sup>22</sup>
52. Moreover, many individuals, as a result of financial hardship, location, lack of support, education and advice, and vulnerability, would not have the opportunity to correct an error through litigation.
53. The Working Group recommends that the Minister and Assistant Minister be encouraged to significantly reduce, or indeed entirely cease, the use of the personal decision-making power, and that the established legal processes are allowed to take their course. If and when personal decisions are made, appropriate transparency should be ensured so that the Parliament and the public are able to scrutinize the use of these powers, which significantly disadvantage those whom they affect. Consideration of appropriate checks and oversight of this power should occur.
54. Taking this course will also encourage Departmental decision-makers to be more efficient in their decision-making. As discussed above, merits review has a substantial normative effect and, by providing oversight, encourages decision-makers to make the right decision in the first instance.
55. The Working Group refers with approval to and adopts the Law Council of Australia's submissions in respect of Ministerial decision-making powers, in particular regarding the repeated use of personal powers by the Minister, the use of multiple powers by the Minister, and the exercise of unrestrained Ministerial power.

## DUPLICATION

### 56. Double-handling as a result of the Minister's powers

- 56.1 Inefficiency occurs as a result of the Minister's broad powers. In many cases where the courts have found jurisdictional error, the Minister has simply made a new decision, utilising his specific powers to do so, addressing that error and thereby making the new decision extremely difficult to challenge successfully. This may occur in a wholly unsatisfactory manner, for example, within minutes of a court's decision: see, for example, *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107 and *Burgess v Minister for Immigration and Border*

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<sup>22</sup> Administrative Review Council, 'What decisions should be subject to merits review?', 1999, available at <http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritsreview1999.aspx>.

*Protection* [2018] FCA 69. Plainly, this is an inappropriate use of the courts' time and resources, and means significant detriment for individuals.

## 57. Duplication with the criminal law system

57.1 The Working Group adopts the submissions of the Law Council of Australia in respect of criminal law issues.

57.2 Part of the justification for the introduction of the 2014 legislation was as follows:

*Without the proposed amendments within section 501, non-citizens in prison who fail the character test can be released from prison prior to a visa cancellation or refusal process being finalised. This has meant that serious criminals who potentially presented a significant risk to the community could reside lawfully in the community while their suitability for doing so was under consideration.<sup>23</sup>*

57.3 This is quite clearly a flawed justification. In addition to the logical difficulties with this justification, there is a clear attempt to cut across the criminal law system. For example, an argument was advanced that sentencing was too lenient: this is not a matter for the administrative branch.

57.4 The criminal law system is uniquely equipped to determine and regulate the suitability of a person to reside in the community. It is uniquely equipped to determine what the consequences of offending ought to be.

57.5 Reform of the bail system in Victoria is expected to mean that any person charged with a serious crime who 'poses a real risk to the community based on substantive evidence' will simply not be released on bail.

57.6 At the time of introduction of this legislation, the "key benefit" of mandatory cancellations was said to be ensuring "noncitizens who pose a risk to the community will remain in either criminal or immigration detention until they are removed or their immigration status is otherwise resolved."<sup>24</sup> There is an enormous leap here: in no sense can a mandatory, sentence-based cancellation be said to demonstrate that a person poses a risk to the Australian community. The administrative system must confine itself to its areas of expertise and avoid detention wherever possible.

57.7 The criminal law jurisdiction is expert in dealing with criminal matters, and this expertise should be relied upon.

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<sup>23</sup> Explanatory Memoranda, Migration Amendment (Character and General Visa Cancellation) Bill 2014.

<sup>24</sup> Commonwealth, *Parliamentary Debates* House of Representatives, 24 September 2017, 10325 (Scott Morrison).



## 58. Duplication within the legislation

58.1 The Working Group adopts the submissions of the Law Council of Australia with respect to the overlap between s.116 and s.501 criminal cancellations. It concurs that the right power should be chosen in the first instance to improve efficiency and equitability.

## CONCLUSION

59. A government that is confident in the correctness of its decision-making should not be threatened by full and proper merits review. Any further limits on the merits review for visa cancellation decisions that currently exists would lead to uncertainty, inappropriate concentration of power, and a lack of integrity in decision-making. Significant injustices, once perpetrated, are difficult to rectify.
60. There are numerous powerful reasons for the protection of merits review, and indeed for strengthening merits review. Most importantly, the nature of visa cancellations is such that every protection must be extended to a person as a part of the process. The Australian community will not support an opaque, unfair system, and as more and more people are affected, and the public becomes aware of the realities of many cancellations, an abhorrence of this process is likely to increase. Very few in the community consider it appropriate to deport individuals raised in Australia since early childhood. These decisions do not only affect individuals: they change families, businesses and communities; cumulatively, they change the fabric of the Australian community and its legal system.
61. This Inquiry must not proceed without appropriate gravity. Its subject matter is of critical importance in the shape of justice in Australia, and in normative protections for individual rights. As Justice Duncan Kerr has observed:

*We too often take for granted our autochthonous administrative law which grants the citizen rights which should be celebrated as Malcolm Fraser did when he nominated reform of administrative law and the AAT as among his great achievements.*<sup>25</sup>

62. The Working Group welcomes the opportunity to consult further on a confidential basis. Its areas of expertise are broad. If you would like to discuss matters regarding cancellation further, please contact Hannah Dickinson, Chair of the Working Group, at [workinggroup@visacancellations.org](mailto:workinggroup@visacancellations.org).

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<sup>25</sup> Kerr, Justice Duncan, "Reviewing the reviewer: the Administrative Appeals Tribunal, Administrative Review Council and the road ahead" (FCA) [2015] FedJScho 16.



## Refusals or Cancellation Under s 501: Information for Affected Individuals



### Section 501 of the *Migration Act 1958* – What it means for you

If you hold any Australian visa, permanent or temporary, or if you have applied for or intend to apply for an Australian visa, s.501 of the Act might affect you. This Fact Sheet will provide you with general information about the law.

S.501 of the Act means that your visa can be **refused** or **cancelled** because of what is broadly known as the 'character' test. It does not matter how long you have held your visa for, even if you came to Australia as a child, or if you were born here: *all* visa holders and visa applicants can be affected.

Receiving notice that your visa may be, or has been, refused or cancelled under s.501 can be distressing and overwhelming. It is crucial that you are informed about your options and your rights, because the consequences of refusal or cancellation are extremely serious. A refusal or cancellation under s.501 may:

- Result in *all* visas you hold or have applied for being considered refused or cancelled;
- Result in you becoming unlawful;
- Result in your immigration detention for extended periods of time;
- Result in your removal from Australia; and
- Prevent you from making an application for a visa, or entering Australia, in the future.

### What is the character test?

Broadly speaking, you may not pass the character test if:

- You have a **substantial criminal record** under the law. Most commonly, this means that you have been sentenced to a term or terms of imprisonment of 12 months or more, even if those terms are concurrent, periodic or suspended.
- You committed an offence relating to or during your immigration detention.
- It is suspected that either you, or an organisation, group or person that you may be associated with, may be involved in crimes of international concern, such as people smuggling or war crimes.
- Your conduct, past and present, leads the Minister to consider you are not of good character.
- There is a risk that your presence would be disruptive or threatening to the Australian community.
- You have been convicted or found guilty of sexually based offences involving a child.
- You have received an adverse ASIO assessment or are the subject of an Interpol notice.

See overleaf for specific details.

### **What should I do if I am, or might be, affected?**

You need to demonstrate to the decision-maker that either:

- You pass the character test, or
- There is another reason why your visa should not be cancelled.

The sooner you take action, the better. Taking action will enable you to prepare, gather information, and respond as fully as you can.

#### **If you are worried about your situation due to your history, investigations, charges or convictions:**

- Seek advice from a reputable migration lawyer.
- Ensure your criminal lawyer, and the court, is aware of your migration status and the potential of s.501 to affect your future.
- Authorise your migration and criminal lawyers to work together. For example, an expert opinion on migration consequences may be relevant to a court's determination of sentence.
- Request a copy of your immigration file and your files from the Department of Justice and Regulation, from Corrections, Prisons and Parole Victoria, and any other relevant bodies.

#### **If you have received correspondence from the Department regarding s.501:**

- Read the correspondence from the Department carefully, and ensure you understand it. In most cases, the Minister is obliged to give you particulars of the information relevant to the decision.
- Comply with the timeframes specified, or you may lose your opportunity for comment or review.
- Request a copy of your immigration file and your files from the Department of Justice and Regulation, Corrections, Prisons and Parole Victoria, and any other relevant bodies.
- Seek advice from a reputable migration lawyer. Your lawyer will tell you what types of evidence to gather and how to proceed, and they will liaise with the Department on your behalf.

**You should seek legal advice from a reputable immigration lawyer in all the situations described below at the earliest possible opportunity.**

If you are having financial difficulties, many private immigration law firms will consider taking your case on a pro bono or reduced fee basis. You can also contact Legal Aid Victoria, JusticeConnect, Refugee Legal, the Asylum Seeker Resource Centre, or Salvos Legal for referrals or assistance.

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

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## Refusals and Cancellations Under s 501: Information for Criminal Lawyers



### Section 501 of the *Migration Act 1958* – What it means for your clients

Section 501 of the Act governs what is known as the 'character' requirements for Australian visas. On 11 December 2014, the Act was amended and provision was made for the mandatory cancellation of a person's visa where certain requirements were met. A December 2016 report by the Commonwealth Ombudsman on the Administration of Section 501 of the *Migration Act 1958* records that, since the passage of the new legislation, the number of people who have had their visas cancelled under s.501 has grown from 76 in 2013 – 2014 to 983 in 2015-2016.

Any non-citizen, whether they are a permanent or temporary resident, a visa holder or a visa applicant, and regardless of their tenure in Australia, can be affected. A refusal or cancellation under s.501 may:

- Result in your client becoming unlawful;
- Result in your client being detained in immigration detention, sometimes in remote locations;
- Result in your client's removal from Australia; and
- Prevent your client from making an application for a visa, or entering Australia, in the future.

If the Minister considers refusal or cancellation is in the national interest, there are fewer protections for your client.

There are other provisions in the Migration Act 1958 that may affect your client, leading to cancellation and immigration detention. For further information, please see the LIV's Fact Sheet 'Visa Cancellations Under s 116 of the *Migration Act 1958*: Information for Affected Individuals'.

### What should I know about cancellation?

- If your client has received a sentence or a combination of sentences of 12 months or more in total (including in the past) and they are in criminal custody, their visa **will** be cancelled.
- If your client is found guilty or convicted of a sexually based offence involving a child and they are in criminal custody, their visa **will** be cancelled.
- If your client is convicted of, or even charged with or suspected of, offences, their visa **may** be cancelled.
- If your client's visa is cancelled, they may be able to seek review of that decision. A cancellation is not final. However, they must seek any review they are entitled to within strict statutory timeframes. Review processes can take substantial time.
- If your client's visa is cancelled, they will almost certainly be detained in immigration detention until review processes are complete or they otherwise depart Australia.

### What should I know about refusals?

Your client can fail the character test in a number of ways. However, if they receive a substantial criminal record (including sentences totalling twelve months or more), have been assessed by ASIO as a risk to security, or have been found guilty of a sexually based offence involving a child, or have been charged with or indicted for a crime of international concern, they will certainly fail the character test.

### **What should I advise my client?**

At present, you must be a registered migration agent to give migration assistance, and penalties apply for breach.

Ensure you ask your client what their status in Australia is at an early stage, and if your client is a visa holder, you or your client should seek advice from a reputable migration lawyer at the earliest opportunity. It may affect how your client should plead. A migration lawyer can also provide an expert affidavit that may assist with sentencing.

Ensure your client understands that timeframes for response to s.501 issues are strict. Failure to comply can mean they forfeit their right to consideration or review.

If your client has financial difficulties, many private firms may be able to assist on a *pro bono* or reduced fee basis. You or your client can also contact Legal Aid Victoria, JusticeConnect, Refugee Legal, the Asylum Seeker Resource Centre, and Salvos Legal for referrals or assistance.

### **What can I do?**

The criminal process and outcomes will be scrutinised in any cancellation or refusal processes. The plea, the police brief, and any sentencing remarks by a judge will be of great importance. Liaise with a migration lawyer about this, and be aware that the implications of such matters go beyond the discrete criminal process.

Ensure your client focuses on rehabilitation and gathering evidence of their family, community, financial, employment and other ties to Australia, as well as of any particular compassionate aspects of their case. They should understand also that their conduct in criminal custody is important, as is any assessment of their risk of recidivism.

Be aware of relevant materials, such as Direction no. 65, and case law, including *Guden v The Queen* [2010] VSCA 196.

You can also direct your clients to the Law Institute of Victoria Fact Sheet. If they are facing mandatory cancellation of their visa, [Victoria Legal Aid](#) has helpful materials.

**Your client should seek migration advice from a reputable immigration lawyer in all the situations described below at the earliest possible opportunity.**

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"> <li>Your client will be given an opportunity to comment prior to the decision.</li> </ul>
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"> <li>Your client will be given an opportunity to comment prior to the decision.</li> </ul>
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"> <li>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.</li> <li>Your client can request that the decision be revoked (meaning reconsidered). Your client must request revocation within 7 days of receiving notice of cancellation.</li> <li>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.</li> </ul>
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"> <li>Your client will not be given an opportunity to comment prior to the decision.</li> <li>Your client can request that the decision be revoked (meaning reconsidered). Your client must request revocation within 28 days of receiving notice of cancellation.</li> <li>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.</li> <li>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.</li> <li>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.</li> </ul>
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"> <li>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.</li> </ul>
A delegate of the Minister decides to cancel or refuse your client's visa under s.501(1) or (2).			<ul style="list-style-type: none"> <li>Your client can request that the Minister's decision be revoked (meaning reconsidered).</li> <li>Your client must request revocation within 7 days of receiving notice of cancellation.</li> <li>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.</li> </ul>
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"> <li>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.</li> </ul>
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.	



## Visa Cancellations Under s 116: Information for Affected Individuals

### Who might be affected?

Most visa holders – temporary and permanent – can have their visa cancelled under s.116. Permanent visa holders in Australia have some protections. In some cases, cancellation is mandatory, but mostly it is discretionary.

Visa holders with charges pending, or histories of criminal offending or dishonesty, are most likely to be affected.

### When might character issues lead to cancellation?

- The Minister thinks your presence might be a risk to the health, safety or good order of the community or a part of it – for example, you have been charged with an offence
- Certain assessments about you have been made by the Foreign Minister, ASIO, Interpol or under particular sanctions legislation
- You are suspected of committing a migration-related offence
- You hold a temporary visa and have been convicted of an offence
- You hold a bridging 'E' visa and have charges pending against you, or certain Australian agencies are investigating you

### When else might a s 116 cancellation occur?

- You cannot establish your identity
- You were never, or are no longer, eligible for that visa
- Fraudulent conduct in obtaining the visa is suspected
- Visa conditions have not been complied with
- You gave incorrect information as part of the application process
- The grant was otherwise unlawful
- You hold a student, visitor, transit or temporary business or work visa, and the Minister thinks you are not genuine in your declared intentions, or are acting in the wrong manner.
- Your sponsor was paid in some manner to sponsor you, or they are not complying with their obligations
- You request that your visa be cancelled

### What should I do?

Keep your contact details updated with the Department so you can be sure you will receive correspondence. Otherwise, you might miss an opportunity to respond, or to seek review.

If you think you might be affected, or if you receive a notice, seek advice from a reputable lawyer.

If you are faced with cancellation, you need to argue that **the ground for cancellation does not exist, or there is a reason why your visa should not be cancelled**. See below for suggestions about what might be relevant.

The timeframe for response is strict. If you are in Australia, you will have five working days to respond, although a short extension may be granted. If you are given notice in person, your visa can be cancelled on the spot. Ask for adequate time to respond and present as many arguments as you can, supported by evidence.

If your visa is cancelled, you will become unlawful. Depending on your decision about what steps to take, you will need to apply for a bridging 'E' visa. If that application is refused, you will likely be detained.



## Can I appeal?

In most cases, if you are in Australia, you can appeal to the Administrative Appeals Tribunal for review of a cancellation decision. You must do so within strict timeframes, or you will lose the opportunity to have your case reviewed.

## How do I seek help?

Visa cancellation is a serious matter, and it is wise to seek legal advice as early in the process as possible. The Law Institute of Victoria has a list of Accredited Specialists in immigration law, and there are a number of reputable law firms that can assist you. If you are facing financial difficulties, you can contact Legal Aid Victoria, Justice Connect, Refugee Legal, the Asylum Seeker Resource Centre, or Salvos Legal for referrals or assistance.

## Issues to consider when making a case that your visa should not be cancelled

- Can you prove or otherwise demonstrate that the ground does not exist? For example, what ways could you prove your identity, or that your intentions have been genuine?
- Do you have a compelling reason for travelling to, or staying in, Australia?
- Have you complied with your visa conditions?
- Are you, or your family members, likely to face financial, psychological, emotional or other hardship as a result of cancellation?
- In what circumstances did the ground for cancellation arise? What should the delegate understand about the situation? Was it beyond your control that the ground arose?
- Does Australia have any international obligations that might be breached as a consequence of cancellation? For example, do you fear persecution in your home country, or is there a child who would be affected?
- Have you formed strong family, business or other ties in Australia?
- If you have been charged, might the charges be dropped? What are you pleading? Ensure you take responsibility for things that you have done.
- If your visa is cancelled, will any family members also face cancellation?
- Have you been a victim of family violence or trauma?
- How have you behaved toward the Department in the past? Have you been truthful and cooperative? Have you engaged voluntarily?
- What are the consequences of cancellation? Would you become unlawful? Could you be detained, or removed from Australia? Might you be removed to danger in your home country?
- Are there important parts of your story a decision-maker should know about? Is there something compassionate in your background that is important for their consideration?
- Would the community, or members of it, support you in remaining in Australia?