



Australian Government
Department of Home Affairs

Inquiry into review processes associated with visa cancellations made on criminal grounds

Joint Standing Committee on Migration

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1. Introduction

1.1. Purpose

The Department of Home Affairs (the Department) welcomes the opportunity to make a submission to the Joint Standing Committee on Migration inquiry into the review processes associated with visa cancellations made on criminal grounds. This submission addresses the terms of reference for this inquiry, with regard to:

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

1.2. Scope

As the inquiry relates to visa cancellations made on criminal grounds, this submission focuses on visa cancellation and refusal powers that are directly or indirectly related to a foreign national's criminal conduct or other serious conduct of concern.

1.3. Key points

The Australian Government takes seriously its responsibility to protect the Australian community from the risk of harm posed by foreign nationals who engage in criminal conduct or behaviour of concern. There are strong provisions in the *Migration Act 1958* (the Act) which allow the Minister for Home Affairs, Immigration and Border Protection (the Minister), other portfolio Ministers, or a departmental delegate to cancel or refuse the visas of foreign nationals who have engaged in such conduct. The Government's legislative amendments in December 2014 significantly strengthened these visa cancellation and refusal powers and ensure a robust framework by which foreign nationals can be considered for visa cancellation and refusal. These legislative changes have resulted in a stronger focus on community protection, a greater range of conduct and criminality being captured under the Act and more foreign nationals being referred for assessment of character issues.

Where a delegate decides under section 501 to cancel, refuse or not revoke mandatory cancellation of a visa, it is open to the foreign national to seek merits review of the decision with the Administrative Appeals Tribunal (AAT). The AAT is an independent body that has the authority to affirm, vary, set aside and substitute a decision, or remit a decision back to the Department for reconsideration, with recommendations or directions as it considers appropriate. The Minister and other portfolio Ministers have personal powers under the Act to cancel or refuse a visa under section 501, and to set aside AAT decisions and substitute them with a cancellation or refusal decision. Such decisions are not reviewable by the AAT, but may be subject to judicial review. In the event that the AAT affirms a delegate's decision, it is open to the foreign national to seek judicial review if they believe there was an error of law in the AAT's decision. All section 501 decisions may be subject to judicial review.

2. Background

2.1. Character cancellation and refusal powers

- 2.1.1 All visa holders are required to pass the character test. A foreign national may be refused a visa, or have their visa cancelled, if they do not pass the character test.
- 2.1.2 Section 501 of the Act provides the legislative framework for character requirements and for refusing and cancelling visas on character grounds. Section 501 includes both a mandatory visa cancellation power and discretionary visa cancellation and refusal powers. The requirements under section 501 apply to all foreign nationals, irrespective of age or nationality.
- 2.1.3 The character test under section 501 was strengthened through legislative change in December 2014, including through the introduction of the mandatory cancellation power. Following these changes, section 501 visa cancellation decisions increased by more than **660 per cent** in FY2014/15 compared to the year prior, a further **69 per cent** in FY2015/16, and a further **31 per cent** in FY2016/17.¹

Table 1: Section 501 (discretionary and mandatory) visa cancellations and refusals by financial year

| Financial Year | Section 501(1) refusals* | Section 501(2) cancellations** | Section 501(3) cancellations and refusals*** | Section 501(3A) - mandatory cancellations**** | TOTAL |
|----------------------------|--------------------------|--------------------------------|--|---|-------------|
| 2014/2015 | 135 | 73 | 6 | 491 | 705 |
| 2015/2016 | 423 | 35 | 15 | 927 | 1400 |
| 2016/2017 | 629 | 28 | 9 | 1234 | 1900 |
| 2017/2018 to 31 March 2018 | 372 | 41 | 9 | 647 | 1069 |
| TOTAL | 1559 | 177 | 39 | 3299 | 5074 |

* Section 501(1) provides that the Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

** Section 501(2) provides that the Minister may cancel a visa that has been granted to a person if the Minister reasonably suspects that the person does not pass the character test; and the person does not satisfy the Minister that the person passes the character test.

*** Section 501(3) provides that the Minister may refuse to grant a visa to a person, or cancel a visa that has been granted to a person, if the Minister reasonably suspects that the person does not pass the character test and the Minister is satisfied that the refusal or cancellation is in the national interest.

****Section 501(3A) provides that the Minister must cancel a visa that has been granted to a person if the person is serving a full time term of imprisonment for an offence committed in Australia and they have, at any time, been sentenced to a single term of 12 months or more imprisonment, or have been convicted, found guilty or had a charge proven for a sexually based crime involving a child.

¹ The figures provided in this document are based on live systems data and therefore may differ slightly with previous and future reporting.

The character test

- 2.1.4 The character test is detailed at section 501(6) of the Act, and consists of objective and subjective limbs.²
- 2.1.5 A foreign national may not pass the character test on a number of grounds including, but not limited to:
- if they have a 'substantial criminal record' (for example, if they have been sentenced to 12 months or more imprisonment or two or more terms of imprisonment that total 12 months or more,³ including any suspended terms of imprisonment);⁴
 - if they are reasonably suspected of being a member, or associating with, a group, organisation or individual involved in criminal conduct;
 - if they have been convicted, found guilty or have had a charge proven for a sexually based offence involving a child (regardless of the sentence);
 - on the basis of their past and present general and/or criminal conduct; or
 - if there is a risk that the foreign national would engage in criminal conduct in Australia; harass, molest, intimidate or stalk another person in Australia; or represent a danger to the Australian community.
- 2.1.6 Where a foreign national has been sentenced to two or more terms of imprisonment which total 12 months or more, they will also objectively fail the character test on the basis of their substantial criminal record. Any sentences of imprisonment imposed by foreign courts will be relevant in determining whether a foreign national has a substantial criminal record.
- 2.1.7 The sentencing of foreign nationals found guilty of an offence against Australian law is a matter for Australian courts to determine according to the applicable legislation and guidelines for the relevant jurisdiction. Depending on the relevant jurisdiction, immigration matters may be taken into account in sentencing.
- 2.1.8 For example, the Victorian Sentencing Manual outlines that the prospect of deportation may be relevant in considering the hardship of any sentence of imprisonment.⁵ Further, pursuant to section 24 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), a New South Wales (NSW) court must take into account time served in custody when considering sentencing. The NSW Sentencing Bench Book provides that a court may have regard to detention in an immigration facility, notwithstanding that an offender has been granted bail for an offence.⁶

² Section 4.1 sets out the full range of grounds under which a foreign national may be found not to pass the character test.

³ As per section 501(12) of the Act, for the purposes of this section, imprisonment includes any form of punitive detention in a facility or institution.

⁴ 'Substantial criminal record' is defined in section 501(7) of the Act, see section 4.1.

⁵ *Victoria Sentencing Manual, 11.7.9 Hardship in the risk of deportation*, Judicial College of Victoria, last updated 5 October 2017 <http://www.judicialcollege.vic.edu.au/eManuals/VSM/16165.htm>.

⁶ *NSW Sentencing Bench Book, Court to take other matters into account (including pre-sentence custody), [12-510] What time should be counted?* Judicial Commission of New South Wales, viewed 6 April 2018 https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/court_to_take_other_matters_into_account.html.

- 2.1.9 Where a foreign national does not have a substantial criminal record but has engaged in criminal conduct or other serious conduct of concern, there may be grounds to consider refusal or cancellation of their visa on the basis of a subjective limb of the character test. For example, they may subjectively fail the character test on the basis that their past and present general and/or criminal conduct indicates that they are not a person of good character, or where there is a risk that they may represent a danger to the Australian community. Foreign nationals may be referred to the Department by law enforcement agencies for consideration under the subjective character grounds where there is a concern regarding risk to the community.
- 2.1.10 In determining whether there are grounds to consider cancelling or refusing a foreign national's visa, consideration may be given to sentencing remarks including any judges comments concerning the likelihood of reoffending or the risk a foreign national may pose.
- 2.1.11 In FY2017/18 (as at 31 March 2018), the three most common offence types for section 501 visa cancellations and refusals were assault, drug offences and other violent offences.⁷

Mandatory cancellation

- 2.1.12 The mandatory cancellation provision at section 501(3A) of the Act, introduced in December 2014, significantly strengthened visa cancellation powers. In FY2016/17, mandatory cancellations consisted of approximately **96 per cent** of cancellation decisions made under section 501 of the Act.
- 2.1.13 Section 501(3A) of the Act requires that a foreign national's visa *must* be cancelled if they are serving a full time term of imprisonment for an offence committed in Australia and they have, at any time, been sentenced to a **single** term of 12 months or more imprisonment, or have been convicted, found guilty or had a charge proven for a sexually based crime involving a child.
- 2.1.14 As there is no discretion for mandatory cancellation decisions, a natural justice opportunity to respond is not provided to the foreign national prior to a decision being made.⁸ However, a foreign national who has had their visa mandatorily cancelled may seek revocation of the decision under section 501CA(4) of the Act within 28 days from the date of notification.
- 2.1.15 A mandatory visa cancellation may be revoked if the Minister (or other portfolio Minister or departmental delegate) is satisfied that the foreign national passes the character test, or there is another reason why the original decision should be revoked, having regard to the considerations in Ministerial Direction 65.⁹ Where a cancellation decision is revoked, the cancelled visa is reinstated.

⁷ Figures regarding section 501 visa cancellations and refusal by offence type are located at section 4.2, Table 1.

⁸ Natural justice provides a foreign national with an opportunity to respond to adverse information and to raise any countervailing considerations.

⁹ A copy of Ministerial Direction 65 is at section 4.3.

Discretionary cancellation and refusal

- 2.1.16 The risk of harm posed by foreign nationals who engage in criminal or other serious conduct is a priority to the Department, regardless of the criminal sentence imposed.
- 2.1.17 Foreign nationals who have engaged in criminal conduct or other serious conduct, but do not engage the mandatory visa cancellation provisions, may still be considered under section 501 and may be found not to pass the character test.
- 2.1.18 Section 501(1) and section 501(2) of the Act provide the power to refuse or cancel a foreign national's visa if they do not pass the character test. These powers may be exercised by the Minister, other portfolio Ministers or a departmental delegate.
- 2.1.19 Section 501(1) and section 501(2) must be exercised with natural justice. As such, a foreign national must be notified of the intention to consider visa refusal or cancellation and will be given 28 days to respond prior to a decision being made.
- 2.1.20 The Minister and other portfolio Ministers have the personal power under section 501(3) to refuse or cancel a visa where they reasonably suspect that the person does not pass the character test and are satisfied that refusal or cancellation is in the national interest. This power is exercised without natural justice, however the foreign national will be entitled to seek revocation under section 501C(4) of the Act within seven days if in immigration detention, and/or judicial review within 35 days from notification.
- 2.1.21 In FY2016/17, there were **666** discretionary section 501 visa cancellation and refusal decisions. In FY2017/18 (as at 31 March 2018), there have been **422** discretionary section 501 visa cancellation and refusal decisions.¹⁰

Discretionary considerations

- 2.1.22 When exercising discretionary section 501 powers, the decision maker must consider whether to exercise their discretion to refuse, cancel, or not revoke mandatory cancellation of a visa given the specific circumstances of the case.
- 2.1.23 Ministerial Direction 65, which commenced on 23 December 2014, is binding for departmental delegates and the AAT, and outlines the relevant primary and secondary considerations that must be taken into account. The Minister and other portfolio Ministers are not bound by Ministerial Direction 65, but may turn their mind to these considerations in determining whether to exercise their discretion to cancel, refuse or not revoke mandatory cancellation of a visa.
- 2.1.24 Ministerial Direction 65 outlines the following primary considerations for section 501 decisions:
- the protection of the Australian community from criminal or other serious conduct;
 - the best interests of minor children in Australia; and
 - the expectations of the Australian community.

¹⁰ Includes only decisions under section 501(1), section 501(2) and section 501(3).

- 2.1.25 The secondary considerations include: international non-refoulement obligations; the strength, nature and duration of ties to Australia; impact on victims; impact on Australian business interests; impact on family members; and the extent of impediments if removed.
- 2.1.26 As such, although the decision maker may find that a foreign national does not pass the character test, they may decide to exercise their discretion not to cancel, not to refuse or revoke the mandatory cancellation of a foreign national's visa, after having regard to the discretionary considerations outlined in Ministerial Direction 65.

The revocation process

- 2.1.27 Foreign nationals who have had their visa cancelled or refused without natural justice under section 501 of the Act (by a Minister under section 501(3) or mandatorily cancelled under section 501(3A))¹¹ may seek revocation of the decision with the prescribed timeframe. It is open to a foreign national who has had their visa cancelled or refused and has an ongoing request for revocation to voluntarily depart Australia and await a revocation decision while offshore.
- 2.1.28 During the revocation process, a foreign national is able to put forward information that supports the cancellation or refusal being revoked, respond to adverse information or to submit evidence of mitigating factors to the Department.
- 2.1.29 In considering whether to revoke a mandatory cancellation decision, the delegate is bound by the relevant considerations in Ministerial Direction 65.
- 2.1.30 For FY2016/17, of the **1234** foreign nationals whose visas were mandatorily cancelled under section 501(3A) of the Act, **less than 958 (approximately 78 per cent)** sought revocation of the mandatory cancellation.

Table 2: Status of revocation requests of foreign nationals whose visas were mandatorily cancelled in FY2016/17

| Status (as at 31 March 2018) | TOTAL |
|------------------------------|----------------|
| Decision Pending | 316 |
| Invalid | <5 |
| Not Revoked | 291 |
| Revoked | 338 |
| Withdrawn | 8 |
| TOTAL | <958 |

- 2.1.31 Of the **less than 958** who sought revocation, a decision was made to revoke the mandatory cancellation decision in **338 cases (approximately 35 per cent)**. A decision was made not to revoke the mandatory visa cancellation in **291 cases (approximately 30 per cent)**. Of the **291** decisions not to revoke mandatory visa cancellation, **187** were made by a delegate.
- 2.1.32 Of the **187** decisions made by a delegate not to revoke mandatory cancellation of a foreign national's visa, **102** individuals sought merits review of the decision with the AAT.

¹¹ See paragraphs 2.1.13 and 2.1.20.

Section 501 decision makers

- 2.1.33 Decisions under section 501 of the Act are made by: the Minister for Home Affairs, Immigration and Border Protection; the Minister for Multicultural Affairs and Citizenship; the Assistant Minister for Home Affairs; and departmental delegates.
- 2.1.34 Further, the Minister and other portfolio Ministers have personal (non-delegable) powers under the Act which cannot be delegated to a departmental delegate, including personal powers under section 501(3), section 501A and section 501BA.¹²
- 2.1.35 Departmental delegates support the Minister and other portfolio Ministers as decision makers for section 501 cancellations, revocations and refusals. Delegates are highly skilled and experienced officers who have; a comprehensive knowledge of the visa cancellation, refusal and revocation legislative framework and its application (including supporting documents such as Ministerial Direction 65), and a sound understanding of the Department's broader visa policy and decision making frameworks.
- 2.1.36 For the FY2017/18 (as at 31 March 2018), the Minister and other portfolio Ministers have made **less than 192** section 501 decisions compared to **513** section 501 decisions made by delegates.¹³

2.2. General visa cancellation powers

- 2.2.1 In addition to the character provisions, temporary visas of foreign nationals who engage in criminal conduct or other serious conduct of concern may also be considered for cancellation under the general visa cancellation powers in the Act.
- 2.2.2 For example, section 116 of the Act sets out certain situation-specific grounds for cancelling temporary visas. A temporary visa may be cancelled where the presence of the visa holder in Australia is or may be a risk to the health, safety or good order of the Australian community, or the health or safety of an individual or individuals. Further, certain temporary visas may be cancelled under section 116 of the Act where the visa holder has been charged or convicted of an offence against an Australian law (i.e. Commonwealth, State or Territory laws).
- 2.2.3 Decisions made by the delegate using general visa cancellation powers are merits reviewable by the AAT. It is also open to the foreign national to seek judicial review of the decision.

2.3. Review processes

- 2.3.1 When a foreign national's visa has been cancelled or refused by a delegate under section 501 of the Act, or where a delegate has made a decision not to revoke mandatory cancellation, it is open to the foreign national to seek merits review or judicial review.

¹² See paragraphs 2.1.20, 2.3.21 and 2.3.22.

¹³ Includes only decisions under section 501(1), section 501(2), section 501(3), section 501C(4), and section 501CA(4).

- 2.3.2 Where a foreign national does not hold a visa and has sought merits or judicial review, they will remain in immigration detention until all ongoing matters are finalised or they request to be voluntarily removed from Australia. Foreign nationals whose visas have been cancelled under section 501 of the Act comprise **36 per cent** of the detention population (as at 29 March 2018).

Merits review

- 2.3.3 The AAT is an independent body that has the authority to affirm, vary, set aside or substitute a decision or remit a decision back to the Department for reconsideration, with recommendations or directions it considers appropriate.
- 2.3.4 A foreign national whose visa has been cancelled or refused by a departmental delegate under section 501, or where a departmental delegate has made a decision not to revoke mandatory cancellation, may seek merits review by the AAT, provided that an application for review is lodged within nine days if the foreign national is in Australia and 28 days if the foreign national is outside Australia.
- 2.3.5 Merits review of an administrative decision involves freshly examining the facts, law and policy relating to that decision. The AAT will also have regard to new information not available to the delegate at the time of primary decision, including any evidence given at a hearing.
- 2.3.6 As previously mentioned, Ministerial Direction 65 provides binding guidance to departmental delegates and the AAT on what factors must be considered when exercising discretion to refuse or cancel a visa on character grounds, or when making a decision regarding whether to revoke a mandatory cancellation.
- 2.3.7 Although the delegate has previously had regard to these considerations when making a primary decision to cancel, refuse or not to revoke mandatory cancellation of a visa, where the AAT has found that grounds for cancellation or refusal are enlivened, the AAT will take a fresh look at the relevant considerations as set out in Ministerial Direction 65.
- 2.3.8 The AAT makes decisions within the same legislative framework as the delegate, and may exercise all the powers and discretion conferred on the delegate, which includes having regard to the considerations in Ministerial Direction 65. In making their decision, the AAT may also have regard to further information that was not available to the delegate at the time the original decision was made.
- 2.3.9 Given the discretionary nature of such decisions, the weight applied to these considerations may differ between decision makers.
- 2.3.10 The AAT does not have the jurisdiction to review visa cancellation or refusal decisions, or decisions not to revoke visa cancellations, made by the Minister or other portfolio Ministers.
- 2.3.11 It is open to a foreign national whose visa has been cancelled, refused or where mandatory cancellation has not been revoked, by the Minister or other portfolio Ministers to seek judicial review of the decision.
- 2.3.12 As at 31 March 2018, there were **54** ongoing matters involving section 501 character decisions before the AAT.
- 2.3.13 For FY2017/18 (as at 31 March 2018), the AAT has affirmed approximately **70 per cent** of the delegate's decisions under section 501. This is an increase from the **65 per cent** of delegate decisions affirmed in FY2016/17.

Table 3: AAT review outcomes for section 501 decisions by financial year

| Status | 2015/16 | 2016/17 | 2017/18 as at 31 March 2018 | TOTAL |
|-----------------------|---------------|----------------|-----------------------------|----------------|
| Applicant Withdrawal | <5 | 22 | 12 | <39 |
| Department loss | 5 | 30 | 38 | 73 |
| Department withdrawal | 0 | <5 | <5 | <10 |
| Department win | 14 | 102 | 124 | 240 |
| TOTAL | <24 | <159 | <179 | <362 |

- 2.3.14 As per section 500(6L) of the Act, if an application is made to the AAT for review of a decision made under section 501 or section 501CA(4) of the Act in relation to a foreign national in the migration zone, the AAT has 84 days after notification to make a decision. If a decision is not made within this period, the AAT is taken to have made a decision (under section 43 of the *Administrative Appeals Tribunal Act 1975*) to affirm the decision. That is, the Minister's or Department's decision stands.
- 2.3.15 In FY2016/17, the average timeframe for a Department loss decision at the AAT relating to a section 501 character decision was 133 days from the date of lodgement, and the average timeframe for a Department win decision was 159 days from the date of the lodgement. In the FY2017/18 (as at 31 March 2018), this has increased to 144 days for Department losses and decreased to 130 days for Department wins.¹⁴
- 2.3.16 The Minister or a foreign national may appeal a decision of the AAT to the Federal Court if they believe there is an error of law.
- 2.3.17 Of the 124 cases which resulted in a Department win at the AAT, between 1 July 2017 and 31 March 2018, 37 foreign nationals went on to seek judicial review.¹⁵
- 2.3.18 In FY2016/17, the average timeframe for a Department loss decision at judicial review relating to a section 501 character decision was 284 days from the date of lodgement, and the average timeframe for a Department win decision was 165 days from the date of lodgement. In the FY2017/18 (as at 31 March 2018), this has decreased to 232 days for Department losses and increased to 235 days for Department wins.

Minister's personal powers to set aside a decision

- 2.3.19 The Minister and other portfolio Ministers have personal powers under the Act to set aside an AAT decision and substitute it with an adverse (cancellation or refusal) decision, if they are satisfied that it is in the national interest to do so. Such decisions are not reviewable by the AAT, but are subject to judicial review.
- 2.3.20 National interest has not been defined by courts or under statute. The question of what is or is not in the national interest is an evaluative one, and is given to the Minister to determine personally, according to his satisfaction, but which must nevertheless be attained reasonably and derived logically from the material.

¹⁴ These timeframes may be affected by subsequent appeals to the court and remittance back to the AAT for further consideration.

¹⁵ This includes active and finalised judicial review proceedings.

- 2.3.21 Section 501A of the Act allows the Minister and other portfolio Ministers to set aside a decision of the AAT or a delegate not to cancel or refuse a visa under section 501(1) or section 501(2) of the Act, and cancel or refuse the visa, if the Minister reasonably suspects that the person does not pass the character test and that cancellation or refusal is in the national interest. This power may be exercised with or without natural justice.
- 2.3.22 Section 501BA of the Act allows the Minister and other portfolio Ministers to set aside a decision of the AAT or a delegate under section 501CA to revoke a mandatory cancellation decision, and cancel the visa, if the Minister is satisfied that cancellation is in the national interest. This power is exercised without natural justice.
- 2.3.23 Section 501BA was introduced in the December 2014 legislative amendments. As per the explanatory memorandum,¹⁶ the intention behind the introduction of section 501BA was to ensure that the Minister retains the ability in exceptional cases, where it is in the national interest, to remove a person who does not pass the character test from the community. This is in recognition of the fact that the Government is ultimately responsible for ensuring that decisions reflect community standards and expectations.
- 2.3.24 The Minister and other portfolio Ministers also have personal powers under section 133A and section 133C of the Act to set aside a decision of the AAT or a delegate not to cancel a visa under general visa cancellation powers including section 116, and cancel the visa if they are satisfied that it would be in the public interest to do so.
- 2.3.25 These provisions were also introduced in the December 2014 legislative amendments. The intention behind the introduction of section 133A and section 133C was that, ultimately, the community holds the Minister responsible for decisions within his portfolio, even where those decisions have resulted from merits review.¹⁷

3. Conclusion

Australia has a sovereign right to determine whether foreign nationals are allowed to enter and/or remain in Australia. A foreign national who has committed a serious crime, including of a violent or sexual nature, and particularly against vulnerable members of the community, should generally expect to be denied the privilege of coming to, or forfeit the privilege of staying in, Australia. There are strong provisions under the Act to cancel or a refuse a visa on the basis of a broad range of criminal conduct or other conduct of concern.

¹⁶ Migration Amendment (Character and General Visa Cancellation) Bill 2014, Explanatory Memorandum (2013-14) http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5345_ems_afd76f6e-75a7-427b-81ac-d4adb963a996/upload_pdf/79436.pdf;fileType=application%2Fpdf.

¹⁷ Migration Amendment (Character and General Visa Cancellation) Bill 2014, Explanatory Memorandum (2013-14) http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5345_ems_afd76f6e-75a7-427b-81ac-d4adb963a996/upload_pdf/79436.pdf;fileType=application%2Fpdf.

Where a decision has been made to cancel or refuse a visa, or a decision has been made not to revoke mandatory visa cancellation, a foreign national may seek to have the decision reviewed either through the revocation process, merits review by the AAT or judicial review. In particular, the merits review process involves freshly examining the facts, law and policy relating to the decision and may have regard to new information that was not available to the delegate at the time of decision. The AAT is also bound to have regard to the considerations in Ministerial Direction 65 when assessing the merits of a case.

Where the AAT has made a decision to set aside a delegate's decision to refuse, cancel or not revoke mandatory cancellation, the Minister and other portfolio Ministers have the personal power to set aside the AAT's decision and substitute with an adverse (refusal or cancellation) decision. Such powers are reflective of the fact that the Government is ultimately responsible for ensuring that decisions reflect community standards and expectations, and that the community holds the Minister responsible for decisions within his portfolio. The AAT does not have jurisdiction to review ministerial decisions.

4. Annexures

4.1. The Character Test

501(6) For the purposes of this section, a person does not pass the character test if:

- (a) the person has a substantial criminal record (as defined by subsection (7)); or
- (aa) the person has been convicted of an offence that was committed:
 - (i) while the person was in immigration detention; or
 - (ii) during an escape by the person from immigration detention; or
 - (iii) after the person escaped from immigration detention but before the person was taken into immigration detention again; or
- (ab) the person has been convicted of an offence against section 197A; or
- (b) the Minister reasonably suspects:
 - (i) 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; and
 - (ii) that the group, organisation or person has been or is involved in criminal conduct; or
- (ba) the Minister reasonably suspects that the person has been or is involved in conduct constituting one or more of the following:
 - (i) an offence under one or more of sections 233A to 234A (people smuggling);
 - (ii) an offence of trafficking in persons;
 - (iii) 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;

whether or not the person, or another person, has been convicted of an offence constituted by the conduct; or

- (c) having regard to either or both of the following:
 - (i) the person's past and present criminal conduct;
 - (ii) the person's past and present general conduct;

the person is not of good character; or

- (d) in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would:

- (i) engage in criminal conduct in Australia; or
- (ii) harass, molest, intimidate or stalk another person in Australia; or
- (iii) vilify a segment of the Australian community; or
- (iv) incite discord in the Australian community or in a segment of that community; or
- (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way; or

- (e) a court in Australia or a foreign country has:
 - (i) convicted the person of one or more sexually based offences involving a child; or
 - (ii) found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction; or
- (f) the person has, in Australia or a foreign country, been charged with or indicted for one or more of the following:
 - (i) the crime of genocide;
 - (ii) a crime against humanity;
 - (iii) a war crime;
 - (iv) a crime involving torture or slavery;
 - (v) a crime that is otherwise of serious international concern; or
- (g) the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979); or
- (h) an Interpol notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.

Otherwise, the person passes the character test.

Substantial criminal record

501(7) 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 or more; 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:
 - (i) been found by a court to not be fit to plead, in relation to an offence; and
 - (ii) the court has nonetheless found that on the evidence available the person committed the offence; and
 - (iii) as a result, the person has been detained in a facility or institution.

4.2. Character Statistics

Table 1: Section 501 visa cancellations (discretionary and mandatory) and refusals by primary offence type and financial year

| Offence* | FY2016/17 | FY2017/18 (as at 31 March 2018) |
|---|-----------------|---------------------------------|
| Assault | 442 | 252 |
| Drug Offences | 309 | 191 |
| Other Violent Offence | 257 | 121 |
| Other Non-Violent Offence | 203 | 67 |
| Child Sex Offences | 126 | 81 |
| Armed Robbery | 102 | 63 |
| Theft, Robbery, Break Enter | 110 | 48 |
| GBH, Reckless Injury | 93 | 52 |
| Rape, Sexual Offences | 74 | 52 |
| Fraud, Deception, White Collar | 79 | 45 |
| Murder | 30 | 12 |
| Child Pornography | 20 | 19 |
| Manslaughter | 21 | 17 |
| Use Threat Intent Weapon | 17 | 7 |
| Domestic Violence | 0 | 19 |
| National Security/Org. Crime | 6 | 9 |
| (blank) | 8 | 6 |
| Kidnapping | 5 | <5 |
| Driving Offence | 0 | 8 |
| War Crimes/Crims Against Human. | <5 | <5 |
| Controversial Visitor | 0 | <5 |
| People Smuggling | <5 | <5 |
| Attempted Murder | <5 | 0 |
| Association/Membership (OMCG, other criminal group) | 0 | <5 |
| Indecent Act/Indecent Behaviour | 0 | <5 |
| TOTAL | <1917 | <1099 |

*This indicates the most serious offence however a foreign national's criminal history may consist of multiple offence types.

4.3. Ministerial Direction 65

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

DIRECTION NO. 65

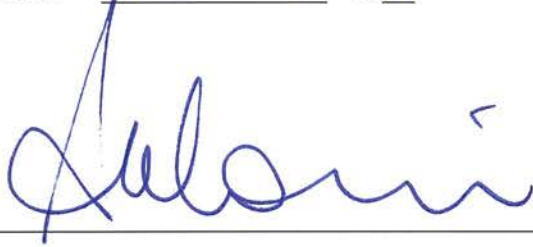
MIGRATION ACT 1958

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.

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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

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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.

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- (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.

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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.

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- (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.

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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

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- 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

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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

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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.

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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;

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- 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.

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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

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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.

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- (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

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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

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- 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.

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- (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

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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

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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.

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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.

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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

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- 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

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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

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- 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:

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- 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

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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

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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.

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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;

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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:

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- 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.

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ANNEX B - Interpretation

| | |
|------------------------------|---|
| Act | means the <i>Migration Act 1958</i> . |
| 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 | <p>is defined in section 5 of the Act and means:</p> <ul style="list-style-type: none">a. being in the company of, and restrained by:<ul style="list-style-type: none">i. an officer; orii. in relation to a particular detainee – another non-citizen directed by the Secretary to accompany and restrain the detainee; orb. being held by, or on behalf of an officer;<ul style="list-style-type: none">i. in a detention centre established under this Act; orii. in a prison or remand centre of the Commonwealth, a State or Territory; oriii. in a police station or watch house; oriv. in relation to a non-citizen who is prevented, under section 249 of the Act, from leaving a vessel – on that vessel; orv. 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 |

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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.