Administrative Appeals Tribunal

SUBMISSION TO THE JOINT STANDING COMMITTEE ON MIGRATION

INQUIRY INTO THE REVIEW PROCESSES ASSOCIATED WITH VISA CANCELLATIONS MADE ON CRIMINAL GROUNDS

CONTENTS

INTRODUCTION

1. The Administrative Appeals Tribunal (AAT) welcomes the opportunity to participate in this inquiry. This submission provides general information about the AAT and our role as well as information about the AAT's jurisdiction to review decisions made under the *Migration Act 1958* (Migration Act) to refuse to grant, or to cancel, visas made on character-related grounds.

ABOUT THE AAT

ESTABLISHMENT, ROLE AND OBJECTIVE

2. The AAT was established by the *Administrative Appeals Tribunal Act 1975* (AAT Act) and commenced operations on 1 July 1976. On 1 July 2015, the Migration Review Tribunal, Refugee Review Tribunal and the Social Security Appeals Tribunal were amalgamated with the AAT.

3. The AAT conducts independent merits review of administrative decisions that have been made under Commonwealth laws. Merits review involves taking a fresh look at the facts, law and policy relating to a decision. We consider all the material that is before us and must determine what is the correct or preferable decision in the case. In most cases, the AAT takes into account new information that was not available to the original decision-maker.

4. When reviewing a decision, the AAT can exercise all of the power and discretions available to the original decision-maker. We have the power to:

   - affirm a decision;
   - vary a decision;
   - set aside a decision and substitute a new decision; or
   - remit a decision to the original decision-maker for reconsideration.

5. In carrying out our functions, the AAT must pursue the objective of providing a mechanism of review that:

   - is accessible; and
   - is fair, just, economical, informal and quick; and
   - is proportionate to the importance and complexity of the matter; and
   - promotes public trust and confidence in the decision-making of the Tribunal.[1]

STRUCTURE

6. The AAT consists of:

   - the President who must be a judge of the Federal Court of Australia;
   - Deputy Presidents;
   - Senior Members; and
   - Members.

[1] Section 2A of the AAT Act.

Members of the AAT are appointed by the Governor-General on a full-time or part-time basis for a term of up to seven years. Their primary role is to conduct hearings and determine applications for review of decisions.

7. Applications to the AAT are managed in one of the following eight divisions:

   - Freedom of Information Division;
   - General Division;
   - Migration and Refugee Division;
   - National Disability Insurance Scheme Division;
   - Security Division;
   - Social Services and Child Support Division;
   - Taxation and Commercial Division; and
   - Veterans' Appeals Division.

   The President and Deputy Presidents can exercise powers in any of the divisions. Senior Members and Members may only exercise powers in the division(s) to which they have been assigned by the Attorney-General following any consultation required with other Ministers.[2]

8. The Registrar and staff of the AAT assist the members to perform their functions.

JURISDICTION, CASELOAD AND PROCEDURES

9. The AAT does not have a general power to review decisions. We can only review a decision if an Act, regulation or other legislative instrument states that the decision can be reviewed by the AAT. Currently, we can review decisions made under more than 400 enactments.

10. The types of decisions the AAT most commonly reviews relate to:

    - child support;
    - citizenship;
    - family assistance and social security;
    - migration and refugee visas;
    - the National Disability Insurance Scheme;
    - taxation;
    - veterans' entitlements; and
    - workers' compensation under Commonwealth laws.

11. The following table shows the size of the AAT's caseload by division since 1 July 2015.

APPLICATIONS LODGED WITH THE AAT – 2015–16 TO 2017–18			
Division	**2015–16**	**2016–17**	**2017–18 to 31 Mar 2018**
Freedom of Information	37	44	38
General	5,460	5,798	4,007
Migration and Refugee	18,929	26,604	27,902

[2] See sections 17A to 17H of the AAT Act.

APPLICATIONS LODGED WITH THE AAT – 2015–16 TO 2017–18			
Division	**2015–16**	**2016–17**	**2017–18 to 31 Mar 2018**
National Disability Insurance Scheme	48	215	546
Security	16	10	3
Social Services and Child Support	15,543	17,450	9,667
Taxation and Commercial	1,057	975	549
Veterans' Appeals	342	330	268
TOTAL	**41,432**	**51,426**	**42,980**

12. The AAT's review procedures vary depending on the type of decision we are reviewing and the division dealing with the application. These differences reflect requirements set out in the AAT Act, the Migration Act and social services legislation as well as particular case management approaches we have developed to deal with the broad range of decisions we review. The AAT's procedures are designed to ensure that the applicant and any other party to a review have a reasonable opportunity to present their case.

REVIEW OF DECISIONS ABOUT VISAS MADE ON CHARACTER-RELATED GROUNDS

OVERVIEW

13. The AAT has jurisdiction to review various decisions made under the Migration Act about a wide range of visas which permit non-citizens to travel to, enter and remain in Australia on a permanent or temporary basis.

14. Applications to the AAT for review of decisions about visas made on character-related grounds are dealt with in the General Division.[3] The jurisdiction to review the following decisions is set out in section 500 of the Migration Act:

- to refuse to grant a visa or to cancel a visa under section 501 because the non-citizen does not pass the character test[4];
- a decision under section 501CA not to revoke a mandatory cancellation of a visa under section 501[5];
- to refuse to grant a protection visa under section 65 relying on section 5H(2), 36(1C) or 36(2C)(a) or (b) which, in broad terms, may apply where it is considered that the non-citizen has committed certain types of international or other crimes or acts, or is a danger to Australia's security or the Australian community.[6]

15. The following table shows the number of applications for review of decisions relating to visas dealt with in the General Division lodged with the AAT in 2015–16, 2016–17 and 2017–18 to 31 March 2018.

[3] These applications were also dealt with by the AAT prior to 1 July 2015.
[4] Section 500(1)(b) of the Migration Act.
[5] Section 500(1)(ba) of the Migration Act. Section 501CA and the AAT's jurisdiction to review decisions made under section 501CA(4) commenced on 11 December 2014.
[6] Section 500(1)(c) of the Migration Act.

APPLICATIONS FOR REVIEW OF DECISIONS RELATING TO VISAS DEALT WITH IN THE GENERAL DIVISION LODGED WITH THE AAT – 2015–16 TO 2017–18			
Decision type	**2015–16**	**2016–17**	**2017–18 to 31 Mar 2018**
Decision to refuse to grant or to cancel a visa under section 501	35	71	65
Decision under section 501CA not to revoke a mandatory cancellation of a visa	41	107	89
Decision to refuse to grant a protection visa relying on section 5H(2), 36(1C) or 36(2C)(a) or (b)	1	5	12
TOTAL	**77**	**183**	**166**

16. The jurisdiction of the AAT's Migration and Refugee Division is set out in Parts 5 and 7 of the Migration Act and the *Migration Regulations 1994* (Migration Regulations) and includes decisions to refuse to grant a visa and to cancel a visa on a broad range of grounds as well as decisions about sponsorship and nominations for visa purposes.[7] Among the decisions subject to review are decisions to cancel a visa under section 116 of the Migration Act which provides for certain grounds that may involve consideration of, or relate to, criminal charges or convictions.[8] The number of applications relating to decisions made on these types of bases is a small part of the caseload.[9]

17. The AAT is not permitted to review any decision that has been made personally by the Minister administering the Migration Act under section 116, 501 or 501CA of the Migration Act.[10] The AAT can only review such decisions if they have been made by a delegate of the Minister.

18. The remainder of the submission focuses on the review of decisions made under section 501 and 501CA of the Migration Act.

REVIEW OF DECISIONS MADE UNDER SECTION 501 OF THE MIGRATION ACT

19. The AAT has jurisdiction to review a decision made by a delegate of the Minister:

- to refuse to grant any class of visa to a person under section 501(1) of the Migration Act on the basis that the person did not satisfy the delegate that he or she passed the character test; and
- to cancel any class of visa under section 501(2) on the basis that the delegate reasonably suspected that the person did not pass the character test and the person did not satisfy the delegate that he or she passed the character test.

[7] Sections 338 and 411 of the Migration Act and regulation 4.02 of the Migration Regulations. Prior to 1 July 2015, these matters were dealt with by the Migration Review Tribunal and the Refugee Review Tribunal.
[8] See, for example, the grounds for cancellation set out in section 116(1)(e) of the Migration Act and regulations 2.43(1)(oa) and (p) of the Migration Regulations.
[9] An assessment of applications finalised in 2016–17 indicates approximately 130 applications were matters of this kind.
[10] See sections 338(3)(d), 411(2) and 500(1)(b) and (ba) of the Migration Act.

20. The character test is set out in section 501(6) of the Migration Act. It provides that a person does not pass the test in a range of circumstances. These include:

    - the person has a substantial criminal record as defined in section 501(7) which includes if the person has been sentenced to death, to imprisonment for life or to one or more terms of imprisonment totalling 12 months or more, or the person has been acquitted on the grounds of unsoundness of mind or insanity or found not fit to plead and, as a result, has been detained in a facility or institution;
    - the person has been convicted of an offence connected with immigration detention;
    - the decision-maker reasonably suspects that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person that has been or is involved in criminal conduct;
    - the decision-maker reasonably suspects that the person has been or is involved in people smuggling or trafficking, or international crimes such as genocide or war crimes;
    - the person is not of good character because of their past and present criminal conduct, and/or their past and present general conduct;
    - there is a risk that the person would engage in criminal conduct in Australia or harass, molest, intimidate or stalk another person in Australia; or
    - the person has been found guilty of one or more sexually based offences involving a child.

21. When reviewing a decision of a delegate made under section 501(1) or (2), the AAT must consider:

    - first, whether or not the person passes the character test; and
    - secondly, if the person does not pass the character test, whether to exercise the discretion to refuse to grant or to cancel the visa.

    Further information relating to the AAT's decision-making task is set out below.

22. A table showing the outcomes of applications for review of decisions made under section 501 finalised by the AAT in 2015–16, 2016–17 and 2017–18 to 31 March 2018 is set out in Appendix A to this submission.

REVIEW OF DECISIONS MADE UNDER SECTION 501CA OF THE MIGRATION ACT

23. Since 11 December 2014, the AAT has had jurisdiction to review a decision made by a delegate of the Minister under section 501CA(4) of the Migration Act not to revoke the mandatory cancellation of a visa under section 501(3A).

24. Any class of visa must be cancelled under section 501(3A) if:

    - the person does not pass the character test because the person:
        - has a substantial criminal record on the basis that the person was sentenced to death, to imprisonment for life or to a term of imprisonment of 12 months or more; or
        - has been found guilty of a sexually based offence involving a child; and

- the person is serving a sentence of imprisonment on a full-time basis in a custodial institution for an offence against a law of the Commonwealth, a State or a Territory.

25. The person may then request under section 501CA that the decision be revoked. If a request is made and the delegate decides not to revoke the mandatory cancellation, the person may apply to the AAT for review of that decision.

26. When reviewing a decision of a delegate made under section 501CA(4), the AAT must consider:

    - first, whether or not the person passes the character test; and
    - secondly, whether the discretion to revoke the cancellation should be exercised on the basis that there is another reason why the original decision should be revoked that is not outweighed by other factors.

    Further information relating to the nature of the AAT's decision-making task is set out below.

27. A table showing the outcomes of applications for review of decisions made under section 501CA finalised by the AAT in 2015–16, 2016–17 and 2017–18 to 31 March 2018 is set out in Appendix A to this submission.

REVIEW PROCEDURES FOR DECISIONS MADE UNDER SECTION 501 AND 501CA OF THE MIGRATION ACT

28. The procedures that apply to the review of decisions under section 501 and 501CA of the Migration Act vary depending on whether the visa applicant or former visa holder who is the subject of the decision is or is not in Australia. The majority of applications are made by visa applicants or former visa holders who are in Australia.

29. In all cases, the AAT is required to undertake the review with as little formality and technicality and with as much expedition as possible.[11] The AAT is not bound by the rules of evidence.[12]

Visa applicant or former visa holder in Australia

30. Where the non-citizen who is the subject of the decision is in Australia, the review must be completed within 84 days after the person was notified of the reviewable decision. The AAT's usual procedures are modified for reviews of this kind, particularly by sections 500(6A) to (6L) of the Migration Act.[13]

31. A summary of the procedures follows. They are also set out in the AAT fact sheet 'Expedited review of decisions under section 501 or 501CA of the *Migration Act 1958*' which is Attachment 1 to this submission.

[11] Section 33(1)(b) of the AAT Act.
[12] Section 33(1)(c) of the AAT Act.
[13] These modifications set out in the Migration Act only applied to decisions made under section 501CA(4) on or after 23 February 2017.

Applying for review and initial procedures

32. An application for review of a decision under section 501 or 501CA must be lodged within nine (9) days after the person was notified of the decision in accordance with section 501G(1) of the Migration Act.[14] The AAT has no power to extend the time for lodging the application.

33. The application must:

- be in writing and contain a brief statement of the reasons for application[15]; and
- be accompanied by a copy of the document notifying the person of the decision as well as one of two sets of the documents relevant to the making of the decision which were provided when the person was notified of the decision.[16]

The application may be lodged in person, by post, by email, by fax or using the AAT's online form.

34. An application fee of $884 must be paid.[17] A reduced fee of $100 is payable in certain concessional circumstances, which include where a person is in prison or otherwise detained.[18] The application may be dismissed if the fee has not been paid within six (6) weeks after the application was lodged.[19]

35. After receiving a valid application, the AAT notifies the Minister via the Department of Home Affairs that an application has been made.[20] Within 14 days, the Minister must provide to the AAT any further documents relevant to the decision that contain information that must not be disclosed to the applicant.[21]

Representation

36. The applicant may be represented.[22] In applications for review of decisions made under section 501 and 501CA of the Migration Act finalised between 1 July 2015 and 31 March 2018, approximately half of all applicants were represented by a lawyer, migration agent or other advocate.

37. The Minister is always represented in these types of cases, generally by an external legal service provider, and is an active participant in the review.

Outreach and directions hearing

38. Within one (1) week after the application has been lodged, 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.

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[14] Section 500(6B) of the Migration Act.
[15] Section 29(1)(a) and (c) of the AAT Act.
[16] Section 500(6C) of the Migration Act.
[17] Section 29(1)(b) of the AAT Act and section 20(1) of the *Administrative Appeals Tribunal Regulation 2015* (AAT Regulation).
[18] Section 20(3) and 21 of the AAT Regulation.
[19] Section 69C of the AAT Act and section 24 of the AAT Regulation.
[20] Section 500(6D) of the Migration Act.
[21] Section 500(6F) of the Migration Act.
[22] Section 32 of the AAT Act.

39. Within approximately two (2) weeks after lodgement, 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.

40. The directions hearing is an opportunity for the AAT member to:

- explain to a self-represented applicant the AAT's role and procedures and what the AAT must decide in the review;
- discuss with the parties the issues to be determined in the case, the further documentary evidence the parties may lodge and whether they wish to call any witnesses at the hearing;
- set a timetable for the parties to lodge further documents and submissions; and
- discuss any matters relating to the arrangements for the hearing.

Additional material

41. The applicant and the Minister may lodge additional information they would like the AAT to consider, including affidavits or witness statements, expert reports or letters of support. If required, either party may request that the AAT issue a summons for the production of documents that will be relevant to the review.

42. If the applicant wants the AAT member to take into account any evidence in support of their case to be presented orally at the hearing, including from another witness, the proposed evidence must be set out in a written statement and given to the Minister's representatives at least 2 business days before the hearing.[23] Similarly, any additional documents on which an applicant wishes to rely must be given to the Minister at least 2 business days before the hearing.[24] Otherwise the Tribunal cannot have regard to the information in reaching the decision.

Hearing and decision

43. The AAT member conducts a hearing unless the application has otherwise been resolved.[25] Depending on the location of the applicant, the representatives, the AAT member and any witnesses to be called, the hearing will be conducted in an AAT hearing room with all participants in person or with one or more participants attending by video link or by telephone.

44. The applicant and any other witnesses arranged by the parties give evidence on oath or affirmation. The parties and the AAT member can ask questions of the witnesses. The parties can submit additional documents and make submissions about the decision under review.

45. The AAT must determine the application within 84 days after the date on which the applicant was notified of the decision. If it does not do so, the decision under review is taken to be affirmed under section 500(6L) of the Migration Act.

[23] Section 500(6H) of the Migration Act.
[24] Section 500(6J) of the Migration Act.
[25] An application may be finalised in accordance with terms of agreement reached by the parties, withdrawn by the applicant or dismissed by the AAT.

46. The AAT member must give their reasons for the decision orally or in writing. In section 501 or 501CA reviews, reasons are usually given in writing. The AAT must include the Tribunal's findings on material questions of fact and refer to the evidence or other material on which those findings were based.

47. The AAT's decisions with written reasons are generally published on AustLII and made available to other legal publishers in these types of cases. If the visa that was refused or cancelled is a protection visa or protection-related bridging visa, section 501K of the Migration Act requires that the AAT not publish any information that may identify the applicant or their relatives and dependants. More generally, the AAT member may, if the circumstances warrant it, make a direction under section 35 of the AAT Act either that the reasons for decision not be published or that the applicant or other persons not be identified in the published decision.

Visa applicant or former visa holder outside Australia

48. If the visa applicant or former visa holder who is the subject of the decision under section 501 or 501CA is outside Australia, the AAT's normal procedures under the AAT Act apply. These differ from the procedures described above in the following key ways.

- The time limit for lodging an application is 28 days after the person is given the decision. This time limit may be extended if the AAT is satisfied it is reasonable in all the circumstances to do so.[26]
- The Minister is required to give all of the documents that are relevant to the review to the AAT within 28 days after being notified of an application.[27] Subject to any non-disclosure directions, a copy must also be given to the review applicant.[28]
- The AAT generally refers the application to a conference conducted by an AAT staff member known as a Conference Registrar rather than holding a directions hearing. In addition to the types of matters discussed at a directions hearing, conferencing provides an opportunity for the AAT Conference Registrar to explore with the parties whether the application can be resolved by agreement.
- The provisions of the Migration Act that prohibit the AAT from having regard to any oral or documentary evidence in support of the applicant's case not given by the applicant to the Minister's representatives in advance of the hearing do not apply. However, the AAT's general procedures ensure that all information the parties intend to rely on at any hearing is lodged and exchanged as early as possible in the review.
- The AAT is not required to complete the review within 84 days after the date the person was notified of the decision.

[26] Sections 29(2) and (7) of the AAT Act.
[27] Section 37(1) of the AAT Act.
[28] Section 37(1AE) of the AAT Act.

THE AAT'S TASK WHEN REVIEWING A DECISION MADE UNDER SECTION 501 OR 501CA OF THE MIGRATION ACT

49. When reviewing a decision made under section 501 or 501CA of the Migration Act, the AAT 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.

    Such a direction must be applied by any person or body (other than the Minister) making decisions to which the direction applies.

50. A series of directions has been made under section 499 providing different considerations over time in relation to making decisions under section 501 of the Migration Act. The current direction, which also applies to making decisions under section 501CA, is 'Direction no. 65 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA' which commenced on 23 December 2014. A copy of this direction is Attachment 2 to this submission.

51. Direction no. 65 provides:

    - direction on the application of the character test; and
    - the framework within which decision-makers should approach their task of deciding whether to exercise the discretion to refuse to grant or to cancel a visa under section 501 or to revoke under section 501CA a mandatory visa cancellation, including considerations to be taken into account, where relevant.

52. When considering the exercise of the discretion, the AAT must, informed by the general guidance and principles set out in paragraphs 6.2 and 6.3 of the direction, take into account the primary considerations and the other considerations that are relevant to the individual case. 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.

53. The primary considerations which must be taken into account, whenever relevant, are:

    - protection of the Australian community from criminal or other serious conduct, comprising:
        - the nature and seriousness of the conduct; and
        - the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct;
    - the best interests of minor children in Australia; and
    - the expectations of the Australian community.

54. The other considerations which must be taken into account, whenever relevant, are:

- international non-refoulement obligations not to forcibly return, deport or expel a person to a place where they will be at risk of certain types of harm;
- the impact on members of the Australian community, including victims of the non-citizen's criminal behaviour and the family members of the victim or victims, where that information is available; and
- the impact on Australian business interests.

55. Where the decision under review is to cancel a visa under section 501 of the Migration Act or not to revoke under section 501CA a mandatory visa cancellation, the following other considerations must also be taken into account, whenever relevant:

- the strength, nature and duration of the person's ties to Australia, including:
  - how long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child;
  - the strength, duration and nature of any family or social links with Australian citizens, Australian permanent residents or people who have an indefinite right to remain in Australia, including the effect of cancellation or non-revocation on the non-citizen's immediate family in Australia;
- the extent of any impediments the non-citizen may face if removed to their home country, in establishing themselves and maintaining basic living standards taking into account the person's age and health, any substantial language or cultural barriers and any social, medical and/or economic support available to them in that country.

56. Where the decision under review is to refuse to grant a visa under section 501 of the Migration Act, the following other consideration must also be taken into account, whenever relevant:

- the impact of visa refusal on family members in Australia, where those family members are Australian citizens, Australian permanent residents or people who have an indefinite right to remain in Australia.

57. Any other relevant considerations must also be taken into account when making a decision.

58. The general nature of the AAT's decision-making task was described in *Drake v Minister for Immigration and Ethnic Affairs*:

> *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.*[29]

59. When reviewing decisions under section 501 and 501CA, the AAT member must apply the Migration Act and Direction No. 65 in light of all of the material that is properly before the Tribunal, including additional information presented during the review process.

[29] (1979) 2 ALD 60 at 68 per Bowen CJ and Deane J.

JUDICIAL REVIEW OF AAT DECISIONS MADE UNDER SECTION 501 OR 501CA OF THE MIGRATION ACT

60. The applicant or the Minister may apply to the Federal Court under Part 8 of the Migration Act for judicial review of the AAT's decision on a review of a decision made under section 501 or 501CA. The following table provides information about the number of judicial review applications lodged and the number and outcomes of applications finalised in relation to such decisions in 2015–16, 2016–17 and 2017–18 to 31 March 2018.

JUDICIAL REVIEW APPLICATIONS LODGED AND FINALISED REGARDING DECISIONS MADE UNDER SECTION 501 OR 501CA OF THE MIGRATION ACT – 2015–16 TO 2017–18

Year	Lodged			Finalised		
	Applicant	Minister	Total	Allowed	Dismissed or discontinued	Total
2015–16	4	0	4	1	3	4
2016–17	26	0	26	2	7	9
2017–18 to 31 March 2018	28	0	28	10	13	23
TOTAL	**58**	**0**	**58**	**13**	**23**	**36**

MINISTER'S POWER TO SET ASIDE AAT DECISIONS MADE UNDER SECTION 501 OR 501CA OF THE MIGRATION ACT

61. Section 501A of the Migration Act permits the Minister, acting personally, to set aside a decision that the AAT has made not to exercise the power to refuse to grant or to cancel a visa under section 501 of the Migration Act. Pursuant to section 501BA, the Minister may personally set aside an AAT decision under section 501CA to revoke a mandatory visa cancellation. The Minister may, if satisfied it is in the national interest, make a new decision refusing to grant or cancelling the relevant visa.

62. In relation to any decision made by the AAT about a refusal to grant or to cancel a protection visa, section 501J of the Migration Act permits the Minister, acting personally, to set aside the AAT's decision and substitute another decision that is more favourable to the applicant.

ATTACHMENTS

1. AAT Fact Sheet: Expedited review of decisions under section 501 or 501CA of the *Migration Act 1958*
2. Direction no. 65 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA

APPENDIX A

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**			**2017–18 to 31 Mar 2018**		
	Section 501[a]	**Section 501CA[b]**	**Total**	**Section 501[a]**	**Section 501CA[b]**	**Total**	**Section 501[a]**	**Section 501CA[b]**	**Total**
By decision under section 43 of the AAT Act									
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**
By consent									
Decision affirmed[c]	0	0	**0**	0	0	**0**	0	0	**0**
Decision varied or set aside[c]	0	0	**0**	2	0	**2**	3	0	**3**
Dismissed by consent[d]	0	0	**0**	0	0	**0**	0	2	**2**
Other									
Withdrawn by applicant	2	1	**3**	7	17	**24**	4	4	**8**
Dismissed by Tribunal[e]	0	0	**0**	0	6	**6**	1	1	**2**
No jurisdiction to review[f]	4	4	**8**	7	11	**18**	8	14	**22**
TOTAL	**17**	**9**	**26**	**64**	**102**	**166**	**70**	**100**	**170**

[a] Decisions under section 501 of the Migration Act to refuse to grant a visa or to cancel a visa.
[b] Decisions under section 501CA of the Migration Act not to revoke a mandatory visa cancellation under section 501(3A).
[c] Applications finalised by a decision of the AAT under section 34D or 42C of the AAT Act in accordance with terms of agreement reached by the parties.
[d] Applications dismissed by consent under section 42A(1) of the AAT Act.
[e] Applications dismissed by the AAT under section 42A(2) (non-appearance at a case event), section 42A(5) (failure to proceed with an application or to comply with a direction of the AAT) and section 42B(1) (application is frivolous, vexatious, misconceived, lacking in substance, has no reasonable prospect of success or is an abuse of the process of the AAT).
[f] Applications finalised on the basis that 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 has not been paid.

Administrative Appeals Tribunal

Fact Sheet

EXPEDITED REVIEW OF DECISIONS UNDER SECTION 501 OR 501CA OF THE *MIGRATION ACT 1958*

Information for applicants in Australia

When this Fact Sheet refers to "you" it means the applicant and his or her representative. When it refers to "we" or "us" it means the AAT.

This fact sheet is for people in Australia who want the Administrative Appeals Tribunal (AAT) to review a decision made by a delegate of the Minister for Home Affairs (the Minister) under the *Migration Act 1958*:

- to refuse or cancel your visa on character grounds under section 501, or
- to not revoke the mandatory cancellation of your visa on character grounds under section 501CA.

Special rules apply to the review when you are the visa applicant or the person whose visa was cancelled, and you are in Australia. This fact sheet provides information about:

- what you need to do, and
- what we do when we review the decision.

For more information about the review of decisions under section 501 or 501CA when the visa applicant or the person whose visa was cancelled is not in Australia, go to our website or call us. Our contact details are at the end of this fact sheet.

How do I apply?

You must apply to us in writing. You can either:

- apply online at www.aat.gov.au/apply-online
- fill out an application form which is available:
  - on the Forms page on our website, or
  - by calling us
- write us a letter, or
- send us an email.

If you write us an application letter or an email, it must include:

- your name, address and telephone number and, if you want to receive documents from us by email, your email address
- the date you received the decision
- brief reasons why you think the decision is wrong, and
- **a copy of the decision** and **one of the two sets of documents** you were given when the Department of Home Affairs (the Department) notified you of the Minister's decision.

If you do not apply online, you can lodge your application at one of our offices or send your application by post, email or fax.

Is there a time limit for applying to the AAT?

Yes. You must lodge your application for review **within 9 days** after the day on which you received a copy of the Minister's decision and the two sets of documents from the Department. If the ninth day is a Saturday, Sunday or public holiday, you must lodge your application by the next working day.

We have no power to extend the time limit for lodging your application for review.

Is there an application fee?

Yes. The **standard application fee** is **$884**. However, you are entitled to pay a **reduced fee of $100** if:

- you are in prison or in immigration detention
- you have been granted legal aid for your application
- you hold a health care card, pensioner concession card, Commonwealth seniors health card, or any other card issued by the Commonwealth that certifies entitlement to Commonwealth health concessions
- you are under 18 years of age or receiving youth allowance, Austudy or ABSTUDY, or
- we decide that paying the standard application fee would cause you **financial hardship**.

To apply for a fee reduction on financial hardship grounds, you must fill out the **Request for Fee Reduction form** which is available:

- on the Forms page on our website, or
- by calling us.

The fee can be paid in cash or by cheque, money order, EFTPOS, MasterCard or Visa.

We will not start the review until you pay the fee. We may dismiss your application if you do not pay the application fee within 6 weeks after lodging your application.

What do we do when we review a decision?

We are independent from the Minister and the Department. We take a fresh look at the information relevant to your case and decide if the Minister's decision should stay the same or be changed.

We must make a decision **within 12 weeks** after the day on which you were notified of the Minister's decision.

What happens next?

We will send you and the Department a letter confirming that we have received your application. We will also call you **within 1 week** of receiving your application to explain what happens next.

It is very important that we are able to contact you. If your telephone number or contact details change at any time, you must let us know immediately.

The Minister's representative

The Minister will usually be represented by a law firm. The Minister's representative will send you a letter notifying you of their contact details.

Once you have received this letter, you should **only** send documents relating to your application to us and to the Minister's representative, **not to the Minister or the Department**.

Do you need an interpreter or assistance with a hearing or speech impairment?

If you need an interpreter at any stage of your application, we will arrange and pay for an interpreter. If you have not already told us that you need an interpreter, contact us to let us know which language you speak.

If you have a hearing or speech impairment, contact us through the National Relay Service. For more information, visit www.relayservice.gov.au.

Do you need help from a lawyer, migration agent, friend or family member?

When we call you, we will talk to you about who can help you with your application. A lawyer or a migration agent can help you. A family member or a friend can also help you. If you want to, you can also handle your application yourself.

If you want a lawyer or a migration agent to represent you, you must arrange this yourself as soon as possible. We are not able to assist with any costs of a lawyer or migration agent. If you do get a lawyer or a migration agent, you must tell them to contact us to let us know that they are representing you.

Assistance for people in prison

There may be a Welfare Officer or Chaplain in the prison who can help you with your application. If someone in the prison is able to help you, please tell us the person's name, telephone number and the best times to contact that person. You should also ask the person to contact us.

Telephone Directions Hearing

Within 1 to 2 weeks of receiving your application, a Member will hold what is called a **Telephone Directions Hearing**. The Member will call you and the Minister's representative, and the three of you will talk about your case.

It is very important that you are available for the Telephone Directions Hearing.

If you are in prison or in immigration detention, we will arrange for you to have access to a telephone for the Directions Hearing. You should find out where that telephone will be and tell us what number we should call to reach you. You should do this at the same time as lodging your application for review.

If you are not in prison or immigration detention, you can come to the AAT to participate in the Directions Hearing in person. You should call us to let us know if you want to come in person.

If you have a lawyer or a migration agent to represent you, he/she will also participate in the Telephone Directions Hearing.

What you need for the Telephone Directions Hearing

It is important that you have all the documents that the Department gave you when they told you about the Minister's decision. You will have sent one of the two sets of these documents to us when you made your application. The Member will talk to you and the Minister's representative about what is in these documents.

What will be discussed during the Telephone Directions Hearing?

The Member will talk to you and the Minister's representative about your case. The Member may talk about:

- why the Minister made the decision
- why you think the Minister's decision is wrong
- what kind of information might support your case
- how to get information that might support your case
- time limits for providing information to the Minister's representative
- the information that the Minister's representative will provide
- when and where the Member will hold a Hearing
- whether you will appear in person at the AAT, or participate by video or telephone, and
- when the AAT must give you its decision.

At the end of the Telephone Directions Hearing, the Member might tell you to give more information to us and the Minister's representative by a certain date. The Member might also tell the Minister's representative to give you and us more information.

The Member might also decide to hold another Telephone Directions Hearing. If so, the Member will tell you the date and time.

Hearing

What is a Hearing?

A Hearing is an opportunity for you and the Minister's representative to present information and arguments about the Minister's decision to the Member who will decide your case.

When will the Hearing be?

We usually tell you the date and the time for the Hearing when we send you the letter confirming that we have received your application. If this changes, we will send you another letter confirming when the Hearing will take place.

Preparing for the Hearing

At the Hearing, you will have the chance to give us information which supports why you think the Minister's decision was wrong. You can also ask your family and friends and other people to give information to us about you and your situation. These people are called your witnesses.

There are special rules about giving this information to us. You must follow these rules if you want the Member to use the information when making the decision in your case. Please read the note below carefully.

Note: In deciding your case, the Member must take into account the matters referred to in **Direction No. 65** made by the Minister. A copy of this Ministerial Direction should be included in the set of documents that the Department gave you when they notified you of the Minister's decision. You should refer to the matters contained in this Direction when deciding what evidence you and any witnesses will give at the Hearing, and what documents (if any) you wish to refer to at the Hearing.

What to do if you want to give us information at the Hearing?

The information that you or anyone else gives us at the Hearing is called evidence. This includes anything you or your witnesses say to the Member and any documents you want the Member to look at, including references or other documents from family members, friends, employers and others.

Note: You must give the Minister's representative **written statements** of what you and your witnesses are going to say **at least 2 business days before the Hearing**.

You must also give the Minister's representative **any documents** you want the Member to consider **at least 2 business days before the Hearing**.

(A **business day** is a day that is ***not*** a Saturday, Sunday, or a public holiday in the ACT or in the place where the hearing is to be held.)

If you do not give the Minister's representative a copy of what you and your witnesses are going to say and any documents you want the Member to consider, **the Member cannot consider the evidence** when making the decision in your case.

You should **email or fax the documents to the Minister's representative** using the contact details in the letter they sent you. If you do not have access to email or a fax machine, you can **post the documents** to them preferably **by Express Post** to guarantee delivery as soon as possible.

If you do not have the representative's contact details, call us immediately and we will provide them to you.

You must also send copies of anything you send to the Minister's representative to us.

Do I need to tell my witnesses to come to the AAT Hearing?

You must arrange for your witnesses to come to the AAT on the day of your Hearing. If they cannot attend in person, they might be allowed to give their information to the Member by telephone. You should talk to the Member about this at the Telephone Directions Hearing or call us about it.

Where will the Hearing be?

Hearings are conducted in person at the AAT, unless the Member allows a person to participate by video or telephone. At the Telephone Directions Hearing, the Member will discuss with you where and how the Hearing will be held.

The Hearing will be held in a hearing room, which looks similar to a court room.

Will the Hearing be in public?

Hearings are generally held in public. However, the Member can decide to hold all or part of the Hearing in private if you or the Minister's representative asks for it to be in private. The

Member can also decide who will be in the room at a Hearing. You should talk to the Member about this at the Telephone Directions Hearing or call us about it.

What happens at a Hearing?

At the beginning of the Hearing, the Member may ask the Minister's representative to talk briefly about the main issues in your case.

You will have the chance to give your evidence to the Member. If you have complied with the special rules above about giving information to the Minister's representative, you can tell the Member about yourself and your situation and you can give any documents to the Member. Your witnesses can also tell the Member about you and your situation.

When you give your evidence at the Hearing, the Minister's representative and the Member can ask questions from you and your witnesses.

The Minister's representative will also have the chance to give information to the Member. If the Minister's representative has any witnesses, you and the Member can ask them questions.

After all the witnesses have spoken, both you and the Minister's representative will have an opportunity to make a final statement. This is a brief summary of why you think the Member should make a different decision.

When will you get your decision?

If there has been a Hearing, the Member will either give you a decision at the end of the Hearing or tell you that they need more time to make a decision. If you do not get a decision at the end of a Hearing, we will contact you when the decision is ready and send you a copy of the decision.

Contact us

For more information about the AAT and how we conduct reviews, go to our website or call us. Our staff can give you information about procedures but cannot give you legal advice.

Email: generalreviews@aat.gov.au

Post: AAT, GPO Box 9955, Your capital city (*Northern Territory residents should write to Adelaide*)

In person or by fax:

ADELAIDE Level 2 1 King William Street ADELAIDE SA 5000 **FAX (08) 8128 8099**	**BRISBANE** Level 6 295 Ann St BRISBANE QLD 4000 **FAX (07) 3052 3001**	**CANBERRA** Level 8 14 Moore St CANBERRA CITY ACT 2600 **FAX (02) 6243 4600**	**HOBART** Edward Braddon Building Commonwealth Law Courts 39–41 Davey St HOBART TAS 7000 **FAX (03) 6232 1601**
MELBOURNE Level 4 15 William St MELBOURNE VIC 3000 **FAX (03) 9454 6998**	**PERTH** Level 13 111 St Georges Terrace PERTH WA 6000 **FAX (08) 6222 7299**	**SYDNEY** Level 6 83 Clarence St SYDNEY NSW 2000 **FAX (02) 9276 5599**	

Telephone: If you want more information or assistance, call us on **1800 228 333** (calls are free from landline phones, however calls from mobiles may be charged).

Non-English speakers can call the Translating and Interpreting Service on **131 450** and ask them to call the AAT.

If you are deaf or have a hearing or speech impairment, contact us through the National Relay Service. For more information, visit www.relayservice.gov.au.

Website: www.aat.gov.au

DIRECTION NO. 65

MIGRATION ACT 1958

DIRECTION UNDER SECTION 499

Visa refusal and cancellation under s501
and
revocation of a mandatory cancellation of a visa under s501CA

I, SCOTT MORRISON, Minister for Immigration and Border Protection, give this Direction under section 499 of the *Migration Act 1958*.

Dated 22. 12 2014

Minister for Immigration and Border Protection

Section 1 Preliminary

1. Name of Direction

This Direction is Direction no. 65 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA.

It may be cited as Direction no. 65.

2. Commencement

This Direction commences on the day after it is signed.

3. Revocation

Direction no. 55, given under section 499 of the *Migration Act 1958* (the Act) and dated 25 July 2012, is revoked with effect from the date this Direction commences.

4. Interpretation

Where terms used in this Direction have a particular meaning, they are defined in Annex B.

5. Contents

This Direction comprises:

Preamble	Contains the Objectives of this Direction, General Guidance for decision-makers and the Principles that provide a framework within which decision-makers should approach their task of deciding whether to exercise the discretion to cancel or refuse a non-citizen's visa under section 501 or to revoke a mandatory cancellation under section 501CA.
Part A	Identifies the considerations relevant to visa holders in determining whether to exercise the discretion to cancel a non-citizen's visa.
Part B	Identifies the considerations relevant to visa applicants in determining whether to exercise the discretion to refuse a non-citizen's visa application.
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.
Annex A	Provides direction on the application of the character test. The character test is set out in section 501(6) of the Act.
Annex B	Defines terms used in the Direction.

6. Preamble

6.1 Objectives

(1) The objective of the Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.

(2) Under subsection 501(1) of the Act, a non-citizen may be refused a visa if the non-citizen does not satisfy the decision-maker that they pass the character test. A non-citizen may have their visa cancelled under subsection 501(2) if the decision-maker reasonably suspects that the non-citizen does not pass the character test, and the non-citizen does not satisfy the decision-maker that they pass the character test. Where the discretion to refuse to grant or to cancel a visa is enlivened, the decision-maker must consider whether to exercise the discretion to refuse or cancel the visa given the specific circumstances of the case.

(3) Under subsection 501(3A) of the Act, the decision-maker must cancel a visa that has been granted to a person if the decision-maker is satisfied that the person does not pass the character test because of the operation of paragraph (6)(a) (on the basis of paragraph (7)(a), (b) or (c) or paragraph (6)(e)) and the non-citizen is serving a sentence of imprisonment on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory. A

non-citizen who has had his or her visa cancelled under section 501(3A) may request revocation of that decision under section 501CA of the Act. Where the discretion to consider revocation is enlivened, the decision-maker must consider whether to revoke the cancellation given the specific circumstances of the case.

(4) The purpose of this Direction is to guide decision-makers performing functions or exercising powers under section 501 of the Act, to refuse to grant a visa or to cancel a visa of a non-citizen who does not satisfy the decision-maker that the non-citizen passes the character test, or to revoke a mandatory cancellation under section 501CA of the Act. Under section 499(2A) of the Act, such decision-makers must comply with a direction made under section 499.

6.2 General Guidance

(1) The Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. The principles below are of critical importance in furthering that objective, and reflect community values and standards with respect to determining whether the risk of future harm from a non-citizen is unacceptable.

(2) In order to effectively protect the Australian community from harm, and to maintain integrity and public confidence in the character assessment process, decisions about whether a non-citizen's visa should be refused or cancelled under section 501 should be made in a timely manner once a decision-maker is satisfied that a non-citizen does not pass the character test. Timely decisions are also beneficial to the client in providing certainty about their future.

(3) The principles provide a framework within which decision-makers should approach their task of deciding whether to refuse or cancel a non-citizen's visa under section 501, or whether to revoke a mandatory cancellation under section 501CA. The relevant factors that must be considered in making a decision under section 501 of the Act are identified in Part A and Part B, while factors that must be considered in making a revocation decision are identified in Part C of this Direction.

6.3 Principles

(1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.

(2) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they commit serious crimes in Australia or elsewhere.

(3) A non-citizen who has committed a serious crime, including of a violent or sexual nature, and particularly against vulnerable members of the community such as minors, the elderly or disabled, should generally expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.

(4) In some circumstances, criminal offending or other conduct, and the harm that would be caused if it were to be repeated, may be so serious, that any risk of similar conduct in the future is unacceptable. In these circumstances, even other strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa.

(5) Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age.

(6) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia.

(7) The length of time a non-citizen has been making a positive contribution to the Australian community, and the consequences of a visa refusal or cancellation for minor children and other immediate family members in Australia, are considerations in the context of determining whether that non-citizen's visa should be cancelled, or their visa application refused.

Section 2 Exercising the discretion

7. How to exercise the discretion

(1) Informed by the principles in paragraph 6.3 above, a decision-maker:

a) must take into account the considerations in Part A or Part B, where relevant, in order to determine whether a non-citizen will forfeit the privilege of being granted, or of continuing to hold, a visa; or

b) must take into account the considerations in Part C, in order to determine whether the mandatory cancellation of a non-citizen's visa will be revoked.

8. Taking the relevant considerations into account

(1) Decision-makers must take into account the primary and other considerations relevant to the individual case. There are differing considerations depending on whether a delegate is considering whether to refuse to grant a visa to a visa applicant, cancel the visa of a visa holder, or revoke the mandatory cancellation of a visa. These different considerations are articulated in Parts A, B and C. Separating the considerations for visa holders and visa applicants recognises that non-citizens holding a substantive visa will generally have an expectation that they will be permitted to remain in Australia for the duration of that visa, whereas a visa applicant should have no expectation that a visa application will be approved.

(2) In applying the considerations (both primary and other), information and evidence from independent and authoritative sources should be given appropriate weight.

(3) Both primary and other considerations may weigh in favour of, or against, refusal, cancellation of the visa, or whether or not to revoke a mandatory cancellation of a visa.

(4) Primary considerations should generally be given greater weight than the other considerations.

(5) One or more primary considerations may outweigh other primary considerations.

PART A

9. Primary considerations – visa holders

(1) In deciding whether to cancel a non-citizen's visa, the following are primary considerations:

a) Protection of the Australian community from criminal or other serious conduct;
b) The best interests of minor children in Australia;
c) Expectations of the Australian Community.

9.1 Protection of the Australian community

(1) When considering protection of the Australian community, decision-makers should have regard to the principle that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. Remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they are, and have been, law abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community.

(2) Decision-makers should also give consideration to:

a) The nature and seriousness of the non-citizen's conduct to date; and
b) The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.

9.1.1 The nature and seriousness of the conduct

(1) In considering the nature and seriousness of the non-citizen's criminal offending or other conduct to date, decision-makers must have regard to factors including:

a) The principle that, without limiting the range of offences that may be considered serious, violent and/or sexual crimes are viewed very seriously;
b) The principle that crimes committed against vulnerable members of the community (such as minors, the elderly and the disabled), or government representatives or officials due to the position they hold, or in the performance of their duties, are serious;
c) Where the non-citizen is in Australia, that a crime committed while the non-citizen was in immigration detention; during an escape from immigration detention; or after the non-citizen escaped from immigration detention, but before the non-citizen was taken into immigration detention again is serious, as is an offence against section 197A of the Act;
d) The principle that any conduct that forms the basis for a finding that a non-citizen does not pass a subjective limb of the character test is or is not of good character under section 501(6)(c), is considered to be serious;
e) The sentence imposed by the courts for a crime or crimes;
f) The frequency of the non-citizen's offending and whether there is any trend of increasing seriousness;
g) The cumulative effect of repeated offending;
h) Whether the non-citizen has provided false or misleading information to the department, including by not disclosing prior criminal offending;
i) Whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware, in writing, about the consequences of further offending in terms of the non-citizen's migration status (noting that the absence of a warning should not be considered to be in the non-citizen's favour);
j) Where the offence or conduct was committed in another country, whether that offence or conduct is classified as an offence in Australia.

9.1.2 The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct

(1) In considering whether the non-citizen represents an unacceptable risk of harm to individuals, groups or institutions in the Australian community, decision-makers should have regard to the principle that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.

(2) In considering the risk to the Australian community, decision-makers must have regard to, cumulatively:

a) The nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and

b) The likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:

i. information and evidence on the risk of the non-citizen re-offending; and

ii. evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken).

9.2 Best interests of minor children in Australia affected by the decision

(1) Decision-makers must make a determination about whether cancellation is, or is not, in the best interests of the child.

(2) This consideration applies only if the child is, or would be, under 18 years old at the time when the decision to cancel the visa is expected to be made.

(3) If there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.

(4) In considering the best interests of the child, the following factors must be considered where relevant:

a) The nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);

b) The extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of

time until the child turns 18, and including any Court orders relating to parental access and care arrangements;

c) The impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;

d) The likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways;

e) Whether there are other persons who already fulfil a parental role in relation to the child;

f) Any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);

g) Evidence that the non-citizen has abused or neglected the child in any way, including physical, sexual and/or mental abuse or neglect; and

h) Evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

9.3 Expectations of the Australian Community

(1) 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.

10 Other considerations – visa holders

(1) In deciding whether to cancel a visa, other considerations must be taken into account where relevant. These considerations include (but are not limited to):

a) International non-refoulement obligations;
b) Strength, nature and duration of ties;
c) Impact on Australian business interests;
d) Impact on victims;
e) Extent of impediments if removed.

10.1 International non-refoulement obligations

(1) A non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm. Australia has non-refoulement obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the

Refugees Convention); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT); and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR). The Act reflects Australia's interpretation of those obligations and, where relevant, decision-makers should follow the tests enunciated in the Act.

(2) The existence of a non-refoulement obligation does not preclude cancellation of a non-citizen's visa. This is because Australia will not remove a non-citizen, as a consequence of the cancellation of their visa, to the country in respect of which the non-refoulement obligation exists.

(3) Claims which may give rise to international non-refoulement obligations can be raised by the non-citizen in response to a notice of intention to consider cancellation of their visa under s501 of the Act, or can be clear from the facts of the case (such as where the non-citizen holds a protection visa).

(4) Where a non-citizen makes claims which may give rise to international non-refoulement obligations and that non-citizen is able to make a valid application for another visa, it is unnecessary to determine whether non-refoulement obligations are owed to the non-citizen for the purposes of determining whether their visa should be cancelled.

(5) If, however, the visa being considered for cancellation is a Protection visa, the person will be prevented from making an application for another visa, other than a Bridging R (Class WR) visa (section 501E of the Act and regulation 2.12A of the Regulations refers). The person will also be prevented by section 48A of the Act from making a further application for a Protection visa while they are in the migration zone (unless the Minister determines that section 48A does not apply to them – sections 48A and 48B of the Act refer).

(6) In these circumstances, decision-makers should seek an assessment of Australia's international treaty obligations. Any non-refoulement obligation should be weighed carefully against the seriousness of the non-citizen's criminal offending or other serious conduct in deciding whether or not the non-citizen should continue to hold a visa. Given that Australia will not return a person to their country of origin if to do so would be inconsistent with its international non-refoulement obligations, the operation of sections 189 and 196 of the Act means that, if the person's Protection visa were cancelled, they would face the prospect of indefinite immigration detention.

10.2 The strength, nature and duration of ties to Australia

(1) Reflecting the principles at 6.3, decision-makers must have regard to:

a) How long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child, noting that:
   i. less weight should be given where the non-citizen began offending soon after arriving in Australia; and
   ii. more weight should be given to time the

non-citizen has spent contributing positively to the Australian community.

b) The strength, duration and nature of any family or social links with Australian citizens, Australian permanent residents and/or people who have an indefinite right to remain in Australia, including the effect of cancellation on the non-citizen's immediate family in Australia (where those family members are Australian citizens, permanent residents, or people who have a right to remain in Australia indefinitely).

10.3 Impact on Australian business interests

(1) Impact on Australian business interests if the non-citizen's visa is cancelled, noting that an employment link would generally only be given weight where visa cancellation would significantly compromise the delivery of a major project, or delivery of an important service in Australia.

10.4 Impact on victims

(1) Impact of a decision not to cancel a visa on members of the Australian community, including victims of the non-citizen's criminal behaviour, and the family members of the victim or victims where that information is available and the non-citizen being considered for visa cancellation has been afforded procedural fairness.

10.5 Extent of Impediments if removed

(1) The extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:

a) The non-citizen's age and health;
b) Whether there are substantial language or cultural barriers; and
c) Any social, medical and/or economic support available to them in that country.

Part B

11 Primary considerations – visa applicants

(1) In deciding whether to refuse a non-citizen's visa, the following are primary considerations:

a) Protection of the Australian community from criminal or other serious conduct;
b) The best interests of minor children in Australia;
c) Expectations of the Australian Community.

11.1 Protection of the Australian community

(1) When considering protection of the Australian community, decision-makers should have regard to the principle that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. There is a low tolerance for visa applicants who have previously engaged in criminal or other serious conduct. Decision-makers should also give consideration to:

a) The nature and seriousness of the non-citizen's conduct to date; and
b) The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.

11.1.1 The nature and seriousness of the conduct

(1) In considering the nature and seriousness of the non-citizen's criminal offending or other serious conduct to date, decision-makers must have regard to:

a) The principle that, without limiting the range of offences that may be considered serious, violent and/or sexual crimes are viewed seriously;
b) The principle that crimes committed against vulnerable members of the community (such as minors, the elderly and the disabled), or government representatives or officials due to the position they hold, or in the performance of their duties, are serious;
c) Where the non-citizen is in Australia, that a crime committed while the non-citizen was in immigration detention; during an escape from immigration detention; after the non-citizen escaped from immigration detention, but before the non-citizen was taken into immigration detention again is serious, as is an offence against section 197A of the Act;
d) The principle that any conduct that forms the basis for a finding that a non-citizen does not pass a subjective limb of the character test is or is not of good character under section 501(6)(c), is considered to be serious;

e) The sentence imposed by the courts for a crime or crimes;
f) The frequency of the non-citizen's offending and whether there is any trend of increasing seriousness;
g) The cumulative effect of repeated offending;
h) Whether the non-citizen has provided false or misleading information to the department, including by not disclosing prior criminal offending;
i) Where the offence or conduct was committed in another country, whether that offence or conduct is classified as an offence in Australia.

11.1.2 The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct

(1) In considering whether the non-citizen represents an unacceptable risk of harm to individuals, groups or institutions in the Australian community, decision-makers should have regard to the principle that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct, and the harm that would be caused if it were to be repeated, is so serious that any likelihood that it may be repeated may be unacceptable.

(2) In addition, decision-makers should have regard to the principle that Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia.

(3) In considering the risk to the Australian community, decision-makers must have regard to, cumulatively:

a) The nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and
b) The likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:
    i. information and evidence from independent and authoritative sources on the likelihood of the non-citizen re-offending; and
    ii. evidence of any rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken); and
    iii. the duration of the intended stay in Australia.

(4) Decision-makers should consider the risk of harm in the context of the purpose of the intended stay, and the type of visa being applied for, including whether there are strong or compassionate reasons for granting a short-stay visa.

11.2 Best interests of minor children in Australia affected by the decision

(1) Decision-makers must make a determination about whether refusal is, or is not, in the best interests of the child.

(2) This consideration applies only if the child is, or would be, under 18 years old at the time when the decision to refuse to grant the visa is expected to be made.

(3) If there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.

(4) In considering the best interests of the child, the following factors must be considered where relevant:

a) The nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);
b) The extent to which the non-citizen is likely to play a positive parental role in the future (taking into account the length of time until the child turns 18), and including any Court orders relating to parental access and care arrangements;
c) The impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have, a negative impact on the child;
d) The likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways;
e) Whether there are other persons who already fulfil a parental role in relation to the child;
f) Any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);
g) Evidence that the non-citizen has abused or neglected the child in any way, including physical, sexual and/or mental abuse or neglect; and
h) Evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

11.3 Expectations of the Australian Community

(1) 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 refuse the visa application of such

a person. Visa refusal 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 be granted a visa. Decision-makers should have due regard to the Government's views in this respect.

12 Other considerations – visa applicants

(1) In deciding whether to cancel a visa, other considerations must be taken into account where relevant. These considerations include (but are not limited to):

a) International non-refoulement obligations;
b) Impact on family members;
c) Impact on victims;
d) Impact on Australian business interests.

12.1 International non-refoulement obligations

(1) A non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm. Australia has non-refoulement obligations to non-citizens in Australia under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT); and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR). The Act reflects Australia's interpretation of those obligations and, where relevant, decision-makers should follow the tests enunciated in the Act.

(2) The existence of a non-refoulement obligation does not preclude refusal of a non-citizen's visa application in Australia. This is because Australia will not remove a non-citizen, as a consequence of the refusal of their visa application, to the country in respect of which the non-refoulement obligation exists.

(3) Claims which may give rise to international non-refoulement obligations can be raised by the non-citizen in response to a notice of intention to consider refusal of their visa under s501 of the Act, or can be clear from the facts of the case (such as where the non-citizen is an applicant for a protection visa).

(4) Where a non-citizen makes claims which may give rise to international non-refoulement obligations and that non-citizen is able to make a valid application for another visa, it is unnecessary to determine whether non-refoulement obligations are owed to the non-citizen for the purposes of determining whether their visa application should be refused.

(5) If, however, the visa application being considered for refusal is a Protection visa application, the person will be prevented from making an application for another visa, other than a Bridging R (Class WR) visa (section 501E of the Act and regulation 2.12A of the Regulations refers). The person will also be prevented by section 48A of the Act from making a further application for a Protection visa while they are in the migration zone (unless the Minister determines that section 48A does not apply to them – sections 48A and 48B of the Act refer).

(6) In these circumstances, decision-makers should seek an assessment of Australia's international treaty obligations. Any non-refoulement obligation should be weighed carefully against the seriousness of the non-citizen's criminal offending or other serious conduct in deciding whether or not the non-citizen should be granted a visa. Given that Australia will not return a person to their country of origin if to do so would be inconsistent with its international non-refoulement obligations, the operation of sections 189 and 196 of the Act means that, if the person's Protection visa application were refused, they would face the prospect of indefinite immigration detention.

12.2 Impact on family members

(1) Impact of visa refusal on immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely;

12.3 Impact on victims

(1) Impact of a decision to grant a visa on members of the Australian community, including victims of the non-citizen's criminal behaviour, and the family members of the victim or victims, where that information is available and can be disclosed to the non-citizen being considered for visa refusal;

12.4 Impact on Australian business interests

(1) Impact on Australian business interests if the non-citizen's visa application is refused, noting that an employment link would generally only be given weight where visa refusal would significantly compromise the delivery of a major project or delivery of an important service in Australia.

PART C

13. Primary considerations – revocation requests

(1) Under subsection 501(3A) of the Act, the Minister must cancel a visa that has been granted to a person if the Minister is satisfied that the person does not pass the character test because of the operation of

paragraph (6)(a) (on the basis of paragraph (7)(a), (b) or (c)) or paragraph (6)(e)) and the non-citizen is serving a sentence of imprisonment on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory. A non-citizen who has had his or her visa cancelled under section 501(3A) may request revocation of that decision under section 501CA of the Act. Where the discretion to consider revocation is enlivened, the decision-maker must consider whether to revoke the cancellation given the specific circumstances of the case.

(2) In deciding whether to revoke the mandatory cancellation of a non-citizen's visa, the following are primary considerations:

a) Protection of the Australian community from criminal or other serious conduct;
b) The best interests of minor children in Australia;
c) Expectations of the Australian community.

13.1 Protection of the Australian community

(1) When considering protection of the Australian community, decision-makers should have regard to the principle that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. Remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they are, and have been, law abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community. Mandatory cancellation without notice of certain non-citizen prisoners is consistent with this principle by ensuring that serious offenders remain in either criminal or immigration detention while their immigration status is resolved.

(2) Decision-makers should also give consideration to:

a) The nature and seriousness of the non-citizen's conduct to date; and
b) The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.

13.1.1 The nature and seriousness of the conduct

(1) In considering the nature and seriousness of the non-citizen's criminal offending or other conduct to date, decision-makers must have regard to factors including:

a) The principle that, without limiting the range of offences that may be considered serious, violent and/or sexual crimes are viewed very seriously;
b) The principle that crimes committed against vulnerable members of the community (such as minors, the elderly and the disabled), or government representatives or officials due to the

position they hold, or in the performance of their duties, are serious;

c) The sentence imposed by the courts for a crime or crimes;
d) The frequency of the non-citizen's offending and whether there is any trend of increasing seriousness;
e) The cumulative effect of repeated offending;
f) Whether the non-citizen has provided false or misleading information to the department, including by not disclosing prior criminal offending;
g) Whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware, in writing, about the consequences of further offending in terms of the non-citizen's migration status (noting that the absence of a warning should not be considered to be in the non-citizen's favour);
h) Where the non-citizen is in Australia, that a crime committed while the non-citizen was in immigration detention; during an escape from immigration detention; or after the non-citizen escaped from immigration detention, but before the non-citizen was taken into immigration detention again is serious, as is an offence against section 197A of the Act;

13.1.2 The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct

(1) In considering whether the non-citizen represents an unacceptable risk of harm to individuals, groups or institutions in the Australian community, decision-makers should have regard to the principle that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.

(2) In considering the risk to the Australian community, decision-makers must have regard to, cumulatively:

a) The nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and
b) The likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account available information and evidence on the risk of the non-citizen re-offending (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken).

13.2 Best interests of minor children in Australia affected by the decision

(1) Decision-makers must make a determination about whether revocation is, or is not, in the best interests of the child.

(2) This consideration applies only if the child is, or would be, under 18 years old at the time when the decision to revoke or not revoke the mandatory cancellation decision is expected to be made.

(3) If there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.

(4) In considering the best interests of the child, the following factors must be considered where relevant:

a) The nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);
b) The extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;
c) The impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;
d) The likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways;
e) Whether there are other persons who already fulfil a parental role in relation to the child;
f) Any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);
g) Evidence that the non-citizen has abused or neglected the child in any way, including physical, sexual and/or mental abuse or neglect; and
h) Evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

13.3 Expectations of the Australian community

(1) 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 not revoke the mandatory visa cancellation of such a person. Non-revocation 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 hold a visa. Decision-makers should have due regard to the Government's views in this respect.

14. Other considerations – revocation requests

(1) In deciding whether to revoke the mandatory cancellation of a visa, other considerations must be taken into account where relevant. These considerations include (but are not limited to):

a) International non-refoulement obligations;
b) Strength, nature and duration of ties;
c) Impact on Australian business interests;
d) Impact on victims;
e) Extent of impediments if removed.

14.1 International non-refoulement obligations

(1) A non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm. Australia has non-refoulement obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT); and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR). The Act reflects Australia's interpretation of those obligations and, where relevant, decision-makers should follow the tests enunciated in the Act.

(2) The existence of a non-refoulement obligation does not preclude non-revocation of the mandatory cancellation of a non-citizen's visa. This is because Australia will not remove a non-citizen, as a consequence of the cancellation of their visa, to the country in respect of which the non-refoulement obligation exists.

(3) Claims which may give rise to international non-refoulement obligations can be raised by the non-citizen in a request to revoke under s501CA the mandatory cancellation of their visa, or can be clear from the facts of the case (such as where the non-citizen held a protection visa that was mandatorily cancelled).

(4) Where a non-citizen makes claims which may give rise to international non-refoulement obligations and that non-citizen would be able to make a valid application for another visa if the mandatory cancellation is not revoked, it is unnecessary to determine whether non-refoulement obligations are owed to the non-citizen for the purposes of determining whether the cancellation of their visa should be revoked.

(5) If, however, the visa that was cancelled was a Protection visa, the person will be prevented from making an application for another visa, other than a Bridging R (Class WR) visa (section 501E of the Act and

regulation 2.12A of the Regulations refers). The person will also be prevented by section 48A of the Act from making a further application for a Protection visa while they are in the migration zone (unless the Minister determines that section 48A does not apply to them – sections 48A and 48B of the Act refer).

(6) In these circumstances, decision-makers should seek an assessment of Australia's international treaty obligations. Any non-refoulement obligation should be weighed carefully against the seriousness of the non-citizen's criminal offending or other serious conduct in deciding whether or not the non-citizen should have their visa reinstated. Given that Australia will not return a person to their country of origin if to do so would be inconsistent with its international non-refoulement obligations, the operation of sections 189 and 196 of the Act means that, if the person's Protection visa remains cancelled, they would face the prospect of indefinite immigration detention.

14.2 Strength, nature and duration of ties

(1) The strength, nature and duration of ties to Australia. Reflecting the principles at 6.3, decision-makers must have regard to:

a) How long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child, noting that:
   i. less weight should be given where the non-citizen began offending soon after arriving in Australia; and
   ii. More weight should be given to time the non-citizen has spent contributing positively to the Australian community.

b) The strength, duration and nature of any family or social links with Australian citizens, Australian permanent residents and/or people who have an indefinite right to remain in Australia, including the effect of non-revocation on the non-citizen's immediate family in Australia (where those family members are Australian citizens, permanent residents, or people who have a right to remain in Australia indefinitely).

14.3 Impact on Australian business interests

(1) Impact on Australian business interests if the non-citizen's visa cancellation is not revoked, noting that an employment link would generally only be given weight where non-revocation would significantly compromise the delivery of a major project, or delivery of an important service in Australia.

14.4 Impact on victims

(1) Impact of a decision not to revoke on members of the Australian community, including victims of the non-citizen's criminal behaviour, and the family members of the victim or victims where that information is available and the non-citizen being considered for revocation has been afforded procedural fairness.

14.5 Extent of impediments if removed

(1) The extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:

a) The non-citizen's age and health;
b) Whether there are substantial language or cultural barriers; and
c) Any social, medical and/or economic support available to them in that country.

ANNEX A - Application of the character test

Section 1 Overview of the character test

Discretionary visa cancellation or refusal

(1) Under section 501 of the Act, a person may be refused a visa if the non-citizen does not satisfy the decision-maker that they pass the character test. A person may have their visa cancelled if the decision-maker reasonably suspects that the person does not pass the character test, and the person does not satisfy the decision-maker that they pass the character test.

(2) Persons who are being considered under section 501 of the Act must satisfy the decision-maker that they pass the character test set out in section 501(6) of the Act. In practice, this requires the decision-maker to determine, on the basis of all relevant information including information provided by the person, that the person does not pass the character test by reference to section 501(6) of the Act.

(3) Section 501(6) of the Act prescribes the circumstances in which a person does not pass the character test. A person need only be found to not pass one ground, in order to not pass the character test.

(4) In considering a person with unresolved criminal matters, decision-makers should note:

a) Where a person already fails the character test, any other outstanding criminal matters would not generally prevent consideration of their case under section 501;
b) A person who does not already fail the character test, and is the subject of criminal charges in Australia, which have not yet been finalised before the relevant court, would not generally be considered under section 501 until the charges have been finally determined;
c) Where a person is in Australia, and they are facing charges in another country, and the charges will not be resolved in absentia, the conduct that is the subject of those charges may be considered in the context of section 501(6)(c)(i) and/or (ii).

(5) If the person does not pass the character test, section 501(1) of the Act enables a visa to be refused and section 501(2) of the Act enables a visa to be cancelled.

Mandatory visa cancellation

(1) Under section 501(3A), a person's visa must be cancelled if:

a) The decision-maker is satisfied that the person does not pass the character test because of the operation of:
i. Paragraph 501(6)(a) (substantial criminal record), on the basis of paragraph 501(7)(a), (b) or (c) (the person

has been sentenced to death, imprisonment for life, or to a term of imprisonment of 12 months or more); or

ii. paragraph 501(6)(e) (sexually based offences involving a child); and

b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

(2) In considering whether a person is liable for mandatory cancellation, decision-makers should note:

a) that the term 'serving a sentence of imprisonment, on a full-time basis' does not include periodic detention or home or residential detention. However, a person who has been serving a sentence of imprisonment on a full-time basis and who is participating in a work release scheme, or is permitted home visits is liable for mandatory cancellation;

b) that mandatory cancellation is not enlivened unless and until a delegate makes a finding that they are satisfied that the requirements as set out in section 501(3A)(a) and (b) are met. Once a delegate is satisfied that these requirements are met, the delegate must cancel the person's visa.

(3) The purpose of mandatory cancellation of the visas of certain visa holders who are in prison is to ensure that persons who pose a risk to the safety of the Australian community remain either in criminal or immigration detention until that risk has been assessed. In this context, there are some circumstances in which it may not be appropriate for a decision-maker to consider whether a person does not pass the character test (and is therefore liable for the cancellation of his or her visa). These circumstances include where a non-citizen is serving a sentence of imprisonment but will not have a visa which is in effect at the end of that sentence. This situation may arise:

a) where a person in prison has been granted a Bridging E visa (BVE) in order to maintain their lawful status while in prison. In circumstances where the BVE will cease upon the person's release from prison, it is not recommended that mandatory cancellation consideration be commenced.

b) where a person is the holder of a criminal justice visa (CJV). CJVs are granted to non-citizens whose entry and/or continued presence in Australia is required for the purposes of the administration of criminal justice. A criterion for a CJV is that a criminal justice stay certificate (CJSC) or a criminal justice stay warrant (CJSW) about the non-citizen is in force. If the CJSC or CJSW is cancelled any CJV granted because of the CJSC or CJSW is cancelled by operation of section 164 of the Act. The only other power under which CJVs may be cancelled is on character grounds under section 501 of the Act. However, in circumstances where the CJV holder is serving a

sentence of imprisonment, this is unlikely to be appropriate.

Section 2 Application of the character test

1. Substantial criminal record (section 501(6)(a))

(1) A person does not pass the character test if the person has a substantial criminal record. The term 'substantial criminal record' is defined in section 501(7) of the Act.

(2) For the purposes of the character test, a person has a substantial criminal record if:

a) the person has been sentenced to death; or
b) the person has been sentenced to imprisonment for life; or
c) the person has been sentenced to a term of imprisonment of 12 months or more; or
d) the person has been sentenced to 2 or more terms of imprisonment where the total of those terms is 12 months (if a person has been sentenced to 2 or more terms of imprisonment to be served concurrently (whether in whole or in part), the whole of each term is to be counted in working out the total of the terms)**; or
e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or
f) the person has been found by a court to not be fit to plead, in relation to an offence; and as a result, the person has been detained in a facility or institution.

** Example: A person is sentenced to 2 terms of 3 months imprisonment for 2 offences, to be served concurrently. For the purposes of the character test, the total of those terms is 6 months.

2. Immigration detention offences (section 501(6)(aa) & (ab))

(1) A person does not pass the character test if the person has been convicted of an offence that was committed;
a) while the person was in immigration detention; or
b) during an escape by the person from immigration detention; or
c) after the person escaped from immigration detention but before the person was taken into immigration detention again.

(2) A person does not pass the character test if the person has been convicted of an offence against section 197A.

3. Membership/Association (section 501(6)(b))

(1) A person does not pass the character test if the Minister reasonably suspects:

a) that the person has been or is a member of a group or organisation, or has or has had an association with a group, organisation or person; and

b) that the group, organisation or person has been, or is, involved in criminal conduct.

(2) A suspicion is less than a certainty or a belief, but more than a speculation or idle wondering. For a suspicion to be reasonable, it should be:

a) a suspicion that a reasonable person could hold in the particular circumstances; and
b) based on an objective consideration of relevant material.

(3) A member is a person who belongs to a group or organisation. The evidence required to establish reasonable suspicion of membership of a group or organisation will depend on the circumstances of the case. Decision-makers should note that failure of this limb of the character test does not require an assessment that the person was sympathetic with, supportive of, or involved in the criminal conduct of the group or organisation. It is sufficient under this element of the test that the decision-maker has a reasonable suspicion that:

a) the person has been, or is a member of a group or organisation; and
b) the group or organisation has been, or is, involved in criminal conduct.

(4) In establishing association, the following factors are to be considered:

a) the nature of the association;
b) the degree and frequency of association the person had or has with the individual, group or organisation; and
c) the duration of the association.

(5) Decision-makers should note that in order for a person to fail the association limb of the character test, the delegate must have a reasonable suspicion that the person was sympathetic with, supportive of, or involved in the criminal conduct of the person, group or organisation – mere knowledge of the criminality of the associate is not, in itself, sufficient to establish association. In order to not pass the character test on this ground, the association must have some negative bearing upon the person's character.

(6) In some cases the information concerning association will be protected from disclosure by section 503A of the Act. In all cases, great care should be taken not to disclose information that might put the life or safety of informants or other people at risk.

4. Involvement in certain criminal activities (section 501(6)(ba))

(1) A person does not pass the character test if the Minister reasonably suspects the person has been, or is involved in, conduct constituting one or more of the following:

a) an offence of people smuggling (as described in sections 233A to 234A of the Migration Act;
b) an offence of trafficking in persons;
c) the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern.

(2) In order to fail this limb of the character test, a person is not required to have been convicted of an offence constituted by the conduct.

5. Not of good character on account of past and present criminal or general conduct (section 501(6)(c)(i) and (ii))

(1) A person does not pass the character test if the person is not of good character, having regard to their past and present criminal and/or their past and present general conduct.

(2) The concepts of criminal conduct and general conduct are not mutually exclusive. Conduct can be both general and criminal at the same time or it may be either general or criminal conduct: *Wong v Minister for Minister Immigration and Multicultural Affairs* [2002] FCAFC 440 at [33].

(3) In considering whether a person is not of good character, all the relevant circumstances of the particular case are to be taken into account to obtain a complete picture of the person's character.

a) In *Godley v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 83 ALD 411, Lee J said at [34] 'the words "of good character" mean enduring moral qualities reflected in soundness and reliability in moral judgement in the performance of day to day activities and in dealing with fellow citizens. It is not simply a matter of repute, fame or standing in the community but of continuing performance according to moral principle. A person of ill repute by reason of past criminal conduct may nonetheless, on objective examination at a later stage in life, be shown to be a person reformed and now of good character.'

(4) In order to fail this limb of the character test, a person need not necessarily have a recent criminal conviction, or have been involved in recent general conduct which would indicate that they are not of 'good character'. However, the conduct in question must be sufficient to indicate a lack of enduring moral quality that outweighs any consideration of more recent good behaviour.

a) In Godley, Lee J went on to say 'For a finding to be made under s501(6)(c) that a person is not of good character it is necessary that the nature of the conduct said to be criminal , be examined and assessed as to its degree of moral culpability or turpitude. Furthermore, there must be examination of past and present criminal conduct sufficient to establish that a person at

the time of decision is not then of good character. The point at which recent criminal conduct, (as the term 'present criminal conduct' is to be understood), becomes past criminal conduct must be a matter of judgement. If there is no recent criminal conduct that circumstances will point to the need for the Minister to give due weight to that fact before concluding that a visa applicant is not of good character'.

'Before past and present general conduct may be taken to reveal indicia that a visa applicant is not of good character continuing conduct must be demonstrated that shows a lack of enduring moral quality. Although in some circumstances isolated elements of conduct may be significant and display lack of moral worth they will be rare, and as with consideration of criminal conduct there must be due regard given to recent good conduct.

5.1 Past and present criminal conduct

(1) In considering whether a person is not of good character on the basis of past or present criminal conduct, the following factors are to be considered:

a) The nature and severity of the criminal conduct;
b) The frequency of the person's offending and whether there is any trend of increasing seriousness;
c) The cumulative effect of repeated offending;
d) Any circumstances surrounding the criminal conduct which may explain the conduct such as may be evident from judges' comments, parole reports and similar authoritative documents; and
e) The conduct of the person since their most recent offence, including:
    i. The length of time since the person last engaged in criminal conduct;
    ii. Any evidence of recidivism or continuing association with criminals;
    iii. Any pattern of similar criminal conduct;
    iv. Any pattern of continued or blatant disregard or contempt for the law; and
    v. Any conduct which may indicate character reform.

5.2 Past and present general conduct

(1) The past and present general conduct provision allows a broader view of a person's character where convictions may not have been recorded or where the person's conduct may not have constituted a criminal offence.

a) In considering whether the person is not of good character, the relevant circumstances of the particular case are to be taken

into account, including evidence of rehabilitation and any relevant periods of good conduct.

(2) The following factors may also be considered in determining whether a person is not of good character:

a) Whether the person has been involved in activities indicating contempt or disregard for the law or for human rights. This includes, but is not limited to:
   i. Involvement in activities such as terrorist activity, activities in relation to trafficking or possession of trafficable quantities of proscribed substances, political extremism, extortion, fraud; or
   ii. A history of serious breaches of immigration law, breach of visa conditions or visa overstay in Australia or another country; or
   iii. Involvement in war crimes or crimes against humanity;

b) whether the person has been removed or deported from Australia or another country and the circumstances that led to the removal /deportation; or

c) whether the person has been:
   i. dishonourably discharged; or
   ii. discharged prematurely;
   from the armed forces of another country as the result of disciplinary action in circumstances, or because of conduct that, in Australia would be regarded as serious.

(3) Where a person is in Australia and charges have been brought against that person in a jurisdiction other than an Australian jurisdiction, and those charges will not be resolved *in absentia*, the conduct that is the subject of those charges may be considered in the context of its impact on the person's overall character.

6 Risk in regards to future conduct (section 501(6)(d))

(1) A person does not pass the character test if, in the event that the person were allowed to enter or remain in Australia, there is a risk that the person would engage in any of the conduct specified in section 501(6)(d) of the Act. The types of conduct specified are discussed below.

(2) The grounds are enlivened if there is evidence suggesting that there is more than a minimal or remote chance that the person, if allowed to enter or to remain in Australia, would engage in conduct specified in section 501(6)(d) of the Act.

(3) It is not sufficient to find that the person has engaged in conduct specified in paragraph 501(6)(d) of the Act in the past. There must be a risk that the person would engage in the future in the specified conduct set out in section 501(6)(d) of the Act.

6.1 Risk of engaging in criminal conduct in Australia (section 501(6)(d)(i))

(1) A person does not pass the character test if, in the event that the person were allowed to enter or remain in Australia, there is a risk that the person will engage in criminal conduct in Australia.

(2) The reference to criminal conduct must be read as requiring that there is a risk of the person engaging in conduct for which a criminal conviction could be recorded.

6.2 Risk of harassing, molesting, intimidating or stalking another person in Australia (section 501(6)(d)(ii))

(1) A person will not pass the character test if, in the event that the person were allowed to enter or remain in Australia, there is a risk that the person will harass, molest, intimidate or stalk another person in Australia.

(2) 'Harassment', 'molestation' 'intimidation' and 'stalking' are to be given their ordinary meaning. Section 501(11) of the Act clarifies the scope of conduct amounting to harassment or molestation. Conduct and behaviours that may fall under this category include, but are not limited to, the following:

a) conduct that could be construed as harassment or intimidation (whether or not it breaches the terms of an Apprehended or Domestic Violence (or similar) Order);
b) conduct that potentially places children in danger, such as unwelcome and/or inappropriate approaches, including, but not limited to, approaches made through electronic media; or
c) conduct that would reasonably cause an individual to be severely apprehensive, fearful, alarmed or distressed regarding the person's behaviour or alleged behaviour towards the individual, any other individual, or in relation to their property or that of any other individual.

6.3 Risk of vilifying a segment of the community, of inciting discord or of representing a danger through involvement in disruptive and/or violent activities (section 501(6)(d)(iii), (iv) and (v))

(1) In deciding whether a person does not pass the character test under section 501(6)(d)(iii), (iv) or (v) of the Act, factors to be considered include, but are not limited to, evidence that the person:

a) Would hold or advocate extremist views such as a belief in the use of violence as a legitimate means of political expression;
b) Would vilify a part of the community;
c) has a record of encouraging disregard for law and order;
Note: For example, in the course of addressing public rallies.
d) has engaged or threatens to engage in conduct likely to be incompatible with the smooth operation of a multicultural society;

Note: For example, advocating that particular ethnic groups should adopt political, social or religious values well outside those generally acceptable in Australian society, and which, if adopted or practised, might lead to discord within those groups or between those groups and other segments of Australian society.

e) participates in, or is active in promotion of, politically motivated violence or criminal violence and/or is likely to propagate or encourage such action in Australia;

f) is likely to provoke civil unrest in Australia because of the conjunction of the person's intended activities and proposed timing of their presence in Australia with those of another individual, group or organisation holding opposing views.

(2) The operation of section 501(6)(d)(iii), (iv) and (v) of the Act must be balanced against Australia's well established tradition of free expression. The grounds in these sub-paragraphs are not intended to provide a charter for denying entry or continued stay to persons merely because they hold and are likely to express unpopular opinions. However, where these opinions may attract strong expressions of disagreement and condemnation from the Australian community, the current views of the community will be a consideration in terms of assessing the extent to which particular activities or opinions are likely to cause discord or unrest.

7 Sexually based offences involving a child (section 501(6)(e))

(1) A person will not pass the character test if a court in Australia or a foreign country has convicted them of one or more sexually based offences involving a child or found them guilty of such an offence, or found a charge proven against them, even if the person was discharged without conviction.

(2) Sexually based offences involving a child include, but are not limited to offences such as:

a) Child sexual abuse;
b) Indecent dealings with a child;
c) Possession or distribution of child pornography;
d) Internet grooming; and
e) Other non-contract carriage service offences.

(3) This provision applies irrespective of the level of penalty or orders made in relation to the offence.

8 Crimes under International Humanitarian Law (section 501(6)(f))

(1) A person will not pass the character test if the person has, in Australia or a foreign country, been charged with or indicted for one or more of the following:

a) the crime of genocide;
b) a crime against humanity;
c) a war crime;
d) a crime involving torture or slavery;
e) a crime that is otherwise of serious international concern.

9 National security risk (section 501(6)(g))

(1) A person will not pass the character test if the person has been assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*)

10 Certain Interpol Notices (section 501(6)(h))

(1) A person will not pass the character test if an Interpol notice in relation to the person is in force, and it is reasonable to infer from that notice that the person would present a risk to the Australian community or a segment of that community.

ANNEX B - Interpretation

Act means the *Migration Act 1958*.

Character test is the character test prescribed in s501(6) of the Act and set out in Annex A of this Direction.

Decision-maker means a person (sometimes referred to as a delegate), or a body (such as the Administrative Appeals Tribunal) with the power to perform functions or exercise powers under s501 of the Act.

Immigration detention is defined in section 5 of the Act and means:

a. being in the company of, and restrained by:
   i. an officer; or
   ii. in relation to a particular detainee – another non-citizen directed by the Secretary to accompany and restrain the detainee; or

b. being held by, or on behalf of an officer;
   i. in a detention centre established under this Act; or
   ii. in a prison or remand centre of the Commonwealth, a State or Territory; or
   iii. in a police station or watch house; or
   iv. in relation to a non-citizen who is prevented, under section 249 of the Act, from leaving a vessel – on that vessel; or
   v. in another place approved by the Minister in writing.

Minor is defined in section 5 of the Act as a person is who less than 18 years old.

Non-citizen is defined in section 5 of the Act as a person who is not an Australian citizen

Remove is defined in section 5 of the Act as remove from Australia.

Serious conduct Behaviour or conduct of concern where a conviction may not have been recorded, or where the conduct may

	not, strictly speaking, have constituted a criminal offence. Such conduct may include, for example, involvement in activities indicating contempt or disregard for the law or human rights, or a history of serious breaches of immigration law. It also includes conduct which may be considered under s501(6)(c) and/or s501(6)(d).
Section 501	means section 501 of the Act
Substantial criminal record	is defined in section 501(7) of the Act.
Substantive visa	is defined in section 5 of the Act and means a visa other than: a. a bridging visa; or b. a criminal justice visa; or c. an enforcement visa.
Visa	Subject to the Act, the Minister may grant a non-citizen permission, to be known as a visa, to do either or both of the following: a. travel to and enter Australia; b. remain in Australia
Visa applicant	is defined in section 5 of the Act as an applicant for a visa and, in relation to a visa, means the applicant for the visa.
Visa holder	is defined in section 5 of the Act as the holder of a visa and, in relation to a visa, means the holder of the visa.