Background Paper: Immigration detention and visa cancellation under section 501 of the Migration Act

January 2009

An increasing number of detainees are in immigration detention because their visas have been cancelled under section 501 of the Migration Act ('section 501 detainees'). Under section 501, if a non-citizen cannot convince the Department of Immigration and Citizenship ('DIAC') of their 'good character', DIAC can cancel an existing visa.

The Australian Human Rights Commission ('the Commission') is concerned about an increasing number of non-citizens held in immigration detention for long periods of time, due to their visa being cancelled on 'character' grounds. Many of these section 501 detainees are long-term permanent residents of Australia.

Visa cancellation can have serious consequences, especially for those people who have lived in Australia for a long time. Such consequences include detention, removal from Australia, a prohibition on returning to Australia and separation from family and friends.

While some section 501 detainees have serious criminal convictions, they are entitled, like anyone in Australia, to protection of their human rights.

This Background Paper explains why section 501 detainees are in immigration detention, and raises some human rights concerns about visa cancellation under section 501.

This Background Paper covers the following issues:

For further information on immigration detention and human rights generally, see the Commission's webpage on immigration detention and human rights.

Who are section 501 detainees?

According to available statistics, in May 2008 there were 25 detainees in immigration detention whose visas had been cancelled, prior to their release from prison, on character grounds under section 501 of the Migration Act.[1]

These 25 section 501 detainees included people originally from New Zealand, the United Kingdom, Indonesia, Vietnam, Cambodia, Chile, El Salvador, Greece, Lebanon, Papua New Guinea, St Vincent and the Grenadines, and Turkey. Many of them first came to Australia as a child and have lived here for over ten years.[2]

What does section 501 say?

Under section 501 of the Migration Act, the Minister for Immigration and Citizenship ('the Minister') or the Minister's delegate (that is, DIAC)[3] may cancel a visa on 'character' grounds.

The Minister may cancel a visa on 'character' grounds where he or she 'reasonably suspects' that the person does not pass the character test (see below) and where that person does not satisfy the Minister that they pass the character test.[4] This power to cancel a visa may be exercised by the Minister or by DIAC.

Section 501(3) provides a further power to cancel a visa on 'character' grounds which can only be used by the Minister personally. The Minister may cancel a visa under section 501(3) where he or she reasonably suspects that the person does not pass the character test and the Minister is satisfied that the cancellation is in the national interest.

Where the Minister cancels a visa under section 501(3), this decision is not subject to the rules of natural justice (see below), and not subject to the code of procedure for dealing fairly, efficiently and quickly with visa applications ('the Code of Procedure').[5]

What is the 'character test' in section 501?

The grounds on which a person may be found not to pass the character test under section 501 can be grouped into 4 broad categories:

---

[1] Question 423, Senate Hansard (17 June 2008), p 2625-2627. At http://www.aph.gov.au/HANSARD/senate/dailys/ds170608.pdf (accessed 20 November 2008). These are the most recent statistics available.
[2] There may be, in fact, other section 501 detainees whose visas have been cancelled on other grounds. However, the Commission was unable to obtain these figures.
[3] The power is exercised by the Minister or a person who is delegated the power by the Minister. In practice, the power is delegated to officers of DIAC. We therefore refer to the power being exercised 'by DIAC' as a shorthand.
[4] *Migration Act 1958* (Cth), s 501(2).
[5] *Migration Act 1958* (Cth), s 501(5) and ss 51A – 64.

(1) substantial criminal record

(2) association with criminal conduct

(3) not of good character on account of past and present criminal or general conduct

(4) significant risk of future conduct grounds.[6]

Further guidance on the interpretation and application of these grounds is contained in the *Ministerial Direction No. 21: Visa Refusal and Cancellation under s 501* ('Ministerial Direction No. 21').[7]

Ministerial Direction No. 21 applies to decisions made by DIAC and by members of the Administrative Appeals Tribunal ('AAT'). It does not apply to decisions made by the Minister him or herself.

(1) Substantial criminal record

From the Commission's interviews with detainees, the most common ground upon which a person fails the character test appears to be where they have a 'substantial criminal record.' A person has a 'substantial criminal record' if they have been:

- sentenced to death or to imprisonment for life
- sentenced to imprisonment for 12 months or more
- sentenced to two or more terms of imprisonment where the total is two or more years, or
- acquitted of an offence on the grounds of unsoundness of mind or insanity and as a result has been detained in a facility or institution.[8]

(2) Association with criminal conduct

A person will not pass the character test if they have had an association[9] with another person, or group, whom the Minister reasonably suspects has been, or is involved in, criminal conduct.[10]

---

[6] *Migration Act 1958* (Cth), s 501(6).

[7] http://www.comlaw.gov.au/ComLaw/legislation/LegislativeInstrument1.nsf/0/552910320446FDFECA257098001B33C1?OpenDocument (accessed 8 December 2008)

[8] *Migration Act 1958* (Cth), s 501(7).

[9] Ministerial Direction No. 21, para 1.5 explains that '[T]he meaning of 'association' for the purposes of the Character Test encompasses a very wide range of relationships, including having an alliance or a link or connection with a person, group or an organised body that is involved in criminal activities.'

[10] *Migration Act 1958* (Cth), s 501(6).

The case of Dr Mohamed Haneef is one example where a non-citizen's visa was cancelled by the Minister on 'association' grounds. For further information, see the Commission's submission to the Haneef Inquiry.

(3) Not of good character on account of past or present criminal or general conduct

General conduct

In determining whether a person's past or present *general* conduct means that they fail the character test, DIAC must consider, amongst other things, whether the person has been involved in activities which show contempt or disregard for the law or human rights or whether they have misled Immigration officials.[11] DIAC may also consider recent good conduct.

Criminal conduct

In determining whether a person's past or present *criminal* conduct means that they fail the character test, the delegate of the Minister should take into account the nature, severity, frequency and time elapsed since the offence(s) were committed and the person's record since the offences were committed, including any mitigating circumstances.[12]

(4) *Significant risk of future conduct grounds*

A person will not pass the character test if there is a significant risk that, while in Australia, the person would:

- engage in criminal conduct
- harass, molest, intimidate or stalk another person
- vilify a segment of the Australian community, or
- incite discord or represent a danger to the Australian community or a part of the community.

If a person fails the character test, what does DIAC have to consider before a visa is cancelled?

If DIAC decides that a person fails the character test, this does not mean that their visa is automatically cancelled.

DIAC is required to consider a number of factors before reaching a decision as to whether or not to cancel a visa.[13] Ministerial Direction No. 21 outlines these considerations.

These considerations are divided into three categories.

[11] Ministerial Direction No. 21, para 1.9.
[12] Ministerial Direction No. 21, para 1.8.
[13] Ministerial Direction No. 21, paras 2.3 – 2.24.

Primary considerations

Currently, the primary considerations in deciding whether to cancel a visa are:

- the protection of the Australian community
- the expectations of the Australian community
- the best interests of any child under 18 affected by the decision to cancel.[14]

Other considerations

Ministerial Direction No. 21 lists some other considerations that may be relevant in determining whether to cancel a visa.[15] These considerations are given less individual weight than the primary considerations.[16] No further direction is given as to how to balance competing considerations.

The other considerations include:[17]

- whether the visa-holder is in a genuine married, de facto or interdependent relationship with an Australian citizen or permanent resident, and any hardship which would be caused to them or other immediate family members
- the extent of disruption to the visa-holder's family, business and other ties in Australia
- the composition of the visa-holder's family, both in Australia and overseas
- the likelihood of the visa-holder seeking to evade any outstanding legal matter or liability
- whether the visa-holder has previously been advised by DIAC about the conduct which brought them within the section 501 cancellation provisions
- any evidence of rehabilitation and recent good conduct.

Other international obligations

DIAC is also required to consider the following international obligations[18] when deciding whether to cancel a person's visa:

[14] Ministerial Direction No. 21, paras 2.3 – 2.16.
[15] Ministerial Direction No. 21, paras 2.17 – 2.24.
[16] Ministerial Direction No. 21, para 2.17.
[17] Ministerial Direction No. 21, para 2.17.
[18] Ministerial Direction No. 21, paras 2.18 – 2.24.

- the obligation not to return people who face a real risk of violation of their right to life and the right to freedom from torture in their country of origin. This obligation is stated to be absolute and there is to be no balancing of other factors if cancellation of the visa would mean that Australia breached this obligation.[19]

- Issues of protection under the *Convention Relating to the Status of Refugees 1951* ('the Refugee Convention'). However, refugees may still have their visa cancelled and be returned to their country of origin. For more information about the Refugee Convention see the Commission's webpage on asylum seekers and refugees.

However, Ministerial Direction 21 also states that these international obligations are qualified by the exercise of Australian sovereignty. The responsibility to determine who should be allowed to enter or remain in Australia in the interests of the Australian community 'ultimately lies within the discretion of the responsible Minister'.[20]

The issue of international obligations is discussed in more detail below under the heading 'What are some of the human rights issues raised by section 501 visa cancellation?'

Can the person provide evidence before a visa is cancelled?

Where DIAC is considering whether to cancel a person's visa on character grounds, they must comply with the Code of Procedure.[21] According to this Code of Procedure, DIAC may invite the person to provide further information before a decision is made.[22]

Where the Minister is the decision-maker, the Minister is not required to comply with the rules of natural justice or with the Code of Procedure.[23]

What are the consequences of visa cancellation?

When a decision is made to cancel a person's visa, the person will then become an unlawful non-citizen and be held in immigration detention.[24]

In addition, a person whose visa is cancelled under section 501 is subject to:

- a permanent ban from applying for another visa while in Australia[25]

- cancellation of any other visas they hold,[26] and

[19] Ministerial Direction No. 21, para 2.21.
[20] Ministerial Direction No. 21, para 2.24.
[21] *Migration Act 1958* (Cth), ss 51A – 64.
[22] *Migration Act 1958* (Cth), s 56.
[23] *Migration Act 1958* (Cth), ss 51A – 64 and ss 501(5) & 501A(4).
[24] *Migration Act 1958* (Cth), s 189.
[25] *Migration Act 1958* (Cth), s 501E. Under s 501E(2), a person may still apply for a protection visa or a visa specified in the Migration Regulations.
[26] *Migration Act 1958* (Cth), s 501F.

- permanent exclusion from Australia.[27]

Can the decision to cancel a visa under section 501 be reviewed?

Whether the decision to cancel a visa can be reviewed depends on whether the decision to cancel was made by the Minister or by DIAC as a delegate of the Minister.

- A decision made by DIAC may be reviewed by the Administrative Appeals Tribunal ('AAT').

- However, decisions made personally by the Minister may not be reviewed by the AAT.

- All section 501 cancellation decisions may be reviewed by the Federal Court or the High Court, including those made by the Minister personally. Decisions made by the Minister are however subject to a privative clause.[28] This means that courts are only able to review decisions of the Minister if he or she has made an error in law. The courts cannot review a decision of the Minister based on the facts of the case.

What are some human rights issues raised by section 501 visa cancellation?

Impact of visa cancellation on long-term permanent residents

Section 501 has been used increasingly to cancel the visas of long-term permanent residents - that is, people who have lived in Australia for more than ten years.[29] The Commission has received complaints from long-term permanent residents whose visas have been cancelled on completion of their prison sentences, and who have been detained for many months prior to their removal from Australia.[30]

As of May 2008:

- The majority of section 501 detainees had been in Australia for over ten years

---

[27] *Migration Regulations 1994* (Cth), Schedule 5.
[28] *Migration Act 1958* (Cth), s 474.
[29] Report by the Commonwealth and Immigration Ombudsman, *Administration of s 501 of the Migration Act 1958 as it applies to long-term residents*, Report No. 01/2006, February 2006, para 2.10.
[30] For example, Australian Human Rights Commission, No.13 Report of an Inquiry into a Complaint of indefinite nature of detention in Prison (2001) *Kiet & Ors v Department of Immigration and Multicultural Affairs* http://www.humanrights.gov.au/legal/HREOCA_reports/hrc_report_13.html

- 15 of the 25 detainees (60%) were under the age of 15 upon their arrival in Australia.[31]

In addition to the consequences of visa cancellation outlined above, long-term permanent residents who have their visas cancelled may be removed from Australia and sent to a country where they have hardly ever, or never, lived, where they do not speak the language and where they have few or no social or familial connections. They may also face separation from children, family and friends in Australia.

Despite these serious consequences the length of time a person has lived in Australia is not listed as a primary consideration for DIAC when they are deciding whether or not to cancel a visa. Although considerations such as the impact of cancellation on the family, and the age at which the visa-holder arrived in Australia are listed as 'other' considerations, the length of time a person has lived in Australia is not specified as a consideration at all.

The Commonwealth Ombudsman has suggested that the use of section 501 to cancel the visas of long-term permanent residents goes beyond the original intention of section 501. That is, that the use of section 501 to cancel long-term permanent residency visas was not made explicit in either the Explanatory Memorandum or the Second Reading speech by the then Minister.[32]

Nevertheless, since 1998, section 501 has operated to cancel the visas of residents of more than ten years.

Visa cancellation of long-term permanent residents

Example 1

Mr J had lived in Australia for 36 years since the age of two. He also had an Australian de facto wife and a sister who was an Australian citizen. However, after going to prison for a number of burglaries, the then Immigration Minister cancelled his permanent resident visa and he was removed from Australia in June 2004 to Serbia – a country in which he had never lived, with a language he did not speak. He was not born in Serbia. The Serbian government refused to recognise him as a citizen, thereby leaving him stateless with no right to work or welfare. He was allowed to return to Australia on compassionate grounds after camping outside the Australian embassy in Belgrade in winter, with no home and no work.[33]

[31] Question 423, Senate Hansard (17 June 2008), p 2625-2627. At http://www.aph.gov.au/HANSARD/senate/dailys/ds170608.pdf (accessed 20 November 2008).

[32] Report by the Commonwealth and Immigration Ombudsman, *Administration of s 501 of the Migration Act 1958 as it applies to long-term residents*, Report No. 01/2006, February 2006, para 2.10.

[33] The Sydney Morning Herald, *Plea for stateless brother,* 24 November 2005, *http://www.smh.com.au/articles/2005/11/24/1132703280426.html.* He was since granted a special protection visa in February 2007 and a permanent resident visa in February 2008; Minister for Immigration and Citizenship, Press Release*, Permanent visa granted to Robert*

Example 2

Mr X had lived in Australia for almost 30 years and had paranoid schizophrenia. After serving a seven year jail sentence, he was removed from Australia in 2003, despite the AAT setting aside the order for his removal on grounds of his medical history and mental health problems.[34] His parents lived in Australia yet he was removed from Australia to Turkey and became homeless on the streets of Ankara.

He was eventually allowed to return to Australia after the Federal Court found that he held a valid resident visa and should be returned home.[35]

The Commission has commented on long-term permanent residents in detention in its submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention. In that submission the Commission recommends that the government review the operation of section 501 as a matter of priority, with the aim of excluding long-term permanent residents from the provision.[36]

DIAC is currently reviewing the policy framework for section 501. This includes how Ministerial Direction No. 21 is applied in relation to the primary and secondary considerations that may be taken into account by DIAC when considering cancellation of a visa under section 501.

Non-refoulement obligations under international law

Refugee Convention

Asylum seekers who have been granted a protection visa have met the definition of refugee under the Refugee Convention. As a party to the Refugee Convention, Australia is obliged not to expel or return – 'refoule' – a refugee to a country where the person would face persecution as defined in the Refugee Convention. [37] This non-refoulement obligation under the Refugee Convention does not apply if there are reasonable grounds for regarding the person as a

---

Jovicic, 23 Feb 2008, http://www.minister.immi.gov.au/media/media-releases/2008/ce08018.htm

[34] *Tastan and Minister for Immigration and Multicultural Affairs* [1999] AATA 276 (23 April 1999).

[35] ABC Radio National, The Law Report, *Deporting non-citizen criminals,* 14 November 2006 http://www.abc.net.au/rn/lawreport/stories/2006/1784837.htm; Topsfield, J., *Deportee left to wander the mean streets of Ankara*, The Age,17 December 2005 http://www.theage.com.au/news/national/deportee-left-to-wander-mean-streets-of-ankara/2005/12/16/1134703611353.html

[36] Australian Human Rights Commission, *Submission of the Human Rights and Equal Opportunity Commission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia*, 4 August 2008, Recommendation 5 (see generally paras 60-68) http://www.humanrights.gov.au/legal/submissions/2008/20080829_immigration_detention.html.

[37] Refugee Convention, art 33(1) which states that 'No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

danger to the country he or she is in. This includes where they have been convicted of a particularly serious crime in the country in which he or she is in.[38]

It is a matter of concern that the grounds of the character test may be substantially wider than the exception to the non-refoulement obligation under the Refugee Convention. For example, the character test includes whether there is a significant risk of future conduct.[39] This means that people could be returned to a country to face persecution because they failed the character test, even if they 'passed' the Refugee Convention test. Concerns with the broad nature of the character test are discussed further below.

Non-refoulement obligations under other international human rights instruments

Australia has non-refoulement obligations under the *International Covenant on Civil and Political Rights 1966* ('ICCPR'), the *Convention on the Rights of the Child 1989* ('CRC') and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984* ('CAT').

These obligations mean that Australia should not return people to countries where there are substantial grounds for believing that they face a real risk of death,[40] torture[41] or cruel, inhuman or degrading treatment, even if they fail to meet the definition of refugee under the Refugee Convention.[42]

Unlike the non-refoulement obligations under the Refugee Convention, these non-refoulement obligations are absolute. That is, there are no situations in which the person's expulsion or removal can be justified if there are substantial grounds for believing that there is a real risk of these harms occurring.

Although Ministerial Direction No. 21 requires DIAC to consider Australia's non-refoulement obligations when deciding whether or not to cancel a visa under section 501, it also promotes the view that the consideration of international obligations are subordinate to considerations of national interest:

> Notwithstanding international obligations, the power to refuse or cancel must inherently remain a fundamental exercise of Australian sovereignty. The responsibility to determine who should be allowed to enter or to remain in Australia in the interests of the Australian community ultimately lies within the discretion of the responsible Minister. [43]

---

[38] Refugee Convention, art 33(2) which states that 'The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.'
[39] *Migration Act 1958* (Cth) s 501(6)(d).
[40] ICCPR, art 6(1); CAT, art 3(1); CRC, art 6(1).
[41] CAT, art 3(1); ICCPR, art 7; CRC, art 37(a).
[42] ICCPR, art 7; CRC, art 37(a).
[43] Ministerial Direction No. 21, para 2.24.

It appears that while DIAC must treat these obligations as absolute when considering whether to cancel a visa, the Minister can override these considerations at his or her discretion.

Further, it is unclear the extent to which DIAC considers these non-refoulement obligations in practice. The Commonwealth Ombudsman's Report, for example, notes that in some of the cases investigated by the Ombudsman, the Issues Paper (which provides the basis for a decision of the decision-maker) has failed to discuss adequately the relevance of an international obligation.[44]

For further information on the Refugee Convention and Australia's non-refoulement obligations see the Commission's webpage on asylum seekers and refugees.

The impact on the best interests of a child

Visa cancellation under section 501 may result in the separation between a parent and child. Such separation may breach Australia's obligations under the CRC. As stated in article 9(1) of the CRC:

> States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

Further, the CRC requires that in all actions concerning children, the best interests of the child be a primary consideration.[45]

The best interests of the child is listed in Ministerial Direction No. 21 as a primary consideration for DIAC to take into account when deciding whether to cancel a visa under section 501. However, the Commonwealth Ombudsman's Report found that 'in many of the cases reviewed, assessment of the best interests of the child is characterised by a paucity of evidence and failure to determine what those best interests might be.'[46] The Ombudsman noted that in one case reviewed, while the Minister was advised that it was open to the Minister to find that cancellation may have a detrimental effect on children, the Minister nevertheless cancelled the visa.[47]

---

[44] Report by the Commonwealth and Immigration Ombudsman, *Administration of s 501 of the Migration Act 1958 as it applies to long-term residents*, Report No. 01/2006, February 2006, paras 3.41 – 3.45.
[45] Art 3(1), CRC which states that 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'
[46] Report by the Commonwealth and Immigration Ombudsman, *Administration of s 501 of the Migration Act 1958 as it applies to long-term residents*, Report No. 01/2006, February 2006, para 3.31.
[47] Report by the Commonwealth and Immigration Ombudsman, *Administration of s 501 of the Migration Act 1958 as it applies to long-term residents*, Report No. 01/2006, February 2006, para 3.35.

Example 3: Best interests of the child

The following example is from the Commonwealth Ombudsman's Report:[48]

Ms NJ was born in England in 1960 and entered Australia in 1977. She has lived continuously in Australia since then, apart from six months in 1979. She has two children, who were aged nine and 12 when her visa was considered for cancellation. The Issues Paper noted that she is a sole parent, is extremely close to her children and had been in constant contact with them while in prison. The Issues Paper also noted that, although the children had spent their entire lives in Australia, health and education services in England are comparable to those in Australia, and the children would face no language and very few cultural difficulties if they were to return to England with their mother upon her removal. The Issues Paper concluded it was open to the Minister to find that cancellation may have a detrimental effect on the children. The Minister decided to cancel Ms NJ's visa.

It is difficult to see how the best interests of the children have been treated as a primary consideration in the Issues Paper. There appears to have been no assessment of what the best interests of the children might be. No reference is made to the hardship resulting from separation from their father and grandparents.

Right to respect for privacy, family and home life

Article 17(1) of the ICCPR provides that 'no one shall be subjected to arbitrary or unlawful interference with his (or her) privacy, family, home or correspondence.' The right to respect for privacy, family and home life is well established in international case law. [49] In addition, as noted above, article 9(1) of the CRC provides that a child shall not be separated from his or her parents, unless it is considered to be in the best interests of the child.

In some circumstances, section 501 cancellations and subsequent removals may violate these obligations. Many section 501 detainees have family in Australia as most of them have been in Australia for over ten years and moved here when they were a child. Removing a person from Australia can mean that not only their right to respect for family life is violated, but also the right to family life of their dependants and spouse.

Prolonged and indefinite detention

People who have had their visas cancelled under section 501 are usually placed in immigration detention prior to removal. As of May 2008, seven of the 25 section 501 detainees discussed above had been held in detention for

[48] Report by the Commonwealth and Immigration Ombudsman, *Administration of s 501 of the Migration Act 1958 as it applies to long-term residents*, Report No. 01/2006, February 2006, paras 3.35 – 3.36.

[49] For a recent example, see the judgment of the Grand Chamber of the European Court of Human Rights in *Maslov v Austria* [2008] ECHR 1638/03 (23 June 2008). In that case, the European Court of Human Rights held that the deportation of a youth who had spent the majority of his childhood in Austria constituted a violation of his right to respect for his family and private life.

more than one year while they pursued legal appeals or awaited removal. Some had been detained for years.[50]

In some cases it has been impossible to return section 501 detainees to their country of origin because it has been difficult to organise travel documents, or the country of origin has refused to accept them. This means that some people are effectively locked in limbo in immigration detention. For example, as part of the Commission's annual immigration detention centre visits, the Commission interviewed a detainee who had been in detention for two years but could not be removed for fear of facing the death penalty in his country of origin.

The Commission has found on previous occasions that prolonged and indefinite detention constituted arbitrary detention in breach of article 9(1) of the ICCPR.[51] For example, in a Report of an Inquiry into a Complaint of indefinite nature of detention in Prison, the Commission found that the human rights of a group of Vietnamese permanent residents had been breached after their visa cancellation due to criminal record grounds had led to indefinite detention.[52]

The Commission has raised human rights concerns about the conditions in immigration detention facilities as part of its annual inspections. In particular, the Human Rights Commissioner has criticised the standard of immigration detention in Stage One, Villawood Immigration Detention Centre and recommended that it be demolished. Stage One has been used to hold many section 501 detainees.

To read more about human rights and immigration detention, see the Commission's webpage on immigration, asylum seekers and refugees.

Criteria for release from immigration detention

On 29 July 2008, the current Minister announced a series of values that would underpin Australia's immigration detention policy.[53] These directions outlined three groups of people who would be subject to mandatory immigration detention:

---

[50] Question 423, Senate Hansard (17 June 2008), p 2625-2627. At http://www.aph.gov.au/HANSARD/senate/dailys/ds170608.pdf (accessed 20 November 2008).

[51] Art 9(1) of the ICCPR states that 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.' This view has also been held by the Human Rights Committee which is responsible for the oversight of the ICCPR. See, for example, *A v Australia* No.560/1993, 30 April 1997; *C v Australia* No.900/1999, 13 November 2002; *Baban v Australia* No.1014/2001, 18 September 2003; *Bakhitiyari v Australia* No.1069/2002, 6 November 2003; *D&E v Australia* No.1050/2002, 11 July 2006.

[52] Australian Human Rights Commission, No.13 Report of an Inquiry into a Complaint of indefinite nature of detention in Prison (2001).

[53] Senator the Hon C Evans, Minister for Immigration and Citizenship, *New directions in detention,* delivered at Australia National University, 29 July 2008.

- All unauthorised arrivals for management of health, identity and security risks to the community
- Unlawful non-citizens who present unacceptable risks to the community
- Unlawful non-citizens who have repeatedly refused to comply with their visa conditions.

As at January 2009, it is unclear whether section 501 detainees will be eligible for release into the community or whether their criminal background or other character assessments will automatically preclude them from release under the 'unacceptable risk' criterion.[54] The Joint Standing Committee on Migration has stated that 'currently there are no guidelines available outlining what may constitute unacceptable risk, what evidence may be used to inform this assessment, and who may be qualified to make such an assessment.'[55]

The Committee recommended that guidelines be developed and published regarding what is considered to constitute an unacceptable risk to the community in order to assist DIAC officers in making their determinations.[56]

Review rights and the Minister's power to vary a visa decision

Considering the serious consequences of visa cancellation, it is of concern that Ministerial decisions to cancel a persons' visa can only be reviewed by the Federal Court or the High Court of Australia, unlike decisions made by DIAC as a delegate of the Minister, which have more avenues of review. As noted above, decisions made by the Minister are subject to a privative clause.[57] This means that the Federal Court and the High Court are only able to review decisions of the Minister to determine if an error in law has been made. The court cannot review a decision of the Minister based on the facts of the case.

In addition, the Minister has a broad discretion to substitute a decision of DIAC or the AAT in respect of the exercise of power under section 501. Under section 501A, if DIAC or the AAT decides not to cancel a visa under section 501, the Minister is able to set aside that decision and then cancel the visa if the Minister reasonably suspects that the person does not pass the character test and if the Minister is satisfied that cancellation is in the national interest.[58]

---

[54] Joint Standing Committee on Migration, *Inquiry into immigration detention in Australia: A new beginning – criteria for release from detention,* http://www.aph.gov.au/house/committee/mig/detention/report.htm (accessed 8 December 2008), para 3.13.
[55] Joint Standing Committee on Migration, *Inquiry into immigration detention in Australia: A new beginning – criteria for release from detention,* http://www.aph.gov.au/house/committee/mig/detention/report.htm (accessed 8 December 2008), para 3.10.
[56] Joint Standing Committee on Migration, *Inquiry into immigration detention in Australia: A new beginning – criteria for release from detention,* http://www.aph.gov.au/house/committee/mig/detention/report.htm (accessed 8 December 2008), para 3.31.
[57] *Migration Act 1958* (Cth), s 474.
[58] *Migration Act 1958* (Cth), ss 501A(2) and (3).

The decision of the Minister to set aside the original decision by DIAC or the AAT cannot be reviewed.[59]

Furthermore, decisions of the Minister to cancel a visa on 'character' grounds are not subject to Ministerial Direction No. 21, the Code of Procedure or the rules of natural justice.[60] Rules of natural justice are fundamental legal rules that require a decision-maker to:

- act fairly
- in good faith
- without bias or conflict of interest, and
- allow each party adequate opportunity to present their case and to respond to the case against them.

This exclusion from the rules of natural justice can only occur if the Minister is satisfied that the cancellation is in the national interest.[61] However, what constitutes the 'national interest' is left to the Minister's discretion.[62] Such broad discretions may mean that Ministerial decisions are left virtually unchecked.

The Commission commented on the use of Ministerial discretion under the Migration Act in its submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention. In that submission, the Commission recommended that the Minister's powers under section 501 should be reduced and measures put in place to provide for transparent, accountable decisions which are subject to review.[63]

The current Minister has signalled his intention to reduce the use of Ministerial intervention powers under the Migration Act.[64]

Broad grounds of character test

The grounds on which the Minister or DIAC may find that a person is 'not of good character' are very broad. These grounds are to be decided on the basis of objective inquiries by members of DIAC. Some of the criteria, however,

---

[59] *Migration Act 1958* (Cth), s 501A(7).
[60] *Migration Act 1958* (Cth), ss 51A – 64.
[61] *Migration Act 1958* (Cth), s 501(3)(d).
[62] Australian Human Rights Commission, *Submission of the Human Rights and Equal Opportunity Commission to the Clarke Inquiry on the case of Dr Mohamed Haneef*, May 2008, para 28 http://www.humanrights.gov.au/legal/submissions/2008/200805_haneef.html
[63] Australian Human Rights Commission, *Submission of the Human Rights and Equal Opportunity Commission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia,* 4 August 2008, Recommendation 10 (see generally paras 104-107) http://www.humanrights.gov.au/legal/submissions/2008/20080829_immigration_detention.html.
[64] Senator Chris Evans, Media Release, *Ministerial intervention powers under review*, 9 July 2008.

introduce a subjective element. For example, addressing a public rally may be considered to be a 'significant risk' or to be 'inciting discord.'[65] This is of concern for visa-holders as it creates uncertainty as to whether or not they might fail the character test. This is especially so considering that a visa-holder may potentially fail the character test because of conduct they have not even committed. All that is required is that there be a 'significant risk' of future conduct. Further, considering that some may not be given an opportunity to respond to the Notice of Intention to Cancel their visa, issued by DIAC, these people may be left wondering why their visa has been cancelled and why they have been detained.

People acquitted of an offence on the grounds of unsoundness of mind or insanity

A person has a 'substantial criminal record' if '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.'[66] In other words, those who have been acquitted of an offence due to a mental illness automatically fail the character test, regardless of the nature and extent of seriousness of the crime. They may then have their visa cancelled, be detained in immigration detention and removed from Australia. This raises the following concerns:

- Immigration detention is unsuitable for persons with mental illness. For further information on the impact of immigration detention on mental health, see the Commission's report, *A last resort*.

- Section 501 unfairly impacts on people who have been acquitted on grounds of unsoundness of mind or insanity.

Where can I find out more about section 501 detainees?

Commission projects and publications on section 501 detainees

The Commission has considered the human rights of section 501 detainees in the following work:

- Individual complaints. For example, in the Commission's Report of an Inquiry into a Complaint of indefinite nature of detention in Prison, the Commission found that the human rights of a group of Vietnamese permanent residents had been breached after their visa cancellation on criminal record grounds had led to prolonged detention.[67]

- The Human Rights Commissioner's inspections of immigration detention facilities reveal that an increasing number of immigration

[65] Harris-Rimmer, S, (2008) *The Dangers of Character Tests: Dr Haneef and other cautionary tales*, Discussion Paper No. 101, The Australia Institute.
[66] *Migration Act 1958* (Cth), s 501(7).
[67] This complaint involves the cancellation of visas under s 200 of the Migration Act, rather than s 501.

detainees, especially long-term detainees, are people whose visas have been cancelled because of a criminal record, despite the fact that they have served their prison sentence. View the Commissioner's observations here.

- The Commission made a submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention, with several recommendations relevant to section 501 of the Migration Act. These recommendations include that:
    - The government review the operation of section 501 as a matter of priority, with the aim of excluding long-term permanent residents from the provision,[68] and
    - The Minister's powers under section 501 be reduced and measures put in place to provide for transparent, accountable decisions which are subject to review.[69]
- The Commission commented on section 501 visa cancellation in its submission to the Clarke Inquiry on the case of Dr Haneef. The Commission recommended that
    - Section 501(3)[70] be reviewed and amended to increase ministerial accountability for the cancellation of a visa, including requiring the Minister to comply with the rules of natural justice and Ministerial Direction No. 21.[71]

Useful links

The Commonwealth Ombudsman has published reports and bulletins on section 501:

- Commonwealth Ombudsman Report No. 1|2006: *Report of an investigation into DIAC's administration of s 501 of the Migration Act.*

---

[68] Australian Human Rights Commission, *Submission of the Human Rights and Equal Opportunity Commission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia*, 4 August 2008, Recommendation 5 (see generally, paras 60-68)
http://www.humanrights.gov.au/legal/submissions/2008/20080829_immigration_detention.html

[69] Australian Human Rights Commission, *Submission of the Human Rights and Equal Opportunity Commission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia*, 4 August 2008, Recommendation 10 (see generally, paras 104-107)
http://www.humanrights.gov.au/legal/submissions/2008/20080829_immigration_detention.html

[70] The Minister's power to cancel a visa because the Minister reasonably suspects the person does not meet the character test and such cancellation is in the national interest.

[71] Australian Human Rights Commission, *Submission of the Human Rights and Equal Opportunity Commission to the Clarke Inquiry on the Case of Dr Mohamed Haneef,* May 2008, Recommendation 3 (see generally, paras 27-31)
http://www.humanrights.gov.au/legal/submissions/2008/200805_haneef.html

- Commonwealth Ombudsman Report No. 10|2007: *Notification of decisions and review rights for unsuccessful visa applications*

- Ombudsman Bulletin 12.