Committee Secretary
Joint Standing Committee on Migration
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Dear Committee Secretary,

I thank you for the offer extended to Professor Crock, to respond to the inquiry into review processes associated with visa cancellations made on criminal grounds. As my Professor of Migration Law at the University of Sydney, Mary Crock extended me this invitation. In accepting this invitation, it was my intention to provide a contextual and contemporaneous discussion of the law, its history, and how it may be changed to align with our system of responsible and representative government.

A Submission to the Inquiry of the Joint Standing Committee on Migration into Review Processes Associated with Visa Cancellations Made on Criminal Grounds.

A CALL TO DE-POLITICISE MIGRATION AND RE-AFFIRM VALUES OF RESPONSIBLE AND REPRESENTATIVE GOVERNMENT

s501 – Ministerial Power – Review

The focus for this submission is the expansive visa cancellation powers of the Minister under section 501 of the Migration Act 1958 (Cth) and the constrained jurisdiction for review of such decisions. The effect has been the (re-)politicization of migration law. A shift to expand the powers of review and to contract the unilateral powers of the Minister is thus recommended. This would work in favor of our legal and social values of responsible and representative government. These issues are explored in light of the history of migration law, the operation of section 501 and related policy, and the constraints on merits and judicial review.

I. INTRODUCTION

Section 501 of the *Migration Act 1958* (Cth), ('the Act') provides for the cancellation of visas on criminal grounds. It establishes parallel pathways; one which affords natural justice,[1] and the other which does not.[2] This framework expands the non-reviewable and non-compellable powers of the Minister when making decisions personally and upon being satisfied that the decision is in the national interest.[3] Simultaneously, this framework contracts the jurisdiction of the Administrative Appeals Tribunal ('AAT'), and the Courts, to review such ministerial decisions. The consequence being the weakening of the coherence, fairness and efficiency of the system, and the (re-)politicisation of migration.[4] Accordingly, it is recommended that this trend be reversed so as to limit Ministerial powers and expand jurisdiction for review, especially merits review. Thus aligning and affirming the values of responsible and representative government. This proposition will be explored through the keystone historical developments of migration law. Further, the operation of the law and related policy and its impact on the review jurisdiction of the AAT. Relatedly, the scope of judicial review of ministerial decisions. Finally, the practical consequences of the current framework which are less duplication of merits review and more inefficiencies in the review process.

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[1] *Migration Act 1958* (Cth) ss 501(1), (2) (*'Migration Act'*).
[2] Ibid ss 501(3), (3A).
[3] Minister for Home Affairs (Cth), *s501 - The character test, visa refusal and visa cancellation,* VM-1001, 24 April 2017, 3.4.1.
[4] Mary Crock, Laurie Berg, *Immigration, Refugees and Forced Migration* (The Federation Press, 2011) 165.

II. SIGNIFICANT DEVELOPMENTS IN THE LAW

A. *The Constitutional Basis for Migration Law*

At Federation, natural born and naturalised British citizens became members of Australia.[5] The *Constitution* omitted to grant legislative power over citizenship, leaving the 'immigration and emigration'[6] and 'naturalization and aliens'[7] powers to govern migration control, and thereby the composition of society. This was immediately evident with the, reprehensible, operation of the White Australia Policy. The consequence of the omission, has compelled the judiciary to determine the Constitutional limits of the immigration and aliens powers.

In *Robtelmes v Brenan,* the High Court of Australia endorsed Lord Atkinson's statement that the power to expel immigrants is 'the complement power of exclusion'.[8] Nevertheless, non-citizens could become absorbed *immigrants*, protected from the reach of the migration power, but not the aliens power. Notably, until *Nolan,*[9] British subjects, Irish nationals and protected persons were further protected as they could become absorbed *persons.*[10]

In *Ex parte Te,*[11] Justices Kirby and Callinan held the minority opinion that an absorbed non-citizen could also be beyond the reach of the aliens power. Despite this, they aligned with the

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[5] Mary Crock, Laurie Berg, *Immigration, Refugees and Forced Migration* (The Federation Press, 2011) 165; *Immigration Restriction Act 1901* (Cth) ss 3, 8; *Pacific Islanders Labourers Act 1901* (Cth) s 8.
[6] *Australian Constitution* s 51(xxvii).
[7] Ibid s 51(xix).
[8] *Robtelmes v Brenan* [1906] HCA 58, 420.
[9] *Nolan v Minister of State for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 183-7.
[10] Crock and Berg, above n 5, 523
[11] *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* [2002] HCA 48 (*'Ex parte Te'*); Cf Michelle Foster, 'An 'Alien' by the Barest of Threads, the Legality of the

majority in upholding the valid deportation of Mr Te under sections 200 and 201 and the visa cancellation of Mr Dang under section 501(2) of the Act.[12] This was owing to the applicants not being naturalised and the incompatibility of their criminal behaviour with absorption.[13] This discourse highlights the socio-legal arguments supporting the visa cancellation power. The prevailing counter-argument is that the conduct is "no worse" than that of many long-term Australian members "*who happen to be citizens*"[14] (emphasis added). Moreover, that visa cancellations of long-term citizens effectively 'exports our problems elsewhere'. This Constitutional backdrop contextualises the politicised notion of migration and the requirement for judicial review of legislation and the executive and administrative exercise of power therein. Such checks-and-balances are foundational safeguards to our system of responsible and representative government.

B. *The Legislative Framework Governing Migration Control on Criminal Grounds Prior to Section 501*

The power to deport non-citizens on criminal grounds has endured since Federation.[15] Initially, under sections 12 and 13 of the Act, the power was available against an immigrant for crimes committed in their first five years in Australia; or an alien for serious crimes committed at any time. In 1983, the Act was amended to be founded in the aliens power.[16] Also, to extend the limit to which all lawful permanent residents could no longer be deported

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Deportation of Long-term Residents from Australia' (2009) 33(2) *Melbourne University Law Review* 483, 498-499.

[12] *Ex parte Te* [2002] HCA 48, 217-219 per Kirby J, 229 per Callinan J.

[13] Ibid 218, 228.

[14] *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 420, 429-430 per Moore and Gyles JJ.

[15] *Immigration Restriction Act 1901* (Cth) s 8; *Aliens Deportation Act 1948* (Cth).

[16] *Migration Amendment Act 1983* (Cth) s 4.

to 10 years.[17] Thus providing for restraint in the exercise of migration powers. Notably, the AAT had recommendation powers over decisions made under these sections, which now operate as sections 200 and 201 of the Act.[18]

In 1992, the *Migration Act* was further amended to insert section 180A, the predecessor to section 501. Its effect was to "conflate the power to exclude non-citizens, with the power to expel on grounds of criminality, character and conduct".[19] The catalyst to this was the scrutiny the Minister received by the Full Federal Court upon attempting to exclude non-citizens and members of the Hell's Angels Club from entry into Australia on "public interest" grounds.[20] The amendment moderated the politics of migration by elevating the review powers of the AAT from recommendation to determination. Though, this could be impinged by the Minister personally issuing certificates to inhibit merits review. With its expanded power, the AAT adopted a conservative approach.[21]

III. THE SCOPE OF THE ADMINISTRATIVE APPEAL TRIBUNAL'S JURISDICTION TO REVIEW

A. *The Operation of Section 501 and Constraints Placed on the AAT's Jurisdiction*

[17] *Migration Amendment Act 1983* (Cth) s 10.
[18] Michelle Foster, 'An 'Alien' by the Barest of Threads, the Legality of the Deportation of Long-term Residents from Australia' (2009) 33(2) *Melbourne University Law Review* 483, 504-507.
[19] Crock and Berg, above n 5, 525-526; Cf then *Migration Act 1958* (Cth) s 502.
[20] *Hand v Hell's Angels Motor Cycle Club Inc* (1991) 25 ALD 667.
[21] Crock and Berg, above n 5, 527.

The 1998 amendment to the Act laid the most groundwork for the current section 501.[22] It dramatically expanded the personal powers of the Minister whilst constraining the independent review powers of the AAT. Thereby, resulting in the re-politicisation of migration.[23] Subsequent legislation has only exacerbated this division of power.[24] The defining features are the Ministerial power to issue binding directions on,[25] and set aside decisions made by,[26] delegates and the AAT; the onus of the character test being shifted to the visa-holder; and the broader categories of bad character.[27]

Section 501 of the Act provides two powers to refuse or cancel visas on character grounds.[28] The primary power under subsections 501(1) and 501(2) is discretionary but requires the provision of natural justice. Under subsection 501(1), a visa may be refused if the person does not satisfy the Minister that they pass the character test. Whilst under subsection 501(2) the Minister may cancel a visa upon reasonably suspecting that the person does not pass the character test,[29] and the person not satisfying the minister otherwise.[30] Distinctively, the natural justice rules are subject to policy and not the strict controls of the Act.[31] The rules thus attract the common law standards.[32] Practically, natural justice is afforded by the

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[22] Foster, above n 19, 509-511.
[23] Crock and Berg, above n 5, 528.
[24] *Migration Amendment (Character and General Visa Cancellation)* Bill 2014.
[25] *Migration Act* s 499, as amended by *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth) sch I items 16-17.
[26] *Migration Act* s 501A, inserted by *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth) sch 1 item 23.
[27] *Migration Act* s 501(7), as amended by *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth) sch I item 23.
[28] Cf Alan Freckelton, Marianne Dickie, *Administrative Decision-Making in Australian Migration Law* (Griffin Press, 2015) ch 3, 'Section 501'.
[29] *Migration Act* s 501(2)(a).
[30] Ibid s 501(2)(b).
[31] Minister for Home Affairs (Cth), above n 4.
[32] *Minister for Immigration and Multicultural and Indigenous Affairs v George* (2004) FCAFC 276; cf *Kioa v West* [1895] 159 CLR 550.

decision-maker providing a written notice of intention to consider refusal on character grounds (‘NOICR’).[33] This must outline disclosable information regarding alleged bad character activities and the information source, and an invitation to make a case. The AAT has review jurisdiction when the power is exercised by a delegate but not when exercised by the Minister personally.[34]

The secondary power under subsections 501(3) and 501(3A) do not mandate natural justice.[35] The former is discretionary, exercisable by the Minister personally when he or she reasonably suspects the person does not satisfy the character test,[36] and is satisfied that the decision is in the national interest.[37] The decisions is not reviewable by the AAT but may be revoked by the Minister. The latter is mandatory, exercisable upon satisfaction that the person will fail the test owing to a substantial criminal record,[38] or conviction for sexually based offences regarding a child,[39] in breach of Australian law, with the person serving a full-time sentence in Australia.[40] The AAT only has jurisdiction if the decision not to revoke the cancellation was made by a delegate and not the Minister acting personally.[41] Pointedly, the Commonwealth Ombudsman found that the Minister, as at April 2016, was personally reviewing 75 percent of the revocation requests.[42] Practically, this undermines jurisdiction for merits review, stagnates processing and creates angst for persons detained and overseas, and their families, in the long wait for consideration. As will be further discussed, the Minister

[33] Minister for Home Affairs (Cth), above n 4, 3.3.
[34] *Migration Act* s 500(1)(b).
[35] Freckelton and Dickie, above n 29.
[36] *Migration Act* s 501(3)(c).
[37] Ibid s 501(3)(d).
[38] Ibid s 501(3A)(a)(i).
[39] Ibid s 501(3A)(a)(ii).
[40] Ibid s 501(3A)(b).
[41] Ibid s 501BA.
[42] Commonwealth Ombudsman, *The Department of Immigration and Border Protection: The Administration of Section 501 of the Migration Act* (2016) 11.

also has personal power to set aside, and substitute, non-adverse decisions.[43] Again, in exercising his or her power personally, the Minister can elect whether natural justice applies.[44] Notably, the broadness of the character test; as shaped by public interest criteria,[45] further enables visa cancellations and attracts criminal law considerations.

B. *The Preference for Section 501 Cancellations*

As recognized by the Senate Committee in 2006, there has been an executive trend to rely on section 501, instead of, the deportation power under sections 200 and 201.[46] This is particularly true since the introduction of mandatory cancellation powers,[47] which has increased section 501 cancellations by over 1400% from 2013-14 to 2016-17.[48] Formerly, *Sales* stood for the preposition that a lawful long-term permanent resident's visa was not granted, but deemed, and therefore not subject to cancellation.[49] The High Court overturned this case in *Nystrom,* and upheld a Ministerial decision to cancel the visa of a 31 year-old man, resident in Australia practically from birth, on criminal grounds.[50] Accordingly, whilst a person lawfully remaining in Australia for more than 10 years is protected from deportation under section 201, they remain vulnerable to section 501 and automatic removal under

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[43] Ibid 18-21.
[44] *Migration Act* s 501BA.
[45] *Migration Regulations 1994* (Cth) sch 4, PIC4001 and PICs 4002, 4003(a)-(c), 4003A; Minister for Home Affairs (Cth), *s501 - The character test, visa refusal and visa cancellation,* VM-1001, 24 April 2017.
[46] Senate Legal and Constitutional References Committee, Parliament of Australia, *Administration and Operation of the Migration Act 1958* (2006), 282.
[47] *Migration Amendment (Character and General Visa Cancellation)* Bill 2014.
[48] Department of Home Affairs, *Key visa cancellation statistics* (2018) Home Affairs <https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics> 'Character cancellations and refusals since 2010-11 financial year'.
[49] *Sales v MIAC* (2008) 171 FCR 56 [18]-[19] per Gyles and Graham JJ and [85] per Buchanan J.
[50] *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) FCA 566; cf s 501HA as inserted by *Migration Legislation Amendment Act (No 1) 2008* (Cth).

sections 189 and 198.[51] This is exacerbated by the significance of the Minister's powers and constraints on the AAT's review jurisdiction. As attested by the Senate Committee, the abolition of the significant safeguard which is the ten year rule, "must be repealed by the Parliament and not by administrative practice".[52] Accordingly, the current imbalance between the powers of the Minister and the powers for review, do not align with our system of a government acting responsibly for the representation of its people, which in reality includes very long-term residents.

C. *The Operation of Migration Policy and Constraints Placed on the AAT's Jurisdiction*

Where the AAT has jurisdiction to review Ministerial decisions it engages in merits review. Whereby, a member of the AAT is to 'stand in the shoes of the decision-maker'[53] to ensure that "the correct or preferable"[54] decision is made. The member is to make findings based on material questions of fact, in light of the totality of the evidence before them.[55] Under the *Administrative Appeals Tribunal Act,*[56] a member has broad authority to affirm, vary or set aside and substitute a decision, or remit the decision for reconsideration with recommendations.

[51] Foster, above n 19, 484.
[52] Senate Legal and Constitutional References Committee, above n 47, 294.
[53] Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995) paragraphs 2.2 – 2.3, 2.54 – 2.55.
[54] *Re Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 68 (*'Re Drake'*).
[55] *Administrative Appeals Tribunal Act 1975* (Cth) s 43.
[56] *Administrative Appeals Tribunal Act 1975* (Cth) s 43(2B).

Direction no. 65 offers three primary considerations for decision-making under section 501.[57] It is binding on the tribunal, to the extent it is consistent with the Act.[58] The first consideration is the "protection of the Australian community from criminal or other serious conduct"[59] which requires determination of 'the nature and seriousness' of the offence and the risk of recidivism.[60] The more serious the conduct, the more likely the tribunal and Minister will be aligned in their views.[61] The next consideration is the "best interests of minor children in Australia affected by the decision".[62] This is bolstered by our accession to the *Convention on the Rights of the Child,*[63] as recognised in *Teoh.*[64] The third consideration is the "expectations of the Australian community".[65] The tribunal interprets our community as composed of impartial members will full evidential access, and not what may be considered to be "in the public interest".[66] Subsidiary factors are "international non-refoulment obligations", "strength, nature and duration of ties", "impact on Australian business…", "impact on victims" and "extent of impediments if removed".[67] These factors highlight the interrelationship between migration law and international human rights law, despite the latter not being directly binding on the Minister. Obligations to consider include a

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[57] Minister for Home Affairs (Cth), *Direction [No 65] - Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s 501CA*, 22 December 2014, pt A s 9(1) (*'Direction No. 65'*).
[58] *Re Drake* (1979) 2 ALD 60, 640 (Brennan J).
[59] Ibid pt A s 9(1)(a).
[60] Ibid pt A s 9.1(2).
[61] Crock and Berg, above n 5, 544.
[62] *Direction No. 65* pt A s 9(1)(b).
[63] *United Nations Convention on the Rights of the Child,* GA Res 44/24, 44th sess, 61st plen mtg, UN Doc A/RES/44/25 (20 November 1989) art 3 (*'ICCPR'*).
[64] *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20, 287.
[65] *Direction No. 65* pt A s 9(1)(c).
[66] *Preston v MIMIA (No 2)* [2004] FCA 107 [23] (French J).
[67] *Direction No. 65* pt A s 10.

right to one's country[68] and to life;[69] arguably the principle of ne bis in idem;[70] and the rights of persons with disabilities.[71] These are particularly relevant to decisions made against lawful long-term residents.

Procedural instruction further influence the exercise of the tribunal's jurisdiction, despite being non-binding.[72] Firstly, it imposes restrictions on standing and short time limits to seek review.[73] Although, the time limit runs only upon notice being properly provided.[74] The notice must articulate the claims against the applicant,[75] and there must be a reasonable opportunity for the applicant to receive the notice.[76] Secondly, the Act mandates its own administrative law procedures, in replacement of AAT Act procedures, for the provision of reasons to the applicant and information to the AAT.[77] Thirdly, it restricts the AAT from hearing the applicant's evidence unless provided in writing to the Minister two business days prior.[78] Finally, the Minister may exercise his or her powers, in the national interest, to set aside a non-adverse section 501(1) or 501(2) decision,[79] or to issue a conclusive certificate to inhibit merits review.[80] The nexus between the Act, Direction 65 and policy reflect a system

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[68] *International Covenant on Civil and Political Rights,* GA Res 2200A(XXI), Treaty Series vol 999, I-14668 (16 December 1966) art 12(4).
[69] *ICCPR* art 6.
[70] *ICCPR* art 14(7).
[71] *Convention on the Rights of Persons with Disabilities,* GA Res 61/106, 61st sess, 106th plen mtg, UN DOC A/RES/61/106 (13 December 2006).
[72] *Re Drake* (1979) 2 ALD 60, 640 (Brennan J).
[73] Minister for Home Affairs (Cth), above n 4, 3.8.1.
[74] Minister for Home Affairs (Cth), *PAM3: Act - Code of procedure - Notification requirements,* 19 November 2016; *Migration Act* s 500(6C); *Maroun v MIAC* (2009) 112 ALD 424.
[75] *SZBEL v MIMIA* (2006) 228 CLR 152 [31].
[76] *Minister for Immigration and Multicultural Affairs v Capitly* (1999) 55 ALD 365 [34].
[77] Minister for Home Affairs (Cth), above n 4.
[78] Minister for Home Affairs (Cth), above n 4, 3.8.1; *Migration Act* sub-ss 500(65), (6J).
[79] Minister for Home Affairs (Cth), above n 4, 3.8.1; *Migration Act* s 501A.
[80] *Migration Act* ss 339, 503A-503D; cf *Minister for Immigration and Citizenship v Kumar* (2009) 238 CLR 448 and *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501.

that allows for natural justice *in some respects.* Upon broader reflection, however, it has the primary effect of expanding the unilateral powers of the Minister whilst contracting the jurisdiction of the AAT to engage in merits review of the exercise of those powers.

IV. THE SCOPE FOR JUDICIAL REVIEW

The Federal Court or High Court have jurisdiction to review the lawfulness of *all* section 501 decisions; including those made by the Minister personally.[81] In contradistinction to merits review, the role of the Courts is not to 'stand in the shoes of the decision-maker'.[82] Rather, it is to review the application of the law to the facts, whether the rules of procedural fairness were upheld and whether a reasonable decision was made.[83] In conducting this review, if the Court finds the decision to be affected by jurisdictional error, it can set it aside and remit it to the decision-maker for reconsideration. This would occur where a decision was made under sections 501(1) or 501(2) and natural justice was not afforded.[84] However, review on this ground can be sidestepped by exercising the power under sections 501(3) or 501(3A), and generally where the Minister personally exercises his power, as in the national interest. This is particularly concerning when natural justice need not be afforded to lawful long-term residents who fall within the scope of section 501 but not 200 to 201. Moreover, owing to the final nature of these visa cancellations.

As with the AAT, the Court has been subject to legislative attempts to expand Ministerial powers and constrain its judicial review jurisdiction. To some extent this trend was in

[81] Minister for Home Affairs (Cth), above n 4, 3.8.2.
[82] Administrative Review Council, above n 54.
[83] *Council of Civil Service Unions v Minister for Civil Service* [1985] 1 AC 374, 407 per Lord Diplock J.
[84] *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

response to judicial activism in this area. The original Part 8 of the Act, saw the mandating of judicial review procedures and tight-time constraints.[85] Later, the privative clause decision clause was inserted into the Act.[86] However, in *Plaintiff S157* the Court interpreted this provision not to unconstitutionally bar judicial review. Rather, to enable the Court to deem decisions that would otherwise be outside the law as lawful, thus bringing them within the Court's jurisdiction.[87] Relatedly, section 503A(2)(c) was deemed invalid in *Graham* to the extent that it prevented the Minister from being required to divulge information to the superior Courts.[88] The Courts have thus flexed their constitutionally enshrined power to prevent encroachment on their capacity to provide for a minimum standard of judicial review.[89] Accordingly, the Courts have been impacted by the expansion of Ministerial powers, but to a lesser degree than the AAT.

V. THE PRACTICAL CONSEQUENCES OF THE CURRENT FRAMEWORK

A. *Present Levels of Duplication Associated with the Merits Review Process*

The general division of the AAT conducts merits review of Ministerial decisions to cancel visas on criminal grounds. Neither the judiciary nor the Minister engage in such review. Accordingly, there is minimal to no duplication associated with the merits review process.

[85] *Migration Act* ss 477, 476 as inserted by the *Migration Reform Act 1992* (Cth).
[86] *Migration Act* s 474(2) as inserted by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth); cf *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598.
[87] *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, 501 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
[88] *Graham v Minister for Immigration and Border Protection and Te Puia v Minister for Immigration and Border Protection* [2017] HCA 33 [51].
[89] *Australian Constitution* s 75(v); *Judiciary Act 1903* (Cth) s 39B(1).

B. *The efficiency of existing review processes as they relate to decisions made under section 501 of the Migration Act*

At a formalistic level, both the AAT and the Courts are efficient in reviewing section 501 decisions. The bodies being established in light of the need to provide just and efficient review. However, substantively, there are grave inefficiencies in the current merits review process. The AAT has powers to make a non-adverse decision afforded with natural justice or to revoke a decision to cancel a visa. However, the Minister may set aside and substitute its decisions in favor of adverse decisions, without the requirement for natural justice. So long as, the Minister exercises his or her personal power and is satisfied that the decision is in the national interest.[90] The Minister may also use his or her powers to inhibit the review process by not disclosing information to the tribunal.[91] This structure expands the unilateral powers of the Minister and contracts jurisdiction to review. Thus, weakening the finality of AAT decisions and causing significant inefficiencies in existing review processes, especially pertaining to merits review.

VI. CONCLUSION AND RECOMMENDATIONS

The analysis of this submission has been the tension between the expansion of the personal powers of the Minister and the contraction of the scope for review, especially merits review by the AAT, under the *Migration Act 1958* (Cth). Thus, undermining the coherence, fairness and efficiency of migration law and, therein, enabling its re-politicization. This thesis was explored firstly through the historical legal framework governing migration control in this

[90] Minister for Home Affairs (Cth), above n 4, 3.8.1; *Migration Act* s 501A.
[91] *Migration Act* s 503A.

area. Then, in examining the scope of the AAT's review jurisdiction as constrained by section 501 and its related policy. Relatedly, in considering the review jurisdiction of the Judiciary. Conclusively, in asserting that the consequence of this framework is not duplicated, but inefficient, merits review. It is recommended that this should be overcome by limiting the Minister's personal powers and expanding the scope of review by the AAT in particular. An alternative system would de-politicise migration and better align with our values of responsible and representative government. This may be achieved by:

- *(a)* Sections 501(3) and 501(3A) being repealed, or made subject to natural justice requirements;
- *(b)* Section 501 being amended to expressly include the 10-year rule as in section 201;
- *(c)* The power of the Minister acting personally and in the national interest be circumscribed:
  - *(i)* When exercised to revoke a non-adverse decision of the AAT in favour of a lawful long-term permanent residents;
  - *(ii)* When exercised to issue a conclusive certificate prohibiting merits review;
  - *(iii)* When exercised to restrict disclosure to the AAT;
  - *(iv)* And not to limit the jurisdiction of the AAT to engage in merits review;
- *(d)* The values of responsible and representative government, coherence, fairness and efficiency be paramount in review of the current framework;
- *(e)* At minimum, due regard be paid to the concerns raised in the Ministerial exercise of such broad powers.

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