COMMONWEALTH OMBUDSMAN

# The Department of Immigration and Border Protection

## THE ADMINISTRATION OF SECTION 501 OF *THE MIGRATION ACT 1958*

December 2016

Report by the Commonwealth Ombudsman,
Colin Neave AM, under the *Ombudsman Act 1976*

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# EXECUTIVE SUMMARY

The Ombudsman's office has a long standing interest in the administration of s 501 of the *Migration Act 1958* (the Act) and in 2006 completed an own motion investigation, *Administration of s 501 of the Migration Act 1958 as it applies to long term residents*. This report was critical of the quality of information provided to the decision maker, in particular that the then Department of Immigration and Multicultural Affairs (DIMA) did not always provide the minister with all relevant information, especially mitigating information, about long term Australian residents when considering the cancellation of their visa.

Section 501 was changed on 11 December 2014 by the passage of the *Migration Amendment (Character and General Visa Cancellation) Bill 2014*. Changes included the insertion of s 501(3A) that requires mandatory cancellation of visas in certain circumstances. After the passage of this legislation the number of visas cancelled under s 501 increased from 76 in 2013-14 to 983 in 2015-16.

Following the passage of the legislation complaints to our office and observations from our compliance monitoring of immigrations use of intrusive powers and the inspection of immigration detention facilities raised concerns about the following aspects of the administration of s 501:

- the length of time a person spends in immigration detention while awaiting a revocation request outcome
- notification of a visa cancellation shortly before release from prison
- the impact of prolonged and interstate detention on detainees and their families
- the impact on immigration compliance operations and the detention network.

These concerns led to the decision by the Ombudsman's office to undertake this investigation.

The department has a stated aim for s 501 visa cancellation cases to:

> cancel well before the estimated date of release where possible so that any revocation process can be finalised while in prison.

To date the department has failed to achieve this. Through prolonging family separation this failure has also undermined the other aim of the department to give primary consideration to the best interests of the minor children of persons subject to visa cancellation.

This investigation concluded the efficient administration of s 501 suffers from:

- a backlog in identifying persons subject to having their visas cancelled under s 501 which reduces the scope to conclude the cancellation/revocation process prior to the end of a prisoner's custodial sentence
- a delay in deciding the outcome of revocation requests. This leads to former prisoners spending prolonged periods in immigration detention.

The delays and backlog stem from the increase in visa cancellations following the introduction of the s 501(3A) mandatory cancellation provision combined with the large number of persons seeking revocation of their visa cancellation.

Other administrative problems exacerbating delays in identifying those subject to cancellation and concluding the revocation request process include:

- the informal links between the National Charter and Cancellation Centre (NCCC) and state

and territory prison services

- slow response time from courts and police for records and transcripts
- the large number of cases decided personally by the minister
- limited scope to include family circumstance when prioritising cases
- complex record keeping and reliance on paper files for older cases.

This investigation included interviewing some of the people detained as a result of having their visa cancelled under s 501. Their key concerns were:

- the impact on their families if they are removed from Australia
- the length of time taken for a revocation request outcome
- what appeared to be inconsistent or quick revocation decisions for persons that did not appear to have exceptional circumstances
- being informed of their visa cancellation shortly before their release from prison
- uncertainty about what assistance would be provided if they awaited the outcome of their revocation decision overseas
- the debt incurred to the Commonwealth from being escorted overseas.

This report endorses the department's aim of informing persons subject to visa cancellation under s 501 of their visa cancellation well before the end of their custodial sentence with the outcome of a revocation request determined before a prisoner's likely parole date. This will minimise the amount of time spent in detention, the impact on detainees and their families as well the impact on the detention network and compliance areas of the Australian Border Force (ABF). The following recommendations are made in support of support of this outcome.

**Recommendation 1**
The department establish Memoranda of Understanding with all state and territory correction services that facilitates an induction process in prisons that identifies prisoners who are not Australian citizens and establishes timeframes for the provisions of prisoner lists to the department.

**Recommendation 2**
The department examine options for improving the processes for obtaining criminal history and sentencing remarks.

**Recommendation 3**
The department:

- review the prioritisation of cases with an aim to placing greater emphasis on those with carer responsibilities towards children and long term residents
- introduce a departmental standard for the timeframe to process cancellations and revocation requests.

**Recommendation 4**
The department increase awareness amongst staff of the literacy problems some prisoners face and review the format in which information regarding the cancellation of visas is provided to prisoners.

**Recommendation 5**
The department better facilitate access to information on post departure support available for prisoners and their families.

# PART 1—INTRODUCTION

1.1 The title of Immigration Ombudsman was conferred on the Commonwealth Ombudsman in 2005 and the Ombudsman's role expanded to include more intensive oversight of immigration administration. The office responded by establishing a program of visiting detention centres, monitoring immigration compliance activities and oversighting the use of coercive powers in the Act such as s 251 [1].

1.2 Our oversight also covers the department's cancellation powers on character grounds under s 501 of the Act. In 2006 we released a report on the department's administration of s 501. The report expressed concerns about the information presented to the minister when considering the cancellation of a visa. We were especially concerned whether mitigating information was presented in sufficient detail for persons who arrived in Australia during childhood and for persons being removed for minor offences despite having children who were Australian citizens [2]. This report made nine recommendations which are listed in attachment A. Underpinning many of these recommendations was the principle that the department give primary consideration to the best interests of the children of persons subject to visa cancellation.

1.3 In December 2014 the *Migration Amendment (Character and General Visa Cancellation) Bill 2014* introduced changes including the insertion of s 501(3A) which requires mandatory cancellation in certain circumstances. Previously s 501 did not require the mandatory cancellation of a visa. Persons however can request that the minister revoke the cancellation of their visa.

1.4 Since the passage of the new legislation the number of people who have had their visas cancelled under s 501 has grown from 76 in 2013-14 to 580 in 2014-15 and 983 in 2015-16. Currently 66 % of persons who have their visa cancelled under s 501(3A) apply for revocation with the average time to process and decide a s 501(3A) revocation request being 153 days although 21 cases have taken more than 12 months.

1.5 Between December 2014 and March 2016 the Ombudsman's office received at least 94 complaints regarding s 501.

1.6 These complaints to our office raised concerns about the following aspects of the administration of s 501:

- length of time in detention while awaiting a revocation request outcome
- notification of a visa cancellation shortly before release from prison
- the department's transfer of people to interstate detention centres despite family links and ongoing legal matters
- the impact on detainees and their families, especially children
- the impact on the immigration detention network and detainees without a criminal background.

[1] Section 251 warrants are internally issued search warrants that allow Immigration officers to enter a premises to look for persons and travel documents.

[2] See http://www.ombudsman.gov.au/__data/assets/pdf_file/0023/26267/investigation_2006_01.pdf for report

## Investigation

1.7 This investigation has been conducted using the own motion powers in the *Ombudsman Act 1976* (the Ombudsman Act).

1.8 The investigation encompasses the department's administration of all of s 501 but focused on the impact of s 501(3A), the increasing number of persons whose visas have been cancelled under s 501 and timeframes for visa cancellations and revocations requests.

1.9 The investigation examined the manner in which s 501 is administered by the department. Specifically to:

- establish how the legislation is being applied and administered including the department's interaction with state and territory correctional services
- examine what discretion (if any) is being exercised
- establish if regional differences in the application of the legislation exist
- examine the revocation process and the quality of information given to the minister
- outline the impact of the legislation on the detention network.

1.10 A draft of this report was provided to the Secretary of the department on 21 November 2016 and a written response was received by the Ombudsman on 19 December 2016. A copy of the covering letter and the department response against each recommendation is at Attachment C.

## Methodology

1.11 We asked the department to provide the following information:

Statistical information for the period 1 January 2014 to 1 March 2016

- the number of people whose visas were cancelled under s 501
- how many of this group sought the revocation of their visa cancellation?
- how many cancellations decisions were revoked?
- the number of persons whose visa were cancelled under s 501 and who requested voluntary removal
- the time spent in detention for those who asked for voluntary removal.

Documentation

- any MOUs between the DIBP/ABF and state and territory governments or agencies relating to how the legislation is being applied and administered
- any documents on arrangements between the DIBP/ABF and states and territories for identifying, handling or assessing persons subject to visa cancellation under s 501
- DIBP and/or ABF internal guidelines on the preparation of s 501 visa cancellations and revocation requests.
- examples of revocation request documentation provided to the minister.

1.12 We interviewed 31 persons for this report who are in immigration detention as a result of having their visas cancelled under s 501. These interviews sought to establish the impact of visa cancellation and the revocation request process upon them and their families [3].

1.13 We also met with the department's NCCC and the ABF's Victorian field compliance teams to gain an understanding of their work and the impact of s 501 upon them.

# PART 2—LEGISLATIVE AND POLICY FRAMEWORK

2.1 Section 501 of the Act allows the minister to refuse to grant a visa or to cancel a visa if the minister reasonably suspects that a person does not pass the character test. The minister may also refuse or cancel a visa if they are satisfied that it is in the national interest.

2.2 Non-citizens who wish to enter or remain in Australia must satisfy the character requirements under s 501 of the Act. If a person fails the character test, s 501 provides:

- a discretionary power to refuse a visa application (s 501(1) *with notice* or s 501(3) *without notice – minister only power*)
- a discretionary power to cancel visas (s 501(2) *with notice* or s 501(3) *without notice – minister only power*); and
- a mandatory cancellation provision (s 501(3A) *without notice*).

2.3 Section 501(3A) requires that the minister must cancel, without notice, a visa if the minister is satisfied that the person does not pass the character test because of a death sentence, life sentence, a substantial criminal record, a sexually based offence involving a child or if 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. The section also specifies that the rules of natural justice do not apply to these decisions.

2.4 The amendments to the Act also inserted additional grounds on which a person will not pass the character test. The character test was strengthened to provide that a person will not pass the character test if there is a risk (as opposed to a significant risk previously) that the person would engage in serious criminal conduct and where they have been sentenced to two or more terms of imprisonment where the total of those terms is 12 months or more (rather than 24 months or more in the previous legislation).

2.5 Other amendments include a new personal ministerial cancellation power. This allows the minister to cancel without notice, or to set aside a non-adverse decision, where it is in the public interest to do so. The amendments also provide that any decision made personally by the minister will not be merits reviewable. A person may, however, appeal to the minister to revoke the decision to cancel a visa. The full text of the legislation is at attachment B.

2.6 We also note that s 501L of the Act allows the department to obtain personal information from a state or territory agency about a person, or person(s) within a class of persons relevant to whether or not they pass the character test.

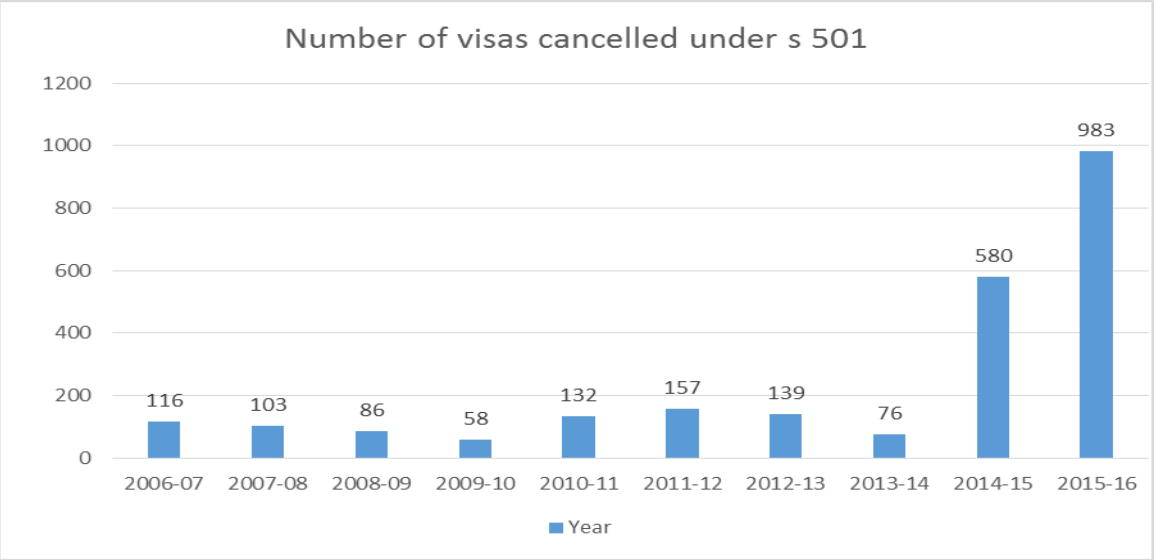
[3] Interviews were conducted with detainees at Villawood Immigration Detention Centre, Yongah Hill Immigration Detention Centre, Adelaide Immigration Transit Accommodation and the Brisbane Immigration Transit Accommodation.

# PART 3—SECTION 501 STATISTICS

## Number of s 501 visa cancellations – 2006-2015

3.1 Since December 2014 the number of visas cancelled under s 501 increased substantially:

**Table 1**




## Number of revocations

3.2 Between 1 January 2014 and 1 March 2016 there were 1219 non-citizens whose visas were cancelled under the mandatory cancellation provisions of s 501(3A) of Act.

3.3 In the period 1 January 2014 to 1 March 2016 66% (805) of individuals within the above group sought revocation of their s 501(3A) visa cancellation decision. As at 1st March 2016 only 178 of these had been finalised. Of those 178, 73 had cancellation decisions revoked (all of whom were mandatory cancellations), 15 were invalid (out of time), 21 were withdrawn by the non-citizen, and 69 were 'not revoked'.

3.4 On 1st March 2016, 78% (627) of revocation requests made in the period 1 January 2014 to 1 March 2016 were pending decision. Of those cases 120 people are awaiting the outcome of their case overseas.

## Timeframes for revocation and length of time in detention

3.5 The average length of time in detention for those who requested revocation was 150 days in the period 1 January 2014 to 31 December 2015. On 29 February 2016, the average time to process a s 501(3A) revocation request had increased to 153 days. We note at the close of business on 1 March 2015 there were, however, 158 cases where persons have spent six months or more awaiting an outcome and 21 cases where persons have spent 12 months or more awaiting an outcome.

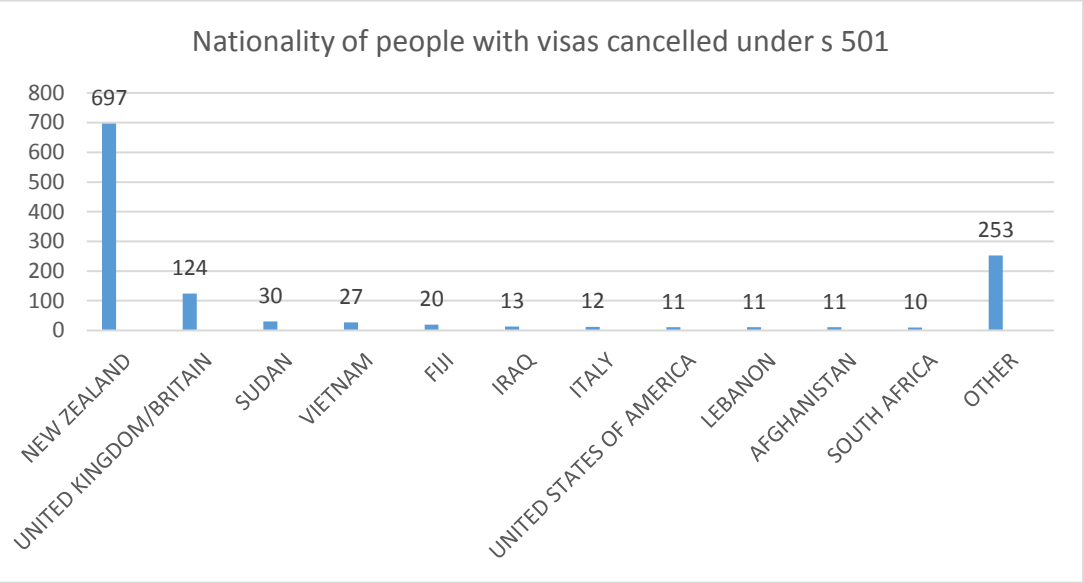
3.6 A total of 380 individuals whose visas were cancelled under s 501 of the Act have been voluntarily removed in the period 1 January 2014 to 31 December 2015. The average length of time in detention was 94 days for those who requested voluntary removal. As at 29 February 2016, the average number of days spent in detention before removal of a person not seeking revocation had reduced to 36 days.

3.7 We note that not all persons in immigration detention as a result of visa cancellation under s 501 are awaiting a revocation request outcome. As of April 2016 there were 104 cases relating to s 501 visa cancellations or revocation decisions before the courts.

## Nationality of people whose visas were cancelled under s 501

3.8 The table below provides a breakdown of the nationalities of the 1219 non-citizens whose visas were cancelled under s 501 between 1 January 2014 and 29 February 2016.

**Table 2**




## Offence Type

3.9 The following table provides a breakdown of the offences that lead to the visas of the 1219 non-citizens being cancelled under s 501 of the Act between 1 January 2014 and 29 February 2016.

**Table 3**

| Offence Type | No. of Cancellations |
|---|---|
| Other Violent Offence | 214 |
| Assault | 210 |
| Drug Offences | 148 |
| Other Non-Violent Offence | 111 |
| Armed Robbery | 105 |
| Theft, Robbery, Break Enter | 93 |
| Child Sex Offences | 88 |
| Rape, Sexual Offences | 59 |
| GBH, Reckless Injury | 55 |
| Fraud, Deception, White Collar | 45 |
| Murder | 18 |
| Child Pornography | 17 |
| (Not Recorded) | 15 |
| Use Threat Intent Weapon | 12 |
| Manslaughter | 13 |
| Kidnapping | <10 |
| National Security/Org. Crime | <10 |
| People Smuggling | <10 |
| **TOTAL** | **1219** |

**Table 4**

3.10 The following table for 2015-16 provides a breakdown according to the state or territory where the 580 persons whose visas were cancelled under s 501 in that year were located when they had their visa cancelled.

| s501 cancellations in 2015-16 by the persons location | Percentage of s501 Cancellations |
|---|---|
| ACT | 0.1% |
| NSW | 32% |
| NT | 1.7% |
| QLD | 30% |
| SA | 3.8% |
| TAS | 0.4% |
| VIC | 18% |
| WA | 14% |
| **TOTAL** | **100%** |

# PART 4—ADMINISTRATION OF S 501

## Operations of the National Compliance and Character Centre

4.1 The administration of s 501 is coordinated and managed by the NCCC. The department's guidelines on the administration of s 501 can be found in the PAM3*: Act – Character Section 501 – The character test, visa refusal and visa cancellation*.

4.2 In April 2016 the NCCC had 92 staff but advised that it is under-resourced given the increased workload the changes to s 501 have caused. The NCCC was recruiting 25 extra staff when we meet with them.

4.3 The NCCC coordinates:

- identification of people subject to visa cancellation under s 501
- preparation of the Notification of Intention to Consider Cancellation (NOICC) notice and submission and associated documentation for discretionary cancellations for the minister or delegate - this includes obtaining relevant court transcripts and criminal histories
- preparation of the cancellation documentation for persons subject to mandatory cancellation – this includes obtaining court transcripts and criminal histories
- revocation submissions
- referrals of persons for detention or removal.

## Identification of people subject to visa cancellation under s 501

4.4 The NCCC receives referrals from sources including (but not limited to) state and territory correction services, community 'dob ins' and law enforcement agencies about non-citizens who may fall within the provisions of s 501 [4]. The majority of cases requiring s 501 assessment are identified by the NCCC through finding non-citizens on the prison lists provided by state and territory corrections services on a fortnightly or monthly basis.

4.5 The NCCC reviews these referrals to identify non-citizen visa holders and those who have a criminal history that would make them liable for cancellation under the character provisions in s 501. Section 501 L of the Act allows the department to obtain from the head of a state or territory agency personal information about a person, or a person within a class of persons (including prisoners) relevant to establishing whether they pass the character test.

4.6 The links between the NCCC and state and territory correction services are informal and are not governed by MOUs or exchange of letters although the department does have the power to compel information under s 501L. This investigation did not identify any substantial regional differences in the application of the legislation. However at least one regional compliance team had formal arrangements with their state corrections service that aided their s 501 related compliance work including allowing read only access to parts each other's IT systems [5].
The NCCC advised the informal arrangements they have in place with state and territory correction services have worked adequately although the process is reactive. They have, however,

[4] The department has advised that media/internet monitoring, community dob-ins, law enforcement enquiries or referrals, visa application declarations, passenger card declarations, and/or CMAL (system alert) activations may all lead to non-citizens being identified and subsequently assessed as being liable for mandatory cancellation once enquiries are undertaken to confirm the non-citizens' circumstances enliven the power.

[5] The Western Australian regional compliance team has a formal agreement with their state's correction service.

experienced delay in the provision of prisoner lists and the Australian Capital Territory has not provided a list of prisoners[6]. Delay in identifying non-citizens in prison increases the likelihood revocation or any other appeals process continuing past the prisoner's sentence, necessitating the person being taken into immigration detention and delaying their release or removal. We note recommendation 2 in the 2006 Ombudsman report stated:

> That DIMA consider negotiating with State and Territory police and correctional services a standard procedure for the identification of convicted persons liable for cancellation of their visas under s 501 of the Migration Act. The procedures should be agreed in writing and should include mechanisms for confirming accurately and consistently throughout Australia the visa status of the convicted persons.

4.7 The department has not fully implemented this recommendation.

4.8 The process of having to go through substantial prisoner lists is also time consuming especially given immigration records for many people who arrived before the 1980s are not fully computerised and may require the investigation of paper files.

4.9 The initial identification of persons subject to visa cancellation under s 501 is the main cause of people spending prolonged periods in detention awaiting the outcome of the revocation process. We are advised that people have received notice of the cancellation of their visa shortly before they were scheduled to be released from prison. It can cause significant emotional distress to the prisoner and their family to be told shortly before release that not only will they not be returning to the community but they will be subject to removal from Australia. We note such cases are declining as the administration of s 501 matures and the NCCC addresses its backlog.

4.10 The investigation did not identify that any discretion is being exercised in the application of the legislation although it was noted that the NCCC's work is focused on persons in prison or with serious criminal convictions. There are a large number of persons subject to visa cancellation under s 501 in the community with older and less serious convictions that are not a priority at present.

**Recommendation 1**
The department establish Memoranda of Understanding with all state and territory correction services that facilitates an induction process in prisons that identifies prisoners who are not Australian citizens and establishes timeframes for the provisions of prisoner lists to the department

## Notification of cancellation under s 501(3A)

4.11 Prisoners are both notified in person and sent a notice of cancellation including sentencing remarks and instructions on how to seek revocation of the cancellation decision if subject to mandatory cancellation.

4.12 During the investigation a number of prisoners claimed they did not receive a cancellation notice or their request for revocation had not been received by the NCCC. The NCCC advised that

[6] The ACT has refused to provide the names of prisoners to the NCCC. The department advised this refusal was based on ACT privacy laws. In December 2014, section 501L was enacted which explicitly provides that the department is able to request this information from an agency of a State or Territory. The department advises that discussions are ongoing with ACT Corrective Services.

records of prisons are not always detailed and the NCCC adopts a flexible attitude in disputes about receipt or dispatch of documentation.

4.13 As part of the notification process the NCCC obtains sentencing information from courts. This can prove problematic – for example the Melbourne magistrate's court will only provide transcripts up to 12 months old while delays from regional courts can be lengthy. This is a vital part of the process and the NCCC noted the department has lost one case in court due to not including sentencing remarks in the visa cancellation notification. Obtaining sentencing remarks and providing all documentation relied upon to make a decision to the person subject to visa cancellation were also included in the recommendations made in the 2006 Ombudsman report.

4.14 Another matter that has proved problematic is the quality and timeliness of criminal records provided by police. The NCCC advised that while the initial police records are provided quickly, the formal criminal history records that are required are frequently slow in arriving and are often not as accurate as the initial police records[7].

**Recommendation 2**
The department examine options for improving the processes for obtaining criminal history and sentencing remarks.

## Decision makers

4.15 Three people make decisions regarding cancellations and revocations. The minister, the assistant minister and a delegate (Executive Level 2) as outlined in the priority matrix in table 5.

**Table 5**

4.16 The breakdown of the number of on-hand revocation cases the with the minister, assistant minister and delegate as at 27 April 2016 was:

| Decision maker | Number |
|---|---|
| Minister (Exceptional/High/NZ Moderate) | 492 (75%) |
| Assistant Minister (non-NZ Moderate) | 80 (12%) |
| Delegate (Low) | 86 (13%) |
| Total | 658 |

4.17 The department has advised that the minister may refer individual cases or groups of cases to the assistant minister or to the delegate at his discretion.

4.18 The minister has powers which are non-delegable. They are:

- s 501(3) — power to refuse or cancel a visa without natural justice (the person is able to apply for revocation of this decision within 7 days of the deemed receipt of the decision).
- s 501A — power to set aside and substitute a non-adverse decision made under sections 501(1) or 501(2) with an adverse decision, with or without natural justice

[7] One s 501 related compliant made to the Ombudsman's office stated the department had received a NSW criminal history stating the complainant was charged with 48 counts of attempt to steal when they had actually been charged with two counts of this offence.

- s 501B — power to set aside and substitute an adverse decision made under sections 501(1) or 501(2)
- s 501BA — power to set aside and substitute a decision to revoke a decision under s 501(3A) to cancel a visa with a decision to not revoke, without natural justice.
- s 501C — power to revoke a decision made under s 501(3) or s 501(3A) where the decision was made without natural justice.

4.19 A decision made by the minister under any of these powers is not merits reviewable at the Administrative Appeals Tribunal. To exercise the first four powers, the minister must be satisfied that the refusal or cancellation is in the national interest.

4.20 The minister personally makes all revocation decisions and the majority of cancellation decisions. While some of this is unavoidable due to the non-delegable provisions there may be some scope to delegate some cancellation decisions from the minister to either the assistant minister or a delegate to reduce the decision making timeframe.

## Prioritising of s 501 visa cancellations and revocation decisions

4.21 The NCCC uses a character case prioritisation matrix to determine the order for processing s 501 visa cancellation cases. The matrix focuses on the seriousness of cases, reputational risk, the impact on the good order of immigration detention centres, ease of removal of the detainee from Australia and the health of the detainee. We note that family circumstances and carer responsibilities are not included in caseload priorities or under the tactical considerations included in the character case prioritisation matrix that can alter the priority of the caseload.

4.22 In the 2006 own motion report recommendation 5 included:

> That DIMA develop appropriate quality assurance mechanisms to ensure that procedures for decision-making under s 501 are applied consistently, and to a high standard of procedural fairness, across Australia. These mechanisms should ensure all relevant considerations are canvassed in the preparation of Issues Papers, and the weightings attributed are appropriate. Special attention should be given to checking that:
>
> - all 'primary considerations' are fully canvassed, especially 'the best interests of the children'
> - the hardship likely to be faced by the visa holder's family is fully canvassed, especially when family members are themselves Australian citizens or long-term permanent residents. . . .

4.23 The substance of this recommendation has been implemented. The department does include the principle of the best interest of the child and the hardship likely to be faced by the visa holder's family in the information it seeks from persons whose visas have been cancelled under s 501 and provides this information to the decision maker.

4.24 However the prolonged detention or transfer interstate of persons seeking revocation of a visa cancellation under s 501 can undermine the principles of taking into account the best interests of minor children and the hardship likely to be faced by the visa holder's family, especially when family members are themselves Australian citizens or long-term permanent residents.

**Case study – Interstate transfer and child custody matters**

Mr X was born in Fiji and came to Australia when he was 14. He has a number of minor and serious convictions from when he was younger. After his visa was cancelled he was sent to Villawood IDC. He was transferred from Villawood early one morning to Christmas Island with no notification. He has two children aged 13 and 9 of whom he had custody prior to being imprisoned for driving offences and attempted theft. He had an ongoing family law court case concerning their custody and claimed his ex-partner is an ice addict and her mother, who has care of the children, allows her access to the children when she is high. During his transfer to Christmas Island all of his family law court documents were lost. He had a court hearing scheduled in NSW which DIBP had arranged a teleconference for. He was placed in a secure room with a teleconference link but nobody answered the call for the teleconference and he missed the hearing.

**Table 6** [8]

The table below provides the department's case prioritisation matrix which outlines priorities for processing, to whom case categories will be assigned to for determination (i.e. minister, assistant minister or delegate) and the tactical considerations that may vary the normal caseload prioritisation.

**Character Case Prioritisation Matrix**

**Programme Objectives**

- To protect the Australian community from the risk of harm posed by non-citizens of character concern, in line with community and government expectations; and
- To maintain integrity and public confidence in the character assessment process

**Caseload priorities**

**Community cases and short-term prisoners***

1. Exceptional case category
2. High case category (violent and/or sexual offences first)
3. Moderate case category (violent and/or sexual offences first)
4. Low case category

* Refers to those not liable for mandatory cancellation. Visa holders offshore with imminent travel – to be treated in accordance with above priorities.

**Visa applicants**

1. Onshore applicants in detention/prison by a) 90 day rule BVE b) EDOR for prison and c) other
2. Offshore applicants with strong reasons for urgent processing (business or compassionate reasons)
3. Visa holders in community with ongoing applications (to be treated as per community cases)
4. Other offshore applicants by a) date of travel and b) date of lodgement

**Mandatory Cancellations**

1. Expected date of release (EDOR), with a focus on facilitating prison to plane removal outcomes/avoiding need for immigration detention*

*Aim is to cancel well before EDOR where possible so that any revocation process can be finalised while in prison

**Revocations**

1. Detention cases posing risk to detention centre*
2. Detention cases with serious physical or mental health issues*
3. Detention cases by date of detention in an Immigration Detention Facility
4. Prison cases by EDOR
5. Offshore revocation cases

*as identified by AS Detention Operations. Priority 2 can include prison cases with serious health issues where EDOR < 3 months.

**Tactical Considerations (may affect priority but do not override case categories)**

- Requests by Minister or Assistant Minister to prioritise sensitive cases
- Advancement of Expected Date of Release
- Advancement of travel date (visa holder offshore)
- Resource availability
- Reputational risks associated with inaction
- Impact on stakeholders
- Impact on the good order of detention facilities
- Quality of information or information sources

**Case categories**

**Category 1 - Exceptional**

Minister Dutton:

National security/importance – including adverse security assessment cases; terrorism; serious organised crime; human trafficking; people smuggling; hate preachers

Cases requiring use of the Minister's 'national interest' powers

High profile cases e.g. where there is media, community, political, Foreign Minister, or international interest

Crimes against humanity – includes war crimes, genocide, torture, or other crimes of serious international concern

Any other cases with factors/circumstances identified as exceptional by the Department

**Category 2 - High**

Minister Dutton:

Any crimes against children – including sexually based offences, indecent dealings and child pornography, kidnapping or abduction

Minister Cash:

Very serious violent, sexual or exploitative offences – such as murder, manslaughter, or other offences resulting in the death of a person; domestic violence, sex offences; and kidnapping or abduction.

Any other offending where the sentence of imprisonment imposed is or exceeds five years imprisonment

**Category 3 - Moderate**

Minister Cash:

Offending resulting in a sentence of imprisonment of one year or more but less than five years – such as 'aggravated' violent offences including assaults with a weapon causing serious injury; armed robbery; larger scale drug offences where the offender played an important role – such as those cultivating, distributing or importing drugs etc.

Some cases with imprisonment of less than one year but with serious violent offending that represents serious risk of harm to the community may be considered moderate. This includes 'green' cases that have been escalated for more formal consideration by a Departmental delegate

**Category 4 - Low**

Delegate:

All other cases including with imprisonment below one year and also low level repeat offenders, including offences such as theft, shoplifting, minor assaults, possession and or use of illicit drugs, and public order offences such as disorderly conduct and affray

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[8] Note Minister Cash is no longer the responsible assistant minister having been replaced by Minister Alex Hawke.

As noted above approximately 75% of cases are assigned to the minister, with the assistant minister and delegate handling 12 and 13% of cases respectively. The minister's heavy workload is due to New Zealand moderate cases being assigned to the minister.

**Recommendation 3**
The department:

- review the prioritisation of cases with an aim to placing greater emphasis on those with carer responsibilities towards children and long term residents
- introduce a departmental standard for the timeframe to process cancellations and revocation requests.

## Revocation Process

4.25 Section 501CA provides that as soon as practicable after making a decision under s 501(3A) to cancel a visa, the minister must give the non-citizen a written notice of the original decision and invite the person to seek a revocation of that decision in the manner prescribed in *the Migration Regulations 1994* (the Regulations). The decision should include the evidence the department used to determine that the non-citizen was in prison. The time and manner in which non-citizens must make their representations are prescribed in regulation is 2.52[9].

4.26 Representations must be made within 28 days from the date of deemed notification and this timeframe cannot be extended. Additional relevant information provided after the expiry of the 28 day period must also be taken into account although the department has adopted a flexible approach if there is a dispute about when or whether it was dispatched from prison.

4.27 To ensure the minister or delegate is properly informed when making a decision on a person's cancellation or revocation case, the department advised it requires specific information to be provided to the Minister or delegate. This information should:

- be prepared once the person has responded to the Notice of Intention to Consider Refusal (NOICR) or NOICC
- address the considerations in ministerial Direction No. 65 [10]
- include all relevant considerations to the decision
- have copies of evidence attached.

4.28 Ministerial Direction No. 65 requires the decision maker, in deciding whether to cancel a non-citizen's visa, to consider the following 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

4.29 Direction 65 also states that, in deciding whether to cancel a visa, other considerations must be taken into account where relevant, including, but not limited to:

a) international *non-refoulement* obligations
b) strength, nature and duration of ties
c) impact on Australian business interests

[9] See http://www.austlii.edu.au/au/legis/cth/consol_reg/mr1994227/s2.52.html
[10] The full text of Direction 63 is at https://www.border.gov.au/visas/Documents/ministerial-direction-65.pdf

d) impact on victims
e) extent of impediments if removed.

4.30 There is no departmental standard for the timeframe to process a revocation request. To minimise the time that revocation applicants are held in immigration detention, requests for revocation are generally processed by the date the revocation applicant entered immigration detention and not the date a client requested revocation.

## Quality of information provided

4.31 We note that the parts of the recommendations made in the 2006 report about the documentation and information provided by the department both to detainees to inform their response and to the minister or decision maker to inform their decision have largely been implemented. Included amongst the 2006 reports recommendations were:

4.32 A notice of intention to cancel includes:

- copies of all documents to be taken into account in the decision-making process are attached
- visa holders are specifically invited to address the evidence in these documents.

4.33 That DIMA ensure the information is provided to the decision maker includes:

- sentencing remarks, and pre-sentence reports where available;
- current prison, psychological and health reports, and parole reports
- the best interests of the children: where the children of the visa holder are themselves Australian citizens or permanent residents, an independent assessment should be undertaken by a qualified social worker/psychologist on the impact of possible separation on the child and/or possible removal from this country, and
- accurate and current information on any health problems suffered, treatment required, medical services available in the likely receiving country and whether such services would be reasonably accessible.

4.34 That DIMA develop appropriate quality assurance mechanisms to ensure that procedures for decision-making under s 501 are applied consistently and include:

- all 'primary considerations' are fully canvassed, especially 'the best interests of the children'
- any international or protection obligations to the visa holder are thoroughly pursued, whether raised by the visa holder or not.
- the hardship likely to be faced by the visa holder's family is fully canvassed, especially when family members are themselves Australian citizens or long-term permanent residents
- copies of all relevant information, whether supporting the case to cancel or not, are provided to the visa holder for comment prior to decision-making.
- the visa proposed for cancellation has been correctly identified
- a decision to cancel the visa of a long-term permanent resident is made either by the Minister, or an authorised delegate.

4.35 That DIMA develop a code of procedural fairness to guide the administration of s 501, including through:

- assisting the visa holder with a guide to the information DIMA is seeking in its response to the Notice of Intention to cancel
- assessing any special requirements individual visa holders may have for assistance in preparing a response to the notice of cancellation, taking account of factors such as the visa holder's level of education and any health problems
- providing the opportunity for oral submissions from the visa holder and members of the visa holder's family, especially children, likely to be affected by a cancellation decision.

4.36 We note that Direction 65 requires consideration of the best interests of minor children in Australia as a primary consideration. In addition other considerations that must be taken into account are international *non-refoulement* obligations and the strength, nature and duration of ties. The department also provides detainees with copies of documents relied upon to make a decision including sentencing remarks. Prior to cancellation of a visa or when seeking revocation person are also invited to provide evidence on children, family health and the hardship they are likely to face overseas as well as links to the Australian community and employment history.

4.37 We note however, other parts of these recommendations may not have been implemented. For instance it is unclear if the department is providing the opportunity for oral submissions from the visa holder and members of the visa holder's family, especially children, likely to be affected by a cancellation decision as outlined in recommendation 6.

4.38 We note from the department's detained released not unlawful reports provided to us on a six monthly basis there have been several instances of the incorrect visa being cancelled for s 501 cases [11]. There has been at least once instance of a visa being reinstated due to protection obligations not being fully considered in the visa cancellation decision[12]. However, on appeal to the Full Federal Court, that decision was set-aside.

## Revocation whilst overseas

4.39 A person whose visa has been cancelled under s 501(3A) of the Act and who has requested revocation of the mandatory visa cancellation decision may choose to stay in immigration detention in Australia, or be voluntarily removed to their country of origin to await the revocation outcome. Where a person decides to depart, the department makes travel arrangements as soon as possible. Voluntary removal will not affect the outcome of the revocation request as it will continue to be processed. Where a person has returned to their country of origin and a decision is made to revoke the cancellation, the visa will be reinstated if it is still valid. The person can then return to Australia, although the visa holder must declare all criminal convictions on the Incoming Passenger Card. Failure to do this may result in a new cancellation consideration process being initiated.

4.40 If the visa has expired the person needs to apply for a new visa. All criteria for a visa grant will have to be met, including exclusion periods. The consequences of voluntary removal may affect a person's ability to re-enter Australia, even if the original cancellation decision is revoked. The person will have to repay the cost of their removal although, as outlined below, this has not been enforced for New Zealand citizens whose visas were cancelled under s 501(3A) of the Act and who were removed voluntarily.

4.41 As at 31 March 2016 131 persons were awaiting the outcome of their revocation request overseas out of a total of 667 revocations requests on hand compared to 174 persons who were in prisons and 362 who were in immigration detention.

[11] The department has been providing the Ombudsman's office with reports on non-citizen who were detained then later found to have a valid visa twice yearly since 2011.

[12] In the detained release not unlawful report for July to December 2015 it was noted that in December 2015 the Federal Court found the decision to cancel Ms Thi Tam Le's visa was affected by a jurisdictional issue in that the *non-refoulement* obligation owing to Ms Le, as a former refugee, was not considered by the delegate. In this reporting period cases were noted were s 501 cases where affected by the cancellation of the wrong visa.

## New Zealand Citizens

4.42 Previously, New Zealand citizens who requested revocation of the mandatory cancellation of their visa, and chose to return to New Zealand to await the outcome of their request, were not eligible for a subsequent TY-444 visa on return to Australia[13]. On 17 October 2015 the regulations were changed allowing New Zealand citizens, who have their mandatory visa cancellation revoked under s 501CA(4) of the Act, to be granted a subsequent TY-444 visa if they choose to return to Australia, provided there is no new offending. This amendment to the Regulations is specific to the mandatory cancellation of a TY-444 visa under s 501(3A) of the Act and does not apply where a TY-444 visa is cancelled on grounds other than s 501(3A). The Australian Government agreed not to recover the removal debt of New Zealand citizens whose visas were cancelled under s 501(3A) of the Act and were removed voluntarily. This is regardless of whether revocation is sought and irrespective of the revocation outcome.

4.43 Awaiting revocation overseas is a significant issue amongst detainees. Many detainees are receiving advice from lawyers advising against waiting overseas as this would either end or undermine their revocation request. This advice has been countered by increasing knowledge of successful requests for revocation whilst overseas. A number of detainees interviewed were considering waiting overseas, especially New Zealand detainees and those who did not have substantial family links in Australia. This issue is examined in greater details in part 5.

[13] A TY-444 visa is a special category temporary visa (subclass 444) visa that lets allows New Zealand citizens to stay and work in indefinitely in Australia as long as they remain a New Zealand citizen. The validity of a Special Category visa ceases when the New Zealand citizen leaves Australia. And they need to apply for a new Special Category visa each time they arrive in Australia. The visa is subject to health and character requirements.

# PART 5—IMPACT OF S 501

## Impact on the Australian Border Force and the Immigration Detention Network

### *Compliance Operations*

5.1 The growth in the s 501 visa cancellation caseload has impacted on the work of field compliance teams with priorities shifting to matters concerning persons whose visas were cancelled under s 501. This change in priorities is demonstrated in the instruction issued to the ABF in October 2016 by Assistant Commissioner, Clive Murray, who stated:

> We are challenged with the capacity of our detention centres, most are at overflowing in their capacity to house people. Given this, it is directed that from now on, there is less of a focus on compliance activities being performed in Regional Commands and more focus on removals (both involuntary and voluntary) unless the compliance activity has a high value, high risk factor.

5.2 We note that from 2014-2015 to 2015-2016 the number of visa over stayers detained as a result of compliance activities declined from 2808 to 2196.

### *Detention Network*

5.3 The main impact on the detention network is the greater proportion of the population who have a criminal background. Between 1 July 2015 and 30 June 2016 the number of persons whose visa were cancelled under s 501 increased as a percentage of the detainee population from 15% to 30%.

5.4 Section 501(3A) visa cancellations, the delays in revocation outcomes as well as discretionary cancellations have resulted in a more people being in immigration detention than otherwise would be the case. Detainees have also been moved interstate away from their families and support networks due to limited space in, or the low risk classification of, some metropolitan IDFs, especially the immigration transit accommodation in Brisbane (BITA) and Adelaide (AITA). As of 27 September 2016 140 persons whose visas were cancelled due to s 501 were detained on Christmas Island (84% of the detainee population on Christmas inland were there as a result of having their visas cancelled under s 501 when the Ombudsman's office visited in August 2016) with little possibility their families can visit them.

5.5 The impact for Queensland detainees has been particularly significant given the lack of space in the BITA for high risk detainees with nearly all s 501 visa cancellations being moved interstate. We note that detainees from Queensland make up 30% of all s 501 visa cancelations in 2015-16. The moving of detainees interstate and their detention has also resulted in considerable extra cost for the department.

**Case study – Separation from family**

Mr X is a New Zealand national who, before his imprisonment, resided in Queensland. He first moved to Australia in 2009 and has a wife, four children and a grandchild living in Queensland. After his parole he was moved to Yongah Hill IDC near Northam in Western Australia. Due to distance and financial constraints he has not seen his family in 14 months. He noted that his wife has mental health problems and has difficulty in caring for their younger children.

## Detainees and their Families

5.6 For this own motion investigation we interviewed 31 people in immigration detention as a result of having their visas cancelled under s 501. Key concerns for those detained as a result of visa cancellation under s 501 were:

- the impact on their families of removal
- the length of time taken for a revocation request outcome
- what appeared to be inconsistent and/or quick revocation decisions for some persons who did not appear to have exceptional circumstances
- being informed shortly before their release date of their visa cancellation
- uncertainty over what assistance will be provided if they await revocation overseas
- the debt incurred to the Commonwealth from being escorted overseas [14].

5.7 The main concern expressed by people detained as a result of a s 501 visa cancellation was they remained in detention after the completion of their sentence which they viewed as a double punishment. Frustration was also expressed over the length of time it was taking to make a decision on their revocation request. A number of detainees also expressed concern that there appeared to be no rationale for prioritising cases, citing examples of persons with no children, relatively recent links to Australia and serious criminal convictions having outcomes, in many cases positive, shortly after arriving in detention.

**Case study – Arriving in Australia as a child**

Mr X spent 15 months in prison for possession of 100 grams of methamphetamine. He arrived in Australia as a seven year old in 1986 from the UK. He has a fiancé and a 30 month old child who are Australian citizens. Before his imprisonment he ran a business employing six people. While in prison his fiancé ran the business and made arrangements for it to continue operations and extended the businesses finance so that he would have employment post release and the workers could retain their jobs. Shortly before his release date he was informed of the cancellation of his visa under s 501. He has to date spent six months in immigration detention awaiting an outcome to his revocation request which he submitted prior to release from prison and the chances of the business being able to continue are receding.

5.8 Some detainees expressed concern about being informed of their visa cancellation decision shortly before release. Three detainees interviewed advised they had been informed of their visa cancellation within a week of the scheduled release date. This caused them and their families significant distress and was viewed as a particularly cruel way of handling a visa cancellation as they had already made plans for their post release future and were psychologically on a countdown to when they could again be free [15]. In discussions with the department it acknowledged that informing people of the cancellation of their visa shortly before their release was not ideal and as the administration of s 501(3A) matured and the backlog addressed this was becoming less common.

[14] International airline regulations and agreements require involuntary removals and those with serious convictions to be escorted on flights. We also note ABF policy requires all detainees with a history or violence to be restrained even during voluntary removals. While this can be required under Air Transport Saftey Regulation 17 the department's interpretation of the requirement is broad.

[15] The Ombudsman's office has received complaints from persons who arrived as children who weren't aware they were not Australian citizens or that they could be subject to removal.

5.9 A number of detainees advised they struggled to fully understand the cancellation, revocation and removal process due to literacy problems. Detainees noted that while it was explained to them when informed of their visa cancellation they found this overwhelming and lacked the ability to fully understand documentation when they subsequently tried to read it. While this was not a widespread problem, instances were not isolated and it was apparent that some former prisoners suffer from a lack of literacy skills which impacts their ability to comprehend the cancellations and revocation process.

**Recommendation 4**
The department increase awareness amongst staff of the literacy problems some prisoners face and review the format in which information regarding the cancellation of visas is provided to prisoners

## Children and family separation

5.10 Separation from family was the major concern of detainees and was the main reason for not accepting removal or awaiting the outcome of a revocation request overseas.

**Case study – Impact upon children**

Mr X was convicted of theft and sentenced to 12 months imprisonment of which he served two months. He claimed he was convicted of stealing $127. He arrived in Australia as a 6 year old from New Zealand and advised he was not really aware he wasn't an Australian citizen. Mr X is married and is the father of nine children, eight of whom are under 14. His wife, who is Indigenous, suffers from poor health and has difficulty in caring for the children. Mr X was concerned that, while he is located at BITA he can receive visits from his wife and children, if he is moved interstate this contact with his children and the moral support he provides to his wife will be lost. Given the number of children and their connection to the community in Queensland, moving his family overseas is not a realistic option for him.

## Awaiting revocation outcome overseas

5.11 While the majority of detainees advised they did not wish to await revocation overseas due to family in Australia, a number interviewed were open to the possibility. Factors influencing their decision were what assistance would be provided, what support networks they had in that country and the debt incurred to the Commonwealth from being escorted overseas.

**Case study – Considering awaiting revocation overseas**

Mr X is a New Zealand national in his 30s who has resided in Australia since 1988. He was convicted of fraud related offences and sentenced to 18 months imprisonment of which he served 6 months. He is married to an Australian citizen and they have a two children. Mr X advised that he was considering returning to New Zealand and that his wife was prepared to move so they could remain together as a family unit. However he does not want his family to struggle to survive if they went to New Zealand. Mr X said he was unclear what assistance he would be eligible for if he returned and has had trouble accessing and understanding this information and it hasn't been fully explained to him. Another significant problem was that his partner cannot afford her and their children's passports.

5.12 Providing better access to advice on what assistance is available if they choose to await the outcome of a revocation request overseas would help many detainees in determining what path they wish to take. While this information is available if asked for and there are posters advertising prisoner support services some prisoners lacked the organisational or literacy skills to actively pursue this information.

**Recommendation 5**
The department better facilitate access to information on post departure support available for prisoners and their families.

# PART 6—CONCLUSION

6.1 Following the change to s 501 in December 2014 the number of person who had their visas cancelled under s 501 increased from 76 in 2013-14 to 983 in 2015-16. While the department has an aim to cancel visas well before the estimated date of a prisoner's release so that any revocation process can be finalised while in prison, as of April 2016 the department has not fully achieved this. It was apparent to us that the number of persons subject to cancellation under s 501 was underestimated prior to the passage of the legislation.

6.2 The increasing number of persons having their visa cancelled as a result of the mandatory cancellation provisions of s 501 (3A) has led to an increase in complaints to our office. Observations from our field compliance and inspections activities indicated that the increasing s 501 visa cancellation caseload was impacting upon compliance work and the immigration detention network.

6.3 Many persons in immigration detention as a result of having their visas cancelled under s 501 have also been moved interstate away from their families and support networks due to limited space in or the low risk classification of metropolitan IDFs. This has resulted in additional costs to the department and the enforced separation of detainees from their families, children and support networks with little chance of being able to receive visits. This, combined with the delays in deciding revocation requests, undermines the department's policy of giving primary consideration to the best interests of the minor children of persons subject to visa cancellation through prolonging family separation. Further, this separation impacts on the ability of the detainee to cope in immigration detention.

6.4 Two thirds of all detainees who have their visas cancelled under s 501 (3A) seek revocation of that decision. Between 1 January 2014 and 1 March 2016 there were 1219 non-citizens cancelled under the mandatory cancellation provisions of s 501(3A) of Act with 805 individuals seeking revocation. As at 1st March 2016, of the 805 revocation requests submitted, only 178 had been finalised with the average length of time in detention for those who requested revocation in this period being 150 days. We note however there are 21 cases where persons have spent 12 months or more awaiting an outcome.

6.5 The Ombudsman's office supports the department's aim of informing persons subject to s 501 cancellation of their visa cancellation shortly after commencing their custodial sentence with the outcome of a revocation request determined before a prisoner's likely parole date. This minimises the amount of time spent in detention, the impact on detainees and families as well as the impact on the detention network and work of the compliance teams.

6.6 This investigation found that the delays and backlog primarily stem from the increase in visa cancellations following the introduction of the s 501(3A) mandatory cancellation provision combined with the large number of persons seeking revocation of their visa cancellation.

6.7 Other administrative problems exacerbating delays in identifying those subject to cancellation and concluding the revocation request process include:

- the informal links between the NCCC and state and territory prison services
- slow response time from courts and police for records and transcripts
- the large number of cases decided personally by the minister
- limited scope to include family circumstance when prioritising of cases
- complex record keeping and reliance on paper files for older cases.

6.9 Interviews with people detained as a result of having the visa cancelled under s 501 highlighted key concerns including the impact on their families, the length of time in detention and the debt incurred to the Commonwealth and their capacity to pay this debt. The interviews revealed that a number of detainees were open to the possibility of awaiting the outcome of their revocation request overseas but needed additional help to understand the implications of this and what assistance was available to them. We noted that most detainees did not view this as a realistic option due to their family responsibilities in Australia.

6.10 The investigation found that the quality of information given to the minister in the revocation decision process was appropriate and there was little if any regional differences in the application of the legislation. Apart from the NCCC prioritising its caseload, resulting in those in the community with old or less serious convictions not being a focus at present, the department was not applying discretion in the exercise of the legislation.

6.11 The Ombudsman's office appreciates the challenges faced by the NCCC. As noted above it appears that the number of persons subject to cancellation under s 501 was underestimated prior to the passage of the amendments to the legislation and the NCCC stated that it was under-resourced at the beginning of 2016. The recommendations made in this report are made to assist the department in achieving its aim to cancel well before the estimate date of release where possible so that any revocation process can be finalised while in prison.

# ATTACHMENT A - RECOMMENDATIONS FROM THE ADMINISTRATION OF S 501 OF THE MIGRATION ACT 1958 OWN MOTION REPORT 2006.

**Recommendation 1:**
That DIMA review the policy and procedural framework for decision- making under s 501 in the Direction and the Migration Series Instruction (MSI) to identify areas where further guidance could help ensure more consistent decision-making. These areas could include:

- ensuring MSI 254 refers to the correct Direction (i.e. No 21, not No 17)
- requiring a distinction between offences committed by the visa holder as a child and those committed when the visa holder was an adult
- specifying that, other than in cases involving exceptionally serious offences, when a permanent resident is first identified for possible visa cancellation, he or she should be issued with a warning rather than moving directly to notification of intention to cancel
- referring explicitly to the compassionate expectations of the Australian community under the heading of 'the expectations of the Australian community'
- assessing the hardship likely to be experienced by the visa holder, including the implications of any serious medical condition suffered by the visa holder, as a 'primary consideration', and
- outlining how a decision-maker should balance competing considerations, for example, what might outweigh 'the best interests of the children'.

**Recommendation 2:**
That DIMA consider negotiating with State and Territory police and correctional services a standard procedure for the identification of convicted persons liable for cancellation of their visas under s 501 of the Migration Act. The procedures should be agreed in writing and should include mechanisms for confirming accurately and consistently throughout Australia the visa status of the convicted persons.

**Recommendation 3:**
That DIMA ensure a Notice of Intention to cancel complies fully with requirements in the relevant MSI, including that:

- copies of all documents to be taken into account in the decision-making process are attached: care should be taken to ensure that any documents identified as 'protected' under s 503A have been correctly classified
- if further documents that are relied on in the decision-making process come to light after the Notice is issued, the visa holder is provided with copies of those documents, and
- visa holders are specifically invited to address the evidence in these documents.

**Recommendation 4:**
That DIMA develop guidelines for sourcing information to ensure the information included in Issues Papers is the most complete and up to date available. Appropriate sources could include:

- seriousness of the crime: sentencing remarks, and pre-sentence reports where available;
- current behaviour and likelihood of recidivism: current prison, psychological and health reports, and parole reports
- the best interests of the children: where the children of the visa holder are themselves Australian citizens or permanent residents, an independent assessment should be

undertaken by a qualified social worker/psychologist on the impact of possible separation on the child and/or possible removal from this country, and
- the implications for the health of visa holders or their family members: accurate and current information on any health problems suffered, treatment required, medical services available in the likely receiving country and whether such services would be reasonably accessible.

**Recommendation 5:**
That DIMA develop appropriate quality assurance mechanisms to ensure that procedures for decision-making under s 501 are applied consistently, and to a high standard of procedural fairness, across Australia. These mechanisms should ensure all relevant considerations are canvassed in the preparation of Issues Papers, and the weightings attributed are appropriate. Special attention should be given to checking that:

- all 'primary considerations' are fully canvassed, especially 'the best interests of the children'
- any international or protection obligations to the visa holder are thoroughly pursued, whether raised by the visa holder or not. This should include considering the circumstances in which refugee, humanitarian or protection status was originally granted
- the hardship likely to be faced by the visa holder's family is fully canvassed, especially when family members are themselves Australian citizens or long-term permanent residents
- copies of all relevant information, whether supporting the case to cancel or not, are provided to the visa holder for comment prior to decision-making. This includes any material relating to the best interests of the children, and the implications of cancellation for any health concerns and necessary medical treatment
- the visa proposed for cancellation has been correctly identified
- a decision to cancel the visa of a long-term permanent resident is made either by the Minister, or an authorised delegate in accordance with the MSI, and
- the grounds for the decision follow logically from the information presented in the Paper and are clearly articulated in the reasons for decision.

**Recommendation 6:**
That DIMA develop a code of procedural fairness to guide the administration of s 501, including through:

- assisting the visa holder with a guide to the information DIMA is seeking in its response to the Notice of Intention to cancel. This could include providing a copy of the standard questionnaire in Attachment 12 to the MSI with every Notice
- assessing any special requirements individual visa holders may have for assistance in preparing a response to the notice of cancellation, taking account of factors such as the visa holder's level of education and any health problems
- providing the opportunity for oral submissions from the visa holder and members of the visa holder's family, especially children, likely to be affected by a cancellation decision. A written record should be made of every interview, endorsed as an accurate record by the interviewer and the interviewee, and a copy provided to the visa holder
- ensuring that adequate time is provided for a response to the notice of cancellation, taking account of the visa holder's access to advice, and
- providing contemporaneous reasons with every s 501 decision.

**Recommendation 7:**
That DIMA review the application of ss 200–201 and s 501 with a view to providing advice to government on whether s 501 should be applied to long-term permanent residents. In particular,

the review could examine whether it would be appropriate to raise the threshold for cancellation under s 501 in relation to permanent residents. One option that should be considered by DIMA in that review is whether visa holders who came to Australia as minors and have lived here for more than ten years before committing an offence should not be considered for cancellation under s 501 unless either:

- the severity of the offences committed is so grave as to warrant consideration for visa cancellation, or
- the threat to the Australian community is exceptional and regarded as sufficiently serious to warrant consideration for visa cancellation.

**Recommendation 8:**
That DIMA review:

- the specific cases of cancellation under s 501 considered in the course of this investigation (details of case studies provided separately to DIMA)
- all other cases where the visa of the long-term permanent resident has been cancelled under s 501 and he or she is still in immigration detention or awaiting removal from Australia
- and advise the Ombudsman
    - in relation to any cases where the long-term permanent resident arrived in Australia before 1984, whether the person held an absorbed person visa. If it appears the long term permanent resident may have held such a visa, what action the Department intends to take, and
    - in relation to all cases, whether procedural fairness has been accorded; the processing of the cancellation was consistent with the recommendations in this report; how long he or she has been in detention; and what steps have been taken towards removal from Australia.

**Recommendation 9:**
That, pending the outcome of the reviews outlined in Recommendation 8, DIMA consider whether to continue the detention in immigration detention centres of all non-citizens to whom these recommendations apply, taking account of the range of alternatives now available. Particular consideration might be given to release on an appropriate visa, in light of the fact that permanent residents whose families are in Australia are unlikely to abscond.

# ATTACHMENT B - SECTION 501 OF THE MIGRATION ACT 1958

## MIGRATION ACT 1958 - SECT 501

**Refusal or cancellation of visa on character grounds**

Decision of Minister or delegate--natural justice applies

(1) 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.

Note: ***Character test*** is defined by subsection (6).

(2) The Minister may cancel a visa that has been granted to a person if:

(a) the Minister reasonably suspects that the person does not pass the character test; and

(b) the person does not satisfy the Minister that the person passes the character test.

Decision of Minister--natural justice does not apply

(3) The Minister may:

(a) refuse to grant a visa to a person; or

(b) cancel a visa that has been granted to a person;

if:

(c) the Minister reasonably suspects that the person does not pass the character test; and

(d) the Minister is satisfied that the refusal or cancellation is in the national interest.

(3A) The Minister must cancel a visa that has been granted to a person if:

(a) the Minister is satisfied that the person does not pass the character test because of the operation of:

(i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or

(ii) paragraph (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.

(3B) Subsection (3A) does not limit subsections (2) and (3).

(4) The power under subsection (3) may only be exercised by the Minister personally.

(5) The rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under subsection (3) or (3A).

Character test

(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

(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.

Concurrent sentences

(7A) For the purposes of the character test, 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.

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.

Periodic detention

(8) For the purposes of the character test, if a person has been sentenced to periodic detention, the person's term of imprisonment is taken to be equal to the number of days the person is required under that sentence to spend in detention.

Residential schemes or programs

(9) For the purposes of the character test, if a person has been convicted of an offence and the court orders the person to participate in:

(a) a residential drug rehabilitation scheme; or

(b) a residential program for the mentally ill;

the person is taken to have been sentenced to a term of imprisonment equal to the number of days the person is required to participate in the scheme or program.

Pardons etc.

(10) For the purposes of the character test, a sentence imposed on a person, or the conviction of a person for an offence, is to be disregarded if:

(a) the conviction concerned has been quashed or otherwise nullified; or

(b) both:

(i) the person has been pardoned in relation to the conviction concerned; and

(ii) the effect of that pardon is that the person is taken never to have been convicted of the offence.

Conduct amounting to harassment or molestation

(11) For the purposes of the character test, conduct may amount to harassment or molestation of a person even though:

(a) it does not involve violence, or threatened violence, to the person; or

(b) it consists only of damage, or threatened damage, to property belonging to, in the possession of, or used by, the person.

Definitions

(12) In this section:

***"court "*** includes a court martial or similar military tribunal.

***"imprisonment "*** includes any form of punitive detention in a facility or institution.

***"sentence "*** includes any form of determination of the punishment for an offence.

Note 1: ***Visa*** is defined by section 5 and includes, but is not limited to, a protection visa.

Note 2: For notification of decisions under subsection (1) or (2), see section 501G.

Note 3: For notification of decisions under subsection (3), see section 501C.

# ATTACHMENT C: DEPARTMENTAL RESPONSE

Australian Government
Department of Immigration and Border Protection

Mr Colin Neave
Commonwealth Ombudsman
GPO Box 442
Canberra ACT 2601

Dear Mr Neave

Thank you for the opportunity to comment on the draft Report to the Department of Immigration and Border Protection on the *Administration of Section 501 of the Migration Act 1958*. This letter includes updates and replaces my response provided to your office on 19 November 2016.

The Department acknowledges the issues raised in the draft report and has indicated how we will act on the recommendations at Attachment A.

Over the past twelve months the Department has made significant progress to manage the section 501 caseload, some of which is not borne out in the draft report given the passage of time. Attachment A also includes some additional material that provides more current data for your consideration.

I would like to highlight the following factual points, which I consider are important for you to note. First, the *Le* Federal Court decision noted at paragraph 4.38, as an example of a case where protection obligations had not been fully considered, has since been successfully appealed by the Department in the Full Federal Court (set-aside on 9 September 2016).

Second, the Department receives signed acknowledgement from individuals on receipt of cancellation notices which is at odds with the statement that some prisoners claimed they did not received decision notices (refer para 4.12). I would be happy to have my staff examine any of the claims made if they names are made available to the Department and provide you with the details of that examination.

I discussed the Department's proposed response with Ms Doris Gibb, and other staff on 14 December 2016, however I would be pleased to meet again to discuss this response if further detail is required.

Yours sincerely

Kaylene Zakharoff
First Assistant Secretary Community Protection Division
Visa and Citizenship Services Group

21 December 2016

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Australian Government
Department of Immigration and Border Protection

## DEPARTMENTAL RESPONSE – COMMONWEALTH OMBUDSMAN REPORT INTO THE ADMINISTRATION OF SECTION 501 OF THE MIGRATION ACT 1958

### Key issues and responses

The Commonwealth Ombudsman (Ombudsman) has undertaken an own motion investigation into the administration of section 501 of the *Migration Act 1958* (the Act) to:

- Establish how the legislation is being applied and administered including the Department's interaction with state and territory correction services
- Examine what discretion (if any) is being exercised
- Establish if regional differences in the application of the legislation exist
- Examine the revocation process and the quality of information given to the minister
- Outline the impact of the legislation on the detention network.

The report delivers five recommendations. The Department notes that the recommendations address the first of the Ombudsman's terms of reference and provides the following response:

**Recommendation 1**

**The Department establish Memoranda of Understanding with all state and territory correction services that facilitate an induction process in prisons that identifies prisoners who are not Australian citizen and establishes timeframes for the provisions of prisoner lists to the Department.**

**Response: Noted**

The Department currently receives regular, timely and complete details of non-citizen prisoners from the majority of jurisdictions which effectively facilitates the information required to manage s501 arrangements. The Department acknowledges it does not have an information sharing arrangement with the Australian Capital Territory (ACT) and is working with the ACT Justice and Community Safety Department on an exchange of letters to ensure the receipt of relevant prisoner information.

The Australian Border Force is leading discussions with offices of state and territory corrections agencies to establish memoranda of understanding on services and information sharing. The

inclusion of prison lists for character purposes will be included in these discussions as they occur and built into broader agreements as distinct from singular issue specific topic agreements. The Department's approach to memorandum of understanding is to have a broad headline agreement and tailored arrangements or specific topics sit under the agreement with letters of exchange.

**Recommendation 2**

**The Department examine options for improving the processes for obtaining criminal history and sentencing remarks.**

**Response: Agreed**

Criminal history information, in the form of national police certificates, is relevant to establishing liability under certain character test grounds within section 501. At present, these are obtained through the Australian Federal Police (AFP) at a cost. Discussions have commenced with the Australian Criminal Intelligence Commission (ACIC) regarding desktop access to police records for a select number of case officers. This would reduce costs and timeframes to obtain criminal history information, however, there are issues with disclosure and consent that the Department is currently working through. The Department welcomes the recommendation from the Ombudsman that processes should be improved and will continue to work with the AFP and the ACIC in this regard.

The Department agrees with the Ombudsman's finding that the process of obtaining sentencing information from the courts can be problematic. Sentencing remarks are relevant in the exercise of discretion in revocation and cancellation matters, in that they assist decision-makers understand such matters as the circumstances of offending, prospects of rehabilitation and the gravity with which the court viewed the offending; but they are not a legal requirement for the decision. The Department continues to work with the courts to improve timeliness for the release of transcripts but also balances the value of obtaining sentencing remarks with progressing a revocation outcome to reduce time spent in immigration detention.

**Recommendation 3**

**The Department:**

- **Review the prioritisation of cases with an aim to placing greater emphasis on those with carer responsibilities towards children and long term residents**
- **Introduce a departmental standard for the timeframe to process cancellations and revocation requests.**

**Response: Noted**

As a general principle, revocation applications are prioritised by the date they are received. However, higher priority is given to an applicant in immigration detention and to cases where there are compassionate and compelling circumstances such as the health and mental well-being of an applicant in detention or circumstances involving their immediate families. Several cases where the revocation applicant was the primary care-giver to minor children have been expedited. Matters regarding best interests of minor children and ties to Australia are factors considered by the decision maker on the revocation request. The Department will review and update the case prioritisation matrix to more explicitly acknowledge compassionate issues, such as care-giving, as one of the factors for consideration in case prioritisation.

Revocation applications are being decided more quickly due to processing efficiencies and quicker decision-making. In the year from 1 November 2015 to 31 October 2016, the number of non-citizens in detention awaiting a revocation outcome has fallen from 308 to 282. This reduction has occurred despite unprecedented numbers of mandatory cancellation decisions

(928 in the 2015/16 financial year compared with 493 in 2014/15*). The increased processing effort is further demonstrated by observing the year-on-year growth in revocation decisions (336 in 2015/16 compared with 43 in 2014/15*). We continue to consider strategies to reduce processing times even further.

There were **928** mandatory cancellation decisions in the 2015/16 financial year compared with **493** in 2014/15*. This increase in cancellations resulted in a higher rate of revocation requests being received. In response, the Department has increased staffing and introduced processing efficiencies enabling quicker revocation decision-making. Our efforts have substantially increased the number of revocation decisions from **43** in the 2014/15 financial year to **336** in 2015/16. On-hand (undecided) revocations decreased from a peak of **715** in July 2016 to **587** as at 30 November 2016. We continue to consider strategies to reduce processing times even further.

* mandatory cancellation and revocation provisions came into effect on 11 December 2014

**Recommendation 4**

**The Department increases awareness amongst staff of the literacy problems some prisoners face and review the format in which information regarding the cancellation of visas is provided to prisoners.**

**Response: Noted**

The Department acknowledges that many non-citizens affected by section 501 are poorly educated and some are illiterate. Others are affected by language barriers. The staff who work on section 501 cases are well aware of this. The Department regularly reviews all forms and documents with a view to improving formats, language and instructions noting that there are legal requirements that must be conveyed. The Department will specifically review the mandatory cancellation notification package to consider if further changes can be made to simplifying the forms.

**Recommendation 5**

**The Department better facilitate access to information on post departure support available for prisoners and their families.**

**Response: Noted**

Consistent with international principles it is expected that the country of return will provide relevant support and welfare assistance to their nationals upon their return. Although the Department is under no legal obligation to assist removees once they leave Australia, the Department can and does provide short term assistance where support is required. This is in line with the Department's broader status resolution principles which emphasises dignified return that considers the person's wellbeing.

The Post Removal Support programme is available to all removees and is not administered as part of a non-citizen's removal debt. The amount of assistance will vary on a case-by-case basis and is intended to cover incidental expenses required for immediate and post removal support, such as meals, accommodation, clothing, health or welfare assistance or a cash payment.

The amount of support required is discussed with removees during removal planning. Some countries, such as New Zealand and the United Kingdom, have advised the Department of in-country support available to their nationals on return. Organisations such as UK Prisoners Abroad have been working with the Australian High Commission in London to ensure those being removed are connected to support services at an early point after their return. Under the provisions of s199 and s205, removal officers can facilitate the relocation of partners and/or children of a removee or deportee (even if the partners and/or children are Australian citizens

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or lawful non-citizens) upon the partner's request. This power is discretionary and may be applied where individuals are unable to meet the costs of travel. The best interests of the child are a primary consideration when planning removal under the provisions at section 199 and 205 of the Act. Where practicable, removal officers will always try to coordinate the removal of a family unit at the same time and from the same location.