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Committee Secretary
Joint Standing Committee on Migration
PO Box 6021
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By email

Dear Committee

**Review processes associated with visa cancellations made on criminal grounds**

Thank you for the opportunity to make this submission. This submission endorses the submission made by the Refugee Council of Australia, and addresses the three terms of reference for the Inquiry. In sum, it argues that:

**Background** Visa cancellations made on criminal grounds operate at the intersection between immigration and criminal laws and processes. Such visa cancellations generate complex issues which underscore the importance of transparency and accountability in this legal area. The complexity engaged supports the argument that independent merits review of visa cancellation is essential, and that the use of personal Ministerial powers to cancel visas should be minimised to support transparency of decision-making and outcome.

**1. The scope of the Administrative Appeals Tribunal's jurisdiction to review ministerial decisions should be broadened.** Specifically, the ability for the Minister to set aside non-adverse decisions of the AAT should be repealed, and the personal power of the Minister to cancel visas should be minimised.

**2. There is no issue of duplication associated with the merits review process**, rather merits review performs a distinct and valuable function for administrative decision-making and justice.

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**3. The discretionary nature of character based cancellation and revocation of mandatory visa cancellation decisions under s 501 of the *Migration Act* prompt issues for efficiency in criminal justice** at various stages of the criminal process including at the entering of a plea, and at sentencing.

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**Background: Which visa cancellation provisions should the Inquiry examine?**

Before turning to the terms of reference, it is important to consider what legal provisions should be considered by the Inquiry. Although s 501 of the *Migration Act 1958* (Cth) ('the *Migration Act*') makes special provision for visa cancellation based on criminal conviction, other provisions allow visa cancellation on the basis of criminal charge or administrative findings of non-citizen conduct that is also regulated under the criminal law. For this reason, I argue the review of decisions under the following provisions should be considered by the Inquiry:

- *Section 501 (refusal or cancellation of visa on character grounds):* This provision places the onus on non-citizens to satisfy the Minister that they satisfy the character test. It sets out mandatory and discretionary visa cancellation powers. It requires visa cancellation on the basis of criminal guilt for specified offences and circumstances where the person is serving a sentence of imprisonment. It permits visa cancellation on the basis of criminal convictions for specified offences. It also allows visa cancellation on the basis of conduct that has not been subject to a finding of criminal guilt.
- *Section 109 (cancellation of visa if information is incorrect):* This provision empowers visa cancellation if the visa applicant has provided incorrect information in a visa application, a passenger card, or via a 'bogus document'.[1]
- *Section 116 (general visa cancellation power):* This provision enables visa cancellation on a wide variety of grounds including risk to good order, likelihood of engagement in conduct not contemplated by the non-citizen's visa and grounds prescribed in the *Migration Regulations 1994* (Cth) ('the Regulations'). It includes the cancellation of bridging visas due to criminal charge or conviction.

A growing literature has emerged on the intersection between criminal and immigration law regimes, coined 'crimmigration', which is said to have intensified from the 1990s in the Anglo-American world. The term 'crimmigration' has been used as an umbrella term for the multiple dimensions of convergence between immigration law and criminal law regimes: the overlap between substantive criminal and immigration law, similarities in enforcement, and similarities between criminal and immigration procedure.[2] The argument that such alignment serves to deepen social stratification and exclusion through its enforcement of 'flexible'

[1] *Migration Act* ss 101-103.
[2] Juliet P Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, & Sovereign Power' (2006) 56 *American University Law Review* 367.

notions of membership is compelling.[3] However, the specific ways in which visa cancellation decisions in Australia have ramifications for differential treatment in criminal law on the basis of non-citizenship status is only starting to emerge.

Deportation (or the potential for deportation) is an important outcome of crimmigration. Non-citizens may be deported as a consequence of a criminal conviction. However the provisions noted above also allow visa cancellation without criminal charge, without criminal prosecution and without criminal conviction on the basis of administrative findings of conduct or the likelihood of conduct that is also prescribed in the criminal law.

All three provisions support visa cancellation if the decision-maker decides the applicant has made a false or misleading statement in their visa application. In the period 1 July 1995 to 31 June 2007, the AAT finalised 365 reviews of character exclusion under s 501(6)(c) of the *Migration Act* that found that having regard to a person's past and present criminal or general conduct, the person is not of good character.[4] 355 of these matters (96 per cent) concerned persons who were found to be dishonest in various ways such as through false and misleading statements or submission of false documents. These non-citizens had neither been charged nor convicted in relation to their alleged conduct. However, much of the conduct contemplated by these provisions is also addressed through criminal provisions in the *Migration Act*. For example, it is a criminal offence to provide a forged or false document, make a false or misleading statement, use a visa granted to another, or make arrangements to help a person obtain a relationship-based visa.[5] These offences are punishable by a maximum period of 10 years' imprisonment and/or a hefty fine, equivalent to the penalty for the basic people smuggling offence[6] which indicates the legislature's approach to their seriousness.

Other conduct contemplated by the *Migration Act* visa cancellation provisions discussed above is also prescribed as summary criminal offences. For example, s 116 empowers cancellation on the basis of risk to good order. At the same time public order offences such as offensive language, offensive conduct and obscene exposure are also found in state and territory criminal statutes.[7] These offences are generally punishable by a maximum period of three months imprisonment and/or a small fine, and importantly, may also be disposed of by way of a criminal infringement notice ('on the spot fine') which does not result in criminal conviction.[8]

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[3] Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime and Sovereign Power' pp 59-76, in *Governing Immigration Through Crime: A Reader*, (eds.) Julie A.Dowling and Jonathan Xavier Inda (Stanford: Stanford University Press, 2013).
[4] Louise Boon-Kuo, *Policing Undocumented Migrants: Law, Violence and Responsibility,* (United Kingdom: Routledge, 2018) p. 152-153.
[5] *Migration Act* ss 234, 236, 240, 241.
[6] *Migration Act* s 233A.
[7] See for example *Summary Offences Act 1988* (NSW) ss 4, 4A, 5.
[8] See for example *Criminal Procedure Act 1986* (NSW) ss 333-337; *Criminal Procedure Regulations 2010* (NSW) Schedule 4.

Understanding visa cancellation as a mechanism that may in practice seek to regulate the alleged criminal conduct of non-citizens focuses attention on the absence of safeguards in immigration law that apply in principle in criminal law. Punishment that seeks to pre-empt or prevent future criminal conduct undermines the principled notion that criminal liability ought to be based on past conduct, whereas ss 116 and 501 both empower visa cancellation on the basis of the likelihood of future conduct. Decisions to remand or release an accused on bail are informed by the fundamental common law principle of the presumption of innocence, whereas visa cancellation on the basis of criminal charges and consequent detention tends to undermine that principle. Administrative findings on the conduct of a non-citizen are not required to meet the criminal law standard of proof beyond reasonable doubt, even though the consequences of visa cancellation are arguably punitive.

Various scholars have referred to deportation following criminal conviction itself as punishment, and thus as undermining criminal law rules against punishment of a person twice for the same offence (double jeopardy).[9] Courts in Victoria and Queensland have conceptualised the punitive aspect slightly differently in the context of deciding that the prospect of deportation is a relevant consideration in sentencing non-citizen offenders. The Victorian Supreme Court of Appeal reasoned that generally the expectation of deportation upon release 'may well mean that the burden of imprisonment will be greater', and the 'fact that a sentence of imprisonment will result in the offender *losing the opportunity of settling permanently* in Australia ... may well be viewed as a serious 'punishing consequence' of the offending.' [10]

The power to cancel visas on the basis of criminal charge illustrates how the entanglement between criminal law and immigration law and processes challenges the characterisation of visa cancellation and subsequent detention as solely administrative. It suggests rather that immigration law augments and/or displaces the criminal law regulation of offending by non-citizens in some instances

For example, in 2016 the Ombudsman reported on the administration of people who had their bridging visa cancelled under s 116(1)(g) of the *Migration Act* due to criminal charges or convictions[11] and had been taken into immigration detention.[12] The Ombudsman provided case studies in which individuals had remained in detention over a year after the criminal charges which led to their bridging visa cancellation had been dropped or withdrawn.[13] In

[9] Michael Grewcock, 'Punishment, Deportation and Parole: The Detention and Removal of Former Prisoners under Section 501 *Migration Act 1958*' (2011) 44(1) *The Australian and New Zealand Journal of Criminology* 56; Daniel Kanstroom, 'Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases' (2000) 113 *Harvard Law Review* 1889.
[10] *Guden v The Queen* [2010] VSCA 196; 28 VR 288 [27].
[11] See also *Migration Regulations* r 2.43(1)(p) and (q).
[12] Commonwealth Ombudsman, "Department of Immigration and Border Protection: The administration of people who have had their bridging visa cancelled due to criminal charges or convictions and are held in immigration detention' Report No. 7/2016 (Canberra: Commonwealth of Australia, 2016).
[13] Ibid, 16-18.

these circumstances, in practice, it is hard to see the continued detention of individuals as anything other than an ongoing consequence of the initial criminal charge, and thus fulfilling a (perverted) criminal law and punitive purpose.

The character of immigration detention as a step in the criminal process in this instance is enhanced by the submission provided by the department to the Minister in seeking intervention under s 195A in one of the case studies.[14] The department advised the Minister that 'The matter may go back to court in the future should future evidence be presented', but as noted by the Ombudsman, there was no information that the Director of Public Prosecutions or Police were continuing to investigate.[15] The Minister did not intervene and the person remained in detention for a further nine months.

Further research is required to better understand whether and how legal decisions at the intersection between immigration law and criminal law regimes may deepen social stratification and contribute to a practice of 'criminal law' regulation that differentiates on the basis of immigration status and citizenship. At the very least, the complexity engaged supports the argument that independent merits review of visa cancellation is essential, and that the use of personal Ministerial powers to cancel visas should be minimised to support transparency of decision-making and outcomes. This is necessary to allow for a more comprehensive understanding of the implications of this convergence to develop.

In specific response to the Inquiry's terms of reference, please see the following.

## 1. The scope of the Administrative Appeals Tribunal's jurisdiction to review ministerial decisions

Two main issues affect the scope of the Administrative Appeals Tribunal's ('AAT') jurisdiction to review ministerial decisions: the ministerial power to act personally to set aside decisions of the AAT; and the power of the minister to make decisions acting personally that are exempt from review. The exercise of Ministerial personal power to cancel visas on criminal grounds should be avoided because it holds serious consequences for non-citizens and undermines the purpose for which the AAT was established and accountability for government decision-making.

*The Ministerial power to set aside AAT decisions*

The ability for the Minister to set aside non-adverse decisions of the AAT should be repealed. The Minister currently holds the power to set aside decisions of the AAT made under s 501 not to refuse or cancel a visa on character grounds; and under s 501CA to

[14] Given that the cohort subject to detention after bridging visa cancellation examined by the Ombudsman were people who had arrived in Australia by boat, release from detention was up to the personal discretion of the Minister to intervene under *Migration Act* s195A and issue a visa.
[15] Commonwealth Ombudsman, "Department of Immigration and Border Protection: The administration of people who have had their bridging visa cancelled due to criminal charges or convictions and are held in immigration detention' Report No. 7/2016 (Canberra: Commonwealth of Australia, 2016), 18.

revoke the mandatory visa cancellation under s 501(3A) of the *Migration Act* ('the set aside provisions').[16] The set aside provisions allow for the Minister to make decisions in which the rules of natural justice do not apply. Unlike set time limits for applications for judicial review, the set aside provisions do not include a timeframe in which the Minister is required to act. Thus, the ability for the Minister to set aside AAT decisions destabilises the finality and certainty of AAT decisions.

Although other provisions in the *Migration Act* similarly provide powers only to be exercised by the Minister personally and not subject to merits review, these other provisions empower the Minister to make decisions that favour the non-citizen.[17] Dispensing provisions such as ss 48B, 195A, 351, 417 are intended to 'confer upon the Minister a degree of flexibility allowing him or her to *grant* visas which might not otherwise be able to be granted because of non-satisfaction of substantive or procedural requirements.'[18] Flexibility to refuse or cancel visas contrary to AAT decision amounts to excessive discretion and institutes the dangerous potential for arbitrary exercise of executive power. The potential for arbitrary exercise of power is heightened by the diminished legislative expectations of accountability for the set aside provisions. Unlike the dispensing provisions, the set aside provisions do not require the Minister to lay a statement before each House of Parliament setting out the fact that the Minister made a decision and the reasons for that decision.

*The growth of Ministerial discretion in character decision-making in law and practice*

Under existing law the scope for AAT review is restricted to decisions made by Ministerial delegates. The AAT does not have jurisdiction to review decisions made by the Minister acting personally. It is important to note that the grounds on which the Minister can make a decision personally (and thus exempt that decision from the requirements of natural justice and merits review) have expanded over time.

In Australia, expansion of the Minister's power to exclude individuals on criminal grounds has occurred alongside convergence between criminal law and immigration law regimes in particular through the introduction of visa cancellation on criminal grounds under the character test and subsequent removal. Scholars have noted that by the early 2000s, visa cancellation under the s 501 of the *Migration Act* (the character test) had replaced the longer standing s 201 criminal deportation power.[19] The implication of this shift was an expansion in the population of non-citizens able to deported. Section 201 was not available to deport those who had been lawfully resident for ten or more years, whereas s 501 allows for visa cancellation irrespective of the period an individual had lawfully resided in Australia. In

[16] *Migration Act* ss 501A, 501BA.
[17] See for example *Migration Act* ss 48B, 195A, 351, 417, 501J.
[18] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31; (2012) 246 CLR 636 [30] (French CJ, Kiefel J) (emphasis added).
[19] See Michael Grewcock, 'Reinventing "the Stain" – Bad Character and Criminal Deportation in Contemporary Australia', in *Routledge Handbook on Crime and International Migration*, ed. Sharon Pickering and Julie Ham (Abingdon: Routledge, 2014); Khanh Hoang, 'The Rise of Crimmigration in Australia: Importing Laws and Exporting Lives', in *The Palgrave Handbook of Criminology and the Global South,* eds. K. Carrington et al. (Palgrave Macmillan, 2018).

essence, the visa cancellation on character and criminal grounds thus represents a change in the legislature's approach to the non-citizen claims to membership, and thus it is no surprise that these changes have been accompanied by an expansion in the power of the Minister to act personally and thus the vulnerability of non-citizens to the lawful use of highly discretionary state power.

A distinct shift can be seen in the rationale for the capacity for the Minister to act personally from 1998 to 2014. The *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth) built on the grounds for the character test that were first introduced in 1992,[20] and enacted much of the current framework of s 501 of the *Migration Act*.[21] Crucially, the 1998 reforms provided the Immigration Minister with personal powers to make character decisions and to set aside AAT decisions on character, and provided that decisions made by the Minister acting personally were not subject to review. Moreover the 1998 reforms also empowered the Minister, unlike delegates, to make personal decisions not subject to natural justice requirements provided the Minister is satisfied that the refusal or cancellation is in the 'national interest'. Such powers have been described as 'extraordinary'.[22] In his second reading speech, Immigration Minister Philip Ruddock explained that this personal power was for 'exceptional or emergency circumstances',[23] and as such reflected the traditional role of Ministerial discretions in migration generally such as the dispensing provisions noted above.

In 2014, further amendments to the character test came into effect.[24] Most significantly, the amendments introduced mandatory visa cancellation without notice for non-citizens sentenced to 12 months or more imprisonment and serving that sentence on a full-time basis.[25] The rules of natural justice do not apply to a mandatory character cancellation  This mandatory requirement might initially appear to reduce Ministerial discretion, at least insofar as offenders with the criminal record contemplated are concerned, however, the discretionary  nature is retained through the power to revoke visa cancellation. From the time these amendments came into effect in December 2014, the Minister has held the power to act personally make a revocation decision and to act personally to set aside a revocation decision by a delegate or the AAT and in those circumstances natural justice may not apply to that decision.[26] The 2014 amendments also introduced further ministerial powers to cancel a visa personally on the grounds under s 109 or s 116 without the requirement for natural justice.[27]

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[20] *Migration (Offences and Undesirable Persons) Amendment Act 1992* (Cth).
[21] *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth).
[22] Joanne Kinslor and James English (2015) 'Decision-making in the national interest' AIAL Forum 79, p. 35
[23] Commonwealth, *Parliamentary Debates,* House of Representatives, December 2, 1998, 1230 (Phillip Ruddock).
[24] *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth).
[25] *Migration Act*  (Cth) s 501(3A) and 501(5).
[26] *Migration Act* (Cth) ss 501(3), (3B), (4); 501BA(2).
[27] Now incorporated into the *Migration Act* ss 133A-133F.

The 2014 amendments indicate that the idea and policy intention that the Minister should only act personally in 'exceptional' matters has almost completely diminished as a policy goal. The Minister's second reading speech for this Bill does not make reference to the powers provided to the Minister to act personally as 'exceptional', nor does the Explanatory Memorandum for this Bill, with one exception. The Explanatory Memorandum explains that section 501BA(4) of the *Migration Act* which was intended to provide that the Minister retain the ability 'in exceptional cases, where it is in the national interest' to set aside a decision of a delegate or tribunal to revoke a visa cancellation.[28] This shift in legislative expectation is deeply concerning.

It is important to note that although the Minister's personal powers under *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* were envisaged only for 'exceptional' use, during the period that Phillip Ruddock was Minister, the use of the personal power to cancel visas became routine. In the period 2002–03, about 80 per cent of the character cancellation decisions were made personally by Minister Ruddock.[29] Subsequent Immigration Ministers made far fewer personal decisions on character; these accounted for 15 per cent in 2003–04, and 19 per cent in 2006–07.[30]

Since the commencement of the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) in December 2014 it also appears that at least for decisions on the revocation of mandatory visa cancellations, it has become routine for the Minister to exercise personal powers. At 27 April 2016, the Ombudsman reported that 75 per cent of on-hand revocation cases were to be determined by the Minister, 12% by the Assistant Minister, and only 13% by a delegate.[31] The Ombudsman reported that a priority matrix sets out how cases are allocated to the three people making decisions regarding cancellations and revocations. The Immigration Minister addresses matters regarded with the following priority 'Exceptional/High/NZ Moderate); the Assistant Minister deals with 'non-NZ moderate' matters; and delegates with matters regarded as of 'low' priority.[32] The report went on to explain 'The minister personally makes all revocation decisions and the majority of cancellation decisions'.[33]

It is well established that that the number of visas cancelled under s 501 has risen sharply due to mandatory visa cancellations under s 501. The Department of Home Affairs reports that 'Between the 2013–14 and 2016–17 financial years, the number of visa cancellations on character grounds have increased by over 1400 per cent due to December 2014 legislative

[28] Migration Amendment (Character and General Visa Cancellation) Bill 2014 Explanatory Memorandum, [85].
[29] Commonwealth and Immigration Ombudsman, "Department of Immigration and Multicultural Affairs Administration of S501 of the *Migration Act 1958* as it Applies to Long-Term Residents" (Canberra: Commonwealth of Australia, 2006), 9.
[30] Ibid., 10; DIAC, "Annual Report 2006–07" (Belconnen, 2007), 113.
[31] Commonwealth Ombudsman (December 2016) 'The Administration of Section 501 of the Migration Act 1958' Report No 08/2016, 11.
[32] Ibid.
[33] Ibid, 12.

amendments'.[34] Together with the insight from the Ombudsman, these figures suggest the high significance of the Ministerial use of personal discretion for visa outcomes of non-citizen criminal offenders.

The existence and use of personal power by the Immigration Minister to cancel visas institutionalises the potential for excessive and arbitrary use of state power. It threatens the certainty of decisions based on visa criteria that informed the establishment of the contemporary visa framework in 1989. Prior to 1989 the migration framework guiding decisions on the entry and stay of non-citizens 'placed no requirements on the exercise of ministerial discretion. In fact, the guidelines relevant to the exercise of the powers were only set out in policy instructions. This meant they did not have the force of law and delegates were not legally obliged to follow them.'[35] Migration legislation at this time was roundly criticised for its 'excessive discretionary features'[36] which were creating uncertainty in visa decision-making.

Major reforms in 1989 codified existing policy into legally binding Migration Regulations, set out clear visa classes and objective criteria for application which sought to remove discretion for officers, and almost entirely removed Ministerial discretion. In this new immigration law system, the Immigration Minister retained certain powers to grant visas not otherwise permitted under legislation, but the limitation of these non-compellable powers to the Minister's personal discretion indicated they were powers of an 'exceptional, last resort, or residual kind'.[37]

The current power for the Minister to act personally to cancel visas under ss 109, 116, and 501 is contrary to the certainty of decision-making that is the objective of clear visa criteria and requirements. These powers do not accord with the original idea of discretionary power to provide a 'last resort' to address potential injustice to non-citizens caused by inflexible rules or rules unable to contemplate all compelling circumstances for visa grant, and depart from the idea of discretionary power as a check and safeguard on executive power. The problems associated with personal Ministerial powers were acknowledged in 2008 by then then Immigration Minister Chris Evans who stated:

> In a general sense I have formed the view that I have too much power. The act [Migration Act] is unlike any act I have seen in terms of the power given to the minister to make decisions about individual cases. I am uncomfortable with that not just because of a concern about

[34] Department of Home Affairs, 'Key Cancellation Statistics' Available: https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics

[35] Senate Select Committee on Ministerial Discretion in Migration Matters. "Senate Select Committee on Ministerial Discretion in Migration Matters Report." Canberra: Commonwealth of Australia, 2004, 15.

[36] Joint Management Review, "Immigration Functions Related to Control and Entry" (Canberra: Commonwealth of Australia, July 1978), 115; Committee to Advise on Australia's Immigration Policies, "Immigration: A Commitment to Australia," 112–13.

[37] *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31; (2012) 246 CLR 636 [111], [30], [55].

> playing God but also because of the lack of transparency and accountability for those ministerial decisions, the lack in some cases of any appeal rights against those decisions and the fact that what I thought was to be a power that was to be used in rare cases has become very much the norm. There is an industry in appealing to the Minister for Immigration and Citizenship, I have noticed. … there is a real sense of the appeal to the minister becoming very much part of the process. Rather than being a check on the system it has become institutionalised.[38]

The personal power of the Minister to cancel visas should be minimised in order to avoid arbitrary exercise of power and broaden the scope of the AAT's jurisdiction to review visa cancellation decisions on criminal grounds.

## 2. Present levels of duplication associated with the merits review process

AAT review involves at least three justice functions which are relevant to avoiding duplication. Firstly, AAT merits review enables justice for the individual by correcting errors in primary administrative decisions. It does this through a process that is distinct from and does not duplicate the primary decision. The primary decision-making stage does not always involve interview, and a decision to refuse or cancel a visa on criminal grounds may be made on the papers. The AAT process permits an applicant to attend a hearing in person and provide evidence to the tribunal member with the assistance of an interpreter to assist where necessary, which can be instrumental in enabling a fuller picture of the case to develop than available at the primary stage. The tribunal member is able to question the applicant and any witnesses which again supports a fuller picture of the case. In conducting its review, the AAT is required by statute to 'pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick'.[39] This statutory guidance infuses all aspects of tribunal process and avoids duplication.

Secondly, AAT merits review decisions support primary decision-makers by providing a source of guidance on the legal question to be determined, the relevant policy and factual matters for particular types of decisions. This is vital in supporting the efficiency of primary decision-making and good government.

Lastly, the AAT merits review process is distinct from the primary stage in that it publishes its reasons for selected decisions. This supports transparency of decision-making, communicates expectations for conduct to the community, and supports the principle of open justice. The Australian Law Reform Commission (ALRC) has characterised the AAT as a 'court-substitute tribunal' , that is, a tribunal that is 'closely modelled on courts and primarily act as providers of dispute resolution services',[40] and thus a tribunal where the principles of open

[38] Evidence to Senate Standing Committee on Legal and Constitutional Affairs Additional Budget Estimates, Parliament of Australia, Canberra, February 19, 2008, 31 (Senator Chris Evans, Minister for Immigration and Citizenship).
[39] *Administrative Appeals Tribunal Act 1975* (Cth) s 2A, see also s 33.
[40] Australian Law Reform Commission (2008) 'For Your Information' Report 108 [35.31]-[35.33], [35.76]-[35.82]. Available:

justice are particularly pertinent for at least some of its functions. The principle of open justice has long been considered essential to our justice system, has been described as 'the best security for the pure, impartial and efficient administration of justice',[41] and provides another example of its distinct role from primary stage decision-making.

## 3. The efficiency of existing review processes as they relate to decisions made under section 501 of the Migration Act.

The discretionary nature of character based cancellation and revocation of mandatory visa cancellation decisions under s 501 of the *Migration Act* prompts issues for efficiency in criminal justice at various stages of the criminal process.

*Section 501 provides a disincentive to plead guilty*

Section 501 grounds for visa cancellation provide a disincentive for an alleged offender to enter a plea of guilt for the charged criminal offence. This is because a plea of guilt may trigger discretionary and mandatory visa cancellation. Section 501 provides that a person with a 'substantial criminal record' (which includes sentences of two or more terms which together amount to 12 months or more imprisonment), as well as convictions for offences committed in immigration detention or during escape from immigration detention and other specified convictions mean that a person does not pass the character test and thus may face visa cancellation. Section 501(3A) mandates visa cancellation for certain criminal histories where a person is serving a full-time sentence of imprisonment.

Visa cancellation on criminal grounds thus runs counter to recent and substantial policy reform that has sought to address systemic issues that discourage guilty pleas and make late guilty pleas normal.[42] This has been a policy priority in part to reduce court delays in busy criminal courts in which it has long been understood that 'justice delayed may be justice denied' as evidence may be lost or deteriorate in quality by the trial date and the accused experience stress and uncertainty in awaiting trial. The utilitarian value of an early guilty plea to the administration of criminal justice has long been recognised,[43] and in 2018 NSW laws came into effect which set fixed sentencing discounts to reflect that value for offences dealt with on indictment.[44]

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https://www.alrc.gov.au/publications/35.%20Federal%20Courts%20and%20Tribunals/federal-tribunals

[41] *Scott v Scott* [1913] AC 417, 463.

[42] See for example New South Wales Law Reform Commission, Report 141, *Encouraging Appropriate Early Guilty Pleas* (2014) Available http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_completed_projects/lrc_encouragingearlyappropriateguiltypleas/lrc_encouragingearlyappropriateguiltypleas.aspx

[43] See for example the NSW Court of Criminal Appeal guideline judgment: *Thomson and Houlton* (2000) 49 NSWLR 383.

[44] *Crimes (Sentencing Procdure) Act 19999 (NSW)* ss 25A-25F.

*Section 501 poses challenges for criminal sentencing*

There is no consistent nation-wide approach which guides whether and how the risk of deportation should be taken into account in sentencing.[45] The courts have acknowledged that Victoria and Queensland adopt one approach, and Western Australia and New South Wales another.[46] Bagaric, Xynas and Lambropoulos[47] and Victoria Legal Aid[48] have identified a number of Victorian cases which hold that the risk of deportation should be taken into account as a mitigating factor in sentencing.

In a Victoria Legal Aid fact sheet for criminal lawyers advising non-citizens potentially subject to mandatory visa cancellation under the *Migration Act 1958* (Cth) s 501(3A) explains that the prospect of deportation at the conclusion of a non-citizen offender's sentence is a relevant consideration for the court to take into account in sentencing.[49] The reason it is relevant is that generally the expectation of deportation upon release 'may well mean that the burden of imprisonment will be greater', and because the 'fact that a sentence of imprisonment will result in the offender *losing the opportunity of settling permanently* in Australia ... may well be viewed as a serious 'punishing consequence' of the offending.' [50] Although this approach preceded the introduction of mandatory visa cancellation, it remains relevant as set out in the extract from the fact sheet set out below:

> **Possibility or probability? Discretionary versus mandatory cancellation**
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> Prior to the introduction of the mandatory visa cancellation provisions, the additional burden or punishment faced by an accused, at risk of having their visa cancelled, could be taken into account by the sentencing judge, although only as a mere 'speculative possibility' (R v Yildirim [2011] VSCA 219; Guden v The Queen [2010] VSCA 196; 28 VR 288; Darcie v The Queen [2012] VSCA 11; DPP v Zhuang [2015] VSCA 96). In other words, the sentencing judge could not be asked to speculate on the likelihood that incarceration exceeding twelve months would negatively affect the accused's immigration status. Proper consideration of a likelihood required sufficient evidence to permit a sensible quantification of the risk, and demonstration that deportation would actually be a hardship.
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> The same approach to sentencing is required, despite visa cancellation now being mandatory in certain circumstances, rather than discretionary. The likelihood of deportation is still considered speculative (Lima Da Costa Junior v The Queen [2016] VSCA 49 and Konamala v The Queen [2016] VSCA 48).

[45] Mirko Bagaric, Lidia Xynas, Victoria Lambropoulos "The Irrelevance to Sentencing of (Most) Incidental Hardships Suffered by Offenders" (2016) 39(1) University of New South Wales Law Journal 47.
[46] See for example *Hickling v State of Western Australia* (2016) 260 A Crim R 33; [2016] WASCA 124 [50]-[51], [57].
[47] Mirko Bagaric, Lidia Xynas, Victoria Lambropoulos, above n. 45. The authors identify the following cases: *Valayamkandathil v The Queen* [2010] VSCA 260, [25]–[27], [44]; *Guden v The Queen* [2010] VSCA 196; (2010) 28 VR 288, 294–5 [25]–[26]; *Director of Public Prosecutions v Yildirim* [2011] VSCA 219 [26], [34], [35].
[48] Victoria Legal Aid (February 2017) 'Mandatory visa cancellations – information for lawyers'. Available https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-resource-factsheet-mandatory-visa-cancellations-information-for-lawyers.docx
[49] Ibid.
[50] *Guden v The Queen* [2010] VSCA 196; 28 VR 288 [27].

> In *Lima Da Costa Junior* and *Konamala*, the Court of Appeal held that under the former provisions the decision to cancel a visa was where the discretion lay, and under the amendments the same discretion applies but in the decision to revoke any cancellation. It was considered that the Minister would approach the discretionary task in the same way.
>
> The requirement for evidence of increased burden of imprisonment (looked at subjectively) or additional punishment due to loss of opportunity to settle in Australia (looked at objectively) per *Guden* still applies.

In Victoria and Queensland, where *Guden* applies,[51] the discretionary character of visa cancellation poses challenges to the court's quantification of a non-citizen's risk of visa cancellation and deportation. *Guden* stated:

> If defence counsel on a plea in mitigation can say no more than that a term of imprisonment of more than 12 months will, upon its expiry, enliven the power of the Minister for Immigration either to revoke an existing visa or to decline to renew one, then deportation may properly be viewed … as 'a completely speculative possibility'.[52]

In contrast, in Western Australia and NSW, the courts have taken the view that deportation is a matter exclusively for the executive government.[53] The Supreme Court of Western Australia stated: 'The court's sentencing discretion is not appropriately exercised by reference to predictions about how such an administrative discretion, which arises only after the appropriate sentence is imposed, may be exercised at some future time.'[54]

Two examples of the impacts of s 501 provisions (and consequent detention and deportation) on the efficiency and efficacy of sentencing were discussed in a recent Queensland Court of Appeal case:

- The likely deportation affects the efficacy of court ordered parole. For example in *Abdi*,[55] after the offender was released on 26 October 2016 on court ordered parole he was taken into immigration detention and thus could not comply with parole conditions. In this case, an order for suspension of his sentence was then substituted.

- It was relevant for the court to take into account the potential adverse consequence that immigration detention beyond a fixed release date might have for the offender's rehabilitation.[56]

These examples provide insight into the implications for the efficiency of review processes arising from the interaction between immigration law and criminal sentencing law. They

[51] *R v UE* [2016] QCA 58.
[52] *Guden v The Queen* [2010] VSCA 196; (2010) 28 VR 288, 295 [28]
[53] See *R v Pham* [2005] NSWCCA 94 [13]; *Khanchitanon v R* [2014] NSWCCA 204 [28]; *Hickling v State of Western Australia* [2016] WASCA 124 [57]-[60].
[54] *Hickling v State of Western Australia* [2016] WASCA 124 [59] (Mazza JA and Mitchell J).
[55] *R v Abdi* [2016] QCA 298 [48], discussed in *R v Norris; Ex parte Attorney-General* (Qld) [2018] QCA 27 [43].
[56] *R v Norris; Ex parte Attorney-General* (Qld) [2018] QCA 27 [46]

highlight the difficulties that discretionary decision-making in visa cancellation produces for criminal law processes.

**Conclusion**

For the reasons above the Inquiry should recommend that:

- The power to cancel visas on the basis of criminal charges should be repealed, and the breadth of visa cancellation available under ss 109, 116 and s 501 should be reviewed in order to support certainty and accountability in decision-making.
- The ability for the Minister to set aside non-adverse decisions of the AAT should be repealed.
- The personal power of the Minister to cancel visas should be repealed, or minimised and subject to improved accountability measures.
- Independent merits review of visa cancellation on criminal grounds is essential and performs a distinct and valuable function for administrative decision-making and justice.
- Overall, the principles of transparency and accountability should guide this legal area.

Yours sincerely

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