



Law Council  
OF AUSTRALIA

# Review processes associated with visa cancellations made on criminal grounds

*Joint Standing Committee on Migration*

11 May 2018

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful for the assistance of the Law Institute of Victoria, the Law Society of New South Wales, the Law Society of South Australia as well as the Law Council's Migration Law Committee, its National Human Rights Committee, National Criminal Law Committee and the Administrative Law Committee within the Federal Litigation and Dispute Resolution Section, in the preparation of this submission.

## Introduction

1. The Law Council welcomes the opportunity to provide this submission to the Joint Standing Committee on Migration (**the Committee**) in relation to its inquiry into the review processes associated with visa cancellations made on criminal grounds (**the Inquiry**).
2. On 14 March 2018, the Minister for Home Affairs asked the Committee to inquire into and report on the review processes associated with visa cancellations made on criminal grounds. In conducting the Inquiry, the Committee is to have particular regard to:
  - (a) the efficiency of existing review processes as they relate to decisions made under section 501 of the Migration Act;
  - (b) present levels of duplication associated with the merits review process; and
  - (c) the scope of the Administrative Appeals Tribunal's jurisdiction to review ministerial decisions.
3. As a preliminary point, the Law Council recognises that it is both necessary and appropriate to regulate people seeking to enter and remain in Australia in terms of character. The executive should have powers where necessary to prevent or remove a dangerous individual from obtaining or retaining the right to enter and remain in Australia.
4. However, the Law Council notes that a decision to cancel or refuse a visa based on character grounds can have a profound effect on an individual's life. These powers need to be transparent and subject to proper scrutiny and oversight, and there must be an appropriate mechanism for review of such decisions to ensure consideration of factors that weigh in favour of not cancelling or refusing a person's visa.
5. For reasons outlined in this submission, the Law Council's view is that it is entirely appropriate for the Administrative Appeals Tribunal (**AAT**) to have the power to conduct merits review in respect of visa cancellations made on criminal grounds. The Law Council submits that existing review processes contribute to good administration, and that the jurisdiction of the AAT should not be restricted any further than it already has been.
6. There are, however, certain aspects of the manner in which the law regarding visa cancellations and refusals on character grounds is currently being applied that could be improved to ensure consistency, fairness and efficiency. Specifically, the Law Council has concerns with the scope of executive power in relation to visa cancellations on criminal grounds, as set out in this submission.
7. Further, and as noted below, the jurisdiction of the AAT to review decisions of the Minister, and his delegates is already circumscribed by certain parameters. It is submitted that in many cases, this attempt to limit the availability of merits review has led to an increase in expensive and time-consuming judicial review.
8. The Law Council strongly supports the role of merits review in the Australian administrative law framework, and endorses the view of the former Administrative Review Council that an effective review tribunal should improve the quality of future

agency decision-making so as to benefit all Australians.<sup>1</sup> This process is referred to in this context as the 'normative effect' of tribunal decisions, where the involvement of merits review leads to departmental decision-making that is consistent and equitable as between individuals in similar situations, and compliant with the rule of law.<sup>2</sup>

## The legislative framework

9. The *Migration Act 1958* (Cth) (**Migration Act**) includes powers to cancel the visa of a person who is not a citizen of Australia because they have committed serious crimes. In 1998, the law was changed by introducing section 501 of the Migration Act which allows the Minister to cancel a person's visa if satisfied they do not pass the 'character test'.<sup>3</sup>
10. A person could fail the 'character test' if they have a substantial criminal record, associated with a person, group or organisation involved in criminal activity, or because of the person's past and present criminal or general conduct.
11. The character test is set out under subsection 501(6) of the Migration Act and the term 'substantial criminal record' is set out under subsection 501(7). The definition is broad, however most commonly applies to those that have been sentenced to a term or terms of imprisonment of 12 months or more, even if those terms are concurrent, periodic or suspended, or spread across different times.
12. Section 501 of the Migration Act can affect any Australian visa holder, permanent or temporary, or applicant for a visa. It applies regardless of how long a person has held their visa, even if they came to Australia as a child or were born here.
13. With respect to visa cancellations, the AAT has jurisdiction to review a decision of a delegate of the Minister:
  - (a) to cancel a person's visa under subsection 501(2) of the Migration Act if the Minister (through a delegate) reasonably suspects that they do not pass the character test and they do not satisfy the Minister that they pass the character test; and
  - (b) to not revoke a decision to cancel a visa under section 501CA of the Migration Act, in respect of people in prison who are subject to the mandatory cancellation provision at subsection 501(3A) of the Migration Act.
14. When engaging in merits review of visa cancellation matters, the AAT must follow directions by the Minister, relevantly, Direction No. 65, *Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*<sup>4</sup> (**the Direction**). The purpose of the Direction is to guide decision-makers performing functions or exercising powers under section 501 of the Migration Act. Part A of the Direction identifies the considerations relevant to visa holders in determining whether to exercise the discretion to cancel a non-citizen's visa, and Part C identifies the considerations relevant to former visa holders in determining whether to exercise the discretion to revoke the mandatory cancellation of a non-citizen's visa.

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<sup>1</sup> Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* Report No. 39 (1995), at 1, online at <[www.arc.ag.gov.au/Documents/ARC+REPORT+39.pdf](http://www.arc.ag.gov.au/Documents/ARC+REPORT+39.pdf)>.

<sup>2</sup> *Ibid*, at x.

<sup>3</sup> See, *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth).

<sup>4</sup> Direction No. 65, *Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*, online at <[www.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf](http://www.homeaffairs.gov.au/visas/Documents/ministerial-direction-65.pdf)>.

15. By way of example of the far-reaching nature of the Direction, the Law Council notes that ‘community expectation’ is a primary consideration in determining whether to exercise the discretion to cancel a non-citizen’s visa. Paragraph 9.3(1) provides that:

*The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to cancel the visa held by such a person. Visa cancellation may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not continue to hold a visa. Decision-makers should have due regard to the Government’s views in this respect.*

16. In *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466, Mortimer J observed that in substance this consideration is adverse to any applicant (Her Honour was referring to paragraph 13.3 of the Direction, which is set out in similar terms).<sup>5</sup> Her Honour further observed that this consideration is a kind of deeming provision that does not deal with any objective, or ascertainable expectation of the Australian community, but rather how the Minister and the executive government wish to articulate the community expectations.
17. The ultimate task of the AAT is to consider all the relevant material, apply the Direction and determine the correct or preferable decision.<sup>6</sup> In performing this function, the AAT should follow government policy unless the policy is unlawful or ‘there are cogent reasons to the contrary’.<sup>7</sup>
18. The AAT has no jurisdiction to review decisions made by the Minister personally as any such review is limited to judicial review and lies in the Federal Court of Australia.
19. A table setting out the process for applications made to the AAT for review of cancellation decisions made under section 501 of the Migration Act can be found at [Appendix A](#) to this submission.<sup>8</sup>

## The efficiency of existing review processes

20. The Law Council considers that the AAT carries out its review of visa cancellation matters in a manner that is efficient and consistent with its stated objectives under the *Administrative Appeals Tribunal Act 1975* (Cth), namely that the AAT must provide a mechanism of review that:
- (a) is accessible;
  - (b) is fair, just, economical, informal and quick;
  - (c) is proportionate to the importance and complexity of the matter; and
  - (d) promotes public trust and confidence in the decision-making of the AAT.<sup>9</sup>
21. The current review process typically involves an initial directions hearing and a final hearing, which is open to the public and is normally set down for one to two days. The

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<sup>5</sup> *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466, at [76].

<sup>6</sup> *Visa Cancellation Applicant and Minister for Immigration and Citizenship* [2011] AATA 690.

<sup>7</sup> *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, per Brennan J at 644-645.

<sup>8</sup> The Law Council is grateful to the Law Institute of Victoria for the data within this table.

<sup>9</sup> *Administrative Appeals Tribunal Act 1975* (Cth), s 2A.

Minister will be required to provide the AAT and the applicant with a copy of the relevant documents, and parties will have an opportunity to make written submissions as well as oral submissions at the hearing. The AAT makes a written decision shortly after the hearing.

22. Working within these parameters, the AAT offers a review mechanism that promotes efficiency without forfeiting the need for a procedurally fair process. Further, recent legislative measures that have been taken to address perceived inefficiencies have led to substantial difficulties for applicants. This is discussed further below.

### **Challenges created under existing efficiency measures**

23. There are a number of features of the existing review process that appear to be directed at improving efficiency, some of which present procedural difficulties for applicants and raise challenges to procedural fairness. For example, applications for review of a decision must be made within a short period of time, namely within nine days after being notified of that decision.<sup>10</sup> The AAT has no jurisdiction if applications are lodged after that period.
24. Further, the AAT is unable to have regard to information or a document presented by an applicant unless it was given to the Minister at least two business days before the hearing.<sup>11</sup> However, the Minister is able to present evidence despite notice having been given within two business days of the hearing. This is even though the Minister is more likely to be better-resourced to present their case.
25. The consequence of these measures is that applicants are often given insufficient time to prepare an adequate case and face challenging issues such as lack of adequate legal representation. It is submitted that any steps to further expedite the review process in pursuit of increased efficiency would exacerbate existing procedural fairness concerns.
26. If the AAT does not make a decision in relation to a review of a cancellation under section 501 or subsection 501CA(4) of the Migration Act within 84 days, then the decision of the Minister's delegate is taken to be affirmed.<sup>12</sup>

### **Factors in an increasing workload**

#### *Increasing numbers of visa cancellations*

27. Where there are inefficiencies in the review process associated with visa cancellations made on criminal grounds, it is submitted that this is a product of increased executive action in this area, rather than a reflection of the AAT as a source of efficient and effective merits review.
28. It is understood that there were 1,284 visa cancellations on character grounds in 2016/17.<sup>13</sup> The amount of visa cancellations on character grounds has steadily increased since the commencement of the *Migration Amendment (Character and General Visa Cancellation) Act 2014*, which introduced mandatory cancellation of visas in certain situations.
29. In relation to the nature of circumstances surrounding many of these character cancellations, the Law Council notes the submission of the Visa Cancellations Working

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<sup>10</sup> *Migration Act 1958* (Cth), s 500(6B).

<sup>11</sup> *Ibid*, s 500(6H) and s 500(6J).

<sup>12</sup> *Ibid*, s 500(6L).

<sup>13</sup> Department of Home Affairs 'Key visa cancellation statistics', online at <[www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics](http://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics)>.

Group which provides several examples of cancellations occurring in instances that may not align with reasonable community expectations. At the very least, such decisions illustrate the importance of merits review with respect to the cancellation processes. The Law Institute of Victoria has provided the Law Council with further examples of visa cancellation matters that appear disproportionate when viewed in the context of the circumstances of the visa holders. The Law Council would be happy to provide these case studies should it assist the Committee in undertaking its inquiry.

30. While there may well be debate as to the appropriate circumstances in which to invoke the character cancellation provisions, there is little doubt that the section 501 power is severe, and it is proper that it be exercised with restraint. In 2004, a Senate Select Committee into Ministerial Discretion in Migration Matters concluded that ‘vesting a non-delegable, non-reviewable and non-compellable discretion with the immigration minister without an adequate accountability mechanism creates both the possibility and perception of corruption’.<sup>14</sup> The availability for merits review to ensure that a decision is correct and preferable is, in the view of the Law Council, critical.

**Recommendation:**

- **Access to merits review should be preserved at its current level, and there should be no moves to further remove or curtail the involvement of the AAT in reviewing visa cancellations made on criminal grounds.**

*Cancellation on the basis of criminal charges alone*

31. The Law Council also notes that there is a serious and unsupportable gap in the legislative framework in relation to the lack of a remedy for an individual that has had their visa cancelled on the basis of criminal charges that have subsequently been withdrawn, struck out or unsubstantiated. It is submitted that the ability for the Minister to cancel a person’s visa on the basis of criminal charge alone, in particular pursuant to section 116 of the Migration Act, should be reconsidered.
32. The criminal system has expertise in assessing risk to the community of a person merely charged with an offence. If a person is granted bail, this should be given significant weight when considering whether to cancel a visa. The Law Council submits that the issue of assessing any risk to the community is best addressed by the criminal justice system, such as at the bail hearing.
33. Alternatively, if the Government intends to retain the power to cancel visas on the basis of criminal charges alone, the Law Council submits that there should be protections for individuals who have had their visa cancelled on the basis of criminal charges, where those charges have been withdrawn, struck out or unsubstantiated, such as immediate reinstatement of the visa held at the time of cancellation.

**Recommendations:**

- **Visas should not be cancelled on the basis of criminal charges alone, other than on the basis of national security.**
- **Alternatively, there should be protections for individuals who have had their visa cancelled on the basis of criminal charges, where those charges have been withdrawn, struck out or unsubstantiated.**

<sup>14</sup> Senate Select Committee on Ministerial Discretion in Migration Matters, *Report* (2004), online at <[www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Former\\_Committees/minmig/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/minmig/index)>.

## Justice impact tests

34. As noted above, previous attempts to review the quality or availability of merits review have been counterproductive, leading to an increase in expensive and time-consuming judicial review.<sup>15</sup> Most recently, this can be seen in the abolition of access to full merits review for certain cohorts of people seeking Australia's protection, creating the 'Fast Track' cohort who may have either limited access or no access to merits review. There can be no question that this change has seen significant increases in pressure on Australian courts.
35. Further, the Law Council submits that the current policy of expanding visa cancellations through an increased use of section 501 of the Migration Act is one area which has been clearly pushing up legal needs amongst legal assistance services. Increased demand on the legal assistance sector has exacerbated the difficulties in obtaining representation when seeking review of visa cancellations, which in turn leads to inefficiencies and delays in the review process.
36. The Law Council is currently undertaking a comprehensive, national review into the state of access to justice in Australia, titled the 'Justice Project'.<sup>16</sup> One area of relevance to the current inquiry is an emerging theme arising from Justice Project consultations indicating support for a 'justice impact test', such as that employed in the United Kingdom. This would require policy makers to plan for the impact of government policy and legislative proposals on the justice system early in the policy development process.
37. Such a measure would adopt a 'user pays' principle, in which departments and decision-makers introducing new laws and policies must meet any additional costs flowing to the justice system. Under this approach, changes to the review process for visa cancellations, or indeed policies towards character cancellations either by the Minister or his delegate, would have to have regard to the increased pressure on the legal assistance sector and review institutions, with the view to ensuring that any increase in workload is appropriately resourced.
38. It is submitted that any perceived inefficiencies in the current review processes associated with visa cancellations made on criminal grounds is a result of inadequate resourcing in the wake of a substantive policy shift in this area, rather than a reflection of the role and effectiveness of the AAT as an administrative review body.

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<sup>15</sup> Mary Crock and Hannah Martin, 'Refugee Rights and the Merits of Appeals' (2013) 32 University of Queensland Law Review 137.

<sup>16</sup> See <[www.lawcouncil.asn.au/justice-project](http://www.lawcouncil.asn.au/justice-project)>.

**Recommendation:**

- **The AAT should be adequately resourced to provide timely and efficient merits review in light of the increasing use of criminal cancellations.**

## Present levels of duplication

39. While it is unclear what aspect of the current review process is considered duplicative for the purposes of the current inquiry, it is assumed that this term of reference is referring to the *de novo* nature of merits review. In this regard, the Law Council considers it entirely appropriate for the AAT to reconsider matters as if it were standing in the shoes of the decision-maker, including giving consideration to all material, facts and submissions again.
40. The Law Council notes that only one level of merits review is available to any person whose visa is cancelled by a delegate of the Minister. Furthermore, if the Minister personally cancels the visa, then no merits review is available. Therefore, there is little to no duplication in the current merits review process.
41. Merits review and judicial review do not and cannot offer the same outcomes for applicants. If individuals are entitled to both merits review and judicial review, there is no duplication. Judicial review can provide no remedy for a decision that is simply unjust or severe. Decision-making at the primary stage is substantially different to decision-making at the merits review stage. The two decision-making processes also serve different functions. The only similarities are that they both review similar facts and arguments.

### The importance of merits review

42. Merits review is a cornerstone of Australia's administrative law system and 'promotes the observance of the rule of law'.<sup>17</sup> The Australian Government has a significant role in the regulation of public life, and the administrative law system supports the government in delivering effective governance. The Law Council notes the following principles of merits review as set out by the former Administrative Review Council:

*The principal objective of merits review is to ensure that those administrative decisions in relation to which review is provided are correct and preferable:*

*correct - in the sense that they are made according to law; and*

*preferable - in the sense that, if there is a range of decisions that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts.*

*This objective is directed to ensuring fair treatment of all persons affected by a decision.*

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<sup>17</sup> The Hon. Justice Pritchard, *The Rise and Rise of Merits Review Implications for Judicial Review and for Administrative Law* AIAL Forum 79 (Jan), 2015, online at <[www.aial.org.au/aial-forum-articles/the-rise-and-rise-of-merits-review-implications-for-judicial-review-and-for-administrative-law](http://www.aial.org.au/aial-forum-articles/the-rise-and-rise-of-merits-review-implications-for-judicial-review-and-for-administrative-law)>.

*Merits review also has a broader, long-term objective of improving the quality and consistency of the decisions of primary decision-makers. Further, merits review ensures that the openness and accountability of decisions made by government are enhanced.*<sup>18</sup>

43. Consistent with the above, the function of merits review should be to ensure that administrative decisions are correct and preferable. Removing or curtailing merits review can have numerous serious disadvantages, from impeding justice and distorting the Australian administrative system's functioning, to the financial and practical consequences including increased pressure on the courts (resulting in expense and delay), incorrect decision-making, decreased accountability and an inappropriate concentration of administrative power.

44. It is therefore critical that there be appropriate processes to test the correctness and appropriateness of administrative decisions affecting individual's interests. This ensures decision-makers act with care and are accountable for their decisions. In this regard, the importance of accountability is well recognised:

*Accountability is fundamental to good governance in modern, open societies. Australians rightly see a high level of accountability of public officials as one of the essential guarantees and underpinnings, not just of the kinds of civic freedoms they enjoy, but of efficient, impartial and ethical public administration. Indeed, public acceptance of government and the roles of officials depends upon trust and confidence founded upon the administration being held accountable for its actions.*<sup>19</sup>

45. In highlighting the need for a comprehensive, coherent and integrated system of Commonwealth administrative law, the former Administrative Review Committee has noted that in general, review tribunals make a strong contribution to openness and accountability of government by providing persons affected by government decisions with a fair and open process for testing those decisions.<sup>20</sup>

46. Where a person does not have access to merits review, there remains only a judicial review option which requires recourse to the Federal Court system. This form of review is highly technical, time-intensive, and potentially expensive for all parties involved and also becomes burdensome on the Courts.

47. People, particularly those that are vulnerable and afraid of what their future may hold given the repercussions of such decisions, who have no legislated access to merits review, are highly likely to pursue litigation despite not understanding its nature or their own situation.

48. Individuals seeking to access review of a decision to cancel their visa are often vulnerable due to youth, advanced age, mental health issues, severe financial hardship, disability, or non-refoulement issues. They often struggle to find representation and to understand their situation. There is extremely limited legal aid available for such matters. This high demand creates an enormous burden on the individuals, on the courts and on the Department, and does not promote effective and sound decision-making.

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<sup>18</sup> Administrative Review Council, 'What decisions should be subject to merit review?' (1999), online at <[www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx](http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx)>.

<sup>19</sup> Management Advisory Board and Management Improvement Advisory Committee, *Accountability in the Commonwealth Public Sector*, Report No. 11, AGPS, Canberra, 1993, p. 3.

<sup>20</sup> Administrative Review Council, 'Better Decisions: Review of Commonwealth Merits Review Tribunals' Report No. 39 (1995), at 20.

49. It is also likely to lead to potentially significant legal costs for the Australian government. In each case where the Minister is unsuccessful, the Minister will be required to pay not only his legal costs, but also the costs of the applicant. In the Federal Circuit Court, this is generally governed by Schedule 1 to the Federal Circuit Court Rules 2001 and allows for up to \$7,328 in costs to be paid (although, routinely, significantly higher costs outside the Schedule are awarded). In the Federal Court of Australia costs are significantly higher - generally between \$10,000 and \$30,000 - and in the High Court, they are higher still. Even where the Minister may be successful, the recovery of costs is often difficult given the affected persons are detained and financially vulnerable. There are also other costs incurred by the Government in the form of detention and related costs.

### Use of multiple powers by the Minister

50. If the Committee is considering issues of duplication surrounding visa cancellations, it may wish to consider the potential for repetition that arises as a result of the two cancellation powers in the Migration Act, section 501 and section 116. Here, a person's visa may be cancelled on the basis of criminal charges alone, or for another reason, under section 116. They may then face cancellation under section 501 once their charges have been determined, including on the very same set of facts.

51. For example, in one recent matter brought to the Law Council's attention by the Law Institute of Victoria, a pregnant Australian woman with a husband accused of a 'crop-sitting' cannabis cultivation offence suffered severe health and mental health problems, including with her pregnancy, after receiving two separate notices of intention to consider cancellation within a space of weeks. This duplication should be avoided where possible as it is an unnecessary process.

52. It is submitted that if the crime alleged is a very serious one, it would be the best use of resources to refrain from reliance on section 116 in the early stages of criminal proceedings so as to use the section 501 powers available at the appropriate time and when all information is to hand.

#### **Recommendation:**

- **Measures should be taken to ensure there is no duplication between the exercise of powers under sections 501 and 116 of the Migration Act. Only one power, the most appropriate for the circumstances, should be used.**

## The scope of AAT jurisdiction

53. As outlined above, the role of the AAT in visa cancellation matters is to engage in merits review, however, in this regard, the AAT's discretion is already significantly circumscribed, including limiting review to decisions by the Minister's delegates rather than decisions made personally by the Minister.

54. The introduction of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, which curtailed review rights for certain applicants for Australia's protection, led a commentator to observe:

*No other minister, not the prime minister, not the foreign minister, not the attorney-general, has the same unchecked control over the lives of other people.<sup>21</sup>*

55. The Law Council submits that the AAT's jurisdiction to review decisions in respect of visa cancellations made on criminal grounds should not be further restricted. Rather, consideration should be given to the appropriateness of existing constraints that serve to limit the role of the AAT in visa cancellation matters.

#### **Lack of merits review when the Minister personally intervenes**

56. As noted above, the AAT has no jurisdiction to review decisions made by the Minister personally as any such review is limited to judicial review at the Federal Court level. This is a deliberate function of the legislation. The AAT has no power to determine whether a person's visa should or should not be cancelled, or whether a cancellation should or should not be revoked. The Federal Court is confined to judicial review and does not possess the ability to conduct full merits review of the decision.

57. The power afforded to the Minister under the current law is extremely broad and far-reaching. It can be difficult to establish jurisdictional error in a Minister's personal decision, because natural justice is excluded from the requirements for Ministerial decision-making, and because the Minister's discretion is significant.

58. Parliament creates the right to merits review to ensure that there is oversight of administrative decision-making and to protect the rule of law. To move away from enshrinement of that right is a cause for significant concern, as it is an incursion on the principles that have generally been accepted as underpinning our administrative law system.

59. The Law Council emphasises the need to limit the concentration of administrative power. In this regard, it is submitted that Ministerial decisions should be subject to AAT review to ensure accountability and appropriate care, and to increase the likelihood of the correct and preferable decision. At the very least, the Law Council submits that the increased use of the Minister's personal powers to cancel visas on character grounds, rather than through the use of a delegate, should be reviewed.

60. It may also be the case that individuals susceptible to cancellation do not have the education or resources to argue their case at the primary stage. If merits review is available, they may realise the gravity of their situation and seek representation. This is another layer of protection where the consequences to the individual and the community may be severe.

61. Effective merits review ensures that there is oversight of administrative decision-making and protects the rule of law. To move away from enshrinement of that right is a cause for concern, as it is an incursion on the principles that have generally been accepted as underpinning Australia's administrative law system in. It vests inappropriate power in individuals, and it reduces the likelihood of just decision-making.

<b>Recommendation:</b>
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<sup>21</sup> Ben Doherty, 'Senate gives Scott Morrison unchecked control over asylum seekers' lives, *Guardian Australia* (5 December 2014), <[www.theguardian.com/australia-news/2014/dec/05/senate-gives-scott-morrison-unchecked-control-over-asylum-seekers-lives](http://www.theguardian.com/australia-news/2014/dec/05/senate-gives-scott-morrison-unchecked-control-over-asylum-seekers-lives)>.

- **The increase in use of the Minister's personal powers to cancel visas on character grounds, rather than through the use of a delegate, should be reviewed.**

### Repeated use of personal powers by the Minister

62. In many cases where the courts have found jurisdictional error, the Minister has simply made a new decision, utilising his specific powers to do so, addressing that error and thereby making the new decision extremely difficult to challenge successfully. Similarly, the Minister may use his personal powers to intervene even after a person has been successful on merits review before the AAT. In the latter case, Ministerial action to cancel a visa is often commenced solely on the basis of the AAT decision record, and perhaps the criminal record. That is, that decision to commence or act is made without first reviewing all of the evidence that had been provided during the merits review process. This process causes great distress to visa holders and involves significant personal and financial costs.
63. The Law Council submits that there should, at the very least, be a strict protocol in place before the Minister is able to use personal powers to intervene after an AAT or Court decision. As a minimum, all evidence submitted to the Department and review bodies should be provided to the Minister to be weighed up and evaluated prior to a decision being made to consider the use of this personal power, let alone prior to a decision being finalised.
64. As a further example, this time in the case judicial review proceedings, the Law Council refers to the recent matter of *Burgess v Minister for Immigration and Border Protection* [2018] FCA 69, in which a Minister's decision to cancel a visa was quashed by the Court. A period of approximately 20 minutes passed before another decision was made to cancel the visa, which was the subject of review. It was held that the Minister did not engage in the active intellectual process of reviewing the appropriate materials to make that decision, and therefore was affected by jurisdictional error. This matter demonstrates that the Minister's ability to personally re-consider his own decisions can result in unnecessary litigation and can lead to a significant waste of the Courts' time and resources. The Law Council suggests that this power should be removed for all cases except those in which the individual presents a serious threat to national security.
65. It is no answer to simply assert that the Minister will not cancel visas where the community may consider it inappropriate to do so, as such decisions can and do occur. For example, the mandatory cancellation provisions are catch-all provisions, and result individuals with Australian-citizen children, non-violent, non-sexual criminal histories, and a long history of living in this country having their visas cancelled.
66. The Law Council considers that increasing use of Ministerial power to overturn decisions of the AAT has been a key factor in creating perceived inefficiencies and duplication within the existing review process.

### Recommendations:

- **The ability for the Minister to use personal powers to intervene after an AAT or Court decision should be reviewed.**
- **There should at least be a strict protocol that before action is taken, all evidence submitted to the Department and review bodies should be provided to the Minister to be evaluated prior to a decision being made to consider the use of this personal power, let alone prior to a decision being finalised.**

### Maintaining integrity and public confidence in the review process

67. Finally, the Law Council remains concerned by the environment of political pressure in which visa cancellations are currently proceeding, at the primary stage as well as the merits review and judicial review stages.<sup>22</sup>
68. In this regard, the Law Council has previously raised concerns with political comments directed at the work of the AAT, noting that despite there being disagreement with certain decisions, courts and tribunals provide an important check upon the unlawful exercise of power and must remain independent.<sup>23</sup>
69. This remains a complex balancing task, and one that requires careful consideration between freedom of speech and the preservation of the integrity and public confidence in the judicial process. However, the Law Council is concerned that unjustified criticism of the merits review function of the AAT, particularly any suggestion that the AAT is not acting with independence, has the potential to undermine the public perception of the legitimate role of merits review, and weakens the rule of law.
70. Appointments and reappointments to the AAT should also be seen to be non-political to ensure public confidence in the institution and the soundness of decision-making. Ensuring the AAT has integrity, appropriate resourcing and is a body whose authority is respected politically would certainly enhance the merits review process.
71. The Law Council submits that it is in the interests of good administration for the AAT's jurisdiction to conduct merits review of decisions taken in respect of visa cancellations to remain. In this regard, the Council notes the view of Justice Downes that the Minister and the AAT are 'constituent parts of the one Commonwealth administration which should work together through [their] respective roles to advance good administration. Where the Tribunal makes a final decision within their power; where a Minister makes a final decision within power, they are both contributing to good administration'.<sup>24</sup>

<sup>22</sup> See eg, 'Peter Dutton 'incredibly frustrated' with visa appeals by criminals' Herald Sun (30 April 2018), online at <[www.heraldsun.com.au/news/peter-dutton-incredibly-frustrated-with-visa-appeals-by-criminals/news-story/0d2a1a35243400b78b1122afd43fbf6f](http://www.heraldsun.com.au/news/peter-dutton-incredibly-frustrated-with-visa-appeals-by-criminals/news-story/0d2a1a35243400b78b1122afd43fbf6f)>.

<sup>23</sup> Law Council of Australia, 'Minister's comments attacking independence of tribunal were unfortunate, should not be repeated' (17 May 2017), online at <[www.lawcouncil.asn.au/media/media-releases/minister-s-comments-attacking-independence-of-tribunal-were-unfortunate--should-not-be-repeated](http://www.lawcouncil.asn.au/media/media-releases/minister-s-comments-attacking-independence-of-tribunal-were-unfortunate--should-not-be-repeated)>.

<sup>24</sup> *Visa Cancellation Applicant and Minister for Immigration and Citizenship* [2011] AATA 690, at [91].

## Appendix A: Summary of AAT review processes<sup>25</sup>

The process for applications made to the AAT for review of cancellation decisions made under section 501, can be summarised as follows:<sup>26</sup>

Section	Scenario	Review
s.501(2)	<p>The Minister or his delegate decides to cancel a visa where he reasonably suspects the holder does not pass the character test and is not satisfied otherwise.</p> <p>The visa holder will have the opportunity to comment before the decision is made.</p>	<p>If a delegate of the Minister makes a decision to cancel the visa, the affected person can apply to the AAT for review (s.500(1)(b)).</p> <p>The Minister can effectively overrule the AAT (s.501A(2)(b)) if satisfied of factors including that cancellation is, in fact, in the national interest. The affected person can apply for revocation of that decision.</p> <p>If the Minister personally makes a decision to cancel, or not to revoke cancellation, the affected person has no merits review rights.</p>
s.501(3)(b)	<p>The Minister personally cancels a visa where he reasonably suspects that the person does not pass the character test and is satisfied that the cancellation is in the national interest.</p> <p>The rules of natural justice and the code of procedure set out in Subdivision AB of Division 3 of Part 2 do not apply.</p> <p>The affected person can request revocation of the cancellation decision within 7 days of receiving notice of cancellation.</p>	<p>If the Minister personally makes a decision not to revoke the cancellation, the affected person has no merits review rights.</p> <p>No merits review rights attach to the initial decision to cancel the visa.</p>
s.501(3A)	<p>Mandatory cancellation occurs where a visa holder does not pass the character test because of:</p> <ul style="list-style-type: none"> <li>• A substantial criminal record; or</li> <li>• Sexually based offences involving a child; and</li> </ul> <p>is serving a sentence of imprisonment on a full-time basis.</p> <p>The rules of natural justice and the code of procedure set out in Subdivision AB of Division 3 of Part 2 do not apply.</p> <p>The affected person can apply for revocation of the cancellation decision.</p>	<p>If a delegate of the Minister makes a decision not to revoke the cancellation, the affected person can apply to the AAT for review (s.500(1)(ba)).</p> <p>If the Minister personally makes a decision not to revoke the cancellation, the affected person has no merits review rights.</p> <p>No merits review rights attach to the initial decision to cancel the visa.</p>

<sup>25</sup> The Law Council is grateful to the Law Institute of Victoria's Migration Law Committee for this input.

<sup>26</sup> There are some exceptions to the information within this table. For example, a decision to cancel a protection visa because of an assessment by ASIO that the holder of the visa is directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*) is not reviewable by the AAT.