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FAMILY UNITY AND THE VISA CANCELLATION AND REFUSAL FRAMEWORK

Submission to the Legal and Constitutional Affairs References Committee

VISA
CANCELLATIONS
WORKING GROUP

ABOUT THE VISA CANCELLATIONS WORKING GROUP

The Visa Cancellations Working Group is a national group with significant expertise in the area of visa cancellations and migration more generally. The Working Group has on multiple occasions been invited to give evidence before Senate Committee Inquiries since its establishment in 2018.

Its membership includes multiple LIV Accredited Specialists in Immigration Law, and is comprised of individuals from private law firms, not-for-profit organisations, community legal centres, and tertiary institutions, including :

- Abode Migration;
- Amnesty International;
- Assent Migration;
- Asylum Seeker Resource Centre;
- AUM Lawyers;
- Carina Ford Immigration Lawyers;
- Central Australian Women's Legal Service;
- Circle Green Community Legal;
- Clothier Anderson Immigration Lawyers;
- Darebin Community Legal Centre;
- Erskine Rodan & Associates;
- Estrin Saul Lawyers and Migration Specialists;
- FCG Legal;
- Fitzroy Legal Service;
- Federation of Ethnic Communities Councils of Australia Inc;
- Flemington Kensington Community Legal Centre;
- Foundation House;
- Immigration Advice and Rights Centre;
- Jesuit Refugee Service (JRS) Australia;
- Kah Lawyers;
- Law Access;
- Legal Aid New South Wales;
- Monash University;
- MYAN Australia;
- Northern CLC;
- Peter McMullin Centre on Statelessness;
- Refugee Legal;
- Refugee Advice & Casework Service;
- Russell Kennedy;
- SCALES Community Legal;
- The Kaldor Centre;
- The Law Institute of Victoria;
- The Refugee Council of Australia;
- The University of Melbourne;
- Varess;
- Victoria Legal Aid;
- Welcome Legal, and
- Women's Legal Service NSW.

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EXECUTIVE SUMMARY

Australia's visa cancellation and refusal framework adversely affects hundreds of Australian families.

The framework does more than fail to facilitate family reunion: it actively separates families, often permanently.

Families may be separated through protracted, indefinite, harsh and remote detention, and through permanent removal from Australia. In the process, the framework exposes those families to immense and – particularly in the case of children – often irreversible harm.

Following visa cancellations or refusals, evidence shows that Australia removes people to among the most dangerous places in the world, where family members are unlikely to ever be able to visit.

The framework requires urgent review. As it stands, it suffers from unjustifiable delays, overwhelming and unnecessary complexity, and increasing politicisation, all of which seriously compromise the integrity of decision-making. It may also involve numerous breaches of Australia's international obligations.

People suffering disadvantage (including financial, socio-economic, cultural and linguistic barriers) are particularly affected by the defects of the framework. Many are unable to access their rights or tell their story to have their case considered.

Critically, there is little to no funding for affected people to obtain representation, despite the severity of the consequences. Families are facing these extraordinary and life-changing challenges on their own.

INTRODUCTION

1. The Visa Cancellations Working Group (**the Working Group**) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs References Committee inquiry into the efficacy, fairness, timeliness and costs of the processing and granting of visa classes which provide or allow for family and partner reunions (**the Inquiry**).

2. Given the Working Group's particular expertise, these submissions will focus on the effect of Australia's framework for visa cancellation and refusal on the basis of character.

3. The existing framework works not merely to stultify or frustrate family reunion: **it actively separates families, often permanently**. In the process, it **exposes families to immense and often irreversible harm**. It causes **particular harm to children**. It suffers from unjustifiable delays, overwhelming and unnecessary complexity, and, disturbingly, increasing politicisation.

4. In accordance with our remit, our submissions to this Inquiry are confined to the following terms of reference:

   j. other matters relevant to family unity;

   h. the suitability and consistency of government policy settings for relevant visas with Australia's international obligations;

   a. Limitations on eligibility to apply for relevant visas, and

   b. Waiting times for processing and integrity checking of applications for relevant visas.

5. Given that the Inquiry is not specifically focussed on visa cancellations and refusals, but appears to concern itself with application processes, we will also limit these submissions in the event the Committee finds they are not relevant to its present concerns.

6. Broadly, it is the Working Group's view that Australia's migration program does not adequately or equitably provide for effective family reunification. It is apparent to our members that there are numerous deficits that ought to be addressed, most notably the extraordinary expense and complexity of mechanisms that effectively and consistently bar many families from being reunited in Australia. We understand the submissions made by others in the industry will address these serious concerns.

RECOMMENDATIONS

The Working Group makes the following recommendations:

- An inquiry into Australia's visa cancellation and refusal regime be conducted to rectify its considerable dysfunction.
- Independent legal representation be assured for all people facing visa refusal or cancellation under s 501 at the primary stage and before the Administrative Appeals Tribunal to ensure individuals and families are aware of their rights and have the ability to make their case.
- Children should be protected categorically from s 501 visa cancellation.
- Legislative timeframes be instituted for cancellation and refusal decision-making to insulate families from extended or indefinite processes.
- An effective and regular detention review mechanism ought to be legislated, entitling a person to appear before an independent body regarding the appropriateness of their ongoing detention.
- A new Direction be made after sector-wide consultation, relevantly for this Inquiry incorporating the following changes:
    - Certain cohorts of people ought not have their visas cancelled in any but the most serious circumstances, for example national security:
        - people who have lived in Australia for over 10 years, and
        - people who arrived in Australia as children;
    - Family and care connections in Australia should be a primary consideration.
    - The best interests of the child should be the paramount consideration.
    - A re-draft regarding family violence, following sector-wide consultation, to prevent the potential harm to survivors of family violence that inheres in the present Direction.
- Appointments to the AAT be made by an independent statutory body.

CONTEXT – VISA REFUSAL AND CANCELLATION

7. To frame these submissions, it is necessary to provide background regarding Australia's framework for visa cancellation and refusal on the basis of character.

8. Any visa holder, regardless of whether the visa is temporary or permanent, regardless of how long they have lived in Australia, family ties to Australia, and regardless of age, refugee background, or mental impairment, can be subject to cancellation on the basis of character. Any visa applicant (including non-citizens who are applying to renew their permanent visa) can be subject to visa refusal.

9. There is no minimum standard of conduct for visa cancellation or refusal. It is not necessary even to have a criminal record. Broadly speaking, a person can fail the s 501 character test in a range of loosely defined circumstances:

   (a) **Criminal history:** Over a lifetime, the person has cumulatively been sentenced to 12 months' imprisonment or more.[1]
   (b) **Detention offences:** The person was convicted of an offence relating to immigration detention, for example property damage.[2]
   (c) **Association:** The Minister reasonably suspects the person is a member of, or associated with, a group or person who themselves has been involved in criminal conduct.[3]
   (d) **International concern**: The person has allegedly been involved in people smuggling, trafficking in persons, or a crime that is of serious international concern such as a war crime, regardless of whether there has been any conviction.[4]
   (e) **Conduct**: Having regard to past and present criminal and/or general conduct, the person is not of good character.[5]
   (f) **Risk**: If permitted to enter or remain, there is a risk the person would:
      i. Engage in criminal conduct;
      ii. Harass, molest, intimidate or stalk another person;
      iii. Vilify or incite discord in the Australian community or in part of it;
      iv. Represent a danger to the community or part of it, including by becoming involved in disruptive activities.[6]
   (g) **Sexually-based offences involving a child**, including where no conviction was recorded.[7]
   (h) **ASIO assessment**: ASIO has deemed a person directly or indirectly a risk to security.[8]
   (i) **Interpol notice**: It is reasonable to infer that the person presents a risk on the basis of an Interpol notice that is in force.[9]

10. For completeness, it is important to note that s 116 also provides for the cancellation of temporary visas on the basis of offending, and even on the basis of unproven charges alone.

[1] S 501(6)(a).
[2] S 501(6)(aa) and (ab).
[3] S 501(b).
[4] S 501(ba) and (f).
[5] S 501(c).
[6] S 501(d).
[7] S 501(e).
[8] S 501(g).
[9] S 501(h).

A determination that a person fails the character test means either that their visa must or may be cancelled or refused. That cancellation may be mandatory,[10] or they may have a chance to respond prior to action being taken. In some cases, a person has the right to merits review.[11] In other cases, they have no such right.[12] In some cases, they are not even entitled to know the information on which the Minister used to make their assessment of the person's character.

11. In the Working Group's submission, these standards are over-broad and lack clarity, contributing to unjust outcomes for families and individuals.

OTHER MATTERS RELEVANT TO FAMILY UNITY

CONSEQUENCES OF VISA CANCELLATION FOR FAMILIES

12. As was observed by Chief Justice Allsop, in some circumstances, cancellation is "potentially life-destroying".[13]

13. Australia's visa refusal and cancellation regime causes catastrophic and often irreversible harm to individuals, to families, and critically, to children. That harm includes:

    (a) Protracted, and indeed indefinite, **detention** in remote locations, under **poor conditions** with limited access to technology and communication;
    (b) **Forcible removal** from Australia, including where a person will be removed to **serious harm in breach of Australia's international non-refoulement obligations**;
    (c) **Permanent family separation**, with individual consequences including ongoing emotional, psychological, financial, social and practical consequences for communities.
    (d) **Permanent separation of a child from their parent/s**, with individual consequences including ongoing emotional, psychological, financial, social and practical consequences for communities.

14. These concerns exist in particular for recognised refugees, including those who have been resettled to Australia, who face indefinite detention (due to the combination of Australia's mandatory detention laws and Australia's nonrefoulement obligations) if their visas are cancelled or refused.

15. The law governing cancellation is complex, with numerous opportunities during a refusal or cancellation process for an individual to lose access to their rights. This potential loss of rights is exacerbated for those experiencing individual or socioeconomic disadvantage. The current settings disadvantage people with limited education, health conditions or who lack resources. In the Working Group's experience, many people who receive notices relating to cancellation or refusal simply do not know what to do and are overwhelmingly distressed, leading to inaction or a failure to comply with requirements for response. This can be fatal to any options they have to properly respond to the notice and exercise their rights.

[10] S 501(3A).
[11] If the decision was not made personally by a Minister, and the affected person complies with strict rules about seeking review.
[12] If a Minister makes a decision personally, a person has no opportunity for merits review. Between 2013 and 30 December 2019, the Minister personally cancelled, refused or didn't revoke in at least 979 cases (see FA 19/12/01125).
[13] *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225 at [45].

16. Harm arising from visa cancellation or refusal may also involve breach of Australia's international obligations. This means that, beyond the harms to individuals, families and communities, Australia's policies regarding family reunion have broader implications for our international standing and relationships. The long-standing international conventions to which Australia voluntarily committed are, as Wigney J has observed, "not something that a reasonable Minister of State would take lightly."[14]

17. This applies to our international obligations in respect of non-refoulement, which we do not address in depth in these submissions, as well as obligations relating to integrity of the family and the rights of children.

18. As the Full Court recently noted:

> *[T]he consequence of non-compliance with Australia's treaty obligations does not only impact on the person who might be returned to their home country. It impacts upon Australia's reputation and standing in the global community*.[15]

19. The harms also involve cost to the community, represented by detention costs, funding for courts and Tribunals, as well as ongoing health costs over what is likely to be decades, and indeed over generations.

SCALE

20. The problem the Working Group seeks to bring to the attention of the Committee is grand in scale and devastating in effect. The following figures are provided to illustrate the size of the problem.

21. For each person cancelled, refused, detained or removed, it must be remembered that there are family members—parents, grandparents, children, grandchildren, brothers and sisters, aunts, uncles, nieces, nephews—and a community, who are all affected.

22. The sheer number of individuals directly affected by visa refusal and cancellation is staggering:

    (a) Since 2015, there have been 5,921 s 501(3A) mandatory cancellations *alone*;[16]
    (b) Since 2013, there have been well over 2,000 refusals under s 501;[17]
    (c) Over the same period and up to 2019, there were at least 32,628 visa cancellations under s 116, although only some s 116 cancellations relate to criminal history or character;[18]
    (d) In 2018 to 2019, 787 people were detained following s 501 visa cancellation,[19] and a total of 7,640 people have been detained following s 501 visa cancellation between 1 January 2015 and 30 April 2020;[20]
    (e) Between 2015 and 30 April 2020, 30,137 people were removed from Australia following visa cancellation,[21] including to Sudan, South Sudan, Syria, the

[14] *BHL19 v Minister for Immigration, Citizenship and Multicultural Affairs* [2020] FCAFC 94 at [224] per Wigney J.
[15] *Ali v Minister for Home Affairs* [2020] FCAFC 109 at [90]; see also *Hernandez v Minister for Home Affairs* [2020] FCA 415 at [63].
[16] FA21/02/00558.
[17] FA19/12/01189.
[18] FA19/12/01189. The Department of Home Affairs may be able to clarify what proportion of cancellations occurred on the basis of character, namely ss 116(e) and 116(g) (in combination with Reg 2.43(a), (b), (m), (oa), (ob), (p) and (q).
[19] FA 19/12/01189.
[20] FA 20/04/01078
[21] FA 20/04/01078

Palestinian Authority, Eritrea, Somalia, Afghanistan, Sri Lanka, Pakistan, Lebanon, Iran, Liberia, Kenya, Iraq, or where they were stateless;[22]

i. Since 2012, at least 2,639 people have been voluntarily removed from Australia following a s 501 cancellation;[23]
ii. Since 2012, at least 163 people have been involuntarily removed from Australia following a s 501 cancellation;[24]
iii. Since 2012, over 285 people have been involuntarily removed from Australia and over 24,000 have been removed voluntarily following a s 116 cancellation.[25]

23. This scale is unprecedented. Following changes to the law in 2014, visa cancellations have increased by well over 1000%, with refusals increasing over 700%.[26] Prior to 2014, visas were still cancelled or refused on the basis of character, and Australia's migration system still managed to ensure community safety. This increase, then, is of concern, particularly given no evidence of increased community safety has been provided.

24. It is very important to note that the distinction between voluntary and involuntary removal is meaningless in the context it is used above. The use of the term 'voluntary' is inappropriate where people making the decision have been subject to years of harsh detention and who are told they have no other option. In many cases, what is categorised as a voluntary removal could not be sensibly described so.

25. It is also important to note that there are numerous reasons family members may be unable to visit people who have been removed from Australia. A key reason is danger: Australia is returning people to extraordinarily dangerous countries. Another is finance: many families simply do not have the money to visit.

26. Many thousands of people in the Australian community, then, are affected by this framework. Innumerable families have been separated, in particular since 2014 when cancellations and refusals increased dramatically.

DETENTION

27. If a person has their visa cancelled or refused, self-evidently they are without a visa to remain in Australia. Any person who does not hold a visa must, under Australian law, be detained.[27]

28. Immigration detention is an extremely difficult place to be. Unlike criminal custody, there is no clear end date. There is no access to education. Detainees are subject to myriad rules and are often moved to remote locations without notice to their families or legal representatives where access to communication, particularly private communication, is limited. Detainees' families often suffer mental health complications as a result of separation from their loved one in detention. Detainees cannot see their children, cannot visit their parents' graves, cannot be there for important life events like hospitalisations, weddings and funerals.

29. We estimate numbers of people in held detention who have been subject to s 501 refusals or cancellations to be between 717 and 1,155 as at 6 January 2021.[28] As at 16

[22] FA 19/12/01189-R1.
[23] FA19/12/01189.
[24] FA19/12/01189.
[25] FA19/12/01189.
[26] See <www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>.
[27] s 189.
[28] FA 21/02/00572.

September 2020, at least 209 people were in detention following a s 501 cancellation who had **previously held protection visas**.[29]

30. It takes between 147 and 650 days on average, depending on subclass, to determine a revocation request, with an overall average of 317 days.[30]

31. Detention is inarguably detrimental to mental health. Studies have concluded that health care services at regional immigration detention centres are deficient and that mental illness is the most common reason for presentation to the hospital and that mental distress and despair are clinical correlates of being held in detention.[31]

32. Asylum seekers in detention are 200 times more likely to commit self-harm than Australians in the community,[32] noting that this figure takes into account only those reported incidents. Between 1 January 2020 and 30 June 2020, there were 356 reported self-harm incidents in held detention facilities.

33. The conditions in Australia's immigration detention facilities are unacceptable. By way of example, *at the Melbourne Immigration Transit Accommodation alone*:

    (a) On 10 August 2020, a New Zealand man died;[33]

    (b) Also in August 2020, orders were made for the Minister to cease detaining a 68-year-old man at MITA as it could be in breach of the Minister's duty of care;[34]

    (c) In 2020 the Government sought to advance legislation to ban mobile phones in detention;[35]

    (d) Self-harm among detainees has increased, with 99 incidents at MITA in the first 7 months of 2020;[36]

    (e) A 23-year-old Afghan man collapsed and died at MITA on 12 July 2019,[37] and his family were not told;[38]

[29] FA 20/11/01049.
[30] FA 20/11/01048.
[31] Triggs, Gillian, 'Mental health and immigration detention', Med J Aus 2013; 199(11): 721-722.
[32] Walden, M., Asylum seekers in detention 200 times more likely to commit self-harm than Australians, research finds', ABC News, 14 October 2019, available at https://www.abc.net.au/news/2019-10-14/asylum-seekers-in-detention-200-more-likely-to-commit-self-harm/11600148.
[33] McGowan, M., 'New Zealand man dies while detained in Melbourne immigration detention centre', the Guardian, 10 August 2020, available at https://www.theguardian.com/australia-news/2020/aug/10/new-zealand-man-dies-while-detained-in-melbourne-immigration-detention-centre
[34] Clayton, R., 'Court orders Federal Government to cease detaining man at Melbourne immigration centre due to Coronavirus', 11 August 2020, available at https://www.abc.net.au/news/2020-08-11/man-immigration-detention-to-be-moved-due-to-coronavirus-risk/12543302.
[35] Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020.
[36] Stayner, T., and Trask, S., 'Fears for immigration detainees as new figures reveal hundreds of self-harm incidents in 2020, SBS News, 14 September 2020, available at https://www.sbs.com.au/news/fears-for-immigration-detainees-as-new-figures-reveal-hundreds-of-self-harm-incidents-in-2020.
[37] Davidson, H., 'Afghan man dies at Melbourne immigration detention centre', the Guardian, 13 July 2019, available at https://www.theguardian.com/australia-news/2019/jul/13/afghan-man-dies-at-melbourne-immigration-detention-centre.
[38] Holt, R., and Hall, B., "Our world has collapsed': Asylum seeker's family demands answers of Australia', Sydney Morning Herald, 18 July 2019, available at https://www.smh.com.au/national/our-world-has-collapsed-asylum-seeker-s-family-demands-answers-of-australia-20190717-p5283n.html.

(f) In July 2019, another young Afghan man tried to set himself on fire at MITA;[39]

(g) An Iraqi asylum seeker was hospitalised after sewing his lips together after a two-week hunger strike in July 2019;[40]

(h) A two-year-old girl was forced to have rotting teeth surgically removed without replacement in July 2019;[41]

(i) In August 2019, an asylum seeker suffered two broken bones and the hands of staff over two occasions where he threatened self-harm;[42] and

(j) Restrictions at the Accommodation are intense, for example with art supplies being confiscated.[43]

34. The Australian community pays for maintenance of these facilities, estimated at $346,178 per detained person, per year.[44]

35. The effect of this for families is the anguish and helplessness of seeing a loved one detained in these conditions. They do not know whether their loved one will be woken in the middle of the night and moved to a remote location. They do not know if their loved one will be removed from the country. They do not know if their loved one is safe; indeed, shockingly, their loved one may die in Australian detention. Their communication with their loved one will be limited and sometimes impossible, particularly in terms of private communication. If their loved one is detained at the Christmas Island detention facility, families cannot visit, meaning they may not have the chance to see their family member again before they are removed to another country.

36. This state of grief and uncertainty may last **years** and may never end. Their loved one will miss major family events, will be unable to say goodbye to those who pass, and will not be able to be reasonably involved in raising their children. In short, it is not possible to quantify the harm to families of protracted detention of family members.

REVIEW PROCESSES

37. There are not appropriate checks and balances are in place to ensure appropriate decisions are made, exacerbating the hardships to families caused by visa cancellation and refusal. The consequences of a s 501 decision are severe (including a lifetime ban from Australia) so there is a duty on the government to ensure that decisions are made after the person has had a real chance to make representations.

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[39] Martin, L., 'Young Afghan man tries to set himself on fire at Melbourne detention centre', the Guardian, 15 July 2019, available at https://www.theguardian.com/australia-news/2019/jul/15/young-afghan-man-tries-to-set-himself-on-fire-at-melbourne-detention-centre.
[40] Hall, B., 'Iraqi asylum seeker sews his lips together amid mounting despair at MITA, lawyer says', Sydney Morning Herald, 23 July 2019, available at https://www.smh.com.au/national/iraqi-asylum-seeker-sews-his-lips-together-amid-mounting-despair-at-mita-lawyer-says-20190723-p529sr.html.
[41] Truu, M., 'Two-year-old in immigration detention forced to have rotting teeth surgically removed', SBS News, 26 July 2019, available at https://www.sbs.com.au/news/two-year-old-in-immigration-detention-forced-to-have-rotting-teeth-surgically-removed.
[42] Eddie, R., 'Asylum seeker's bones broken in two altercations with detention guards', the Age, 19 February 2020, available at https://www.theage.com.au/national/victoria/asylum-seeker-s-bones-broken-in-two-altercations-with-detention-guards-20200127-p53v5o.html.
[43] Baker, N., 'Top Australian artists slam government for confiscating refugee's art supplies', SBS News, 22 June 2020, available at https://www.sbs.com.au/news/top-australian-artists-slam-government-for-confiscating-refugees-art-supplies.
[44] Karp, P., 'Australia's 'border protection' policies cost taxpayers $4bn last year', the Guardian, 5 January 2018.

38. As just one example, numerous people do not or cannot even *seek* review for a range of reasons, including lack of resources and overwhelming complexity and stress. Since 2015, 1,398 people have had their visas mandatorily cancelled but did not make a revocation request or made an invalid request (roughly 23% of all those whose visas were mandatorily cancelled).[45] As an example, the mandatory cancellation framework requires a response be given within 28 days with no possibility for extension. With no access to email in prison, prisoners are reliant on slow and ineffective postal services or on the word from prison officers that their documents will be emailed.

39. Since 2015, roughly 65% of people entitled to seek review of a s 501 decision in the Administrative Appeals Tribunal did not do so.[46] This equates to thousands of people who have not had the merits of their case heard and reviewed.

40. Unlike in criminal proceedings, even when a person is able to seek review, they are unable to secure representation: the Law Council has highlighted the large increase in demand for assistance following the expansion of visa cancellation powers in 2014.[47] At the court and tribunal, between 60 and 67% of people are unrepresented.[48] The sector is completely overwhelmed and unable to deal with the volume of cases. Representation is **essential** in this complex area, particularly given the severity of consequences for individuals, families and children.

41. When they do seek review, not only may they be without representation, there are concerns about the review bodies' impartiality. The relevant merits review body has received fair criticism for its increasing politicisation,[49] calling into question the integrity of its decision-making.

42. In short, the pathways available to affected people are difficult to navigate and unlikely to succeed. From 1 July 2019 to 30 June 2020, roughly 35% of revocation requests resulted in revocation.[50] Between 2013 and 2020, roughly 24% of cases appealed to and decided by the Tribunal succeeded.[51]

43. Of matters appealed to and decided by the court – noting that access to the court relies heavily on having accessed earlier processes and on financial capacity – roughly 23% succeed.[52] It could be extrapolated, given the lack of representation, that more would succeed if they were represented. At the very least, however, the rate of success at court indicates that over 1 in 5 decisions made about cancellation and refusal are **unlawful**: that is, suffering from an error that renders the decision void. This should be of considerable concern, indicating as it does the standard of decision-making in this most important and consequential area.

CONCERNS RELATING TO CHILDREN

Cancellation of children's visas

44. The law currently allows for children to have their visas cancelled, to be detained in immigration detention, and to be forcibly removed from Australia.

[45] FA21/02/00558.
[46] FA19/12/01125.
[47] The Justice Project, Final Report – Part 1: Recent Arrivals to Australia (August 2018), 30.
[48] QON.
[49] Hardaker and Landis-Hanley, 'Anatomy of a scandal: how the government stacks the AAT with its political cronies', Crikey, 24 September 2019.
[50] https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation.
[51] FA19/12/01189.
[52] FA19/12/01125.

45. In the past, while the law did not prevent such actions being taken, those outcomes were avoided. That previous reluctance to cancel, detain and remove is in accordance with Australia's international obligations, the explicit s 4AA Parliamentary commitment, and other sources, including the Victorian Charter of Human Rights and Responsibilities. It is in accordance with the widely acknowledged principle that children should be subject to separate systems of justice in recognition of their immaturity and inexperience.

46. A treatise on why children are considered differently to adults, from psychosocial to developmental reasons, should surely be accepted on its face. However, in terms of offending, it is worth emphasizing that children are developmentally different from adults and their behavior is considered more malleable:

> *While a substantial proportion of crime is perpetuated by juveniles, most juveniles will 'grow out' of offending and adopt law-abiding lifestyles as they mature…*
>
> *[R]ates of offending usually peak in late adolescence and decline in early adulthood. Although the concept of the age-crime curve has been the subject of much debate, critique and research since its emergence, the relationship between age and crime is nonetheless 'one of the most generally accepted tenets of criminology'…*
>
> *Juveniles are more likely than adults to come to the attention of police, for a variety of reasons.*
>
> *Research on adolescent brain development demonstrates that the second decade of life is a period of rapid change, particularly in the areas of the brain associated with response inhibition, the calibration of risks and rewards and the regulation of emotions…*
>
> *Some of the key characteristics of Australia's juvenile justice systems (including a focus on welfare-oriented measures, the use of detention as a last resort, naming prohibitions and measures to address juveniles' criminogenic needs) have been developed in recognition of these important differences between adult and juvenile offenders.*[53]

47. One-third of children in immigration detention centres have mental health disorders requiring psychiatric support.[54] Human Rights Watch has reported:

> *The toll of immigration detention on children is high. Children are often without access to education for months and years. Immigration detention – which often lacks clear time limits – takes its toll on the mental health of many detainees, and this problem is especially severe for children*.[55]

48. The International Detention Coalition adds:

[53] Richards K. 2011. What makes juvenile offenders different from adult offenders?. Trends & issues in crime and criminal justice No. 409. Canberra: Australian Institute of Criminology. https://aic.gov.au/publications/tandi/tandi409.
[54] The Conversation, 'Detained children risk life-long physical and mental harm', 19 February 2015, available http://theconversation.com/detained-children-risk-life-long-physical-and-mental-harm-37510.
[55] Human Rights Watch, 'The Impact of Immigration Detention on Children', 29 September 2013, available at https://www.hrw.org/news/2013/09/29/impact-immigration-detention-children.

> *Because of children's particular vulnerabilities, detention may cause additional problems for children's developmental and physical health. Much research into the effects of immigration detention comes from Australia because of Australia's long-standing practice of detaining children who arrive there without prior authorisation… Children who are detained for immigration purposes are at risk of a variety psychosocial and developmental problems linked to their detention experiences… [including] an inability to experience life as predictable, meaningful and safe… children and young people who are detained for extended periods of time are more likely than others to experience feelings of isolation, detachment and loss of confidence. … Children detained and assessed in a 2009 British study displayed symptoms of depression and anxiety, sleep problems including nightmares, eating difficulties and somatic complaints. They further displayed emotional and behavioural problems. Parents in this study showed signs of psychological deterioration as a result of their detention. The study concluded that 'the high levels of mental and physical health difficulties detected support the view that detention, even for short periods of time, is detrimental and not appropriate for children.'*[56]

49. Australia has, in the past, attracted negative international attention for its willingness to subject minors to visa cancellation and detention.[57]

50. In the Working Group's view, this effect of the law is unacceptable. Children should not be subject to visa cancellation or detention.

Best interests of the child

51. The Working Group analysed the 20 most recent decisions of the Administrative Appeals Decision regarding s 501 refusals or cancellations where the applicant had one or more minor biological children in Australia.[58]

52. In just five of those decisions, the Administrative Appeals Tribunal made a finding in the applicant's favour. In two of those five decisions, the Tribunal had also found that Australia's international non-refoulement obligations were engaged, meaning that if returned the applicant would suffer serious harm.

53. It is clear, then, that having biological minor children in Australia, from whom you will be separated as a result of cancellation or refusal, is not determinative in most Tribunal decisions and offers very little protection against the harms set out herein.

54. Even more troublingly, in some decisions the Tribunal uses the physical removal of a person by virtue of their immigration detention as evidence of their playing a 'limited parental role',[59] or reasoning that a parent will be able to speak to children through 'telephonic/electronic/digital communication platforms'.[60] Even where the Tribunal finds a child would be 'devastated' by a 'loving' parent's removal to Sierra Leone, where that child has psychological issues in the context of existing separation, and where there will

[56] IDC Coalition, 'Impacts of Detention on Children', available at https://idcoalition.org/wp-content/uploads/2012/03/IDCCaptured-Childhood-Report-Chap-5.pdf.
[57] See, for example, Fernando, G., 'Australia accused of flouting international obligations over child's 'disturbing' deportation to New Zealand', 17 March 2021, available at https://www.sbs.com.au/news/australia-accused-of-flouting-international-obligations-over-child-s-disturbing-deportation-to-new-zealand; Roy and Doherty, 'Release teenager from Australian immigration detention, urges acting New Zealand PM', the Guardian, 4 July 2018, available at https://www.theguardian.com/australia-news/2018/jul/04/release-teenager-from-australian-immigration-detention-urges-acting-new-zealand-pm.
[58] As at 30 April 2021.
[59] See, for example, *XSLJ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 939 at [251].
[60] Ibid at [264].

be 'a very significant long-term negative impact' on the daughter including because the parent would play a 'positive parental role' if permitted to remain, negative decisions occur – even where that Australia had non-refoulement obligations to that person.[61]

FAMILY VIOLENCE

55. The Working Group strongly supports efforts to improve the safety of women and children. We are concerned, however, that current policy settings unintentionally undermine, rather than further, this critical work. In our view, the current law, whilst well-intended, has dangerous implications for survivors, removes individual survivor voices, and erodes the effectiveness of family violence policies existing in Australia that have been built upon consultation with people with lived experience.

56. The Working Group calls for an urgent sector-wide and inclusive consultation regarding Australia's migration program as it relates to family violence. In the Working Group's view, the deficiencies of current settings are exposing individuals and communities to danger and causing family separation against the wishes of family members.

Direction No. 90

57. The most urgent issue is the promulgation of Direction No. 90, made by Alex Hawke, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, on 8 March 2021 (**the Direction**). It came into effect on 15 April 2021 and governs how all decision-makers must approach visa refusal and cancellation under s 501.

58. The Direction makes clear that all persons who are believed to have engaged in broadly-defined family violence should be refused visas or have their visas cancelled, even where there are 'strong countervailing circumstances'. It states, without evidence, that is also the view of the Australian community.

59. The Working Group is extremely concerned about the implications of the Direction for survivors of family violence. The Working Group strongly supports efforts to improve the safety of women and children. We are concerned, however, that the Direction unintentionally undermines, rather than furthers, this critical work. In our view, the Direction, whilst well-intended, has dangerous implications for survivors, removes individual survivor voices, and erodes the family violence policies existing in Australia that have been built upon consultation with people with lived experience.

60. In the Working Group's view, the unintended consequences of the Direction are as follows:

- **More children in Australia may be permanently separated from a parent**, harming children in Australia and potentially breaching Australia's obligations under the Convention on the Rights of the Child.

- **Survivors' voices may be sidelined**. Survivors may be subjected to paternalistic, disempowering and dangerous intervention in their lives and against their wishes. They may have little control over the outcomes and processes, for example if they do not want their partner's visa to be cancelled.

- **Survivors may be placed at risk of visa cancellation or refusal after misidentification**. There is growing evidence of the phenomena of police

[61] See, for example, *HWLJ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 860 (13 April 2021) at [55]-[58].

misidentification of primary victims in applications for family violence intervention orders. Indeed, almost half the women murdered by an intimate partner in Queensland had previously been labelled by police as the perpetrator of domestic violence.[62] Misuse of the IVO system is increasingly recognised as a form of violence that can be used by perpetrators against survivors. Facing a visa refusal or cancellation based on a false report of family violence or misidentification could **place survivors at greater risk of trauma and other harm**.

- Survivors may be **deterred from seeking the assistance of police or other support services**, given the seriousness of the consequences for perpetrators and for themselves. That fear may be used by perpetrators as a tool of additional violence. **Policies including early intervention may be undermined**, as may recourse to tools like counselling and welfare services.

- During any cancellation or refusal process, given the perpetrator will be offered procedural fairness, **survivors may be exposed to increased danger as a consequence of reporting**.

- **Survivors' visa statuses may be insecure** as a result of a partner's refusal or cancellation.

- Survivors may be **unable to access future support** from perpetrators, particularly in relation to parenting, due to removal from Australia.

- The **lack of clarity in the Direction** regarding standards of evidence of family violence is likely to lead to an overbroad and uncertain application, compounding the above effects and leading to unjust outcomes.

61. Implementation of the Direction must be urgently paused to protect survivors' safety. In order to prevent delay in consideration, this could be done by reverting to the previous Direction pending consultation. A new Direction, drafted in consultation with expert bodies and after sector-wide consultation, ought to be issued.

Underreporting

62. In 2018-2019, just 413 partner visas were granted on the basis of an applicant having met a family violence provision, representing just 0.4% of a total 98,070 partner visas granted over that period.[63]

63. Given that 1.7% of women and 0.8% of men experienced physical or sexual partner violence, not including psychological or other violence, in the 12 months prior to a 2016 ABS survey,[64] it can be deduced that numerous visa applicants are not reporting the violence to the Department or are remaining in those relationships.

[62] Smee, B., 'Queensland police misidentified women murdered by husbands as perpetrators of domestic violence', the Guardian, 3 May 2021, available at https://www.theguardian.com/australia-news/2021/may/03/women-murdered-by-husbands-labelled-perpetrators-of-domestic-violence-by-queensland-police.
[63] FA 19/07/00201.
[64] Australian Institute of Health and Welfare 2019. Family, domestic and sexual violence in Australia: continuing the national story 2019. Cat. no. FDV 3. Canberra: AIHW. doi:10.25816/5ebcc837fa7ea.

64. It is possible, and indeed likely, that the consequences of reporting family violence under the Act are dissuading survivors from reporting, placing them in danger and compromising Australia's efforts to eradicate family violence.

65. It is our understanding that some perpetrators of family violence use the threat of visa cancellation or refusal itself as a tool of violence, either to coerce a survivor not to report the violence, or to threaten them with cancellation or refusal. Current law protects only a handful of survivors of family violence from refusal or cancellation, and there is very little awareness of what protections are available.

66. The current framework, then, including by undermining **agency** regarding family unity following family violence and by imposing a blunt approach, risks endangering survivors and harming families in the long-term.

LIMITATIONS ON ELIGIBILITY TO APPLY FOR RELEVANT VISAS

67. As set out above, the outcome of s 501 visa cancellation or refusal is effectively permanent exclusion from the Australian community.

68. An individual subject to such visa refusal or cancellation is prohibited from making future applications other than for a protection visa.[65] If the visa refused or cancelled *was* a protection visa, the person is prohibited from lodging a further protection application.[66]

69. These provisions permanently deny a person who has had their protection visa cancelled or refused reunion with their family in Australia. Without a visa, they are also unable to sponsor family members in humanitarian need, further entrenching family separation.

70. There is little comfort for those who can apply for protection. A person who is able to apply for a protection visa is almost certain to have that application refused. Because s 501 can be used again, and because there is a further bar to grant in s 36(1C) of the Act, the Department can essentially 'triple-dip': absurdly, a person may have a partner visa cancelled under s 501; they may then apply for a protection visa and be found to face serious harm in their home country but be refused on s 36(1C) because of character; and then, if that finding is overturned on review, may be refused *again* under s 501 because of character. This is unwieldly, costly, and plainly unjust. It exposes people and their families to *years* of suffering and separation due to detention.

71. Individuals subject to visa cancellation under s 501 and without a valid claim for protection are permanently ineligible to apply for any further substantive visas,[67] with the only exception to this being where the Minister, on a discretionary basis, personally intervenes.[68]

72. The Full Court's words regarding the likelihood of Ministerial intervention or the grant of a protection visa to a person previously cancelled are apposite here:

> *… it is difficult to see how any delegate acting rationally and reasonably, or the Minister herself or himself acting rationally and reasonably, could decide to grant a visa to a person who a) has had a different visa cancelled and b) has applied for the cancellation to be revoked but has been unsuccessful. To grant or restore a*

[65] s 501E(2)(a).
[66] s 48(a).
[67] s 501E(2).
[68] Migration Regulations 1994, SRC 5001.

> *visa in such circumstances would be to return a person to free and lawful residence in the Australian community, an outcome which under a different provision has been determined to pose an "unacceptable" risk to that same community…*[69]

73. It is important to note that many of these individuals and their immediate family, including partners, parents and children, have been in Australia for a significant period of time, some for the majority of their lives.

74. Cancellations under s 116 also limit eligibility to apply for relevant family reunion visas. People subject to cancellations under these sections are subject to s 48 bars which preclude them from applying for most visas.[70] Although a s 48 bar does not prevent a partner visa or protection visa application, other family stream visas that could facilitate meaningful family reunion such as parent visas remain inaccessible.

75. Additional bars limit offshore applications by people subject to s 116. For example, a person who is involuntarily removed from Australia may be required to wait 12 months before applying for a visa unless there are special circumstances,[71] and may face refusal or cancellation in the future.

76. The practice of preventing those subject to visa refusal and cancellation from being applying for many substantive family reunion visas has a significant and adverse impact on family unity, and the effects extend far beyond the individual that has been subject to the adverse decision. Often, the trauma of forcible removal of family members is exacerbated by temporary or permanent ineligibility to apply for visa classes that could facilitate meaningful reunion and results in extended forced separation and irreparable psychological damage to the family unit. These effects continue long after any criminal penalties may be satisfied.

WAITING TIMES FOR PROCESSING AND INTEGRITY CHECKING OF APPLICATIONS FOR RELEVANT VISAS

77. A visa application or cancellation process can take many years. We attach tables demonstrating the complexity of the pathways involved, noting there are many additional processes which we have not included.

78. Assessment of eligibility for a visa, even aside from character consideration, is extraordinarily slow. Assessment of a Child (subclass 101) visa application may take well over 2 years. A Partner (subclass 820) application may also languish well over 2 years just for the first stage, and nearly the same again to reach the permanent stage: four years in total.[72]

79. Illustratively, as at June 2020, the average length of time for people who had applied for a protection visa was 978 days, and 106 people who had so applied had been in detention for greater than 5 years.[73]

80. The assessment of whether a person passes the character test for the purpose of cancelling or refusing a visa on character grounds in many situations is discretionary, rather than mandatory. For example, a visa applicant may not pass the character test

[69] *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 55 at [124] per Kenny and Mortimer JJ.
[70] Migration Regulations 1994, Reg 2.12.
[71] Migration Regulations 1994, SRC 5002.
[72] See https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/global-visa-processing-times.
[73] FA 20/06/01001.

having regard to either or both of their past and present criminal and general conduct they are not of good character.[74] Further, even if a visa applicant or holder does not pass the character test, the Minister or delegate of the Minister has the discretion not to refuse or cancel a visa on character grounds, or to revoke an existing cancellation.

81. It is unsurprising that this consideration takes time: what is alarming, however, is the extraordinary length of time it *does* take. The average time to process a revocation request was 314 days as at 14 August 2020.[75] It is the Working Group's experience that many considerations relating to cancellation, refusal or revocation take well in excess of a year, and sometimes many years.

82. As such, a person applying for family or partner reunion can face a long and utterly uncertain immigration process. The current order of processing requires the decision maker to first consider whether a visa applicant meets all the other criterion for the grant of a visa before assessing character, where the non-character component of the assessment can take years. Therefore, an applicant is required to wait for a prolonged period before the character assessment process is even initiated and this process also takes a significant time. Even if the applicant is found to be eligible for the visa, they can be separated from their family members for a very significant period. This could be overcome by initiating the character assessment earlier in the visa process, and by imposing time limits on that consideration.

83. As noted above, there may be duplicate consideration of a person's character. Protection visa applicants can be refused under s 501, or because the Minister considers, that on reasonable grounds, that they are a danger to Australia's security or to the Australian community.[76] Again, this test is discretionary, and often results the character of the applicant being assessed twice. This duplication results in serious delays and inefficiency of processing as well as cost to the applicant for legal fees. For example, if a review decision-maker finds that a person is not a danger to the community, after thorough testing, it is unjust and inefficient for that person to then face a s 501 refusal on character. A more streamlined assessment of character for protection visa applicants would result in a more efficient and fair process.

Impact of cancellation on family reunification applications

84. Often individuals who are successful in having visa cancellations set aside still face delays in being reunited with their family members. For example, if an individual has had their visa cancelled or revoked on character grounds, it may also result in the refusal of their sponsorship of a family member for a family reunification visa where the criterion of the visa requires sponsorship by an Australian permanent resident or citizen. The visa cancellation of the sponsor results in them no longer being a permanent resident, ineligible to support a family member. If the visa cancellation or revocation is overturned, they may then need to re-apply for the family reunification visa which can result in several years of separation. Character concerns are also applicable to the sponsorship requirements for family reunification visas and therefore issues may arise with the application for sponsorship, even when a visa cancellation has been overturned.

85. If a visa of a sponsor for a family visa is cancelled, the processing of an application for family reunification can be put on hold. In many instances, despite the visa cancellation being overturned, there is still a significant delay in the processing of the family reunification visa application. As a hypothetical, a person may be granted a permanent

[74] s 501(6)(c).
[75] FA 20/08/00717.
[76] s 501(1C).

protection visa, and, shortly afterwards, sponsor their wife and children for a partner visa might face visa cancellation years after their arrival, which cancellation might be overturned after a lengthy review process, but where the application for family reunion may be left dormant. The Working Group is aware of similar cases where the family reunion process is still pending, 10 years after the person's initial arrival.

86. Appropriate protections should be put in place to prevent unreasonable stultification of application processes.

THE SUITABILITY AND CONSISTENCY OF GOVERNMENT POLICY SETTINGS FOR RELEVANT VISAS WITH AUSTRALIA'S INTERNATIONAL OBLIGATIONS

87. Permanent or protracted family separation in the foregoing context is contrary to Australia's obligations under the *International Covenant on Civil and Political Rights* (**ICCPR**).

88. Under Article 23, the family unit is defined as, 'the natural and fundamental group unit of society and is entitled to protection by society and the State.'[77] Under Article 17, all people shall have the right to be free from 'arbitrary or unlawful interference' with their family.[78]

89. As articulated in the Human Rights Committee's General Comment 17, while 'the term "unlawful" means that no interference can take place except in cases envisaged by the law';[79] Article 17 also prohibits 'arbitrary interference' which itself is still lawful. The Committee notes:

> *[T]he introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances*.[80]

90. To clarify, the criminal justice system may impose a sentence of imprisonment on a person. While a family is undoubtedly affected when their loved one is imprisoned, the individual at issue may return to their family when their sentence, finite in nature, is complete.

91. However, Australia's migration system then *compounds* that punishment by cancelling or refusing an individual's visa--removing them from their family--but also *extends* that punishment to the family of the cancellee by removing their loved one. This punishment of a family is only increased when their loved one is removed to a country from which family members fear harm or have little means to travel.

92. In these cases, **the permanent exclusion of people from Australia, away from their families, cannot be considered 'reasonable' or 'in accordance with the provisions,**

[77] *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol 999, p 171, art 23.
[78] *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol 999, p 171, art 17.
[79] UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, [3].
[80] UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988, [4]. It should be further noted that, alarmingly, this clarification of 'lawful but arbitrary" ***is not*** noted in the Attorney-General's Public Sector Guidance Sheet on the Right to Respect for Family, available at: https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-respect-family.

aims, and objectives' of the ICCPR, particularly as the family unit is entitled 'to protection by society and the State.' As such, these bars to further visas constitute a lawful, but arbitrary interference in the lives of cancellee's families and are thus a contravention of the ICCPR.

93. Cancellations also frequently and catastrophically affect children, either where the cancellee is the parent, aunt or uncle, or sibling of a child,[81] or where the cancellee is a child herself. Notably, the Working Group has seen numerous cases of serious concern in which children have faced cancellation or refusal.

94. Family separation in these circumstances is also contrary to Australia's obligations under the *Convention on the Rights of the Child* (**CRC**). Particularly in relation to the parent-child relationship, under Article 9(1), Australia is obligated to ensure that a minor child is not separated from her parents against her will, 'except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, **that such separation is necessary for the best interests of the child**'[82] (emphasis added). On the relationship between the necessity of the separation for the best interests of the child, the Committee on the Rights of the Child states in General Comment No 14 that:

> *Given the gravity of the impact on the child of separation from his or her parents, such **separation should only occur as a last resort measure**, as when the child is in danger of experiencing imminent harm… **separation should not take place if less intrusive measures could protect the child.*** [emphasis added]

95. Given that, except in confined circumstances in our criminal justice system, an individual who has duly served their sentence can return to their family including their children, the bars that operate in s 501 cancellations and refusals to permanently prevent the cancellee's return to Australia can neither be considered a last resort, nor absent a less intrusive measure.

96. While the Direction at Clause 8.3 requires decision-makers to make the best interests of minor children in Australia a 'primary consideration,' the CRC indicates that the rights of a child to prevent family separation should be the *paramount* consideration. This is because the CRC recognises that *any* separation made by a State of a child and her parent significantly affects the child: the permanent and distant nature of a separation caused by s 501 cancellation must be considered all the graver.

[81] NB on broader family members, General Comment No 14 to the *Convention on the Rights of the Child* reiterates the ICCPR, stating that: 'The **family is the fundamental unit of society** and the natural environment for the growth and well-being of its members, particularly children (preamble of the Convention). The right of the child to family life is protected under the Convention (art. 16). **The term "family" must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom (**art. 5)' (emphasis added) [59]. The General Comment continues: "Preservation of the family environment encompasses the preservation of the ties of the child in a wider sense. These ties apply to the extended family, such as grandparents, uncles/aunts as well friends, school and the wider environment and are particularly relevant in cases where parents are separated and live in different places." [70] UN Committee on the Rights of the Child (CRC), *General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 29 May 2013, CRC /C/GC/14

[82] UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, art 9(1).

CONCLUSION

97. The Australian community will not support an opaque, unfair system, and, as more and more people are affected by visa cancellations, and the public becomes aware of the realities of many cancellations, an abhorrence of this process is likely to increase.

98. The extraordinary separation of families, and the harms done in the process, may cause the Australian community to lose faith in the administrative system and its objects.

99. Visa refusal and cancellation is a pressing issue that requires urgent attention. Its present dysfunction is causing irreparable harm Australia-wide and even internationally.

100. The Working Group welcomes the opportunity to consult further on a confidential basis.

ANNEXURE A

Section 501(2)

Discretionary cancellation by delegate or Minister with natural justice