

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

**The report of the inquiry into
review processes associated with
visa cancellations made on
criminal grounds**

Joint Standing Committee on Migration

February 2019
CANBERRA

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Foreword

Section 501, which allows for cancellation or refusal of a visa on character grounds, is a critical component of Australia's migration system. The provisions contained in section 501 allow the Government to protect the community from threats posed by serious criminals and those who would seek to cause harm and disharmony in Australia.

These provisions are working. In 2018 alone over 800 non-citizens had their visas cancelled after failing to pass the character test due to criminal convictions. One hundred of those had been involved in child sex offences or child exploitation, 53 were convicted of domestic violence, 34 were guilty of sex offences and 13 had committed murder. A further 125 were guilty of assault and 56 had served sentences for armed robbery.¹ Australia is a safer place without these people.

Some criminals whose visas have been cancelled, however, have not been removed from Australia. Some have been saved from deportation through appealing the Government's decision at the Administrative Appeals Tribunal (AAT). These appeals come at a cost to the taxpayer and around 80 per cent of them are either thrown out or affirm the Government's decision. In around 20 per cent of cases, the AAT has sided with non-citizens and overturned the Department's decision.

The Committee was asked to assess the efficiency of merits review and we carefully considered the evidence. An 84 day time limit imposed on the AAT in the legislation ensures that reviews are quick and cannot drag out. Compared with judicial review in the courts, merits review in the AAT is a faster and cheaper

¹ The Hon David Coleman MP, Minister for Immigration, Citizenship and Multicultural Affairs, and the Hon Peter Dutton MP, Minister for Home Affairs, 'Joint media release: Violent and sexual offenders stripped of Australian visas', Monday 7 January 2019, viewed on 1 February 2019, <<https://minister.homeaffairs.gov.au/davidcoleman/Pages/violent-and-sexual-offenders-stripped-of-Australian-visas.aspx>>.

alternative. The Committee was concerned, however, to see some of the timeframes associated with primary decision-making in the Department of Home Affairs, and believes there may be scope to speed up this part of the process.

While the AAT conducts merits reviews efficiently, its decisions may not always meet the community's expectations. The AAT's role in overturning a number of criminal deportations in recent years has not gone unnoticed. Australians rightly look for an explanation when drug dealers, violent criminals and repeat offenders are offered a reprieve by the AAT.

The AAT conducts its merits reviews according to considerations spelled out in Ministerial Direction 65. The three primary considerations are:

- the protection of the Australian community;
- the best interests of minor children in Australia; and
- the expectations of the Australian community.

I believe the Australian community expects that non-citizens – who are guests in Australia – will be removed from Australia if they commit serious crimes. The AAT must take this primary consideration seriously.

Non-citizens who commit crimes such as murder, aggravated assault, rape, sexual offences involving children, and weapons offences must not be allowed to remain in Australia. These people pose an unacceptable threat to our communities and the AAT should not prevent their deportation.

The existing Ministerial Directions are open to interpretation and need to be revised. This report makes a number of recommendations aimed at improving these Directions to ensure the focus of decision-makers remains on protecting the Australian community and meeting its expectations.

If revised as the Committee recommends, the Ministerial Directions would create a stronger distinction between serious violent offending and other kinds of criminal offending, and would ensure that victims of crime are properly considered in the review process.

The Committee heard differing opinions about the role of victims in the appeals process. I was not persuaded by arguments that the views of victims have already been considered by the courts, and that victims should play no role at the AAT. I believe that in the past the victim has been forgotten in AAT review processes. The best way to ensure decision-makers take into account the impact on victims is to give victims a voice. In any AAT review process, the views of victims are critical and should be one of the primary considerations, particularly in cases where it is felt that the offender may pose a risk to the victim or their family. I have heard

from victims and their families how important this is, and have subsequently made a recommendation ensuring the victim's voice is heard.

During the inquiry, we heard compelling evidence from the New Zealand High Commissioner, Oz Kiwi and others regarding the disproportionate impact of visa cancellations on New Zealand citizens living in Australia. I was persuaded that the historic special immigration status of New Zealanders should be taken into account by decision-makers in relation to cancelling the visas of New Zealanders who have lived in Australia for many years. These factors do not, of course, outweigh the need to protect the Australian community, and New Zealanders who have committed serious violent crimes should still expect to be deported.

Long-term permanent residents of Australia from all countries must understand that they are not protected from possible deportation for criminal activity, regardless of the length of time they have lived in Australia.

Finally, I believe the character cancellation provisions need to be stronger. Important legislation introduced into Parliament late in 2018 seeks to ensure violent offenders can be removed from Australia at the earliest possible opportunity. I urge the Australian government to pass and enact this legislation without delay.

Mr Jason Wood MP

Chair

Committee membership

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Mr Jason Wood MP

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Terms of reference

The Joint Standing Committee on Migration shall examine the review processes associated with visa cancellations made on criminal grounds. In conducting its inquiry, the Committee shall have particular regard to:

- The efficiency of existing review processes as they relate to decisions made under section 501 of the Migration Act.
- Present levels of duplication associated with the merits review process.
- The scope of the Administrative Appeals Tribunal's jurisdiction to review ministerial decisions.

Recommendations

Recommendation 1

1.94 The Committee recommends the Australian Government extend the prescribed timeframe for visa holders in Australia to respond to a notice of intention to cancel issued under Section 116 of the *Migration Act 1958* to 14 days.

Recommendation 2

2.97 The Committee recommends that the Department of Home Affairs conduct a review into the resourcing and processes applied to delegate decision-making on revocation of mandatory cancellations with a focus on:

- ensuring that the time taken to make these decisions is reduced to three months, with six months seen as the acceptable maximum; and
- assessing if there is a need for increased staffing to meet these timeframes.

Recommendation 3

3.61 The Committee recommends that Ministerial Directions 65 and 63 be revised to include a specific provision allowing the historic special immigration status of New Zealand citizens, and its impact on take up of citizenship in Australia, to be a secondary consideration in reviewing character cancellations.

This consideration should not be taken into account if the applicant has ever been convicted of a serious violent or sexual crime, such as rape, murder, sexual offences involving children, aggravated assault or armed robbery.

Recommendation 4

3.62 The Committee recommends that all young people from New Zealand who are living permanently in Australia, and who complete at least four years of their higher education in Australia, are eligible to access student loans through the Higher Education Loan Program (HELP).

Recommendation 5

3.117 The Committee recommends that Ministerial Directions 65 and 63 be revised to create a distinction between serious violent offending, and other types of offending, with serious violent crimes more likely to result in visa cancellation or refusal. In line with the Migration Amendment (Strengthening the Character Test) Bill 2018, serious violent crimes includes designated offences such as murder, manslaughter, kidnapping, assault, aggravated burglary, sexual assault, sexual offences involving children, breaching an order made by a court or tribunal for the personal protection of another person, and weapons offences.

The revised Ministerial Directions should state that, in cases of serious violent offending:

- the likelihood of the applicant reoffending is a primary consideration;
- the impact of the applicant's crimes on victims is a primary consideration; and
- the applicant's strength, nature and duration of ties to Australia is a secondary consideration, and is not to be given more weight than consideration of the impact on victims.

Recommendation 6

3.178 The Committee recommends that the Australian Government regulate to guarantee that victims of crime, or their families, are provided with an opportunity to make a written or oral statement as part of the appeals process in the Administrative Appeals Tribunal, and:

- where victims/families provide a statement, this evidence should be a primary consideration, especially if the review applicant poses a continuing threat to victims, their families or the Australian community; and
- where victims/families choose not to provide a statement, the impact on victims should be a secondary consideration.

1. Introduction

Merits review of visa cancellations made on criminal grounds

Conduct of the Inquiry

- 1.1 On Wednesday 14 March 2018 the Minister for Home Affairs, the Hon Peter Dutton MP, asked the Committee to inquire into and report on the review processes associated with visa cancellations made on criminal grounds. The Committee was to have particular regard to:
 - the efficiency of existing review processes as they relate to decisions made under section 501 of the Migration Act;
 - present levels of duplication associated with the merits review process; and
 - the scope of the Administrative Appeals Tribunal's jurisdiction to review ministerial decisions.
- 1.2 The Committee invited an array of stakeholders, groups and individuals to submit to the inquiry, including relevant federal government departments, peak bodies, and industry groups.
- 1.3 The Committee received 41 submissions from a range of federal government departments, peak bodies, non-government organisations, advocacy groups, academics and concerned citizens. The Committee also heard evidence from organisations and individuals at nine public hearings held in Canberra, Sydney and Melbourne over the course of the inquiry.

- 1.4 The Committee would like to acknowledge the time and effort taken by academics, advocacy groups and individuals who work in the migration sector, many of whom gave passionate and informed evidence about the visa cancellations regime and its impacts. The Committee has considered all of this evidence and thanks participants for their role in this important inquiry process.

Structure of the report

- 1.5 The Committee's report is focussed on the inquiry's terms of reference. This introductory chapter provides an outline of the conduct of the inquiry and an explanation of the current visa cancellation provisions and processes, including the role played by the Administrative Appeals Tribunal (AAT) in reviewing decisions.
- 1.6 This chapter also includes statistics on visa cancellations and reviews.
- 1.7 Chapter 2 analyses the efficiency of existing review processes, firstly considering how visa cancellations may help to protect the Australian community, then looking at the AAT's processes, and the efficiency of mandatory cancellation and review in the Department of Home Affairs. The chapter seeks to answer whether there is any duplication associated with merits review.
- 1.8 Chapter 2 also looks at the issues of detention and non-refoulement, in terms of how these impact efficiency in the system.
- 1.9 Chapter 3 considers the impacts of visa cancellations on long-term residents, Australian citizens and minor children, and citizens of New Zealand. Then looks at the scope of AAT merits review, the appropriateness of merits review in cases of violent and sexual crimes, and the role of merits reviews in cases of minor criminality.
- 1.10 Also considered is the role of victims in the merits review process, issues of public confidence in merits review, and ways in which visa cancellations and merits review could be strengthened.

Visa cancellation powers in the Migration Act

- 1.11 Persons wishing to travel in or reside in Australia must hold a valid visa. The Act contains two provisions allowing for the cancellation or refusal of visas for persons who may pose a risk to the Australian community. These are section 501 and section 116.

Section 501 – character cancellation and refusal powers

1.12 Australian visa holders are required to pass the character test. The grounds upon which a person may fail the character test are contained in section 501 of the Act, and are in summary:

- if a person has a substantial criminal record;¹
- if a person has committed offences in, or while escaping from, detention;
- if a person has committed sexually based offences involving a child;
- if the person has an adverse security assessment by ASIO or an Interpol notice suggesting the person is a risk to the Australian community; or if the Minister suspects the person is:
 - involved with a group, organisation or person involved in criminal conduct;
 - at risk, if allowed to remain in Australia, of engaging in criminal conduct;
 - likely to harass, molest, intimidate, or stalk another person in Australia, incite discord, or represent a danger to the Australian community; or
 - has been involved in people smuggling, people trafficking, genocide, a war crime, a crime against humanity, a crime involving torture or slavery, or a crime that is of serious international concern, whether or not convicted.²

1.13 Legislative changes in 2014 saw the introduction of the mandatory cancellation provision, section 501(3A). This provision states that a person's visa is subject to mandatory cancellation if:

- they are currently serving a full-time custodial sentence and have ever been sentenced to death, life imprisonment or 12 months or more imprisonment;³ or
- they have been found to have committed a sexually based crime involving a child.

¹ Defined in section 501(7) of the Act, as: The person has been sentenced to death or life imprisonment; sentenced to a term of imprisonment of 12 months; sentenced to two or more terms of imprisonment where the total is 12 months or more; found by a court to be not fit to plead in relation to an offence but found to have committed the offence and as a result have been detained in a facility or institution.

² *Migration Act 1958* (Cth), s 501(6).

³ The 12 months can be cumulative, for instance four prison terms of three months.

- 1.14 A person whose visa has been cancelled mandatorily has 28 days to request that the Department of Home Affairs (the Department) revokes this decision and reinstates the visa. If the Department refuses to reinstate the visa, the person may appeal to the AAT. Persons who have had a visa refused by a departmental delegate may also appeal to the AAT.
- 1.15 Under section 501, the Minister for Home Affairs and other portfolio ministers have personal powers to cancel or refuse visas on character grounds, and also to set aside AAT decisions and substitute them with a cancellation or refusal decision. Decisions made by ministers personally cannot be reviewed in the AAT, but may still be subject to judicial review.⁴
- 1.16 The Act specifies the following powers (summarised):
- section 501(1): To refuse a visa application on character grounds with notice given.
 - section 501(2): To cancel a visa on character grounds with notice given.
 - section 501(3): The Minister may personally decide to refuse or to cancel a visa in the national interest on character grounds without notice.
 - section 501(3A): The visa must be cancelled if the visa holder does not pass the character test because of a substantial criminal record, or because they have been convicted, found guilty or had a charge proven of a sexually based offence involving a child, and that the person is currently serving a sentence of imprisonment.
 - section 501A: The Minister may personally decide to refuse or to cancel a visa in the national interest by setting aside a decision made by a delegate or the AAT.
 - section 501BA: The Minister may personally decide to cancel a visa in the national interest by setting aside a decision to revoke a mandatory cancellation made by a delegate or the AAT under section 501CA.
 - section 501C: The Minister may personally revoke a visa cancellation made under section 501(3) after receiving representations from the person whose visa is cancelled.
 - section 501CA: To revoke a mandatory visa cancellation made under section 501(3A) after receiving representations from the person whose visa is cancelled.⁵

⁴ Department of Home Affairs, *Submission 29*, p. 3.

⁵ *Migration Act 1958* (Cth).

Section 116 – general visa cancellation powers

1.17 The general cancellation power of the Act (section 116) sets out situation-specific grounds for cancelling temporary visas:

A temporary visa may be cancelled where the presence of the visa holder in Australia is or may be a risk to the health, safety or good order of the Australian community, or the health or safety of an individual or individuals. Further, certain temporary visas may be cancelled under section 116 of the Act where the visa holder has been charged or convicted of an offence against an Australian law (i.e. Commonwealth, State or Territory laws).⁶

1.18 The Department provided information on the discretionary grounds for cancelling visas under section 116 of the Act, stating that:

Depending on the circumstances, the cancellation power is either mandatory or discretionary. Grounds specified in section 116(1) can be used to cancel temporary visas where the holder is onshore, offshore or in immigration clearance.⁷

1.19 The Department elaborated on the provisions of the Act that provide grounds for cancelling either a temporary or permanent visa:

- A permanent visa can only be cancelled under section 116(1) while the visa holder is offshore.
- Grounds specified in section 116(1AA), (1AB) and (1AC) of the Migration Act may be used to cancel both temporary and permanent visas where the holder is onshore, offshore, or in immigration clearance.⁸

1.20 Either the Minister or delegate 'may exercise the relevant specific cancellation power to cancel a visa under section 116 of the Migration Act.'⁹

1.21 A notice of intention to cancel a visa under section 116 of the Act is provided to the visa holder prior to cancellation irrespective of whether the visa holder is in Australia or overseas.¹⁰

1.22 The Department stated that the purpose of issuing a notice of intention to cancel was:

⁶ Department of Home Affairs, *Submission 29*, p. 9.

⁷ Department of Home Affairs, *Supplementary Submission 29.3*, p. 2.

⁸ Department of Home Affairs, *Supplementary Submission 29.3*, p. 2.

⁹ Department of Home Affairs, *Supplementary Submission 29.3*, p. 2.

¹⁰ Department of Home Affairs, *Supplementary Submission 29.3*, p. 16.

- to provide the visa holder with an opportunity to respond to the grounds for cancelling the visa as provided by the delegate; and
- to enable the delegate to cancel the visa if, after considering the visa holder's response (or lack of response), they decide that there are grounds for cancelling the visa.¹¹

1.23 The notice 'must invite the visa holder to show the grounds do not exist or there is a real reason the visa should not be cancelled'.¹² The visa holder must do this within a prescribed timeframe.

1.24 The *Migration Regulations 1994* include the prescribed timeframe for responding to a notice of intention to cancel, which is five working days if the person is in Australia.¹³

1.25 The Law Institute of Victoria argued that this timeframe is unreasonably short.¹⁴

1.26 A Departmental policy sets out the matters delegates should consider when moving to cancel a visa under section 116 of the Act, including:

- The purpose of the visa holder's travel to and stay in Australia.
- The extent of compliance with visa conditions.
- The degree of hardship that may be caused to the visa holder and any family members.
- The circumstances in which the ground for cancellation arose.
- The visa holder's past and present behaviour towards the department (for example, whether they have been truthful and cooperative in their dealings with the department).
- Whether there are persons in Australia whose visas would, or may, be cancelled under section 140 of the Act.
- Whether there are mandatory legal consequences to a cancellation decision.
- Whether Australia has obligations under relevant international agreements that would be breached as a result of the visa cancellation.
- Any other relevant matters.¹⁵

¹¹ Department of Home Affairs, *Supplementary Submission 29.3*, p. 16.

¹² Department of Home Affairs, *Supplementary Submission 29.3*, p. 16.

¹³ *Migration Regulations 1994* (Cth), reg 2.44(2)(a).

¹⁴ Visa Cancellation Working Group, *Submission 33*, Fact Sheet, *Visa Cancellations Under s 116 of the Migration Act 1958: Information for Affected Individuals*, Law Institute of Victoria, p. 31.

¹⁵ Department of Home Affairs, *Supplementary Submission 29.3*, p. 23.

1.27 The Department added that decision-makers are also guided by:

...the Act, the *Migration Regulations 1994*, the policy guidance contained in *Procedural Instruction: General visa cancellation powers* (s109, s116, s128, s134B and s140), and *Ministerial Direction 63* (regarding the cancellation of Bridging visas).¹⁶

1.28 At a public hearing, the Department commented that the two cancellation powers under sections 501 and 116 of the Act were complementary and allowed them to ‘make, sometimes, quick decisions in the interest of community safety’.¹⁷

1.29 The Department highlighted that there is no legislative authority that allows for revocation of a visa cancelled under section 116:

A non-citizen who has had their visa cancelled under section 116 of the Act does not have the ability to seek revocation of the cancellation decision as there is no legislative authority that allows for revocation.¹⁸

1.30 Persons who have had a visa refused by a departmental delegate may lodge an appeal with the AAT or seek judicial review of the decision providing they are onshore.¹⁹ The appeal must be lodged with the AAT within seven working days from receipt of the notification to cancel their visa.²⁰

1.31 Decisions made by the Minister personally to cancel a visa under section 116 cannot be reviewed by the AAT.²¹ In cases where the visa holder is offshore, non-citizens may seek judicial review through the courts.²²

1.32 The AAT submitted that it receives a relatively small number of applications relating to decisions under section 116 of the Act.²³ Most of the visa cancellation decisions reviewed by the AAT refer to cancellations made under section 501 of the Act.

¹⁶ Department of Home Affairs, *Supplementary Submission 29.3*, p. 23.

¹⁷ Ms Peta Dunn, First Assistant Secretary, Immigration Integrity and Community Protection Division, Department of Home Affairs, *Transcript*, 27 June 2018, p. 4.

¹⁸ Department of Home Affairs, *Supplementary Submission 29.3*, p. 15.

¹⁹ Department of Home Affairs, *Submission 29*, p. 9; Department of Home Affairs, *Supplementary Submission 29.3*, p. 15.

²⁰ Department of Home Affairs, *Supplementary Submission 29.3*, p. 25.

²¹ Australian Human Rights Commission, *Submission 11*, p. 15.

²² Department of Home Affairs, *Supplementary Submission 29.3*, p. 23.

²³ Administrative Appeals Tribunal, *Submission 22*, p. 6. See footnotes 8 and 9.

Ministerial directions

Ministerial Direction No. 65

1.33 In addition to the statutory guidelines set out in section 501 of the Act, the Department's decision makers take a number of considerations into account prior to making a decision to cancel an individual's visa under section 501. Ministerial Direction 65 sets out pertinent considerations that must be taken into account:

Ministerial Direction 65, which commenced on 23 December 2014, is binding for departmental delegates and the AAT, and outlines the relevant primary and secondary considerations that must be taken into account. The Minister and other portfolio Ministers are not bound by Ministerial Direction 65, but may turn their mind to these considerations in determining whether to exercise their discretion to cancel, refuse or not revoke mandatory cancellation of a visa.²⁴

1.34 Primary considerations for the decision maker under Ministerial Direction 65 include:

- the protection of the Australian community from criminal or other serious conduct;
- the best interests of minor children in Australia; and
- the expectations of the Australian community.²⁵

1.35 Other considerations that must be taken into account include:

- international non-refoulement obligations;
- the strength, nature and duration of ties;
- impact on Australian business interests;
- impact on victims;
- extent of impediments if removed.²⁶

²⁴ Department of Home Affairs, *Submission 29*, p. 7.

²⁵ Minister for Immigration and Border Protection, *Direction No. 65 - Migration Act 1958 - Direction under section 499: Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA (2014) (Ministerial Direction 65)*, p. 5.

²⁶ *Ministerial Direction 65*, p. 8.

1.36 The AAT is also guided by the provisions set out in the direction. When reviewing a decision made under section 501 or 501CA of the Act, the AAT is:

...informed by the general guidance and principles set out in paragraphs 6.2 and 6.3 of [Ministerial Direction 65], take into account the primary considerations and the other considerations that are relevant to the individual case.²⁷

1.37 The Department stated that its decision makers, like those in the AAT, are obliged to take Ministerial Direction 65 into account, but noted that the weight applied to various considerations may differ between them.²⁸

1.38 The AAT highlighted that greater weight was generally applied to primary considerations in Ministerial Direction 65:

The direction states that primary considerations should generally be given greater weight than the other considerations and one or more primary considerations may outweigh other primary considerations. The direction also states that, in applying the considerations, information and evidence from independent and authoritative sources should be given appropriate weight.²⁹

1.39 Ministers are not obliged to consider the Ministerial Direction when making decisions to cancel an individual's visa. However, when it is preparing visa cancellation cases for the Minister's consideration, the Department chooses to take into account the considerations in the Direction.³⁰

Ministerial Direction No. 63

1.40 Ministerial Direction 63 provides a framework for decision makers in the Department of Home Affairs to guide decisions about whether to exercise their discretion to cancel a non-citizen's Bridging visa. It relates to the Bridging E visa, which is a temporary visa.

²⁷ Administrative Appeals Tribunal, *Submission 22*, p. 12.

²⁸ Ms Peta Dunn, First Assistant Secretary, Immigration Integrity and Community Protection Division, Department of Home Affairs, *Transcript*, 27 June 2018, p. 1.

²⁹ Administrative Appeals Tribunal, *Submission 22*, p. 12.

³⁰ Ms Peta Dunn, First Assistant Secretary, Immigration Integrity and Community Protection Division, Department of Home Affairs, *Transcript*, 27 June 2018, p. 5.

1.41 Ministerial Direction 63 incorporates a set of principles, which 'provide a framework within which decision-makers should approach their task of deciding whether to cancel a non-citizen's Bridging E visa'.³¹

1.42 The principles are summarised below:

- Mandatory detention applies to anyone without a valid visa.
- Non-citizens must obey Australia's laws.
- The government has a 'low tolerance' for non-citizens on temporary visas who break the law.
- The government provides education to non-citizens around its expectations to encourage compliance with Australia's laws and standards of behaviour.
- Non-citizens who engage in criminal conduct should 'expect' to have their visas cancelled, including while investigations are ongoing.
- Individual circumstances, mitigating factors and the seriousness of the crime/s, will be taken into account.³²

1.43 Ministerial Direction 63 requires a delegate who is considering cancelling a bridging visa to consider primary and secondary considerations. The two primary considerations are, in summary:

- 1 the Government's view that a person on a bridging visa who has been convicted of an offence, charged with an offence, is the subject of an adverse Interpol notice, is being investigated by law enforcement and is considered a threat, or does not have the intention to leave Australia, should be considered for cancellation; and
- 2 the best interests of children under the age of 18 in Australia who would be affected by the cancellation.³³

1.44 The secondary considerations are:

- 1 the impact of a decision to cancel the visa on the family unit;
- 2 the degree of hardship that may be experienced by the visa holder;
- 3 the circumstances: mitigating factors, the seriousness of the offence, the reason for the person being the subject of an Interpol notice, or under investigation by law enforcement;

³¹Ministerial Direction 63, Part 1, 4.3. Principles.

³²Ministerial Direction 63, Part 1, 4.3. Principles.

³³Ministerial Direction 63, Part 2, 6. Primary considerations.

- 4 consequences of cancellation, including indefinite detention and Australia's non-refoulement obligations;
 - 5 any other matter delegates consider relevant.³⁴
- 1.45 The Commonwealth Ombudsman published a report in 2016 into the administration of people who have had their bridging visa cancelled due to criminal charges and are in immigration detention. This report states that Ministerial Direction 63 is 'under review as a result of court decisions which highlighted issues with its application'.³⁵

Merits review

- 1.46 According to the Attorney General's Department, current Australian government policy stipulates that:
- ...an administrative decision that is likely to adversely affect the rights and interests of a person should be reviewable on its merits unless to do so would be inappropriate or there are other factors which justify the exclusion of a merits review.³⁶
- 1.47 Merits review of visa cancellation or refusal decisions made by delegates within the Department of Home Affairs is conducted in the AAT.
- 1.48 The AAT is an independent statutory body within the Attorney-General's portfolio, and was established under the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act). It commenced operations on 1 July 1976.³⁷
- 1.49 The Migration Review Tribunal, Refugee Review Tribunal and the Social Security Appeals Tribunal were amalgamated with the AAT on 1 July 2015.³⁸
- 1.50 The AAT conducts merits review of administrative decisions made under certain Commonwealth laws. The decisions currently reviewable by the AAT are set out in its Reviewable Decisions List and include decisions relating to: Freedom of Information; migration and refugee issues; the

³⁴Ministerial Direction 63, Part 2, 7. Secondary considerations.

³⁵ Commonwealth Ombudsman, *Report No. 07, 2016: The administration of people who have had their bridging visa cancelled due to criminal charges and are in immigration detention*, December 2016, p. 10.

³⁶ Mr Cameron Gifford, First Assistant Secretary, Attorney-General's Department, *Transcript*, 17 October 2018, p. 1.

³⁷ Administrative Appeals Tribunal, *Submission 22*, p. 3.

³⁸ Administrative Appeals Tribunal, *Submission 22*, p. 3.

National Disability Insurance Scheme; social services and child support; tax and commercial decisions; veterans' appeals, and others.³⁹

- 1.51 Reviewing visa cancellations on character grounds makes up a small part of the AAT's overall workload. For instance, the total number of reviews in any subject area finalised by the AAT in 2016-17 was 42,224. Of these, 168 were decisions relating to visa cancellation on character grounds. The AAT notes that this is 0.4 per cent of its caseload.⁴⁰
- 1.52 Merits review involves considering all evidence about the merits of a decision and deciding whether the 'correct or preferable' decision has been made. The AAT can:
- affirm the decision under review;
 - vary the decision under review; or
 - set aside the decision under review and:
 - make a decision in substitution for the decision so set aside; or
 - remit the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.⁴¹
- 1.53 Decisions to cancel a person's visa that are made personally by ministers cannot be referred to the AAT. Those made by delegates can be referred. Mandatory cancellations that the Minister's delegate chooses not to revoke can also be referred. This is discussed in Chapter 3.

AAT processes and time limits

- 1.54 The Migration and AAT Acts and the *Administrative Appeals Tribunal Regulation 2015* set out specific procedures for reviewing visa cancellation decisions. When initially applying for a review with the AAT, the application must:
- be lodged with the AAT within 9 days after the day of receiving the Department's decision—the AAT has no power to extend the time;
 - be in writing, state the reasons for the application and be accompanied by the document notifying the person of the decision;

³⁹ Administrative Appeals Tribunal, *Submission 22*, p. 4.

⁴⁰ Ms Sian Leathem, Registrar, Administrative Appeals Tribunal, *Committee Transcript: Senate Estimates, Legal and Constitutional Affairs Legislation Committee*, 24 May 2018, p. 62.

⁴¹ *Administrative Appeals Tribunal Act 1975*, Division 6—Tribunal's decision on review, section 43.

- include an application fee of \$884, which can be reduced to \$100 in certain circumstances (including where a person is in prison or otherwise detained).⁴²
- 1.55 After determining that the application received is valid, the 'AAT notifies the Minister via the Department of Home Affairs that an application has been made.' The Minister must then provide to the AAT 'any further documents relevant to the decision that contain information that must not be disclosed to the applicant' within 14 days.⁴³
- 1.56 Within approximately one to two weeks after lodging the application:
- an AAT registry officer calls a self-represented applicant to explain the AAT's procedures as well as to identify whether the applicant requires an interpreter or assistance because of a disability;
 - the AAT member allocated to hear and decide the application holds a directions hearing, usually by telephone, with the applicant or their representative and the Minister's representative.⁴⁴
- 1.57 The applicant or the Minister may lodge additional information for the AAT to consider including 'affidavits or witness statements, expert reports or letters of support.'⁴⁵
- 1.58 Any additional evidence to support an applicant's case must be provided to the Minister's representatives at least two business days before the hearing, otherwise the AAT 'cannot have regard to the information in reaching the decision' (the 'two-day rule').⁴⁶
- 1.59 The review process will generally include: a telephone directions hearing with all parties; a face to face hearing; and the issuing of the AAT's decision, which must be completed within 84 days from the date the applicant was notified of the Department's decision.⁴⁷
- 1.60 Unless the cancelled visa was a protection or protection-related bridging visa, the 'AAT's decisions with written reasons are generally published on

⁴² Administrative Appeals Tribunal, *Submission 22*, p. 9.

⁴³ Administrative Appeals Tribunal, *Submission 22*, p. 9.

⁴⁴ Administrative Appeals Tribunal, *Submission 22*, pp. 9-10.

⁴⁵ Administrative Appeals Tribunal, *Submission 22*, p. 10.

⁴⁶ Administrative Appeals Tribunal, *Submission 22*, p. 10.

⁴⁷ Administrative Appeals Tribunal, *Submission 22*, p. 10.

AustLII⁴⁸ and made available to other legal publishers in these types of cases'.⁴⁹

- 1.61 The AAT pointed out that time limits vary if the applicant resides outside Australia. In these circumstances, the applicant is given 28 days to lodge an application; the Minister must provide any further information within 28 days; and the AAT is not required to complete the review within the 84 days.⁵⁰
- 1.62 When the AAT reviews decisions made under section 501 or 501CA of the Migration Act, they must apply:
- the terms of the relevant provisions of the Migration Act, particularly the character test set out in section 501(6); and
 - any written direction given by the Minister under section 499 of the Migration Act. (The current direction is Ministerial Direction 65.)⁵¹
- 1.63 The AAT will make a determination based on all the information it has available before it. A 1979 decision of the Federal Court of Australia dealing with deportation and judicial roles described the AAT's role as decision maker:

The question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal.⁵²

Minister's power to overrule AAT

- 1.64 There are a number of provisions in the Act that gives the Minister and other portfolio ministers the power to set aside a decision of the AAT and

⁴⁸ The Australasian Legal Information Institute (AustLII) is a joint facility of the University of Technology Sydney and University of NSW Faculties of Law. It provides free internet access to Australasian legal materials.

⁴⁹ Administrative Appeals Tribunal, *Submission 22*, p. 10.

⁵⁰ Administrative Appeals Tribunal, *Submission 22*, p. 11.

⁵¹ Administrative Appeals Tribunal, *Submission 22*, p. 12.

⁵² Administrative Appeals Tribunal, *Submission 22*, p. 13.

substitute it with an adverse (cancellation or refusal) decision or a decision that is more favourable to the applicant.⁵³

- 1.65 Section 501A of the Act allows the Minister to set aside a decision of the AAT not to cancel or refuse a visa where the Minister reasonably suspects that the person does not satisfy the character test and is satisfied that the refusal or cancellation is in the national interest.⁵⁴
- 1.66 Introduced in December 2014, section 501BA of the Act allows the Minister to set aside a decision of the AAT not to cancel or refuse a visa 'if the Minister is satisfied that cancellation is in the national interest'.⁵⁵
- 1.67 The Minister and other portfolio ministers also have personal powers under section 133A and section 133C to set aside a decision of the AAT relating to cancellations made under section 116 of the Act 'if they are satisfied that it would be in the public interest to do so'.⁵⁶
- 1.68 The Minister's personal powers to set aside a decision cannot be delegated and while not reviewable by the AAT, may be subject to judicial review.⁵⁷
- 1.69 Between 1 July 2009 and 31 May 2018 the Minister exercised their personal power to cancel or refuse a visa under section 501A of the Act and overrule the AAT's decision on 47 occasions (39 visas were cancelled and eight refused).⁵⁸

⁵³ Administrative Appeals Tribunal, *Submission 22*, p. 14; Department of Home Affairs, *Submission 29*, p. 11.

⁵⁴ Administrative Appeals Tribunal, *Submission 29*, p. 11.

⁵⁵ Administrative Appeals Tribunal, *Submission 29*, p. 11.

⁵⁶ Administrative Appeals Tribunal, *Submission 29*, p. 12.

⁵⁷ Administrative Appeals Tribunal, *Submission 29*, p. 11.

⁵⁸ Administrative Appeals Tribunal, *Submission 29*, p. 10.

Table 1.1 Section 501A cancellations and refusals

Financial Year	S501A cancelled	S501A refused	Total
2009/2010	0	0	0
2010/2011	<5	0	
2011/2012	8	<5	9
2012/2013	7	0	7
2013/2014	<5	0	<5
2014/2015	7	<5	8
2015/2016	5	0	5
2016/2017	<5	<5	6
2017/2018	<5	<5	6
Total	39	8	47

Source: Department of Home Affairs, Supplementary Submission 29.1, p. 10.

Judicial review

- 1.70 All section 501 decisions may be subject to judicial review,⁵⁹ with AAT decisions generally reviewed in the Federal Circuit Court and decisions personally made by the Minister subject to judicial review in the Federal Court. Appeals against the decision of the Federal Court are heard by the High Court.⁶⁰
- 1.71 In a background paper on visa refusal or cancellation under section 501 of the Act, the Australian Human Rights Commission (the Commission) noted the scope of the courts to review administrative decisions:

⁵⁹ Department of Home Affairs, *Submission 29*, p. 3.

⁶⁰ Department of Home Affairs, *Submission 29*, p. 11; Ms Peta Dunn, First Assistant Secretary, Immigration Integrity and Community Protection Division, Department of Home Affairs, *Transcript*, 27 June 2018, p. 2.

Under judicial review, courts are restricted to reviewing the lawfulness of an administrative decision, rather than considering whether it was the correct decision.⁶¹

- 1.72 The Commission added that if 'a court finds that a visa refusal or cancellation decision was affected by jurisdictional error, the court can set aside the original decision and return the case to the decision-maker to be reconsidered.'⁶²
- 1.73 The Department's submissions contained statistics on the number of foreign nationals who sought judicial review and the average timeframe for the judicial hearings, stating:
- Of the 124 delegate decisions affirmed by the AAT between 1 July 2017 and 31 March 2018, 37 foreign nationals went on to seek judicial review.
 - As at 31 March 2018, the timeframe for judicial reviews was 232 days for cases where the Department lost, and 235 days for cases where the Department won the case.⁶³

Visa cancellation and merits review statistics

Section 501

- 1.74 Over recent years, there has been a significant increase in the number of visa cancellations on character grounds following the introduction of the mandatory cancellation provision under section 501(3A). The Department submitted:

Between the 2013–14 and 2016–17 financial years, the number of visa cancellations on character grounds have increased by over 1,400 per cent due to December 2014 legislative amendments to the *Migration Act 1958*.⁶⁴

⁶¹ Australian Human Rights Commission, *Background paper: Human rights issues raised by visa refusal or cancellation under section 501 of the Migration Act*, p. 19.

⁶² Australian Human Rights Commission, *Background paper: Human rights issues raised by visa refusal or cancellation under section 501 of the Migration Act*, p. 19.

⁶³ Department of Home Affairs, *Submission 29*, p. 11.

⁶⁴ Department of Home Affairs, 'Key visa cancellation statistics', viewed on 4 September 2018, <www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics>.

- 1.75 In FY2016-17, 1,839 non-citizens had their visa cancelled or refused under section 501. Of those, 1,232 were mandatory cancellations, 606 were refused a visa and one had their visa cancelled by a delegate.⁶⁵
- 1.76 A total of 3,432 non-citizens have had their visas mandatorily cancelled since the provisions under section 501(3A) came into effect on 11 December 2014.⁶⁶ Of those:
- 2,644 (or 77 per cent) sought revocation of the mandatory cancellation decision; and
 - of the 2,644 revocation applications, 834 decisions were made to revoke the original cancellation decision.⁶⁷
- 1.77 In that same period, ministers (including other portfolio ministers) cancelled 35 visas and refused 12 visa applications under section 501 of the Act (Table 1.2).

Table 1.2 Ministers (includes other portfolio Ministers) section 501 primary cancellation and refusal decisions

Financial Year	Cancelled	Refused	Total
2009/2010	<5	0	<5
2010/2011	<5	<5	<5
2011/2012	14	<5	16
2012/2013	<5	12	15
2013/2014	32	14	46
2014/2015	79	28	107
2015/2016	47	36	83
2016/2017	35	12	47
2017/2018	47	10	57
Total	260	115	375

Source: Department of Home Affairs, Supplementary Submission 29.1, p. 8.

⁶⁵ Department of Home Affairs, Supplementary Submission 29.1, p. 4.

⁶⁶ Department of Home Affairs, Supplementary submission 29.1, p. 5.

⁶⁷ Department of Home Affairs, Supplementary submission 29.1, p. 5.

- 1.78 New Zealand citizens have had their visa cancelled significantly more than any other nationality. Between 1 January 2017 to 31 December 2017, 620 New Zealanders had their visas cancelled on character grounds. The next four nationalities featured in character cancellations over that period were the United Kingdom (124); Vietnam (55); Sudan (31); and Fiji (25).⁶⁸
- 1.79 Non-citizens had their visas cancelled under character grounds for a variety of reasons including criminal offences. The top five primary offence types for character cancellations over that period in the Department's statistics were assault, drug offences, other violent and non-violent offences, and armed robbery.⁶⁹
- 1.80 In 2017, 794 visas were cancelled due to the mandatory cancellation provisions. A non-citizen whose visa is mandatorily cancelled can seek to have the cancellation decision revoked. Of those visa cancellation review requests, 320 were revoked, 457 were not revoked and 17 were withdrawn or invalid. A number of the refused applicants subsequently applied to the AAT for administrative review of the Department's decision.⁷⁰

Merits review of section 501 decisions

- 1.81 Applications for review of character-related visa decisions are assessed in the AAT's General Division. These applications have risen in line with the increase in the number of primary decisions made in the Department of Home Affairs following the introduction of mandatory cancellation.
- 1.82 Applications received by the AAT rose from 77 in 2015–16 to 183 in 2016–17. As of 31 March 2018, the AAT had already received 166 applications. These were applications relating to decisions:
- to refuse or cancel a visa under section 501 of the Act;

⁶⁸ Department of Home Affairs, 'Key visa cancellation statistics', viewed on 4 September 2018, <www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics>.

⁶⁹ Department of Home Affairs, 'Key visa cancellation statistics', viewed on 4 September 2018, <www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics>. Only the primary offence category was shown by the Department of Home Affairs. The field is therefore not exhaustive as non-citizens may have multiple offences/sentences recorded.

⁷⁰ Department of Home Affairs, 'Key visa cancellation statistics', viewed on 4 September 2018, <www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics>.

- under section 501CA of the Act not to revoke a mandatory visa cancellation under section 501; and
- to refuse or cancel a protection visa under sections 5H(2), 36(1C) or 36(2C)(a) or (b) of the Act.⁷¹

1.83 Table 1.3 below shows that the AAT finalised 166 of the 183 applications it received in FY2016–17. Of those:

- the AAT affirmed (upheld) the decision of the Department in 87 cases;
- set aside the decision in 29 cases;
- twenty four were withdrawn by the applicant;
- six were dismissed by the AAT for either non-appearance at a case event, failure to proceed with an application or to comply with a direction of the AAT or the application is frivolous, vexatious, misconceived, lacking in substance, has no reasonable prospect of success or is an abuse of the process of the AAT;
- eighteen applications were finalised on the basis that either the decision is not subject to review by the AAT, the applicant does not have standing to apply for a review, the application has not been made within a prescribed time limit, the AAT has refused to extend the time for applying for a review or the application fee had not been paid; and
- an agreement between the parties was reached with two applicants.⁷²

⁷¹ Administrative Appeals Tribunal, *Submission 22*, p. 6.

⁷² Administrative Appeals Tribunal, *Submission 22*, Appendix A, p. 15.

Table 1.3 Outcomes of applications for review of decisions made under section 501 and 501CA of the Migration Act – 2015-16 to 2017-18

Outcome Type	2015-16			2016-17			2017- 31 March 2018		
	s501	s501 CA	Total	s501	s501 CA	Total	s501	s501 CA	Total
<i>By decision under section 43 of the AAT Act</i>									
Decision affirmed	7	3	10	31	56	87	32	63	95
Decision varied or set aside	4	1	5	17	12	29	22	16	38
<i>By consent</i>									
Decision affirmed	0	0	0	0	0	0	0	0	0
Decision varied or set aside	0	0	0	2	0	2	3	0	3
Dismissed by consent	0	0	0	0	0	0	0	2	2
<i>Other</i>									
Withdrawn by applicant	2	1	3	7		17	24	4	4
Dismissed by Tribunal	0	0	0	0		6	6	1	1
No jurisdiction to review	4	4	8	7		11	18	8	14
Total	17	9	26	64		102	166	70	100

Source: Administrative Appeals Tribunal, Submission 22, Appendix A.

Section 116

- 1.84 Statistics provided by the Department show that 39,450 visas were cancelled under section 116 of the Act in the past five years (Table 1.4).
- 1.85 The Committee notes that concerns about a visa holder's character are only one of the criteria for cancelling a visa under section 116. Other criteria include a change in circumstances or failure to abide by the conditions of the visa.

Table 1.4 Section 116 cancellations by financial year⁷³

2013-14	2014-15	2015-16	2016-17	2017-18	Total
6356	7204	7002	10375	8513	39450

Source: Department of Home Affairs, Supplementary submission 29.3, p. 26.

- 1.86 In the 2017-18 financial year, the top five countries whose citizens had visas cancelled under section 116 of the Act were China (2,217), Malaysia (1,532), India (717), Vietnam (396) and the United Kingdom (275). Table 1.5 below provides details on the top ten countries where non-citizens have had their visas cancelled under section 116 of the Act.

⁷³ A visa may be recorded as cancelled more than once. An example of this is when a visa is cancelled, the cancellation is subsequently set aside, and then the visa is cancelled again. A cancellation may be set aside for a number of reasons, including legal proceedings, and administrative or jurisdictional errors.

Table 1.5 Section 116 cancellations by financial year and citizenship

Country	2013-14	2014-15	2015-16	2016-17	2017-18
China	836	697	792	1464	2217
Malaysia	1059	1282	1082	2227	1532
India	363	799	597	1177	717
Vietnam	505	603	730	1029	396
United Kingdom	314	383	396	342	275
Thailand	230	183	228	424	263
New Zealand	14	12	64	126	254
South Korea	325	311	203	236	201
Pakistan	136	127	172	307	194
Taiwan	206	318	390	206	159

Source: Department of Home Affairs, *Supplementary submission 29.3*, p. 27.

Merits review of section 116 decisions

- 1.87 The AAT's role is limited to reviewing applications made by non-citizens who are onshore. These applications are reviewed in the Migrant and Refugee Division.⁷⁴
- 1.88 Approximately 130 applications for review of section 116 cancellations made on criminal or character grounds were finalised by the AAT in 2016-17.⁷⁵
- 1.89 While the terms of reference for this inquiry focus on section 501 cancellations, evidence was also received about character cancellations under section 116. As such, these are discussed at various stages of the report.

⁷⁴ Administrative Appeals Tribunal, *Submission 22*, p. 6.

⁷⁵ Administrative Appeals Tribunal, *Submission 22*, p. 6. See footnotes 8 and 9.

Committee comment

- 1.90 The timeframes associated visa cancellation and merits review are further discussed in Chapter 2. However, that discussion is mainly focussed on revocation requests and AAT appeals made in relation to Section 501.
- 1.91 The Committee notes the timeframe prescribed in the regulations to respond to a notice of intention to cancel made under Section 116 of the Act is five working days.
- 1.92 Evidence received by the Committee indicated that this timeframe is unusually tight. The time given in which to respond to a notice of intention to cancel a visa under similar provisions in the Act is anywhere between 14 and 35 days, depending on how the notice was transmitted to the individual.
- 1.93 The Committee believes that the timeframe in which to respond to a notice of intention to cancel a visa should provide procedural fairness. The Committee has therefore formed the view that there would be merit in extending the timeframe to 14 days.

Recommendation 1

- 1.94 The Committee recommends the Australian Government extend the prescribed timeframe for visa holders in Australia to respond to a notice of intention to cancel issued under Section 116 of the *Migration Act 1958* to 14 days.**

2. Efficiency of existing review processes

- 2.1 The terms of reference for the inquiry instructed the Committee to analyse the efficiency of existing review processes as they relate to decisions made under section 501 of the *Migration Act 1958* (the Act), as well as to consider if there is any duplication in the system.
- 2.2 This chapter presents evidence around the efficiency of existing review processes, including departmental reviews (applications for revocation of mandatory cancellation), merits review in the Administrative Appeals Tribunal (ATT), and judicial review. It looks at:
- how visa cancellations may make Australia safer;
 - the efficiency of the AAT's merits review process and the AAT's approach to evidence;
 - the efficiency of mandatory cancellation and revocation reviews in the Department of Home Affairs (the Department);
 - timeframes for AAT reviews, and the 'two-day evidence rule'; and
 - access to legal assistance for merits review.
- 2.3 The chapter then considers how mandatory detention and issues of non-refoulement impact the efficiency of the visa cancellations and merits review systems.

A safer Australia

- 2.4 The visa cancellation regime is designed to make Australia safer by removing serious criminals who are not Australian citizens.
- 2.5 The Department commented that the legislative changes brought in in 2014:

...have resulted in a stronger focus on community protection, a greater range of conduct and criminality being captured under the Act and more foreign nationals being referred for assessment of character issues.¹

- 2.6 The range of crimes that have resulted in non-citizens having their visas cancelled includes, in order of prevalence: assault, drug offences, other violent offences, other non-violent offences, child sex offences, armed robbery, and theft, robbery, break and enter.²
- 2.7 Some witnesses suggested that the regime makes Australia safer because it removes persons who were likely to commit more crimes if they remained in Australia. For instance, the Police Federation of Australia presented evidence provided to it by the New Zealand Police that a significant number of offenders returned to New Zealand had 'reoffended on their return to New Zealand'.³
- 2.8 In its submission to the Committee's previous inquiry into migrant settlement outcomes, the Police Federation asserted that, 'of those deported to New Zealand under that section of the Act, 51% have reoffended within two years of returning'.⁴
- 2.9 Some witnesses disputed the idea that the visa cancellations regime makes Australia safer. The Victorian Multicultural Commission said it did not believe the regime makes migrants more law-abiding, and reported that some communities in Victoria are experiencing significant fear around the regime, because it leads to family separations, which are traumatic for the whole community.⁵
- 2.10 Mrs Shirin Whittaker (private capacity) argued that Australia had not become safer as a result of more criminal deportations, saying:

This is not borne out by crime statistics: according to the Bureau of Statistics, released on 08/02/2017 for recorded crime offences during 2015 –2016, offender numbers increased in almost all states and territories, from previous years,

¹ Department of Home Affairs, *Submission 29*, p. 3.

² Department of Home Affairs, *Submission 29*, p. 16.

³ Mr Mark Burgess, Chief Executive Officer, Police Federation of Australia, *Transcript*, 15 August 2018, p. 1.

⁴ Police Federation of Australia, 'Inquiry into migrant settlement outcomes', *Submission 115*, p. [1].

⁵ Ms Elizabeth Blades-Hamilton, Senior Research and Policy Officer, Victorian Multicultural Commission, *Transcript*, 24 July 2018, p. 3. The Multicultural Youth Advocacy Network submitted a similar opinion, *Submission 12*, p. 3.

2014 – 2015. The majority of these offences were drug related, committed by serial offenders.⁶

Efficiency of existing review processes

Merits review in the AAT

- 2.11 As outlined in Chapter 1, a non-citizen whose visa cancellation, refusal, or non-revocation decision was made by a delegate has the right to appeal to the AAT. They have nine days to lodge the appeal, and the AAT has 84 days to hand down a decision. This is called an ‘expedited review’ process, and is designed to be as efficient as possible, while also being fair.⁷ During the inquiry, the Committee sought evidence as to the efficiency of this process.
- 2.12 Most witnesses described the AAT’s merits review process as efficient. The Immigration Advice and Rights Centre, which works directly with persons navigating the system, described it as ‘fair, economical and quick and [said that it] promotes public confidence in the determination of visa cancellation matters’.⁸
- 2.13 The AAT explained that it is required to undertake its reviews with ‘as little formality and technicality and with as much expedition as possible’.⁹
- 2.14 Further, because it is not bound by the same evidence rules as a court, the AAT can make decisions quicker and with less delay. The AAT’s decision-makers are, however, ‘guided by those rules in terms of the weight that they might give particular types of evidence’.¹⁰
- 2.15 Migration and refugee law expert, Dr Anthea Vogl highlighted the extensive experience of the AAT’s decision-makers ‘in a very narrow field of law’, saying:
- ...as a general rule, they are very professional and they carefully apply not just the law but government policy in each of the decisions that they make.¹¹

⁶ Mrs Shirin Whittaker, *Submission 3*, p. [2].

⁷ Administrative Appeals Tribunal, *Submission 22*, p. 8.

⁸ Mr Ali Mojtahedi, Principal Solicitor, Immigration Advice and Rights Centre, *Transcript*, 17 July 2018, p. 9.

⁹ Administrative Appeals Tribunal, *Submission 22*, p. 8.

¹⁰ Ms Sian Leathem, Registrar, Administrative Appeals Tribunal, *Transcript*, 16 July 2018, p. 9.

¹¹ Dr Anthea Vogl, Private capacity, *Transcript*, 16 July 2018, p. 25.

- 2.16 Witnesses from the Home Affairs Department explained that the Attorney-General's Department 'liaises closely with the AAT on procedures, training and processes to ensure timely, consistent and lawful outcomes in relation to their obligations under the [*Administrative Appeals Tribunal Act 1975*]'.¹²
- 2.17 However, two individuals, Mr Brian Woods (private capacity) and Ms Maria Kathryn Aylward (private capacity) thought the right of persons to appeal in the AAT represented a waste of tax-payer money.¹³
- 2.18 The Department also suggested that some non-citizens may use merits review as a delaying tactic 'to extend their stay where there is little or no prospect for a positive outcome'.¹⁴
- 2.19 The Law Council of Australia cautioned against 'any steps to further expedite the review function', saying the expedited review process already raises some 'procedural fairness concerns', and any steps to further expedite the process 'may in fact lead to greater inefficiencies'.¹⁵
- 2.20 The Visa Cancellations Working Group is a group of migration experts and organisations from around Australia with specific interests in visa cancellations. The Working Group acknowledged that the workload of the AAT has increased in recent years and suggested 'increased resourcing for the AAT' could be warranted to ensure it continues to meet the demands of the expedited review process.¹⁶

Mandatory cancellation and departmental timeframes

- 2.21 Mandatory cancellation significantly increased the number of cancellations and the number of people detained waiting for their cases to be assessed by the Department. The Department submitted that section 501 visa cancellation decisions increased by more than 660 per cent in FY2014/15 compared to the previous year, a further 69 per cent in FY2015/16, and a

¹² Ms Peta Dunn, First Assistant Secretary, Immigration Integrity and Community Protection Division, Department of Home Affairs, *Transcript*, 27 June 2018, p. 1.

¹³ Mr Brian Woods, *Submission 1*, p. [2]; Ms Maria Kathryn Aylward, Private capacity, *Transcript*, 24 July 2018, pp. 31-33.

¹⁴ Ms Peta Dunn, First Assistant Secretary, Immigration Integrity and Community Protection Division, Department of Home Affairs, *Transcript*, 27 June 2018, p. 1.

¹⁵ Mr David Prince, Chair, Migration Law Committee, Law Council of Australia, *Transcript*, 24 July 2018, p. 13.

¹⁶ Visa Cancellations Working Group, *Submission 33*, p. 4.

further 31 per cent in FY2016/17, as a direct result of mandatory cancellation.¹⁷

- 2.22 While the cancellation is mandatory, it is not automatic. The Department was asked how mandatory cancellations are triggered, and it confirmed that it regularly receives lists of prisoners, goes through them and assesses liability for mandatory cancellation, then actions these cancellations.¹⁸
- 2.23 The Department submitted that in 2016/17, 78 per cent of the 1,234 foreign nationals whose visas were subject to mandatory cancellation sought revocation of the decision and 338 were successful (approximately 35 per cent). A further 291 were unsuccessful in their application, and 316 decisions were still pending (as at 31 March 2018).¹⁹
- 2.24 The Asylum Seeker Resource Centre asserted that the Department was not equipped to deal with the ‘massive spike in work’ arising from the introduction of mandatory cancellation:
- ...both in terms of numbers of people working on these matters, given how long and complex they are, and their level of skills and experience to do so.²⁰
- 2.25 Some witnesses suggested that mandatory cancellation has led to a backlog of pending revocation decisions in the Department, with decisions on revocation requests commonly taking from six to 12 months.²¹ The Human Rights Commission said the average is 10 months.²²
- 2.26 The Department’s own figures indicate that over 30 per cent of revocation applications lodged in FY2016/17 were still unresolved more than nine months later.²³

¹⁷ Department of Home Affairs, *Submission 29*, p. 4.

¹⁸ Ms Justine Jones, Assistant Secretary, Character Assessment and Cancellations Branch, Department of Home Affairs, *Transcript*, 27 June 2018, p. 3.

¹⁹ Department of Home Affairs, *Submission 29*, p. 8.

²⁰ Dr Carolyn Graydon, Principal Solicitor and Manager of the Human Rights Law Program, Asylum Seeker Resource Centre, *Transcript*, 23 July 2018, p. 6.

²¹ Mr Jason Donnelly, Private capacity, *Transcript*, 16 July 2018, p. 27. See also: Dr Carolyn Graydon, Principal Solicitor and Manager of the Human Rights Law Program, Asylum Seeker Resource Centre, *Transcript*, 23 July 2018, pp. 5-6.

²² Mr Graeme Edgerton, Deputy General Counsel, Australian Human Rights Commission, *Transcript*, 17 July 2018, p. 2.

²³ Department of Home Affairs, *Submission 29*, p. 8.

- 2.27 The Commonwealth Ombudsman conducted an investigation into the administration of section 501, reporting in December 2016. The report identified concerns with the timeframe for revocation reviews, and recommended the Department of Immigration and Border Protection ‘introduce a departmental standard for the timeframe to process cancellations and revocation requests’.²⁴
- 2.28 The Department’s response is included at the end of the Ombudsman’s report. The Department ‘noted’ the recommendation and offered the following response (summarised):
- applications are generally processed in the order they are received, with some expedited for compassionate reasons;
 - the Department was working to increase the efficiency of processing these requests, having increased staffing and the efficiency of the process;
 - the number of undecided requests had fallen slightly from 2015 to 2016, despite greater numbers overall; and
 - the Department ‘continue[s] to consider strategies to reduce processing times’.²⁵
- 2.29 Legal Aid NSW contended that more delegates were required at the Department to expedite the decision-making process:
- It’s clearly a resources issue and it clearly costs a lot of money to keep somebody in detention. Resources need to be directed towards making decisions quicker.²⁶
- 2.30 A number of witnesses proposed that mandatory cancellation is – by its nature – inefficient, and that the Department’s timeframes for making decisions regarding revocations are too long.
- 2.31 For instance, the Australian Human Rights Commission (the Commission) submitted that cancelling a visa based on an arbitrary figure of 12 months prison means:

²⁴ Commonwealth Ombudsman, *The Department of Immigration and Border Protection: Administration of section 501 of the Migration Act 1958*, December 2016, p. 2.

²⁵ Departmental Response to Commonwealth Ombudsman, *The Department of Immigration and Border Protection: Administration of section 501 of the Migration Act 1958*, December 2016, p. 34.

²⁶ Mr Alexander Grosart, Senior Solicitor, Civil Law Division, Government Law Group, Legal Aid NSW, *Transcript*, 16 July 2018, p. 10.

You don't take into account the risk to the community, you don't take into account the expectations of the Australian community and you don't take into account the best interests of the children—they are the primary considerations—and also you don't take into account any of the secondary considerations. None of that is done until an actual person engages with this decision, and usually that's five months down the track on average.²⁷

- 2.32 The Commission added that, in its view, mandatory cancellation is inefficient because around 50 per cent of all mandatory visas cancellations are 'ultimately revoked'.²⁸
- 2.33 The Department confirmed that around 38 per cent of persons whose visa had been cancelled mandatorily in 2018 had the decision revoked by the Department.²⁹
- 2.34 Migration law academic, Professor Mary Crock, described mandatory cancellation as 'a real mess', saying a system that starts with a mandatory action, then requires an exercise of discretion is duplicative.³⁰
- 2.35 Victoria Legal Aid expressed a similar view, saying that the previous legislative regimes provided for the exercise of discretion from the outset, whereas the current regime means 'the first tool used is the very blunt one'.³¹
- 2.36 Refugee Legal argued that because the departmental process does not include hearing oral testimony from the non-citizen, it puts up 'a whole range of barriers' which can prevent the right decision being made the first time. It proposed 'better procedural safeguards', including that the Department hear oral testimony.³²
- 2.37 Other witnesses proposed similar changes, with the Commission suggesting departmental officers should be 'able to take into account all relevant factors

²⁷ Mr Graeme Edgerton, Deputy General Counsel, Australian Human Rights Commission, *Transcript*, 17 July 2018, p. 2.

²⁸ Australian Human Rights Commission, *Submission 11*, p. 4.

²⁹ Ms Justine Jones, Assistant Secretary, Character Assessment and Cancellations Branch, Department of Home Affairs, *Transcript*, 27 June 2018, p. 4.

³⁰ Professor Mary Crock, Private capacity, *Transcript*, 17 July 2018, p. 16.

³¹ Ms Hollie Kerwin, Senior Policy and Projects Officer, Civil Justice Program, Victoria Legal Aid, *Transcript*, 24 July 2018, p. 28.

³² Mr David Manne, Executive Director and Principal Solicitor, Refugee Legal, *Transcript*, 24 July 2018, p. 26.

at that early stage'. This may include hearing oral testimony from the applicant.³³

- 2.38 Additional suggestions for increasing the efficiency of the revocation process included Mrs Shirin Whittaker's proposal that:

The revocation process should be started approximately a year before the release of a prisoner. At least the individual will know, before his/her release, the outcome of his/her revocation request. This will save on the frivolous use of tax-payers money (transport costs, wages of accompanying officers, the cost of detention) when people are transferred to the various detention centres by two or more officers at any given time.³⁴

- 2.39 Mandatory cancellation also generally means mandatory detention. The Law Council of Australia (the Law Council) highlighted that non-citizens who meets the criteria for criminal cancellation have their visa cancelled and are detained in immigration detention upon release from prison.³⁵

- 2.40 The Commission claimed that this detention lasted for an average of 10 months, while non-citizens awaited the result of their revocation application.³⁶

- 2.41 The Law Council stated that Departmental revocation reviews can take a year:

There's no discretion; it's absolute. We must hold you in detention for that year. I agree it's common that it will be successful, revocation be granted and the visa will be returned after an extra nine, 10 or 12 months of detention. That is the harsh reality of the mandatory cancellation. It really is a very draconian system.³⁷

³³ Mr Edward Santow, Human Rights Commissioner, Australian Human Rights Commission, *Transcript*, 17 July 2018, p. 1.

³⁴ Mrs Shirin Whittaker, *Submission 3*, p. [3].

³⁵ Mr David Prince, Chair, Migration Law Committee, Law Council of Australia, *Transcript*, 24 July 2018, p. 16.

³⁶ Mr Graeme Edgerton, Deputy General Counsel, Australian Human Rights Commission, *Transcript*, 17 July 2018, p. 2.

³⁷ Mr David Prince, Chair, Migration Law Committee, Law Council of Australia, *Transcript*, 24 July 2018, p. 16. See also: Mr Alexander Grosart, Senior Solicitor, Civil Law Division, Government Law Group, Legal Aid NSW, *Transcript*, 16 July 2018, p. 10.

- 2.42 Barrister and academic, Mr Jason Donnelly, also cited long delays in processing revocation requests through the Department of Home Affairs. He said ‘a time period of at least six months to two years’ was common.³⁸
- 2.43 Mr Donnelly submitted that Ministerial Direction 65 declares that decisions with respect to a revocation application should be decided in a ‘timely manner’, which he defines as within three to six months.³⁹
- 2.44 The Commission recommended that mandatory cancellation be repealed⁴⁰, and the Law Council of Australia suggested that removing mandatory cancellation would result in a significant cost saving to the Commonwealth.⁴¹
- 2.45 Mr Jason Donnelly also proposed that persons detained while waiting for the outcome of their application for revocation through the Department of Home Affairs should not be able to be detained longer than six months.⁴²

AAT timeframes and evidence rules

Nine-day application limit

- 2.46 Witnesses working in the legal sector commented on the timeframe for lodging an application for review at the AAT, which is nine days. Many thought this were too short. Some also believed the 84 day timeframe for the AAT to make a decision could also be too short in some cases.⁴³
- 2.47 Professor Crock argued that the limited timeframes ‘confine’ the tribunal and stop it ‘doing the job that it’s supposed to do’. She suggested a 28 day limit on lodging applications.⁴⁴

³⁸ Mr Jason Donnelly, Private capacity, *Transcript*, 16 July 2018, p. 27. See also: Dr Carolyn Graydon, Principal Solicitor and Manager of the Human Rights Law Program, Asylum Seeker Resource Centre, *Transcript*, 23 July 2018, pp. 5-6.

³⁹ Mr Jason Donnelly, *Submission 4*, p. 4.

⁴⁰ Australian Human Rights Commission, *Submission 11*, p. 4.

⁴¹ Mr David Prince, Chair, Migration Law Committee, Law Council of Australia, *Transcript*, 24 July 2018, p. 17.

⁴² Mr Jason Donnelly, Private capacity, *Transcript*, 16 July 2018, p. 27.

⁴³ See for instance: Mr Ali Mojtahedi, Principal Solicitor, Immigration Advice and Rights Centre, *Transcript*, 17 July 2018, p. 10. And Ms Hollie Kerwin, Senior Policy and Projects Officer, Civil Justice Program, Victoria Legal Aid, *Transcript*, 24 July 2018, p. 30.

⁴⁴ Professor Mary Crock, Private capacity, *Transcript*, 17 July 2018, p. 18.

2.48 NSW Legal Aid explained the issues it perceives with the nine day time limit to lodge an application at the AAT:

If somebody is in custody, they have no ability to access the internet and download a form. They cannot fax it to the AAT. They're completely reliant on welfare workers to do that for them. They may not be able to see a welfare worker within that time, or they may but the welfare worker, through their own pressures of other work, may not fax it to the AAT in time. We have had experience where the form has reached the AAT after the nine-day limit. The AAT then has no jurisdiction to hear the matter.⁴⁵

2.49 Mr Donnelly appealed to the Committee to consider recommending an extension to the nine day limit because this limitation:

...appears to ignore that there may be compassionate and/or compelling reasons why a non-citizen failed to lodge an appeal with the AAT within the prescribed mandatory nine-day appeal period.⁴⁶

2.50 The Commission commented on the 84 day time limit, saying:

...the current process may not give applicants sufficient time to prepare their case. Secondly, if the number of these cases continues to increase, the AAT may be unable to deal with them as fully as required in the time allocated. Some meritorious applications for review may therefore be unsuccessful because they cannot be decided within 12 weeks.⁴⁷

2.51 However, a number of other witnesses proposed that the 84 day timeframe for a decision by the AAT ensures an efficient process, and did not recommend changing this time limit. Legal Aid NSW said:

Our concern isn't with the AAT making decisions within 84 days so much. That seems to work quite well. There are some concerns around the AAT—for example, the short time limit given to appeal to the AAT.⁴⁸

2.52 The AAT stated that, while it was sometimes challenging, it always meets this timeframe.⁴⁹

⁴⁵ Mr Alexander Grosart, Senior Solicitor, Civil Law Division, Government Law Group, Legal Aid NSW, *Transcript*, 16 July 2018, p. 11.

⁴⁶ Mr Jason Donnelly, *Submission 4*, p. 17.

⁴⁷ Australian Human Rights Commission, *Submission 11*, p. 32.

⁴⁸ Mr Alexander Grosart, Senior Solicitor, Civil Law Division, Government Law Group, Legal Aid NSW, *Transcript*, 16 July 2018, p. 11.

⁴⁹ Ms Sian Leathem, Registrar, Administrative Appeals Tribunal, *Transcript*, 16 July 2018, p. 7.

- 2.53 Persons whose visa is cancelled under section 116 have even less time to apply to the AAT for a review – 48 hours. Witnesses including retired solicitor, Mr Michael Chalmers (private capacity) expressed the view that this is insufficient time, especially as these persons are taken into detention, which is often offshore.⁵⁰
- 2.54 Mr Chalmers said that these persons are taken straight to immigration detention after being charged in a court and granted bail, and ‘given a whole lot of papers’, including instructions on how to appeal to AAT, which they only have 48 hours to do. In these circumstances, he said, these persons cannot prepare an adequate application.⁵¹
- 2.55 The Immigration Advice and Rights Centre argued that the AAT should have the right to extend these time limits to allow it to hear cases it otherwise cannot.⁵²

Two-day rule

- 2.56 The Immigration Advice and Rights Centre highlighted the ‘two-day rule’, which is incorporated into the Migration Act. The rule stipulates that ‘the applicant is prevented from producing any new information or evidence unless it’s given to the tribunal and to the ... minister two days before the hearing’. This rule does not apply to the minister or department.⁵³
- 2.57 According to the Immigration Advice and Rights Centre, this rule means that:
- ...the minister produces evidence either on the day of the hearing or the day before the hearing, then unless the tribunal decides to adjourn the matter then the applicant can’t produce evidence in response to it. Because of the very tight 84-day limit, sometimes you’ve just got to suck it up.⁵⁴
- 2.58 Mr Donnelly suggested this rule is unfair and frustrates the review process, especially in cases where an applicant does not have any legal assistance to

⁵⁰ Mr Michael Chalmers, Private capacity, *Transcript*, 17 July 2018, p. 23.

⁵¹ Mr Michael Chalmers, Private capacity, *Transcript*, 17 July 2018, p. 24.

⁵² Mr Ali Mojtahedi, Principal Solicitor, Immigration Advice and Rights Centre, *Transcript*, 17 July 2018, p. 13.

⁵³ Mr Ali Mojtahedi, Principal Solicitor, Immigration Advice and Rights Centre, *Transcript*, 17 July 2018, p. 12.

⁵⁴ Mr Ali Mojtahedi, Principal Solicitor, Immigration Advice and Rights Centre, *Transcript*, 17 July 2018, p. 12.

prepare their case. These persons, he submitted are more likely to ‘adduce oral evidence (in the examination-in-chief process) that is not in their written statement’.⁵⁵

- 2.59 The Australian Human Rights Commission submitted that, while the rule is supposed to ensure the process is efficient, and prevent applicants from wilfully delaying proceedings, it ‘may paradoxically have the effect of prolonging the review process’ by preventing a ‘full and thorough consideration’ of the case at the AAT, leading to more judicial reviews.⁵⁶
- 2.60 Mr Donnelly recommended that the legislation be changed to allow for new oral evidence to be presented by applicants in cases where the applicant has no legal assistance and where consideration of this evidence ‘is otherwise in the interests of justice’.⁵⁷
- 2.61 The Asylum Seeker Resource Centre suggested that the Department should also be required to provide the applicant with information about evidence it intends to present against them, as failing to do so means the applicant ‘can’t narrow the issues’.⁵⁸

Duplication associated with merits review

- 2.62 The AAT addressed the inquiry’s term of reference regarding whether merits review duplicates the decision-making process undertaken by the Department, saying:

Merits review undertaken by the AAT is different from the process undertaken by delegates of the minister within the Department of Home Affairs. Both play an important role in the system of executive decision-making that exists under Australian law.⁵⁹

- 2.63 In addition, the AAT provided this view on the difference between merits review and judicial review:

Critically, and in contrast to judicial review, the AAT is not looking to see if the original decision-maker made an error based on the information before

⁵⁵ Mr Jason Donnelly, *Submission 4*, p. 20.

⁵⁶ Australian Human Rights Commission, *Submission 11*, p. 37.

⁵⁷ Mr Jason Donnelly, *Submission 4*, p. 20.

⁵⁸ Dr Carolyn Graydon, Principal Solicitor and Manager of the Human Rights Law Program, Asylum Seeker Resource Centre, *Transcript*, 23 July 2018, p. 9.

⁵⁹ Ms Sian Leathem, Registrar, Administrative Appeals Tribunal, *Transcript*, 16 July 2018, p. 2.

them; it is making a new decision with the benefit of all the information and evidence, using a different process from that of the original decision-maker.⁶⁰

2.64 The Attorney General's Department argued that merits review is important, and plays a different role to judicial review:

The AAT is really a quick and effective means of merits review, which looks at ... the content of the original decision, how it was arrived at and, indeed, any updated information that is relevant to the decision at the time the review was undertaken. Alternative forms of review are judicial review. ... It's a very different form of review. It's a question about the legalities, whether or not something is correct in terms of the rule of law. It doesn't go to the merits of the particular decision; it goes to the rule of law and the legalities of the decision that was made.⁶¹

2.65 Academic, Dr Anthea Vogl (private capacity) took exception to the idea that merits review could constitute a duplication of Department's decision-making. She said:

We want to stress to the committee that describing any form of merits review as duplication is a mischaracterisation of the role and objectives of the merits review process.⁶²

2.66 Dr Vogl proposed that merits review is accessible and cost-efficient, and 'enhances the openness and accountability of government decisions' by bringing into the process 'a degree of independence that a politically accountable department of government simply cannot'.⁶³

2.67 Mr Donnelly argued that merits review is not a duplication of the Department's processes for a number of reasons, including that:

- it is a de novo process, where the decision-maker starts fresh and reviews all available evidence; and
- the AAT hears oral evidence from the applicant and other witnesses.⁶⁴

2.68 There are also differences between the decision-makers in the Department and the AAT, with the Department's delegate not necessarily a person with

⁶⁰ Ms Sian Leathem, Registrar, Administrative Appeals Tribunal, *Transcript*, 16 July 2018, p. 1.

⁶¹ Mr Cameron Gifford, First Assistant Secretary, Attorney-General's Department, *Transcript*, 17 October 2018, p. 2.

⁶² Dr Anthea Vogl, Private capacity, *Transcript*, 16 July 2018, p. 22.

⁶³ Dr Anthea Vogl, Private capacity, *Transcript*, 16 July 2018, p. 22.

⁶⁴ Mr Jason Donnelly, Private capacity, *Transcript*, 16 July 2018, p. 27.

a legal background or a qualified lawyer, as they are in the AAT. The Department said:

They need to be someone who obviously has a lot of experience and understanding of our legislation, policy and processes. I understand that in the past there have been different models of what the delegate personally had in terms of their qualifications. We don't require the person to have legal qualifications per se, but they need to be au fait with all the complexity of the legislation and policies. Good judgement is obviously a very important aspect of that role, and good judgement balanced with a good understanding of the government's expectations.⁶⁵

2.69 Most witnesses saw merits review as a crucial component of the visa cancellations regime. The Human Rights Commission argued:

Australian courts correct errors of law, and since the 1970s Australian independent tribunals have been crucial in fixing problems that go to the merits of decisions. Merits review is central to good decision-making.⁶⁶

2.70 Victoria Legal Aid pointed out that similar federal schemes with 'a heavy impact on people's lives', incorporate 'several tiers of internal and external review to help ensure that those decisions are right'.⁶⁷

2.71 Assistant Professor Narelle Bedford argued that merits review improves primary decision-making by providing 'guidance to decision-makers on interpretation of statutes and the application of policies to facts'. This, they argued, leads to better decisions being made at the departmental level.⁶⁸

2.72 The Department of Home Affairs itself suggested that merits review plays a role in making the system function more efficiently:

Without merits review, it's likely the department would see an increase in the number of matters being taken to judicial review, along with the associated litigation costs and increased time to resolve cases.⁶⁹

⁶⁵ Ms Justine Jones, Assistant Secretary, Character Assessment and Cancellations Branch, Department of Home Affairs, *Transcript*, 27 June 2018, pp. 7-8.

⁶⁶ Mr Edward Santow, Human Rights Commissioner, Australian Human Rights Commission, *Transcript*, 17 July 2018, p. 1.

⁶⁷ Ms Sarah Fisher, Program Manager, Migration, Civil Justice Program. Victoria Legal Aid, *Transcript*, 24 July 2018, p. 24.

⁶⁸ Assistant Professor Narelle Bedford, *Submission 38*, p. 3.

⁶⁹ Ms Peta Dunn, First Assistant Secretary, Immigration Integrity and Community Protection Division, Department of Home Affairs, *Transcript*, 27 June 2018, p. 1.

2.73 Witnesses argued that putting any further limitations on merits review would lead to more judicial reviews, which are more expensive and inefficient.⁷⁰

2.74 Victoria Legal Aid said removing visa cancellation from the merits review system in the AAT ‘would not increase overall efficiency’, saying:

From our direct practice experience, we know that it would result in much higher numbers of judicial review matters in a sector which is already stretched. This would be acutely felt in overworked federal courts, where already some matters take two years to be listed for final hearing.⁷¹

2.75 The Attorney-General’s Department supported this assertion, saying: ‘In the absence of the AAT redress would be through the courts. You would see a rather major upswing in the caseload of the courts.’⁷²

2.76 Some witnesses suggested that the Minister’s right to review and set aside decisions made by the AAT constitutes a duplication.⁷³

2.77 The Visa Cancellations Working Group recommended:

...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.⁷⁴

⁷⁰ See for instance: Dr Vogl, Private capacity, *Transcript*, 16 July 2018, p. 22. And: Ms Sarah Fisher, Program Manager, Migration, Civil Justice Program. Victoria Legal Aid, *Transcript*, 24 July 2018, p. 24.

⁷¹ Ms Sarah Fisher, Program Manager, Migration, Civil Justice Program. Victoria Legal Aid, *Transcript*, 24 July 2018, p. 24.

⁷² Mr Cameron Gifford, First Assistant Secretary, Attorney-General's Department, *Transcript*, 17 October 2018, p. 5.

⁷³ See for instance: Ms Elizabeth Blades-Hamilton, Senior Research and Policy Officer, Victorian Multicultural Commission, *Transcript*, 24 July 2018, p. 4. And: Visa Cancellations Working Group, *Submission 33*, p. 4.

⁷⁴ Visa Cancellations Working Group, *Submission 33*, p. 4.

Committee comment

Merits review in the AAT

- 2.78 The Australian Government has a responsibility to provide protection for Australian citizens and all those who visit and reside in Australia. Migrants make a significant positive contribution to Australian society and are overwhelmingly law abiding. However, some choose to engage in criminal activity, possibly forfeiting their right to remain here.
- 2.79 The Committee supports the sovereign right of the Australian government to remove non-citizens who commit serious crimes in Australia, especially those who pose a danger to others.
- 2.80 Overall, the Committee believes that sections 501 and 116 of the Migration Act operate well and are achieving the aim of protecting the Australian community from harms caused by non-citizens who do not meet the character test.
- 2.81 The introduction of mandatory cancellation in 2014 greatly increased the number of persons whose visas were cancelled, and, as a consequence, the number of persons seeking merits review at both the Departmental level and in the AAT.
- 2.82 The Committee acknowledges that this may have put some pressure on the Department and the AAT. However, strengthening the regime has also created a more effective system, where serious criminals are less likely to slip through the cracks and be allowed to remain in Australia where they may commit further crimes.
- 2.83 There is no doubt that merits review in the AAT involves a reconsideration of cases already decided by the Department, requires human resources and costs the tax payer. However, the Committee understands that merits review is different to both the original decision-making process in the Department, and to judicial review.
- 2.84 One key difference between the Department's process, and merits review, is that merits review provides an opportunity for the applicant to state his or her case orally.
- 2.85 Some witnesses suggested that the opportunity to provide oral testimony at the Departmental stage may decrease the instance of non-citizens seeking merits review. However, this is arguably impractical, as many applicants are imprisoned at the time.

- 2.86 The Committee accepts that differences between judicial review and merits review are significant, and that most witnesses, including the relevant Departments, believe merits review is more efficient and affordable than judicial review.
- 2.87 While, in the view of some submitters merits review may constitute a duplication of Departmental decision-making, merits review also works to reduce the incidence of judicial review, which is more costly and time-consuming.
- 2.88 The Committee is persuaded that the AAT generally hears its reviews quickly and efficiently. The legislated maximum time of 84 days for the AAT to complete a review is appropriate and should be retained.
- 2.89 The Committee has some sympathy for arguments about the strictness of the nine day timeframe for lodging an application for review in the AAT, noting that some persons in prison may struggle to meet this deadline through no fault of their own.
- 2.90 The Committee is not making any formal recommendations around these timeframes but suggests that if the legislation is reviewed in future, consideration may be given to providing the AAT with the ability to extend the application deadline in exceptional situations. However, the timeframe should never be allowed to exceed 28 days.

Departmental (revocation) reviews

- 2.91 The Committee notes that according to the Department's submission, in March 2018 a significant proportion of applications for revocation of mandatory cancellation lodged in 2016/17 remained unresolved by the Department of Home Affairs at that time. This suggests that more than 30 per cent of applications had been ongoing for over nine months.⁷⁵
- 2.92 Many of these persons were residing in immigration detention, which comes at a significant cost to the tax payer; around \$346,660 a year, according to the Refugee Council of Australia.⁷⁶ The Committee would prefer to see revocation decisions made more expeditiously, and suggests that three months to a maximum of six months may be a more appropriate timeframe.

⁷⁵ Department of Home Affairs, *Submission 29*, p. 8.

⁷⁶ Dr Carolyn Graydon, Principal Solicitor and Manager of the Human Rights Law Program, Asylum Seeker Resource Centre, *Transcript*, 23 July 2018, p. 2.

- 2.93 Faster decisions on revocation applications would benefit applicants and their families, as well as reducing costs associated with detention.
- 2.94 The Department of Home Affairs may need to devote more resources to the task of reviewing mandatory cancellations, including appointing more delegates, to reduce these delays and make the system more efficient.
- 2.95 The Committee stops short of recommending a legislated timeframe for making these decisions, but is recommending the Department of Home Affairs review its workforce structure and processes associated with delegate decisions on criminal cancellations and revocations.
- 2.96 A review should focus on reforms that reduce the time taken to process revocation applications, ideally so that a majority are processed within three to six months. None should take longer than a year.

Recommendation 2

- 2.97 **The Committee recommends that the Department of Home Affairs conduct a review into the resourcing and processes applied to delegate decision-making on revocation of mandatory cancellations with a focus on:**
- **ensuring that the time taken to make these decisions is reduced to three months, with six months seen as the acceptable maximum; and**
 - **assessing if there is a need for increased staffing to meet these timeframes.**

AAT's approach to evidence

- 2.98 The Committee reviewed evidence which criticised the AAT's approach to collecting and considering evidence in visa cancellation cases. The Police Federation was concerned that the AAT are failing to take into account the full range of information available about an offender when making a decision. Mr Mark Burgess said:

So one would have thought that at least somebody might have said to the department of corrections, to the police department, and, potentially, to the victims: 'This matter is being appealed; it is going to the AAT. Is there

information that you think would help in this process in the AAT making an informed decision?’⁷⁷

2.99 Mr Burgess argued that the AAT should seek input to its reviews from relevant state government agencies, corrections facilities, etc, which may be able to offer insight into the character of the offender.⁷⁸

2.100 Victorian Victims of Crime Commissioner, Mr Greg Davies, expressed a similar view, saying:

What I’m suggesting is that, if a person is making the type of application we’re dealing with, there should be an absolutely complete list of prior convictions of that person.⁷⁹

2.101 The AAT, however, stated that it considers evidence brought to it by the applicant and the Department and doesn’t seek evidence ‘on its own motion’. Further, the AAT confirmed that it does not have ‘a resourced investigative capacity’.⁸⁰

2.102 The Police Federation submitted that one way to ensure ‘closer alignment of communication between state authorities’ and the AAT would be through the proposed National Criminal Intelligence System.⁸¹

Committee comment

2.103 The Committee understands the frustration of witnesses who expressed concerns about the AAT’s failure to collect additional evidence regarding the history and criminality of review applicants.

2.104 Decision-makers in the AAT must take responsibility for ensuring they are informed about the character of these non-citizens, and ideally should consider a wide variety of evidence, including information from parole boards, state police and corrections facilities.

⁷⁷ Mr Mark Burgess, Chief Executive Officer, Police Federation of Australia, *Transcript*, 15 August 2018, p. 4.

⁷⁸ Mr Mark Burgess, Chief Executive Officer, Police Federation of Australia, *Transcript*, 15 August 2018, p. 2.

⁷⁹ Mr Greg Davies, Victims of Crime Commissioner, Office of the Victims of Crime Commissioner, Victoria, *Transcript*, 24 July 2018, p. 40.

⁸⁰ Administrative Appeals Tribunal, *Supplementary Submission 22.2*, p. 3.

⁸¹ Police Federation of Australia, *Submission 28*, pp. 1-2.

- 2.105 However, the Committee also understands that the AAT does not receive funding or resources to conduct investigations and is generally relying on the Department to produce this evidence.
- 2.106 That said, the Committee believes there could be some merit in the idea of bodies such as state police and corrections being informed that a review is occurring, providing the opportunity to submit relevant evidence. Chapter 3 explores this issue further and makes recommendations.

Access to legal assistance

- 2.107 The AAT's review process is designed to be straightforward, allowing applicants to proceed without legal representation. The AAT confirmed that in criminal cancellation cases, about 50 per cent of applicants are represented by either a lawyer or a migration agent, and around 40 per cent are self-represented.⁸²
- 2.108 Asked if it makes a difference to the case, the AAT remarked:
- Obviously for the member who is conducting the hearing it can sometimes be of great assistance if the person has a legal representative, but it is not an unusual situation in the tribunal for people to be self-represented. Members, generally, are very accustomed to managing those sorts of processes.⁸³
- 2.109 However, Legal Aid NSW was concerned that an applicant representing themselves often 'prepares their case inadequately', fails to focus on 'the most relevant factors', and fails to obtain relevant reports from experts that would help their case.⁸⁴
- 2.110 Oz Kiwi was also concerned about access to legal assistance, saying it is contacted regularly by families seeking help with their cases:
- Having gone through court cases and legal appeal processes, they are financially strapped and they are unable to navigate the legal quagmire they now find themselves in. After expensive court cases and legal appeals, they can't afford lawyers, and New Zealanders don't qualify for legal aid generally.⁸⁵

⁸² Ms Sian Leathem, Registrar, Administrative Appeals Tribunal, *Transcript*, 16 July 2018, p. 8.

⁸³ Ms Sian Leathem, Registrar, Administrative Appeals Tribunal, *Transcript*, 16 July 2018, p. 8.

⁸⁴ Mr Alexander Grosart, Senior Solicitor, Civil Law Division, Government Law Group, Legal Aid NSW, *Transcript*, 16 July 2018, p. 12.

⁸⁵ Ms Joanne Cox, Deputy Chairperson, Oz Kiwi Association Inc., *Transcript*, 24 July 2018, p. 6.

- 2.111 The Refugee Council of Australia revealed that some organisations do provide limited free visa cancellation advice, but no legal aid commission is funded to offer this assistance, the work is complicated and time-consuming, and it feels the sector is ‘in a critical demand situation’.⁸⁶
- 2.112 Victoria Legal Aid provided some data around the demand for assistance and advice in relation to visa cancellation, saying the demand has increased exponentially since the 2014 changes to the regime. In the 2017-18 financial year, Victoria Legal Aid provided:
- Legal advice on character cancellation matters to 258 people.
 - Legal information on character cancellation matters to 165 people.
 - Issues around visa cancellation or refusal on character grounds make up around 35% of all ‘one off’ advice services provided by VLA.
 - The Prisoner Legal Help line has received 105 calls regarding visa cancellation.
 - [The] general Legal Help telephone service took 218 calls in relation to visa cancellation.⁸⁷
- 2.113 Victoria Legal Aid confirmed that it does not receive funding to provide any ongoing assistance to people seeking revocation of visa cancellations or merits review in the AAT.⁸⁸ Legal Aid NSW presented similar evidence.⁸⁹
- 2.114 A number of witnesses working in the legal sector recommended the provision of legal representation at the early departmental review stage.⁹⁰ The Kingsford Legal Centre said this could save significant resources by ensuring the ‘preferable’ decision is made by the Department in the first instance, minimising appeals to the AAT and making the system more efficient.⁹¹
- 2.115 Ms Er-kai Wang went as far as to say that without any legal advice or representation, applicants are not able to receive a fair hearing at the AAT,

⁸⁶ Dr Joyce Chia, Director of Policy, Refugee Council of Australia, *Transcript*, 23 July 2018, p. 7.

⁸⁷ Victoria Legal Aid, *Supplementary Submission 19.1*, p. 2.

⁸⁸ Victoria Legal Aid, *Supplementary Submission 19.1*, p. 2.

⁸⁹ Legal Aid NSW, *Submission 26*, p. 4.

⁹⁰ See for instance: Legal Aid NSW, *Submission 26*, p. 5

⁹¹ Ms Theresa Deegan, Solicitor, Kingsford Legal Centre, *Transcript*, 16 July 2018, p. 13. See also Mr Jason Donnelly, *Submission 4*, p. 7.

making 'merits review a meaningless and wasteful exercise' for unrepresented persons.⁹²

Committee comment

- 2.116 The Committee appreciates that legal representation assists non-citizens who are dealing with character cancellations to navigate the system in a more effective and efficient way.
- 2.117 The Committee also appreciates the frustrations of legal assistance organisations who may be providing help to people in section 501 and 116 cases without receiving government funding for this work.
- 2.118 However, it is the Committee's view that the merits review process in the AAT is designed to be accessible and navigable for unrepresented applicants.
- 2.119 Evidence that 40 per cent of applicants currently represent themselves and that AAT members are accustomed to dealing with self-represented applicants suggests the current arrangements are not causing significant problems or inefficiencies in the system.
- 2.120 Considering the strain already placed on legal aid budgets, the Committee does not support the suggestion that non-citizens affected by character cancellations should have guaranteed access to publically-funded legal assistance.

Detention and non-refoulement

- 2.121 A large number of submissions focussed on consequences of the visa cancellations regime on the human rights of asylum seekers and individuals on protection visas, looking at mandatory detention and the issue of non-refoulement.⁹³ This report addresses these issues primarily within the terms of reference; specifically in terms of how they relate to the efficiency of the visa cancellation and review system.

⁹² Ms Er-kai Wang, *Submission 7*, p. 8.

⁹³ See for instance: SCALES Community Legal Centre, *Submission 24*; Mr Jason Donnelly, *Submission 4*; and Refugee Council of Australia, *Submission 6*.

Immigration detention

2.122 Witnesses argued that keeping people in immigration detention for the duration of the revocation process is inefficient and expensive.⁹⁴ The Refugee Council's Dr Joyce Chia submitted that it costs \$346,660 per year to detain someone in Australia's immigration detention system, and that many of those detained could be safely housed in the community at much lower cost.⁹⁵

2.123 Dr Chia was also concerned about the increasing numbers of refugees and asylum seekers detained as a result of visa cancellations, saying:

Prior to the introduction of mandatory cancellation, fewer than five refugees a year had their visas cancelled under section 501. Since then, those numbers have skyrocketed. In the last full financial year that I have figures for, 2016-17, 126 people on protection or refugee visas had them cancelled under section 501. On 28 February 2018, this year, there were 166 refugees – all people seeking asylum – in detention because their visas had been cancelled.⁹⁶

2.124 A person whose visa is cancelled 'must be detained', explained Dr Chia, until they can either be deported, or have their visa reinstated:

So, when we talk of visa cancellations, what we are really talking about is indefinite detention. For refugees, detention is not only indefinite but extremely prolonged. The 124 refugees whose visas had been cancelled in detention on 28 February this year had, on average, spent an extraordinary 416 days in detention.⁹⁷

2.125 It was Dr Chia's view that Australia's policy of mandatory detention means Australia detains people for longer than 'other countries', where:

...what would happen is you would cancel a visa, but you would only detain them when you were ready to deport them, whereas we do it for the whole time.⁹⁸

2.126 The Refugee Council argued that refugees should not be subject to visa cancellation because they 'cannot be returned to their home country without

⁹⁴ Dr Carolyn Graydon, Principal Solicitor and Manager of the Human Rights Law Program, Asylum Seeker Resource Centre, *Transcript*, 23 July 2018, p. 2.

⁹⁵ Dr Joyce Chia, Director of Policy, Refugee Council of Australia, *Transcript*, 23 July 2018, p. 6.

⁹⁶ Dr Joyce Chia, Director of Policy, Refugee Council of Australia, *Transcript*, 23 July 2018, p. 1.

⁹⁷ Dr Joyce Chia, Director of Policy, Refugee Council of Australia, *Transcript*, 23 July 2018, p. 1.

⁹⁸ Dr Joyce Chia, Director of Policy, Refugee Council of Australia, *Transcript*, 23 July 2018, p. 5.

breaching Australia's international legal obligations'. It recommended the Migration Act be amended 'to prohibit the cancellation of visas of those owed non-refoulement obligations'.⁹⁹

2.127 The Council also pointed out that refugees are at a high risk of automatic visa cancellation because 'any offence committed while in immigration detention, no matter how trivial, results in mandatory cancellation of their visa'.¹⁰⁰

2.128 Dr Louise Boon-Kuo expressed concern that, under the section 116 provisions, persons who have been charged with a crime but not convicted, can have their visa cancelled and be detained even if a court has seen fit to bail them, assessing that they are not a risk to the community. She said:

I would argue that the predictive risk-assessment exercise has been developed and refined in the criminal jurisdiction over the years, and that's the appropriate arena for that decision as to whether a person should be at liberty while awaiting a decision on a criminal charge.¹⁰¹

2.129 Mr Michael Chalmers was also concerned that persons detained after section 116 cancellations are not being released quickly if they are found not guilty. He said: 'It typically takes three to eight months before that person is released after being found not guilty or no conviction entered.'¹⁰²

2.130 The Human Rights Commission recommended that:

...where a bridging visa has been cancelled under s 116 of the Migration Act on the basis of criminal charges, the withdrawal of these charges or a non-adverse judicial outcome should automatically trigger a review of the decision to cancel the visa.¹⁰³

2.131 The Visa Cancellations Working Group recommended that the law be amended to prevent cancellation of visas 'on the basis of charges alone' to

⁹⁹ Dr Joyce Chia, Director of Policy, Refugee Council of Australia, *Transcript*, 23 July 2018, p. 1.

¹⁰⁰ Dr Joyce Chia, Director of Policy, Refugee Council of Australia, *Transcript*, 23 July 2018, p. 1.

¹⁰¹ Dr Louise Boon-Kuo, Private capacity, *Transcript*, 17 July 2018, p. 20.

¹⁰² Mr Michael Chalmers, Private capacity, *Transcript*, 17 July 2018, p. 23. Another submission, *Submission 10* (Mr Philip Duncan), also presented evidence of detention the submitter considers to have been unlawful and arbitrary.

¹⁰³ Australian Human Rights Commission, *Submission 11*, p. 6.

prevent people being kept in detention long after their charges are dropped or they have been found not-guilty.¹⁰⁴

Non-refoulement

2.132 Witnesses were concerned about impact of cancellations on refugees and asylum seekers on protection visas. The Commission said:

If that protection visa is taken away, the Migration Act requires them to go into immigration detention. If they can't be taken out of immigration detention because they don't have a visa, and they can't be sent back to their home country because they've got a real risk of persecution there, then the only outcome really is indefinite detention. That's the cohort of people we're particularly concerned about.¹⁰⁵

2.133 The Department of Home Affairs was asked if its delegates take Australia's non-refoulement obligations into consideration when making decisions under section 501. Its representatives confirmed that the Department takes non-refoulement into account under Ministerial Direction 65. However, it does cancel the visas of people who are holding refugee and humanitarian visas, 'where there are grounds of risk to the community'.¹⁰⁶

2.134 The Department then considers non-refoulement again if it reaches 'the point of potential removal', because: 'We certainly can't breach our non-refoulement obligations in our removal actions'.¹⁰⁷

2.135 Witnesses argued that this has led to indefinite detention for a number of refugees, especially in the context of a marked increase in the cancellation of protection and refugee visas in recent years, with less than five a year from 2010 to 2013, growing to 126 in 2016-17.¹⁰⁸

2.136 Mr Donnelly argued that it was inefficient to cancel the visas of persons who cannot be deported, because 'it just delays the inevitable. They continue to

¹⁰⁴ Visa Cancellations Working Group, *Submission 33*, p. 4.

¹⁰⁵ Mr Graeme Edgerton, Deputy General Counsel, Australian Human Rights Commission, *Transcript*, 17 July 2018, p. 5.

¹⁰⁶ Ms Peta Dunn, First Assistant Secretary, Immigration Integrity and Community Protection Division, Department of Home Affairs, *Transcript*, 27 June 2018, p. 7.

¹⁰⁷ Ms Peta Dunn, First Assistant Secretary, Immigration Integrity and Community Protection Division, Department of Home Affairs, *Transcript*, 27 June 2018, p. 7.

¹⁰⁸ Refugee Council of Australia, *Submission 6*, pp. 3-4.

be in detention, and more money is spent whilst they're in detention, considering at a later stage a protection visa application'.¹⁰⁹

2.137 Non-refoulement obligations were once a primary consideration of visa cancellation.¹¹⁰ A number of witnesses wanted to see non-refoulement obligations elevated to being a primary consideration in the future.¹¹¹

2.138 The Visa Cancellations Working Group submitted:

There is no question in the working group's view that non-refoulement must be a primary consideration and cannot be dealt with, as it often is now, by a reference to the opportunity to apply for protection at a later stage.¹¹²

2.139 The Asylum Seeker Resource Centre urged the Committee to entirely exclude people to whom Australia owes protection obligations from the visa cancellations regime.¹¹³

2.140 Non-refoulement is also a secondary consideration in Ministerial Direction 63 which relates to the cancellation of bridging visas under section 116.¹¹⁴

Committee comment

2.141 The Committee understands that detaining non-citizens who have had their visas cancelled on character grounds is expensive to tax payers and places stress on individuals and families.

2.142 However, the protection of the Australian community is paramount, so until a decision can be made that a person does not pose a threat to the community, it is right that the person remain in detention.

¹⁰⁹ Mr Jason Donnelly, Private capacity, *Transcript*, 16 July 2018, p. 30.

¹¹⁰ Mr Ali Mojtahedi, Principal Solicitor, Immigration Advice and Rights Centre, *Transcript*, 17 July 2018, p. 9.

¹¹¹ See for instance: Ms Theresa Deegan, Solicitor, Kingsford Legal Centre, *Transcript*, 16 July 2018, p. 14; and Mr Mohammad Al-Khafaji, Acting Chief Executive Officer, Federation of Ethnic Communities' Council of Australia, *Transcript*, 5 December 2018, p. 3; Dr Joyce Chia, Director of Policy, Refugee Council of Australia, *Transcript*, 23 July 2018, p. 6; Dr Carolyn Graydon, Principal Solicitor and Manager of the Human Rights Law Program, Asylum Seeker Resource Centre, *Transcript*, 23 July 2018, p. 6.

¹¹² Ms Hannah Dickinson, Chair, Visa Cancellations Working Group, *Transcript*, 24 July 2018, p. 19.

¹¹³ Asylum Seeker Resource Centre, *Submission 13*, p. 3.

¹¹⁴ Ms Sian Leatham, Registrar, Administrative Appeals Tribunal, *Transcript*, 16 July 2018, p. 6.

- 2.143 Time periods in detention should be minimised for the sake of persons detained, as well as to keep costs down. The Committee's first recommendation aims to reduce time spent in detention waiting for departmental decisions on revocation.
- 2.144 The issue of non-refoulement is a complex one. The Committee has some sympathy for the plight of those whose visas have been cancelled who cannot be returned to their home country because of a genuine fear of persecution.
- 2.145 However, refugees cannot be immune from the consequences of any criminal conduct. Those seeking Australia's protection must abide by Australia's laws. If they choose to engage in criminal activity, the consequence may be the loss of their visa.
- 2.146 Ministerial Direction 65 already lists the issue of non-refoulement as a consideration, and the Committee is satisfied that decision-makers at the Department and at the AAT take the issue into account and grasp the serious implications of cancelling a humanitarian or protection visa.
- 2.147 The Committee does not support the suggestion that non-refoulement should be a primary consideration. The right to safety of one individual does not outweigh the right of the Australian community to be protected from individuals who pose an ongoing risk.

3. Future directions for merits review

- 3.1 This chapter starts by considering the impacts of the existing system of visa cancellations and merits review on long-term residents of Australia, their families and children, and on citizens of New Zealand, the largest cohort of deportees.
- 3.2 The chapter then looks at:
- the scope of AAT merits review, including the exclusion of ministerial decisions from merits review;
 - the appropriateness of merits review in cases of violent and sexual crimes;
 - minor criminality and the visa cancellations and merits review regimes;
 - the role of victims in the review process;
 - public confidence in merits review; and
 - moves to strengthen the visa cancellations regime.

Impacts of visa cancellations and merits review

Impacts on long-term residents

- 3.3 Cancelling a person's visa is a very serious decision and one which can have severe consequences for the individual. The Committee heard that visa cancellations made on criminal grounds generally lead to a permanent exclusion from Australia.¹ These consequences tend to be most keenly felt by long-term permanent residents of Australia who have never taken up citizenship, and who have their visas cancelled under section 501.

¹ Mr Jason Donnelly, Private capacity, *Transcript*, 16 July 2018, p. 30.

- 3.4 A number of witnesses argued that Australia should not be deporting non-citizens who have lived in Australia for most of their lives but are not citizens, regardless of what crimes they commit.²
- 3.5 The Human Rights Commission observed that some of those caught up by section 501 have come to Australia ‘as a very, very young child’ and committed a crime decades later. The Commission said:
- If that person is then considered for removal from Australia back to a country that they may never have been in as an adult, may have no real ties to and may not even speak the language of, that is a very significant imposition on that individual and can restrict a number of their basic human rights.³
- 3.6 The NSW Council for Civil Liberties referred to such persons as ‘absorbed persons’, citing a number of cases where people who are, ‘for all intents and purposes, absorbed into the Australian community’ have had their visas cancelled. The Council added:
- The fact that they are not legally citizens is an accident, a loophole, and it’s quite often an accident of which they’re not aware and have no reason to be aware.⁴
- 3.7 A number of examples were provided, including that of Robert Jovicic:
- Robert Jovicic lived in Australia since he was two years old. After living here for 36 years, and in the latter part of that being repeatedly convicted of crimes related to his heroin addiction, he was deported to Serbia even though he could not speak Serbo-Croat, and had no means of support there. He became destitute.⁵
- 3.8 Barrister, Mr Jason Donnelly, explained that previous iterations of the law, and previous ministerial directions, incorporated ‘a greater level of tolerance’ for people who have lived in Australia ‘most of their natural lives’. He said:

² For instance: Australian Human Rights Commission; New South Wales Council for Civil Liberties; the Visa Cancellations Working Group; and many others.

³ Mr Edward Santow, Human Rights Commissioner, Australian Human Rights Commission, *Transcript*, 17 July 2018, p. 4. A number of other witnesses made similar points, including Mr Aidan Hammerschmidt, Private capacity, *Transcript*, 17 July 2018, p. 16.

⁴ Mr Stephen Blanks, President, New South Wales Council for Civil Liberties, *Transcript*, 16 July 2018, p. 19.

⁵ NSW Council for Civil Liberties, *Submission 9*, p. 7.

There was also the old absorbed person principle, where, if a person had been in Australia for more than 10 years, the minister didn't even have a statutory power to cancel the person's visa in those circumstances.⁶

- 3.9 Mr Donnelly acknowledged that Ministerial Direction 65 includes a statement of principle that if a person has lived in Australia for most of their natural life, 'there is an expectation that the Australian community would exercise a larger level of tolerance for their criminality'. However, he pointed out that the word 'may' is included in the sentence, making it discretionary, which it was not under previous regimes.⁷
- 3.10 The Human Rights Commission also observed that a person's length of time in (and connection to) Australia 'has become perhaps a less significant consideration'.⁸
- 3.11 The Police Federation of Australia argued that length of time in Australia is not relevant when the crime committed was 'a serious violent crime or a crime of a sexual nature'.⁹
- 3.12 The Visa Cancellations Working Group drew the Committee's attention to Article 12(4) of the International Covenant on Civil and Political Rights, saying:
- Those people are not considered to be aliens who have been in Australia for that period of time. There should be a restriction on the cancellation of their visas.¹⁰
- 3.13 Monash University submitted that: 'From an international ethical standpoint, Australia must take responsibility for offending committed by long term residents.'¹¹
- 3.14 The New Zealand High Commission submitted:
- There is a public policy case for 'connections to Australia' being given more weight in the visa cancellation appeal process, particularly where people have resided in Australia for a long period of time.¹²

⁶ Mr Jason Donnelly, Private capacity, *Transcript*, 16 July 2018, p. 29.

⁷ Mr Jason Donnelly, Private capacity, *Transcript*, 16 July 2018, p. 29.

⁸ Mr Edward Santow, Human Rights Commissioner, Australian Human Rights Commission, *Transcript*, 17 July 2018, p. 4.

⁹ Mr Mark Burgess, Police Federation of Australia, *Transcript*, 15 August 2018, p. 2.

¹⁰ Ms Hannah Dickinson, Chair, Visa Cancellations Working Group, *Transcript*, 24 July 2018, p. 21.

¹¹ Monash University, *Submission 14*, p. 2.

- 3.15 Under the current Ministerial Direction, connection to Australia and length of time in Australia are secondary considerations.¹³

Impacts on Australian citizens, including children

- 3.16 Visa cancellations and deportation on character grounds often have a significant impact on families, including Australian citizens and minor children in Australia.
- 3.17 The Law Council of Australia highlighted possible impacts on the family unit that remains in Australia, including loss of the family structure, estrangement of children from their father, and generational impacts, adding:

Whilst it might seem a simple solution sometimes to say, let's just send them back, and it can be New Zealand's problem, we haven't yet measured the impact and what's going to happen to the generation of often Australian citizens or, potentially, New Zealanders who remain here.¹⁴

- 3.18 Oz Kiwi told the committee that 'families are being split up—fathers are separated from their young children', and explained that custody orders or financial difficulties often mean those deported cannot see their children for long periods of time.¹⁵

- 3.19 The Committee heard anecdotal evidence suggesting that, in most cases the families of persons deported don't leave Australia to join their partner due to 'complicating factors', such as custody orders, or reluctance of the Australian partner to leave her support network in Australia:

Financially it costs money, and the mother of a young child or young children doesn't want to go and live in a strange country with no support. It's very hard, and it has actually led to family break-ups—divorce or separation.¹⁶

- 3.20 Oz Kiwi believed a large majority of families of New Zealand deportees remain in Australia rather than following the deported person, usually the father.¹⁷

¹² New Zealand High Commission, *Submission 40*, p. 5.

¹³ Ms Lucy Morgan, Australian Human Rights Commission, *Transcript*, 17 July 2018, p. 4.

¹⁴ Ms Carina Ford, Deputy Chair, Migration Law Committee, Law Council of Australia, *Transcript*, 24 July 2018, p. 16.

¹⁵ Ms Joanne Cox, Deputy Chairperson, Oz Kiwi Association Inc., *Transcript*, 24 July 2018, p. 5.

¹⁶ Ms Joanne Cox, Deputy Chairperson, Oz Kiwi Association Inc., *Transcript*, 24 July 2018, p. 12.

- 3.21 The New South Wales Council for Civil Liberties provided a case study in which a UK citizen who had lived in Australia for 50 years (since the age of 7) had his visa cancelled after receiving a suspended sentence for a sexual offence.¹⁸ The individual concerned was deemed not to pose a risk to the community by the sentencing judge, who suspended his sentence. However, the Minister decided to cancel his visa and detain him in immigration detention with the intention to deport him to the UK.¹⁹
- 3.22 The NSW Council for Civil Liberties argued that, because the Minister is not bound by Ministerial Direction 65, he ‘was not obliged’ to consider the man’s caring roles for his elderly father and orphaned grandchild, who are Australian citizens and would be ‘profoundly’ affected by his deportation.²⁰
- 3.23 The Council added that, because the above decision was made by the Minister, it was not reviewable in the AAT.²¹
- 3.24 Witnesses including Oz Kiwi were concerned that criminal deportations often infringe upon the rights of the child and the right to family cohesion by removing the father or another carer, leaving the children vulnerable and without access to this person.²²
- 3.25 The Multicultural Youth Advocacy Network (MYAN) recommended that government decision-makers ‘have relevant and adequate training’ to ensure they fully understand how to apply these considerations ‘consistent with international human rights law, specifically the Convention on the Rights of [the] Child.’²³

¹⁷ Ms Joanne Cox, Deputy Chairperson, Oz Kiwi Association Inc., *Transcript*, 24 July 2018, p. 12.

¹⁸ Mr Stephen Blanks, President, New South Wales Council for Civil Liberties, *Transcript*, 16 July 2018, p. 18.

¹⁹ Mr Stephen Blanks, President, New South Wales Council for Civil Liberties, *Transcript*, 16 July 2018, p. 18.

²⁰ Mr Stephen Blanks, President, New South Wales Council for Civil Liberties, *Transcript*, 16 July 2018, p. 18.

²¹ Mr Stephen Blanks, President, New South Wales Council for Civil Liberties, *Transcript*, 16 July 2018, p. 18.

²² Ms Joanne Cox, Deputy Chairperson, Oz Kiwi Association Inc., *Transcript*, 24 July 2018, p. 5.

²³ Multicultural Youth Advocacy Network, *Supplementary Submission 12.1*, p. 3.

- 3.26 The Visa Cancellations Working Group observed that there has been a recent rise in cancellation of the visas ‘of very young people and children’, which it said ‘underscores the need for merits review’.²⁴
- 3.27 The Asylum Seeker Resource Centre cited cases where young people who were child soldiers and on protection visas have been subject to visa cancellation, and separated from their families.²⁵
- 3.28 MYAN submitted that the visa cancellations regime ‘risks undermining’ Australia’s youth justice system, which aims to:
- ...reintegrate young people who commit criminal offences and serve their sentences back into our society as constructive individuals who are willing to pursue their aspirations and fulfil their potential as successful members of Australian society.²⁶
- 3.29 Further, MYAN recommended that the visa cancellations legislation, which does not currently include a reference to the age of non-citizens, ‘should explicitly exclude children/young people under the age of 18 from such processes’.²⁷

Impacts on New Zealand citizens

- 3.30 The Committee received substantial evidence regarding the impact of the visa cancellations regime on citizens of New Zealand residing in Australia, who are the largest cohort of deportees under section 501.
- 3.31 The New Zealand High Commissioner told the Committee that the number of New Zealanders being deported from Australia has skyrocketed as a result of the 2014 changes to the Migration Act. The High Commissioner stated that:
- ...before the 2014 changes, Australia was deporting about 65 New Zealanders a year, so we were running about one a week. As a result of the change, we quickly went to the figure of one a day, effectively.²⁸

²⁴ Visa Cancellations Working Group, *Submission 33*, p. 16.

²⁵ Dr Carolyn Graydon, Principal Solicitor and Manager of the Human Rights Law Program, Asylum Seeker Resource Centre, *Transcript*, 23 July 2018, p. 2.

²⁶ Ms Nadine Liddy, National Coordinator, Multicultural Youth Advocacy Network Australia, *Transcript*, 23 July 2018, p. 3.

²⁷ Multicultural Youth Advocacy Network, *Supplementary Submission 12.1*, p. 5.

²⁸ His Excellency Chris Seed, High Commissioner, New Zealand High Commission, *Transcript*, 12 September 2018, p. 3.

- 3.32 Over half of the visa cancellations in 2017 were New Zealanders, despite the fact that New Zealanders make up less than 10 per cent of the migrant population in Australia.²⁹
- 3.33 New Zealanders are vulnerable to deportation because historically they have not had a strong incentive to take out citizenship because there was no need. Before 2001, New Zealand citizens in Australia could access most forms of social security without becoming citizens and could obtain Australian citizenship without having to become permanent residents first.³⁰
- 3.34 Legislative changes enacted in 2001 meant New Zealanders could no longer automatically access many forms of social security and made it harder for New Zealand citizens to obtain citizenship or sponsor family members for permanent residence, as they had to apply for and be granted permanent resident visas first.³¹
- 3.35 Transitional arrangements were put in place for New Zealanders who were already in Australia at the time the legislation was enacted, meaning New Zealanders who arrived prior to 26 February 2001 are able to ‘continue to apply for citizenship, sponsor family members for permanent residence and access social security payments without being granted permanent visas’.³²
- 3.36 High Commissioner Seed explained how the 2001 immigration law changes, combined with the 2014 strengthening of the visa cancellations regime, have impacted New Zealand citizens:

Before 2001, New Zealanders essentially were permanent residents from the time they arrived, so their incentive to become citizens of Australia was quite low. ... The figure that we use says that, of the other migrant groups that have been in Australia for 10 years after 2001, 70 per cent have become an

²⁹ New Zealand High Commission, *Submission 40*, p. 2.

³⁰ Parliamentary Library, ‘New Zealanders in Australia: a quick guide’, 29 August 2016, viewed on 21 January 2019, <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/NZAust>.

³¹ Parliamentary Library, ‘New Zealanders in Australia: a quick guide’, 29 August 2016, viewed on 21 January 2019, <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/NZAust>.

³² Parliamentary Library, ‘New Zealanders in Australia: a quick guide’, 29 August 2016, viewed on 21 January 2019, <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/NZAust>.

Australian citizen. For New Zealanders, it's only seven per cent. ... Because we have more people in percentage terms who are not citizens, they became more vulnerable to deportation.³³

3.37 Oz Kiwi said New Zealanders now comprise almost 13 per cent of the immigration detention population, with 173 New Zealanders in immigration detention on 31 May 2018,³⁴ and commented:

Most Australians would be surprised to learn that any New Zealanders are being held in Australian immigration detention. They would be even more surprised to learn that nearly 300 have been detained on Christmas Island (CI) since 2015. One New Zealander has been held on CI for two years while he appeals his deportation. This individual arrived as a six year old and has resided in Australia for 25 years never having returned to New Zealand in that time.³⁵

3.38 High Commissioner Seed communicated New Zealand's view that it is concerned about the application of some aspects of Australia's migration law to New Zealanders charged with crimes in Australia.³⁶ Concerns included:

- the threshold for what constitutes a 'serious criminal record' is now too low, and is now cumulative;
- mandatory cancellation is capturing large numbers of New Zealanders; and
- the legal changes in 2014 meant that there 'was less weight given to where their family connection was'.³⁷

3.39 Australia has a responsibility for long-term resident New Zealanders who 'have made their life [in Australia] and have the weight of their family here and are essentially products of the Australian system', the High Commissioner argued.³⁸

³³ His Excellency Chris Seed, High Commissioner, New Zealand High Commission, *Transcript*, 12 September 2018, p. 2.

³⁴ Ms Joanne Cox, Deputy Chairperson, Oz Kiwi Association Inc., *Transcript*, 24 July 2018, p. 5.

³⁵ Oz Kiwi, *Submission 8*, p. 5.

³⁶ His Excellency Chris Seed, High Commissioner, New Zealand High Commission, *Transcript*, 12 September 2018, p. 2.

³⁷ His Excellency Chris Seed, High Commissioner, New Zealand High Commission, *Transcript*, 12 September 2018, p. 3.

³⁸ His Excellency Chris Seed, High Commissioner, New Zealand High Commission, *Transcript*, 12 September 2018, p. 2.

3.40 New Zealand is also concerned with Australia's treatment of New Zealand minors. The High Commissioner said:

We are especially concerned that Section 116 has been applied to at least one New Zealand minor in the last year. In that case, a 16 year old New Zealand citizen was detained for many months in an adult immigration detention centre hundreds of kilometres from his family and support networks. New Zealand raised serious concerns about whether this treatment of a minor conformed with Australia's obligations under the UN Convention on the Rights of the Child, including (Art 37) the right for a minor to be held separately from adults. It is noteworthy that the AAT overturned the decision to cancel this New Zealand minor's visa, on the basis that due consideration had not been given to their best interests. While the relevant visa was reinstated, we cannot know the personal impact that holding a minor in adult detention has had.³⁹

3.41 Witnesses were most concerned with those New Zealanders who have been in Australia for many years. Oz Kiwi asserted that such persons 'don't consider New Zealand home':

They've lived here for 35 of their 38 years, or 45 of their 52 years. They don't consider New Zealand home. And it's the same as sending them to Sweden or Russia or Canada or wherever. If they don't know that country and have no support there, they're isolated. It's a recipe for disaster...⁴⁰

3.42 Professor Mary Crock said, in her experience, Australia is deporting people who have been in Australia 'for longer and longer times' and 'should be our responsibility'.⁴¹

3.43 New Zealand had to introduce measures quickly to deal with the influx of deported persons from Australia. The High Commissioner explained that there was nothing in place in 2015, but now New Zealand has:

...much stronger procedures in place for ensuring that deep information about returning offenders is taken into account. That issue is much better managed now, and we acknowledge the contribution that the Australian government has made to make that happen. Border Force and others have engaged on it.⁴²

³⁹ New Zealand High Commission, *Submission 40*, p. 3.

⁴⁰ Ms Joanne Cox, Deputy Chairperson, Oz Kiwi Association Inc., *Transcript*, 24 July 2018, p. 8.

⁴¹ Professor Mary Crock, Private capacity, *Transcript*, 17 July 2018, p. 17.

⁴² His Excellency Chris Seed, High Commissioner, New Zealand High Commission, *Transcript*, 12 September 2018, p. 6.

3.44 New Zealand is now campaigning to encourage New Zealanders who came to Australia before 2001 to take up Australian citizenship.⁴³ However, citizenship is more complex and costly for those who arrived after this date. Oz Kiwi explained:

A New Zealander here would have to pay \$7,000 for a spousal visa, \$3,000 to \$5,000 for a work visa and then sponsor their spouse and children. ... the new New Zealand 189 skilled visa still requires \$3,600 from the primary applicant, \$1,800 for their partner, \$800 for each minor child and \$1,800 for a child aged between 18 and 23. So that's quite an expensive process for a lot of people just to retain the status quo; they become a citizen.⁴⁴

3.45 The High Commissioner argued that criminal deportation 'is threatening to undermine the generally very positive Trans-Tasman relationship'.⁴⁵ Oz Kiwi submitted a similar view, saying:

The situation is causing harm to the New Zealand-Australia relationship, with acting New Zealand Prime Minister Winston Peters, just last week, and justice minister Andrew Little both criticising the Australian government for their deportation of New Zealand long-term residents of Australia who no longer consider New Zealand home.⁴⁶

3.46 Oz Kiwi suggested that Australia should return to the 10 year rule.⁴⁷ This would mirror the way the law is structured in New Zealand, where offenders who have been residents of New Zealand for 10 years or more cannot be deported.⁴⁸

Student loans

3.47 Oz Kiwi raised concerns about access to student loans for some young people from New Zealand, suggesting that this may make offending more likely, saying:

...we know that there are cohorts of young New Zealanders in Perth and on the Sunshine Coast and in Melbourne who, once they reach middle high

⁴³ His Excellency Chris Seed, High Commissioner, New Zealand High Commission, *Transcript*, 12 September 2018, p. 5.

⁴⁴ Ms Joanne Cox, Deputy Chairperson, Oz Kiwi Association Inc., *Transcript*, 24 July 2018, p. 9.

⁴⁵ New Zealand High Commission, *Submission 40*, p. 2.

⁴⁶ Ms Joanne Cox, Deputy Chairperson, Oz Kiwi Association Inc., *Transcript*, 24 July 2018, p. 5.

⁴⁷ Ms Joanne Cox, Deputy Chairperson, Oz Kiwi Association Inc., *Transcript*, 24 July 2018, p. 8.

⁴⁸ New Zealand High Commission, *Submission 40*, p. 4.

school, realise that they have no pathway to higher education. So that becomes a trigger for them, and they start falling through the cracks.⁴⁹

3.48 The Department of Education and Training submitted that, while New Zealanders pay the same price for a degree as Australians and are eligible for Commonwealth supported places, most New Zealanders are not eligible for student loans through the Higher Education Loan Program (HELP).⁵⁰

3.49 The Department also explained that since 1 January 2016 there has been a 'special cohort' of New Zealand citizens eligible for student loans. They must meet all of the following long-term residency criteria:

- Hold a New Zealand Special Category Visa (subclass 444);
- First began residing in Australia at least 10 years ago and at that time were a child under the age of 18 with no spouse or de facto partner; and
- Have been in Australia for at least:
 - a total of eight out of the past 10 years; and
 - a total of 18 months out of the last two years.⁵¹

3.50 Oz Kiwi recommended that any New Zealander who has completed high school in Australia should have access to student loans:

If someone came here as, say, a nine-year-old and completed nine years of their education here and finished high school but they don't quite make the 10-year rule, they still have to remain dependent and living at home to make that 10th year in order to qualify for the HELP loan.⁵²

Committee comment

3.51 The Committee acknowledges that cancelling the visas of non-citizens on character grounds can have significant impacts on Australian citizens with connections to that person, including their spouse or dependent children.

3.52 The needs of Australian citizens affected by the removal of a non-citizen are considered in both the departmental and AAT merits review processes. However, these needs do not outweigh the need to protect the Australian

⁴⁹ Ms Joanne Cox, Deputy Chairperson, Oz Kiwi Association Inc., *Transcript*, 24 July 2018, p. 8.

⁵⁰ Department of Education and Training, *Submission 41*, p. [1].

⁵¹ Department of Education and Training, *Submission 41*, p. [1].

⁵² Ms Joanne Cox, Deputy Chairperson, Oz Kiwi Association Inc., *Transcript*, 24 July 2018, p. 10.

community from criminals, especially those who have committed violent crimes.

- 3.53 The Committee has heard compelling evidence from the New Zealand High Commission and others regarding the impact of the 2014 changes to the Migration Act on New Zealand citizens living in Australia.
- 3.54 We note that many New Zealand citizens affected by visa cancellations have been resident in Australia for many years and have not taken up citizenship because, under previous laws, it did not seem necessary or beneficial for a range of reasons.
- 3.55 The Committee believes these special circumstances applying to New Zealanders who have lived in Australia for many years should be taken into account by all decision-makers in section 501 cancellations.
- 3.56 A specific provision should be included in the Ministerial Directions which allows the historic special immigration status of New Zealand citizens, and its impact on take up of citizenship in Australia, to be considered. However, it should be a secondary consideration and not considered in cases where the person has ever been convicted of a serious violent crime, such as rape, murder, sexual offences involving children, aggravated assault or armed robbery.
- 3.57 The Committee also supports moves to encourage New Zealanders who are permanent residents in Australia to become citizens if they wish, particularly those who arrived in Australia before 2001. The Committee notes the High Commission is campaigning around this issue.
- 3.58 Citizens of countries other than New Zealand who have been long-time residents of Australia, but never become citizens, have also been affected by the strengthened laws. The Committee understands some of these people may not have known they were not Australian citizens and, therefore, vulnerable to deportation if they commit serious crimes.
- 3.59 Long-term permanent residents of Australia, from all countries, including New Zealand, must understand that, unless they become citizens, they are not protected from possible deportation for criminal activity, regardless of the length of time they have lived in Australia.
- 3.60 Non-citizens who are permanent residents of Australia must understand the risks associated with choosing not to apply for citizenship. The Department of Home Affairs should ensure it communicates these risks to long-term residents of Australia in the strongest terms. This may, in turn, act as a deterrent to committing crimes.

Recommendation 3

3.61 The Committee recommends that Ministerial Directions 65 and 63 be revised to include a specific provision allowing the historic special immigration status of New Zealand citizens, and its impact on take up of citizenship in Australia, to be a secondary consideration in reviewing character cancellations.

This consideration should not be taken into account if the applicant has ever been convicted of a serious violent or sexual crime, such as rape, murder, sexual offences involving children, aggravated assault or armed robbery.

Recommendation 4

3.62 The Committee recommends that all young people from New Zealand who are living permanently in Australia, and who complete at least four years of their higher education in Australia, are eligible to access student loans through the Higher Education Loan Program (HELP).

Scope of AAT merits review

Ministerial decisions

- 3.63 Ministerial decisions cannot be reviewed by the AAT and the Minister can also overturn any decision made by the AAT in relation to character cancellations. A number of witnesses and submitters were concerned that these powers are too broad and are being applied too liberally by the current government. However, other witnesses supported the need for a minister to have the ultimate say in order to protect the community.
- 3.64 The Department of Home Affairs confirmed that the AAT does not have the ability to review cancellation or revocation decisions made by the minister or other portfolio ministers, and that the minister can overturn a decision of the AAT 'if it is in the national interest to do so'.⁵³
- 3.65 According to the Department, these provisions are designed for use 'in exceptional cases' and are currently used in cases with 'serious criminality',

⁵³ Ms Peta Dunn, First Assistant Secretary, Immigration Integrity and Community Protection Division, Department of Home Affairs, *Transcript*, 27 June 2018, p. 1.

such as those involving ‘national security, organised crime and crimes against humanity’:

These provisions for personal ministerial decision-making recognise that the government is ultimately responsible for ensuring that decisions reflect community standards and expectations.⁵⁴

3.66 Ms Dawn Joyce submitted that the Minister’s discretionary powers are being used in ‘ordinary and straightforward matters; rather than to merely deal with cases that are ‘exceptional or unforeseeable’’.⁵⁵

3.67 Detailing the history of the provisions, Dr Louise Boon-Kuo said the Minister’s personal powers under the Act were envisaged only for ‘exceptional’ use. However, their use ‘became routine’ from 2002–03, when then Immigration Minister, the Hon Phillip Ruddock MP made around 80 per cent of character cancellation decisions. She added:

Subsequent Immigration Ministers made far fewer personal decisions on character; these accounted for 15 per cent in 2003–04, and 19 per cent in 2006–07.⁵⁶

3.68 Home Affairs submitted that in FY2017/18 (as at 31 March 2018), the Minister and other portfolio Ministers had made 192 section 501 decisions, with 513 section 501 decisions being made by delegates.⁵⁷ Thus, the ministers made around 27 per cent of decisions in that year.

3.69 The Department also provided evidence regarding which cases are allocated to ministers, saying:

...the cases that Minister Dutton would see, for example, would be those related to national security or sexually based offences where the person has been sentenced to more than 12 months in jail. Similarly, the other ministers will be on the more severe end of criminality, such as murders, significant drug charges and things of that nature.⁵⁸

⁵⁴ Ms Peta Dunn, First Assistant Secretary, Immigration Integrity and Community Protection Division, Department of Home Affairs, *Transcript*, 27 June 2018, p. 1.

⁵⁵ Ms Dawn Joyce, *Submission 2*, p. [1].

⁵⁶ Dr Louise Boon-Kuo, *Submission 37*, p. 8.

⁵⁷ Department of Home Affairs, *Submission 29*, p. 9.

⁵⁸ Ms Justine Jones, Assistant Secretary, Character Assessment and Cancellations Branch, Department of Home Affairs, *Transcript*, 27 June 2018, p. 3.

3.70 The Department confirmed that it uses ‘a risk matrix’ to allocate cases to either a minister, or departmental delegate.⁵⁹ The ‘Character Case Allocation by Category’ matrix shows that the Minister for Home Affairs, Minister for Immigration and Border Protection personally reviews cases in the following crime categories:

- national security;
- organised and gang-related crime;
- crimes against humanity; and
- child exploitation, assault and abuse.⁶⁰

3.71 The matrix also demonstrates that cases are allocated to the Minister for decision if they are ‘high profile/sensitive’, with media and public interest, or if they are ‘cases requiring the use of the Minister’s personal powers’.⁶¹

3.72 The Visa Cancellations Working Group contended that avoiding the possibility of merits review is ‘the chief reason’ decisions are made personally by a minister, which it said ‘troubles the working group’.⁶²

3.73 A number of witnesses argued that the AAT should be able to review all decisions, including those made by the ministers.⁶³

3.74 The Australian Human Rights Commission proposed that ‘a tribunal should be able to correct an error irrespective of whether it’s made by a junior public servant or a minister of the Crown’.⁶⁴

3.75 The NSW Council for Civil Liberties argued that ministers:

...are prone to making wrong decisions, especially where public opinion has been aroused. They are subject to pressures. They can be ill-informed. They can be overly sure of their own wisdom, or that of their advisors. And of course, Ministers can act corruptly.⁶⁵

⁵⁹ Ms Peta Dunn, First Assistant Secretary, Immigration Integrity and Community Protection Division, Department of Home Affairs, *Transcript*, 27 June 2018, p. 2.

⁶⁰ Department of Home Affairs, *Supplementary Submission 29.1*, p. 16.

⁶¹ Department of Home Affairs, *Supplementary Submission 29.1*, p. 16.

⁶² Ms Hannah Dickinson, Chair, Visa Cancellations Working Group, *Transcript*, 24 July 2018, p. 19.

⁶³ See for example: Dr Louise Boon-Kuo, Private capacity, *Transcript*, 17 July 2018, p. 20.

⁶⁴ Mr Edward Santow, Human Rights Commissioner, Australian Human Rights Commission, *Transcript*, 17 July 2018, p. 1.

⁶⁵ NSW Council for Civil Liberties, *Submission 9*, p. 6.

3.76 The Human Rights Commission stated that other common law countries with merits review do not exclude ‘particular classes of decision-maker’, making Australia’s system unique among like countries.⁶⁶

3.77 Many submitters also opposed the Minister’s right to overturn AAT decisions, arguing that it constitutes a ‘duplication’:

...after a primary decision has been made by a delegate of the Minister and it is reviewed by the AAT, the Minister is able to set aside decisions of the AAT if certain conditions are met. This represents a duplication of executive decision-making — first by a delegate and then by the Minister.⁶⁷

3.78 The Attorney-General’s Department reported that the Minister has set aside the decision of the AAT ‘60 times since 2009’.⁶⁸

3.79 The Federation of Ethnic Communities’ Council of Australia was concerned that ministerial intervention should be reserved for ‘high threshold’ cases, saying:

Cancelling a visa on the basis of character assessments is a very subjective judgement, one which we understand at times needs to be there, but our recommendation is really that ministerial discretion also offer the public and the individual high levels of transparency.⁶⁹

3.80 The Human Rights Commission stated that is not aware of any other area of government decision-making in the AAT’s jurisdiction where a minister has the power to overturn the AAT’s decisions, saying: ‘This is a very unusual provision, where the minister is able to step in and overturn a decision by an independent merits review tribunal.’⁷⁰

3.81 Mr Jason Donnelly (private capacity) confirmed that, as a matter of contrast, in citizenship cases the AAT is able to review decisions made personally by the ministers.⁷¹

⁶⁶ Mr Edward Santow, Human Rights Commissioner, Australian Human Rights Commission, *Transcript*, 17 July 2018, p. 4.

⁶⁷ Australian Human Rights Commission, *Submission 11*, p. 4.

⁶⁸ Mr Cameron Gifford, First Assistant Secretary, Attorney-General’s Department, *Transcript*, 17 October 2018, p. 4.

⁶⁹ Ms Mary Patetsos, Chairperson, Federation of Ethnic Communities’ Council of Australia, *Transcript*, 5 December 2018, p. 1.

⁷⁰ Mr Graeme Edgerton, Deputy General Counsel, Australian Human Rights Commission, *Transcript*, 17 July 2018, p. 8.

⁷¹ Mr Jason Donnelly, Private capacity, *Transcript*, 16 July 2018, p. 27.

- 3.82 Professor Mary Crock suggested that the only other area where a review tribunal's powers are curtailed in this way in the area of national security.⁷²
- 3.83 The Visa Cancellations Working Group argued that the intention of Australia's merits review system was to ensure 'all decisions affecting an individual's interests would be subject to merits review'. As such, it recommended that the Minister:
- ...be exhorted to substantially reduce, or to cease, the making of personal decisions regarding cancellation. ... 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.⁷³
- 3.84 As well as recommending curtailing its use, the Visa Cancellations Working Group proposed 'the tabling of such decisions in parliament, with reasons', arguing this would improve decision-making and increase accountability.⁷⁴
- 3.85 The Human Rights Commission supported this recommendation.⁷⁵

Committee comment

- 3.86 The Committee rejects suggestions that it is inappropriate for ministerial decisions on character cancellations and refusals to be exempt from review in the AAT.
- 3.87 The government is elected to serve the interests of the Australian community and protect it from threats, including those posed by non-citizens who fail the character test.
- 3.88 Deporting dangerous and violent criminals, or preventing them from coming to Australia, is in Australia's national interest. It is right and proper that the Minister retains the ultimate power to decide if a person who fails the character test can or cannot reside in, or travel to, Australia.

⁷² Professor Mary Crock, Private capacity, *Transcript*, 17 July 2018, p. 17.

⁷³ Visa Cancellations Working Group, *Submission 33*, p. 4.

⁷⁴ Ms Hannah Dickinson, Chair, Visa Cancellations Working Group, *Transcript*, 24 July 2018, p. 21.

⁷⁵ Australian Human Rights Commission, *Submission 11*, p. 7.

Violent and sexual crimes

3.89 The Committee heard evidence of concern about the AAT setting aside decisions to deport persons convicted of violent or sexual crimes. The Police Federation of Australia reported having evidence of:

...a lot of people who've been convicted of aggravated armed robberies and all of those sorts of things, where the AAT has seen fit that they should remain here, even though they're not Australian citizens.⁷⁶

3.90 The Police Federation made the claim that the AAT has overturned '200 ... decisions pertaining to violent criminals convicted of the most heinous of crimes'.⁷⁷

3.91 The Police Federation further argued that anyone convicted of a crime of violence should have their status to remain in Australia 'immediately reviewed' and that such people 'forfeit their right to stay here if they commit a serious violent crime or a crime of a sexual nature'.⁷⁸

3.92 They argued that many instances where the AAT has overturned a decision made by a departmental delegate, 'it would be in the national interest to have those people deported from the country'.⁷⁹

3.93 Monash University analysed statistics from the Department of Home Affairs and submitted that visa cancellations under s501 for serious offences such as murder, manslaughter, aggravated assault, armed robbery and sexual offences 'appear to make up less than half of cancellations':

By comparison, the largest categories of visa cancellation by most serious crime type are for common assault (which may be very minor or result in substantive harm that falls short of grievous harm), drug offences (which could include individual possession or other arguably 'victimless' crimes) and other forms of non-violent crime, including driving offences, which may not result in serious harm against individuals.⁸⁰

⁷⁶ Mr Mark Burgess, Chief Executive Officer, Police Federation of Australia, *Transcript*, 15 August 2018, p. 3.

⁷⁷ Police Federation of Australia, *Submission 28*, p. 2.

⁷⁸ Mr Mark Burgess, Chief Executive Officer, Police Federation of Australia, *Transcript*, 15 August 2018, p. 2.

⁷⁹ Mr Mark Burgess, Chief Executive Officer, Police Federation of Australia, *Transcript*, 15 August 2018, p. 2.

⁸⁰ Monash University, *Submission 14*, p. 7

3.94 The Law Council argued that the majority of cases involving serious violent criminal offending go to the ministers at the moment, with very few ending up in the AAT:

It is really very unusual to see very serious criminality before the tribunal, and then what tends to happen is, even if there is serious criminality, the reason it's decided by a delegate rather than the minister is that the department and, to his credit, the minister recognises there's a very significant number of other factors—positive factors—to take into consideration. ... So you need to understand that the number of cases you're looking at is very, very small ...⁸¹

3.95 Some submitters suggested that any non-citizen who commits a violent crime should simply be deported. Ms Maria Aylward wrote:

If you can't obey the law then you don't deserve to be here. The taxpayer should not be paying for non-citizens incarceration. Simply arrest and deport! There is no other solution, without the hard line we are endangering the lives of Australians.⁸²

3.96 Ms Aylward further suggested that such non-citizens should not have access to appeals in the AAT.⁸³

3.97 Victoria Legal Aid disputed the idea that crimes of violence and sexual crimes should lead to automatic deportation, and proposed that the context in which offending occurs 'is highly relevant as to whether they pose a continuing risk'.⁸⁴

3.98 Commenting on context, Mr Michael Chalmers (private capacity) pointed out that not all sexual offences are on an equal footing of seriousness. He said:

In relation to sexual assaults on children these are serious but could include an indecent assault by an 18 year old on a seventeen year victim, say for a female victim having her breasts touched.⁸⁵

3.99 The Law Council opposed the idea of limiting the AAT's jurisdiction, saying:

⁸¹ Mr David Prince, Chair, Migration Law Committee, Law Council of Australia, *Transcript*, 24 July 2018, p. 15.

⁸² Ms Maria Aylward, *Submission 39*, p. [2].

⁸³ Ms Maria Aylward, *Submission 39*, p. [2].

⁸⁴ Ms Hollie Kerwin, Senior Policy and Projects Officer, Civil Justice Program, Victoria Legal Aid, *Transcript*, 24 July 2018, p. 28.

⁸⁵ Mr Michael Chalmers, *Submission 5*, p. 4.

The Law Council firmly believes that the existing review processes contribute to good administration and that the jurisdiction of the tribunal should not be restricted any further than it already has been.⁸⁶

3.100 The Committee notes that any moves to change the AAT's jurisdiction to review decisions made under sections 501 or 116 would require legislative change. The Attorney-General's Department said:

The AAT's jurisdiction, powers and procedures in relation to migration decisions, including visa and citizenship decisions, are set out in the Migration Act and other migration legislative instruments. The Department of Home Affairs has responsibility for the administration of the Migration Act, including policies governing decision-making considerations contained in it.⁸⁷

Weighting of considerations under Ministerial Direction 65

3.101 The Committee explored the idea of revising Ministerial Direction 65 to place more weight on the impact of a person's offending on the victims.

3.102 The Department of Home Affairs observed that the way the Direction is structured – with only two levels (primary and secondary considerations) – provides significant discretion in their application. The Department remarked:

Given the discretionary nature of cancellation revocation decisions, the weight applied to various considerations may differ between the department's decision-makers and the AAT.⁸⁸

3.103 The Attorney-General's Department was asked about the possibility of changing the ministerial directions to stipulate that more weight be placed on victims. Its representative said, 'that's a matter for the government and indeed would be informed by the Department of Home Affairs who is responsible for those guidelines'.⁸⁹

⁸⁶ Mr David Prince, Chair, Migration Law Committee, Law Council of Australia, *Transcript*, 24 July 2018, p. 13.

⁸⁷ Mr Cameron Gifford, First Assistant Secretary, Attorney-General's Department, *Transcript*, 17 October 2018, p. 1.

⁸⁸ Ms Peta Dunn, First Assistant Secretary, Immigration Integrity and Community Protection Division, Department of Home Affairs, *Transcript*, 27 June 2018, p. 1.

⁸⁹ Mr Cameron Gifford, First Assistant Secretary, Attorney-General's Department, *Transcript*, 17 October 2018, p. 3.

- 3.104 Some witnesses disagreed with the idea in principle, as it implicitly suggests connections to Australia, the needs of minor children in Australia, and impacts on the applicant's family should be lower-ranked considerations. The Victorian Multicultural Commission said it is 'appropriate' to consider 'family circumstances and carer responsibilities' more highly in considering whether to permanently remove a person from Australia.⁹⁰
- 3.105 The Visa Cancellations Working Group argued that the protection of the community is already often 'given primacy over all other considerations, in circumstances where that is not morally or logically appropriate'.⁹¹

Committee comment

- 3.106 The primary focus of visa cancellation on character grounds is protecting Australia from serious criminals, particularly those with a history of violence. Australians rightly have an expectation that such persons will be deported.
- 3.107 The AAT must take seriously the requirement that it consider the expectations of the Australian community as a primary consideration in assessing applications for review.
- 3.108 The Committee believes there is an expectation from the community that the AAT will prioritise its safety over the needs of criminals. As such the Committee is recommending changes to the Ministerial Directions which are used by the AAT to inform its decisions regarding character cancellations.
- 3.109 The current ministerial directions appear to put the best interests of minor children on the same level of importance as the expectations of the Australian community and protecting the community from the risk of the applicant reoffending.
- 3.110 The directions also imply that the impacts on victims of a non-citizen's offending are on an equal footing to other secondary considerations, such as: the length of time the offender has been in Australia, the impact on family and friends, and impacts on business interests.
- 3.111 The Committee believes there is an expectation from the community that when non-citizens commit violent crimes they will be deported.

⁹⁰ Ms Elizabeth Blades-Hamilton, Senior Research and Policy Officer, Victorian Multicultural Commission, *Transcript*, 24 July 2018, p. 1.

⁹¹ Visa Cancellations Working Group, *Submission 33*, p. 16.

- 3.112 It is the belief of the Committee that non-citizens who commit crimes such as murder, aggravated assault, rape, sexual offences involving children, and weapons offences must not be allowed to remain in Australia simply because they have children in Australia, or have lived here for many years.
- 3.113 The Committee believes that factors such as length of time in Australia and the needs of minor children should be given less weight in cases where the crimes that trigger cancellation or refusal are serious violent crimes.
- 3.114 As such, the Committee is recommending the Ministerial Directions be revised to create a stronger distinction between serious violent offending and other kinds of criminal offending.
- 3.115 In line with the Migration Amendment (Strengthening the Character Test) Bill 2018, serious violent crimes includes designated offences such as murder, manslaughter, kidnapping, assault, aggravated burglary, sexual assault, sexual offences involving children, breaching an order made by a court or tribunal for the personal protection of another person, and weapons offences.
- 3.116 Further discussion of the Bill is later in this Chapter.

Recommendation 5

- 3.117 The Committee recommends that Ministerial Directions 65 and 63 be revised to create a distinction between serious violent offending, and other types of offending, with serious violent crimes more likely to result in visa cancellation or refusal. In line with the Migration Amendment (Strengthening the Character Test) Bill 2018, serious violent crimes includes designated offences such as murder, manslaughter, kidnapping, assault, aggravated burglary, sexual assault, sexual offences involving children, breaching an order made by a court or tribunal for the personal protection of another person, and weapons offences.**

The revised Ministerial Directions should state that, in cases of serious violent offending:

- **the likelihood of the applicant reoffending is a primary consideration;**
- **the impact of the applicant's crimes on victims is a primary consideration; and**

- **the applicant's strength, nature and duration of ties to Australia is a secondary consideration, and is not to be given more weight than consideration of the impact on victims.**

'Minor' criminality

- 3.118 Some witnesses argued that persons are being detained and deported under sections 501 and 116 for non-violent, and in some cases, relatively minor crimes.⁹²
- 3.119 The Visa Cancellations Working Group submitted an analysis of the Department's published statistics regarding the types of offences involved in visa cancellations. The two highest categories are assault and drug offences, with assault including 'non-aggravated assault, and threats of assault'. Murder is a separate and relative small category.⁹³
- 3.120 The Working Group highlighted the variation in seriousness of offences for which people face deportation – from 'cannabis crop-sitting' to importation of commercial quantities of drugs. It argued that the 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'.⁹⁴
- 3.121 Mr Chalmers gave an example of a high-range drink driving charge leading to visa cancellation. He said:

There's no accident and no-one's hurt. I can tell you that that person will go to a local court and get loss of licence, obviously, and they'll get a good behaviour bond. That's what happens to the two people who are in Villawood Immigration Detention Centre. Why are they in detention?⁹⁵

- 3.122 Further examples of relatively minor offending were provided by the Visa Cancellations Working Group, including this one:

A man with a pending application for Australia's protection, who has five young children in Australia also seeking protection, has his visa automatically

⁹² Visa Cancellations Working Group, *Submission 33*, p. 7; Mr Michael Chalmers, Private capacity, *Transcript*, 17 July 2018, p. 25.

⁹³ Visa Cancellations Working Group, *Submission 33*, p. 7.

⁹⁴ Visa Cancellations Working Group, *Submission 33*, p. 7.

⁹⁵ Mr Michael Chalmers, Private capacity, *Transcript*, 17 July 2018, p. 25.

cancelled under section 501(3A) on the basis of a conviction relating to misrepresenting details of used cars for sale.⁹⁶

- 3.123 In its submission to the Committee's previous inquiry into migrant settlement outcomes, the Police Federation of Australia suggested including suspended sentences in the definition of a 'substantial criminal record', 'may also have some unintended consequences'. Specifically, that this inclusion may see 'less serious offenders ... caught up in the provisions of the Act'.⁹⁷ The Police Federation suggested this should be reviewed.⁹⁸
- 3.124 Oz Kiwi argued that the 2014 change from 'a single 24-month sentence to a 12-month cumulative and retrospective sentencing' means more minor criminality is being picked up by the system. It said:
- Deportation should be reserved for serious offences, for recidivist offenders, for violent offending and for those who pose a danger to others. A number of those who have contacted Oz Kiwi have very minor convictions – for example, marijuana possession, unpaid court fines or traffic offences – and for some it's their first offence that lands them in detention. The accumulation of these offences has sometimes meant courts imposing sentences of 12 months or imposing a suspended sentence of 12 months.⁹⁹
- 3.125 Oz Kiwi provided three cases relating to family violence where non-citizens breached apprehended violence orders, received suspended sentences, and ended up in detention as a result of section 501 cancellations.¹⁰⁰
- 3.126 Oz Kiwi noted that, in one of these cases the consequence was that the non-citizen 'missed the birth of his first child'.¹⁰¹
- 3.127 The New Zealand High Commissioner suggested that if non-citizens 'have in fact improved their circumstance and if the offending is at the minor end of the scale then, again, it seems unfair' to deport them.¹⁰²

⁹⁶ Visa Cancellations Working Group, *Submission 33*, p. 17.

⁹⁷ Police Federation of Australia, 'Inquiry into migrant settlement outcomes', *Submission 115*, p. [2].

⁹⁸ Police Federation of Australia, 'Inquiry into migrant settlement outcomes', *Submission 115*, p. [2].

⁹⁹ Ms Joanne Cox, Deputy Chairperson, Oz Kiwi Association Inc., *Transcript*, 24 July 2018, p. 5.

¹⁰⁰ Ms Joanne Cox, Deputy Chairperson, Oz Kiwi Association Inc., *Transcript*, 24 July 2018, p. 6.

¹⁰¹ Ms Joanne Cox, Deputy Chairperson, Oz Kiwi Association Inc., *Transcript*, 24 July 2018, p. 6.

¹⁰² His Excellency Chris Seed, High Commissioner, New Zealand High Commission, *Transcript*, 12 September 2018, p. 3.

- 3.128 The Visa Cancellations Working Group proposed that suspended sentences and cumulative sentences should not be allowed to trigger ‘automatic failure of the character test’.¹⁰³
- 3.129 However, there were different views on such consequences, with one witnesses taking a more ‘hard line’ approach. Ms Maria Aylward argued:
- ...any crime should be grounds for deportation. I’m sorry. It needs to be as simple as that. We make so many exceptions, and the bureaucratic mess gets greater and greater.¹⁰⁴
- 3.130 Victoria Legal Aid cautioned against the idea of a two-tier system ‘that attempts to rank the seriousness of offending’, submitting:
- Creating a two-tier system based on offence would merely swap the current situation which sees some visa holders subject to mandatory cancellation because they fall one side of an arbitrary line (presently a 12-month sentence), for one where the arbitrary line is the offence for which they are convicted. In our experience, neither measure (sentence duration or offence) is sufficiently nuanced to make for an accurate, efficient or cost-effective method of evaluating risk to the community.¹⁰⁵

Committee comment

- 3.131 The Committee has heard from participants in the inquiry that some people have been ‘caught up’ in the system whose offending was less serious, non-violent and historic.
- 3.132 The Act allows for discretion in whether or not to cancel or refuse a visa, and whether or not to revoke a visa cancelled mandatorily.
- 3.133 The Committee is satisfied that the existing provisions provide ample opportunity for delegates or ministers to apply leniency in cases of non-violent and minor offending. Additionally, cases where the offending is minor or non-violent generally go to the delegate, and therefore are eligible for merits review in the AAT. This is appropriate.

¹⁰³ Ms Hannah Dickinson, Chair, Visa Cancellations Working Group, *Transcript*, 24 July 2018, p. 21.

¹⁰⁴ Ms Maria Kathryn Aylward, Private capacity, *Transcript*, 24 July 2018, p. 33.

¹⁰⁵ Victoria Legal Aid, *Supplementary Submission 19.1*, p. 3.

Victims of crime and the review process

Ensuring victims are heard

3.134 The Committee explored the question of whether the needs of victims of crime are being taken into account sufficiently in the merits review process.

3.135 The Attorney General's Department expressed the view that impacts on victims were already considered in both the original decision and the AAT's review, with impacts on victims considered as a secondary consideration in Ministerial Direction 65:

For migration decisions, the migration guidelines also provide that a secondary consideration is the victim impact of the original conduct. So, from that point of view, the original decision-maker within the department of immigration has regard to the victim's impact. When it's reviewed by the AAT, the AAT must also have regard to victim's impact as provided by the ministerial guidelines. So it's already part of the decision-making that the AAT needs to consider.¹⁰⁶

3.136 The AAT confirmed that it is already able to hear evidence from the victims of an applicant's offending, 'but it is a matter for the parties to decide what evidence and which witnesses they might call for hearings'.¹⁰⁷

3.137 In response to questioning, the AAT submitted that it takes into account information about the impacts on victims and their family members 'when the information is made available', which is generally through sentencing remarks and victim impact statements provided by the Minister's representative in support of the departmental case.¹⁰⁸

3.138 The Police Federation of Australia supported the suggestion that victims could play a greater role in the AAT process, saying:

If the victim felt they were still feeling aggrieved by the crime that was committed against them, why wouldn't you allow them such an opportunity?¹⁰⁹

¹⁰⁶ Mr Cameron Gifford, First Assistant Secretary, Attorney-General's Department, *Transcript*, 17 October 2018, p. 2.

¹⁰⁷ Ms Sian Leathem, Registrar, Administrative Appeals Tribunal, *Transcript*, 16 July 2018, p. 9.

¹⁰⁸ Administrative Appeals Tribunal, *Supplementary Submission 22.2*, p. 3.

¹⁰⁹ Mr Mark Burgess, Chief Executive Officer, Police Federation of Australia, *Transcript*, 15 August 2018, p. 1.

3.139 Also of this view was the Victorian Victims of Crime Commissioner who was concerned about the impact on victims when a person is successful in their appeal and allowed to remain in Australia. He said:

If that decision is then overturned, the victims of that offender will be left largely without hope. The fear that the offender will commit further offences against the community or them in particular may return, with the probability of it never, ever diminishing in their mind.¹¹⁰

3.140 The Commissioner questioned how a tribunal member who does not understand the harm caused to victims of the applicant's offending can make an informed decision about what the applicant is 'capable of', and added:

How can the tribunal know what the actual impact on the victim and/or their community was, is or may continue to be without hearing from the victims?¹¹¹

3.141 The Commissioner claimed that the AAT can seek any evidence it wants to and contended that 'clearly, the victims are, as they usually are, are overlooked'.¹¹²

3.142 Going further, the Commissioner stated that, in his view, AAT has a 'responsibility' to seek this evidence:

It should not, in my view, be left to the minister's delegate or anyone else but should be done, on every single occasion, at the direction of the tribunal.¹¹³

3.143 Considering the practicalities of giving victims a say at the tribunal, the Commissioner recommended victims be given an opportunity to present their point of view either in person, or via a written sworn statement. He said:

I ask that this committee recommends giving the victim of a person who it has been determined should be deported from Australia a legislated right to be heard. I further submit that the appeal hearing should include a victim impact

¹¹⁰ Mr Greg Davies, APM, Victims of Crime Commissioner, Office of the Victims of Crime Commissioner, Victoria, *Transcript*, 24 July 2018, p. 37.

¹¹¹ Mr Greg Davies, APM, Victims of Crime Commissioner, Office of the Victims of Crime Commissioner, Victoria, *Transcript*, 24 July 2018, p. 37.

¹¹² Mr Greg Davies, APM, Victims of Crime Commissioner, Office of the Victims of Crime Commissioner, Victoria, *Transcript*, 24 July 2018, p. 39.

¹¹³ Mr Greg Davies, APM, Victims of Crime Commissioner, Office of the Victims of Crime Commissioner, Victoria, *Transcript*, 24 July 2018, p. 38.

statement of the financial, familial, social, physical and physiological impact of the crime committed by the person.¹¹⁴

- 3.144 The AAT expressed concern with the suggestion that it be compelled to seek additional evidence about the impacts of criminality on victims, saying it would be complex, impossible or highly impractical in cases where offending occurred a long time ago, and difficult to achieve in the short timeframe the AAT has to assess cases.¹¹⁵
- 3.145 The tribunal also stated that resources would likely need to be provided to support any victims who may choose to participate in the review process, as well as their families.¹¹⁶
- 3.146 The Human Rights Commission opposed the idea, saying:
- The impact of the decision on the victim and affected family members is also one of the considerations under direction 65, so it's well within the remit of decision-makers to take that into account.¹¹⁷
- 3.147 It was also concerned that bringing the victims of an applicant's crimes into an administrative review process was inappropriate, because the AAT is not a court and 'administrative tribunals are effectively an arm of the executive'.¹¹⁸
- 3.148 The Refugee Council cautioned against treating the AAT like a court, asserting that visa cancellations should not be used as 'a way of punishing criminals for what they have done'.¹¹⁹
- 3.149 Also expressing this view, the NSW Council for Civil Liberties said that a criminal court proceeding, not the AAT, is the right and proper place for

¹¹⁴ Mr Greg Davies, APM, Victims of Crime Commissioner, Office of the Victims of Crime Commissioner, Victoria, *Transcript*, 24 July 2018, p. 37.

¹¹⁵ Administrative Appeals Tribunal, *Supplementary Submission 22.2*, p. 3.

¹¹⁶ Administrative Appeals Tribunal, *Supplementary Submission 22.2*, p. 3.

¹¹⁷ Ms Lucy Morgan, Specialist Adviser, Immigration, Australian Human Rights Commission, *Transcript*, 17 July 2018, p. 7.

¹¹⁸ Mr Edward Santow, Human Rights Commissioner, Australian Human Rights Commission, *Transcript*, 17 July 2018, p. 3.

¹¹⁹ Dr Joyce Chia, Director of Policy, Refugee Council of Australia, *Transcript*, 23 July 2018, p. 1.

weighing up ‘the balance between the rights of the victim and the rights of the accused’.¹²⁰

3.150 The Law Council of Australia contended it is the responsibility of the Department and its lawyers to determine if they wish to present victim testimony as part of their case in the AAT.¹²¹

3.151 The Visa Cancellations Working Group questioned the ‘usefulness’ of having victims of crime specifically invited to participate in AAT reviews, saying:

...a different victim will have an entirely different perspective about what happened, and what they want to happen, than another victim. One might call for the death penalty; another might be horrified at the thought of a person being removed as a result of that offending.¹²²

3.152 Not all victims may want an offender deported. The Immigration Advice and Rights Centre pointed out that in many cases the victim of an applicant’s crimes was a family member, such as the spouse or children in domestic violence cases. In these cases, deportation of the perpetrator could adversely impact the victims.¹²³

3.153 Dr Louise Boon-Kuo was also concerned that the system of deportation on criminal grounds may mean victims of intimate partner violence hesitate to report it due to the fear that ‘the ultimate outcome might involve permanent separation between family members’.¹²⁴

3.154 Some witnesses were concerned for the mental health and well-being of victims, who may be traumatised again by having to tell their story.¹²⁵

3.155 However, the Victims of Crime Commissioner rebuked this assertion, saying, as long as they were not compelled, ‘many people are strong enough to be able to come forward.’¹²⁶

¹²⁰ Dr Martin Bibby, Convenor, Asylum Seekers Working Party, New South Wales Council for Civil Liberties, *Transcript*, 16 July 2018, p. 21.

¹²¹ Mr David Prince, Chair, Migration Law Committee, Law Council of Australia, *Transcript*, 24 July 2018, p. 14.

¹²² Ms Hannah Dickinson, Chair, Visa Cancellations Working Group, *Transcript*, 24 July 2018, p. 20.

¹²³ Mr Ali Mojtahedi, Principal Solicitor, Immigration Advice and Rights Centre, *Transcript*, 17 July 2018, pp. 9-10.

¹²⁴ Dr Louise Boon-Kuo, Private capacity, *Transcript*, 17 July 2018, p. 20.

¹²⁵ See for instance: Ms Hannah Dickinson, Chair, Visa Cancellations Working Group, *Transcript*, 24 July 2018, p. 20.

- 3.156 The Human Rights Commission and Law Council of Australia both cautioned that bringing victims of crime into the AAT's process risked making it a 'punitive' process, which could be unconstitutional.¹²⁷
- 3.157 Explaining the reasons it had come to this conclusion, the Law Council said:
- The criminal justice system is essentially backwards looking. It's to punish primarily the person for their conduct. The 501 power is not a form of punishment. That would be unconstitutional. 501 is essentially forward-looking. It is to protect the Australian community from future conduct.¹²⁸

Case study: the Aylward family's story

- 3.158 The Committee heard evidence from Ms Maria Aylward and other members of the Aylward family in Melbourne. Ms Aylward's sister, Korinne Aylward, and her partner, Greg Tucker, were murdered on 8 December 2013 by Turkish citizen Mustafa Kunduraci after a dispute about payment for home renovation services he had performed for them. Korinne Aylward and Greg Tucker left behind a number of children, some of whom are now cared for by Ms Aylward's younger sister, Katelyn, and herself.¹²⁹
- 3.159 The family contends that Mr Kunduraci 'played the immigration department and the immigration tribunal', being granted various visas despite being 'known to police for domestic violence'.¹³⁰
- 3.160 Ms Aylward told the Committee that, in her view:
- Any person that breaks the law in Australia should be deported if they are not an Australian citizen. For too long, we have looked at the circumstances of the offender and not those of the victim.¹³¹
- 3.161 Ms Aylward expressed strong support for the idea that victims should be invited to appear and provide a victim impact statement before the AAT in review cases. She added:

¹²⁶ Mr Greg Davies, APM, Victims of Crime Commissioner, Office of the Victims of Crime Commissioner, Victoria, *Transcript*, 24 July 2018, p. 38.

¹²⁷ Mr David Prince, Chair, Migration Law Committee, Law Council of Australia, *Transcript*, 24 July 2018, p. 14; Australian Human Rights Commission, *Supplementary Submission 11.1*, p. 2.

¹²⁸ Mr David Prince, Chair, Migration Law Committee, Law Council of Australia, *Transcript*, 24 July 2018, p. 14.

¹²⁹ Ms Maria Kathryn Aylward, Private capacity, *Transcript*, 24 July 2018, p. 31.

¹³⁰ Ms Maria Kathryn Aylward, Private capacity, *Transcript*, 24 July 2018, p. 31.

¹³¹ Ms Maria Kathryn Aylward, Private capacity, *Transcript*, 24 July 2018, p. 31.

What I see not just from a victim's point of view but from a community perception—I talk to a lot of people and I'm involved in a lot of advocacy groups—is that the AAT doesn't see the faces of the victims of decisions that are made.¹³²

- 3.162 The AAT published comments in relation to the roles played by review tribunals in reviewing Mr Kunduraci's visa applications. Mustafa Kunduraci is a Turkish immigrant who first came to Australia in 1996 and subsequently settled in Australia. Over the years from 1996 to 2013, Mustafa Kunduraci applied for various visas, most of which were granted by the Department of Immigration.¹³³
- 3.163 On two occasions, visas were refused and Mr Kunduraci appealed to the AAT's forerunners – the Immigration Review Tribunal (1996) and the Migration Review Tribunal (2007) – and these decisions were overturned.¹³⁴
- 3.164 The AAT contends that neither of the cases about Mr Kunduraci heard by its forerunners had 'criminal conduct or character [as] a basis upon which the visa was refused by the then Department of Immigration'.¹³⁵
- 3.165 According to the published decisions of the two tribunals which overturned the visa refusals:
- 1 The 1996 visitor visa was refused by the Department because it was concerned Mr Kunduraci intended to remain in Australia. The question of 'credibility in terms of character and conduct' was asked and there were no issues noted. The tribunal found 'there is 'very little likelihood' that the Principal will remain in Australia after the expiry of his visa', and set aside the Department's decision, thus allowing Mr Kunduraci to travel to Australia.¹³⁶

¹³² Ms Maria Kathryn Aylward, Private capacity, *Transcript*, 24 July 2018, p. 33.

¹³³ Administrative Appeals Tribunal, 'Recent media coverage concerning the AAT', 1 June 2018, viewed on 10 January 2019, <www.aat.gov.au/resources/news/recent-media-coverage-concerning-the-aat>.

¹³⁴ Administrative Appeals Tribunal, 'Recent media coverage concerning the AAT', 1 June 2018, viewed on 10 January 2019, <www.aat.gov.au/resources/news/recent-media-coverage-concerning-the-aat>.

¹³⁵ Administrative Appeals Tribunal, 'Recent media coverage concerning the AAT', 1 June 2018, viewed on 10 January 2019, <www.aat.gov.au/resources/news/recent-media-coverage-concerning-the-aat>.

¹³⁶ Immigration Review Tribunal of Australia, 'Statement of Decision and Reasons for Decision: Applicant: Kadriye Kunduraci Principal: Mustafa Kunduraci', 26 June 1996, viewed on 10

2 The 2007 partner visa for Mr Kunduraci was refused by the Department of Immigration because it believed that the applicant did not meet the regulations; specifically that the visa applicant and his sponsor had not been living together for over a year, their relationship had ‘broken down’, and there was no proof of cohabitation. The tribunal agreed that the relationship had ended but found that, under the regulations, the applicant should be granted a visa because of the child in Australia that had resulted from the marriage. The tribunal remitted the decision to the Department for reconsideration, and Mr Kunduraci was granted a visa to remain in Australia.¹³⁷

3.166 Ms Aylward believes the tribunals deciding Mr Kunduraci’s cases should have used investigative powers to look more deeply into his background, where Ms Aylward says there was evidence of previous bad character. She said the AAT told her that, as an administrative appeals tribunal, it does not seek evidence in this way because it is ‘not an investigative tribunal’.¹³⁸

3.167 Ms Aylward questioned the ‘point’ of the AAT if it does not seek additional evidence on top of what the applicant and the Department provide, saying:

To me, and as a community person, there is no point, because all they’re doing is going, ‘Well, I’m having an opinion about this really, and I decide that, ‘Well, they had a tough upbringing. We’ll give them a go.’¹³⁹

3.168 According to media reports, three years after being granted the visa to remain in Australia, Mr Kunduraci was charged and convicted for assaulting and threatening to kill his former partner. His sentence was six months in prison, suspended for 12 months. This sentence was not sufficient to trigger the cancellation of his visa.¹⁴⁰ Three years later, he killed Korinne Aylward and Greg Tucker.

January 2019, <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/IRTA/1996/7315.html?context=1;query=Mustafa%20Kunduraci;mask_path=>>.

¹³⁷ Migration Review Tribunal of Australia, *Decision Record: 060276631 [2007] MRTA 4*, 10 January 2007, viewed on 10 January 2019, <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/MRTA/2007/4.html?context=1;query=Mustafa%20Kunduraci;mask_path=>>.

¹³⁸ Ms Maria Kathryn Aylward, Private capacity, *Transcript*, 24 July 2018, p. 35.

¹³⁹ Ms Maria Kathryn Aylward, Private capacity, *Transcript*, 24 July 2018, p. 35.

¹⁴⁰ Max Margan and Belinda Cleary, ‘The kids would still have parents: How a Turkish immigrant was free to murder a couple in their suburban home after authorities failed to deport him twice’, 30 April 2018, viewed on 10 January 2019, <<https://www.dailymail.co.uk/news/article->

Committee comment

- 3.169 The Committee heard a range of evidence on this issue. Some witnesses thought that the current process of evidence gathering for merits review in the AAT is insufficient to ensure the voices of victims are heard. Others believed that the views of victims are more relevant in the criminal justice process.
- 3.170 The Committee understands that the AAT generally relies on the Department of Home Affairs to provide evidence including victim impact statements and/or sentencing remarks, and that it does not generally seek evidence from victims directly.
- 3.171 The Committee is concerned that this process means there is no guarantee that victims of the applicant's offending will have their views represented in the appeals process, and no opportunity for them to state their case against the applicant remaining in Australia.
- 3.172 Victims of crime can be directly affected by a decision to allow a non-citizen to remain in Australia. They may live in fear that the person will commit further crimes against them or their loved ones. They may be traumatised when they find out that a person they believed was going to be deported has been allowed to stay. Victims may be left feeling unsafe and unprotected.
- 3.173 Decision-makers in both the Department and the AAT need to take seriously their responsibility to consider the impacts of their decisions on victims of crime. The best way to ensure victims are considered in the process is to give them a voice.
- 3.174 Some witnesses argued that it was not appropriate to invite victims into the appeals process, or that having victims participate may further traumatise them. The Committee acknowledges these concerns, but believes that victims should be given the choice.
- 3.175 Some victims may not want to make a submission but others will. In cases where the victims of crime are family members of the offender, these victims may not want the person deported, and their statement could reflect that.
- 3.176 The Committee believes that, where the crime that triggers visa cancellation has a clearly identifiable victim or victims, these victims should have the

opportunity to make a statement to the AAT, if they wish to do so. This could be in person, or in writing.

- 3.177 The Committee is recommending that the government impose upon the AAT an obligation to inform known victims of an applicant's offending that the applicant has lodged an appeal. These victims would be invited to make either a written or verbal statement to the AAT in relation to the impacts upon them if the applicant should remain in Australia.

Recommendation 6

- 3.178 **The Committee recommends that the Australian Government regulate to guarantee that victims of crime, or their families, are provided with an opportunity to make a written or oral statement as part of the appeals process in the Administrative Appeals Tribunal, and:**

- **where victims/families provide a statement, this evidence should be a primary consideration, especially if the review applicant poses a continuing threat to victims, their families or the Australian community; and**
- **where victims/families choose not to provide a statement, the impact on victims should be a secondary consideration.**

Public confidence in the review process

- 3.179 The Committee received evidence suggesting the AAT does not enjoy the confidence of sectors of the media and the public, due to decisions it has made to overturn deportations. For instance, Mr Brian Woods submitted that 'public commentators are angered and shocked' about many AAT decisions.¹⁴¹

- 3.180 Mr Woods pointed out that comments from the public on articles regarding overturned deportations were generally opposed to the AAT's decision.¹⁴² He suggested the public see the AAT as operating on 'its own criteria of inexperienced human rights interpretations', rather than deciding cases based on the law.¹⁴³

¹⁴¹ Mr Brian Woods, *Submission 1*, p. [1].

¹⁴² Mr Brian Woods, *Submission 1*, p. [3].

¹⁴³ Mr Brian Woods, *Supplementary Submission 1.1*, p. [1].

- 3.181 Evidence provided by the Attorney-General's Department indicated that it is a misconception that the AAT overturns most visa cancellations decisions. In 2016-17 the AAT affirmed 52 per cent of the Department's decisions regarding visa cancellations and refusals and set aside (overturned) 19 per cent. The rest were withdrawn. This set aside rate of 19 per cent is less than the set aside rate for all decisions reviewed in the AAT, which was 26 per cent.¹⁴⁴
- 3.182 The Australian Human Rights Commission commented on media coverage of AAT decisions, saying it tended to focus on the offending, without considering any of the reasons for the decision, which are set out in the AAT's published decision records. The Commission added:
- As decisions are made on a case-by-case basis, in assessing whether any particular decision was appropriate, the full reasons for that decision setting out all of the relevant circumstances need to be taken into account.¹⁴⁵
- 3.183 Professor Narelle Bedford argued that the AAT has been 'unfairly maligned' by the media and some public commentators,¹⁴⁶ partly because some of the criticisms directed towards the AAT were actually for actions taken 'earlier in the decision-making continuum', such as by departmental delegates.¹⁴⁷
- 3.184 The New Zealand High Commissioner expressed confidence in the AAT's decision-making, saying: 'Its deliberations help to ensure that visa cancellation decisions reflect the expectations of the Australian community.'¹⁴⁸
- 3.185 The AAT submitted that it is obligated by law to carry out its functions in a way that 'promotes public trust and confidence in the decision-making of the Tribunal'.¹⁴⁹ However, it also recognised 'a need to communicate more effectively and to help the public understand'.¹⁵⁰ The Tribunal has taken steps to improve its public messaging, including by introducing a monthly

¹⁴⁴ Attorney-General's Department, *Submission 34*, p. 10.

¹⁴⁵ Australian Human Rights Commission, *Submission 11*, pp. 11-12.

¹⁴⁶ Assistant Professor Narelle Bedford, *Submission 38*, p. 5.

¹⁴⁷ Assistant Professor Narelle Bedford, *Submission 38*, p. 4.

¹⁴⁸ New Zealand High Commissioner, *Submission 40*, p. 3.

¹⁴⁹ Administrative Appeals Tribunal, *Submission 22*, p. 3.

¹⁵⁰ Ms Sian Leathem, Registrar, Administrative Appeals Tribunal, *Transcript*, 16 July 2018, p. 8.

review bulletin ‘which tries to explain in plain English the decisions that have been made by the tribunal’.¹⁵¹

- 3.186 While the AAT has taken steps to better explain what it does to the public and the media, it clarified that it ‘wouldn’t seek to enter the policy debate about the actual law’.¹⁵²
- 3.187 The Law Council stated that it believes the AAT carries out its reviews in a way ‘which promotes public trust and confidence in the decision-making of the tribunal body itself’.¹⁵³
- 3.188 Concerned with ‘political comments directed at the work of the AAT’, the Law Council argued that the AAT’s disagreement with certain decisions made by the Department was a natural part of a well-functioning system.¹⁵⁴
- 3.189 The Visa Cancellations Working Group argued that community views may not always align against the AAT in overturned decisions. For instance, it submitted that the Australian community generally do not consider it ‘appropriate to deport individuals raised in Australia since early childhood’.¹⁵⁵
- 3.190 The Police Federation was asked if it supported the AAT continuing to ‘play a major role’ in providing merits review. Mr Burgess said:
- I think the AAT has a role. I don’t think there’s any argument about the AAT having a role. I think it’s about the AAT playing a role that the wider community would expect of them.¹⁵⁶
- 3.191 In the opinion of the Police Federation, the community would have more confidence in the AAT, if the Tribunal ensured ‘all the relevant facts are available’ when it makes its decisions.¹⁵⁷

¹⁵¹ Ms Sian Leathem, Registrar, Administrative Appeals Tribunal, *Transcript*, 16 July 2018, p. 8.

¹⁵² Ms Sian Leathem, Registrar, Administrative Appeals Tribunal, *Transcript*, 16 July 2018, p. 8.

¹⁵³ Mr David Prince, Chair, Migration Law Committee, Law Council of Australia, *Transcript*, 24 July 2018, p. 13.

¹⁵⁴ Law Council of Australia, *Submission 30*, p. 16.

¹⁵⁵ Visa Cancellations Working Group, *Submission 33*, p. 22.

¹⁵⁶ Mr Mark Burgess, Chief Executive Officer, Police Federation of Australia, *Transcript*, 15 August 2018, p. 5.

¹⁵⁷ Police Federation of Australia, *Submission 28*, p. 3.

3.192 An alternative view was put by the Springvale Monash Legal Service, who pointed out that Australia is made up of many diverse ethnic communities, some of which are being heavily effected by visa cancellations:

When we're talking about, say, South Sudanese people having their visas cancelled, where is the community expectation of the South Sudanese diaspora being met in terms of procedural fairness and things like that? As well as the wife and children of people who are having their visas cancelled, they are part of that community. They are part of the community expectations that we should be taking into account.¹⁵⁸

3.193 Mr Aiden Hammerschmidt (private capacity) proposed that concerns around the AAT's decisions could be ameliorated by introducing a two-tiered review facility within the AAT, where straightforward cases could be reviewed at a lower level, and 'more complex or publicly significant cases' could be referred to an appellate review panel.¹⁵⁹

Committee comment

3.194 The Committee believes that AAT members conduct their reviews with close consideration of the legislation, regulations and ministerial directions.

3.195 Decisions published by the AAT are detailed, and suggest that due care and attention is being applied to weighing up the considerations to make the 'right and preferable' decision in each case.

3.196 However, the Committee is of the view that the AAT has made some decisions that do not align with the community's expectations that serious violent criminals will be deported from Australia.

3.197 The Committee believes that clearer ministerial directions, as recommended in this report, would go some way towards ensuring that the AAT does not prevent the deportation of serious violent criminals.

3.198 The Committee also notes that existing regulations allow review applicants or the Minister to lodge additional information for the AAT to consider including 'affidavits or witness statements, expert reports or letters of support'.¹⁶⁰

¹⁵⁸ Ashleigh Newnham, Manager, Strategy and Community Development, Springvale Monash Legal Service, *Transcript*, 24 July 2018, p. 30.

¹⁵⁹ Mr Aidan Hammerschmidt, Private capacity, *Transcript*, 17 July 2018, p. 15. See: Mr Aidan Hammerschmidt, *Supplementary Submission 17.1*, for full details of this proposal.

¹⁶⁰ Administrative Appeals Tribunal, *Submission 22*, p. 10.

- 3.199 The Committee heard that information regarding an applicant's conduct in prison, reports from parole boards, etc., are generally collected and provided as part of the Department's case at the AAT. However, relying on the Department to source and provide all relevant information on the applicant may pose a risk in some circumstances.
- 3.200 The AAT has an obligation to ensure it has the necessary information to fully assess an applicant's character and past conduct. This could include information from state authorities that have dealt with the person.
- 3.201 The Committee believes there may be merit in the idea that the AAT should inform relevant authorities when applications for merits review are lodged. 'Relevant authorities' would include corrections facilities, parole boards, state police departments, state-based courts and others, depending on the nature of the applicant's offending. These authorities would then have the option to submit information to the AAT.
- 3.202 Ensuring the AAT had this information may help build public confidence in the AAT's review processes and decisions. The Committee notes, however, that this idea may be difficult to implement, given the practical limitations imposed by the strict 84 day timeframe for AAT reviews.
- 3.203 While not making a recommendation, the Committee encourages the Department of Home Affairs to investigate possible processes that would ensure relevant authorities are informed of applications for review of visa cancellations on character grounds.

Strengthening the visa cancellations regime

- 3.204 On 25 October 2018, the Australian Government introduced the Migration Amendment (Strengthening the Character Test) Bill 2018 (the Bill) into the House of Representatives.¹⁶¹
- 3.205 If passed, the Bill 'introduces measures that enhance the Government's ability to protect the Australian community'.¹⁶² The explanatory memorandum to the Bill, which provides details on the proposed

¹⁶¹ Parliament of Australia, Migration Amendment (Strengthening the Character Test) Bill 2018.

¹⁶² Migration Amendment (Strengthening the Character Test) Bill 2018, Explanatory Memorandum, p. 9.

amendments, states that the Bill provides additional grounds to consider visa cancellation or refusal:

The Bill strengthens the character test in section 501 of the *Migration Act 1958* by providing a new specific and objective ground to consider visa cancellation or refusal where a non-citizen has been convicted of offences involving violence against a person (including murder, assault and kidnapping), weapons, breaching of an apprehended violence order (or similar) or non-consensual sexual acts.¹⁶³

3.206 The Bill specifically allows for discretionary cancellation and deportation of non-citizens who have been convicted of ‘certain designated crimes’, regardless of any sentence imposed, and even where no custodial sentence is imposed.¹⁶⁴

3.207 Designated offences are those which:

...involve violence against a person, including murder, manslaughter, kidnapping, assault, aggravated burglary and the threat of violence, nonconsensual conduct of a sexual nature, using or possessing a weapon or breaching an order made by a court or tribunal for the personal protection of another person.¹⁶⁵

3.208 The Bill has been considered by three Parliamentary Committees: Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee); Senate Legal and Constitutional Affairs Legislation Committee (SLCALC); and Parliamentary Joint Committee on Human Rights (JCHR).

3.209 The Scrutiny Committee raised a number of concerns about the Bill and found:

...that section 501 of the Act already provides the minister with considerable and broad discretionary power to refuse or cancel a visa, and does not contain procedural fairness obligations or adequate merits review.¹⁶⁶

¹⁶³ Migration Amendment (Strengthening the Character Test) Bill 2018, Explanatory Memorandum, p. 9.

¹⁶⁴ Minister for Immigration, Citizenship and Multicultural Affairs, Hon David Coleman MP, *Migration Amendment (Strengthening the Character Test) Bill 2018 Second Reading Speech*, 25 October 2018.

¹⁶⁵ Minister for Immigration, Citizenship and Multicultural Affairs, Hon David Coleman MP, *Migration Amendment (Strengthening the Character Test) Bill 2018 Second Reading Speech*, 25 October 2018.

¹⁶⁶ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2018*, 14 November 2018, p. 8.

- 3.210 The Scrutiny Committee recommended that the Senate as a whole debate the appropriateness of amending the character test.¹⁶⁷
- 3.211 The SLCALC recommended that the Bill be passed stating that:
- The committee is satisfied that the bill strikes the appropriate balance between the protection of the Australian community and the rights of non-citizens who have committed criminal acts, and therefore recommends the passage of the bill.¹⁶⁸
- 3.212 The JCHR expressed concern on a number of human rights issues in relation to the Bill and sought advice from the Minister for Home Affairs.¹⁶⁹
- 3.213 To date the Bill has not passed the House of Representatives.

Committee comment

- 3.214 The Migration Amendment (Strengthening the Character Test) Bill 2018 seeks to introduce additional criteria for cancelling or refusing visas based on violent offences, regardless of any sentence imposed.
- 3.215 This important legislation will ensure violent offenders can be removed from Australia at the earliest possible opportunity.
- 3.216 The Committee believes this legislation would address a number of community concerns around non-citizens who commit acts of violence in Australia. As such, the Committee urges the Australian government to pass and enact this legislation without delay.

Mr Jason Wood MP

Chair

¹⁶⁷ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2018*, 14 November 2018, p. 12.

¹⁶⁸ Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Strengthening the Character Test) Bill 2018 [provisions]*, December 2018, p. 29.

¹⁶⁹ Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Report 12 of 2018*, p. 7.

A. List of submissions

- 1 Brian Woods
 - 1.1 Supplementary to submission 1
- 2 Ms Dawn Joyce
- 3 Mrs Shirin Whittaker
- 4 Mr Jason Donnelly
- 5 Mr Michael Chalmers
- 6 Refugee Council of Australia
- 7 Ms Er-kai Wang
- 8 Oz Kiwi
- 9 NSW Council for Civil Liberties
- 10 Mr Philip Duncan
- 11 Australian Human Rights Commission
 - 11.1 Supplementary to submission 11
- 12 Multicultural Youth Advocacy Network Australia
 - 12.1 Supplementary to submission 12
- 13 Asylum Seeker Resource Centre
- 14 Monash University
- 15 Immigration Advice & Rights Centre
- 16 Ms Bianca Brunozzi
- 17 Mr Aidan Hammerschmid

- 17.1 Supplementary to submission 17
- 18 Pacific Islands Council of Qld Inc.
- 19 Victoria Legal Aid
- 19.1 Supplementary to submission 19
- 20 Federation of Ethnic Communities' Councils of Australia
- 21 Dr Elyse Methven and Dr Anthea Vogl
- 22 Administrative Appeals Tribunal
- 22.1 Supplementary to submission 22
 - 22.2 Supplementary to submission 22
- 23 Australian National Audit Office
- 24 SCALES Community Legal Centre
- 25 Kingsford Legal Centre
- 26 Legal Aid NSW
- 27 Springvale Monash Legal Service
- 28 Police Federation of Australia
- 29 Department of Home Affairs
- 29.1 Supplementary to submission 29
 - 29.2 Supplementary to submission 29
 - 29.3 Supplementary to submission 29
 - 29.4 Supplementary to submission 29
- 30 Law Council of Australia
- 31 *Confidential*
- 32 Victorian Multicultural Commission
- 33 Visa Cancellations Working Group
- 34 Attorney-General's Department
- 35 Refugee Legal
- 36 Liberty Victoria
- 37 Dr Louise Boon-Kuo
- 38 Assistant Professor Narelle Bedford
- 39 Ms Maria Aylward

- 40 New Zealand High Commission
- 41 Department of Education and Training

B. List of public hearings and witnesses

Wednesday, 27 June 2018 – Canberra, ACT

Department of Home Affairs

Ms Peta Dunn, First Assistant Secretary, Immigration Integrity and Community Protection Division

Dr Richard Johnson, First Assistant Secretary, Immigration, Citizenship and Multiculturalism Policy Division

Ms Justine Jones, Assistant Secretary, Character Assessment and Cancellations Branch

Mr Brett Schuppan, Acting Assistant Secretary, Community Cohesion and Multicultural Policy Branch

Monday, 16 July 2018 – Sydney, NSW

Administrative Appeals Tribunal

Ms Sian Leathem, Registrar

Mr Chris Matthies, Executive Director, Strategy and Policy

Legal Aid NSW

Mr Alexander Grosart, Senior Solicitor, Civil Law Division, Government Law Group

Kingsford Legal Centre

Ms Dianne Anagnos, Solicitor

Ms Theresa Deegan, Solicitor

NSW Council for Civil Liberties

Dr Martin Bibby, Convenor, Asylum Seekers Working Party

Mr Stephen Blanks, President

Private capacity

Dr Elyse Methven and Dr Anthea Vogl

Mr Jason Donnelly

Tuesday, 17 July 2018 – Sydney, NSW*Australian Human Rights Commission*

Emeritus Professor Rosalind Croucher, President

Mr Graeme Edgerton, Deputy General Counsel

Ms Lucy Morgan, Specialist Adviser, Immigration

Mr Edward Stantow, Human Rights Commissioner

Immigration Advice & Rights Centre

Mr Ali Mojtahedi, Principal Solicitor

Private capacity

Professor Mary Crock, Ms Bianca Brunozzi and Mr Aidan Hammerschmid

Dr Louise Boon-Kuo

Mr Michael Chalmers

Monday, 23 July 2018 – Melbourne, VIC*Refugee Council of Australia*

Dr Joyce Chia, Director of Policy

Multicultural Youth Advocacy Network Australia

Mrs Derya Koksall, Policy and Advocacy Officer

Ms Nadine Liddy, National Coordinator

Asylum Seeker Resource Centre

Dr Carolyn Graydon, Principal Solicitor and Manager of the Human Rights Law Program

Tuesday, 24 July 2018 – Melbourne, VIC*Victorian Multicultural Commission*

Ms Elizabeth Blades-Hamilton, Senior Research and Policy Officer

Mr Tony O’Hea, Manager, Research and Policy

Oz Kiwi

Ms Joanne Cox, Deputy Chairperson

Law Council of Australia

Ms Carina Ford, Deputy Chair, Migration Law Committee

Mr Nathan MacDonald, Senior Policy Lawyer

Mr David Prince, Chair, Migration Law Committee

Visa Cancellations Working Group

Ms Hannah Dickinson, Chair, Visa Cancellations Working Group

Mr Dushan Nikolic, Member, Visa Cancellations Working Group

Refugee Legal

Mr Gregory Hanson, Senior *Lawyer and* Policy Officer

Mr David Manne, Executive Director and Principal Solicitor

Victoria Legal Aid

Ms Sarah Fisher, Program Manager, Migration, Civil Justice Program

Ms Hollie Kerwin, Senior Policy and Projects Officer, Civil Justice Program

Springvale Monash Legal Service

Ms Ashleigh Newnham, Manager, Strategy and Community Development

Private capacity

Mr Gavin Aylward, Ms Katelyn Aylward, and Ms Maria Kathryn Aylward
Office of the Victims of Crime Commissioner, Victoria

Mr Greg Davies, APM, Victims of Crime Commissioner

Wednesday, 15 August 2018 – Canberra, ACT*Police Federation of Australia*

Mr Mark Burgess, Chief Executive Officer

Wednesday, 12 September 2018 – Canberra, ACT*New Zealand High Commission*

His Excellency Mr Chris Seed, High Commissioner

Mr Andrew White, First Secretary

Wednesday, 17 October 2018 – Canberra, ACT*Attorney-General's Department*

Mr Imran Church, Principal Legal Officer

Mr Cameron Gifford, First Assistant Secretary

Wednesday, 5 December 2018 – Canberra, ACT*Federation of Ethnic Communities' Councils of Australia*

Mr Mohammad Al-Khafaji, Acting Chief Executive Officer

Ms Mary Patetsos, Chairperson

Dissenting report

Labor Members

- 1.1 Australia is a nation built on migration with over 7.5 million migrants coming to call Australia home since 1945. These rich and diverse diaspora contribute to the vibrant, productive multicultural society we enjoy today. We are also a welcoming nation. People from all around the globe come to Australia to study, to work, to explore our beautiful country, to visit family and friends and, in some cases, to seek Australia's protection.
- 1.2 While the vast majority are law abiding, some migrants and visitors to Australia may commit crimes. When these crimes are of a serious nature, it is appropriate that the person's right to remain in Australia be reconsidered.
- 1.3 The Labor Members of the Joint Standing Committee on Migration, Maria Vamvakinou MP, the Hon Shayne Neumann MP, Steve Georganas MP and Senator the Hon Kristina Keneally take seriously the government's responsibility to promote the safety and security of all Australians.
- 1.4 In line with this, Labor Members strongly support the character provisions contained in Sections 501 and 116 of the *Migration Act 1958* (Cth). These laws provide a process for removing non-citizens whose actions and character pose a threat to safety and security.
- 1.5 However, these provisions must be applied responsibly. The decision to cancel a person's visa on character grounds may alter their life profoundly, as well as the lives of their loved ones, and is generally permanent.

- 1.6 These decisions should be made with due consideration to the circumstances of the offender, to the rule of law and Australia's human rights obligations, and be subject to appropriate checks and balances.
- 1.7 Labor Members believe that the availability of merits review in the Administrative Appeals Tribunal makes the visa cancellations regime fairer and more robust. Merits review is fast and efficient, and reduces the burden on the courts through decreasing the need for judicial review. We are encouraged that this report made similar findings and did not recommend curtailing the AAT's role in reviewing character cancellations.
- 1.8 Labor Members support Recommendations 1, 2 and 4.

Impact of visa cancellations on New Zealand citizens

- 1.9 Labor Members agree that the historic special migration status of New Zealanders in Australia has left this cohort vulnerable to visa cancellation and resulted in New Zealanders being over-represented in cancellation statistics.
- 1.10 Evidence provided by the New Zealand High Commissioner, Oz Kiwi and others was compelling. Over half of all visa cancellation cases are New Zealanders and New Zealanders make up 13 per cent of those in immigration detention.¹
- 1.11 Labor Members support the intent of Recommendation 3, which seeks to ensure that special migration arrangements that have existed between Australia and New Zealand can be considered in the visa cancellations process. However, we believe the issue requires a more thorough examination. As such, Labor Members dissent from Recommendation 3.

Crimes of violence

- 1.12 Recommendation 5 proposes revising Ministerial Directions 65 and 63 to create a 'two-tiered' approach to decision-making, based on the nature of the crime/s committed. Specifically, the Committee is proposing to distinguish between violent and non-violent crimes, with the aim of ensuring violent offenders are more likely to be deported.
- 1.13 The definition of violent crimes that the Committee proposes is drawn from the Migration Amendment (Strengthening the Character Test) Bill 2018, introduced to Parliament in October 2018. Labor does not support this Bill.

¹ Ms Joanne Cox, Deputy Chairperson, Oz Kiwi Association Inc., *Transcript*, 24 July 2018, p. 5.

- 1.14 The Bill seeks to broaden the grounds for cancellation, capturing a set of ‘designated offences’, including: making threats of violence, breaching an apprehended violence order or possessing a weapon. Persons convicted of any of these designated offences would be deemed to have failed the character test, regardless of the sentence imposed.²
- 1.15 Labor Members share the concerns raised by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee) and the Parliamentary Joint Committee on Human Rights (JCHR) about this Bill.
- 1.16 The Scrutiny Committee was concerned that the legislation may ‘unduly trespass on personal rights and liberties’ by setting the bar too low.³ It pointed out that under the proposed legislation a permanent resident that had lived in Australia for 20 years could face deportation for carrying pepper spray.⁴
- 1.17 The JCHR found that the Bill was likely to be incompatible with a number of Australia’s human rights obligations, including: the right to non-refoulement, the right to liberty, the rights of the family, and the rights of the child. The JCHR requested a response to these concerns from the relevant ministers.⁵
- 1.18 Labor Members agree with the Scrutiny Committee’s assessment that existing legislation already provides ‘broad discretionary powers’, and gives significant scope for removing non-citizens who pose a threat.⁶
- 1.19 In addition, we question the appropriateness of dictating to decision-makers that the category of crimes committed should trump other factors that weigh into the decision.
- 1.20 Assessing whether or not to cancel a person’s visa is a complicated task, and decision-makers need to be able to weigh up competing factors, including: the nature and timeline of offending, the likelihood of reoffending, how long the person has been in Australia, whether the person is a refugee or asylum seeker, and potential impacts on family members and dependent children remaining in Australia.

² Parliament of Australia, Migration Amendment (Strengthening the Character Test) Bill 2018.

³ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2018*, p. 9.

⁴ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2018*, p. 10.

⁵ Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Report 12 of 2018*, p. 7.

⁶ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2018*, p. 11.

- 1.21 Labor Members dissent from Recommendation 5. However, evidence presented during the inquiry has convinced Labor Members of the need for an independent review into the operation of the character provisions under Ministerial Direction 65 and Ministerial Direction 63.

A flawed approach

- 1.22 The overwhelming majority of evidence presented during the inquiry suggested that the current approach to visa cancellations may have some significant flaws.
- 1.23 Evidence suggested the visa cancellations regime under the current government has resulted in non-citizens being detained for unnecessarily long periods of time and some detained indefinitely, and to deportation for relatively minor crimes or offences committed 20 years ago.⁷
- 1.24 Labor Members do not believe the Committee has given this evidence the consideration it warrants.
- 1.25 Under the previous Ministerial Direction, Direction 55, non-refoulement obligations were a primary consideration. Under the existing Directions, these obligations are secondary, ranked lower than the elusive and hard-to-define 'expectations of the Australian community'.
- 1.26 The Refugee Council of Australia, the Australian Human Rights Commission, the Visa Cancellations Working Group and many others proposed that non-refoulement should again be made a primary consideration.⁸ Labor Members share this view.
- 1.27 The Committee also heard that a number of 'absorbed persons' have been deported under the current settings. Absorbed persons are non-citizens that have lived in Australia for most of their lives and may have few or no connections to the country of their birth. Some may not even know they are

⁷ See evidence presented in Chapter 2, pages 47 to 51.

⁸ See for instance: Ms Theresa Deegan, Solicitor, Kingsford Legal Centre, *Transcript*, 16 July 2018, p. 14; and Mr Mohammad Al-Khafaji, Acting Chief Executive Officer, Federation of Ethnic Communities' Council of Australia, *Transcript*, 5 December 2018, p. 3; Dr Joyce Chia, Director of Policy, Refugee Council of Australia, *Transcript*, 23 July 2018, p. 6; Dr Carolyn Graydon, Principal Solicitor and Manager of the Human Rights Law Program, Asylum Seeker Resource Centre, *Transcript*, 23 July 2018, p. 6.

not a citizen until their visa is cancelled.⁹ These people should be treated differently from someone who arrived in Australia six months ago.

- 1.28 We want to be perfectly clear: Labor's first priority in government is the safety and security of the Australian community. Labor will not hesitate to use the character provisions to remove dangerous criminals who threaten that safety. However, we believe most Australians would have an expectation that a person who grew up here, went to school here, has paid taxes and perhaps raised children here, should be given a fair go.
- 1.29 The existing Ministerial Directions deprioritise the 'strength, nature and duration of ties' to Australia by making it a secondary consideration. Labor Members believe this should be reconsidered.
- 1.30 A number of witnesses to the inquiry agreed that an independent review of character cancellation was necessary. The Visa Cancellations Working Group suggested that a review of the operation of the provisions should be led by 'someone with very good experience in criminal law as well as administrative and federal law'.¹⁰
- 1.31 David Mann from Refugee Legal proposed that an inquiry should be directed towards ensuring that Australia's approach to visa cancellation and reviews 'conforms with the ordinary standards that apply more generally under the Australian legal system'.¹¹
- 1.32 Mr Mann said that, in his view, the recent application of the provisions represent a 'fundamental deviation' from ordinary standards of the Australian legal system, including the right to a fair hearing, due process and natural justice.¹² These claims require further investigation.

⁹ Mr Jason Donnelly, Private capacity, *Transcript*, 16 July 2018, p. 29; NSW Council for Civil Liberties, *Submission 9*, p. 7; Mr Edward Santow, Human Rights Commissioner, Australian Human Rights Commission, *Transcript*, 17 July 2018, p. 4.

¹⁰ Ms Hannah Dickinson, Chair, Visa Cancellations Working Group, *Transcript*, 24 July 2018, p. 22.

¹¹ Mr David Mann, Executive Director and Principal Solicitor, Refugee Legal, *Transcript*, 24 July 2018, p. 29.

¹² Mr David Mann, Executive Director and Principal Solicitor, Refugee Legal, *Transcript*, 24 July 2018, p. 29.

Recommendation 1

1.33 Labor Members recommend that the Australian Government commission an independent review into the impacts of Ministerial Direction 65 and Ministerial Direction 63, to be undertaken by someone with expertise in both criminal and administrative law. The review should look at how these Ministerial Directions have impacted the exercise of discretion in visa cancellation on character grounds, particularly in relation to:

- **impacts on New Zealand citizens and other heavily-represented nationalities;**
- **impacts on the number of persons detained in immigration detention and the length of time in detention;**
- **Australia’s non-refoulement obligations; and**
- **cancellation and deportation of ‘absorbed persons’.**

The findings of the review may be used to inform the drafting of new Ministerial Directions.

Victims of crime

- 1.34 The Committee’s final recommendation, Recommendation 6, proposes introducing a requirement for the AAT to provide victims of crime with an opportunity to make a statement as part of the appeals process.
- 1.35 Labor Members dissent from Recommendation 6 for a number of practical and legal reasons, particularly as it raises questions of constitutionality.
- 1.36 Labor Members understand the deep trauma and hurt that is suffered by many victims of crime and their families. To have your life turned upside down through the reckless or intentional actions of another may lead to feeling unsafe, bereft and grief-stricken. No one should have to carry these scars or shoulder this burden, but sadly too many do.
- 1.37 Members were moved by evidence provided during the inquiry about the impacts of crime on individuals and families, and we extend our deepest sympathies and thank these witnesses for their testimony.
- 1.38 The criminal justice system recognises the important role of victims in the justice process by providing the opportunity for impacts on victims to be considered by the court. Victims are generally given the chance to make a

statement at the point where a sentence is determined. This process is well-entrenched and forms an integral part of the criminal justice system.

- 1.39 Merits review is not a criminal justice process. It is not a retrial of the applicant. The applicant has already served a sentence for their crime and has generally been released. The question to be decided through merits review is whether or not the delegate made the right and preferable decision in cancelling the person's visa, or choosing not to revoke a mandatory cancellation.
- 1.40 In making this decision, the AAT weighs up evidence provided by the applicant, against evidence provided by the Department. The AAT can and does consider victim impact statements if these are provided by the Department as part of its case.
- 1.41 The Committee heard that compelling the AAT to seek further statements from victims at the review stage may be resource-intensive and unworkable considering the strict 84 day timeframe for reviews. More importantly, witnesses from the legal sector suggested that it is likely to be unconstitutional.
- 1.42 Asked to comment on this proposal, the Australian Human Rights Commissioner explained that the AAT does not hold judicial power and is only empowered to consider specific questions, including if the applicant fails or passes the character test, and if the decision made against the applicant was the 'right and preferable' decision.¹³
- 1.43 The Commissioner argued that it would be unconstitutional for a tribunal such as the AAT to 'stray' from its remit by considering whether a visa holder should be further punished or 'subject to retribution that the victim might understandably want'.¹⁴
- 1.44 Legal and regulatory reforms should be evidence-based and legally-sound. Labor Members are not convinced that the Committee's proposal is either. As such, we cannot support Recommendation 6.

¹³ Mr Edward Santow, Human Rights Commissioner, Australian Human Rights Commission, *Transcript*, 17 July 2018, p. 6.

¹⁴ Mr Edward Santow, Human Rights Commissioner, Australian Human Rights Commission, *Transcript*, 17 July 2018, p. 6.

Ms Maria Vamvakinou MP
Deputy Chair

The Hon Shayne Neumann MP
Member

Mr Steve Georganas MP
Member

Senator the Hon Kristina Keneally
Member