27 April 2018

[redacted]

Committee Secretary

Joint Standing Committee on Migration

P.O. Box 6021, Parliament House, Canberra ACT 2600

RE: Invitation to make submissions — review processes associated with visa cancellations made on criminal grounds

[redacted]

I write to provide your Joint Standing Committee with written submissions addressing the Terms of Reference of your Committee's inquiry into review processes associated with visa cancellations made on criminal grounds.

An invitation to make submissions was extended to me by Professor Mary Crock, who teaches the subject of Migration, Refugees and Forced Migration (LAWS3499) at Sydney Law School, in which I am presently enrolled.

Yours sincerely,

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REVIEW PROCESSES ASSOCIATED WITH VISA CANCELLATIONS MADE ON CRIMINAL GROUNDS

I Overview

The Joint Standing Committee on Migration has initiated an inquiry into review processes relating to visa refusals and cancellations made on criminal grounds. These submissions are structured according to the inquiry's Terms of Reference. First, they identify applicants' rights to legal representation and the exclusion of the rules of natural justice as focal points for evaluating the efficiency of existing review mechanisms relating to decisions under s 501. Second, they note that there is no duplication in existing merits review processes. They instead examine whether the introduction within the Administrative Appeals Tribunal ("AAT") of a two-tier review process for reviewing visa refusals and cancellations would better achieve the suggested justifications for the AAT's "super tribunal" structure. Third, they explore the AAT's position as the pre-eminent merits review forum in the federal administrative setting, and analyse whether presently non-reviewable ministerial decisions relating to visa refusals and cancellations should be brought within the AAT's jurisdiction. The underlying premise of these submissions is that the quality of administrative decision-making must remain paramount over considerations of efficiency and expedience.[1]

II Efficiency of existing review processes

(i) Applicants' rights to legal representation

Legal representation of applicants can enable a tribunal or court 'to deal with matters more efficiently' [2] because it sharpens the factual and legal issues for determination. But the appropriateness of conferring on applicants a right to legal representation depends on the complexity of the matter at hand. It would be inefficient to prescribe an inflexible rule in favour

[1] Deirdre O'Connor, 'Effective Administrative Review: An Analysis of Two-tier Review' (1993) 1 *Australian Journal of Administrative Law* 4, 12.
[2] Rachel Bacon, 'Tribunals in Australia — Recent Developments' (2000) 7 *Australian Journal of Administrative Law* 69, 70.

of representation, resulting in the unnecessary staying of proceedings at the expense of other prospective applicants and to the state.[3]

For s 501 decisions, even if the legal and factual issues of the case are straightforward so as to disfavour legal representation, it does not follow that legal representation would be futile. An applicant may be unable to 'understand and communicate effectively in the language used by the Tribunal',[4] especially in the use of technical and legal terms of art contained in s 501. Indeed, an applicant may even 'lack capacity to understand the nature of the proceedings.'[5] Further, the '[critical] importance of the decision to the applicant's liberty'[6] strongly tends in favour of representation, since any final decision by a tribunal or court to refuse or cancel a visa will expose an applicant to the real risk of federal administrative detention. Consistently with the paramount importance of high quality administrative decision-making,[7] for s 501 decisions an applicant should have a right to seek legal representation if the applicant's personal vulnerabilities would substantially impair the tribunal's or court's ability to reach a just decision, or if the likely consequences of an adverse decision are so serious as to warrant the use of legal representation.

(ii) Exclusion of rules of natural justice

Section 501 constructs two separate regimes for the application of the rules of natural justice. First, the rules of natural justice apply to the Minister's or delegate's exercise of the powers to refuse or cancel a visa under sub-ss 501(1) and (2). Second, natural justice does not apply to the Minister's personal exercise of the power to refuse or cancel a visa under sub-s 501(3). These powers are non-compellable and the Minister, being free to select which mechanism to use, will strongly prefer to bypass any fetters presented by the rules of natural justice. But insofar as the concern to avoid these restrictions rests on efficiency considerations, it is without foundation. As French CJ has explained, extrajudicially, the flexibility of the rules of natural justice enables

[3] Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2nd ed, 2012) 214.
[4] Kira Raif, 'The Role of Interpreters in the Refugee Determination Process' (2003) 11 *Immigration Review* [182], [336].
[5] Ibid.
[6] Ibid.
[7] O'Connor, above n 1, 12.

tribunals and courts to adapt them to the 'practical exigencies'[8] of the individual case.[9] It is not enough that the rules of natural justice may impose 'stringent requirements'[10] on tribunals and courts to safeguard the individual applicant.[11] Nor is it material that hearings may become longer[12] or that more adjournments may be granted.[13] As a matter of fundamental principle, a person facing a visa refusal or cancellation, with the attendant prospect of immigration or criminal detention, ought to have an opportunity to present their case to an impartial decision-maker. The power contained in s 501(3) should be repealed.

III Duplication in the merits review process

Since July 2015,[14] the AAT's General Division has been the only avenue of merits review available for s 501 decisions. Thus, in the absence of any present duplication, the inquiry shifts to asking whether the post-2015 AAT, as an amalgamated "super tribunal", overlooks the issue of whether different processes may be more suitable to the review of s 501 decisions. The justification for the present AAT's "super tribunal" structure rests on three strands.

(i) Efficiency function

First, a "super tribunal" is said to promote the efficient operation of its various divisions through uniform practices. Internalising specialist tribunals under the aegis of the AAT allows for the prescription of general 'minimum standards'[15] across all subject matters of federal merits review.

The chief defect of this suggested justification is that the loss of benefits attached to specialisation may outweigh the correlative benefits of consolidation. It is submitted that the two-

[8] Chief Justice Robert French, 'The Role of Courts in Migration Law' (Speech delivered at the Migration Review Tribunal and Refugee Review Tribunal Annual Members' Conference, Torquay, 25 March 2011).
[9] Ibid.
[10] Juliet Lucy, 'Merits Review and the 21st Century Tribunal' (2017) 24 *Australian Journal of Administrative Law* 121, 131-132.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] *Tribunals Amalgamation Act 2015* (Cth) s 2.
[15] Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995) [8.18].

tiered review process described in Part 4 (below) would more be a more efficient method of adjudicating the s 501 caseload. Complex cases would not suffer from cursory first instance determination, and straightforward cases would not receive unnecessarily detailed treatment. Consistently with the AAT's statutory objects of informality[16] and speed,[17] the distribution of the s 501 caseload across these two tiers would ensure that individual proceedings are heard by the facility most competent to adjudicate them. The necessity for a diversion mechanism of this kind is particularly strong in light of (i) the rapidly growing s 501 caseload[18] (following the introduction of mandatory visa cancellations in December 2014),[19] and (ii) the highly variable factual inquiries in the application of the character test[20] depending on, for example, whether a person's character is discerned from their 'criminal conduct'[21] (the subject of clear curial determination) or their 'general conduct'[22] (an opaque case-by-case determination).

(ii) Insulating function

Second, a "super tribunal" is said to discharge an insulating function in the sense that it bolsters the institutional independence of merits review forums. On this view, a generalist cross-institutional tribunal, unlike a smaller specialist tribunal, is not susceptible to the 'control and portfolio responsibility of the [particular] minister and agency whose decisions are under review'.[23]

The principal difficulty with this suggested justification is that, irrespective of whether merits review of s 501 decisions is undertaken by a one-level AAT division or by a two-tiered review process, the responsible Minister retains a wide power under s 499(1) to issue Ministerial Directions which bind the AAT.[24] The content of these Directions ranges from a general statement

[16] *Administrative Appeals Tribunal Act 1975* (Cth) s 2A(b) ('*AAT Act*').
[17] Ibid s 2A(b).
[18] Department of Home Affairs, Commonwealth Government, *Key Visa Cancellation Statistics*, <https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics>.
[19] *Migration Amendment (Character and General Visa Cancellation) Act 2014* s 2.
[20] *Migration Act 1958* (Cth) s 501(6) ('*Migration Act*').
[21] Ibid s 501(6)(c)(i).
[22] Ibid s 501(6)(c)(ii).
[23] Administrative Review Council, above n 15, [8.81].
[24] *Migration Act* s 499(2).

of guiding principles[25] to identifying specific matters affecting decisions to refuse or cancel visas on character grounds.[26] Ministerial Directions assume a particularly enlarged role due to the absence in the *Migration Act* of any general principles or detailed criteria to guide the exercise of these powers.[27] Although the two-tiered process described in Part 4 would not evade the application of Ministerial Directions, it could insulate the AAT from other forms of executive interference, such as rigid ministerial policy. An appellate review panel for s 501 decisions, charged with the determination of issues of general public significance, would identify situations where the application of ministerial policy diverges from what the Tribunal, as the arbiter of 'the requirements of good government',[28] considers to be the 'correct or preferable decision'.[29]

(iii) Communicative function

Third, a "super tribunal" is said to discharge a communicative function. It signals the existence of 'a single external merits review tribunal'[30] and apprises prospective applicants 'of their review rights in relation to government decisions'.[31]

If, however, the executive intended the AAT to discharge a general communicative function, that pursuit is not reflected in the executive decision-making processes leading up to AAT review. The Minister has developed a longstanding policy[32] of sending the entire text of the applicable Direction to a person when notifying them of a decision to refuse or cancel a visa under s 501. As Kirby J explained in *Palme*,[33] sending the entire Direction is 'obviously designed to cover every possible case',[34] yet '[f]or many of its recipients, it would be quite difficult to understand, even

[25] Minister for Immigration and Border Protection (Cth), *Direction no. 65 — Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s 501CA*, 22 December 2014, paras 6.2-6.3.
[26] Ibid paras 9.1-9.3, 10.1-10.5, 11.1-11.3, 12.1-12.4, 13.1-13.3, 14.1-14.5.
[27] Chantal Bostock, 'The effect of ministerial directions on tribunal independence' (2011) 18 *Australian Journal of Administrative Law* 161, 161.
[28] Cane and McDonald, above n 3, ch 8.
[29] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589 (Bowen CJ and Deane J) ('*Drake (No 1)*').
[30] Administrative Review Council, above n 15, *xi*.
[31] Administrative Review Council, above n 15, *xi*.
[32] Minister for Immigration and Border Protection (Cth), *Procedures Advice Manual III: s501 – The character test, visa refusal and cancellation*, 24 April 2017, para 3.3.
[33] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 ('*Palme*').
[34] *Palme* (2003) 216 CLR 212, [80] (Kirby J).

for those… with a proficiency in the English language which many recipients would not enjoy'.[35] That practice is continued in the current policy.[36] It is submitted that situating the AAT at the apex of decision-making on the merits for all visa refusal and cancellation decisions, and adopting the two-tiered process described in Part 4, would improve the AAT's performance of its communicative function. In particular, it would enable the AAT to 'lead by example'[37] and '[impress] upon managers in the public service the need to… regulate and monitor decision-making processes'.[38]

IV Ambit of the AAT's jurisdiction to review ministerial decisions

In issue is whether the AAT's jurisdiction to review ministerial decisions to cancel or refuse visas on character grounds should be expanded. That question must be answered by reference to the essential function of merits review in improving administrative decision-making, and to the position of the AAT as the pre-eminent forum for federal merits review. The basic function of merits review is to determine whether, on the material before the review authority, the decision of the primary decision-maker was the 'correct or preferable' decision to make.[39] The AAT is responsible for remedying decisions which 'in the [Tribunal's] view [are] not acceptable when tested against the requirements of good government'.[40] An essential feature of 'good government',[41] as identified in the statutory objects of the AAT Act,[42] is the maintenance of public confidence in administrative decision-making. The scheme of the AAT Act safeguards this public confidence by establishing a generalist merits review tribunal,[43] the administration of which falls entirely outside the 'portfolio responsibility of [any particular] minister [or] agency whose decisions are under review'.[44] Indeed, the AAT Act's 'very broad operation across the board of

[35] *Palme* (2003) 216 CLR 212, [80] (Kirby J).
[36] Minister for Immigration and Border Protection (Cth), above n 32, para 3.3.
[37] Cane and McDonald, above n 3, 235.
[38] Cane and McDonald, above n 3, 235.
[39] *Drake (No 1)* (1979) 24 ALR 577, 589 (Bowen CJ and Deane J).
[40] *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 41 FLR 338, 368 (Smithers J) ('*Brian Lawlor*').
[41] *Brian Lawlor* (1979) 41 FLR 338, 368 (Smithers J).
[42] *AAT Act* s 2A(d).
[43] *AAT Act* s 5.
[44] Administrative Review Council, above n 15, [8.20]-[8.22].

federal administrative decisions'[45], coupled with its extensive depth of *de novo* review facilities,[46] has made the AAT a 'significant mechanism… for holding government accountable'.[47]

The exercise of the ministerial powers contained in ss 501(3),[48] 501A(2) and (3),[49] 501B,[50] 501BA(2),[51] and 501C(4)[52] is not currently reviewable by the AAT. These five powers therefore present suitable candidates for future integration into the AAT's jurisdiction. For analytical purposes, these powers can be organised into two overlapping groups.

The first group comprises ss 501(3), 501A(2) and (3), 501B, and 501BA(2). The common feature of these powers is the condition that the Minister be satisfied that visa cancellation or refusal 'is in the national interest'. Relevantly, the absence of any express criteria to identify what is 'in the national interest' has left ample scope for ministerial policy[53] and Ministerial Directions[54] to give meaning to the 'national interest'.

The decisions to which the powers in this group relate can potentially be made by two[55] or three[56] decision-makers, depending on the involvement of a delegate of the Minister or the AAT. This multiplicity of possible decision-makers inevitably carries with it the attendant risk of inconsistent decision-making, as each decision-maker will interpret the applicable policies[57] and Directions[58] through the prism of their own nuanced conception of the 'national interest'. This risk is exacerbated by the fact that the 'national interest' is a highly opaque discrimen for

[45] *Allan v Transurban City Link Ltd* (2001) 208 CLR 167, [68] (Kirby J).
[46] Cane and McDonald, above n 3, 234.
[47] Cane and McDonald, above n 3, 234.
[48] *Migration Act* s 500(4)(b).
[49] *Migration Act* s 501A(7).
[50] *Migration Act* s 501B(4).
[51] *Migration Act* s 501BA(5).
[52] *Migration Act* s 501C(11).
[53] Minister for Immigration and Border Protection (Cth), *Procedures Advice Manual III: s501 – The character test, visa refusal and cancellation*, 24 April 2017.
[54] Minister for Immigration and Border Protection (Cth), *Direction no. 65 — Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s 501CA*, 22 December 2014.
[55] *Migration Act* ss 501B, 501(3), 501C.
[56] *Migration Act* ss 501A, 501BA.
[57] Minister for Immigration and Border Protection (Cth), *Procedures Advice Manual III: s501 – The character test, visa refusal and cancellation*, 24 April 2017.
[58] Minister for Immigration and Border Protection (Cth), *Direction no. 65 — Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s 501CA*, 22 December 2014.

administrative decision-making.[59] Even when the Directions do articulate 'primary' and 'other' considerations going to the 'national interest', they do not explain what weight is to be accorded to the specific matters identified under each of these headings.[60]

The second group of powers comprises those contained in ss 501A, 501B, 501BA and 501C. These provisions are constructed as a ministerial power to set aside a previous decision, whether of a delegate or of the AAT. They can be contrasted with a "first instance" power of the type conferred by s 501(3). These four powers secure the supremacy of the Minister by situating the Minister at the apex of the process of decision-making on the merits, subject of course to judicial review. In their legal operation, these provisions withdraw decisions to refuse or cancel visas on character grounds from the supervisory jurisdiction of the AAT. In their practical operation, they fragment the merits review process by varying which decision-maker will assume the role of "final arbiter" at the conclusion of the review process. For ss 501A, 501B, 501BA and 501C, the Minister is the final arbiter. For the other decisions related to visa refusals and cancellations on character grounds, it is the AAT.

From the executive's viewpoint, establishing two separate regimes is understandable. It ensures that decisions related to these four powers will accord with the Minister's personal conception of the 'national interest'. But the bifurcated process lends itself to arbitrariness in the availability of merits review options. That is because the availability of merits review will turn simply on whether or not the Minister chooses to personally exercise one of its non-reviewable powers. A lucid illustration of this arbitrariness is the difference with which Immigration Minister Philip Ruddock and his successor, Amanda Vanstone, exercised these powers. In 2003-04, 80 per cent of visa refusals and cancellations emanated from Mr Ruddock's use of such powers.[61] In the very same financial year, after Ms Vanstone was appointed Immigration Minister, a mere 12 per cent of refusals and cancellations were made under these powers.[62] It is submitted that the availability of AAT merits review, as an independent forum for remedying defective executive decision-making, should never depend simply on the personal predisposition of the responsible Minister of the day.

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[59] *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 639 (Brennan J) ('*Drake No 2*').
[60] Mary Crock and Laurie Berg, *Immigration and Refugee Law in Australia: Law, Policy and Practice in Australia* (Federation Press, 2011) 539.

[61] Ibid 535.
[62] Ibid.

It is axiomatic that inconsistent decision-making 'suggest[s] an arbitrariness which is incompatible with commonly accepted notions of justice'.[63] But the need to curtail inconsistency assumes especial importance in the context of s 501 decisions, where refusal or cancellation often will expose the person to immigration or criminal detention. To remedy the potential for inconsistent treatment in the two ways analysed above, the ministerial powers contained in ss 501(3), 501A(2) and (3), 501B, 501BA(2), and 501C(4) should be reviewable by the AAT. This would locate the AAT at the apex of decision-making on the merits.

The AAT discharges a broader normative function of enhancing the quality of administrative decision-making. A generalist merits review forum like the AAT is better positioned to deal with tribunal decisions 'rais[ing] issues that have a broader significance and a potential long-term impact on [g]overnment administration'.[64] Policymakers can then use the reasons for these decisions to 'improve the quality of future agency decision making… to benefit all Australians'.[65] Although the AAT's previous decisions are not strictly binding on it, they nonetheless provide persuasive guidance.[66] In relation to the first group of above powers, consistency in decision-making would be advanced through the emergence of reasoned decisions on the content of 'national interest'. The emergence of such "quasi-precedents" would provide clear illustrations of how to weigh and balance the 'primary' and 'other' considerations of what is 'in the national interest'. In this way, the AAT's position as the final decision-maker on the merits would plug the existing lacunae in ministerial policy and Directions. In relation to the second group of powers, AAT review would secure the Tribunal's position as the final arbiter of 'the requirements of good government'.[67] More importantly, it would go a long way towards extinguishing the arbitrariness in the availability of merits review options that arises from personally exercisable ministerial powers.

These conclusions are not affected by the existence of some intractable tension between the community's general interest in the 'consisten[t]… treatment of [persons] under the law' and the

[63] *Drake No 2* (1979) 2 ALD 634, 639 (Brennan J).
[64] Administrative Review Council, above n 15, *x*.
[65] Administrative Review Council, above n 15, *x*.
[66] Garry Downes, 'The Administrative Appeals Tribunal – Its Role in the Regulation of the Insurance Industry' (Speech delivered to the Australian Insurance Law Association – Northern Territory Branch – Seminar, Darwin, 11 April 2006).
[67] *Brian Lawlor* (1979) 41 FLR 338, 368 (Smithers J).

individual's idiosyncratic 'ideal of justice in the [particular] case'.[68] To the contrary, if a two-tiered process is adopted, no such tension emerges. A two-tiered process would partition the caseload of the five ministerial powers into two classes: (i) those involving 'simple questions of fact and the application of settled law'[69] and (ii) those involving 'substantial questions of law or of mixed fact and law',[70] 'rais[ing] issues of general principle',[71] or 'involv[ing]… manifest error'.[72] The first genus of cases would proceed to a straightforward first instance determination, while the second genus would be remitted to an appellate review panel for more comprehensive analysis. Distributing the caseload between these two facilities would ensure that settled law is applied in a consistent manner to clear facts, vindicating the community's general interest in equal treatment of persons. The residue of complex cases would receive nuanced appellate treatment according to the particular facts and issues agitated, thereby delivering individualised justice. Critically, this structure would fulfil Kirby J's extrajudicial aspiration that the AAT 'strik[e]… a just balance between the needs of the machinery of government and the interests of the individual'.[73]

V Conclusion

These submissions have suggested recommendations for future reform across all three aspects of the present inquiry's Terms of Reference. First, they express support (i) for conferring a limited right to legal representation on applicants for merits review and judicial review of s 501 decisions, and (ii) for repealing the statutory exclusion of the rules of natural justice in s 501(3). Second, these submissions illustrate how a two-tier merits review forum for s 501 decisions would be better positioned than the present single-level structure to discharge the AAT's efficiency, insulating, and communicative functions. Third, they explain how public confidence in administrative decision-making would be bolstered by expanding the AAT's jurisdiction to review the exercise of ministerial powers contained in ss 501(3), 501A(2) and (3), 501B, 501BA(2), and 501C(4). At their most basal level, these submissions emphasise the paramount importance of improving the quality of decision-making in the federal administrative setting.

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[68] *Drake (No 1)* (1979) 24 ALR 577, 590 (Bowen CJ and Deane J).
[69] Administrative Review Council, above n 15, [3.64].
[70] Administrative Review Council, above n 15, [8.5].
[71] Administrative Review Council, above n 15, [8.51].
[72] Administrative Review Council, above n 15, [8.60].
[73] Michael Kirby, 'Administrative Review on the Merits: The Right or Preferable Decision' (1980) 6 *Monash University Law Review* 171, 194.

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