The Administrative Appeals Tribunal and Character Assessments for Non-Citizens

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Abstract 350 words maximum: (PLEASE TYPE) Under section 501 of the *Migration Act 1958*, a delegate of the Minister for Immigration may cancel or refuse to grant the visa of a non-citizen on the ground of "bad" character, a decision which can lead to the permanent exclusion of non-citizens from Australia. In its review of these decisions, the Administrative Appeals Tribunal ('the Tribunal') is frequently perceived as being too independent. I explore the role of the Tribunal, examining aspects of its performance having regard to the wider context and consider what the Tribunal's role should be when reviewing these types of cases.

My historical overview reveals an area of decision-making, marked by an underlying tension between law and politics. In order to provide a framework in which to assess the Tribunal's performance, I provide an overview of the law and fact-finding processes.

After briefly setting out some usages of "character" in philosophy and psychology, I explore its use in different legal contexts and show how it serves particular goals and is influenced by the various interests at play.

I proceed to explore the two limbs of section 501, namely the grounds upon which a person is deemed to have failed the character test, and the exercise of the discretion to refuse or cancel the visa. I show how the government employs various devices to shape Tribunal decision-making. I explore its independence, the fairness of its processes, and the quality of its decision-making and conclude that although Tribunal members ultimately enjoy independence of thought, their ability to accord applicants procedural fairness is compromised.

I argue that as members of the legal, and, at times, the social community, the difference in treatment of non-citizens cannot always be justified. In accordance with this view of justice, I suggest legal reform, designed to better balance the values and interests involved.

The bulk of my thesis relates to the law prior to the coming into force of recent amendments, although I discuss the impact of these changes.

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CHAPTER I

INTRODUCTION

The Administrative Appeals Tribunal reviews many decisions made by government officials. It finalised a little more than 6000 decisions in the 2012–13 financial year.[1] Given its many, diverse jurisdictions, while working at the Tribunal, I was struck by the level of controversy involved in its review of visa cancellations and refusals on the grounds of character, compared to its other caseload. By way of explanation, under section 501 of the *Migration Act 1958* (Cth) ('*Migration Act*'), when non-citizens fail to pass the character test, the Department of Immigration may refuse or cancel their visa. When a delegate of the Minister makes the decision, rather than the Minister personally, the non-citizen generally has a right of review to the Tribunal, which stands in the shoes of the original decision-maker and makes a fresh decision. If a decision to cancel or refuse a visa stands, the non-citizen faces detention, removal and the possibility of permanent exclusion from Australia.

Applicants and their families routinely express concern with the fairness of Tribunal review while it not uncommon for the victims of crime, their families, the media, the police and even, on occasion, the Minister to attack the Tribunal for overturning the original decision.[2] The cases of the Taufahema brothers illustrate this point. These brothers, who left Tonga as children and lived in Australia for most of their lives, were convicted of the manslaughter of a police officer. The Tribunal affirmed the decision to cancel Sione Taufahema's visa, on the basis that his high risk of re-offending outweighed other factors set out in the Directions, while it set aside the decision in Motekiai Taufahema's case on the grounds of the best interests of his seven-year-old

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[1] Administrative Appeals Tribunal, *Annual Report 2012–13* <http://www.aat.gov.au/docs/Reports/2013/AR2013.pdf> 26.

[2] See, for example, Jessica Marszalek, 'Immigration Minister Scott Morrison to Personally Decide Visa Cancellations', *Herald Sun* (online), 13 January 2014 <http://www.heraldsun.com.au/news/victoria/immigration-minister-scott-morrison-to-personally-decide-visa-cancellations/story-fni0fit3-1226800975967 >; 2GB, 'Operation Sovereign Borders, Visit to Malaysia, Administrative Appeals Tribunal: Interview with the Minister for Immigration, Scott Morrison MP' 28 October 2013 (Ray Hadley) <http://www.minister.immi.gov.au/media/sm/2013/sm209116.htm> ; 'Police Want Cop Killer Motekiai Taufahema Deported from Australia', *news.com.au* (online), 9 April 2010 <http://www.news.com.au/breaking-news/police-want-cop-killer-motekiai-taufahema-deported-from-australia/story-e6frfku0-1225851848721> ; Sue Hewitt and Renato Castello 'Teen Killer Allowed to Stay', *Sunday Mail* (online), 27 September 2009 <http://www.adelaidenow.com.au/news/south-australia/teen-killer-allowed-to-stay/story-e6frea83-1225779993722>.

daughter and evidence of his rehabilitation.[3] As I will discuss in detail, in contrast to other jurisdictions, in reviewing section 501 decisions the Tribunal must apply Directions, issued by the Minister under the Migration Act, which set out primary or other considerations that must be taken into account in the decision-making process.

The Tribunal was heavily criticised for its decisions in these two cases but for different reasons. Sione Taufahema's father expressed his disappointment with the Tribunal's decision as his son had "spent a lot of his life in Australia" and "his behavior was based on the Australian environment".[4]

The Tribunal's decision in relation to Motekiai Taufahema triggered a widespread, adverse reaction and sparked a campaign to have him removed. The Police Association of NSW and the Police Federation of Australia were involved in the campaign as were "police officers from around Australia and members of the community [who] expressed their outrage by writing letters to the Minister and by contacting their local MPs".[5] The NSW Police Commissioner also wrote to the Minister for Immigration demanding that Motekiai Taufahema be deported.[6] The pressure applied on the Minister appeared to achieve results. The Minister used his personal power under the Migration Act to set aside the Tribunal's decision in Motekiai's case and personally cancelled his visa on the grounds of national interest. In his press release, the then Minister for Immigration, Senator Evans, noted that "the role of the character provisions of the Act is to protect the Australian community from unacceptable risk of harm from criminal or other serious conduct".[7] The controversy arising from the Taufahema cases was not unique. These, and like cases, raised questions in my mind relating to the role of the Tribunal, its independence and its performance. If the Tribunal was doing such a bad job, should it continue to review section 501 cases? To what extent were its hands tied by the Ministerial Directions?

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[3] *Re Taufahema and Minister for Immigration and Citizenship* [2009] AATA 897 (Unreported, Deputy President Handley) 23 November 2011; *Re Taufahema and Minister for Immigration and Citizenship* [2009] AATA 898 (Unreported, Deputy President Handley) 23 November 2011.

[4] Joel Gibson, 'Court Allows Police Killer to Stay for Daughter's Sake', *Sydney Morning Herald* (online) 3 December 2009 <http://www.smh.com.au/national/court-allows-police-killer-to-stay-for-daughters-sake-20091202-k6fg.html>.

[5] Police Association of NSW, 'Minister's Cop Killer Decision Welcomed', Circular 18, 29 April 2010 <https://www.pansw.org.au/sites/default/files/public/Circular%2018%20%20Minister's%20Cop%20Killer%20Decision%20Welcomed.pdf >.

[6] 'Police Want Cop Killer Motekiai Taufahema Deported from Australia', *news.com.au* (online) 9 April 2010 <http://www.news.com.au/breaking-news/police-want-cop-killer-motekiai-taufahema-deported-from-australia/story-e6frfku0-1225851848721>.

[7] Police Association of NSW, Circular 25, 17 June 2010 <https://www.pansw.org.au/sites/default/files/public/Circular%2025%20%20Minister%20Cancels%20MotekiaiTaufahema%20Visa.pdf >.

What was the impact of the Directions on Tribunal decision-making? I wanted to explore these questions in the thesis.

I was also astonished by the procedures regulating the Tribunal's review of section 501 decisions. Amongst other things, these rules allowed no extension of time in which to lodge the review application, at times prevented review applicants from submitting further information at the hearing and effectively required the Tribunal to make a decision within 84 days. Why were non-citizens and, for that matter, the Tribunal bound by these non-discretionary rules, which displaced the Tribunal's generally autonomous approach to procedure? It was hard to understand the rationale for these rules, given the potentially enormous impact of the decision to cancel or refuse a visa on non-citizens and their family. In order to assess whether the Tribunal should continue to review section 501 decisions, it was necessary to evaluate the impact of the rules on the fairness of the process. Given that review applicants were generally either in prison or in immigration detention, how were applicants able to present their case fairly?

Even from a limited exposure to this jurisdiction, what was emerging was an intriguing picture of Tribunal review in a potentially political area of law. I became convinced of the importance of the study of section 501, focusing on Tribunal review for five principal reasons.

First, the review of section 501 decision-making raised many questions about the Tribunal's role, purpose and performance, which required in-depth exploration. Public criticism indicated that the Tribunal seemed unable to strike the right balance in its decision-making. It leaned either too far in favour of the interests of non-citizens or too far in favour of the interests of the wider community. I wanted to investigate whether the Tribunal should continue to review section 501 decisions, which could not be assumed given the criticism. In addition, it was well known that the Tribunal was set up as an independent, external reviewer of government action. However, its role in relation to section 501 and the related area of deportation was previously considered by the government and resulted in the introduction of the Directions and special procedures. Did these obvious constraints on decision-making affect the Tribunal's independence and the fairness of Tribunal proceedings? Were there any other constraints on its decision-making? What was the impact of the Directions and the procedures on Tribunal's fact-finding, a core aspect of merits review?

The ministerial power to set aside the Tribunal's decision was also unusual and raised further questions about the purpose of Tribunal review. Was the power appropriate in light of the potential for undue influence on decision-making? Were applicants being made into scapegoats in a society, which emphasised law and order and encouraged a tough stance on crime? Or was it an important safeguard in case the Tribunal got it wrong?

Secondly, little has been written about the Tribunal's review of section 501 decision-making. During the course of the thesis, however, Susan Harris Rimmer, Michelle Foster and Michael Grewcock all published excellent papers on broader aspects of section 501. Harris Rimmer examined character in migration and citizenship law and the law regulating employment in certain industries.[8] She firmly rejected the use of character tests, which, in her opinion, lacked clarity, transparency and natural justice. In her paper, Foster examined the legality of section 501 under domestic and international law and argued that the removal of long-term residents constituted a breach of Australia's international obligations.[9] Grewcock explored the nexus between section 501 and the criminal justice system and concluded that, amongst other things, criminal convictions on their own did not justify immigration detention and removal.[10] While these recent additions make valuable contributions to the study of section 501, they do not address Tribunal review of section 501 decisions.

Much has been written about the Tribunal's history, role and function which was helpful when assessing whether it should continue to undertake merits review of section 501. There was also literature about deportation from Australia, which explored the Tribunal's review of deportation decisions. In this context, Glenn Nicholl's book *Deported: A History of Forced Departures from Australia*[11] and Jennifer Sharpe's book, *The Administrative Appeals Tribunal*, were very helpful.[12]

Although there was a lack of on-point academic material, there were many Tribunal decisions, and Federal Court and High Court judgments, which consider and apply section 501. The higher court authorities provided valuable guidance on the meaning and parameters of section 501.

The former Commonwealth Ombudsman ('*the Ombudsman*') published a comprehensive review entitled *The Administration of s 501 of the Migration Act 1958 as it applies to long-term residents* in 2006 and the Australian Human Rights Commission ('*AHRC*') published numerous reports relating to section 501.[13] In addition, several Senate inquiries were conducted in relation

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[8] Susan Harris Rimmer, *The Dangers of the Character Test: Dr Haneef and other Cautionary Tales*, Discussion Paper No 101, The Australia Institute (2008).

[9] Michelle Foster, 'An "Alien" by the Barest of Threads' — The Legality of the Deportation of Long-term Residents from Australia' (2009) 33 *Melbourne University Law Review* 483.

[10] Michael Grewcock, 'Punishment, Deportation and Parole: the Detention and Removal of Former Prisoners under Section 501 Migration Act 1958' (2011) 44 *Australian and New Zealand Journal of Criminology* 56.

[11] Glenn Nicholls, *Deported: A History of Forced Departures from Australia* (University of New South Wales Press, 2007).

[12] Jennifer Sharpe, *Administrative Appeals Tribunal* (The Law Book Company Ltd., 1986).

[13] Commonwealth and Immigration Ombudsman, *Administration of s 501 under the Migration Act 1958 as it applies to Long-term Residents Report* 01/2006 (2006) ('Commonwealth Ombudsman

to key section 501 reform packages.[14] These bodies all expressed grave reservations relating to the operation of section 501. In addition, the Australian National Audit Office ('*ANAO*') published *Administering the character requirements of the Migration Act 1958* in 2011, which considered Departmental and Tribunal processes and decision-making in this area.[15]

As an employee, I was granted access to all Tribunal files relating to section 501 from 2003 to 2008, a total of 146 files. I was able to discuss the decision-making processes with Tribunal members and staff and observe section 501 hearings. This access gave me useful insights into the decision-making process, which would not otherwise have been available from a review based only on the Tribunal's published decisions. Based on this material, I hoped to make a valuable contribution to this field of study.

Thirdly, the extent of the section 501 power was troubling and deserved further academic consideration. The ramifications of the decision to refuse and, in particular, to cancel a visa are potentially catastrophic, as the government can, and does, remove non-citizens who have lived almost their entire lives in Australia. Stefan Nystrom is probably the most extreme example. He arrived in Australia as a 27-day-old baby. He experienced a difficult childhood in Australia and eventually the government cancelled his visa on the basis of his serious criminal convictions. Nystrom launched a legal challenge, which was successful before the Full Bench of the Federal Court. Using strong language in their joint judgment, Moore and Gyles JJ were explicitly critical of the use of section 501 in Nystrom's case. I reproduce their opening paragraph because it demonstrates the breadth of the section 501 power:

> This is yet another disturbing application of s 501 of the *Migration Act 1958* (Cth) (the Act). The appellant was born on 31 December 1973 in Sweden. His parents had permanently migrated to Australia from Sweden in 1966. His mother went back to Sweden in 1973 for a holiday with her first child, a daughter. She stayed in Sweden for the birth of the appellant rather than coming back to her home and husband in Australia because of the difficulty of travelling whilst

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Report'); Australian Human Rights Commission ('AHRC'), *Background Paper: Immigration Detention and Visa Cancellation under Section 501 of the Migration Act* (Sydney, January 2009) ('AHRC Background Paper 2009') <http://www.humanrights.gov.au/human_rights/immigration/501_migration_2009.html>; AHRC, *Background Paper: Human Rights Issues raised by Visa Refusal or Cancellation under s 501 of the Migration Act* (Sydney, June 2013) <http://www.humanrights.gov.au/sites/default/files/document/publication/section_501_paper.pdf> ('AHRC Background Paper 2013').

[14] Senate Legal and Constitutional Legislation Committee, Parliament of Australia, Consideration of Legislation Referred to the Committee: Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997, 1998 ('Senate Report 1998'); *Senate Legal and Constitutional References Committee, Parliament of Australia, Administration and Operation of the Migration Act 1958* (2006) *('Senate Report 2006')*.

[15] Australian National Audit Office ('ANAO'), *Administering the Character Requirements under s 501 of the Migration Act 1958*, Audit Report No 55, 2010–11 ('ANAO Report').

> pregnant. She returned to Australia on 27 January 1974, accompanied by the appellant. The appellant has not left Australia since 27 January 1974. He has never learnt the Swedish language and only speaks English. The appellant's mother and father separated when he was about five years old and there was little contact between the appellant and his father thereafter. His mother, father and sister have all continued to live in Australia. There has been little contact between the appellant and his mother's family in Sweden. He does not even know the names of his cousins, where they live or what they do. The appellant has been entirely brought up in Australia. It was only happenchance that he was not born here. He is only an 'alien' by the barest of threads. However, if the decision under challenge here stands he will be deported to Sweden and permanently banished from Australia.[16]

Nystrom's successful appeal in the Federal Court was overturned by the High Court, which found that he could be lawfully removed.[17] He was eventually sent to Sweden, his country of citizenship, where he was subsequently interviewed by SBS.[18] He explained in the interview that since his removal, he had suffered "depression, anger and drug addiction issues". He sometimes heard voices and had spent time in a Swedish psychiatric hospital. He "alternates between a life on the streets and time in prison". He said that because he could not speak the language, he could not get a job and was homeless. He was therefore "up shit creek". A psychologist, who was also interviewed, observed that in the nine-year period between his release from prison and his removal, he "behaved properly", had a caravan and worked picking fruit in Victoria. In Sweden, however, he had been convicted of 47 offences including the unlawful use of amphetamines, shoplifting and damaging property.

Also in the interview, Nystrom explained that he was "100% Aussie" and just wanted to return home. His family continued its attempts to bring him home, lodging a claim with the United Nations Human Rights Committee, which was ultimately successful.[19] The Committee found that in removing Nystrom from Australia, the government breached its international law obligations. Because the Committee's ruling was unenforceable, the government steadfastly refused to allow him to return to Australia.

Nystrom's case raises further questions. How could people generally considered to be "Australian" be removed to a country to which they have no ties apart from the legal status of citizenship? What was the political and legal context in which this power evolved? Was the

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[16] *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 420, 421–2.

[17] *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566.

[18] SBS, 'Stefan Nystrom's Deportation Led to Criminal Relapse', *SBS News*, 26 August 2013 <http://www.sbs.com.au/news/article/2012/05/18/stefan-nystroms-deportation-led-criminal-relapse >.

[19] Human Rights Committee ('*HRC*'), *Views: Communication No 1557/2007*, 102nd session, UN Doc CCPR/C/102/D/1557/2007 (18 August 2011) ('*Views: Communication No 1557/2007*').

removal of long-term residents just? Could people who had lived in Australia for a shorter period justly be removed?

Fourthly, it was unclear how the concept of character upon which visa refusals and cancellations turned informed the law. Generally, the law reduced the complexity of people's character to an inquiry into whether they had carried out an action that led to conviction of an offence. But surely the law had to recognise that people could change for the better. The character test under section 501, however, seemed to preclude consideration of fundamental issues such as rehabilitation and the risk of recidivism. How could this approach be justified? Was it not deeply unfair to people who had reformed?

Finally, having regard to the number of Tribunal decisions relating to section 501, it was apparent that section was regularly invoked to refuse or cancel visas. The Australian Human Rights Commission reported that in the 2011–12 financial year alone, "88 people had their visa applications refused and 157 people had their visas cancelled" under section 501.[20] That section 501 was regularly relied upon provided further reason to explore the wider issues.

In order to determine whether the Tribunal should continue to review character decisions made under the *Migration Act*, I first needed to understand the history of section 501, including when and why it was introduced. Thus, in chapter two, I examine the broader historical, political and social context in which immigration issues in Australia have evolved. I then explore the history of the criminal deportation provisions, the precursor to section 501, which have existed since Australia's first *Immigration Restriction Act* and the introduction of section 501, its various amendments and the controversies generated by its use. Next, I review the constitutional foundations of deportation and section 501 and their interrelationship. It becomes evident that, legally, there are few limits imposed on section 501, which is now relied upon to effect removal. I note the development of administrative law, which saw the establishment of institutions such as the Tribunal and the move away from discretionary decision-making to codification of migration law. Exploring these issues allowed me to understand the broader historical, political and social dynamics in which the Tribunal was established and which inform the Tribunal's role to this day.

It becomes clear that throughout the thesis, I focus on the role of the Tribunal in an area of law marked by the tension between law and politics. Section 501 decision-making is subject to

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[20] AHRC, *Background Paper: Human Rights Issues raised by Visa Refusal or Cancellation under s 501 of the Migration Act* (Sydney, June 2013) <https://www.humanrights.gov.au/sites/default/files/document/publication/section_501_paper.pdf > 3.

independent review, which is designed to provide individualised justice, shielded from various interests. Yet because of the potentially political nature of the decision, the government retains ultimate control of decision-making and is able to set aside the Tribunal's decision. In the end, I assess whether the correct balance between the competing interests has been struck.

Chapter three begins with a brief discussion of Davis' work in relation to discretion.[21] While not the focus of this thesis, I subsequently consider whether the appropriate balance between discretion and rules has been struck in the section 501 decision-making framework at the level of the Tribunal. I set out important background information needed in order to address the core questions posed in the thesis. I provide an overview of section 501 decision-making at Departmental and Tribunal level, including the section 501 legislative scheme, and the substantive and procedural law. In this chapter, I focus on the fact-finding process initially at the Departmental level. I note that the Department's processes have been criticised for failing to obtain up-to-date and relevant information. I then delve into the history of the Tribunal, including its role, its task and the manner in which it conducts its task. The Tribunal was established to provide independent, de novo merits review. For various reasons explained in the chapter, it adopted a modified adversarial approach to review proceedings, which continues today. I also set out its broader legal obligations. The insight into Departmental and Tribunal processes is critical, setting the scene for a broader assessment of the Tribunal's role in this jurisdiction. In particular, by understanding the Tribunal's background, method of operation and legal obligations, it provides a framework in which its performance can be assessed.

Given that visa cancellation and refusal under section 501 are on the grounds of character, I briefly set out in chapter three what character means in the disciplines of philosophy and psychology. It is clear from this short discussion that context is critical to the notion of character. It affects how people perceive the situation, how they will act and how they will be judged by others.

As context is critical, I then explore character in other legal areas, namely in citizenship law and in the regulation of legal and medical practitioners. In citizenship law, in keeping with Australia's inclusive approach to citizenship, the assessment of character is deliberately broad, given that its purpose is to determine whether the non-citizen should be accepted as a member of the formal community. With the exception of various statutory bars on citizenship acquisition while criminal proceedings are on foot or following imprisonment of a certain duration, there are few legal constraints on the assessment of character under citizenship law.

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[21] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, 1969).

Character as a construct also underpins the regulation of legal and medical practitioners. In these regulatory contexts many interests are at play including those of the individual, the profession, the public, the government and the media.

After having considered the regulatory context governing legal and medical practice, I discuss in detail two cases, involving a solicitor and an ophthalmologist, respectively convicted of sexual offences against children and child pornography. Because of the interplay of these multiple interests, the assessment of character is much broader in these contexts, requiring a far more nuanced evaluation, involving the weighing and balancing of many variables. The review of character in these legal contexts demonstrates that character serves particular goals and is influenced by the various interests at play. The use of character in these different legal contexts provides an interesting contrast, highlighting the bluntness with which character is dealt with under section 501. Like character in other legal contexts, my subsequent discussion of section 501 decision-making reveals persistent strains and tensions between various interests, which ultimately affect the role of the Tribunal.

In chapter four, I explore the two limbs of section 501. I initially discuss in detail the five grounds upon which non-citizens may fail the character test, which represent the law as it stood prior to the coming into force of the *Migration Amendment (Character and General Visa Cancellation) Act 2014* in December 2014. I show how the grounds have evolved in response to controversial cases or political events. I discuss how the grounds are interpreted and consider criticisms relating to their application. Interestingly, the most commonly invoked criterion of the character test is the substantial criminal record ground, the ground in relation to which there is the least discretion, which demonstrates once again that section 501 is not so much about character but more about the government's ultimate control of decision-making in this context.

I then examine the Ministerial Directions, which govern the exercise of discretion to refuse or cancel the visa. Although Directions usefully structure the exercise of discretion, I explain how the Directions' coverage of decision-making is constrained by the law. I provide a brief overview of relevant Directions, showing how some have been unlawful or unjust or both. I analyse in detail how the various primary and other considerations contained in the Directions are applied, with a view to improving the balance between the various interests involved in the decision-making process.

By analysing the two limbs of section 501, I show how the government is able to shape the Tribunal's role. The shaping of Tribunal decision-making, however, must occur within legal limits, which, as I subsequently show, have a major impact on the Tribunal's independence.

In chapter six, based principally on the findings of my file review but also informed by Tribunal and judicial decisions, I explore the Tribunal's decision-making process. I focus on three key indices, namely independence, process and quality, to assess its performance. Given the use of a character test and the Ministerial Directions, which sharply structure the exercise of discretion in section 501, I begin by questioning whether Tribunal members enjoy independence of thought. Following an examination of the files, I found that there was one group of cases, those involving violent, shocking crimes, which almost always resulted in the decision being affirmed. It was not possible, however, to definitively argue that the Directions in force produced that effect on decision-making, given that the Tribunal may have come to that conclusion in any event. In relation to other cases, I concluded that there was sufficient scope within the decision-making process to enable the Tribunal to come to what it saw as the preferable decision for reasons, which I discuss in detail in the chapter.

I then examine the Tribunal's capacity to provide procedural fairness, which required an overview of the system. I found that while the Tribunal attempted to provide procedural fairness throughout the hearings, its ability to do so was severely curtailed by multiple factors including such things as the power imbalance between the applicant and the state, the Tribunal's modified adversarial approach to decision-making and, most significantly, the impact of the rigid procedural rules on Tribunal discretion.

Finally, as a result of observations based on the file review, I explore two aspects of Tribunal decision-making, namely its approach to fact-finding and its use of research. I found that Departmental and Tribunal approaches to fact-finding required improvement as there was a lack of current, accurate and relevant material on file. Given the difficulties faced by applicants in putting forward their best case, and the impact of the decision on applicants and their families, I suggest that this is an area which calls for change.

In relation to the use of its own independently acquired research, I note that this is generally a practice which is to be applauded as it encourages informed decision-making. However, in the cases studied, the quality of the research was questionable and controversial and added little to decision-making. In these circumstances, I argue that its use should be discontinued.

While concluding in chapter six that the Tribunal enjoys independence of thought, a critical aspect of its role, I find that the decision-making process is deficient and requires reform, particularly having regard to the possible impact of the decision on non-citizens, to which I turn in the next chapter.

In chapter seven, I consider whether the removal of non-citizens, in particular long-term residents, is just. While conscious of the limitations of his approach, I use Michael Walzer's

approach to questions of social justice, namely that justice is to be understood in the light of the inherited standards and traditions of a particular community.[22] I argue that these standards and traditions can be discerned from the community's values. I demonstrate how Australian values, which derive from its liberal democratic traditions and its multicultural approach to integration, include equality in general and before the law, freedom and dignity.

The use of expedited procedures throughout the section 501 review process and the imposition of an additional punishment, namely removal, is said to be justified on the grounds that applicants are not Australian citizens. This justification, however, does not stand up to scrutiny when one considers the different ways persons can be members of the community. For as well as membership of a political community, persons who are not members of this community (ie citizens) may nonetheless be members of our legal or social community. As members of the legal community, section 501 applicants are entitled to be treated equally under the law, an important value in the Australian community. Furthermore, when non-citizens become members of the social community, the government's right to remove them also becomes constrained because of their ties to the community. Australian values thus provide an important justification for the continued involvement of an external, impartial and independent institution in the review of section 501 decision-making.

Shortly before finalising what was to be my final draft, Parliament amended the *Migration Act* as noted earlier in December 2014. The section 501 structure remains but its content has become even more savage, and even broader options for skirting and overturning merits reviews have emerged. In chapter eight, I briefly discuss the principal changes resulting from the *Migration Amendment (Character and General Visa Cancellation) Act 2014*, and outline my concerns arising out of the changes. My concerns mirror those, which relate to the law prior to these amendments.

One might say that the latest Amendment has met some of my criticisms, namely those relating to the lack of clarity in some respects of the old section 501. However, whilst old doubts have in some parts been resolved, the resulting clarity is normatively more objectionable than the normative concerns I raised regarding the old section 501. Further the new amendments are themselves highly unclear at a couple of critical junctures, discussed further in chapter eight.

In chapter nine, I put forward my reform proposals. I begin by arguing that there ought to be a residence rule, which limits the breadth of the section 501 power. Once a person becomes a

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[22] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1983).

member of the social community, that person ought to be non-removable. Subject to public debate, that point may be 10 years lawful residence or it may be less.

I further argue that in the interests of individualised justice, while a residence rule is critical, the system must also accommodate the claims of non-citizens who have lived in Australia for a period that is less than the residence rule requires. I conclude that it is possible to continue to use section 501, although it requires reform. First, the residence rule must also be incorporated into section 501, in order to protect long-term residents from removal.

Secondly, I suggest that the character test should be retained. I explain, however, that the substantial criminal record ground has not always been clear, resulting in frequent litigation, discussed in chapter five. I argue that the grounds either need to be amended or abolished, in order to ensure greater clarity in relation to their purpose and the type of conduct captured by the grounds. I note that certain subsections of the substantial criminal record ground have since been amended pursuant to the *Migration Amendment (Character and General Visa Cancellation) Act 2014.*

Thirdly, I discuss in detail the Directions, arguing that because they promote consistency and fairness, they should continue to be used. I propose, however, that certain considerations must always be taken into account while others must never be taken into account. These proposals are designed to ensure that a better balance is struck between the various interests at play and that, in the end, non-citizens are treated justly.

Finally, I assess the section 501 system as it relates to the Tribunal and argue that because of its independence, merits review must be retained. The Tribunal's capacity to provide a fair hearing, however, is hamstrung by the procedures presently set out in the *Migration Act*. Accordingly, these procedures should be amended or abolished. As members of the legal community, non-citizens are entitled to equal treatment under the law and should not therefore be subject to different procedures. I also argue that because the Minister's power to set aside the Tribunal's decision fundamentally undermines the purpose of Tribunal review and constitutes a waste of resources, it should be abolished. Lastly, I argue that section 501 review applicants must be provided legal representation to ensure a fairer review process. I argue that these reform proposals would provide a better balance between the interests involved, thus enhancing the Tribunal's role in reviewing section 501 decision-making.

It thus becomes apparent that section 501 is an unusual area of law, characterised by a high level of strain between the competing interests. This strain, the underpinning theme of the thesis, helps explain section 501 decision-making and its context, characterised by frequent litigation and regular legislative intervention, as evidenced by the *Migration Amendment (Character and*

General Visa Cancellation) Act 2014, the most recent, substantive amendment. The wider context provides a valuable insight into the dynamics of decision-making, resulting in reform proposals, which are designed to achieve more just and fair decision-making.

CHAPTER II

HISTORICAL OVERVIEW

A *Introduction*

This chapter charts the growth of a disturbingly wide power, namely section 501 of the *Migration Act 1958*. The chapter contains six parts. The first examines the political and social context in which immigration issues arise in Australian society. The second briefly sets out the broad historical framework in which the deportation power developed and was applied. As section 501's precursor came into existence in 1992, it is important to examine, what was, in effect, its earlier incarnation. The third considers the history of section 501, which is, at present, the principal mechanism by which criminal non-citizens are removed from Australia. It focuses on the reasons for its introduction, the wide-ranging amendments made in 1992 and 1998, and the controversies generated by its use. The fourth discusses the constitutional foundations of the deportation and section 501 powers, and notes that in practice, there are few constitutional limits imposed on the application of section 501 by the absorption doctrine and the concept of the non-citizen non-alien. The fifth examines the relationship between the deportation power and the section 501 power, focusing on whether the existence of the criminal deportation provisions circumscribes the use of section 501. Finally, in the conclusion of this chapter, I discuss the emerging theme, which underpins the thesis.

B *The Politics of Immigration*

It is often said that Australia is a nation of immigrants. As at June 2013, its overseas-born resident population was estimated to be 27.7% of the population.[23] The selection criteria and annual intake levels are "predetermined" and "carried out in a planned and orderly fashion".[24] As Jupp observes, "there is nothing random about Australian immigration".[25] From the short discussion that follows, the government's "obsession with control" of the immigration system

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[23] Janet Phillips and Joanne Simon-Davies, 'Migration to Australia: A Quick Guide to the Statistics' Research paper series, 2013–14, Parliamentary Library, Parliament of Australia, 14 May 2014, overview.

[24] Sev Ozdowski, 'The Law, Immigration and Human Rights: Changing the Australian Immigration Control System' (1985) 19(3) *International Migration Review* 535, 537.

[25] James Jupp, 'Terrorism, Immigration and Multiculturalism: the Australian Experience' (2006) 61(3) *International Journal* 699, 700.

becomes clear.[26] As the former Prime Minister of Australia, John Howard, declared, "we will decide who comes to this country and the circumstances in which they come".[27] It will also become evident from the section 501 context that the desire to control also extends to the removal of so-called undesirables. The ability to control immigration, however, has been tested by asylum seekers arriving by boat, people in Australia resisting removal and, in the executive's view, judicial responses to administrative action, matters to which I return shortly. But first, I take a bird's eye view of immigration in Australia.

From the outset, colonial authorities were preoccupied with immigration and it was "said to have been one of the prime factors that encouraged colonies in Australia to federate as a nation".[28] As I will discuss Australia's political and legal framework in more detail in chapter seven, it is sufficient to note at this point that under the Australian system of government, for multifactorial reasons, "the balance of power has reverted decisively to the Executive Government". [29] As a result, Australia has an immigration system marked by an unusually high level of executive control.[30] As Professor Crock observes, so long as the government can "negotiate legislation through the Senate", "the only obstacles to the immediate implementation of laws" are the Australian Constitution and the courts.[31] It is also important to remember that this level of control is facilitated by Australia's geographic isolation.[32] As Cronin notes, because almost all of Australia's "arrivals disembark from established airline and shipping carriers, they are amenable to legislative control".[33] Australia is therefore able to rely upon "legal solutions to control immigration because the laws work".[34]

In this context, it is important to note that "between the 1880s and the 1960s, Australia deliberately insulated itself from its geographical region by adopting the White Australia Policy,

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[26] Stephen Castles, Robyn Iredale and Ellie Vasta, 'Australian Immigration between Globalization and Recession: A Report on the Proceedings of the Immigration Outlook Conference held November 11–13 1992, Sydney, Australia' (1994) 28(2) *International Migration Review* 370, 375.

[27] John Howard, Speech delivered at the Federal Liberal Party Campaign Launch, Sydney, 28 October 2001 quoted in Mary Crock, 'Alien Fears: Politics and Immigration Control' (2010) 29 *Academy of Social Sciences Dialogue* 20, 25.

[28] Mary Crock, 'Contract or Compact: Skilled Migration and the Dictates of Politics and Ideology' (2001–02) 16 *Georgetown Immigration Law Journal* 133, 136.

[29] Gerard Brennan, 'Courts, Democracy and the Law' (1991) 65 *The Australian Law Journal* 32, 34.

[30] Bob Birrell, 'Immigration Control in Australia' (1994) 534 *Annals of American Academy of Political and Social Science* 106, 107.

[31] Crock, above n 28, 136.

[32] Kathryn Cronin, 'Controlling Immigration: Australian Legislation and Practice' (1999) 75 *Reform* 6, 6.

[33] Ibid.

[34] Ibid.

"the most famous aspect" of which was "its exclusion of non-European immigrants".[35] The White Australia policy was "actively pursued" not only by the "conservative side of Australian politics" but also by the Australian Labor Party and unions, such as Australian Workers' Union, were "among the most enthusiastic supporters of White Australia into the 1960s".[36] The White Australia policy was motivated not only by racism but also a concern that "immigrants would take jobs from Australians or undercut their wages".[37] As a result of the appalling effects of the Great Depression, public policy debate was thereafter "haunted" by the threat of unemployment.[38]

Through the use of the "dictation test and fines on carriers bringing unacceptable immigrants", the White Australia policy was "extremely effective in insulating Australia from its neighbours".[39] Following World War II, however, the government was galvanised by the need to populate the country in order to ensure that it could "defend itself from more populous northern neighbours".[40] In addition to the family reunion program and the refugee intake,[41] the post-war immigration program focused on the recruitment of unskilled workers "to provide the muscle for the development of manufacturing industries",[42] although governments "went to great lengths to reassure the electorate that this would not be at the expense of Australian workers' privileges".[43] Jupp observes that "the painless integration of large numbers of non-English-speaking Europeans under the mass migration programs" contributed to the demise of the White Australia policy.[44] Other factors also played a role:

> [The White Australia policy] limited the scope of immigration intake to European societies which eventually lost any strong incentive to move to Australia because of their growing prosperity; it alienated newly independent Asian states; it restricted the thinking of Australians to a world view unduly focused on distant regions such as Britain; it was based on theories and attitudes which became intellectually unfashionable; and it could be shown pragmatically not to be in the economic, social or political interests of Australia.[45]

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[35] James Jupp, ' "White Australia" to "Part of Asia": Recent Shifts in Australian Immigration Policy towards the Region' (1995) 29(1) *International Migration Review* 207, 207–8.

[36] Ibid.

[37] James Jupp, 'Australia: A Changing Identity' (2007) 79(3) *Australian Quarterly* 66, 67.

[38] Ibid.

[39] Jupp, above n 35, 207–8.

[40] Gary Freeman and Bob Birrell, 'Divergent Paths of Immigrant Politics in the United States and Australia' (2001) 27(3) *Population and Development Review* 525, 532.

[41] Ozdowski, above n 24, 535.

[42] Castles, above n 26, 379.

[43] Birrell, above n 30, 108.

[44] Jupp, above n 35, 209.

[45] Ibid.

The policy was progressively "abandoned by the Liberal and Labor governments with surprisingly little political resistance" between 1966 and 1973.[46]

In *A New Paradigm of International Migration: Implications for migration policy and planning in Australia*, Professor Hugo explores changes in Australian migration, attributable to international population movements. He argues that "perhaps the greatest change which has occurred in Australian immigration in the last decade is that whereas in the first five post-war decades Australia emphatically eschewed acceptance of temporary workers in favour of an overwhelming emphasis on settlement migration there has been a reversal with a number of new visa categories designed to attract temporary residents to work in Australia (especially the temporary business and student visa categories)", resulting in "an exponential increase in non-permanent migration to Australia".[47] What is also significant is the increase in temporary residents acquiring permanent residence onshore. Hugo observes that:

> Three out of every 10 'settlers' to Australia are 'onshore' immigrants in that they are already in Australia under a temporary residence and seek to transfer to permanent residence.[48]

Permanent migration to Australia has also "undergone profound change in the last decade or so".[49] Hugo notes that "there has been a substantial shift in the balance of the settlement program away from family and humanitarian to skill selected immigrants" and a "substantial reduction" in the proportion of migrants from the United Kingdom and Europe and an increase in the number of migrants from Asia, Oceania and Africa.[50]

The Australian government thus continues to embrace immigration, albeit within well-defined limits. The current planning figure for the migration program is 190 000 permanent places while the temporary residence program is demand-driven. Interestingly, despite the number of non-citizens and the change in source countries, "mass immigration has caused no serious tensions".[51] Gibson and others explain that following the post-war years, Australia was able to avoid "the tensions that stem from having a large immigrant population that is racially and ethnically diverse, together with a historically disadvantaged indigenous population" for three

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[46] Ibid 210.

[47] Graeme Hugo, 'A New Paradigm of International Migration: Implications for Migration Policy and Planning in Australia' (Research Paper No 10 2003–04, Parliamentary Library, Department of Parliamentary Services, 2004) 1.

[48] Ibid.

[49] Ibid.

[50] Ibid.

[51] Jupp, above n 35, 223.

principal reasons.[52] First, Australia enjoys "comparative prosperity, an arbitrated wages system and the lack of inherited privilege".[53] Secondly, "successive governments have funded a comprehensive and sophisticated set of programs designed to ensure the smooth settlement of new immigrants".[54] Thirdly, and, in their view, perhaps most importantly, "there has been a bipartisan consensus within the political elite to ensure that issues of race and ethnicity are not placed on the electoral agenda".[55]

There is no question that, for economic and political reasons, the idea that "migrants should be chosen to meet immediate needs in the labour market while bearing in mind the rights and interests of local workers" has been "the dominant theory" underpinning immigration policy.[56] Furthermore, official policy "is strongly committed to building effective links with Asia and to maintaining an immigration program with a large Asian component".[57]

Government policy, however, does not always reflect the electorate's views. The extent to which immigration, including issues such as population growth and the level of Asian immigration, concerns the community is unclear, particularly given that polling is influenced by a wide variety of factors, ranging from the wording of the questions, sampling and methodology,[58] media coverage,[59] and the extent to which "politicians themselves may help shape public opinion".[60] Some, such as Markus, argue that "contrary to the impression created in the media, the general disposition of Australians towards immigration has become more positive over time".[61] The majority view "supported the immigration program or wanted it expanded".[62] Those positive attitudes to immigration, however, are linked to "the improved state of the economy".[63] Others, however, argue that public attitudes to immigration are negative, tied to "fears about immigrants encroaching on one's material well-being" and "a more diffuse sense

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[52] Rachel Gibson, Ian McAllister and Tami Swenson, 'The Politics of Race and Immigration in Australia: One Nation Voting in the 1998 Election' (2002) 25(5) *Election, Ethnic and Racial Studies* 823, 838.

[53] Ibid.

[54] Ibid.

[55] Ibid.

[56] Crock, above n 28, 138.

[57] Jupp, above n 35, 217.

[58] Andrew Markus, 'Public Opinion Divided on Population, Immigration and Asylum' (2010) 26(3) *Policy* 7, 8.

[59] Jupp, above n 35, 219.

[60] Murray Goot and Ian Watson, 'Population, Immigration and Asylum seekers: Patterns in Australian Public Opinion' (Parliamentary Library, Parliament of Australia, May 2011, 2010–11) 57.

[61] Markus, above n 58, 9.

[62] Goot, above n 60, 54.

[63] Markus, above n 58, 9. Ozdowski, above n 24, notes, at 547, that the 1980s, for example, "brought continuing high unemployment and high inflation rates, a large budget deficit and associated restraints in government expenditure, as well as a substantial cut in the immigrant intake".

of discomfort with overall levels of immigration".[64] In their study of the right-wing One Nation party, for example, Gibson and others found that race and immigration and, only to a lesser extent, economic insecurity contributed to its brief success.[65] Overseas terrorist attacks, and the race riots in Cronulla, Sydney in December 2005 have also played a role in generating public debate about "immigration, multiculturalism and the integration of the Muslim population".[66] In short, it is difficult to gauge community views on immigration although there is no doubt that it is influenced by local economic conditions. While immigration, race and religious issues may periodically arise, particularly in response to international events, generally the settlement of significant numbers of immigrants has been harmonious.

The belief that Australia could effectively control immigration was brought into question by "the Indo-Chinese refugee emergency in the 1970s".[67] Since that period, "the phenomenon of unauthorised boat arrivals has engendered extraordinary responses from government", which "demonstrate a deep resistance to the notion of irregular migration".[68] As Crock notes, "in financial terms the policies of mandatory detention, interdiction and offshore processing have cost [Australia] a literal fortune" yet "electoral support has remained strong".[69] While attitudes to immigration may vary, "Australian public opinion clearly shows consistent and strong negative views towards asylum seekers arriving by boat".[70]

Dr Birrell claims that the government's ability to control immigration has also been challenged by "the extension of administrative law to immigration decisions".[71] He observes that "the government did not intend to open up the immigration decision-making process in this way and especially not to those illegally in Australia".[72] At the heart of the tension is the bipartisan political view that the courts are "ill-suited" to dealing with migration matters and, accordingly, have "little or no business being in the migration area".[73] It is a debate which also encompasses the Tribunal in the context of section 501 and criminal deportation. Who is best placed to decide whether to cancel or refuse a visa is a matter further explored in due course.

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[64] Gibson, above n 52, 838.

[65] Ibid 823.

[66] Jupp, above n 25, 699–700.

[67] Castles, above n 26, 372.

[68] Mary Crock, 'Alien Fears: Politics and Immigration Control' (2010) 29 *Academy of Social Sciences Dialogue* 20, 21–2.

[69] Ibid 23.

[70] Markus, above n 58, 13.

[71] Birrell, above n 30, 111.

[72] Ibid.

[73] Michael McHugh, 'Tensions between the Executive and the Judiciary' (2002) 76 *The Australian Law Journal* 567, 576.

The tension between the executive and the judiciary contributed to the decision to codify the *Migration Act* in 1989, which enabled the detailed specification of "the entry criteria for each migrant category" and which was designed to reduce the scope for judicial review.[74] As I discuss later to a degree, the law regulating section 501 reverses the trend to remove discretion. Instead it grants the Minister and his or her delegate (or the Tribunal) significant latitude when deciding to refuse or cancel a visa. In contrast, the procedures governing the Tribunal's review process are highly codified and non-discretionary. These procedures are designed to expedite the review process to prevent the applicant from prolonging his or her stay in Australia. I ultimately argue that the substantive and procedural law governing section 501 decision-making is fundamentally unfair and requires urgent reform in ways.

C *The History of Deportation*

I have already mentioned that Australia's general approach to immigration has involved "a high degree of state action and control",[75] whereby "governments have decided what types of immigrants to attract and what types to discourage".[76] Since colonisation, governments have actively encouraged the migration of the "right" type of migrant. The assisted passage schemes, which were primarily for the British-born, brought more than three million immigrants from 1831 to 1982.[77] Supplementing these schemes in the early days was the transportation of convicts. From 1788 to 1867, the British government sent more than 155 000 convicts.[78] In time, however, transportation was increasingly viewed as incompatible with sovereignty.[79] The early settlers were no longer happy to be "a dumping ground for 'criminals' ".[80] Also deeply troubling for many settlers was the number of non-Europeans, including approximately 32 000

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[74] Birrell, above n 30, 113.

[75] James Jupp, 'Australian Immigration 1788–1973' in Frances Milne and Peter Shergold (eds) *The Great Immigration Debate* (Federation of Ethnic Communities' Councils of Australia, 1989) 2.

[76] Ibid.

[77] Gary Freeman and James Jupp 'Comparing Immigration Policy in Australia and the United States' in Gary Freeman and James Jupp (eds) *Nations of Immigrants: Australia, the United States and International Migration* (Oxford University Press, 1992) 3.

[78] Jupp, above n 75, 2.

[79] Glenn Nicholls, *Deported: A History of Forced Departures from Australia* (University of New South Wales Press, 2007) 20.

[80] Geoffrey Sherington, *Australia's Immigrants* (Allen and Unwin, 2nd ed, 1990) 53.

Chinese,[81] attracted to Victoria's "vast gold deposits"[82] and the estimated 50 500 Pacific Islanders working primarily in the cane fields of Queensland.[83]

In response to this influx of criminals and non-Europeans, some Australian colonies legislated to control immigration.[84] Continuing concern led to the insertion of a provision in the *Commonwealth of Australia Constitution Act 1900* ('*Constitution*'),[85] enshrining the Commonwealth's ability to prevent the influx of criminals.[86] As Dr. Nicholls notes, it was "an understated but assertive act against Britain", "a unique piece of symbolism to put the past in its place".[87]

More importantly, also enshrined was the ability to control the entry and stay of non-citizens in Australia. Deliberately, Australian citizenship was left undefined. Instead, Parliament was granted ample powers to enact laws for the peace, order and good government with respect to naturalisation and aliens[88] and immigration and emigration.[89] The meaning of alien and of immigrant has evolved over time, in light of legislation and judicial decisions. As noted previously, the scope of these powers will be explored in part three. For present purposes, however, it suffices to note that historically an alien was, broadly speaking, anyone who was not a British subject.[90] At present, an alien is synonymous with non-citizen and as such, subject to removal, regardless of length of residence and ties to Australia. Immigrant was "the generic term used for all permanent or long-term arrivals in Australia".[91] Previously, immigrants could be deported, regardless of length of residence in Australia. It is now recognised that Parliament's powers with respect to immigrants does not extend to those who have become absorbed into the community. This reduction in the scope of the immigration power, however, has been matched by an expansion of the "aliens" power.

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[81] H I London, *Non-White Immigration and the "White Australia" Policy* (Sydney University Press, 1970) 9.

[82] Sherington, above n 80, 59.

[83] London, above n 81, 12. London notes, at 9 and 10, that paradoxically, while Chinese labour was being excluded, Kanaka labour was forcibly brought into Australia. s

[84] *An Act to Regulate the Residence of Chinese Population in Victoria 1857* (Victoria); *Immigration Restriction Act 1897* (WA); *Immigration Restriction Act 1898* (NSW).

[85] *Australian Constitution* s 51(xxviii).

[86] Nicholls, above n 79, 20.

[87] Ibid 20–1.

[88] *Australian Constitution* s 51(xix).

[89] Ibid s 51(xxvii).

[90] Nicholls, above n 79, 12.

[91] Mary Crock, *Immigration and Refugee Law in Australia* (The Federation Press, 1998), 232.

Amongst the first laws to be passed by the newly established Commonwealth Parliament was the *Immigration Restriction Act 1901*.[92] It commenced on 23 December 1901 and remained in force until it was replaced by the *Migration Act 1958*.[93] The Act was a "shell", containing "almost no reference to the categories of immigrants the Australian government wished to encourage".[94] It enabled officers to refuse entry or to deport two broad categories of people, namely non-Europeans and those who failed health, character or procedural requirements.[95] Section 3(a) of the Act prohibited the immigration of persons who failed the dictation test and persons who had within the previous three years been convicted of an offence and sentenced to imprisonment for one year or longer. Such persons became prohibited immigrants, liable to imprisonment for not more than six months and deportation.[96] Section 8 further provided that non-British subjects, (in other words, aliens) who had been convicted of a crime of violence were liable upon expiration of their sentence to undertake the dictation test, failure of which led to becoming a prohibited immigrant, and deportation. However, there was no time limit set on when the non-British subject could be subjected to the dictation test. Accordingly, the government had almost absolute discretion to refuse entry and to remove non-citizens, a right upheld by early High Court decisions.[97]

The dictation test was the notorious tool used to implement the White Australia policy. Its application ensured that it was "almost impossible for anyone not of 'substantial European descent and appearance' to be admitted to Australia for permanent residence".[98] The White Australia policy was only abolished much later, in the early 1970s. It is less well known, however, that the test additionally "assumed the added function of preventing the entry or securing the deportation of Europeans who were considered undesirable for economic, political or moral reasons".[99] Its use for this purpose, however, was "infrequent, spasmodic and arbitrary",[100] possibly as a consequence of the controversies generated from cases where it was used, such as the *Egon Kisch* case.[101]

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[92] Nicholls, above n 79, 26.

[93] AC Palfreeman, *The Administration of the White Australia Policy* (Melbourne University Press, 1967) 81. The *Immigration Restriction Act* was renamed the *Immigration Act* in 1920.

[94] Sean Cooney, 'The Codification of Migration Policy: Excess Rules? — Part I' (1994) 1 *Australian Journal of Administrative Law* 125, 126.

[95] AC Palfreeman, above n 93, 97.

[96] *Immigration Restriction Act 1901* (Cth) s 7.

[97] *Robtelmes v Brena*n (1906) 4 CLR 395; *Ah Yin v Christie* (1907) 4 CLR 1428.

[98] Jupp, above n 75, 8.

[99] Alexander Yarwood, 'The Dictation Test — Historical Survey' (1958) 30 *The Australian Quarterly* 19, 2.

[100] Ibid 38.

[101] Ibid 38.

The large-scale migration to Australia, which occurred at the end of World War Two, and the public questioning of the merits of the White Australia policy,[102] brought "demands for a clearer statement of ministerial and departmental powers to admit and expel non-resident aliens".[103] In response, the *Migration Act* was passed. It abolished the dictation test and introduced a system of entry permits.[104] The Minister's broad discretionary powers were retained, however, as it did not specify the grounds upon which entry permits could be granted.[105]

The *Migration Act* contained a number of sections relating to deportation. Section 12 provided that the Minister could order the deportation of aliens convicted in Australia of a crime of violence or extortion or who had been sentenced to imprisonment for one year or longer, no matter the length of the alien's residence in Australia. An alien was defined as anyone who was not a British subject, an Irish citizen or a protected person.[106] Section 13 provided that the Minister could deport an immigrant, which could include an alien, convicted of an offence punishable by imprisonment for one year or longer, committed within five years of entry into Australia. These powers were regularly used to effect the removal of non-citizens. Nicholls notes that from 1950 to 1965, 1076 people were deported on the basis of criminal offending.[107] An additional, although rarely used, power existed, namely section 14, which provided that within five years of residence in Australia immigrants could be deported on the basis that their conduct was such that they should not be allowed to stay.[108]

The 1970s and 1980s witnessed significant changes, which had a major impact on deportation. In 1971, the Administrative Review Committee, headed by Justice Kerr, published its report, recommending a simplified administrative review system, designed "to reconcile the requirements of efficiency of administration and justice to the citizen".[109] Pursuant to its recommendations, an independent, general merits review tribunal called the Administrative Appeals Tribunal was established, with the power to affirm, vary, set aside, remit or substitute decisions.[110] From its inception, the Tribunal was empowered to review criminal deportation cases, although until 1992 the Tribunal could only recommend that a deportation order be

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[102] Sean Brawley, 'Mrs O'Keefe and the Battle for White Australia' *Memento* Winter 07 (National Archives of Australia) <http://www.multiculturalaustralia.edu.au/doc/Brawley_AnnieOKeefe.pdf>.

[103] Crock, above n 91, 19.

[104] Ibid.

[105] Cooney, above n 94, 126.

[106] *Migration Act 1958* (Cth) s 5(1).

[107] Nicholls, above n 79, 103.

[108] Ibid 107.

[109] Commonwealth Administrative Review Committee, Parliament of Australia, *Commonwealth Administrative Review Committee Report* (1971) 112.

[110] Adm*inistrative Appeals Tribunal Act 1975* (Cth) s 43.

affirmed or revoked.[111] With the exception of several high-profile cases, discussed in the next part, whereby the Minister rejected AAT recommendations**,** the relationship between the Tribunal and the government was generally "harmonious".[112]

The 1970s also saw the creation of the Federal Court, principally to "relieve the High Court of Australia of non-constitutional controversies falling within its original jurisdiction"[113] and the passing of the *Administration Decisions (Judicial Review) Act 1977*. Non-citizens and their Australian-resident families availed themselves of the new remedies,[114] which ultimately led to greater "judicial intervention in migration decision-making" and set the scene for the dramatic codification of migration law in 1989.[115]

As Nicholls explains, in 1983 the newly elected Labor government placed a higher priority on clarifying its deportation policy, in light of, amongst other things, the well-known case of *Pochi v MacPhee*, discussed in the next part. Shortly after taking office, and motivated by the previous confused and inconsistent policy, the new Minister for Immigration tabled before Parliament a formal criminal deportation policy,[116] heavily influenced by an earlier Human Rights Commission report that found that the human rights of deportees and their families were not adequately protected.[117] The policy required the consideration of four factors in the deportation decision, namely, the nature of the crime, the risk of recidivism, the contributions to the community and the rights of Australian citizens or permanent residents, such as spouses and children of the putative deportee.

Complementing the policy, the Minister introduced significant amendments to the *Migration Act*. The terms "alien" and "immigrant" were replaced with "non-citizen" and a 10-year period of lawful residence, excluding periods in prison, was set, beyond which a non-citizen could not be deported on the grounds of criminal conviction.[118] The Minister explained to Parliament that he was removing discrimination against non-British subjects:

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[111] Ibid sch cl. 22.

[112] Crock, above n 91, 235.

[113] Susan Kiefel, 'The Federal Court of Australia and its Contribution to the Federal Civil Justice System' (2006) 9(1) *Flinders Journal of Law Reform* 1, 3.

[114] Mary Crock, 'The Impact of the New Administrative Law on Migrants' (1989) 58 *Canberra Bulletin of Public Administration* 150, 151.

[115] Cooney, above n 94, 127.

[116] Jennifer Sharpe, *Administrative Appeals Tribunal* (The Law Book Company Ltd., 1986) Appendix D.

[117] Human Rights Commission, *Human Rights and the Deportation of Convicted Aliens and Immigrants* Report No 4 (Australian Government Publishing Service, Canberra, 1983).

[118] *Migration Amendment Act 1983* (Cth).

> [N]on-citizens, wherever they come from, should be able to settle in this country of their choice without fear of deportation after 10 years' lawful permanent residence in Australia.[119]

The 10-year limit on deportation of immigrants remains in place. Nicholls observes, however, that the legislative changes aimed at redressing inequality between British and non-British citizens had an "unintended consequence", namely that all "non-citizens could potentially be deported for criminal offending no matter how long they had lived in Australia",[120] an effect discussed in the next part of this chapter.

The clearer articulation of law and policy was not limited to deportation. Inquiries by the Human Rights Commission[121] and the Administrative Review Council[122] found that the lack of statutory criteria in the *Migration Act* and external review were problematic. In 1988, the Committee to Advise on Australia's Immigration Policies, commissioned to undertake a wide-ranging review of the immigration system, presented its findings, which included major reform of immigration law and a model bill.[123] The reviews culminated in the *Migration Legislation Amendment Act 1989*, which codified migration policy and established a statute-based system of merits review.[124] The reforms provided for the making of regulations, which comprehensively set out the criteria for the grant of entry permits and visas, from which the Minister had only a limited power to depart.[125] Shortly after the 1989 Act was passed, section 501's precursor was inserted into the *Migration Act*.

D *The Controversial History of Section 501*

Section 180A was inserted into the *Migration Act* in 1992,[126] in response to the furores surrounding the government's refusal to allow the entry of members of the Hell's Angels Motor Cycle Club and to the murder of Dr Victor Chang, a heart surgeon, by temporary residents.[127]

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[119] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 August 1983, 235 (Stewart West).

[120] Nicholls, above n 79, 122.

[121] Human Rights Commission, *Human Rights and the Migration Act 1958,* Report No 13 (Australian Government Publishing Service, Canberra, 1985).

[122] Administrative Review Council, *Review of Migration Decisions*, Report No 25 (Australian Government Publishing Service, Canberra, 1985).

[123] Committee to Advise on Australia's Immigration Policies, *Immigration: A Commitment to Australia*, (Australian Government Publishing Service, Canberra, 1988).

[124] Cooney, above n 94, 129.

[125] Ibid 130.

[126] *Migration (Offences and Undesirable Persons) Amendment Act 1992* (Cth).

[127] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 December 1992, 4123 (Philip Ruddock).

The amendment enabled the Minister to refuse or to cancel a visa or entry permit on two grounds under that section: first, if the Minister was satisfied that the person was not of good character, having regard to the person's past criminal conduct, general conduct or association with a group or organisation involved in criminal conduct;[128] and secondly, if allowed to enter or to remain in Australia, the person would be likely to engage in criminal conduct in Australia, vilify a segment of the Australian community, incite discord in the Australian community, or represent a danger to the Australian community, whether by involvement in activities that are disruptive to, or violence threatening harm to, that community or in any other way.[129] The Minister was also empowered, on the grounds of national interest, to declare persons excluded, thereby curtailing their right to seek review of the decision by the Tribunal.[130]

The amendments, however, unintentionally created a shift in the onus of proof.[131] Because the character test was not, at that stage, codified in the *Migration Act*, the Minister or his or her delegate was required to give reasons for being satisfied that the person was of bad character.[132] As law enforcement agencies were reluctant to formally share information, the Department was at times "forced" to grant visas to persons it considered to be of bad character because of the lack of evidence relating to character.[133]

Following the 1992 amendments, there were more high-profile cases relating to character. In 1994, the Minister for Immigration, Local Government and Ethnic Affairs refused to grant a visa to David Irving, a Holocaust denier, on the basis that he was not of good character,[134] and in 1996, to Gerry Adams, the British Member of Parliament for Northern Ireland because of his association with the Irish Republican Army.[135] In 1996, the Minister also ordered the deportation of Paul Gunner, a British national who stole Westpac travellers' cheques to the value of $32 million.[136] In 1997, the Minister cancelled the visa of Lorenzo Ervin, a member of the Black Panthers, by reason of his convictions for air piracy and kidnapping.[137]

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[128] *Migration (Offences and Undesirable Persons) Amendment Act 1992* (Cth) s 180A(2).

[129] *Migration (Offences and Undesirable Persons) Amendment Act 1992* (Cth) s 180A(1).

[130] *Migration (Offences and Undesirable Persons) Amendment Act 1992* (Cth) s 180B.

[131] Katharine Betts, 'The Character Bill and Migration Rights' (1998) 6(3) *People and Place* 39, 41.

[132] Ibid 42.

[133] Ibid 43.

[134] *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 68 FCR 422.

[135] Robert Milliken, 'Australia bans Gerry Adams over IRA Links', *The Independent* (online), 9 November 1996 <http://www.independent.co.uk/news/australia-bans-gerry-adams-over-ira-links-1351393.html>.

[136] Gunner and his co-offenders stole travellers' cheques to the face value of $32 million. Although half was destroyed by one co-offender, $16 million remained, of which $9 million was eventually accounted for. At the time of the judgment of the Full Federal Court, however, $1.85 million had

Within that context, in 1997, the Minister introduced the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill*. The purpose of the Bill was "to ensure that the government [could] effectively discharge its fundamental responsibility to prevent the entry and stay in Australia of non citizens who have a criminal background or have criminal associations".[138]

The Bill introduced a raft of significant amendments, including a codified character test and provisions, whereby certain persons were deemed to fail the character test. It strengthened the power of the Minister to issue legally binding directions to Departmental officers and the Tribunal[139] and introduced mandatory expedited procedures to hasten the Tribunal's decision-making, which was taking on average 250 days.[140] It also empowered the Minister to set aside a decision made by a delegate or the Tribunal and substitute a less favourable decision, where the Minister was satisfied that it was in the national interest to refuse or cancel the visa.[141]

The Bill was eventually passed, despite significant criticism from external organisations as well as Senators.[142] Criticism included that the definition of substantial criminal record "covered anyone who had been sentenced to more than 12 months' imprisonment and did not allow for the age of convictions or the possibility of rehabilitation" and that it was unreasonable to assume a bad character "forever" on the basis of one conviction carrying a sentence of more than 12 months or more, no matter how long ago.[143] There was concern relating to the Minister's "virtually absolute powers to exclude or remove non-citizens who are determined not to be of good character" and "at the potential dangers of major decisions regarding the future of individual human beings becoming more subject to immediate political pressures rather than broader, soundly based legal principles".[144]

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already been presented: *Minister for Immigration and Multicultural Affairs v Gunner* (1998) 84 FCR 400, 401.

[137] Senate Legal and Constitutional References Committee, Parliament of Australia, *Administration and Operation of the Migration Act 1958* (2006) ('*Senate Report 2006*'), 304.

[138] Explanatory Memorandum, Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998 (Cth).

[139] *Migration Act 1958* (Cth) s 499.

[140] Betts, above n 131, 43.

[141] *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth) s 501A.

[142] Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Consideration of Legislation Referred to the Committee: Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997*, 1998 ('Senate Report 1998').

[143] Ibid 15.

[144] Ibid 45–6.

With the exception of the introduction of additional grounds in the character test, section 501 remains substantially unchanged since the 1997 amendments.[145] The continued use of section 501, particularly to remove long-term residents, has been the subject of intense criticism from multiple sources, including the courts,[146] the Ombudsman[147] and the Senate Legal and Constitutional Affairs Committee.[148]

To understand the nature of some of the criticism, it is worthwhile noting the general profile of persons whose visas are cancelled on the grounds of character. They come from diverse countries, including New Zealand, the United Kingdom, Indonesia and Vietnam.[149] Many of them first came to Australia as children and have lived here for more than 10 years with "well established family and community ties and other parental responsibilities".[150] Others, however, arrive as adolescents from war-torn countries and fail to grasp the English language.[151] Many are "poorly educated" with limited understanding of the immigration process.[152] Typical offences include dealing in illegal narcotics, property and theft crimes, armed robbery, and assault.[153]

The reasons for the criticism are multifactorial. First, there is strong evidence that the government is using section 501 "to circumvent the limitations in s 201", specifically the

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[145] Section 501(6) was amended pursuant to the *Migration Amendment (Strengthening the Character Test and Other Provisions) Act 2011* (Cth), which provides that persons convicted of offences committed in, during an escape or after escaping, immigration detention and immigration detainees convicted of manufacturing, possessing, using or distributing weapons will fail the character test: *Migration Act 1958* (Cth) s 501(6)(aa) and (ab).

[146] See, for example, Moore and Gyles JJ's judgment in *Nystrom v Minister for Immigration and Multicultural Affairs* (2005) 143 FCR 420, where they expressed "a similar sense of disquiet to that expressed by Spender J in *Shaw v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 142 FCR 402, particularly at [2]–[5] and Sackville and Allsop JJ in *Ayan v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 126 FCR 152 at [1] and [64]–[79] respectively".

[147] Commonwealth and Immigration Ombudsman, *Administration of s 501 under the Migration Act 1958 as it applies to Long-Term residents* Report 01/2006 (2006) ('*Commonwealth Ombudsman Report*'). The Commonwealth Ombudsman noted, at 44, that there was an "issue to do with the fairness and reasonableness of the extensive application of s 501 to long term permanent residents, particularly in circumstances where the deportation provisions could not have been used".

[148] *Senate Report 2006*, above n 137, 295.

[149] AHRC, *Background Paper: Immigration Detention and Visa Cancellation under section 501 of the Migration Act* (Sydney, January 2009) <http://www.humanrights.gov.au/human_rights/immigration/501_migration_2009.html> 2. In May 2008, there were 25 s 501 visa cancellation detainees in immigration detention, originally from New Zealand, the United Kingdom, Indonesia, Vietnam, Cambodia, Chile, El Salvador, Greece, Lebanon, Papua New Guinea, St Vincent and Grenadines and Turkey.

[150] *Commonwealth Ombudsman Report*, above n 147, 9.

[151] According to the file review, 19% of applicants used interpreters throughout the review process.

[152] *Commonwealth Ombudsman Report*, above n 147, 30.

[153] Ibid 9.

"criminal deportation" provision.[154] In its broad-ranging review of the administration of the *Migration Act*, the Senate Legal and Constitutional Affairs References Committee refused to accept that section 501 implicitly superseded the criminal deportation provisions[155] and expressed concern that its role "in the debate and passage of laws which affect the fundamental rights and interests of Australians" was bypassed:[156]

> Section 201 is the current Australian law in relation to criminal deportation of permanent residents and the abolition of the ten-year rule, if it is to occur, must be repealed by the Parliament not by administrative practice.[157]

I discuss in more detail later the manner in which the government is able to "circumvent" the deportation provisions.

Secondly, although legally untenable,[158] many argue that removal or deportation constitutes double punishment.[159] Removing people, who have served their sentence, seems particularly harsh.[160] Although they may have character flaws, they are "Australia's responsibility".[161] Removing them may be seen as "cleansing" the Australian population.[162] In response, the government has consistently claimed that criminal deportation and section 501 removals are not a matter of penalty or double punishment but "an administrative decision taken by Australia pursuant to its sovereign right to decide who is permitted to enter and remain within this jurisdiction",[163] particularly in light of its "responsibility to the Parliament and the Australian community to protect the community from criminal or other reprehensible conduct".[164]

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[154] *Senate Report 2006*, above n 137, 280.

[155] Ibid 294.

[156] Ibid 294.

[157] Ibid 294.

[158] The Tribunal found that deportation would constitute further punishment in *Re Gungor and Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 225 and *Re Jeropoulos and Minister for Immigration and Ethnic Affairs* (1980) 2 ALD 891. However, in *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292, the Full Federal Court held, at 309, that the power to cancel or refuse a visa "is not to be regarded as punitive in character merely because exercise of the power involves interference with the liberty of the individual or imposes what the individual may see as sanctions consequential on his criminal convictions". Furthermore, it held, also at 309, that such legislation cannot be characterised as punitive if it can fairly be said to protect the Australian community.

[159] See, for example, 288.

[160] David Wood, 'Deportation, the Immigration Power, and Absorption into the Australian Community' (1986) 16 *Federal Law Review* 288, 298.

[161] Glenn Nicholls, 'Detention and Deportation: A Continuing Scandal' (2007–08) 92 *Arena* 40, 42.

[162] Wood, above n 160, 298.

[163] *Commonwealth Ombudsman Report*, above n 147 , 291.

[164] Direction No 21 — Visa Refusal and Cancellation under Section 501 of the Migration Act 1958 (23 August 2001) ('*Direction No 21*') Preamble.

Thirdly, the Minister's personal powers are a "particularly potent" aspect of the section 501 power[165] and there is alarm at the "increasing tendency to utilise direct ministerial decision making",[166] particularly in "ordinary case[s] of criminal conduct".[167] The implications of the usurping of Tribunal review are discussed later.

Fourthly, section 501 is being exercised to permanently remove people who are essentially Australians, "by upbringing and long residence".[168] As Moore and Gyles JJ said in *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs*:

> In our opinion, it is difficult to envisage the bona fide use of section 501 to cancel the permanent absorbed person visa of a person of over 30 years of age who has spent all of his life in Australia, has all his relevant family in Australia by reason of criminal conduct in Australia so leading to his deportation to Sweden and permanent banishment from Australia.[169]

It seems deeply unfair that owing to "the barest of technicalities", "the chance result of an accident of birth", "the inaction of ... parents and some contestable High Court decisions," which are discussed in the next part, a person can face permanent banishment.[170] I have already briefly referred to Nystrom's case in the introduction, in which the High Court eventually held that he could be lawfully removed. His litigation is discussed in detail in the next part, in light of its important contribution to our understanding of the relationship between section 501 and deportation. Although already previously mentioned, it is worthwhile once again highlighting the decision of the United Nations Human Rights Committee.[171] By majority, it found that Australia breached various obligations under the *International Covenant on Civil and Political Rights*, including Nystrom's right to enter his own country,[172] "in light of the strong ties connecting him to Australia, the presence of his family in Australia, the language he speaks, the duration of his stay in the country and the lack of any other ties than nationality with

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[165] Nicholls, above n 79, 155.

[166] *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 420, 430.

[167] Ibid.

[168] Nicholls, above n 79, 159.

[169] *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 420, 429.

[170] Ibid 429–30.

[171] Human Rights Committee, *Views: Communication No 1557/2007*, 102nd session, UN Doc CCPR/C/102/D/1557/2007 (18 August 2011) 4.

[172] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12(4). That article provides that "no one shall be arbitrarily deprived of the right to enter his own country".

Sweden".[173] That decision once again brings into question whether the rights of long-term permanent residents are sufficiently protected under existing law. The government "respectfully disagreed" with the Committee's findings, given that the Committee gave no reason for not abiding by its previous jurisprudence, namely that a person "cannot regard the State as his own country when he has not acquired the nationality".[174] The government was also "unable to agree" with the recommendations of the Committee to allow and facilitate Nystrom's return to Australia.[175]

The government observed, however, that it has "implemented measures to enhance consideration of relevant factors in decisions involving other persons in a similar situation to that of Mr Nystrom", including incorporating two new primary considerations in Direction No 41, namely arrival as a minor and length of residence in Australia.[176] The current Direction, which superseded Direction No 41, also requires decision-makers to consider the person's ties to the Australian community. These considerations, however, may be outweighed by other considerations, such as the protection of the community, a matter I discuss in detail in the context of the Directions.

An added dimension relating to the use of section 501 is the removal of former refugees and people suffering mental illness or addiction to "strife-torn and developing countries with rudimentary mental health and drug rehabilitation services such as Turkey, Lebanon, Vietnam, Romania and Iran".[177] My focus here, however, is whether and at what point a non-citizen becomes a member of the Australian community, regardless of formal citizenship.

Fifth, section 501, like deportation, is also controversial because of the effect on family members.[178] Family members may be forced to choose either to remain in Australia without the non-citizen or leave Australia as a family. The various Ministerial Directions have required primary decision-makers and the Tribunal to consider the best interests of children and, to a lesser degree, partners and other family members, which I consider in due course.

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[173] Human Rights Committee, above n 171, 18. Nystrom thought that he was Australian, "having lived all his life in Australia" and being in possession of a Medicare card and driver's licence.

[174] Response of the Australian Government to the views of the Committee in Communication No. 1557/2007, *Nystrom et al v Australia* <http://www.ag.gov.au/RightsAndProtections/HumanRights/DisabilityStandards/Documents/NystrometalvAustralia-AustralianGovernmentResponse.pdf> [4]–[5].

[175] Ibid [13]–[14].

[176] Ibid [15].

[177] Nicholls, above n 79, 41.

[178] See, for example, Gregor Heissl, 'Family Protection and Deportations or Removals: The Relevance of the Protection of Family Life for the Assessment of Deportations and Removals in Australia' UNSW Law Research Paper No 2009 – 44.

Finally, the Departmental and merits review process has been criticised, a process which I discuss in detail in later chapters. The Ombudsman observed that investigations into the Department's decision-making process revealed, amongst other things, that non-citizens "did not fully understand what was required of them or how they might present their case".[179] Whether the Tribunal is able to afford procedural fairness to section 501 applicants within the existing framework constitutes an important focus of the thesis.

Given the breadth and impact of section 501, the next part considers whether its constitutional foundations give rise to any limits on its use.

E *The Constitutional Foundation of the Deportation and Section 501 Powers*

As noted in the second part, the Constitution provides that the Australian Parliament has the power to make laws for the peace, order and good government of the Commonwealth with respect to immigration and emigration[180] and naturalisation and aliens.[181] Associate Professor Foster observes that because there is no "express constitutional concept of citizenship",[182] the focus of litigation has been on two matters, namely "whether and when a person ceases to be an 'immigrant' and whether there is any limit to the ability of Parliament to define 'alienage' for the purpose of its power over aliens".[183] Accordingly, in this part, I focus on that litigation.

Traditionally, the Commonwealth Government relied on the immigration power as the constitutional basis underpinning deportation laws, given that its wide ambit allowed the removal of immigrants and aliens alike.[184] However, the development of the doctrine of absorption effectively hindered the deportation of immigrants who were absorbed and who were therefore "full member(s) of the Australian community".[185] Absorption involved an assessment of the factual circumstances, including the immigrant's "family, employment, and other social and economic ties with Australia".[186] The High Court considered absorption in two early cases. In *Potter v Minahan*, a majority of the High Court held that Minahan, who had been absent from Australia for more than 20 years, was not an immigrant as he was a British subject, born to a

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[179] *Commonwealth Ombudsman Report*, above n 147, 31.

[180] *Australian Constitution* s 51(xxvii).

[181] *Australian Constitution* s 51(xix).

[182] Michelle Foster, 'An "Alien" by the Barest of Threads' — The Legality of the Deportation of Long-term Residents from Australia' (2009) 33 *Melbourne University Law Review* 483, 491.

[183] Ibid 490.

[184] *Robtelmes v Brenan* (1906) 4 CLR 395.

[185] *R v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369, 373.

[186] Wood, above n 160, 292.

British mother in Victoria.[187] Applying *Potter*, the High Court held that Walsh and Johnson, who had lived in Australia for lengthy periods and made it their "permanent home", could not be deported.[188]

The absorption doctrine was controversial and not uniformly accepted by High Court judges.[189] Isaacs J famously said "once an immigrant, always an immigrant".[190] However, "it is now beyond doubt"[191] that once absorbed into the community, persons cannot be regarded as immigrants.[192] The limit placed on the immigration power by the absorption doctrine resulted in the Commonwealth's reliance on the aliens power to effect deportation,[193] a reliance endorsed by the High Court in the case of *Pochi v McPhee* ('*Pochi*').[194]

Pochi, an Italian citizen, arrived in Australia in 1959 as a 20-year-old. He married an Italian, who became an Australian citizen, and they had three Australian citizen children. In 1977, he was convicted of supplying Indian hemp and sentenced to two years' imprisonment. In 1979, the then Minister for Immigration and Ethnic Affairs, Ian McPhee, ordered that he be deported. The Tribunal recommended that the deportation order be revoked, upon which the Minister decided not to act. Pochi commenced an action in the High Court, seeking a declaration that the Minister had no power to deport him under section 12 of the *Migration Act* and an injunction preventing his deportation.

The High Court unanimously held that section 51(xix) of the Constitution relating to aliens and naturalisation "provided ample power to enact legislation providing for the deportation of aliens".[195] Pochi had argued, amongst other things, that he had ceased to be an alien upon becoming absorbed into the community. Gibbs CJ, with whom Mason J, Wilson J and Murphy J agreed, held that Pochi's argument was "impossible to maintain".[196] Parliament could treat as "an alien any person who was born outside Australia, whose parents were not Australians and who has not been naturalised as an Australian",[197] regardless of the person's length of residence

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[187] (1908) 7 CLR 277.
[188] *Re Yates; Ex parte Walsh and Johnson* (1925) 37 CLR 36.
[189] Wood, above n 160, 288–9.
[190] In *Re Yates; Ex parte Walsh and Johnson* (1925) 37 CLR 36, 81–2.
[191] Foster, above n 182, 492.
[192] *R v Director-General of Social Welfare (Vict); Ex parte Henry* (1975) 133 CLR 369.
[193] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.
[194] (1982) 151 CLR 101.
[195] Ibid 111 (Gibbs CJ).
[196] Ibid.
[197] Ibid 109.

or intention to remain permanently.[198] Only naturalisation ensured that a person was no longer an alien as absorption played no role. Although Murphy J agreed that section 12 of the *Migration Act* was valid, he held that, in light of Australia's "legal heritage", including the Bill of Rights, resulting from the English Revolution of 1688, the Minister was not permitted to order Pochi's deportation "in circumstances which would either break up his family or compel his wife and children, who are Australians, to leave Australia".[199] His deportation would be regarded as "inhumane and uncivilised".[200]

Six years after *Pochi* was decided, the High Court once again considered the scope and the constitutional basis of the deportation power in *Nolan v Minister of State for Immigration and Ethnic Affairs* ('*Nolan*').[201] By that time, section 12 had been amended to enable the deportation of non-citizens convicted of offences for which they received a prison sentence of not less than one year, unless he or she had been a permanent resident for 10 years, excluding periods spent in prison. Non-citizen was defined as a person who was not an Australian citizen.[202]

Nolan, a UK citizen, had lived in Australia for almost 18 years, more than nine of which he had spent in prison. He challenged the deportation order on the basis that he was not an alien, as he was British and accordingly, a subject of the Queen. The Commonwealth Government, however, argued that "the purpose of the *Migration Amendment Act 1983*, which introduced section 12, was to ensure equal treatment of non-citizens by removing the discrimination which had previously existed against persons from non-Commonwealth countries in their liability for deportation as a result of crimes committed in Australia".[203] Applying *Pochi*, the majority held that as Parliament could treat as an alien any person who was born outside Australia, whose parents were not Australian and who had not been naturalised as an Australian, section 12 fell within the legislative competence of Parliament under the aliens power. They held that "a separate Australian citizenship" was established by the *Nationality and Citizenship Act 1948,* later renamed the *Australian Citizenship Act 1948*, the effect of which was to enable the classification of British subjects or subjects of the Queen by reason of their birth in another

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[198] Ibid 111.

[199] Ibid 116.

[200] Ibid 115.

[201] (1988) 165 CLR 178. The court consisted of Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.

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

[203] *Nolan v Minister of State for Immigration and Ethnic Affairs*, above n 201, 179.

country as aliens.[204] Section 12 could therefore be used to deport British settlers, such as Nolan, regardless of any previous protection from deportation:[205]

> [T] he section reveals a clear legislative intent that its provisions should extend to any "non-citizen" who otherwise comes within its words, regardless of whether he was, at the time of commencement of the section in its present form, within the reach of the section in its earlier form.

The High Court reconsidered the limits of the aliens power, the status of British subjects and, to a lesser degree but relevantly for our purposes, the doctrine of absorption in a trilogy of cases, heard and determined in short succession.

In *Re Patterson; ex parte Taylor*, the first case, Taylor arrived in Australia at the age of six in 1966.[206] In 1996, he was convicted of sexual assaults upon children, in relation to which he was sentenced to three and a half years' imprisonment. The Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs cancelled his visa under section 501(3).

The minority view in this case, a view which would ultimately prevail, may be dealt with briefly. Gummow and Hayne JJ, with whom Gleeson CJ concurred, followed *Pochi* and *Nolan*. Taylor was born outside Australia, his parents were not Australians and he had not been naturalised. He was therefore an alien and could be removed. The fact that a person was a British subject or "a subject of the Queen by reason of his birth in another country" did not preclude "his classification as an alien",[207] "as a result of the emergence of Australia as an independent nation, the acceptance of the divisibility of the Crown and the creation of a distinct Australian citizenship in the *Nationality and Citizenship Act 1948*".[208]

The majority of the High Court, namely Gaudron J, McHugh J, Kirby J and Callinan J, however, held that *Nolan* should be overruled "in so far as it held that all British subjects living in Australia who had not taken out Australian citizenship were aliens for the purpose of the Constitution".[209] For different reasons, the majority held that Taylor was a member of a class of certain British subjects, who were not aliens. In other words, he was a non-citizen non-alien.

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[204] Ibid 184.

[205] Ibid 186-187.

[206] (2001) 207 CLR 391.

[207] Ibid 400.

[208] Peter Prince, 'The High Court and Deportation under the Australian Constitution' (Current Issues Brief No 26, Department of the Parliamentary Library, Parliament of Australia, 2002–03) 9.

[209] *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 47.

McHugh J defined an alien as someone who did not owe allegiance to the Queen. Australian citizens and British settlers, living in Australia owed allegiance to the same sovereign until the *Royal Style and Titles Act 1973* came into force. Because Taylor settled in Australia prior to the making of that Act, he was not an alien.[210]

The reasons of Gaudron and Kirby JJ were "essentially the same".[211] At the time of Taylor's arrival in Australia, the *Australian Citizenship Act* excluded British subjects from the definition of alien. Although the definition did not control the constitutional meaning of alien, "it could, until its repeal in 1987, serve to identify those whom Parliament had legislated to recognise as members of the Australian community".[212] Because Taylor was amongst those who held "the uniquely privileged status of non-citizen British subjects ... who had migrated to this country" prior to 1987, he was not an alien and could not be removed.[213] Kirby J, with whom Callinan J agreed, said that the doctrine of absorption could be relevant to the scope of the aliens power,[214] as alienage involved "a meaningful, qualitative assessment of a person's ties to and membership of the Australian community".[215]

A year later, the High Court heard the cases of *Re Minister for Immigration and Multicultural Affairs*; *Ex parte Te* and *Re Minister for Immigration and Multicultural Affairs*; *Ex parte Dang* together ('*Te*').[216] Te, a Cambodian citizen, arrived in Australia as a 16-year-old refugee and was subsequently convicted of various criminal offences, including drug trafficking. Of his 19 years living in Australia, he spent approximately 10 in prison or immigration detention. The Minister ordered his deportation. Dang, a Vietnamese citizen, arrived in Australia as a 13-year-old refugee. Following his criminal convictions, his visa was cancelled pursuant to section 501(2). He had spent 21 years in Australia, of which about five and a half were spent in prison or detention. His wife and son were Australian citizens. Te and Dang unsuccessfully argued that as they had become absorbed into the community, they were beyond the reach of the aliens power. Gleeson CJ, Gaudron J, McHugh J, Gummow J and Hayne J again firmly rejected the relevance of absorption to the aliens power while Kirby and Callinan JJ held that it was unnecessary to consider its relevance because Te and Dang fell "so far short" of absorption:[217]

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[210] *Re Patterson; ex parte Taylor* (2001) 207 CLR 391, 436–7.
[211] *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 59.
[212] *Re Patterson; ex parte Taylor* (2001) 207 CLR 391, 410 (Gaudron J); 495 (Kirby J); 518 (Callinan J).
[213] Ibid 496 (Kirby J).
[214] Foster, above n 182, 495.
[215] Ibid.
[216] (2002) 212 CLR 162.
[217] Ibid 218.

> Far from showing allegiance or being absorbed into the Australian body politic, the repeated conduct of the applicants constitutes a public renunciation of the norms of the community. Far from there being any long-term participation in the duties and obligations of civic life, that might conceivably in a particular case be treated as equivalent to a public demonstration of allegiance, commitment or adherence to the Australian community, each of the applicants has repeatedly broken this country's laws.[218]

Foster observes that this focus on civic rights and duties represents "a very abstract and formalistic sense of what constitutes membership of and participation in society".[219] Furthermore, she notes that Kirby J and Callinan J assumed that the failure to acquire citizenship was a conscious decision, which "overlooks the fact that it is often the case, especially with those who have migrated as children, that non-citizens are simply unaware of their lack of citizenship or its consequences".[220]

Kirby and Callinan JJ viewed Te's and Dang's criminal activities as essentially "incompatible with absorption".[221] Numerous writers and judges have argued, however, that it is not obvious why criminal behaviour precludes absorption into the community.[222] Prince notes that within every community, "there will be those who implicitly renounce the accepted values of a peaceful and ordered society by committing crimes".[223] Foster observes that "the fact that we punish the criminal behaviour of citizens not by banishment but by imprisonment followed by eventual reintegration into society reflects the fact that as a community we take responsibility for the individuals produced by our community".[224] Prince asks "if crimes are relevant to the issue of absorption, to what extent is it sensible to distinguish between offences and when they were committed?"[225] Taylor was convicted of sexually assaulting children yet was a member of the Australian community while Te and Dang, who were convicted of drug offences, were excluded:[226]

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[218] Ibid.

[219] Foster, above n 182, 497.

[220] Ibid 498.

[221] *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 228: Callinan J observed, at 229, as follows: "A relevant meaning of "absorb" is to become part of, to cease to exist apart from. To be absorbed, a person must fit into, live in the community, and seek to make himself a member of the community and to participate in the lawful activities of it. Committing serious crimes against the community, and as a result, becoming liable to spend and spending substantial periods in prison are the antithesis of these."

[222] Foster, above n 182; Prince, above n 208; *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 420.

[223] Prince, above n 208, 9.

[224] Foster, above n 182, 500.

[225] Prince, above n 208, 9.

[226] Ibid 9.

> If the reason for this divergent treatment is not the different type of crime but the longer period Taylor spent in Australia before committing an offence, this seems inconsistent with the judges' argument that serious crime by its very nature amounts to a 'public renunciation' of community values and is 'incompatible' with membership of the Australian community.[227]

These issues will be considered in detail in chapter seven, which relates to membership of the Australian community.

The meaning of alien was finally settled, one year later, when the High Court considered Jason Shaw's case.[228] He arrived from the United Kingdom at the age of two in 1972 and remained in Australia. In 2001, his visa was cancelled under section 501(2) on the grounds that he failed the character test, following his convictions for property and drug offences. By majority, the High Court held that he was an alien as the aliens power applied to all persons who entered Australia after the commencement of the *Australian Citizenship Act* on 26 January 1949, who were not born in Australia, whose parents were not Australian citizens and who had not been naturalised.[229] Shaw had entered Australia as an alien, a status which was not lost by "his subsequent personal history" in Australia.[230] The majority also rejected the notion that citizens of the United Kingdom and colonies were implicitly protected from the reach of the aliens power, on the basis that "the Constitution contemplate[d] changes in the political and constitutional relationship between the United Kingdom and Australia".[231]

Shortly after Shaw's case was decided, the High Court considered whether non-citizens, born in Australia, were aliens. In *Singh v the Commonwealth*,[232] by majority, the High Court, held that a six-year-old Indian citizen, born in Australia but whose parents were not permanent residents, was an alien and therefore could be removed.[233]

The present unwillingness of the High Court to unequivocally recognise the relevance of absorption to the exercise of aliens power and the existence of a third class of residents falling outside the citizen–alien dichotomy reflects its reluctance to fetter Parliament's power to

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[227] Ibid 9.

[228] *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.

[229] Ibid 43 (Gleeson CJ, Gummow, Hayne and Heydon JJ).

[230] Ibid 43 (Gleeson CJ, Gummow and Hayne JJ).

[231] Ibid 42 (Gleeson CJ, Gummow and Hayne JJ).

[232] (2004) 222 CLR 321.

[233] In dissent, McHugh J held, at 378, as follows: "the 'essential meaning' of the term 'aliens' in 1900 and now does not include a person born in Australia who owes permanent allegiance to the Queen of Australia. For that reason, Ms Singh is not an alien". Callinan J also dissented, holding at 437 that Ms Singh was not an alien, regardless of whether she was an Australian citizen.

identify members of the Australian community.[234] In view of the lack of clear limits on the aliens power, the constitutional underpinning of the deportation and section 501 powers, it is important to now consider whether there are any restrictions on the use of section 501, arising out of the presence of the criminal deportation provisions.

F *The Relationship Between Section 501 and Deportation*

The courts have considered whether, following the setting aside of a deportation order by the Tribunal, the Minister may cancel a visa under section 501 based on the same facts. In one case, Gunner, a British citizen, obtained Australian permanent residence on the basis of his de facto relationship with an Australian citizen, with whom he had a son.[235] He was convicted of conspiring to cheat and defraud the Westpac Banking Corporation of $32 million worth of travellers' cheques and numerous stealing offences. Gunner was imprisoned for almost six years.[236] In 1996, the Minister for Immigration ordered his deportation, a decision set aside by the Tribunal. It found that Gunner's risk of recidivism was low, he had expressed remorse and helped the authorities to retrieve travellers' cheques and had "a strong emotional attachment" with his son, evidenced by a psychological report.[237] Exercising his personal power, the Minister then cancelled his visa under section 501 and declared him "excluded" under section 502, which prevented Gunner from seeking Tribunal review once again.[238]

Gunner sought judicial review, arguing that the general power contained in section 501 did not apply when section 201 applied. He relied on the principle of statutory construction *generalia specialibus non derogant*, which means that "as a matter of general construction, where there is repugnancy between the general provision of a statute and provisions dealing with a particular subject matter, the latter must prevail and, to the extent of any such repugnancy, the general

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[234] Foster, above n 182, 503.

[235] Gun*ner v Minister for Immigration and Multicultural Affairs* (1997) 50 ALD 507; *Minister for Immigration and Multicultural Affairs v Gunner* (1998) 84 FCR 400.

[236] *Gunner v Minister for Immigration and Multicultural Affairs* (1997) 50 ALD 507, 507.

[237] *Minister for Immigration and Multicultural Affairs v Gunner* (1998) 84 FCR 400, 402.

[238] *Migration Act 1958* (Cth) s 502(1). That section provides as follows: "If: a) the Minister, acting personally, intends to make a decision: … (ii) under section 501; … in relation to a person; and (b) the Minister decides that, because of the seriousness of the circumstances giving rise to the making of that decision, it is in the national interest that the person be declared to be an excluded person; the Minister may, as part of the decision, include a certificate declaring the person to be an excluded person. (2) A decision under subsection (1) must be taken by the Minister personally. (3) If the Minister makes a decision under subsection (1), the Minister must cause notice of the making of the decision to be laid before each House of Parliament within 15 sitting days of that House after the day on which the decision was made." Section 501(2)(ii) was repealed in the Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997.

provisions will be inapplicable to the subject matter of the special provisions.[239] An example of "repugnancy" is "where special provisions were intended exhaustively to govern their particular subject matter and where general provisions, if held to be applicable to the particular subject matter, would constitute a departure from that intention by encroaching on that subject matter".[240] Sackville J dismissed this ground of appeal on the basis that, amongst other things, there was "no repugnancy between s 201 and s 501" because "both provisions are concerned with criminal conduct".[241]

Gunner further claimed that the visa cancellation and the declaration of "exclusion" from further Tribunal review were based on "the same facts and circumstances" considered by the Tribunal in relation to the review of the deportation order, contrary to the intention of the *Migration Act*.[242] Sackville J considered the statutory scheme and acknowledged that five considerations suggested that sections 501 and 502 were "framed broadly enough" to permit the making of the cancellation decision and declaration, despite the Tribunal setting aside a deportation order on the same facts and circumstances.[243] These five considerations are worth considering as they formed the basis for a successful appeal. First, section 501 did "not expressly exclude from the scope of the Minister's power to cancel a person's visa where the Minister acts on the same facts and circumstances as were before the AAT when it set aside a decision to deport that person".[244] Secondly, although some overlap exists, "the criteria enlivening each power are different".[245] Thirdly, there are circumstances in which the section 501 power could be invoked in relation to a person against whom a decision to deport has been set aside by the Tribunal.[246] Sackville J observed that it would be "strange" that the Minister could exercise the powers under sections 501 and 502 following factual changes dated after the Tribunal's decision yet could not, where he or she took "a different view of the relevant facts from that adopted by the AAT".[247] Fourthly, if the Minister could effectively "bypass" the Tribunal by exercising his or her personal power to cancel the visa and issue an exclusion certificate, without resorting to the

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[239] *Gunner v Minister for Immigration and Multicultural Affairs* (1997) 50 ALD 507, 519 quoting *Refrigerated Express Lines (A'asia) Pty Ltd v Australian Meat and Livestock Corporation* (1980) 29 ALR 333, 347.

[240] Ibid quoting *Refrigerated Express Lines (A'asia) Pty Ltd v Australian Meat and Livestock Corp* (1980) 29 ALR 333, 347.

[241] Ibid 520.

[242] Ibid 518. Sackville J held, at 525, that there was sufficient evidence to make a finding that the facts were the same.

[243] Ibid 526.

[244] Ibid 526.

[245] Ibid 526.

[246] Ibid 526.

[247] Ibid 526.

deportation power, "why [could] the Minister not be able to reach a different conclusion from the AAT, where it had set aside a deportation order?"[248] Finally, sections 501 and 502 had inbuilt "specific safeguards designed to prevent a possible abuse of the power", which made it unnecessary to give sections 501 and 502 a narrow interpretation.[249] Sackville J, however, found that there were "countervailing considerations":

> ... having regard to the statutory context and the "scrupulous care" with which ss 501 and 502 should be read, the legislation was not intended to confer on the Minister power to set at nought a determination by the AAT simply because the Minister takes a different view of the material considered by the AAT ... In reaching this conclusion I have not overlooked the objectives of the provisions introduced into the *Migration Act* in 1992. These include protecting the Australian community against persons who constitute a danger or threat by reason of past criminal conduct. But it is necessary to take into account other considerations in construing the relevant provisions, including Parliament's recognition of the importance of review by the AAT of deportation decisions based on criminal conduct, including the AAT's power to substitute its own decision in a particular case for that of the Minister.[250]

As the Minister's actions were outside the scope of sections 501 and 502, Sackville J set aside the decision. The Minister appealed to the Full Federal Court in *Minister for Immigration and Multicultural Affairs v Gunner* ('*Gunner*').[251] The full bench upheld the appeal, holding that "the five reasons identified by His Honour compel an opposite conclusion".[252] The "whole point" of section 502 was to exclude merits review in certain instances. The Minister was required to exercise the power personally and lay a notice of the making of the decision before each House of Parliament.[253] The Court disagreed with Sackville J's finding that the Minister was "setting at nought the AAT's determination" because the powers, while overlapping, were "by no means co-extensive".[254] Finally, the Court held that in any event, the Minister's decision

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[248] Ibid 527.

[249] Ibid 527.

[250] Ibid 528–9. Citations omitted.

[251] (1998) 84 FCR 400. Prior to the handing down of Full Federal Court's judgment in *Gunner*, French J considered a similar argument in *Jia Le Geng v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 87. He disagreed with Sackville J's conclusion, finding that the "highly specific limiting implication is not visited upon the combined exercise of the powers under ss 501 and 502 by the general system of merits review through the AAT for which the Act otherwise provides".

[252] *Minister for Immigration and Multicultural Affairs v Gunner* (1998) 84 FCR 400, 407.

[253] Ibid 407–8.

[254] Ibid 408.

was not based on the same facts and circumstances as the test and criteria in sections 201 and 501 were different.[255]

A year later, the Full Court held again, in *Jia v Minister for Immigration and Multicultural Affairs* ('*Jia*'), that sections 501 and 201 were separate sources of power, thereby endorsing the Minister's power to cancel Jia's visa, after the Tribunal had set aside his deportation order.[256] Although not the primary issue on appeal to the High Court, Gleeson CJ and Gummow J observed that there was nothing in the legislative scheme which required the Minister to "defer to the Tribunal, or to refrain from giving effect to his own opinions and judgment when considering whether to act under ss 501 and 502".[257]

The *Gunner* and *Jia* line of cases demonstrate that the Minister may cancel a visa under section 501 after a deportation order has been set aside by the Tribunal, even if the facts underpinning both decisions are essentially the same. But can the Minister decide under section 501 to cancel the visa of a long-term permanent resident, who cannot be deported under section 201? The answer lies in the litigation relating to Nystrom's case, noted earlier. Nystrom made an unsuccessful judicial review application in relation to his visa cancellation.[258] Before the Full Federal Court, the issues included whether he held more than one visa and whether each visa had to be considered prior to their cancellation. Moore and Gyles JJ found that regardless of whether he also held a transitional (permanent) visa, the fact that Nystrom "undoubtedly held an absorbed person visa vitiated the Minister's decision".[259] Given "the width of the potential application of section 501", it was necessary, "at the very least, for there to be proper identification and consideration of the nature of a visa to be cancelled directly or by force of

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[255] Ibid. French J, for example, held in *Jia Le Geng*, at 111, that "the national interest considerations to which the Minister must have regard under s 502 may raise issues of a policy character which transcend the circumstances of the individual case". He further noted that "in particular the significance of the case for public acceptance of Australia's immigration program is a matter which is beyond the scope of the AAT review and peculiarly within the province of the Minister".

[256] *Jia v Minister for Immigration and Multicultural Affairs* (1999) 93 FCR 556.

[257] *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 535.

[258] *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FMCA 305. The principal issue was whether the Minister made a jurisdictional error by cancelling a visa, which he did not hold, namely a transitional (permanent) visa, when he held an absorbed person visa. The Federal Magistrate held that Nystrom was, in fact, granted a transitional (permanent) visa, which the Minister clearly considered and cancelled.

[259] *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 420, 426.

s(ection) 501(f)(3)".[260] In accordance with section 501F, if one visa is cancelled, with few exceptions, all visas are cancelled by operation of law.[261]

Emmett J, in dissent and whose judgment was upheld by the High Court, held that Nystrom was the holder of both a transitional (permanent) visa and an absorbed person visa. The underlying policy of section 501F, namely that a person whose visa is cancelled under section 501 should not be permitted to remain on the basis of holding another visa, was "clear".[262] Given that there was "no difference in the substantive content of the two visas in question",[263] the Minister was not required to have regard to the consequences of section 501F.

On appeal to the High Court, relying on obiter observations made by Moore and Gyles JJ, Nystrom additionally argued that the Minister could not cancel his visa because he was not liable for deportation. [264] Nystrom urged the court to distinguish *Gunner* and *Jia* on the basis that either of the powers could have been exercised in those cases whereas the criminal deportation power in section 201 could never be used in his case.[265] The High Court allowed the appeal, on the basis of Emmett J's reasoning.[266] Nystrom's additional argument was rejected for the same reason provided in *Gunner* and *Jia*, namely that the powers were "distinct and cumulative".[267] The legislative history and the differing constitutional basis revealed independent purposes of the deportation and section 501 powers.[268] As Gleeson CJ observed:

> They create two sources of power, by which a person in the position of the respondent may be exposed, by different processes, and in different circumstances, to similar practical circumstances.[269]

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[260] Ibid 427.

[261] *Migration Act 1958* (Cth) s 501F. That section provides as follows: "(1) This section applies if the Minister makes a decision under section 501, 501A or 501B to refuse to grant a visa to a person or to cancel a visa that has been granted to a person … (3) If: (a) the person holds another visa; and (b) that other visa is neither a protection visa nor a visa specified in the regulations for the purposes of this subsection; the Minister is taken to have decided to cancel that other visa".

[262] *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 420, 432–3.

[263] Ibid.

[264] Ibid 429: "While it was not argued in these proceedings, it may be that the specific power conferred by s 201 to deport non-citizens who have committed crimes is the only source of power to deport (in a case such as the present) and not indirectly, the power conferred by s 501 to cancel a visa enlivening the power to remove under s 198 …"

[265] *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, 614–15.

[266] Ibid 593.

[267] Ibid 615.

[268] Ibid 611.

[269] Ibid 571.

In short, the Minister may, without a change in factual circumstances, cancel a visa, even if a deportation order has been set aside by the Tribunal or if the deportation provisions are inapplicable because the applicant is a long-term permanent resident.

G *Conclusion*

As the White Australia policy and the special status of British subjects demonstrate, Australia's historical approach to immigration was highly discriminatory, an approach enabled by the lack of clear, transparent, just law. The 1970s, however, signalled a change, with the introduction of administrative law reform, such as the establishment of the Tribunal, designed to provide a more effective check on the high level of executive control over immigration policy. Deportation was not immune from the calls for greater oversight of government decision-making. The law was clarified in the form of the criminal deportation provisions and supplemented by the tabling of the government of the day's deportation policies in Parliament. It was also liable to merits review, although initially the Tribunal only had recommendatory powers. Recently, however, reliance on the criminal deportation provisions has given way to the use of section 501 to remove criminal non-citizens. Section 501 is an exceptionally broad power, as all non-citizens may be removed, regardless of their length of residence in Australia and the limited ties in their country of citizenship. As I noted earlier in this chapter, the underlying purpose of section 501 is to enable the government to "effectively discharge its fundamental responsibility to prevent the entry and stay in Australia of non-citizens who have a criminal background or have criminal associations".[270] It is nevertheless subject to legal processes such as merits review. Dissatisfaction with these legal processes, however, means that certain section 501 decisions cause widespread debate and disquiet and at times, leads to the lobbying of politicians to remove criminal non-citizens.

The scene is therefore set for extraordinary tension. On the one hand, undoubtedly in light of the possible impact on non-citizens and their Australian families, section 501 decision-making is subject to independent, merits review by the Tribunal, a legal institution designed to provide individualised justice, removed from the understandable emotions of victims and their families and the agendas of wider interest groups. On the other hand, the potentially political nature of the subject matter means that the government has not relinquished ultimate control over section 501 decision-making. This tension is reflected in the existing law. Section 501 has, to a certain extent, bucked the trend to codify migration law. As Betts observes in relation to the 1998 amendments, which generally remain the current law:

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[270] Explanatory Memorandum, Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998 (Cth).

> While it uses codification to reverse the onus of proof and to limit access to review, it also reintroduces discretion. But this time it is a discretion exercised under the supervision of parliament hedged about with provisions designed to make it judge-proof.[271]

Betts thus identifies a paradox: although section 501 is broad, with few limits on its exercise, it is nevertheless "confined" and "structured" in many ways. For example, while Tribunal review exists, time frames in order to lodge the review application and to make a decision may limit the non-citizen's participation in the proceedings. Although nevertheless tasked with coming to the correct or preferable decision, legally binding Ministerial Directions require the Tribunal to consider certain factors. In addition, the Minister holds a trump card, as he or she can set aside a favourable decision made by the Tribunal, a decision which, like most ministerial decisions, is "almost impossible to appeal".[272]

These dynamics bring into sharp focus the Tribunal's role in section 501 decision-making. After critical consideration of the substantive and procedural law, the Tribunal's role and aspects of the system more generally, I argue that the current structuring of decision-making is unjust. While the inherent tension within section 501 may not be resolved, drawing upon domestic law, I develop a model for decision-making, which is designed to better balance the consideration of the different interests at stake.

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[271] Betts, above n 131, 48.
[272] Ibid.

CHAPTER III

AN OVERVIEW OF THE SECTION 501 DECISION-MAKING FRAMEWORK

A *Introduction*

In this chapter, I begin with a brief review of Kenneth Culp Davis' seminal work on discretion, in which he discusses the importance of confining, structuring and checking discretion. I do this because I subsequently assess whether the section 501 decision-making framework, as it relates to the Tribunal, is appropriately structured.[273] I then set out the section 501 framework in general, including the Minister's delegable powers, under which the bulk of section 501 decisions have been made as well as key aspects of the substantive and procedural law. Finally, I provide an overview, including criticisms, of Departmental decision-making and the Tribunal's role, powers and obligations.

B *Discretion*

In his seminal book *Discretionary Justice: A Preliminary Inquiry*, Davis acknowledges the importance of discretion for legal regulation, which he defines as a public officer's freedom "to make a choice among possible courses of action or inaction".[274] Discretion, however, "is not limited to substantive choices but extends to procedures, methods, forms, timing, degrees of emphasis, and many other subsidiary factors".[275] Discretion coexists with rules as it is required to interpret and apply rules.[276] To a degree, both discretion and rules are necessary to do justice. Discretion can "fill the gaps in rules" and "resolve the conflict in ways that best accommodate all the interests involved".[277] It permits decision-makers to deal with such complex cases that "no effective rule can be written".[278] However, "discretion is a kind of power, and power corrupts",[279] enabling decision-makers "to consult illegitimate considerations".[280] In contrast, rules promote consistency, enabling like cases to be treated alike.[281] They are more efficient

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[273] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, 1969).

[274] Ibid 4.

[275] Ibid 4.

[276] Keith Hawkins, 'The Use of Legal Discretion: Perspectives from Law and Social Science' in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 2001) 11, 35.

[277] Carl E Schneider, 'Discretion and Rules: A Lawyer's View' in Keith Hawkins (ed), *The Uses of Discretion* (Clarendon Press, 2001) 47, 61.

[278] Ibid.

[279] Ibid 68.

[280] Ibid.

[281] Ibid 74.

than discretion, as they institutionalise the experience of decision-makers in processing particular types of cases.[282] They are "public in formulation and dissemination",[283] setting standards of behaviour.[284] Finally, their legitimacy is enhanced because they are made by legislators.[285]

Davis argues that either too much or too little discretion can be dangerous:[286]

> When it is too broad, justice may suffer from arbitrariness or inequality. When it is too narrow, justice may suffer from insufficient individualizing.[287]

Davis' solution therefore is the elimination of unnecessary discretionary power and the confining, structuring and checking of necessary discretionary power.[288] Davis uses the term checking to refer to "the constitutional doctrine involving the interrelation of the three departments of government" as well as more informal checking mechanisms.[289] In this context, judicial review constitutes one form of checking as does merits review. However, I am more concerned with the confining and structuring of discretionary power. Confining discretion fixes the boundaries of discretionary power while structuring discretion guides its exercise within those boundaries.[290]

Taking a similar approach, Sharpe observes that "discovering the optimum level of control appropriate for each discretionary power requires an understanding of the purpose for which the power has been conferred and an appreciation of the importance of achieving a balance between consistency and flexibility in the decision making process".[291] In due course, I consider whether the proper balance between discretion and rules has been achieved in section 501 decision-making at Tribunal level, concluding that more appropriate confining and structuring of discretion would ensure more just decision-making.

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[282] Ibid 77.
[283] Ibid 75.
[284] Ibid 77.
[285] Ibid 69.
[286] Davis, above n 273, 52.
[287] Ibid.
[288] Ibid 142.
[289] Ibid.
[290] Ibid 225.
[291] Jennifer Sharpe, *Administrative Appeals Tribunal* (The Law Book Company Ltd., 1986) 176.

C *The Section 501 Scheme*

C 1 *Overview*

In the thesis, I deal with the law prior to the coming into force of the *Migration Amendment (Character and General Visa Cancellation) Act 2014 ("latest Amendment")*, although, as I noted in my Introduction, I discuss its principal amendments in chapter eight and certain amendments to the character test in chapter nine. I have two reasons for dealing separately with the most significant aspects of the latest Amendment. First, my thesis was in almost final draft when that amendment was enacted. Every thesis writer is subject to the risk of "recent developments" skewing their analysis and arguments. If that were my only reason, I recognise that I would need to reshape aspects of my thesis as either a historical account or a lament. However, I have a second reason, which chapter eight develops. In brief, it is that regardless of the colour of government now or in the mid-term, the drastic narrowing of administrative or Ministerial discretion to allow a person to stay, despite their "substantial criminal record" as defined, will prove to be administratively, politically and economically unworkable. The amendment, in short, is too blunt and will undoubtedly require change.

The *Migration Act* establishes a highly codified regime, governing the entry, stay and removal of non-citizens. All non-citizens are potentially subject to section 501, regardless of length of residence in Australia and level of absorption into the Australian community.

The *Migration Act* confers upon the Minister various broad powers to refuse or cancel a visa,[292] including the delegable power to refuse or cancel a visa if the person does not satisfy the Minister that the person passes the character test.[293] If the person is found not to pass the character test, the Minister or the Minister's delegate proceeds to consider whether to exercise the discretion to refuse or to cancel a visa. The Minister's non-delegable powers, including the power to refuse or cancel a visa on the grounds of national interest, are not subject to merits

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[292] *Migration Act 1958* (Cth) s 501(3). That power, which may only be exercised by the Minister, provides as follows: "the Minister may set aside the original decision and (a) refuse to grant a visa to the person; or (b) cancel a visa that has been granted to the person; if (c) the Minister reasonably suspects that the person does not pass the character test (as defined by section 501); and (d) the Minister is satisfied that the refusal or cancellation is in the national interest. In addition, the Minister is conferred non-delegable powers under sections 501A, 501B and 501C".

[293] *Migration Act 1958* (Cth) s 501(1). It provides as follows: "The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test". Section 501(2) provides as follows: "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".

review.[294] The Minister also has the power to set aside and replace the Tribunal's decision not to refuse or cancel a visa with his or her decision.[295]

The consequences of visa refusal or cancellation on character grounds are very serious. Unless applying for a protection or other type of visa, prescribed from time to time, persons in Australia who have been refused a visa or whose visa has been cancelled, are prohibited from applying for other visas.[296] If the person has made visa applications other than a protection or prescribed visa on foot, the Minister is taken to have refused those other applications.[297] Once a visa is cancelled, all other visas other than a protection or prescribed visa are cancelled.[298] The person becomes an unlawful non-citizen.[299] If not already incarcerated, the person is immediately placed in immigration detention.[300]

The Tribunal's review of the decision constitutes the final opportunity for the person to have the decision examined on its merits.[301] Limited rights of judicial review before the courts exist, with applicants enjoying varying rates of success in relation to judicial review challenges to visa cancellation and refusal decisions.[302] Once a person has exhausted all avenues of review, the person may be removed [303] and permanently excluded from Australia.[304]

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[294] *Migration Act 1958* (Cth) s 501(3). In addition, the Minister is conferred non-delegable powers under sections 501A, 501B and 501C.

[295] *Migration Act 1958* (Cth) s 501A.

[296] *Migration Act 1958* (Cth) s 501E. See also *Migration Regulations 1994* (Cth) reg 2.12AA, which provides that the prescribed visa is a Bridging R (Class WR).

[297] *Migration Act 1958* (Cth) s 501F(1)–(2).

[298] *Migration Act 1958* (Cth) s 501F (3)–(4).

[299] *Migration Act 1958* (Cth) ss 13–14.

[300] Migration Act 1958 (Cth) s 189.

[301] Review rights are set out in s 500 of the *Migration Act 1958* (Cth).

[302] Currently the only avenue of appeal for the judicial review of migration decisions is to seek the grant of writs of mandamus or prohibition under s 75(v) of the Constitution, although the jurisdiction to grant writs extends, in this jurisdiction, to the Federal Court (s 476A *Migration Act*) and the Federal Circuit Court (s 476 *Migration Act*). Section 483 of the *Migration Act* provides that section 44 of the *Administrative Appeals Tribunal Act* does not apply to privative and purported privative clause decisions. In *S157 v Commonwealth* (2003) 211 CLR 476, the High Court held that judicial review of privative clause decisions under the *Migration Act* was available where the decision involved jurisdictional error. According to the Tribunal's *Annual Report 2013–14*, at 197 and 199, under the category of immigration and citizenship, in 2010–11, 21 judicial review applications were lodged against the Tribunal's s 501 decisions, of which 1 was allowed, 15 dismissed and 1 discontinued; in 2011–12, 14 judicial review applications were lodged of which 3 were allowed, 9 were dismissed and 2 were discontinued; in 2012–13, 21 judicial review applications were lodged of which 9 were allowed, 12 dismissed and 1 discontinued.

[303] *Migration Act 1958* (Cth) s 189, s 198.

[304] *Migration Regulations 1994* (Cth). Schedule 5 of the Migration Regulations provides for permanent exclusion where "a person whose visa has been cancelled under section 501, 501A or 501B of the Act, wholly or partly because of paragraph 501(6)(a), subparagraphs 501(6)(c)(i) or subparagraphs 501(6)(c)(i) and (ii) of the Act, if the cancellation has not been revoked under subsection 501C(4) of

C 2 *The Substantive Law in Summary*

The decision to refuse or to cancel a visa is a two-stage process. The first stage requires an assessment of whether the person passes the character test. The *Migration Act* provides that persons may fail the character test on five grounds. I briefly set out those grounds here, although I subsequently discuss them in more detail. Those grounds are first, the person has a substantial criminal record.[305] Sections 501(7) to (12) expand upon the meaning of "substantial criminal record". Consistent with the early approach to deportation, it includes being sentenced to a term of imprisonment of 12 months or more. Having a substantial criminal record constitutes the principal ground for failing the character test.[306] Secondly, the person has been convicted of immigration detention-related offences.[307] Thirdly, the person has or has had an association with someone else, a group or organisation, whom the Minister reasonably suspects has been involved in criminal conduct.[308] Fourthly, the person is not of good character because of past and present criminal and general conduct and finally, there is a significant risk that the person would engage in criminal conduct, harass, vilify or incite discord or represent a danger to the community.[309]

If the person fails the character test, the decision-maker must then decide whether to refuse to grant a visa or cancel the person's visa. The delegate exercises a discretion when determining whether to refuse or cancel a visa.

The *Migration Act* itself gave little guidance about the circumstances in which the discretion should be exercised. Instead, section 499 empowers the Minister to give written directions relating to the exercise of powers under the Act. Directions under section 499 are "intended to be an important control on the way in which the s 501 discretion is exercised".[310] In order to "give precise directions on what weight is to be given to each of the factors" and to ensure

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the Act". Persons who do not pass the character test on the other grounds set out in section 501(6) are subject to a 12 month exclusion period, although the Minister has the power to grant a visa within 12 months of removal: Migration Regulations Schedule 5, r. 5002.

[305] Ibid s 501(6)(a).

[306] ANAO, *Administering the Character Requirements under s 501 of the Migration Act 1958*, Audit Report No 55, 2010–11 [11].

[307] *Migration Act 1958* (Cth) s 501(6)(aa) and (ab).

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

[309] *Migration Act 1958* (Cth) s 501(6)(c) and (d).

[310] *Williams v Minister for Immigration and Border Protection* [2014] FCA 674. The Minister is not bound by the Directions: *Halmi v Minister for Immigration and Multicultural Affairs* (1999) 95 FCR 1, 13; *Javillonar v Minister for Immigration and Multicultural Affairs* [2001] FCA 854.

consistency,[311] the Minister has issued legally binding directions, which identify relevant considerations.[312] Four relating to section 501 have been made under the present form of section 499. While all directions have the protection of the Australian community and the best interests of children as primary considerations, the content and weight accorded to other considerations vary.

Direction No 21, which was in force from August 2001 until June 2009, governed Tribunal decision-making studied in the file review. Direction No 21 identified three primary considerations, namely the protection of the Australian community, the expectations of the Australian community, and the best interests of the children where the person had children or other close relations under the age of 18 years.[313] Protection of the Australian community required decision-makers to assess the risk of recidivism and the prospect of rehabilitation.[314] Other relevant, although not primary, considerations included the extent of disruption to the person's family, a genuine marriage to an Australian citizen, family composition, evidence of rehabilitation and previous Departmental warnings.[315] Two subsequent directions, Direction No 41 and Direction No 55 have since been issued.

The character test and the Directions are two mechanisms used to structure the Tribunal's role and task. I discuss them in detail in chapter five, in order to assess their effect on Tribunal decision-making.

C 3 *Migration Act Procedures*

Where the applicant is in the migration zone, the *Migration Act* displaces the Tribunal's usual procedures set out in the *Administrative Appeals Tribunal Act 1975*. The procedures were introduced in order to expedite decision-making and to remove criminal non-citizens quickly and efficiently. As they are discussed in detail later, for the moment, I briefly summarise key procedures. The applicant must lodge the review application within nine days after the day on which notification of the decision was received.[316] The Tribunal has no power to extend the time in which the applicant may lodge the application. Within 14 days of receiving notice of the application from the Tribunal, the Minister must lodge two copies of every document that is in

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[311] See, for example, Direction [21] — Visa Refusal and Cancellation under section 501 (23 August 2001) ('*Direction No 21*'), Preamble.

[312] *Migration Act 1958* (Cth) s 499.

[313] Direction No 21 [2.3].

[314] Direction No 21 [2.10].

[315] Direction No 21 [2.17].

[316] *Migration Act 1958* (Cth) s 500(6B).

the Minister's possession or control that is relevant to the making of the application.[317] The documents, known as G documents,[318] vary according to each case but usually include the Department's issues paper, the decision and statement of reasons.

In keeping with its merits review function, the Tribunal may receive additional material from the parties prior to making its decision. In the section 501 context, however, additional procedural rules set out in the *Migration Act* shape the decision-making process. The Tribunal cannot have regard to oral or written information supporting the applicant's case, unless the information was provided to the Minister in writing at least two business days before the Tribunal holds its hearing.[319] Furthermore, the Tribunal must decide the application within 84 days, failure of which leads to deemed affirmation of the decision.[320]

The impact of these procedures, which are also designed to structure the Tribunal's decision-making, are considered in chapter six.

D *The Department*

D 1 *The Department's Decision-Making Process*

It is not possible to consider Tribunal decision-making without first considering what occurs at Departmental level. In this section, I briefly set out the Department's decision-making process in section 501 cases. As will become evident, what occurs in practice may, at times, fall short of the standards outlined in the Department's own Procedures Advice Manual (PAM).

Non-citizens come to the attention of the Department in various ways, including "state prison lists, police referral, citizenship referral, tip-offs, visa processing office referrals, media reports".[321] PAM reminds officers that the decision-making process involves two stages, namely the delegate must initially be satisfied that the applicant passes the character test and if not so satisfied, "the discretion to refuse or to cancel the visa is triggered, and the delegate must consider whether it is appropriate to refuse or cancel the visa given the individual circumstances of the case".[322] PAM stipulates that "the obligation rests with the person to satisfy the delegate

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[317] *Migration Act 1958* (Cth) s 500(6F): The Minister must also provide non-disclosable material to the Tribunal but the Tribunal cannot disclose that information to the applicant.

[318] *Migration Act 1958* (Cth) s 501G.

[319] *Migration Act 1958* (Cth) s 500(6H) and (6J).

[320] *Migration Act 1958* (Cth) s 500(6L).

[321] Procedures Advice Manual 3 — s 501— The Character Test, Visa Refusal and Visa Cancellation, issued 15 August 2011 [28].

[322] Ibid [23].

that they pass the character test".[323] Non-citizens "who are clearly not liable are removed from consideration while the remainder are streamed according to the perceived risk of possible future harm to the community based on the totality of their circumstances".[324] The first stream consists of the Administrative Finalisation Determination (AFD) while the second stream consists of the issuing of the Notice of Intention to Consider Refusal or Cancellation (NOICR and NOICC respectively).[325] This Notice is sent to the person whose visa application is being considered for refusal or cancellation under section 501 and is "the primary way in which a person is afforded natural justice in relation to their case".[326] In the first stream, the delegate makes the decision to either "close the case with no further action, to issue the client with a letter of advice or to issue a NOICR/NOICC".[327] In the second stream, the person is given information, including the sources of information, in relation to "the alleged activities that bring the person within the scope of the character test" and provided with an opportunity to comment.[328] PAM states that "it is essential that case officers obtain the most up-to-date and relevant information to ensure that a NOICR/NOICC is as complete and as current as possible", including sentencing remarks, pre-sentence and pre-release reports, prison/parole reports and counselling/psychological reports.[329] PAM further provides that natural justice does not simply involve giving people an opportunity to respond but extends to considering whether the person "is capable of understanding what is required of them and the potential implications".[330] Where assistance is required, the Department will usually undertake an interview or request other officials, such as prison welfare officers to assist the person.[331] PAM states that "it is essential that case officers attempt to obtain the most up-to-date and relevant information to ensure that issues papers are complete and current as possible", including "professional assessments, formal reports and responses from the person undergoing s 501 consideration, as well as any submissions from family members".[332]

In its report on section 501, the Australian National Audit Office ('ANAO') observed that PAM did not entirely reflect current Departmental processes. For example, the second stream in fact consists of two sub-streams, a streamlined issues paper stream, which is based on a briefer

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[323] Ibid [25].
[324] Ibid [28].
[325] Ibid [27].
[326] Ibid [32].
[327] Ibid [31].
[328] Ibid [35].
[329] Ibid [36].
[330] Ibid [44].
[331] Ibid [44].
[332] Ibid [50].

issues paper template, and a full issues paper stream.[333] The issues paper "is the way in which the Minister or delegate is briefed on the information that is relevant to making a decision on a person's case".[334] The ANAO found that case officers generally preferred to develop a full issues paper.[335] The ANAO set out the information required for the different character processes, which indicates that minimal information is required in order to make a decision.[336] Finally, it found that "case officers conducted interviews in only a small number of cases and those interviews were held to clarify specific matters, not to seek additional information".[337]

D 2 *Criticisms of the Department's Fact-Finding Process*

While PAM sets out in general when, how and what type of information should be obtained by the Department, it does not always occur in practice. As noted earlier, the Ombudsman was critical of the quality of the Department's issues papers. He observed that "in a number of cases examined, information provided about the visa holder was incorrect or of doubtful relevance".[338] For example, "the characterisation of the crime [was] often inaccurate" or there was "no information about the circumstances of the offences", as found, for example, in pre-sentencing or sentencing comments.[339] He observed that "the currency of information is important in assessing the rehabilitation of the visa holder and prospects for recidivism" yet "in many of the Issues Papers reviewed, little effort seems to have been made to ensure that up-to-date information about the visa holder is used".[340] The Ombudsman cited one case involving an applicant deemed to be at a high risk of recidivism, where there was no evidence that the Department had attempted to obtain an up to date assessment of his rehabilitation.

Following the Ombudsman's report, Direction No 41 was issued. Unlike its predecessors, it referred to the type of information to be considered, perhaps in response to the Ombudsman's concerns relating to the quality of material underpinning decision-making. For example, when considering the seriousness and nature of the conduct under the primary consideration of the

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[333] ANAO, *Administering the Character Requirements under s 501 of the Migration Act 1958, Audit Report No 55, 2010–11* ('ANAO Report') [4.12].

[334] Ibid [49]. It found that case officers expressed "a preference for developing a full issues paper in the first instance because the streamlined issues paper offers only marginal opportunities to enhance the efficiency of the process": [49].

[335] Ibid [4.12].

[336] Ibid Table 4.1.

[337] Ibid [4.15].

[338] Commonwealth and Immigration Ombudsman, *Administration of s 501 under the Migration Act 1958 as it applies to Long-term Residents Report* 01/2006 (2006) ('Commonwealth Ombudsman Report') [3.12].

[339] Ibid [3.13]–[3.17].

[340] Ibid [3.18].

protection of the Australian community, the Direction stated that the factors to be considered included "any relevant information, including, but not limited to, evidence from independent and authoritative sources in respect of the person such as judicial comments in an individual's case, professional psychological reports, pre-sentence reports for the courts, parole assessments, victim impact statements and similar sources of authoritative information or assessment".[341] In terms of the risk of conduct, "evidence of the extent of rehabilitation already achieved and the prospect of further rehabilitation" was considered particularly relevant.[342] I discuss the impact of this change in Direction No 41 in chapter six.

E *The Tribunal*

E 1 *Role of the Tribunal*

In order to understand the Tribunal's powers and obligations, it is important to first understand the reasons for its establishment. As noted in chapter one, the Tribunal was established in the 1970s as part of a wider administrative law package, intended to provide individuals with access to better, faster and cheaper justice. The Tribunal was set up as an independent, merits review body, with wide powers to affirm, vary, set aside, remit or substitute decisions.[343] When introducing the Bill establishing the Tribunal into Parliament, the Attorney-General explained that the intention was "to establish a single independent tribunal with the purpose of dealing with appeals against administrative decisions on as wide a basis as possible ...":[344]

> It will be called upon to review decisions by Ministers and of the most senior officials of government. In the words of the Franks Committee on Tribunals and Inquiries, the Tribunal is not to be an appendage of Government departments. The Tribunal is to be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of departmental administration.[345]

Thus it was clear, from its very inception, that the Tribunal would conduct independent review. Independence comprises two concepts, namely structural independence and independence of thought. Structural independence refers to, amongst other things, "the allocation of financial

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[341] Direction No 41 — Visa Refusal and Cancellation under Section 501 of the Migration Act 1958 (3 June 2009) ('*Direction No 41*') [10.1.1(4)(a)].

[342] Ibid [10.1.2(b)].

[343] *Administrative Appeals Tribunal Act 1975* (Cth) s 43.

[344] Michael Kirby, 'Administrative Review: Beyond the Frontiers Marked 'Policy — Lawyers Keep Out' (Paper presented to the Australian National University Administrative Law Seminar, Canberra, 19 July 1981), 10, quoting Commonwealth, *Parliamentary Debates*, House of Representatives, 6 March 1975, 1187 (Keppel Enderby).

[345] Ibid.

resources and accountabilities for those resources to the [relevant] Department"[346] and the lack of "formal and informal monitoring of tribunal outcomes in individual cases and classes of cases" by the relevant government departments.[347] In this context, however, I am concerned with the concept of independent thought, which "encompasses matters such as non-interference, non-delegation and the exercise of unbiased, individual judgment".[348] Without independence, the Tribunal cannot be an "effective check on executive power" in practice and in appearance: [349]

> Applicants and the broader community must have reason to be confident that the members of review tribunals both have the skills required to provide merits review and will consider the merits of their cases in an impartial way, and make a different decision to that of the relevant government agency where they consider that appropriate. In other words, it is crucial to ensure that there is no perception (let alone any reality) that tribunals are in any way subject to undue influence either in reaching decisions in particular cases or more generally.

O'Connor J, a former President of the Tribunal, argued that "there has never been any doubt as to the AAT's independence", which she attributed to its "judicial mould", "the absence of any statutory restriction on its capacity to review policy" and the separation of the Tribunal's administration from the Attorney-General's Department.[350]

E 2 *The Tribunal's Task and The Manner in which it Conducts its Task*

As noted above, the Tribunal is an independent, merits-reviewing body.[351] As a result, it must make the correct or preferable decision in each individual case.[352] In a frequently cited passage, Bowen CJ and Deane J in *Drake v Minister for Immigration and Ethnic Affairs* commented:

> The function of the Tribunal is, as we have said, an administrative one. It is to review the administrative decision that is under attack before it. In that review, the Tribunal is not restricted to a consideration of the questions which are relevant to a judicial determination of whether a discretionary power allowed by statute has been validly exercised.[353]

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[346] Gabriel Fleming, 'The Proof of the Pudding is in the Eating: Questions about the Independence of Administrative Tribunals' (1999) 7 *Australian Journal of Administrative Law* 33, 40.

[347] Ibid.

[348] Gabriel Fleming, 'Tribunals in Australia: How to Achieve Independence' in Robin Creyke (ed), *Tribunals in the Common World* (The Federation Press, 2008) 87.

[349] Ibid.

[350] Deirdre O'Connor, 'Effective Administrative Review: An Analysis of Two-tier Review' (1993) 1 *Australian Journal of Administrative Law* 4, 8.

[351] *Migration Act 1958* (Cth) s 500(3).

[352] *Re Drake and Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 589 (Bowen CJ and Deane J).

[353] Ibid.

Bowen CJ and Deane J held that the question was not whether the decision was correct or preferable based on the material before the decision-maker, but rather "whether the decision was the correct or preferable one on the material before the Tribunal".[354] The High Court endorsed this view in *Shi v Migration Agents Registration Authority,*[355] which held that generally the Tribunal was not restricted to considering evidence of the facts as they existed at the time of the original decision. Kirby J approved the view of Davies J that "ultimately, it was for the Tribunal to reach its own decision upon the relevant material including any new, fresh, additional or different material that had been received by the Tribunal as relevant to its decision".[356] In making a fresh decision, the Tribunal's powers are extensive: it may affirm, vary, set aside, substitute the decision or remit to the Department to make a new decision.[357]

Given that the Tribunal's task is to remake the decision, "neither party before the AAT bears a legal or evidential onus of proof".[358] Onus of proof is a "common law concept, developed with some difficulty over many years, to provide answers to certain practical problems of litigation between parties in a court of law".[359] Instead, the Tribunal must apply the relevant legislation, which generally requires that the Tribunal must be satisfied on a particular issue.[360] In order to reach the necessary state of satisfaction, however, the Tribunal still requires sufficiently probative evidence. In the absence of such evidence, it has a number of options: it can request that the parties call the necessary evidence, call the evidence itself or it can "decide the case simply by considering which party fails if the particular matter is not established".[361] Although it possesses a wide range of investigative powers, such as the power to inform itself on any matter in such manner as it thinks appropriate[362] and to summon witnesses or to order the production of documentary material,[363] generally, the Tribunal will rely on a "modified adversarial" approach, which is also open to it.[364] The Tribunal thus "ordinarily leaves to the parties the decision on what evidence will be produced and the expense and the organisation of

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[354] Ibid.

[355] (2008) 235 CLR 286.

[356] Ibid 299 (Kirby J).

[357] *Administrative Appeals Tribunal Act 1975 (Cth)* s 43.

[358] Scott Henchliffe, 'Theory, Practice and Procedural Fairness at the Administrative Appeals Tribunal Hearings' (1995) 13 *Australian Bar Review* 243, 244.

[359] *McDonald v Director-General of Social Security* (1984) 1 FCR 354, 356.

[360] Linda Pearson, 'Fact-Finding in Administrative Tribunals' in Linda Pearson, Carol Harlow, and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 310.

[361] Joan Dwyer, 'Overcoming the Adversarial Bias in Tribunal Procedures' (1991) 20 *Federal Law Review* 252, 262.

[362] *Administrative Appeals Tribunal Act 1975* (Cth) s 33.

[363] *Administrative Appeals Tribunal Act 1975* (Cth) s 40(1)(a).

[364] Henchliffe, above n 358, 247.

producing that evidence".[365] It also relies heavily on the "single continuous oral hearing",[366] an important element of the adversarial system. The hearing provides the parties with an opportunity to present evidence and to make submissions[367] and enables "the resolution of disputed questions of fact, especially where the credibility of the parties is in dispute".[368]

The use of a modified adversarial approach is unsurprising. The adoption of a judicial model and "court-like procedures" was a deliberate strategy employed by the Tribunal's first President:[369]

> At a time when review of decisions of the executive was new, and not welcomed by many of its members, it was important for the Tribunal to assert its authority and independence and the adoption of the judicial model was the appropriate way to do this. It was also important for the Tribunal to lay down a set of procedural rules so that the parties before it knew what was required.[370]

The continued use of this modified adversarial approach reflects the environment in which tribunals operate:

> This result is in part the strength of legal culture, in part, the unwillingness to move from the known and well-established rules of evidence and in part the fact that tribunals are sited in an adjudicative system the final tiers of which traditionally operate in an adversarial fashion.[371]

Tribunal members also fear that the use of investigative powers may compromise their impartiality and lead to allegations of actual or apprehended bias.[372] Finally, Tribunal members are precluded from taking a more active approach by the lack of staff as well as financial resources.[373] A more investigative approach, whereby staff under the direction of the Tribunal

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[365] Henchliffe, above n 358, 248.

[366] Richard Eggleston, 'What is Wrong with the Adversary System?' (1975) 49 *Australian Law Journal* 428, 428.

[367] Garry Downes, *Case Management and Case Tracking in the Administrative Appeals Tribunal: Visit to Thailand's Central Administrative Court* 2006 <http://www.aat.gov.au/SpeechesPapersAndResearch/speeches/downes/CaseManagementFeb2006.htm> 13.

[368] Gillian Osborne, 'Inquisitorial Procedure in the Administrative Appeals Tribunal: A Comparative Perspective' (1982–83) 13 *Federal Law Review* 150, 166.

[369] Garry Downes, *The Tribunal Dilemma: Rigorous Informality* 17 September 2008 <http://www.aat.gov.au/SpeechesPapersAndResearch/speeches/downes/WhitmoreLectureSeptember2008.htm > 9.

[370] Ibid 10.

[371] Narelle Bedford and Robin Creyke, *Inquisitorial Processes in Australian Tribunals* The Australian Institute of Judicial Administration Inc (2006) 66.

[372] Ibid 25.

[373] Ibid 66.

seek to obtain further evidence either through the parties or itself, subject to procedural fairness, would require greater financial resources than presently allocated.[374]

E 3 *The Tribunal's Obligations*

It is also helpful to briefly set out the Tribunal's legal obligations, which inform my subsequent discussion of Tribunal decision-making and ultimately, my reform proposals. The *Administrative Appeals Tribunal Act* requires the Tribunal to provide applicants with a review mechanism that is "fair, just, economical, informal and quick"[375] and to ensure that every party to the proceeding is given a reasonable opportunity to present his or her case.[376] The Tribunal is also under a common law duty to act fairly.[377] The duty to act fairly, however, does not translate into an obligation on the part of the Tribunal "to initiate enquiries or to make out an applicant's case for him or her".[378]

The Tribunal may supplement the parties' evidence and arguments with its "wealth of knowledge, information and expertise", accumulated in previous cases.[379] This practice, known as official notice, is designed to improve the quality of decision-making by allowing the Tribunal to make "informed decisions".[380] Generally, the Tribunal cannot rely on evidence or conclusions previously reached "without affording an affected party an opportunity to make submissions".[381] The Tribunal, however, is not required to disclose its "evolving process of deliberation or decision making"[382] or give "a running commentary" on the parties' prospect of success.[383]

Under the *Administrative Appeals Tribunal Act*, with certain exceptions, the Tribunal must give either written or oral reasons for its decision.[384] When in writing, the reasons must include the Tribunal's findings on material questions of fact, namely "the substantial issues on which the

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[374] Joan Dwyer, above n 361, 269.

[375] *Administrative Appeals Tribunal Act 1975* (Cth) s 2A.

[376] *Administrative Appeals Tribunal Act 1975* (Cth) s 39(1).

[377] *Kioa v West* (1985) 159 CLR 550, 584.

[378] *Minister for Immigration and Citizenship v Le* (2007) 164 FCR 151, 172. See also *Minister for Immigration and Citizenship v SZIAI* (2009) 111 ALD 15; *Teuila v Minister for Immigration and Citizenship* (2012) 59 AAR 98.

[379] Geoffrey Flick, *Natural Justice: Principles and Practical Application* (Butterworths, 1979) 65.

[380] *Scorgie v Minister for Immigration and Citizenship* (2007) 47 AAR 314, 318.

[381] Ibid 316.

[382] Ibid 317.

[383] Ibid.

[384] *Administrative Appeals Tribunal Act 1975* (Cth) s 43(2).

case turns"[385] and a reference to the evidence or other material on which those findings were based.[386] The material questions of fact are discerned in part from the relevant legislation, under which the application is made and in part from the evidence before it. In section 501 cases, the primary and other considerations will constitute the substantial issues. The Tribunal is not required to refer all the evidence or material: it is sufficient if it "identifies in a meaningful manner the evidence upon which it relies in making a finding on a "material question of fact"'.[387] The evidence or other material must be "logically probative".[388] As Thawley notes, the obligation to provide reasons "promotes sound administration, facilitates review of decisions and engenders public confidence".[389]

F *Conclusion*

This chapter provides the background for a more detailed analysis of the substantive and procedural law governing section 501 and Tribunal decision-making. It is evident, even from this preliminary discussion, that Tribunal decision-making does not occur in a vacuum and that multiple forces, interests and pressures shape its approach, revealing existing tensions. It is therefore critical that the confining and structuring of Tribunal decision-making does not stifle its basic purpose, namely independent, individualised justice.

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[385] *Muralidharan v Minister for Immigration and Ethnic Affairs* (1996) 62 FCR 401, 414.

[386] *Administrative Appeals Tribunal Act 1975* (Cth) s 43(2b).

[387] *Australian Postal Corporation v Hughes* (2009) 50 AAR 267, 277.

[388] *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41, 68.

[389] Tom Thawley, 'An Adequate Statement of Reasons for an Administrative Decision' (1996) 3 *Australian Journal of Administrative Law* 189, 189. In *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 88 ALJR 52, however, the Court held the standard of reasons required "vary markedly with the context": [46]. In the case's particular statutory context, the Court held at [46] and [54] that two considerations were of "particular significance", namely the nature of the function performed by the Medical Panel and the purpose of requiring the Panel to give a written statement of reasons, which was to ensure that the person affected received "a written statement of reasons adequate to enable a court to see whether the opinion does or does not involve any error of law".

CHAPTER IV

CHARACTER IN OTHER SETTINGS

A *Introduction*

The concept of character underpins section 501 of the Migration Act. Although we all have an intuitive understanding of the idea of character, I nevertheless begin this chapter with a brief discussion of its meaning in philosophy and psychology.[390] I then discuss character in citizenship law and in the regulation of legal and medical practitioners. These other areas of law are instructive, because like section 501, they also demand the balancing of individual interests with broader interests. By examining the use of character in these discrete areas of law, I show how the idea of character is not used "at large".[391] Instead, it is "construed as limited to the context in which it appears".[392] By analysing the context and the interests underpinning the character assessment in these areas of law, I take away lessons, which will guide proposals for reform of the section 501 scheme.

B *Character in Philosophy and Psychology*

Aristotle was interested in character because he wanted to identify the virtues, which "guide a good life".[393] He defined the good life as a lifetime of proper decision-making, underpinned by both reason and emotions and aimed at "just and decent ways of living as a social being".[394] If virtues could be identified, then people could be taught to be virtuous, thus reaching a state of wellbeing.[395] He believed that "the truly good and sensible person bears what fortune brings him with good grace, and acts on each occasion in the finest way possible given the resources at the time ... ".[396]

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[390] Gilbert Harman, *Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error* (article) <http://www.princeton.edu/~harman/Papers/Virtue.html> [1.1].

[391] *McBride v Walton* [1994] NSWCA 199, 15.

[392] Ibid.

[393] Nancy Sherman, *The Fabric of Character: Aristotle's Theory of Virtue* (Clarendon Press, Oxford, 1989) 1.

[394] Ibid 1, 2.

[395] Bill Ransome, 'Sen and Aristotle on Wellbeing' (2010) 45 (1) *Australian Journal of Social Issues* 41, 42.

[396] Aristotle, *Nichomachean Ethics: Translation, Introduction and Commentary* (Christopher Rowe trans Sarah Broadie intro, Oxford University Press, 2002) 107.

Aristotle defined character as a set of "enduring traits",[397] distinguishable from psychological disorders and "innate aspects of temperament".[398] Traits also differ from reputation, which "refers to known manifestations of the person's character".[399] Traits include "virtues and vices like courage, cowardice, honesty, dishonesty, benevolence, malevolence, friendliness, unfriendliness ... ".[400] Aristotle believed that "the relevant virtue can be seen as a mean between extremes".[401] For example, "the courageous person is called rash by the coward, cowardly by the rash".[402] The challenge is to determine "the intermediate", which requires knowing "how far and to what extent one has to deviate" from the extremes.[403] The answer cannot be written down, however, as it lies in the particular circumstances and one's appropriate perception of those circumstances.[404]

Integral to good character is practical wisdom, namely "good deliberation", a form of reasoning.[405] Practical wisdom is "like a sensory faculty",[406] comparable to seeing.[407] It "ensures that the eye will be looking in the right direction, for the kind of things that ought to be taken into account".[408] As Sherman notes, we do not "start out with some end, and then decide how to act":[409]

> The process begins further back with a perception of the circumstances and a recognition of its morally salient features. Before we can know how to act, we must acknowledge that action may be required. And this reaction to circumstances is itself part of the virtuous response.[410]

Practical wisdom demands not only an understanding of "what is best for a human being" but also of the particulars of the situation, in order to act appropriately.[411] Aristotle gives the example of a person who knows that light meats are easily digested and therefore healthy but does not know what meats are light. That person will not make anyone healthy, in contrast to

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[397] Sherman, above n 393, 1.
[398] Harman, above n 390, [2].
[399] John Heydon, *Cross on Evidence* (LexisNexis, 8th Aus. ed, 2010) 665.
[400] Harman, above n 390, [2].
[401] Harman, above n 390, [2].
[402] Aristotle, above n 396, 120.
[403] Aristotle, above n 396, 122.
[404] Aristotle, above n 396, 122.
[405] Aristotle, above n 396, 47.
[406] Aristotle, above n 396, 47.
[407] Aristotle, above n 396, 48.
[408] Aristotle, above n 396, 48.
[409] Sherman, above n 393, 5.
[410] Sherman, above n 393, 5.
[411] Aristotle, above n 396, 182.

the person who knows that bird meat is light and healthy.[412] In this context, practical wisdom is more important in terms of knowing how to act.[413] Thus, while enduring, virtue is always to be realised in specific contexts.

Generally, good character is acquired incrementally and without awareness,[414] although, assuming "a natural predisposition to goodness," people can be taught to be virtuous if they receive "the correct guidance ... from childhood on".[415] Practical wisdom, however, cannot be taught but is only accumulated over time.[416]

Because of its enduring nature, character should in principle provide insight into, and enable prediction of, behaviour.[417] Behaviour can also be studied from the standpoint of psychology. Psychologists "study the factors that influence the way that people think, feel and learn" and "work to assess, diagnose, treat or prevent problems" in prisons, schools and hospitals as well as in everyday living.[418]

Initially, psychologists, such as Allport, believed that "human behaviour [was] governed by stable personality traits that produce[d] generally consistent behaviour in widely divergent situations".[419] However, using experiments, Mischel and others subsequently, demonstrated that "what people do in all situations ... can be affected, often quite readily, by many stimulus conditions and can be modified substantially by numerous environmental manipulations"[420] and, in fact, "situational factors are better predictors of behaviour then personal factors".[421] As a consequence, psychologists understand behaviour "as a function of the person and the situation".[422] In the forensic context, for example, psychologists examining the risk of recidivism often use highly sophisticated actuarial risk assessments and structured clinical

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[412] Aristotle, above n 396, 182.

[413] Aristotle, above n 396, 182.

[414] Aristotle, above n 396, 132.

[415] Aristotle, above n 396, 255.

[416] Aristotle, above n 396, 183.

[417] Sherman, above n 393, 1.

[418] Australian Psychological Society, *About Psychologists* <http://www.psychology.org.au/community/about/>.

[419] Susan Davies, 'Evidence of Character to Prove Conduct: A Reassessment of Relevancy' (1991) 27 *Criminal Law Bulletin* 504, 518 quoting Gordon Allport, *Personality — A Psychological Interpretation* (Holt, 1937) 289. See also Jack Wright and Walter Mischel, 'A Conditional Approach to Dispositional Constructs: the Local Predictability of Social Behavior' (1987) 53(6) *Journal of Personality and Social Psychology* 1159.

[420] Walter Mishel, *Personality and Assessment* (John Wiley & Sons, 1968) 10.

[421] John Doris, *Lack of Character: Personality and Moral Behavior* (Cambridge University Press, 2002) 2.

[422] David Funder and C Randall Colvin, 'Explorations in Behavioral Consistency: Properties of Persons, Situations and Behaviors' (1991) 60(5) *Journal of Personality and Social Psychology* 773, 774.

guides,[423] which explore in detail the person's background and experiences and the contextual and clinical variables.[424]

What we learn from these short discussions of Aristotelian virtue ethics, and psychology, is that when considering the notion of character, context is critical. Its importance is emphasised in the following sections, which examine character in citizenship law, and in the regulation of medical and legal practitioners. These sections will show how the legal idea of character is defined and assessed, in order to achieve different purposes and protect different interests in the various legal environments.

C *Character in Citizenship Law*

Australia's approach to citizenship is "inclusive and easy to access".[425] Even when Australia has had high numbers of eligible permanent residents, the government prefers to promote and actively encourage the acquisition of citizenship,[426] rather than imposing penalties, such as restricting access to benefits.[427] It grants citizenship "without undue barriers, [to] migrants and humanitarian entrants who come to Australia as part of the planned migration and humanitarian programs".[428] What Australian citizenship means has never been defined.[429] The Preamble of the *Australian Citizenship Act 2007*, however, provides that "Australian citizenship represents full and formal membership of the community of the Commonwealth of Australia, and Australian citizenship is a common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity".[430] The Preamble further provides that citizens undertake to pledge loyalty to Australia, to share in Australia's democratic beliefs, to respect rights and liberties and to uphold and obey the laws of Australia.[431] Citizenship encompasses "a person's ability to know what society considers good, right and proper, and to conduct him or

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[423] John Monahan, 'Violence Risk Assessment' in Alan Goldstein and Irving Weiner (eds), *Handbook of Psychology Volume 11: Forensic Psychology* (John Wiley & Sons, 2003) 532.

[424] Ibid 532.

[425] Christian Joppke, 'Through the European Looking Glass: Citizenship Tests in the USA, Australia and Canada' (2012) 17(1) *Citizenship Studies* 1, 1.

[426] Commonwealth of Australia, *Australian Citizenship ... A Common Bond: Government Response to the Report of the Australian Citizenship Council* (2001) <http://www.citizenship.gov.au/_pdf/0501report.pdf> 6. At 5, the Government states that the decision to acquire citizenship is "an important life choice which should be taken voluntarily and be indicative of a commitment to Australia".

[427] Ibid 14.

[428] Ibid 6.

[429] See Kim Rubenstein, *Australian Citizenship Law in Context* (Lawbook Co., 2002).

[430] *Australian Citizenship Act 2007* (Cth) Preamble.

[431] Ibid.

herself in a manner that accords with society's values".[432] The emphasis on the need to obey the law helps explain certain features of citizenship law, including the character requirement and the statutory bars, which prevent consideration of the grant of citizenship for certain periods of time following criminal convictions. Once a person is convicted, he or she remains a probationary member of the community, subject to the extraordinarily broad removal powers, until he or she acquires citizenship. I now briefly describe how character is incorporated into Australian citizenship law.

The *Australian Citizenship Act* sets out the circumstances in which Australian citizenship may be acquired and revoked. Australian citizenship may be acquired automatically by birth or by application on the basis of descent, adoption, conferral or resumption.[433] There is no character requirement for citizenship by birth or by application on the basis of descent or adoption. In contrast, in most circumstances, applicants applying for citizenship by conferral must be of "good character".[434] Citizenship by conferral is a two-stage process, requiring approval of the application to become an Australian citizen by the Minister and the making of the pledge by the applicant. The applicant applies for citizenship, which the Minister must approve or refuse.[435] The *Australian Citizenship Act* sets out circumstances in which the Minister must not approve a citizenship application including when proceedings are pending, the applicant is incarcerated for two years following a serious prison sentence, and if a serious repeat offender, for 10 years following imprisonment.[436]

The Minister has a number of other powers relevant in this context. The Minister may cancel the approval of the citizenship application on the grounds of character.[437] The Minister may also defer for a period of not more than 12 months the making of the pledge, where the applicant's

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[432] *Re Zheng and Minister for Immigration and Citizenship* (2011) 121 ALD 372, 408.

[433] *Australian Citizenship Act 200*7 (Cth).

[434] *Australian Citizenship Act 2007* (Cth) s 12. A person 18 years or over, who is applying to become a citizen again, must also be of good character: *Australian Citizenship Act 2007* (Cth) s 29.

[435] *Australian Citizenship Act 2007* (Cth) s 24.

[436] *Australian Citizenship Act 2007* (Cth) s 24. "Serious prison sentence" means "a sentence of imprisonment for a period of at least 12 months" while "serious repeat offender" is defined as follows: "a person is a serious repeat offender in relation to a serious prison sentence if the sentence was imposed on the person for an offence committed by the person at a time after the person ceased to be confined in prison because of the imposition of another serious prison offence": *Australian Citizenship Act 2007* (Cth) s 3. The character requirements in the *Australian Citizenship Act* were amended as a result of recommendations made by the Australian Citizenship Council, *Australian Citizenship for a New Century: A Report by the Australian Citizenship Council* (Commonwealth of Australia, 2000) 52–4.

[437] *Australian Citizenship Act 2007* (Cth) s 25.

visa may be cancelled under the *Migration Act* or the applicant may be or has been charged with an offence.[438]

Where the person did not automatically become a citizen, the Minister may revoke citizenship in circumstances involving offences or fraud.[439] Thus, if, in the period between the making of the citizenship application and the grant of citizenship, the applicant was convicted of a serious offence and the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen, the Minister may revoke citizenship.[440]

C 1 *Meaning of Good Character in Citizenship Law*

Like character under the *Migration Act*, while the concept of good character features throughout the *Australian Citizenship Act*, it is not defined. Guidance, however, is contained in the Australian Citizenship Instructions (ACIs), which, adopting judicial interpretation, define good character as "the enduring moral qualities of a person" and not "the good standing, fame or repute of that person in the community".[441] Somewhat confusingly,[442] the ACIs provide that:

> It is the responsibility of the applicant to show that they are of good character ... An applicant may be presumed to be of good character unless there is evidence to the contrary. In most cases, such evidence would be in the form of a serious criminal record ... [443]

The ACIs further provide that the assessment of good character involves establishing whether an applicant has a criminal record or whether there is other information, which suggests he or she may not be of good character.[444] The ACIs provide that general conduct and associations may also be relevant.[445]

The ACIs set out the factors relevant to the applicant's criminal record including the following: seriousness of any offences against ordinary community standards; whether an offence was a

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[438] *Australian Citizenship Act 2007* (Cth) s 26.

[439] *Australian Citizenship Act 2007* (Cth) s 34.

[440] *Australian Citizenship Act 2007* (Cth) s 34.

[441] Department of Immigration National Office, Chapter 10 — Character, *Australian Citizenship Instructions* (1 January 2013) < http://www.immi.gov.au/__data/assets/pdf_file/0017/213560/aci-jul-2009.pdf > [10.2.1].

[442] *Re Zheng and Minister for Immigration and Citizenship* (2011) 121 ALD 372, at 392 and 393, Deputy President Forgie noted that the passage seemed "inconsistent" and additionally, "incorrect" in so far as it suggested that the onus was on the applicant to demonstrate a change in character. She stated as follows: "At most, it will be in an applicant's own interests to produce all relevant material to demonstrate good character but, contrary to what the ACIs suggest, there is no onus to do so".

[443] Department of Immigration National Office, above n 441, [10.2.1].

[444] Ibid [10.2.1].

[445] Ibid [10.2.1].

one-off occurrence or part of an ongoing pattern of behaviour; any extenuating circumstances relating to the offence, such as temporary psychological disturbance; the applicant's age at the time of offences; and the length of time between the last offence and the application for citizenship.[446] The ACIs further provide that other factors which are relevant to the character assessment include the applicant's behaviour since commission of the offence, length of employment, stable family life, community involvement and reputation in the community, as evidenced by character references.[447]

The *Australian Citizenship Act* confers jurisdiction on the Tribunal to review most decisions relating to citizenship.[448] In accordance with *Re Drake v Minister for Immigration and Ethnic Affairs (No. 2)*,[449] the Tribunal generally applies the ACIs, even though they lack legislative status.[450] It is useful to examine Tribunal decisions relating to the meaning of character. In relation to the seriousness of the offences, while the Tribunal considers "any criminal conduct [to be] serious in nature",[451] it acknowledges that there is a scale.[452] Property and minor drug and traffic offences are generally considered less significant.[453] In cases involving more serious offences, such as sexual and violent offences, the Tribunal must be satisfied that the applicant has demonstrated rehabilitation and revival and re-establishment of good character.[454] Relevant factors include whether the applicant is remorseful,[455] voluntarily attending rehabilitation and support programs,[456] in stable and long-term employment,[457] undertaking community work,[458]

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[446] Ibid [10.2.1].

[447] Ibid [10.3]. In *Re Zheng and Minister for Immigration and Citizenship* (2011) 121 ALD 372, 393. Deputy President Forgie further stated as follows: "The ACIs speak of the applicant's demonstrating "a good reputation in the community". Evidence to that effect may have a place but this passage of the ACIs could be read as suggesting that reputation is indicative of good character when the Federal Court has clearly said that enduring moral qualities, and not reputation, are indicative of good character".

[448] *Australian Citizenship Act 2007* (Cth) s 52.

[449] (1979) 2 ALD 634.

[450] See, for example, *Re Steele and Minister for Immigration and Multicultural Affairs* [1997] AATA 405 (Unreported, Senior Member Hotop) 21 October 1997; *Re Dandan and Minister for Immigration and Citizenship* (2010) 117 ALD 167; *Re Taylor and Minister for Immigration and Citizenship* (2012) 129 ALD 311.

[451] *Re Dandan and Minister for Immigration and Citizenship* (2010) 117 ALD 167, 174.

[452] Ibid [29].

[453] Ibid [29].

[454] *Re Clough and Minister for Immigration and Citizenship* [2005] AATA 1158 (Unreported, Deputy President Hotop) 22 November 2005 [22].

[455] *Re Booth and Minister for Immigration and Citizenship* [2009] AATA 185 (Unreported, Deputy President Hotop) 19 March 2009 [29].

[456] *Re Haeri and Minister for Immigration and Citizenship* (2009) 109 ALD 661, 667.

[457] *Re Clough and Minister for Immigration and Citizenship* [2005] AATA 1158 (Unreported, Deputy President Hotop; Senior Member Sweidan) 22 November 2005 [19].

and being drug-free.[459] Whether the applicant is supported by family and friends will also be relevant.[460] As noted earlier, the length of time between the last offence and the citizenship application will be highly relevant.[461] Where the Tribunal is not satisfied on the evidence that the applicant is of good character, the Tribunal affirms the decision, often noting, however, that the applicant is at liberty to reapply for citizenship.[462]

C 2 *Relationship Between Section 501 and Citizenship*

The ACIs provide that the assessment of character for the purposes of citizenship is "a different and separate exercise" from the assessment of character under the *Migration Act*:[463]

> An assessment that a person meets the character requirements under the Migration Act does not mean that the person is necessarily of good character for the purposes of the Citizenship Act.[464]

Re Boskovic illustrates how the assessments of character differ under each Act.[465] The applicant was convicted of wounding one partner and murdering the other, receiving a four-year and 20-year prison sentence in relation to the respective convictions. The Tribunal noted that the applicant committed the last offence 15 years earlier and had been free of court obligations for one year.[466] While acknowledging that the applicant was "a long way along the road to rehabilitation", the Tribunal found that "he was not there yet" and affirmed the decision to refuse citizenship.[467] The Tribunal noted that, given the outcome of the application on hand, the applicant still faced the possibility of deportation under section 200 or cancellation under section 501 and found as follows:

> Obviously the present application does not involve a consideration of such grave possibilities and the Tribunal would indicate that there was significant evidence before the Tribunal that

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[458] *Re Kakar and Minister for Immigration and Multicultural Affairs* [2002] AATA 132 (Unreported, Deputy President Wright) 1 March 2002 [11].

[459] *Re Booth and Minister for Immigration and Citizenship* [2009] AATA 185 (Unreported, Deputy President Hotop) 19 March 2009 [27].

[460] *Re Sahin and Minister for Immigration and Citizenship* (2012) 129 ALD 345, 353.

[461] Ibid.

[462] See, for example, *Re Rafiq and Minister for Immigration and Citizenship* (2008) 99 ALD 688; *Re Haeri and Minister for Immigration and Citizenship* (2009) 109 ALD 661; *Re Zheng and Minister for Immigration and Citizenship* (2011) 121 ALD 372; *Re Radmanovic and Minister for Immigration and Citizenship* (2010) 117 ALD 183.

[463] Department of Immigration National Office, above n 441, [10.2.1].

[464] Department of Immigration National Office, above n 441, [10.2.1], [10.3].

[465] *Re Boskovic and Minister for Immigration and Multicultural Affairs* [2000] AATA 251 (Unreported, Member Chappell) 2 February 2000.

[466] Ibid [41].

[467] Ibid [42].

> would suggest that if it were to have been looking at a cancellation of a visa, it would have exercised a discretion not to refuse a granting of a visa despite a finding of a bad character or, alternatively, if it had been a situation involving section 200 of the Act the evidence also showed a very low risk of re-offending, of strong ties to this country, coupled with significant disabilities on the part of the applicant, which would weigh significantly in his favour and would make it unlikely that the Tribunal would affirm expulsion at this point.[468]

In addition to finding that the task of assessing character is different, certain Tribunal members found that different standards applied. In *Re Mlinar and Minister for Immigration and Multicultural Affairs* (*'Re Mlinar'*), the Tribunal found that "the standard of good character should be even higher for citizenship cases than section 501 matters because of the importance of citizenship and the greater responsibilities and privileges attached to it ... ",[469] an approach other Tribunal members have since followed.[470] Deputy President Jarvis in *Re CDCZ and Minister for Immigration and Citizenship* disagreed with the approach in *Re Mlinar* on the basis that good character must be "interpreted by reference to the statutory provisions that are applicable in each case":[471]

> section 501(6) contains detailed provisions as to when a person does not pass the character test that does not appear in the new Citizenship Act.[472]

He found that "it was not helpful or relevant to compare the standard of character in the two contexts" as "each case should be decided on its own facts, and by reference to the relevant policy documents that apply in each context".[473] In *Re Gibson and Minister for Immigration and Citizenship*, Deputy President Forgie also disagreed with the approach adopted in *Re Mlinar* but on different grounds, namely that "the responsibilities and privileges attached to a person's being an Australian citizen and being permitted to remain in Australia on a visa [did] not necessarily greatly differ".[474] She noted that there was "little difference" between citizenship and permanent residence in daily life.[475]

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[468] Ibid [48].

[469] *Re Mlinar and Minister for Immigration and Multicultural Affairs* (1997) 48 ALD 771, 776. See also Department of Immigration National Office, above n 441, [10.1].

[470] See, for example, *Re Chen and Minister for Immigration and Citizenship* (2012) 128 ALD 682; *Re Darwich and Minister for Immigration and Citizenship* (2007) 99 ALD 410.

[471] *Re CDCZ and Minister for Immigration and Citizenship* (2008) 103 ALD 671, 676.

[472] Ibid.

[473] Ibid.

[474] *Re Gibson and Minister for Immigration and Citizenship* (2007) 45 AAR 424 (18 June 2007) [34].

[475] Ibid.

Leaving aside the question of whether they should differ, there is no question that the approaches to character under section 501 and citizenship are divergent. The section 501 scheme is characterised by a character test with little discretion in relation to whether the person passes the character test. That approach to the character test is unsurprising given that its principal purpose is to protect the public. Admittedly, some applicants for citizenship have also committed offences, but, unlike section 501 detainees, the risks involved in assessing the protection of the public are significantly lessened by the statutory bars on applying for citizenship, which operate to exclude offenders from even applying for citizenship for periods of up to 10 years.

In contrast, under citizenship law, the character assessment is intentionally broad, having regard to the extensive nature of the inquiry, namely whether the applicant is entitled to "full and formal membership of the Australian community".[476] That the extent of discretion is by design is further evidenced by the Minister's power to refuse to approve citizenship despite the applicant being eligible to become an Australian citizen.[477] Reflecting the value attributed to formal membership of the community, government policy provides that the standard of good character should be higher in citizenship cases than in section 501 cases. The assumption that citizenship is more valuable in this context, however, is arguable given the limited impact of formal membership on the ability to participate in the life of the community and that section 501 applicants face the possibility of exclusion from the community in which they have lived, often for much of their lives.

Finally, it is important to highlight the different effects of the character assessment. Unlike decisions made under section 501 to remove the applicant from Australia, a finding that the applicant is not of good character under citizenship law may lead to the refusal or cancellation of the decision to grant citizenship or even revocation of citizenship itself. Unless facing action under section 501, however, the applicant is permitted to remain an "informal" member of the Australian community. During that time, unlike section 501 detainees, the applicant gains the luxury of time, which can be used wisely to undertake more rehabilitation. The door is then open for the person to reapply for citizenship.

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[476] *Re Zheng and Minister for Immigration and Citizenship* (2011) 121 ALD 372, 408.
[477] *Australian Citizenship Act 2007* (Cth) s 24.

D *Character in the Regulation of Legal and Medical Practitioners*

In this next section, I examine character in the regulation of the legal and medical profession. These professions are subject to a form of regulation known as "protection of title".[478] Regulatory schemes "create an enforceable barrier to entry to the regulated profession and regulate the standards of practice and conduct of registered practitioners".[479] The schemes generally "set up a disciplinary system that, in most cases, empowers the regulatory authority to investigate complaints of professional misconduct and to impose sanctions on a practitioner, including deregistration, if necessary".[480]

The primary purpose of this form of regulation is to protect the public,[481] by ensuring that only suitable persons with the necessary qualifications and training are permitted to practise, in accordance with professional standards of practice and conduct and by disciplining those who breach those standards.[482] Protection of the public extends to goals such as the maintenance of the profession's standards and reputation. In the past, the professions self-regulated, resulting in the public perception that "colleagues too often protected each other".[483] While the "bolstering of public confidence" through the use of specific and general deterrence is considered important, there is also "the need to be fair to individual [health] practitioners and not unreasonably to single them out as vehicles to effect general shifts in conduct and culture within a profession".[484] Other important interests exist such as the public interest in the use of often highly specialised and difficult to acquire skills, which, if used appropriately, benefit the public.[485]

D 1 *Regulation of the Legal Profession*

The regulation of the legal profession is a matter for the states and territories. Almost each jurisdiction has its own Legal Profession Act, which set outs, amongst other things, the circumstances in which a person may be admitted to practise, hold a practising certificate and be subject to discipline. Each jurisdiction has its own regulatory authorities. Generally, more

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[478] Anne-Louise Carlton, 'National Models for Regulation of the Health Professions' (2005) 23(2) *Law in Context: Regulating Health Practitioners* 21, 23.

[479] Ibid.

[480] Ibid.

[481] *Law Society of New South Wales v Foreman* (1994) NSWLR 408, 441.

[482] Gino Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co., 5th edition, 2013).

[483] Ian Freckelton, 'The Margins of Professional Regulation: Disjunctions, Dilemmas and Deterrence' (2005) 23(2) *Law in Context: Regulating Health Practitioners* 148, 150.

[484] Ibid.

[485] *Law Society of New South Wales v Foreman* (1994) NSWLR 408, 414.

"serious conduct matters are determined by the Tribunals",[486] whose decisions may be appealed. Generally the courts attach weight to the decision of the relevant disciplinary authority, particularly given its "opportunity of seeing and hearing the witnesses".[487] In addition, the Supreme Court of each state retains the inherent power to admit and remove people from the roll of legal practitioners.[488]

In 2001, the Standing Committee of Attorneys-General agreed upon "the need for a more uniform approach to the regulation of the legal profession" and authorised the development of model laws.[489] In 2004, the Standing Committee released a draft Model Bill, designed to harmonise the laws across all jurisdictions, which was revised and reissued in 2006.[490] The Model Bill contains three different types of provisions — core uniform, core non-uniform and non-core provisions — which govern the extent and form of the provisions' incorporation into state and territory law.[491] The Model Bill was incorporated into the various Legal Profession Acts of all states and territories, except South Australia.[492] As Lauchland observes, "the common law standard — that one may join and remain a member of the profession only if one is 'fit and proper' — is incorporated in the Act".[493] Chapter 2 of the Model Bill sets out the provisions relating to the admission of local lawyers. In addition to meeting academic and practical legal training requirements, the applicant must demonstrate suitability, which, according to the Model Bill, includes whether the person is of good fame and character, or has been insolvent or convicted of an offence.[494] These factors must be considered by the relevant authority but do not preclude a finding that the applicant is suitable. Suitability is also considered for the purpose of the grant, renewal, suspension or cancellation of the practising certificate.

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[486] Office of the Legal Services Commission, *Regulation of the Legal Profession in Australia* <http://www.olsc.nsw.gov.au/olsc/olsc_education/lsc_lawregulate.html>.

[487] Dal Pont, above n 482, 741.

[488] *Charter of Justice 1823* (UK) 4 Geo IV c 96.

[489] NSW Government Attorney-General and Justice, *National Legal Profession Reform — Background Information* <http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/lpr_background_info>.

[490] Ibid.

[491] Legal Profession — Model Laws Project Model Bill (Model Provisions) ('*Model Bill*') 2nd ed. August 2006 <http://www.lawlink.nsw.gov.au/lawlink/corporate/ll_corporate.nsf/vwFiles/SCAG_Model_Bill_August_2006.pdf/$file/SCAG_Model_Bill_August_2006.pdf>.

[492] NSW Government Attorney-General and Justice, above n 489.

[493] Kay Lauchland, 'Regulation and Discipline of the Legal Profession' (2008) 86 *Precedent* 16, 17.

[494] Model Bill, above n 491, Chapter 2, Division 2.

Complaints and discipline are dealt with in the fourth chapter of the Model Bill. Three key concepts, namely unsatisfactory professional conduct, conduct capable of constituting unsatisfactory professional conduct or professional misconduct, are core non-uniform provisions. Unsatisfactory professional conduct "includes conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner".[495] Professional misconduct includes "unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence" and "conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice".[496] The Model Bill provides examples of both types of conduct, including breaches of professional obligations, overcharging, convictions for serious offences, tax offences, and offences involving dishonesty.[497]

Lauchland observes that "given the adoption of the common law test of fitness, there is unlikely to be any change in the identification of behaviour deserving of striking off".[498]

In reviewing case law in relation to the "fit and proper test", a number of key principles emerge. First, while "of great importance",[499] conviction and sentence do not result in the automatic failure to meet the fit and proper person standard,[500] particularly as the conviction may relate to an isolated act.[501] While the conviction cannot be impeached, the "real facts", including the conduct of the trial, must be examined "with meticulous care".[502]

Secondly, while the circumstances leading to the offence are critical, a broader approach is required.[503] Any conduct, which is relevant to the assessment, may be considered, including "immediately recent and more distant behaviour".[504] Furthermore, "when a considerable period

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[495] Model Bill, above n 491, [4.2.1].
[496] Model Bill, above n 491, [4.2.2].
[497] Model Bill, above n 491, [4.2.3].
[498] Lauchland, above n 493, 21.
[499] *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 ('Ziems'), 288.
[500] *In Re Davis* (1947) CLR 409 ('*Davis*'), 416.
[501] *Ziems* (1957) 97 CLR 279, 299.
[502] *Ziems* (1957) 97 CLR 279, 288.
[503] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 348.
[504] *Davis* (1947) CLR 409, 416.

of time has elapsed past facts should be considered in the light of the lapse of time and weight should be given to the subsequent behaviour of the person concerned", thus recognising that the applicant may have rehabilitated.[505]

Thirdly, as noted earlier, the conduct leading to a finding of unfitness does not have to be connected to the practice of law. The legal profession is not "ordinary",[506] as it carries "exceptional privileges and exceptional obligations".[507] Although the dividing line is not clear,[508] the "conduct may show defect of character incompatible with membership of a self-respecting profession".[509] Certain conduct is so "immoral or outrageous or disgraceful"[510] that it provides an "instant demonstration of unfitness".[511]

Finally, the person's candour is critical. Admissions of guilt are generally viewed favourably as they demonstrate that the person is able "to appreciate the nature of his [sic] behaviour".[512] In contrast, attempts to justify conduct manifest "a sad lack of judgment and discrimination".[513] The failure to disclose prior convictions can be more harmful to a character assessment than the conviction itself.[514] In *Re Davis*, Latham CJ held that the appellant had failed to "retrieve his character" because he did not disclose an "obviously relevant" matter, namely his conviction.[515]

D 1 *(a) A Solicitor — A Case Study*

The highly controversial case of *A Solicitor* provides a good example to use to flesh out the abovementioned principles. The facts are drawn from the NSW Court of Appeal and High Court judgments.[516]

The solicitor, who held a high level position in the Army Reserve, began a relationship with a mother of four children in 1993, eventually moving in with the family. In 1997, the solicitor's

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[505] *Davis* (1947) CLR 409, 416.

[506] *Ziems* (1957) 97 CLR 279, 298.

[507] *Ziems* (1957) 97 CLR 279, 298.

[508] *A Solicitor v Council of the Law Society of New South Wales* (2004) 216 CLR 253 ('A Solicitor'), 267.

[509] *Ziems* (1957) 97 CLR 279, 298.

[510] *John Roylance v General Medical Council* (No 2) [2000] 1 AC 311, 332.

[511] *A Solicitor* (2004) 216 CLR 253, 15.

[512] John Basten and Paul Redmond, 'Character Review of Intending Lawyers' (1979) 3 *University of New South Wales Law Journal* 117, 123 quoting *The Prothonotary v Larkin* Unreported NSWCA 24 October 1977, 20–1.

[513] Ibid 123.

[514] *Davis* (1947) CLR 409, 416.

[515] Ibid.

[516] *Council of the Law Society of New South Wales v A Solicitor* [2002] NSWCA 62 (12 March 2002) ('Law Society of NSW'); *A Solicitor* (2004) 216 CLR 253.

father was diagnosed with a fatal disease and the solicitor was made redundant. He gained employment as an Army instructor, "working long hours under difficult physical conditions".[517] He subsequently became depressed. He inappropriately touched his partner's children who were 10 and 12 at the time of the offences.

During the police interview, the solicitor admitted that "he gave in to temptation".[518] The solicitor pleaded guilty to four counts of aggravated indecent assault and was sentenced to three months' imprisonment. The solicitor appealed the severity of the sentence. The District Court allowed the appeal, quashing the sentence and "in lieu deferred passing sentence in each case on condition that the appellant entered into a recognizance to be of good behaviour for 3 years".[519] The appellate judge found that the solicitor was in the midst of "a difficult period" as he had been made redundant and his father was dying.[520] Recognising "the frailty of human beings" and that the conduct "was obviously totally out of character", the judge observed that the conduct was not the most serious examples of indecent assault, the solicitor "recognised the seriousness of his conduct and readily accepted it" and the incidences were isolated.[521] The judge further noted that the solicitor himself brought two offences to light, immediately pleaded guilty and sought counselling from an expert psychiatrist. The solicitor was supported by his partner and her family and, on the material, the children had suffered no psychological harm and wanted the solicitor to continue to be "a father figure".[522] He noted that the psychiatrist "suggested that there [was] a great likelihood that such behaviour would never occur again".[523] As punishment, the solicitor would "carry the shame of his conduct" and had resigned from the army reserve, leading to a financial loss of $7000 to $10000 per annum.[524]

The solicitor then married his partner, moved in with the family and obtained work as a casual call centre operator. About one month later, the solicitor was convicted of a further two counts of indecent assault in relation to one child and sentenced to two years' imprisonment. On appeal, the District Court quashed the convictions and sentences.

The Law Society commenced proceedings in the Supreme Court under section 171M of the *Legal Profession Act 1987* (NSW) claiming that the 1997 conduct was professional misconduct,

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[517] *Law Society of NSW* [2002] NSWCA 62 (12 March 2002) [3].
[518] Ibid [4].
[519] *A Solicitor* (2004) 216 CLR 253.
[520] *Law Society of NSW* [2002] NSWCA 62 (12 March 2002) [5].
[521] Ibid.
[522] Ibid.
[523] Ibid.
[524] Ibid [48].

and seeking the removal of the appellant's name from the roll of legal practitioners.[525] At this point, the solicitor disclosed the later convictions, which although successfully appealed, were added by the Law Society as a further charge of professional misconduct because of his failure to disclose them. He explained his lack of disclosure on the basis that he was innocent of all charges, he was considered innocent until proven guilty, the charges were based on uncorroborated allegations, which were contradicted by his wife and his other stepchildren and telephone records, and he appealed the convictions. Furthermore, he was concerned that it was "highly emotive and could have a prejudicial effect".[526]

The solicitor regularly received treatment from his psychiatrist and completed a program at the Child Abuse Prevention Service. The expert psychiatrist described the solicitor's risk of re-offending as "negligible", given his "excellent response to treatment", his "psychological stability and ethical values".[527] The psychiatrist found him to "totally honest and trustworthy" and contrite.[528] The director of the Child Abuse Prevention Centre provided a report, stating that the solicitor was basically of good character and that he was not a future risk to the children. The solicitor also tendered supportive affidavits from barristers, a solicitor, his parents-in-law, his church pastor and his manager.

Sheller J, with whom Mason and Giles JJ agreed, held that the solicitor's conduct resulting in his criminal convictions constituted professional misconduct. The solicitor, who stood in the place of a father, breached the victims' trust on four separate occasions. Sheller J did not characterise the offences as isolated. Instead he found that the solicitor could not control his behaviour and did nothing until confronted by his partner.

Sheller and Giles JJ took a dim view of the solicitor's failure to disclose the subsequent convictions, finding that the solicitor "deliberately omitted" to inform the Law Society of these convictions as he was concerned that the "wrong weight" would be placed upon them.[529] His failure to disclose indicated that he "knew that the charges, convictions and sentence were relevant to his submission and even so chose not to disclose them".[530] As Giles J observed:

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[525] *A Solicitor* (2004) 216 CLR 253, 255. Section 171M provided as follows:
(1) The inherent power or jurisdiction of the Supreme Court with respect to the discipline of legal practitioners is not affected by anything in this Part or Part 2.
(2) That inherent power or jurisdiction extends to interstate legal practitioners and locally registered foreign lawyers.

[526] *Law Society of NSW* [2002] NSWCA 62 (12 March 2002) [51].

[527] Ibid [56], [58].

[528] Ibid [92].

[529] Ibid [108].

[530] Ibid [108].

> Error of judgment does not mean unfitness to practise. I have not found the categorisation easy, but I have concluded that the opponent's failure to disclose the November 2000 convictions was more than an error of judgment. He made a conscious decision not to disclose the convictions ... in my opinion the opponent succumbed to the temptation of keeping from the claimant something clearly relevant to its decisions because he feared that disclosure would be against his interests. That was not simply an error of judgment. It was misleading, and incompatible with "the qualities of character and trustworthiness which are the necessary attributes of a person entrusted with the responsibilities of a legal practitioner" ... [531]

On appeal, in a unanimous decision, the High Court held that the practitioner's lack of candour in relation to the subsequent convictions was a breach of his professional duty. In contrast, in relation to his convictions for aggravated indecent assault, "the nature of the trust and the circumstances of the breach were so remote from anything to do with professional practice that the characterisation of the appellant's personal misconduct as professional misconduct was erroneous".[532] Professional misconduct and fitness to practise were distinct concepts. Although the Court of Appeal's approach was correct, namely the indecent acts and the lack of candour were relevant to the solicitor's fitness to practise law, it had given insufficient weight to the isolated nature of the offences and "the powerful subjective case" made on behalf of the solicitor, relating to his character and rehabilitation, "the exceptional circumstances" in which the offences were committed and his efforts to obtain professional help.[533] The High Court set aside the Court of Appeal's declaration that the practitioner was not a fit and proper person to be a legal practitioner and held that a five-year suspension order was appropriate.

The case raises a number of issues, which are worth exploring. Although subsequently overturned, the Court of Appeal found that the practitioner was guilty of professional misconduct as the criminal conduct was connected to his fitness to practise law. The connection with the practitioner's fitness to practise limits the scope of the enquiry by identifying the purpose of the assessment, which in this case, was the protection of the public. The High Court, however, found that that connection was too "remote" to constitute professional misconduct. By way of contrast, the fitness to practise test is a much wider test, not limited by such a connection. As a standard, it is open to broader influences, such as community perceptions, negative media attention and political comment. The High Court's decision was the subject of intense external criticism, particularly in light of the nature of the offences and their

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[531] Ibid [125]. Citations omitted.
[532] *A Solicitor* (2004) 216 CLR 253, 274.
[533] Ibid 21.

"considerable stigma".[534] One academic commentator observed that the solicitor appeared to receive "a very sympathetic hearing" from the High Court,[535] an unfair criticism given the evidence relating to the solicitor's rehabilitation. There is no doubt that legal practitioners must be held to a high standard, given the fiduciary relationship between clients and solicitors and the position they hold in society. However, as the High Court found, rehabilitation is key. As *Re A Solicitor* exemplifies, the need to balance the competing interests can be an agonising task, particularly when the sanctions imposed pursuant to protection of the reputation of the profession or general deterrence affect the applicant more than sanctions imposed as a consequence of protecting the public.

Because the professional misconduct and fitness to practice test are so malleable,[536] *Re A Solicitor* "highlights the difficulty faced by the courts in determining which types of offences warrant striking off", particularly where, amongst other things, there is significant evidence of rehabilitation.[537]

The case also illustrates the critical importance of the hearing, which allows the assessment of the applicant's credibility, particularly in relation to issues such as the risk of recidivism and rehabilitation and the articulation of competing interests.

A Solicitor raises another important issue, namely what weight should be placed on factors such as mental illness, addiction and external stressors, when considering the imposition of sanctions. In *A Solicitor*, the solicitor suffered depression and grief at the time of committing the offences, a factor weighed differently by the Court of Appeal and the High Court, but weighed nonetheless.

Finally, the case begs the question whether and to what extent the interests of third parties should be considered. As noted earlier, the disciplinary proceedings had a significant financial impact upon the applicant and his family. As a consequence of the criminal proceedings, he resigned from the army, which resulted in the loss of $10 000, and was unable to work as a solicitor, instead finding work at a call centre and a funeral parlour

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[534] Suzanne Le Mire, 'Striking off: Criminal Lawyers and Disclosure of their Convictions' (2005) 79 *Australian Law Journal* 641, 647. At 648, Le Mire notes that there was "subsequent public unease and statements by the New South Wales and Western Australian Attorneys-General that there [would] be legislative intervention" following *A Solicitor*.

[535] Ibid 643.

[536] *A Solicitor* (2004) 216 CLR 253, at 268, the High Court observed that "in a statutory context, where the power of removal depends upon a finding of professional misconduct, it may be appropriate to give the expression a wider meaning … ".

[537] Le Mire, above n 534, 641.

These interests are alive in the area of section 501 and the questions will return when considering the reform of section 501.

D 2 *Regulation of Medical Practitioners*

Like the legal profession, the regulation of medical practitioners has traditionally been the province of the states and territories, which "[have] similar requirements in relation to character or fitness for practice for medical practitioners".[538] In 2010, however, a national scheme regulating health care practitioners, and relevantly for present purposes, medical practitioners, was implemented.[539]

The *Health Practitioner Regulation National Law ('National Law')*, which has been adopted by all states and territories, regulates the conduct, performance, health and fitness to practise of health practitioners, providing "considerable guarantees to the public in relation to the status, currency and fitness to practise of health practitioners".[540] The Australian Health Practitioners' Regulation Authority, in conjunction with the 14 national health practitioner boards, implements the national registration and accreditation scheme.[541]

The National Law enables the channelling of investigations into different streams, known as the conduct, performance, health and fitness and propriety to practise pathways.[542] The National Law draws upon existing practice in states such as NSW, which retained its complaints scheme.[543] That scheme illustrates the manner in which the impairment pathway works. Impairment is defined as "the person has a physical or mental impairment, disability, condition, or disorder (including substance abuse or dependence) that detrimentally affects or is likely to detrimentally affect" his or her ability to practise the profession".[544] Wilhelm and Reid observe that "alcohol and drug problems and psychiatric illnesses are the most common causes of impairment in doctors referred to the NSW Medical Board".[545] When the NSW Medical Council receives "a credible notification", "the registrant will be assessed by a Council-appointed

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[538] Ian Freckelton, ' "Good Character" and the Regulation of Medical Practitioners' (2008) 16 *Journal of Law and Medicine* 488, 495.

[539] Ian Freckelton, 'Regulation of Health Practitioners: National Reform in Australia' (2010) 18 *Journal of Law and Medicine* 207, 207.

[540] Ibid 213.

[541] Australian Health Practitioner Regulation Authority, *The National Boards* <http://www.ahpra.gov.au/About-AHPRA/Who-We-Are.aspx>.

[542] Freckelton, above n 539, 214.

[543] Freckelton, above n 539, 207.

[544] Health Practitioner Regulation National Law (NSW) No 86a, s 5.

[545] Kay Wilhelm and Alison Reid, 'Critical Decision Points in the Management of Impaired Doctors: the NSW Medical Board program' (2004) 181(7) *Medical Journal of Australia* 372, 372.

practitioner to determine the extent and nature of their impairment".[546] The registrant appears before the Impaired Registrants Panel, consisting of two or three professionals who decide what (if any) "action is necessary to protect the public" such as conditions imposed on the registrant's registration.[547]

Freckelton observes that the different pathways exemplify the new "pro-therapeutic" approach,[548] which is designed to "minimise collateral harm".[549] The pathways enable "a reframing of the issues presented by notifiers or complainants and an assessment in the public interest of what fundamentally has given rise to consternation or what in the future might produce unacceptable risks for patients".[550] He notes that the pathways represent a "shift" from "the disciplinary to the provision of guidance, mentoring and enhancement of performance, as well as maintenance of adequate conduct and performance by virtue of therapeutic intervention".[551]

D 2 *(a) Dr Wingate — A Case Study*

The following case study provides an example of the pro-therapeutic approach and highlights its challenges. The facts are drawn from the decision of the NSW Medical Tribunal and the judgment of the NSW Court of Appeal.[552]

Dr Wingate, an ophthalmologist, pleaded guilty to one count of downloading child pornography, "being 66 images of boys apparently under the age of 16", although he was subsequently found to have downloaded much more.[553] He was fined and placed on a good behaviour bond for a period of three years. Following the imposition of conditions on his practice, the Health Care Complaints Commission (HCCC) brought three complaints to the NSW Medical Tribunal that Dr Wingate was guilty of unsatisfactory professional conduct, was not of good character, and was convicted of an offence the circumstances of which rendered him unfit in the public interest to practise medicine.

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[546] Medical Council of NSW, *Impaired Registrants (Health) Program Overview* <http://www.mcnsw.org.au/page/doctors--performance--conduct---health/doctors--health>.

[547] Ibid.

[548] Freckelton, above n 483, 152.

[549] Ibid 152.

[550] Ian Freckleton, 'Regulation of Health Practitioners: Grappling with Temptations and Transgressions' (2004) 11 *Journal of Law and Medicine* 401, 402.

[551] Ibid.

[552] *Re Dr Richard Wingate* [2007] NSWMT 2; *Healthcare Complaints Commission v Wingate* (2007) 70 NSWLR 323.

[553] *Re Dr Richard Wingate* [2007] NSWMT 2 [2].

The Tribunal dismissed the complaints. It considered the factors in his favour, including his exemplary practice of medicine, his lack of a prior criminal record, his insight into the seriousness of the offences, his success in overcoming his alcohol addiction, the positive commendations from his colleagues, and his pro bono work: caring for the elderly and indigenous who suffered macular degeneration. The Tribunal also found that he had "negligible" risk of interfering or making inappropriate sexual advances to a patient and the risk of re-offending in relation to internet downloading was low to moderate.[554]

It also considered the factors against him, including the serious nature of the offences, the persistent nature of his downloading over an extended period of time, involving over 10 000 images, and the misleading information he provided to the Board and its experts, which was "an attempt to minimise the seriousness of the offence, minimise the extent of his offending behaviour, which was not the subject of charges and to hide the true nature of his sexual proclivities".[555] It reprimanded him and imposed conditions on his practice, including chaperoned contact with children.

The HCCC appealed, asserting that, amongst other things, "the Tribunal misdirected itself by taking into account the fact that the practitioner had been "dealt with under the criminal law"',[556] a ground firmly rejected by the Court.[557] Basten JA held that "it cannot be said as a matter of general principle that a professional disciplinary tribunal should disregard any penalty imposed under the criminal law":[558]

> Although the exercise of professional disciplinary powers may be seen as protective and not as involving punishment, there is undoubtedly a degree of overlap between the purposes served by each in their respective contexts ... The fact that disciplinary orders are commonly characterised as "protective" does not deny that they have punitive effects, nor does it require that the fact of criminal punishment must be disregarded ... In particular circumstances, it may be important to recognise that disciplinary orders other than fines also have punitive effects and to take those effects into account in ensuring that the necessary protective purpose is achieved without unnecessarily imposing a degree of punishment exceeding that thought appropriate by the criminal court.[559]

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[554] Ibid [70].
[555] Ibid [87].
[556] *Healthcare Complaints Commission v Wingate* (2007) 70 NSWLR 323 ('Wingate'), 225.
[557] Ibid 337.
[558] Ibid 323.
[559] Ibid 336. Citations omitted.

Also at issue was the propriety of the chaperone order and whether it was inconsistent with *Health Care Complaints Commission v Litchfield* ('*Litchfield*'),[560] a case involving "inappropriate sexual contact with female patients".[561] In that case, the Court of Appeal made the following observation:

> Female patients entrust themselves to doctors, male and female, for medical examinations and treatment which may require intimate physical contact which they would not otherwise accept from the doctor. The standards of the profession oblige doctors to use the opportunities afforded them for such contact for proper therapeutic purposes and not otherwise.[562]

In *Litchfield*, the Court found that rather than imposing a chaperone order, the Tribunal should have removed the name of the practitioner from the register, given that "he could not be trusted in relation to a fundamental aspect of proper professional conduct".[563] In analysing the purpose of imposing the condition in *Wingate*, Basten JA held that "the lower the risk of inappropriate conduct in a professional setting, the greater the likelihood that a condition is being imposed for purposes other than actually preventing such misconduct".[564] He held that one purpose is "maintenance of confidence of the public, both in the particular doctor and in the profession generally".[565] While the Tribunal "might have little or no inhibition in imposing a condition which flowed from a rational concern, even though based on ignorance of the particular circumstances", it should "exercise caution in imposing conditions on a practitioner designed to meet views which are truly irrational prejudices".[566] Basten JA held that:

> Conditions may be imposed in varying circumstances and for various purposes. The circumstances and purposes will always be important, in part because of the need for the Tribunal to be satisfied that the condition will be effective.[567]

Ultimately, the Court found that the Tribunal should have taken into account the legislative scheme which prohibited Dr Wingate from providing services to patients under the age of 18 years when making its orders. It varied the Tribunal's first order to prohibit Dr Wingate from providing such services but otherwise dismissed the appeal.

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[560] (1997) 41 NSWLR 639.
[561] *Wingate* (2007) 70 NSWLR 323, 337.
[562] Ibid 337–8, quoting *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630, 638D.
[563] Ibid 338.
[564] Ibid 339.
[565] Ibid 339.
[566] Ibid 339.
[567] Ibid 338.

The case of *Wingate* picks up an important issue, which is directly relevant to the section 501 context. As noted earlier, the protection of the public is not simply about assessing whether the applicant is likely to re-offend, a narrow question. It encompasses other important objectives, such as specific and general deterrence. Case law establishes that the imposition of a sanction in this context, and in the section 501 context, is not double punishment. There is a real risk, however, that authorities in the regulatory or immigration context, impose excessive punishment, in order to demonstrate and create the perception that they are effectively fulfilling their role, thereby ensuring public confidence.

As in the regulatory context, community expectations are an important factor in section 501 cases, so much so that it was a primary consideration in two Ministerial Directions.[568] How fair is it, however, to use the applicant to send a message to other non-citizens and the public? Does general deterrence even work? Is removal excessive punishment? I will be exploring these issues further in subsequent chapters.

E *Conclusion*

What is clear from a brief review of character assessments in citizenship law and the regulation of legal and medical practitioners is that character is an artificial construct, highly context-specific and affected by complex, multilayered interests.

Clearly, the purpose of the relevant character assessment affects the scope of the enquiry. In the context of the regulation of legal and medical practitioners, protection of the public is its principal purpose. This purpose encompasses a subsidiary goal of the maintenance of the profession's standards and its reputation. Because character assessments are so malleable, they are particularly prone to external influences such as community outrage and political interference. As exemplified by the factual circumstances in *Re A Solicitor* and *Wingate*, the nature of the offences and the resultant stigma have the potential to distract decision-makers from the central issue, namely the risk that the person will reoffend. The use of a character test in section 501, to which I now turn, provides a contrast to these particular and at times highly discretionary character assessments.

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[568] See Direction No 17 — Visa Refusal and Cancellation under Section 501 of the Migration Act 1958 (16 June 1999) ('*Direction No 17*'); Direction No 21 — Visa Refusal and Cancellation under Section 501 of the Migration Act 1958 (23 August 2001) ('*Direction No 21*').

CHAPTER V

SECTION 501: THE DETAILS

A *Introduction*

In this chapter, I focus in detail on the character test and the Directions, two mechanisms used to confine and structure the Tribunal's role. In the first part of the chapter, I deal with the evolution of the grounds of the character test, highlighting their scope of application, difficulties with their interpretation and application and the context in which the grounds were introduced. The discussion forms the basis for suggested reforms of the character test.

In the second part, I set out the extent to which Directions bind the Tribunal, setting the scene for a discussion of Tribunal independence in chapter six. Given that the Directions constitute the rules governing the exercise of discretion under section 501, I also review the "primary" and "other" considerations in the current Direction, highlighting commonalities and drawing out differences with previous Directions. This review provides the background for a more detailed discussion of matters such as the merits of the use of directions to shape the exercise of discretion under section 501, the form of directions and what factors ought to be taken into account in the exercise of discretion in chapter nine, which ultimately result in reform proposals.

To be clear, the analysis in this and the following chapters concerns the law and practice to mid-December 2014. Chapter eight will discuss the radical change introduced since then, which effectively removes administrative discretion from section 501 decisions to the extent to which the visa cancellation or refusal is based upon the "substantial criminal record". As for Tribunal discretion, the newly amended provisions provide absolutely no guidance. The task is simply "any other reason". Chapter eight will argue that this recent change is highly problematic, adversely impacting on the interests of non-citizens.

B *The Character Test Under Section 501*

Although character underpins the section 501 scheme, it is not defined in the *Migration Act*. Instead section 501 provides that a person does not pass the character test if the person falls into one of five categories.[569] The first ground is that the applicant has a substantial criminal record

[569] The *Migration Amendment (Character and General Visa Cancellation) Act 2014* inserts additional grounds in the character test. See chapter eight for a further discussion.

(the substantial criminal record ground).[570] The second ground is that the applicant has been convicted of an immigration detention-related offence, such as escaping from detention (the immigration detention-related offences ground).[571] The third ground is that the applicant has an association with a person, a group or organisation, whom the Minister reasonably suspects has been involved in criminal conduct (the association ground).[572] The fourth ground is that the person is not of good character, having regard to either or both the applicant's past and present criminal and general conduct (the criminal and general conduct ground).[573] The final ground is where there is a significant risk that the person would engage in certain types of criminal or personally abusive conduct or represents a direct danger to or threatens the social cohesion of the Australian community (risk of engaging in certain conduct ground).[574]

The character test, along with other significant amendments, was introduced in 1992 (the 1992 amendments), in order to provide the government with greater powers to exclude and remove non-citizens.[575] It was further amended in 1998 (the 1998 amendments) as part of a widespread reform package,[576] designed to strengthen the government's existing powers,[577] and in 2011, in response to riots in immigration detention centres.[578] In many instances, changes to the grounds and the section 501 scheme more generally were political reactions, in response to either Tribunal and or judicial decisions or to wider events. The reactions were designed to reinforce the power of the government to be the unequivocal arbiter of who enters and remains in Australia. As will become evident, changes were frequently made to the character test itself.

The grounds of the character test operate as a trigger: once a finding is made that the person does not pass the character test, the Minister or the delegate may then refuse to grant or cancel the visa. The manner in which the character test is interpreted and applied in this two-stage process is therefore critical as failing the character test becomes the gateway to the exercise of discretion whereby the Minister may have "the final and only say on the question of whether the

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

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

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

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

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

[575] *Migration (Offences and Undesirable Persons) Amendment Act 1992* (Cth) came into operation on 24 December 1992.

[576] *Migration Legislation Amendment (Strengthening of provisions relating to character and conduct) Act 1998* (Cth) came into operation on 1 June 1999.

[577] Explanatory Memorandum, Migration Legislation Amendment (Strengthening of provisions relating to character and conduct) Bill 1998 (Cth) [1].

[578] Ibid.

person in question should or should not be entitled to enter or be in Australia".[579] Once a person fails the character test, the government may take swift action, with potentially devastating consequences.[580]

It is difficult to gain data relating to the number of visa refusals and cancellations made pursuant to section 501.[581] The Australian National Audit Office ('*ANAO*') noted that in 2009–10 the Department processed about 4.3 million visas,[582] of which 1519 cases were referred to the Department's National Character Consideration Centre ('*NCCC*') for character assessment.[583]

The ANAO found that the Department's "approach to identifying and processing clients of character concern focuses primarily on the substantial criminal record element of the test".[584] Of the ANAO's sample of 56 visa applications, only five were assessed on another ground, namely the criminal or general conduct ground.[585] It appears that the remaining two (at that time) grounds were not considered at all. According to the ANAO, one processing centre reported that the "NCCC is not interested in cases that do not involve substantial criminal records".[586] The ANAO's findings are consistent with my review of Tribunal cases, in which I found that the substantial criminal record ground was the principal ground of refusal or cancellation, followed by the criminal or general conduct ground.

In its audit of the NCCC, the ANAO found that in 2009–10, 491 visa applicants failed the character test yet were granted visas while 513 visa holders failed the character test but retained their visa.[587] The NCCC refused 156 visa applications and cancelled 58 visas.[588] The ANAO observed that "the majority of character decisions are positive".[589] The small number of visa refusals and cancellations, however, belie the "imposing powers of the Commonwealth Government, endorsed time and time again by the High Court, to control the entry, stay and

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[579] *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 [87].

[580] See Michael Grewcock, 'Punishment, Deportation and Parole: the Detention and Removal of Former Prisoners under section 501 Migration Act 1958' (2011) 44 *Australian and New Zealand Journal of Criminology* 56, who describes the case of Moore, who had lived in Australia since the age of 11 and who was removed to the UK, whereupon he died on the street two days later.

[581] Ibid 57. See also Susan Harris Rimmer, *The Dangers of the Character Test: Dr Haneef and other Cautionary Tales*, Discussion Paper No 101, The Australia Institute (2008).

[582] Australian National Audit Office ('ANAO'), *Administering the Character Requirements under s 501 of the Migration Act 1958*, Audit Report No 55, 2010–11 ('ANAO Report') [6].

[583] Ibid.

[584] Ibid [4.17].

[585] Ibid [4.19].

[586] Ibid [4.20].

[587] Ibid.

[588] Ibid.

[589] Ibid [6].

departure" of non-citizens.[590] The section 501 scheme, for example, permits the Minister to overturn the Tribunal's decision to set aside the primary decision to refuse or cancel[591] and to make a fresh decision in the national interest, without being bound by the rules of natural justice and immune from merits review.[592]

B 1 *Substantial Criminal Record Ground*

As noted in chapter one, there has long been provision to deport people who have been convicted of crimes and sentenced to imprisonment. Prior to its enactment in 1992, the substantial criminal record ground was contained in Departmental guidelines. In this section, I explore the reasons for its enactment, its purpose, and issues arising in its interpretation. It will become apparent that visa cancellation or removal triggered by failure of the character test on the ground of a substantial criminal record has been subject to significant litigation which is not surprising given the important competing interests at stake.

The catalyst for enacting the substantial criminal record ground appears to have been the case of *Minister for Immigration and Ethnic Affairs v Baker* ('*Baker*').[593] Thorn, a UK national, was convicted of using a false passport to enter Australia. His purpose had been to join his de facto spouse, Baker, and their son. Thorn subsequently sought to regularise his status but was refused on the grounds of character. The *Migration Act* provided that a person was not of good character, having regard to the person's past criminal conduct, defined in the guidelines, as being sentenced to imprisonment for a period of 12 months or more, or general conduct. The Tribunal found that the Departmental guidelines went "well past the bounds of reason if applied literally":[594]

> To prescribe that bad character will be forever assumed in the event of one conviction carrying a sentence of 12 months or more, no matter when that conviction took place is quite unreasonable.[595]

On appeal, the Full Federal Court ruled that the guidelines were unlawful.[596] It held that "it [was] not conceivable that Parliament intended anything so unreasonable as a conclusion

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[590] Glenn Nicholls, 'Gone with hardly a Trace: Deportees in Immigration Policy' in Klaus Neumann and Gwenda Tavan (eds) *Does History matter? Making and Debating Citizenship, Immigration and Refugee Policy in Australia and New Zealand* (ANU E Press, 2009) 20.

[591] *Migration Act 1958* (Cth) s 501A.

[592] *Migration Act 1958* (Cth) s 501(3), s 501(2).

[593] (1997) 73 FCR 187.

[594] *Re Baker and Department of Immigration* (1995) 37 ALD 744, 751.

[595] Ibid.

[596] *Minister for Immigration and Ethnic Affairs v Baker* (1997) 73 FCR 187, 193.

whether a person is now not of good character, based exclusively on his past criminal conduct, without regard to any recent good conduct".[597]

The Full Federal Court also criticised another aspect of the Departmental guidelines, namely the acquisition of a substantial criminal record following acquittal on the grounds of insanity.[598] The Court held that this "extraordinary" paragraph of the guidelines contained "no limitation at all by reference to the seriousness of the crime, the length of the term of imprisonment which might have been imposed had guilt in the normal sense been established or the antiquity of events, and [said] nothing about the nature of the unsoundness of mind or the completeness of the recovery that may have followed".[599]

The Tribunal and Court decisions "attracted the ire of Minister Ruddock", who had strong views relating to the impact on character of serious criminal convictions.[600] It was therefore "no mere coincidence" that both aspects of the guidelines were inserted into the character test in the 1998 amendments.[601]

The current substantial criminal record ground has evolved considerably. Section 501(7) of the *Migration Act* sets out the circumstances in which a person is deemed to have a substantial criminal record, namely when the person has been sentenced to death or imprisonment for life; a term of imprisonment of 12 months or more; two or more terms of imprisonment (whether on one or more occasions, where the total of those terms is two years or more); or 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.[602] Further guidance on the interpretation of the ground is set out in the *Migration Act*. Imprisonment, for example, is defined as "any form of punitive detention in a facility or institution" while sentence "includes any form of determination of the punishment for an offence".[603] The number of days the person spends in periodic detention or

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[597] Ibid 194.

[598] Ibid 192. The Court referred to paragraph 8.5.2(c) of the Department Guidelines in force at the time, which provided as follows:
c) has at any time been charged with a crime and either:
1. found guilty of having committed the crime while of unsound mind; or
2. acquitted on the ground that the crime was committed while the person was of unsound mind.

[599] Ibid 192.

[600] Mary Crock and Laurie Berg, *Immigration Refugees and Forced Migration: Law, Policy and Practice in Australia* (The Federation Press, 2011) 530.

[601] Ibid.

[602] The *Migration Amendment (Character and General Visa Cancellation) Act 2014* amends section 501(7)(f), which is discussed further in chapter nine.

[603] *Migration Act 1958* (Cth) s 501(12).

residential schemes or programs for drug rehabilitation or the mentally ill is taken to be included in the person's term of imprisonment.[604]

Much opposition to the amendments was expressed during the relevant Senate inquiry.[605] While acknowledged as reasonable for the government to impose character requirements on visa applicants and holders,[606] many argued that the goal "should not be systematic discrimination against individuals with prior convictions, but the identification of those few individuals who pose a real and serious threat to the safety of the internal community".[607] The ground "did not allow for the age of the convictions or the possibility of rehabilitation".[608] Furthermore, it could constitute double punishment, contrary to international obligations, which prevent state parties from punishing "an individual twice for an offence for which the person has been finally convicted or acquitted".[609] Critics further claimed that the failure of the character test following acquittal on the grounds of insanity was "an abuse of human rights"[610] as "Australia ha[d] an obligation to treat and assist such people if they [were] already residents, not to deport them".[611]

In response to the criticism, the Department explained that its purpose was to "simplify matters for decision makers"[612] by providing "an objective, easily identified criterion",[613] which accorded with the views on character held by the then Minister for Immigration.[614] As the Minister noted:

> The bill seeks to establish clear benchmarks for criminal behaviour that would automatically lead to a non-citizen failing the character test. Non-citizens who have been convicted to a single sentence of detention of 12 months or more, or where the length of several sentences aggregates to two years or more, will fail the character test. This will truncate the character assessment process and cover most non-citizens of character concern who come to notice. This will provide more certainty as to who is able to pass the character test.[615]

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[604] *Migration Act 1958* (Cth) s 501(9).

[605] Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Consideration of Legislation Referred to the Committee: Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997*, 1998 ('Senate Report 1998').

[606] Ibid [2.2].

[607] Ibid [2.2].

[608] Ibid [2.11].

[609] Ibid [2.13].

[610] Ibid [2.2].

[611] Ibid [2.22].

[612] Ibid [2.17]

[613] See *Brown v Minister for Immigration and Citizenship* (2010) 183 FCR 113, 117.

[614] See *Minister for Immigration v Jia Legeng* (2001) 205 CLR 507.

[615] See *Minister for Immigration and Multicultural and Indigenous Affairs v Hicks* (2004) 138 FCR 475, 491.

The substantial criminal record ground was intended to allow decision-makers "to concentrate on the important issue of the exercise of the discretion", namely "whether to grant or not cancel the visa of persons who did not pass the test".[616]

The legislative intention to provide a clear, unambiguous ground upon which the person failed the character test has not been entirely successful and it is therefore not surprising that the substantial criminal record ground was recently amended in December 2014, which I discuss in chapter eight. The review of the case law that follows reveals differences in judicial opinion relating to the interpretation of the substantial criminal record ground and illustrates how the various interests play out in judicial decision-making. Different approaches evolved in relation to aspects of the substantial criminal record ground upon which the *Migration Act* was either silent or ambiguous, such as whether concurrent sentences should be counted cumulatively and whether it was the duration of the sentence or the time served in prison that counted for the purposes of calculating the person's criminal record. I begin by briefly outlining three cases, involving long-term Australian residents, which, although unrelated to the substantial criminal ground in the character test, shaped its interpretation. A number of additional cases are then discussed, highlighting the lack of clarity and certainty in the law.

In *Drake v Minister for Immigration and Ethnic Affairs* ('*Drake*'), the Minister ordered that Drake, a married permanent resident with a teenage son, be deported following his conviction for drug offences.[617] Bowen and Deane JJ held that the meaning of "sentenced to imprisonment for one year or longer" referred "to the sentence imposed and not the term of imprisonment actually served".[618] While acknowledging that a deportation order could "involve drastic interference with the liberty of an individual",[619] it did "not alter the fact that the magistrate determined that the appropriate sentence to be imposed for the offence for which the plaintiff was guilty was a term of imprisonment of one year".[620] Smithers J dissented, holding that Parliament intended to confer the power of deportation upon the Minister where the punishment ordered by the court [was] actually imprisonment for one year at least".[621]

In *Minister for Immigration and Ethnic Affairs v Sciascia* ('*Sciascia*'), the Minister ordered that Sciascia, a New Zealand citizen, be deported on the grounds that, at the time of entry, he had been "convicted of two or more crimes and sentenced to imprisonment for a period totalling at

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[616] Senate Report 1998, above n 605 [2.17].
[617] (1979) 46 FLR 409.
[618] Ibid 416.
[619] Ibid 418.
[620] Ibid 418.
[621] Ibid 426.

least one year".[622] Sciascia had lived in Australia for some 16 years. He had been sentenced to imprisonment on three occasions to periods of imprisonment of less than one year some 20 years earlier in New Zealand. Sciascia claimed the ground only applied when the person was "sentenced on one occasion to a period of more than one year arising out of several smaller sentences required to be served consecutively", a claim which was upheld by French J at first instance and by Burchett and Lee JJ on appeal. Burchett and Lee JJ observed that laws depriving people of "one of their most precious rights", namely "their right to a community" ought to be read in their narrowest sense, particularly given that the retroactive effect of that particular provision was unlimited, regardless of the person's length of residence.[623] To find otherwise would be "unfair" and "irrational".[624] They observed that "so serious a question would have been expressly resolved, and not left to be settled outside the Parliament by the sometimes uncertain processes of construction".[625] They noted that there was no reference to whether concurrent sentences were included.

In *Te v Minister for Immigration and Ethnic Affairs* ('*Te*'), Te, a Cambodian refugee, was a teenager on arrival in Australia, where he had lived for 15 years at the time of the making of his deportation order under section 200 of the *Migration Act*.[626] The offence which led to the deportation order was drug trafficking, in relation to which Te was sentenced to 12 months' imprisonment, three months of which were suspended. Sackville, North and Merkel JJ dismissed Te's appeal relating to the dismissal of his judicial review application, holding that he was sentenced to a period of imprisonment for a period of not less than one year. The Court endorsed the majority approach in *Drake*, which had stood "for twenty years without challenge" and was "presumably relied upon in very many cases in which the Minister has issued deportation orders".[627] The Court observed that Parliament's language focused on "the quality of the offence committed by him or her, reflected in the sentence imposed by the Court".[628]

In *Minister for Immigration and Multicultural and Indigenous Affairs v Ball* ('*Ball*'), a more recent case involving the substantial criminal record ground, Ball, before moving to Australia,

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[622] (1991) 31 FCR 364.

[623] Ibid 372: At 372, Burchett and Lee JJ observed as follows: "There is no limit to its retroactive effect upon a person who may have lived here as a lawful entrant for, perhaps, 20 or more years. The making of a deportation order is the plainest infringement of liberty; the making of it under a retroactive law underlines the common law's concern. Both retrospectivity and curtailment of liberty, when found in any statute, are strong pointers towards a construction confining its operation".

[624] Ibid 372.

[625] Ibid 375.

[626] (1999) 88 FCR 264.

[627] Ibid 271.

[628] Ibid 272.

was convicted of numerous offences in New Zealand, including 49 counts in relation to "obtaining by cheque (under $500) by false pretences".[629] In relation to 25 of those counts, she was sentenced to imprisonment on each count for 11 months to be served concurrently and in relation to the remaining counts, she was sentenced to two months on each count, also to be served concurrently. Policy provided that the sentences should be totalled, "irrespective of the time and place at which each sentence was imposed",[630] a remarkably broad approach. In Ball's case, if totalled**,** the terms equalled to more than 26 years of imprisonment. The primary judge, Ryan J, upheld Ball's appeal, holding, amongst other things, that the substantial criminal record ground "did not require the totalling of concurrent terms of imprisonment".[631] The appeal was dismissed by the majority, with Dowsett J dissenting. Jacobsen and Bennett JJ considered *Drake*, *Te* and *Sciascia* and noted that subsequent amendments to the subsection failed to clarify the scope of application of the ground in light of the comments made in *Sciascia* relating to concurrent sentences.[632] The majority endorsed the view that its language did "not readily lend itself to the totalling of concurrent terms of imprisonment" and that the preferable construction was one that counted only terms of imprisonment which were other than concurrent.[633]

The Full Federal Court handed down its judgment in *Minister for Immigration and Multicultural and Indigenous Affairs v Hicks* ('*Hicks*') shortly after *Ball*.[634] Hicks had migrated to Australia as a 14-year-old with his family, where he had resided for 16 years. He was convicted of a number of offences and was sentenced to a total period of 10 months to be served concurrently, or if aggregated, 25 months.[635] The Minister cancelled his visa as he was deemed to have a substantial criminal record as he had been sentenced to two or more terms of imprisonment where the total of those terms was two years or more. At first instance, French J held that concurrent sentences were not to be totalled.[636] On appeal, Hely J held that the correct construction was "debatable" and therefore a construction which did not "deprive the respondent of his right to a community" should be favoured.[637] He observed that Parliament's attention had been drawn to ambiguities in the law in *Sciascia,* which provided for accumulation

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[629] (2004) 138 FCR 450.

[630] Ibid 464.

[631] Ibid. At 460, the primary judge stated as follows: "The plural expression 'terms of imprisonment' is not apt to refer to the same period for which several sentences have been directed to be served concurrently".

[632] Ibid 465.

[633] Ibid 467.

[634] (2004) 138 FCR 475.

[635] Ibid 484.

[636] Ibid 488.

[637] Ibid 494.

of separate periods of imprisonment but yet section 501 still did not deal explicitly with concurrent sentences. He dismissed the appeal. While Hill and Carr JJ agreed with Dowsett J in *Ball*, they were unprepared to find that the decision in *Ball* was "clearly wrong".[638] The Minister's appeal was dismissed.

In *Seyfarth v Minister for Immigration and Multicultural and Indigenous Affairs* ('*Seyfarth*'), Seyfarth arrived in Australia at the age of 12, where he lived for more than 20 years.[639] His visa was cancelled on the ground of having a substantial criminal record after being sentenced to a term of imprisonment of 12 months or more. Seyfarth was convicted of various deception-related offences, for which he was sentenced, amongst other things, to multiple sentences. Under section 8 of the *Sentencing Act 1989* (NSW), the sentencing judge was required to list the commencement and expiry dates of Seyfarth's prison sentence, which was marginally less than 12 months.[640] Despite the conflicting sources of information relating to the exact length of the sentence, the primary judge found that Seyfarth was sentenced to a nine-month non-parole period with an additional term of three months.[641] He noted that there was "insufficient foundation for a conclusion that Holt DCJ 'discounted' what would otherwise have been a 12-month sentence to allow for the period spent in custody".[642] Therefore Seyfarth had been sentenced to a term of 12 months or more. The Full Federal Court dismissed Seyfarth's appeal, including his argument that "the specification of dates by a judge under s 8, while not forming part of the sentence, fixes the period of the sentence".[643] Relying on *Te* and various judgments in *Drake*, *Ball*, and *Hicks*, the Court held that "section 501(7)(c) is concerned with the sentence that has been imposed on a person rather than the term of imprisonment actually served".[644] The Court stated as follows:

> We do not consider that anything turns on the slight differences between the language of the legislative provisions under consideration in *Drake*, *Te*, *Ball* and the present case to which the appellant drew attention.[645]

It upheld the primary judge's decision that there was no evidence that the sentencing judge had discounted the 12 month imprisonment sentence.

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[638] Ibid 483.
[639] (2005) 142 FCR 580.
[640] Ibid 587.
[641] Ibid 587.
[642] Ibid 587.
[643] Ibid 590.
[644] Ibid 587.
[645] Ibid 587

In *Brown v Minister for Immigration and Citizenship* (‘*Brown*’), Brown, a New Zealand citizen, had lived in Australia for 11 years when her visa was cancelled on the substantial criminal record ground for a sentence of 12 months or more.[646] She was convicted of six drug-related offences in relation to which she was sentenced to terms of 12-months’ imprisonment to be served concurrently. The sentences, however, were suspended on the condition that she enter into a good behaviour bond.[647] She claimed that *Seyfarth* was wrongly decided as what was relevant was the sentence served rather than the sentence imposed, having regard to section 501 as a whole, including the definitions relating to periodic detention and residential schemes or programs.[648] As she was not required to serve any time in detention, her sentence did not give rise to a substantial criminal record.[649] Following a review of the authorities, the Full Federal Court dismissed the appeal, holding that such an interpretation “would involve a significant shift in emphasis when compared to analogous provisions in the Act in its current and former versions which, as interpreted by this Court, have emphasised the quality of the offence as reflected in the sentence imposed as opposed to the amount of time that the person convicted of the offence is required to spend in detention”.[650]

It is thus evident that the definition of substantial criminal record was not always clear. The uncertainty surrounding the totalling of sentences and concurrent sentences was recently resolved by Parliament.[651] Although the amendments seek to clarify the law and provide greater certainty, the substantial criminal record ground has been widened and for that reason, the amendments are problematic. The amendments are discussed further in chapter eight.

It is also apparent that it is the sentence imposed which determines whether the person fails the character test, rather than the sentence served. In support of this interpretation, much store is placed on the notion that the sentence imposed reflects the sentencing judge’s view of the seriousness of the offence. While the underlying rationale of this approach may be to achieve clarity and certainty, particularly in light of the complexity of the different state sentencing regimes, it raises the question of whether sentencing judges are aware of the consequences of the imposition of a sentence of more than 12 months on the person’s right of residence, a matter which warrants further research.

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[646] (2010) 183 FCR 113.

[647] Ibid 118.

[648] Ibid 127.

[649] Ibid 138.

[650] Ibid 141.

[651] The amendments to section 501(7) of the *Migration Act 1958* pursuant to the *Migration Amendment (Character and General Visa Cancellation) Act 2014* are discussed in chaper eight.

B 2 *Immigration Detention-Related Offences Ground*

As the Australian Human Rights Commission ('*AHRC*') notes, "Australia continues to have one of the strictest immigration detention regimes in the world":[652]

> Not only is it mandatory, it is not time limited, and people are not able to challenge the need for their detention in a court.[653]

As at 30 September 2013, there were 3885 detainees in mainland immigration detention facilities and 2518 at the Christmas Island immigration detention centre.[654] The poor conditions of detention centres are well documented.[655] It is not therefore surprising that disturbances in detention regularly take place. In 2011, widespread rioting at the Christmas Island Immigration Detention Centre and the Villawood Immigration Detention Centre occurred, which caused an estimated $20 million in damage.[656] In response, the then government decided to send "a strong and clear message that the kind of unacceptable behaviour seen recently in immigration detention centres will not be tolerated".[657] It introduced a specific immigration detention-related ground in the character test in 2011, s 501(6)(aa), in order "to strengthen the consequences of criminal behaviour by persons in immigration detention".[658] The ground provides that a person does not pass the character test if the person is convicted of an offence committed in, during or following escape from, immigration detention or is convicted of an offence under section 197A of the *Migration Act*, which provides that detainees must not escape from detention.

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[652] AHRC, *Immigration Detention and Human Rights* <http://www.humanrights.gov.au/publications/immigration-detention-and-human-rights>.

[653] Ibid.

[654] Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary* 30 September 2013 < http:// .immi.gov.au/managing-australias-borders/detention/facilities/statistics/> .

[655] See, for example, Savitri Taylor, 'Exclusion from Protection of Persons of 'Bad Character': Is Australia Fulfilling its Treaty-Based Non-Refoulement Obligations?' (2002) 7 *Australian Journal of Human Rights* 8.

[656] Simon Benson, 'Rioting asylum seekers caused almost $20 million damage to immigration detention centres' *The Daily Telegraph* (online) 12 December 2011 <http://www.dailytelegraph.com.au/rioting-asylum-seekers-caused-almost-20-million-damage-to-immigration-detention-centres/story-e6freuy9-1226219383175?nk=d44f02da2e50270c6cdae0f60755c705>. An independent review found that the cause of the rioting was multi-factorial, including "the rapidity and size" of boat arrivals, which increased from several hundred to over 6000 in less than 18 months, and led to major overcrowding in the detention centres and delays in refugee status determination and security assessments: Allan Hawke and Helen Williams, *Independent Review of the Incidents at the Christmas Island Immigration Detention Centre and the Villawood Immigration Detention Centre*, 31 August 2011 http://www.immi.gov.au/media/publications/independent-review-incidents.htm 3.

[657] Explanatory Memorandum, Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011 (Cth) 2.

[658] Ibid 1.

Although section 501(6)(aa) was held to be constitutionally valid on the basis that the amendment was clearly within the power of Parliament,[659] the amendments were not only unnecessary but unfair, a view also held by others.[660] Detainees who commit offences in detention are already subject to state and Commonwealth law,[661] conviction upon which may lead to the failure of the character test on an alternative ground.[662]

Unlike the substantial criminal record ground, there is no requirement to be sentenced to a term of imprisonment of 12 months or more. Accordingly, "a lower level of criminality" can cause the person to fail the character test.[663] Like the substantial criminal record ground, however, there is no scope for assessment of the circumstances of the offence and subsequent conduct at the time of considering whether the person fails the character test.[664] As noted above, while the failure of the character test is only the first stage in the section 501 decision-making process, the ability of detainees to provide sufficient information to satisfy the Minister to nevertheless grant the visa is likely to be severely compromised, given their personal circumstances, their level of resources and the emphasis on deterrence. These systemic disadvantages faced by applicants are explored further in more detail in chapter six.

The United Nations High Commissioner for Refugees ('*UNHCR*') argues that "involvement in criminal activities in the country of asylum which does not lead to loss of refugee status or to expulsion, should not per se restrict the entitlement to rights guaranteed to refugees by the 1951

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[659] *NBNB v Minister for Immigration and Border Protection* (2014) 220 FCR 44.

[660] See, for example, AHRC, *Inquiry into the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 201*1: AHRC Submission to the Senate Legal and Constitutional Committees, 31 May 2011 <http://www.humanrights.gov.au/submission-inquiry-migration-amendment-strengthening-character-test-and-other-provisions-bill-2011>.

[661] Savitri Taylor, 'Exclusion from Protection of Persons of "Bad Character": Is Australia Fulfilling its Treaty-Based Non-Refoulement Obligations?' (2002) 7 *Australian Journal of Human Rights* 8, 8. See, for example, *R v Ali*; *R v Amiri*; *R v Feili*; *R v Haidari*; *R v Parhizkar* [2013] NSWSC 871 (28 June 2013), where the detainees were convicted of riot and affray under NSW criminal law.

[662] AHRC, Inquiry into the Migration Amendment (Strengthening the Character Test and Other Provisions) Bill 2011: AHRC Submission to the Senate Legal and Constitutional Committee, 31 May 2011 <http://www.humanrights.gov.au/submission-inquiry-migration-amendment-strengthening-character-test-and-other-provisions-bill-2011> ('AHRC submission') [18]; United Nations High Commissioner for Refugees ('UNHCR'), *Submission by the Office of the United Nations High Commissioner for Refugees: Migration Amendment (Strengthening the Character test and Other Provisions) Bill 2011 Senate Legal and Constitutional Affairs Committee*, 25 May 2011 <http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=213&catid=37&Itemid=61> ('UNHCR submission') [19].

[663] AHRC, *Background Paper: Human rights issues raised by visa refusal or cancellation under s 501 of the Migration Act* (Sydney, June 2013) <http://www.humanrights.gov.au/sites/default/files/document/publication/section_501_paper.pdf> ('Background Paper 2013') [2.3(c)].

[664] AHRC submission, above n 662, [18].

Refugee Convention ...".[665] Refugees, whose visa is refused or cancelled, face the prospect of indefinite detention or if released on a bridging visa, difficulties being reunited with their families.[666] Such a high impact decision should not be subject to the Minister's "complete discretion in the refusal or cancellation of a visa" and should be "subject to the requirements of natural justice":[667]

> UNHCR is of the view that the granting of rights and obligations associated with international legal status should be grounded in law and not be subject to the sole discretion of Government.[668]

The insertion of the immigration detention-related offences ground underscores the government's willingness to demonstrably increase its already broad power under section 501 in order to achieve political objectives.

B 3 *Association Ground*

The next ground of the character test is that the applicant has an association with a person, a group or organisation, whom the Minister reasonably suspects has been involved in criminal conduct. As will be shown, the government's attempt to use a person's associations as an instant marker of bad character has been discredited by the courts, which insist on an informed assessment of the relevance of the association to the person's character.

One case was highly significant, leading to the enactment of the association ground in the 1992 amendments. In *Hand v Hell's Angels Motorcycle Club Inc (Hell's Angels Motorcycle Club),* 23 members of the club applied for visitor visas to attend its world run in Australia.[669] At that time, the Minister could refuse visa applications on public interest entry criteria contained in the Migration Regulations, which required applicants to be of good character, and unlikely to become involved in violent activities disruptive to, or harmful to, the Australian community or a group within the Australian community. Relying on the conduct of members of the club overseas, the Department sent a letter to the visa applicants, requesting comment on adverse information, including that the club was "an international criminal organisation" and the world run was "an opportunity for members to discuss and to plan the organisation's international criminal activity".[670] The club lodged judicial review proceedings following the refusal of four

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[665] UNHCR submission, above n 662, [12].
[666] AHRC submission, above n 662, [30].
[667] UNHCR submission, above n 662, [8].
[668] Ibid [13].
[669] (1991) 25 ALD 659 ('Hell's Angels Motorcycle Club').
[670] Ibid 664–6.

visa applications on the grounds that their activities would be disruptive to the community and the delay in the processing of the remaining visa applications. Several legal issues arose in the case although, of interest in this context, are the primary judge's and Full Court's approach to association.

At first instance, Olney J held that the past conduct of overseas club members was irrelevant in the absence of other evidence "to the question of whether the minister should determine that non-citizen members of HAMC wishing to attend the World Run would be likely to become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community".[671] He ordered that the decisions in relation to the four visa applications be set aside on the grounds that the Minister had taken into account irrelevant considerations and ordered the Minister be restrained from taking into account the Department's views contained in the letter or the fact of membership of the Hell's Angel's Association in deciding the remaining applications.

On appeal, the Full Federal Court upheld Olney J's decision to set aside the four visa refusals but upheld other aspects of the Minister's appeal, which are not relevant for present purposes.[672] The Full Federal Court agreed with Olney J that the Department's letter was irrelevant to public interest criterion relating to the likelihood of involvement in certain disruptive or harmful activities in Australia. The Court observed that while membership of an organisation and attendance of its event will have probative value in considering a person's likely engagement in activities, "very great care needs to be taken in engaging in any predictive exercise, on the basis of a person's affiliations, if logically unjustifiable and unfair conclusions are to be avoided".[673] In the present case, the Court found that "the information [was] simply insufficient to support a positive prediction that an individual member [was] likely to become involved" in disruptive or harmful activities.[674]

It held, however, that the Department's letter was not irrelevant to the character criterion:

> The affiliations of a person may be relevant to the question of good character as one of many matters that could be considered. The weight to be given to membership of an organisation may vary enormously and opinions may legitimately differ on such questions ... It is commonly said, sometimes unfairly, that a person may be known by the company he keeps. If it is well known

[671] Ibid 663.
[672] Ibid.
[673] Ibid 674.
[674] Ibid.

> that a particular organisation has undesirable members or attributes, then an affiliation with that organisation may — by no means must — bear upon that person's character.[675]

The Department's letter could therefore be taken into account in deciding the visa applications in relation to the character criterion.

In response, the government introduced into the *Migration Act* a form of the ground, which was explicitly designed "to provide the Minister with the power to exclude from Australia persons whose conduct or association with individuals or organisations [was] such that the presence of such persons in Australia would not be in the interests of the Australian community".[676]

The ground was tested in *Morales v Minister for Immigration and Multicultural Affairs* ('*Morales*').[677] Morales, an Australian permanent resident, sponsored her de facto spouse, Gonzales, to migrate to Australia. His application was refused, however, on the grounds that he was not of good character because of his association with the Chilean police service and the Chilean army, who had employed him to work as General Pinochet's personal bodyguard. On appeal, Black CJ, Burchett and Tamberlin JJ called for limits on the ground, holding that "the association must be such that it impacts adversely on the character of the person to such an extent that he or she can be said to be not of good character".[678] However, the Court found that the Tribunal did not err in finding that Gonzales' lengthy association with these organisations "during a period in which a significant number of people were unlawfully arrested, detained, assaulted, tortured and murdered [did] not reflect well on his character".[679] Not only was Gonzales aware of the criminal conduct for many years, he failed to dissociate himself.[680]

The ground was criticised for being "unusually vague"[681] and broad during the Senate inquiry relating to the 1998 amendments.[682] The wording of the ground was changed in the 1998 amendments, although according to the Department, the only material change was the reversal of the onus of proof.[683] The exact effect of the change was considered in *Minister for Immigration and Multicultural Affairs v Chan* ('*Chan*'), a case in which the applicant failed the

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[675] Ibid 675.

[676] Mary Crock, *Immigration and Refugee Law in Australia* (The Federation Press, 1998) 64.

[677] (1999) 82 FCR 374.

[678] Ibid 380.

[679] Ibid 382.

[680] Ibid 382.

[681] Bill Pincus, 'The Haneef Affair' (2008) 19 *Public Law Review* 91, 101.

[682] Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, Migration Legislation Amendment (Strengthening of provisions relating to character and conduct) Bill 1998 (Cth) [2.25].

[683] *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40 ('Haneef'), 84.

character test on account of her association with her former spouse.[684] The Tribunal rejected the argument that family ties to a person connected with a group or association involved in criminal activities warranted failure of the character test.[685] It found that the "existence or otherwise of the association will depend upon the particular circumstances of each case and whether or not the connection, combination, community of ideas, common purpose directly, or indirectly, results in establishing a criminal association".[686] On appeal, Emmett J disagreed, holding that the change in the wording removed any "judgment as to whether or not the visa holder was not of good character because of the association with the person involved in criminal conduct".[687]

The meaning of the ground was reconsidered in *Minister for Immigration and Citizenship v Haneef* ('*Haneef*'). Dr Haneef was completing his medical training in Australia when his second cousins were arrested in relation to bombings in the UK. Although not a permanent resident, he enjoyed valuable rights in Australia, including the right to remain during the period of his visa, the right to work and to bring his family.[688] Dr Haneef was charged with recklessly assisting a terrorist organisation. Following his release on bail, the Minister cancelled his visa under section 501(3), claiming that he reasonably suspected that Dr Haneef did not pass the character test because of his association with his second cousins. Dr Haneef filed a judicial review application in relation to the visa cancellation. On behalf of Dr Haneef, it was argued that mere connection was insufficient to fulfil the association ground. Instead there had to be "a connection between the visa holder and those suspected of criminal conduct that involve[d] personal fault, or reflect[ed] adversely on the character of the visa holder".[689]

Acknowledging that each arm of government was not to intrude on the other, Spender J observed that the ground's interpretation had to be "ascertained from the context in which it appears; the object and purpose of the statute in which the provision is found; the legislative history of the matter; and a consideration of the consequences of adopting the competing interpretations".[690] The Tribunal's interpretation in *Chan* was a more accurate reflection of the meaning of the ground. The other grounds in the character test required "an assessment of qualities personal to them, which qualities, parliament has said, determine that that person fails

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[684] (2001) 34 AAR 94.

[685] *Haneef* (2007) 161 FCR 40, 72 quoting *Re Chan and Minister for Immigration and Citizenship* (2001) 33 AAR 191 [36]–[37].

[686] *Haneef* (2007) 161 FCR 40, 72.

[687] *Haneef* (2007) 161 FCR 40, 73–4.

[688] *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, 443.

[689] *Haneef* (2007) 161 FCR 40, 55.

[690] Ibid 74.

the character test".[691] In that context, it would be "striking" if any transient or innocent association was sufficient:[692]

> Having regard to the context, it seems to me to be impossible to conclude that Parliament would have intended that a person fail the character test where the relationship of a visa holder with a person, group or organisation was utterly remote from the criminality of that person, group or organisation.[693]

Spender J disagreed with Emmett J in *Chan* that the change in wording removed the requirement that the association reflect on the person's character: it simply reversed the onus of proof.[694] Although Emmett J considered the innocence of the association was a relevant factor in the exercise of the discretion to refuse or cancel, Spender J observed that the *Migration Act* did not provide any opportunity to be heard on how the discretion was to be exercised.[695]

Spender J refused to accept the Minister's submission that the words "the character test" in section 501 did not have any meaning, observing that it "starkly reveal[ed] the distance between the scope and object of s 501(3) of the *Migration Act* and the construction that the Minister wished to make" of the ground.[696] He cited examples in which "an innocent association" would result in the person failing the character test, such as people providing professional services, or familial or social association.[697] Spender J upheld the application.

The Full Federal Court upheld Spender J's judgment, finding that the association had to have "some bearing upon the person's character" and the applicant had to have "some sympathy with, or support for, or involvement in, the criminal conduct of the person, group or organisation with whom the visa holder is said to have associated".[698] The 1998 change in the wording related to the Minister's satisfaction and not the impact of the association on character.

The Court dismissed the Solicitor-General's argument that the 1998 amendments were designed "to make it easier for the Minister to exclude from Australia persons who might be thought to pose a risk" and that "if some entirely innocent people were caught up in the process that was regrettable, but it was simply the price that had to be paid to ensure the safety of the Australian

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[691] Ibid 75.
[692] Ibid 75.
[693] Ibid 75.
[694] Ibid 84.
[695] Ibid 76.
[696] Ibid 78.
[697] Ibid 78.
[698] *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, 447.

community".[699] It observed that it was "significant that Parliament did not simply entrust the Minister with an unfettered power to refuse or cancel visas, as it might have done":[700]

> Rather it established a scheme whereby a person who has been judged to fail the character test could be given the opportunity to have the decision revoked. The expression "passes the character test" in s 501C(4) must be given meaningful content.[701]

The government did not appeal and the Full Federal Court's findings were incorporated into Direction No 41, the direction in force at the time and the subsequent Direction, Direction No 55. The current Direction provides that the nature, degree, frequency and duration of the association are to be considered and that "mere knowledge" of the associate's criminality is insufficient to establish association. In addition, "in order to not pass the character test on this ground, the association must have some negative bearing upon the person's character".[702] The fallout from the Haneef affair was widespread, including damaging "Australia's reputation for fair play" and culminating in the government paying Haneef a "substantial compensation settlement".[703]

The ability of the government to exclude or remove persons associated with unsavoury organisations, such as "bikies", is an ongoing issue. Recently, for example, Alex Vella, the national president of Australia's largest bikie gang, the Rebels, was visiting his country of citizenship, Malta, when his visa was cancelled.[704] Vella, whose wife and children are Australian citizens, is trying to return to Australia.[705] Although it is unclear upon which ground of section 501 his visa was cancelled, the cancellation is a timely reminder of the extent of the section 501 power, which, in this case, prevents Vella from returning to Australia, his country of residence for the past four decades and makes it difficult for him to challenge the decision.[706] Although not possible to examine the issue in the present context, it does beg the question why migration law, rather than the criminal law, is being used to deal with suspected criminals.

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[699] Ibid 446.

[700] Ibid.

[701] Ibid.

[702] Direction No 55 — Visa Refusal and Cancellation under Section 501 of the Migration Act 1958 (25 July 2012) ('*Direction No 55*') Annex A — Application of the Character Test, Section 3.

[703] Emma Pollard, 'Haneef wins 'substantial' compensation settlement', *ABC News*, 22 December 2010 <http://www.abc.net.au/news/2010-12-21/haneef-wins-substantial-compensation-settlement/2382174>.

[704] Linda Kerin, 'Government Cancels Rebel Bikie Gang Leader Alex Vella's Visa', *ABC News* 17 June 2014.

[705] Nick Ralston, 'Alex Vella, President of Rebels Bikie Gang 'Unfairly Targeted' over Visa Cancellation', *Sydney Morning Herald*, 17 June 2014.

[706] Ibid.

Both the South Australian and Queensland Governments recently approached the Commonwealth Government seeking bans on entry and "mandatory deportation" of foreigners belonging to motorcycle gangs, their associates and other organised crime gangs, [707] proposals, which may have resulted in changes to the association ground brought about by the *Migration Amendment (Character and General Visa Cancellation) Act 2014*, discussed further in chapter nine.

B 4 *Past and Present Criminal or General Conduct Ground*

This ground provides that a person is not of good character having regard to either or both of the applicant's past and present criminal and or general conduct. As noted earlier, a form of the ground was contained in policy prior to its enactment in the 1992 amendments.[708]

Current policy provides that criminal conduct encompasses convictions which have not resulted in a sentence of 12 months or more or conduct not resulting in conviction.[709] Policy further provides that "all other conduct is treated as general conduct".[710] General conduct is not limited to usual or prevalent conduct as one or two instances of conduct may "lay character bare very tellingly".[711] What is required is scrutiny of the conduct in order to shed light on whether the person is not of good character".[712]

In *Godley v Minister for Immigration and Multicultural and Indigenous Affairs* ('*Godley*'), the applicant applied for a spouse visa while he was overseas which was refused on the basis that he did not pass the character test because, amongst other things, he had been convicted of traffic offences, failed to disclose certain matters and worked unlawfully in Australia.[713] Godley had previously been an Australian permanent resident and his extended family, including siblings and children from his former spouse, lived in Australia. He had also recently remarried, this time to an Australian citizen, whose mother and sister were seriously ill and who could not leave Australia. Godley sought judicial review.

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[707] Michael McKenna and Mark Schliebs, 'Newman push for bike deportation' *The Weekend Australian*, (12–13 October 2013), 3.

[708] PAM3: Act — Compliance and Case Resolution — Controversial Visitors, Overview, Section 3.

[709] PAM3: Section 501 — Refusal or Cancellation on Character grounds, Section 5 [9.2].

[710] Ibid [9.4].

[711] *Minister for Immigration and Ethnic Affairs v Baker* (1997) 73 FCR 187, 195.

[712] Ibid 194.

[713] (2004) 83 ALD 411.

Lee J's analysis at first instance was found on appeal to be "correct" and constituted "a valuable guide for decision makers".[714] It is therefore worthwhile examining his approach in detail. Lee J held that the construction of the ground depended on the context and purpose of the Act, and on section 501.[715] The ground required "the minister to have regard to the visa applicant's past and present criminal and/or past and present general conduct and then determine as a fact whether the person is not of good character".[716] Lee J stated as follows:

> The words "of good character" mean enduring moral qualities reflected in soundness and reliability in moral judgment in the performance of day-to-day activities and in dealing with fellow citizens. It is not simply a matter of repute, fame or standing in the community but of continuing performance according to moral principle. A person of ill repute by reason of past criminal conduct may, nonetheless, on objective examination at a later stage in life, be shown to be a person reformed and now of good character.[717]

Lee J warned that while the criminal or general conduct provided "indicia as to the presence or absence of good character," the conduct did not answer the question relating to character:[718]

> The minister must look at the totality of the circumstances and determine whether the person before him is distinguishable from others as a person not of good character, a question not to be confused with characterisation by conduct alone ... The distinction between "criminal" and "general" conduct as indicia of absence of good character may suggest that the word "criminal" is likely to carry the common meaning of the more serious offences than misdemeanours that involve lesser faults and omissions ... Context, however, is important and may provide a broader meaning for such a term in appropriate circumstances having regard to the purpose to be served ... For a finding to be made under s 501(6)(c) that a person is not of good character it is necessary that the nature of the conduct said to be criminal, be examined and assessed as to its degree of moral culpability or turpitude. Furthermore, there must be examination of past and present criminal conduct sufficient to establish that a person at the time of decision is not then of good character. The point at which recent criminal conduct (as the term "present criminal conduct" is to be understood), becomes 'past criminal conduct' must be a matter of judgment. If there is no recent criminal conduct that circumstances will point to the need for the minister to give due weight to that fact before concluding that a visa applicant is a person not of good character ... Before past and present general conduct must be taken to reveal indicia that a visa applicant is not of good character continuing conduct must be demonstrated that shows a lack of

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[714] *Minister for Immigration and Multicultural and Indigenous Affairs v Godley* (2005) 141 FCR 552, 559.

[715] *Godley* (2004) 83 ALD 411, 425.

[716] Ibid 426.

[717] Ibid.

[718] Ibid.

> enduring moral quality. Although in some circumstances isolated elements of conduct may be significant and display lack of moral worth they will be rare, and as with consideration of criminal conduct there must be due regard given to recent good conduct.[719]

Lee J noted that the convictions were "non-informative" of Godley's character, particularly as they took place many years ago.[720] At 67, Godley had committed no recent offences and had worked most of his professional life as a qualified accountant. Accordingly, "more than a snapshot of the applicant's activities" was required to find that he was not good character.

Lee's guidance emphasises the need to take a holistic and long-term view of a person's conduct, an approach confirmed in *Mujedenovski v Minister for Immigration and Citizenship* ('*Mujedenovski*').[721] Mujedenovski sponsored his father, Selimi, for a contributory parent migrant visa. Selimi, an illiterate farmer from Macedonia, had previously travelled to Australia and entered into a contrived marriage for which he was convicted. His permanent residence application was therefore rejected on the grounds of character, thereby preventing him, his wife and their child from joining their remaining three children and six grandchildren in Australia.

The Full Federal Court found that both past and present conduct must be considered, thus requiring "attention to the character of the visa applicant over the continuum of a period of time".[722] There was no evidence that since the time of the offences, Selimi, who was remorseful, "had committed any offences or otherwise engaged in any conduct which would impinge adversely upon his eligibility for a visa on character grounds".[723] The Tribunal had incorrectly reversed the onus of proof by asking whether Selimi had enduring moral qualities, rather than asking itself whether it was satisfied that he had a lack of enduring moral quality. It allowed the appeal.

The past and present criminal and general conduct ground is a catch all provision, generally invoked when the visa applicant or holder has previously committed less serious offences or breached immigration law. What a person's recent conduct reveals in terms of his or her current character provides a critical limit upon what would otherwise be an extraordinarily broad ground. Appropriately, an absence of further criminal conduct is relevant in determining a lack of enduring moral quality, particularly given the difficulty in demonstrating enduring moral quality. The character assessment, however, does not require the decision-maker to make a

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[719] Ibid 426, 427. Citations omitted.
[720] Ibid 428.
[721] *Mujedenovski v Minister for Immigration and Citizenship* (2009) 112 ALD 10.
[722] Ibid 22.
[723] Ibid 23.

general judgment about a person's character, including whether he or she meets "the highest standards of integrity".[724] Rather it "is concerned with whether the applicant for entry's character in the sense of his or her enduring moral qualities is so deficient as to show it is for the public good to refuse entry".[725] The standard is "elastic, in the sense that identified deficiencies in the moral qualities of an applicant for a short term entry permit may not justify the conclusion that he is 'not of good character' within s 501(2) while similar deficiencies may suffice to justify that conclusion, where the person seeks long term entry".[726] The length and purpose of the residence therefore require "different emphases to be placed on matters that are relevant to each application".[727]

B 5 *Significant Risk of Certain Type of Conduct/Danger to the Community Ground*

The final ground provides as follows:

> In the event that the person were allowed to enter or to remain in Australia, there is a significant 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.[728]

Although subsections 501(6)(d)(i) to section 501(6)(d)(iv) are rarely invoked in practice, section 501(6))(d)(v), which has existed in some form for years, enables the government to refuse visas to controversial visa applicants who are considered to threaten the Australian community and or its relationship with other countries.[729] The Department's *Controversial Visa Applicants* fact sheet sets out the profile of people of concern, which, broadly speaking, focuses either on those who have committed, planned or encouraged criminal activities or those who may "threaten the safety or wellbeing of the community".[730]

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[724] *Goldie v Minister for Immigration and Multicultural Affairs* (1999) 56 ALD 321, 324.

[725] Ibid.

[726] Ibid.

[727] *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 68 FCR 422, 433.

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

[729] *Migration Act 1958* (Cth) s 501(11): It provides that conduct may constitute harassment or molestation, even if it does not involve violence, or threats of violence or if it consists of damage or threats of damage to property.

[730] Mary Crock, above n 676, 62; Department of Immigration and Border Protection, *Controversial Visa Applicants*, Fact Sheet No 78, <http://www.immi.gov.au/media/fact-sheets/78controversial.htm>.

I have already mentioned the case of *Hell's Angels Motorcycle Club*, "a case that caused great consternation"[731] in the context of the association ground. As noted earlier, at that time, the present ground was not contained in the *Migration Act*. Instead it was contained in a public interest criterion which enabled the Minister to grant a person a visa provided that the person was "not determined by the minister acting personally to be likely to become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community".[732] The Full Federal Court in *Hell's Angels Motorcycle Club* held that activities such as "foment[ing] hatred on account of religious or racial differences in the Australian community" or drug-related activities could have sufficient impact on the Australian community as a whole to be covered by the ground.[733] The Court held that "the focus is upon the likelihood of involvement in activities having a broader impact than that which the activities may have upon an individual victim".[734] Likelihood meant that "a mere chance or probability" was not enough.[735] In that case, the information before the Minister was insufficient "to support a positive prediction" that the applicant was likely to become involved in such activities.[736]

In response, the then Minister for Immigration stated:

> Following the challenge to the decision to exclude from Australia non-Australian members of the Hell's Angels Motor Cycle Club, there has been close scrutiny of the decision-making regime for the exclusion of persons of bad character and persons generally who may represent a danger to the community or a segment of it. This Bill represents the results of that process and enables the Minister to exclude from Australia persons of bad character and other undesirable persons.[737]

As Professor Crock observes, the enactment of the character provisions, including the Minister's power to exclude merits review, left "no doubt about the extent of the Minister's power".[738]

Subsection 501(6))(d)(v) was also considered in *Irving v Minister for Immigration, Local Government and Ethnic Affairs* ('*Irving*'), another high-profile case in which the controversial

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[731] Ibid 63.
[732] *Hell's Angels Motor Cycle Club* (1991) 25 ALD 659, 659.
[733] Ibid 672.
[734] Ibid.
[735] Ibid.
[736] Ibid 674.
[737] Commonwealth, *Parliamentary Debates*, House of Representatives, 17 December 1992, 4121 (Gerry Hand).
[738] Crock, above n 676, 64.

Holocaust denier was refused a visa on the grounds that he was likely to become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community. Since his previous visits to Australia, Irving had been convicted of insulting and slandering the memory of the dead in Germany and had also been deported from Canada. He wished to visit Australia in order to promote his latest books. Ryan J held that the meaning of "disruptive" required "the activities to be likely to have the effect of polarising two sections of the Australian community, or two elements of a group within that community, to an extent, beyond mere disagreement or controversy, which threatens, in a harmful way, the normal cohesiveness of the community or the group".[739] It was not enough, however, "for the activities to be likely to cause pain, distress or offence within the Australian community",[740] although physical violence was not required. Lee J held that disruptive "connotes actions designed to divide or rend the cohesiveness of the community" while Drummond J held that the activities led to "forcible community division".[741] Interestingly, Drummond J observed that the ground favoured the preservation of order and calm over freedom of speech, acknowledging that it could make "freedom of speech a hostage to the willingness of a few already living in Australia to break the law".[742] Ultimately, the Court held that there was no evidence that it was likely that if Irving visited Australia and engaged in activities to promote his books, "conflict of such a degree as to be disruptive to the Australian community would be generated by those activities".[743] It allowed Irving's appeal and remitted the matter to the Minister for redetermination in accordance with the law. Irving's further attempts to enter Australia, however, were unsuccessful. [744]

In his consideration of the case, Maher is persuasively critical. The litigation revealed that the ground, particularly the use of the term "disruptive", was too broad, vague and elusive. He notes that "where the basic democratic right of freedom of expression is at stake, precision in the

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[739] *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 44 FCR 540, 543.

[740] Ibid 544.

[741] Ibid 558.

[742] Ibid 559.

[743] Ibid 552.

[744] See *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 68 FCR 422. Irving's attempts to visit Australia continued to be unsuccessful as the Minister refused two further entry applications on the basis that he was not satisfied that Irving was of good character. At 428, the Full Federal Court observed that there were "no precise parameters," distinguishing good and bad character and that it was essentially "a value judgment" entrusted in the hands of the administrative decision maker, "in whom Parliament has reposed the function of making that assessment". The Court would only intervene if an error of law was established, which in this case had not. Irving's appeal was dismissed.

specification of the visa entitlement standard is essential".[745] However, it is "very difficult, if not impossible, to determine whether any proposed conduct will fall within the would-be standard of "activities disruptive to ... the Australian community", even with the assistance of judicial interpretation.[746] He notes that debate and disagreement periodically lead to peaceful disruption in a democratic society[747] and that "even where there is some risk of violence it is wrong in principle to guard against such risk by denying the exercise of free expression without making an assessment of the magnitude of the risk and the capacity of law enforcement agencies to prevent the risk crystallising or to control violent disturbances".[748] In an area of law particularly subject to political interference, the ground is too open to inappropriate use as "a censorship mechanism".[749] He notes that it is also of concern that the Minister has "the final substantive say in assessing the risks associated with the applicant's behaviour", a criticism frequently made in relation to the character test more broadly.

Maher raises important concerns, which continue to be relevant today.[750] As Drummond J noted, law and order trumps freedom of speech in this context. While such a balance may be legitimate, it is disappointing in a liberal democratic society, which should encourage the expression of different views and public debate. As Maher notes, the best way to combat to "dangerous ideas" is to use "the power of truth".[751] This ground was also recently amended in December 2014 and is discussed further in chapter nine.

B 6 *Conclusion in Relation to the Character Test*

The character test is problematic. It has developed and widened, in response to specific cases and events, illustrating the ongoing struggle between the government's desire to direct outcomes and the need to ensure that decision-making is subject to independent, fair, legal processes. I have also explained how the substantial criminal conduct ground captures too many people while the other grounds are rarely invoked. In chapter nine, I offer reform proposals, which are designed to better balance the various interests involved.

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[745] Laurence Maher, 'Migration Act Visitor Entry Controls and Free Speech: The Case of David Irving' (1994) 16 *Sydney Law Review* 358, 378.

[746] Ibid 379.

[747] Ibid.

[748] Ibid 380.

[749] Ibid 379.

[750] See, for example, Lindsay Murdoch, 'Malaysian democracy activist refused entry' *The Sydney Morning Herald* (Sydney), 27 September 2013, 2.

[751] Maher, above n 745, 393.

C *Directions to Structure the Tribunal's Discretion but not the Minister's*

C 1 *Directions under Section 499 of the Migration Act*

Directions are a flexible mechanism by which the government can shape policy, to reflect its broader social objectives.[752] The development of directions is essentially "a political function, to be performed by the Minister who is responsible to the parliament ... ".[753] As Rares J noted:

> The constitutional scheme of responsible government would be defeated if departmental decision makers were entirely free to arrive at their own idiosyncratic views, unfettered by the control of the Minister who, by s 64 of the Constitution, is the person who administers a department of State and answers for that administration in the Parliament.[754]

The process of laying directions before Parliament also enables parliamentary and public scrutiny of the directions and "political comment and debate",[755] for which the Minister is again accountable.[756]

Brennan J observed in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* that policy encourages internal consistency within the Tribunal but also the Department and the Tribunal, by acting as a "constant reference point".[757] Furthermore, policy bolsters "the integrity" of the decision-making process by "diminishing inconsistencies" and enhancing "the sense of satisfaction with the fairness and continuity of the administrative process ...".[758] These observations also apply to directions.

In 1999, section 499 was amended to strengthen the Minister's power to "specify more precisely how a discretion should be exercised".[759] Section 499 of the *Migration Act* now provides as follows:

> (1) The Minister may give written directions to a person or body having functions or powers under this Act if the directions are about:
>
> (a) The performance of those functions; or

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[752] *Toro Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337, 356.

[753] *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 644.

[754] *Toro Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337, 356.

[755] *Aboriginal Legal Service Ltd v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 69 FCR 565, 578.

[756] *Migration Act 1958* s 499(3): The Minister shall cause a copy of any direction given under subsection (1) to be laid before each House of the Parliament within 15 sitting days of that House after that direction was given.

[757] *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 644.

[758] Ibid 640.

[759] Explanatory Memorandum, Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998, Item 30. Previously the government could only issue general directions, such as Direction No 5, which related to refusals to grant a visa under section 501.

(b) The exercise of those powers.

...

(2A) A person or body must comply with a direction under subsection (1).

Directions No 17, 21, 41 and the current Direction, Direction No 55, have been issued under the amended section 499. They are legally binding on Departmental decision-makers and the Tribunal[760] but not the Minister.[761]

C 2 *Applying the Directions*

The various Directions have essentially the same structure, namely two principal parts. The first part deals with the application of the character test, and the second part deals with the exercise of the discretion. Each Direction "creates a framework within which the discretion vested in the decision-maker is lawfully to be exercised".[762] Under the second part, which is my focus, decision-makers are required to take into account "relevant considerations" known as primary and "other" considerations. The Direction is "telescopic", in other words, the considerations are "given additional content and explanation".[763] The primary and other considerations are "fundamental element(s)" [764] and therefore the Tribunal must treat consideration of the factors "as a central element in the deliberative process".[765] In addition, the considerations in the Direction must "be considered in accordance with the significance placed upon them by the Direction".[766] While the primary and other considerations are intended to guide decision-makers on how the balancing exercise should be undertaken, it is ultimately "open to decision-makers to adopt a different approach in the exercise of discretion in the individual case".[767]

In addition, the Tribunal must show "an active intellectual engagement" with how the factor is taken into account.[768] While not required to refer to each factor listed under the various

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[760] *Migration Act 1958* s 499(2A); *Rokobatini v Minister for Immigration and Multicultural Affairs* (1999) 90 FCR 583.

[761] See, for example, *Rocca v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 87 ALD 529.

[762] *Minister for Immigration and Border Protection v Lesianawai* [2014] FCAFC 141 [80].

[763] *Minister for Immigration and Citizenship v Makasa* (2012) 207 FCR 488, 492.

[764] *Minister for Immigration and Citizenship v Taufahema* (2010) 114 ALD 537, 545 quoting *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322, 329.

[765] Ibid citing *Telstra Corporation v Australian Competition and Consumer Commission* (2008) 176 FCR 153 [110].

[766] Ibid 546.

[767] *Minister for Immigration and Border Protection v Lesianawai* [2014] FCAFC 141 [83].

[768] *Lafu v Minister for Immigration and Citizenship* (2009) 112 ALD 1, 7.

considerations, doing so "provides assurance to the parties — especially the frequently unrepresented claimant — that a case has been properly considered".[769]

In order to ensure independence, however, as discussed in the following section, directions cannot force the Tribunal to arrive at a particular conclusion in individual cases.[770] It is not bound to consider only the factors stipulated in the direction,[771] and is not bound by the weight the government gives to each of these factors.[772]

In summary, in order to comply with the Directions, the Tribunal is required to consider all relevant factors and weigh the factors as it sees fit. However, it cannot simply apply "some ritualistic formula":[773]

> it must make the correct or preferable decision, according to the merits of the case and "independently of any instruction, advice or wish of the executive government, including in cases where government policy is a relevant factor for consideration ..."[774]

C 2 *(a) Direction No 17: An Unlawful Direction*

Part 2 of Direction No 17 was held to have been imperfectly formulated as it operated as a fetter on the Tribunal's discretion, conferred by section 501.[775] Direction No 17 set out three primary considerations, namely the protection of the Australian community, the expectations of the Australian community and the best interests of the child. The relevant paragraph of Direction No 17 provided that "no individual considerations can be more important that a primary consideration, but that a primary consideration cannot be conclusive in itself in deciding whether to exercise the discretion to refuse or to cancel a visa".[776] In *Aksu v Minister for Immigration and Multicultural Affairs* ('*Aksu*'), Dowsett J held that Direction No 17 overstepped its legal limits for the following reasons:

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[769] *Salahuddin v Minister for Immigration and Border Protection* (2013) 140 ALD 1, 7. The Court further observed at 7 that "a failure to do so exposes such a decision-making process to a perhaps well-justified perception on the part of a claimant that his decision has not been made in accordance with law".

[770] See *Howells v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 580 ('Howells'), 587–8.

[771] *Re SAAC v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 85 ALD 202, 220.

[772] *Milne v Minister for Immigration and Citizenship* (2010) 52 AAR 1, 15.

[773] *Howells* (2004) 139 FCR 580, 598.

[774] *Toro Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337, 346.

[775] *Aksu v Minister for Immigration and Multicultural Affairs* (2001) 65 ALD 667.

[776] Direction No 17 [2.2].

> Two primary considerations, protection and expectations will be present in almost all cases, militating in favour of refusal or cancellation of the visa. Where there are two primary considerations, and no other consideration can have more weight than either of them standing alone, an almost mathematical logic compels a decision which upholds those primary considerations. Further, as the primary considerations are really direct outcomes of the person's bad character, the effect is that once he or she fails the character test, there is virtually a prescription in favour of refusal or revocation of the visa. This is inconsistent with the unfettered discretion conferred by section 501.[777]

A number of not always consistent Federal Court cases ensued.[778] The Tribunal acknowledged the invalidity of part two but took it into account as it represented the government's policy.[779] The issue was put to rest with the Full Federal Court decision in *Howells v Minister for Immigration and Multicultural and Indigenous Affairs* ('*Howells*'), which upheld *Aksu*.[780] By the time *Howells* was decided, however, the Minister had revoked Direction No 17, replacing it with Direction No 21.

C 2 *(b) Direction No 21: An Unjust Direction*

Direction No 21 was lawful.[781] It was, however, condemned for being unjust. Direction No 21 required decision-makers to take into account the same three primary considerations as Direction No 17 when exercising the discretion to cancel a visa, namely the protection of the Australian community, the expectations of the Australian community and the best interests of children. It stipulated other considerations such as the extent of the disruption to the person's family, a genuine marriage to an Australian citizen or permanent resident, family composition, evidence of rehabilitation and previous Departmental warnings. Decision-makers were also required to consider Australia's international obligations under various treaties.

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[777] *Aksu v Minister for Immigration and Multicultural Affairs* (2001) 65 ALD 667, 674.

[778] See *Ruhl v Minister for Immigration and Multicultural Affairs* (2001) 184 ALR 401; *Javinollar v Minister for Immigration and Multicultural Affairs* (2001) 114 FCR 311; *Jahnke v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 268; *Andary v Minister for Immigration and Multicultural Affairs* [2001] FCA 1544. Aksu was not followed in *Turini v Minister for Immigration and Multicultural Affairs* [2001] FCA 822.

[779] *Re Shvarts v Minister for Immigration and Multicultural Affairs* [2001] AATA 840 (Unreported, Deputy President Handley) 8 October 2001 [54]: "to the extent that Part 2 represents the Government's policy with respect to the refusal or cancellation of visas, the Tribunal's view is that it should take into account such policy without fettering its discretion by giving pre-eminent weight to particular considerations". See also *Re Policarpio v Minister for Immigration and Multicultural Affairs* [2001] AATA 658 (Unreported, Deputy President Block) 19 July 2001.

[780] *Howells* (2004) 139 FCR 580: The Full Federal Court held at 598 as follows: "Insofar as Direction No 17 requires the decision-makers to give greater weight to the primary considerations, Direction No 17 fetters the discretion given to that decision maker".

[781] *Toro Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337, 357–8.

The Direction conspicuously omitted what were considered to be highly relevant factors, such as whether the person had arrived in Australia as a minor, had been absorbed into the Australian community and had familial, linguistic, cultural and educational ties to the country of citizenship.[782]

Direction No 41 effected a significant shift in government policy. It specified that the Tribunal had to consider whether the applicant arrived in Australia as a minor and the applicant's length of residence in Australia, thus recognising the applicant's personal ties to the Australian community. Direction No 55, as we shall see, also requires the Tribunal to consider the person's ties to the community.

C 2 *(c) Distinction Between Visa Applicants and Visa Holders under the Current Direction*

In terms of the application of primary and other considerations, the current Direction distinguishes between visa holders and visa applicants. In relation to visa holders, decision-makers must consider the protection of the Australian community from criminal or other serious conduct, the strength, duration and nature of the person's ties to Australia, the best interests of minor children and Australia's international non-refoulement obligations to the person. The position is different for visa applicants, whose ties to Australia need not be considered either under the primary or other considerations.

In contrast to previous Directions, the current Direction provides that "separating the considerations for visa holders and visa applicants recognises that persons holding a substantive visa will generally have an expectation that they will be permitted to remain in Australia for the duration of the visa, whereas a visa applicant should have no expectation that a visa application will be approved".[783] The demarcation of visa holders and applicants, however, is not simply about their expectations. As the Direction further provides:

> Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life or from a very young age. Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia.[784]

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[782] AHRC, *Background Paper: Immigration Detention and Visa Cancellation under Section 501 of the Migration Act* (Sydney, January 2009).

[783] Direction No 55 [8].

[784] Direction No 55 [6.3].

The Direction therefore expressly recognises the importance of social membership of the community, when exercising the discretion. I will argue, however, that this approach does not go far enough in protecting the right of people, who are effectively Australian, to remain in the community and that there should be a reversion to the use of a lawful residence rule. I also discuss the merits of drawing a distinction between visa applicants or holders in terms of the applicable considerations.

C 3 *Protection of the Australian Community*

Central to the exercise of power under section 501 is the protection of the Australian community. As Jacobson, Siopis and Murphy JJ observed, it lies "at its heart".[785] It is therefore unsurprising that the protection of the Australian community has been a primary consideration in all Directions. In considering the protection of the Australian community, decision-makers must take into account the seriousness and nature of the conduct and the likelihood that the conduct may be repeated.

Although some minor variations exist, in general, the Directions provide that violent or sexual offences are viewed "very seriously", particularly against vulnerable sectors of society such as children, the elderly and the disabled.[786] In determining the seriousness and nature of the conduct, the circumstances of the offence and the sentence imposed are critical considerations. In general, the Tribunal cannot impugn the conviction or the sentence, which underpins the exercise of the relevant power, in this case, section 501, or alternatively, the deportation power.[787] As recognised by the courts, there are important policy reasons for this restriction, namely "that the criminal justice system is pre-eminently suited to the determination of the guilt of persons charged with criminal offences" and it "limits inconsistency between decisions of the criminal courts and those of tribunals".[788] Subject to those restrictions, however, the Tribunal must make its own assessment of the person's conduct, "including the nature and seriousness of conduct which led to convictions and the significance of such conduct so far as the risk of recidivism is concerned".[789] The conduct in question is limited to "past conduct which is found to have actually occurred".[790] When considering whether to exercise the discretion under section 501, general conduct, even conduct in relation to which a person has been acquitted, may also

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[785] *Minister for Immigration and Citizenship v Makasa* (2012) 207 FCR 488, 496.

[786] See, for example, Direction No 55 [9.1.1].

[787] See, for example, *Minister for Immigration v SRT* (1999) 91 FCR 234; *Minister for Immigration and Multicultural Affairs v Ali* (2000) 62 ALD 673.

[788] *Minister for Immigration and Multicultural Affairs v Ali* (2000) 62 ALD 673 [43].

[789] Ibid [41]–[45].

[790] *Minister for Immigration and Citizenship v Makasa* (2012) 207 FCR 488, 498.

be considered, provided that the conduct is considered in the context of the protection of the Australian community.[791]

Unlike the current Direction, previous Directions specifically required decision-makers to take into account mitigating factors, where relevant.[792] In *Green v Minister for Immigration and Citizenship*, the applicant, who had lived in Australia from a young age and had, amongst other things, suffered domestic violence and drug addiction, argued that the Tribunal erred by considering the mitigating factors relating to only part of his conduct, namely his most serious offences. Tamberlin J agreed, holding that "when characterising the conduct as a whole and appraising the seriousness of that conduct in its totality, all mitigating circumstances advanced by the non-citizen which are relevant to the conduct must be considered".[793]

In cases of people convicted because of unsoundness of mind or insanity, the degree of recovery and the likely consequence of deliberately or accidentally not taking medication were to be considered.[794] Direction No 41 additionally required decision-makers to consider whether Australian residents "would have access to appropriate medication or treatment in the country to which they would be removed", the hardship faced, and potential danger he or she could represent, if treatment were not available.[795]

Decision-makers must consider the nature of the harm and the likelihood of the person further engaging in criminal or other serious conduct, including the risk of re-offending and rehabilitation.[796] In assessing the risk of recidivism, the Tribunal must take into account a range of factors and not simply the results of the psychological testing, if available.[797] The Tribunal is permitted to find that the risk of recidivism is "real, in the sense that it is not far-fetched or fanciful, yet the degree of probability of its occurrence is quantitatively low".[798] In certain circumstances, the Tribunal may not be prepared to take even a small risk, given "the extremely serious consequence to the Australian community".[799]

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[791] *Ngaronoa v Minister for Immigration and Citizenship* [2007] FCA 1565 [57] upheld in *Ngaronoa v Minister for Immigration and Citizenship* (2007) 244 ALR 119, 122.

[792] Direction No 17 [2.8(a)]; Direction No 21 [2.8]; Direction No 41 [10.1.1(4)].

[793] *Green v Minister for Immigration and Citizenship* (2008) 100 ALD 346, 351.

[794] Direction No 21 [2.9]; Direction No 41 [10.1.1(5)].

[795] Direction No 41 [10.1.1(5)].

[796] Direction No 55 [9.1.2].

[797] *Tirtabudi v Minister for Immigration and Citizenship* (2008) 101 ALD 103, 107.

[798] *Minister for Immigration, Local Government and Ethnic Affairs v Batey* (1993) 40 FCR 493, 501.

[799] *V324/2004 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 259 [44].

In contrast to previous directions, Direction No 41 and the current Direction do not specifically require decision-makers to consider general deterrence, in other words, the likelihood that visa cancellation or refusal would prevent similar offences by others.[800] Given that it is considered to be "a well-established principle of sentencing",[801] it nevertheless remains a relevant factor for consideration by the Tribunal.[802] I discuss the issue of general deterrence in greater detail below including whether general deterrence should be taken into account at all.[803] For the moment, I note that in general, the Tribunal found general deterrence difficult to apply primarily because it was difficult to measure or predict.[804] Deputy President Forgie observed that deterrence requires knowledge of the cancellation to become known and the behaviour of others to be altered as a consequence.[805] The Tribunal found that the media, friends, family, solicitors, migration agents, "ethnic grapevines" and the Department of Immigration itself could pass on information relating to visa cancellations.[806] The Tribunal also took other approaches to general deterrence, such as relying on its own knowledge or research, approaches which I assess in my later discussion of general deterrence.

In previous directions, whether a person received a previous warning was relevant to the likelihood of conduct being repeated and to other considerations.[807] Direction No 55 provides that a previous warning must be considered in the context of the nature and seriousness of the conduct, although "the absence of a warning should not be considered to be in the person's favour".[808] In *Minister for Immigration v Pareina*, the Federal Court held that "the evident object" was to ensure that decision-makers treated re-offending after a warning as a factor that aggravated the seriousness of the conduct but did not treat the absence of a warning as a

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[800] Direction No 17 [2.11] and Direction No 21 [2.5(c)]: Direction No 21 provided that although not conclusive, whether the visa refusal or cancellation prevented or discouraged similar conduct (general deterrence) was relevant to the assessment of the level of risk to the community.

[801] *Jagroop v Minister for Immigration and Border Protection* (2013) 139 ALD 536, 554.

[802] Ibid.

[803] *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1; *NBNB v Minister for Immigration and Border Protection* (2014) 220 FCR 44.

[804] *Re Fisher and Minister for Immigration and Multicultural and Indigenous Affairs* [2005] AATA 1013 (Unreported, Deputy President Walker) 13 October 2005 [53]; *Re Rajaratnam and Minister for Immigration and Multicultural Affairs* [2006] AATA 942 (Unreported, Deputy President Block) 3 November 2006.

[805] *Re Truong and Minister for Immigration and Multicultural and Indigenous Affairs* [2005] AATA 100 (Unreported, Deputy President Forgie) 3 February 2005 [106].

[806] *Re SAAC and Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 85 ALD 202, 217; *Re Barratini v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] AATA 157 [38].

[807] Direction No 17 [2.10(a)], [2.17(k)]; Direction No 21[2.10(b)], [2.17(k)].

[808] Direction No 55 [9.1.1(i)].

mitigating factor.[809] The Court held, however, that the Direction did not preclude decision-makers from taking the absence of a warning into account in considering other matters.[810]

In short, the protection of the Australian community raises important questions, which I will explore in due course.

C 4 *Best Interests of the Child*

Australia ratified the United Nations Convention on the Rights of the Child (the Convention) on 17 December 1990 and it entered into force for Australia on 16 January 1991.[811] Article 3 (1) provides:

> 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 a child shall be a primary consideration.

The impact of the Convention's ratification was considered in the highly significant High Court judgment of *Minister of State for Immigration and Ethnic Affairs v Teoh* ('*Teoh*'), from which the facts are taken.[812] Teoh, a Malaysian citizen, was married to an Australian citizen who had a serious drug addiction. In addition to their three children, Teoh's wife had four other children, three of whom were the children of Teoh's deceased brother.

While his application for a permanent entry permit was on foot, Teoh was convicted of importing and possessing heroin for which he was sentenced to six years' imprisonment with a non-parole period of two years and eight months. As a consequence, his residence application was refused on the basis that he was not of good character. In July 1991, which was after the Convention was ratified, the Departmental delegate accepted the recommendation of the Immigration Review Panel, which found that Teoh's application for reconsideration should be rejected, despite recognising that his family faced a "very bleak and difficult future" and they would be "deprived of a possible breadwinner as well as father and husband" if resident status was refused.[813] In 1992, another delegate ordered Teoh's deportation.

Teoh commenced legal action, which was successful in the Full Federal Court. The matter came before the High Court. By majority, the High Court held that although not incorporated into domestic law, the Convention nevertheless gave rise to a legitimate expectation that "absent

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[809] [2013] FCA 586 [15].
[810] [2013] FCA 586 [15].
[811] See *Minister for Immigration and Ethnic Affairs v Te*oh (1995) 183 CLR 273.
[812] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.
[813] Ibid.

statutory or executive indications to the contrary, the administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as a "primary consideration"".[814] Gaudron J held that it was the fact that the children were Australian citizens that was "significant".[815] The Convention merely gave expression to "a fundamental human right which is taken for granted by Australian society, in the sense that it is valued and respected here as in other civilized countries".[816] The Court held that neither the delegate nor the Panel had "regarded the children as a primary consideration" and dismissed the appeal.[817]

As a result of *Teoh*, the *Migration Act* was amended to enable the Minister to give directions "to guide decision-making under provisions of the Act including s 501".[818] As noted earlier, Direction No 17 was the first direction issued under the amended section of the *Migration Act*. It, and all subsequent Directions, required that the best interests of children be taken into account as a primary consideration.[819] Importantly, the best interests of children are a primary consideration and not the primary consideration. In other words, the best interests of children do not necessarily trump other primary considerations.[820]

C 4 *(a) Approach under the Current Direction*

Direction No 55 requires consideration of the "best interests of minor children in Australia affected by the decision".[821] As with previous Directions, it provides that the consideration applies to children who would be less than 18 years of age at the time the decision is made.[822] The interests of children over the age of 18 must be considered under other considerations.[823]

Owing to litigation, which is discussed below, Direction No 55, unlike its predecessors, specifically requires that decision-makers "make a determination about whether a cancellation is, or is not, in the best interests of the child".[824]

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[814] Ibid 291.

[815] Ibid 304.

[816] Ibid 305.

[817] Ibid 292.

[818] *Basile v Minister for Immigration and Citizenship* (2011) 193 FCR 329.

[819] Under Direction No 41, the best interests of children were subsumed under the broader category of international obligations.

[820] *Baker v Minister for Immigration and Citizenship* [2012] FCAFC 145 [56] quoting *Basile v Minister for Immigration and Citizenship* (2011) 193 FCR 329, [46].

[821] Direction No 55 [9.3].

[822] Direction No 21 [2.13]; Direction No 41 [10.4.1(1)]; Direction No 55 [9.3].

[823] Direction No 21 [2.13]; Direction No 41 [10.4.1(2)].

[824] Direction No 21 [2.14]; Direction No 41 [10.4.1(3)]; Direction No 55 [9.3(3)].

Direction No 55 sets out factors which must be considered, where relevant, including the following: the nature and the duration of the relationship between the child and the person; the extent to which the person is likely to play a positive parental role in the future; the impact of the person's prior conduct on the child; the likely effect of separation on the child; whether there are other persons already fulfilling a parental role; the child's known views, and evidence that the person abused or neglected the child or that the child suffered or experienced any physical or emotional trauma arising from the person's conduct.[825]

In contrast to the previous Direction, Direction No 55 no longer specifically directs the decision-maker's attention to consideration of the impact on the child of relocation to the probable country of future residence, including the educational facilities, standard of the health support system, language and cultural barriers.[826]

C 4 *(b) Scope of Application*

Each direction has progressively broadened the relationships to be considered under this consideration. Like its predecessor, Direction No 55 provides that the nature and duration of the relationship and the extent to which the person is likely to play a "positive parental role" up until the child's eighteenth birthday must be considered, where relevant.[827] It provides that "less weight should generally be given where the relationship is non parental and/or there is no existing relationship and/or there have been long periods of absence or limited meaningful contact (including whether an existing court order restricts contact)".[828] Factors indicative of a parental relationship include living in the same household, financial dependence and being involved in the making of important decisions concerning the child's upbringing and education.[829]

The identification of the class of children whose interests must be considered is important for several reasons. First, relationships which do not fall within the class of relationships specified are not considered to be a primary consideration. For example, the best interests of the unborn child may not be considered a primary consideration.[830] Their interests, however, may be

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[825] Direction No 41 [10.4.1(5)].

[826] Direction No 41 [10.4.1(5)].

[827] Direction No 55 [10.4.1(5)]; Direction No 41 [10.4.1(5)].

[828] Direction No 55 [10.4.1(4)].

[829] *Nassif v Minister for Immigration and Citizenship* [2007] FCA 197 [10]; see, for example, *Lam v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 445 at [57], where the Federal Court held that it was not possible to construe a close relationship as extending to an indirect relationship existing through third parties.

[830] See, for example, *Re Kalm and Minister for Immigration and Citizenship* [2013] AATA 87 (Unreported, Senior Member Fice) 21 February 2013.

considered under the rubric of "other considerations", which means that their interests may be accorded less weight. Secondly, as Lander J noted, when the Ministerial Direction identifies the children whose best interests must be assessed in the decision-making process, applicants cannot have a legitimate expectation that the best interests of any other child not within the class "would be the subject of an assessment by the decision-maker considering the application generally".[831]

C 4 *(c) The Task Required?*

The Federal Court articulated what was expected of decision-makers in two important cases. In *Vaitaiki v Minister for Immigration and Ethnic Affairs* ('*Vaitaiki*'), the applicant was convicted of sex offences for which he was imprisoned for more than three years.[832] The Tribunal found that the applicant's three older children from his previous marriage to an Australian citizen would remain in Australia while his three younger children from his current de facto relationship with an Australian citizen would accompany him to Tonga. The Tribunal found that the children's "return" to Tonga would only result in the hardship consequent upon a disparity in economic opportunities. Considering the position of the three older children initially, Burchett J held that the Tribunal's failure to consider the Convention or their citizenship led to the conclusion that "their interests were not treated as a primary consideration".[833] In relation to the three younger children, Burchett J held as follows:

> [The Tribunal's decision-making] leaves out of account that the children, as citizens, would be deprived of the country of their own and their mother's citizenship under our law, and of its protection and support, socially, culturally and medically, and in the many other ways evoked by, but not confined to, the broad concept of lifestyle. It ignores the social and linguistic disruption of their childhood, as well as the loss of their homeland. It ignores educational problems, to which reference had been made in the evidence. And it ignores the fact that these young children would not only be transported to a foreign environment, very different from that in which they have grown up thus far, but would also be isolated there from the normal contacts of children with their mother's family, who live in Sydney, and their father's mother and sisters, who also live here.[834]

In relation to the Tribunal's finding that the best interests of the applicant's younger children "would be served by remaining in Australia with their mother, should their father be deported", Branson J held that the Tribunal "reached this conclusion without, apparently, having regard to

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[831] *Lam v Minister for Immigration and Multicultural Affairs* [2006] FCA 445 [83].
[832] (1998) 150 ALR 608.
[833] Ibid 614.
[834] Ibid. Citations omitted.

the break-up of their family unit which would flow from their father's deportation, with consequential restrictions on their subsequent contact with their father and half-siblings and a likely diminution in their father's capacity to influence and guide them".[835] *Vaitaiki* was endorsed soon after in *Wan v Minister for Immigration and Multicultural Affairs* ('*Wan*'), a case involving two Australian citizen children.[836]

In these judgments, the decision-makers' task was set out. First, the Tribunal must identify what the "best interests of the children indicated that it should decide with respect [to the person's] application for a visa".[837] It is not enough, for example, to refer to the applicant's "family situation".[838] Secondly, the Tribunal must examine "the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it".[839] While the task may appear relatively simple, in practice a significant amount of litigation relating to both limbs of the task has occurred. Commonly, the Tribunal fails to "consider the possible impact upon the children of the range of events that may follow if the applicant's visa were cancelled".[840] It assumes, for example, that the children will accompany the parent to be removed, generally their mother, without having regard to the possibility that the remaining parent may seek contact orders, which in itself, prevents the removal of the children from Australia.[841] Alternatively, the Tribunal mistakenly asks how the children's interests would be adversely affected by a decision to refuse to grant the person a visa.[842] Only deciding whether the person's removal would have a "detrimental" effect on the children is an error of law.[843]

Recent cases have further complicated matters. It will be recalled that review of section 501 decisions by the Tribunal is subject to procedural rules designed to expedite decision-making by, amongst other things, ensuring that the Minister is not taken by surprise with new claims at the hearing.[844] Section 500(6H) provides that "the Tribunal must not have regard to any information presented orally in support of the person's case unless the information was set out

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[835] (1998) 150 ALR 608, 631.

[836] (2001) 107 FCR 133.

[837] Ibid 140.

[838] *Tauriki v Minister for Immigration and Citizenship* (2012) 135 ALD 51, 57.

[839] (2001) 107 FCR 133, 140 quoting *Minister for Immigration and Ethnic Affairs v Teoh* (1985) 183 CLR 273, 292.

[840] *Nguyen v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 757 [53].

[841] *Powell v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 717 [32]: As the Federal Court observed, "the mere issue of proceedings has the result that … the applicant could not take her children out of Australia".

[842] *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133, 141.

[843] *Long v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 76 ALD 610**,** 616; 620.

[844] *Goldie v Minister for Immigration and Multicultural Affairs* (2001) 111 FCR 378, 310.

in a written statement given to the Minister at least two business days before the Tribunal holds a hearing (other than a directions hearing) in relation to the decision under review". In *Uelese v Minister for Immigration and Citizenship*, it emerged during cross-examination that, in addition to his three known children, the applicant, who had lived in Australia for about 15 years, had two further children, who had visited the applicant in prison.[845] The Tribunal found that it could not take into account this information by operation of section 500(6H). It further found that the applicant presented a risk of harm to the Australian community which was unacceptable and which was not outweighed by the other considerations, including the interests of his three children.[846] In a joint judgment, the Full Federal Court held that "the AAT's failure to consider the best interests of the appellant's other two children did not constitute a denial of procedural fairness or a disappointment of the applicant's asserted legitimate expectation because the content of the appellant's procedural fairness entitlements (and the AAT's corresponding procedural fairness obligations) was necessarily affected by the statutory constraint imposed on the AAT by s 500(6H) of the Act".[847] Furthermore, contrary to the appellant's contention, there was "no irreconcilable contradiction between the AAT's statutory obligation imposed by s 499 of the Act to comply with Direction 55 (including its relevant mandatory requirements concerning children and their best interests) and the statutory constraint imposed on the AAT by s 500(6H)".[848] Of note, the Court held that the Tribunal's obligation to consider the best interests of minor children as a primary consideration was subject to "the procedural qualifications and constraints imposed by various provisions in s 500".[849]

A related issue was considered in *Paerau v Minister for Immigration and Border Protection*.[850] The applicant, who arrived in Australia in 1993 as a 14-year-old, failed to provide any statements or documents to the Minister before the hearing. At the hearing, he tried to tell the Tribunal about his relationships with his six children but the evidence was excluded as a result of section 500(6H). Little information about the children and their relationship with the applicant was contained on the file. The Tribunal made the following finding:

> Given the paucity of evidence, I cannot be satisfied about whether it is in the best interests of Mr Paerau's minor children for Mr Paerau to remain in Australia or whether it would be in their

[845] (2013) 60 AAR 534.
[846] Ibid 539.
[847] Ibid 543.
[848] Ibid 544–5.
[849] Ibid 545.
[850] (2014) 219 FCR 504.

> best interests for him to be removed to New Zealand. As such, this consideration does not weigh against cancellation and, at best, is neutral.[851]

A single judge of the Federal Court dismissed Paerau's judicial review application.[852] On appeal, Buchanan J acknowledged the line of cases which provided that the Tribunal had "an obligation to say what are the best interests of the children of a person facing deportation from Australia as a consequence of failing the character test" but noted that in those cases, "a finding on that question was reasonably open on the material before the AAT".[853] He endorsed an approach adopted by the court in an earlier case in which "each of the judges rejected the submission that an obligation to find facts left no room for a neutral outcome"[854] and held as follows:

> ... there could be no objection in any case to the AAT concluding that the best interests of a child did not weigh either for or against the cancellation of a visa so long as the available material was assessed conscientiously.[855]

Perry J also held that, "confronted with very limited information" the Tribunal lawfully decided that it was unable to make the determination.[856]

For the moment, I note that this developing line of authority is concerning, given the primacy accorded to the procedural rules and their impact on decision-making. These judgments raise important issues relating to the Tribunal's fact-finding obligations and the standard of Tribunal decision-making, which I discuss in the conclusion.

C 5 *International Non-Refoulement Obligations*

As a party to the Convention relating to the Status of Refugees ('Refugee Convention'),[857] the International Covenant on Civil and Political Rights ('ICCPR')[858] and the Convention against

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[851] *Re Paerau and Minister for Immigration and Citizenship* [2012] AATA 798 (Unreported, Senior Member Redfern) 15 November 2012 [61].

[852] *Paerau v Minister for Immigration and Border Protection* (2013) 138 ALD 83.

[853] (2014) 219 FCR 504, 510.

[854] *Jones v Minister for Immigration and Ethnic Affairs* (1995) 63 FCR 32.

[855] *Paerau* (2014) 219 FCR 504, 512.

[856] Ibid 527.

[857] *Convention Relating to the Status of Refugees* (opened for signature 28 July 1951) 189 UNTS 150 (entered into force 22 April 1954). Australia is also a party to the *Protocol Relating to the Status of Refugees* (opened for signature 31 January 1967) 606 UNTS 267 (entered into force 4 October 1967).

[858] *International Covenant on Civil and Political Rights* (opened for signature 16 December 1966) 999 UNTS 171 (entered into force 23 March 1976).

Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT'),[859] Australia is bound by the principle of non-refoulement, which means that Australia cannot refoule, in other words return people who may face a risk of harm, as set out in the relevant treaty. The Refugee Convention provides that Australia may exclude asylum seekers or expel refugees in certain circumstances.[860] In contrast, under the ICCPR and CAT, the non-refoulement obligations are absolute, in other words, "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 types of harms occurring".[861]

In 2012, the complementary protection regime was introduced, which was designed "to introduce greater efficiency, transparency and accountability into Australia's arrangements for adhering to its nonrefoulement obligations" under the various treaties.[862] If decision-makers find that a person is not a refugee, they must then decide whether Australia's non-refoulement obligations under the other abovementioned treaties are invoked. People found to be a refugee or owed complementary protection "may be granted a protection visa if all other visa requirements are met",[863] including public interest criterion 4001, which relates to character.[864] It is important to note, however, that the non-refoulement obligations not only apply in the context of protection visas.[865] For example, non-refoulement obligations may be owed to the holders of other types of visa, such as a partner or business visa. Persons without a visa in the migration zone become unlawful and are subject to detention, and ultimately, removal. The Minister, however, does have a "nondelegable, noncompellable public interest power" to grant a

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[859] *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (opened for signature10 December 1984) 1465 UNTS 85 (entered into force 26 June 1987).

[860] See, for example, Article 1F, Article 32 and Article 33(2).

[861] AHRC Background Paper 2013, above no 652, [4.3(b)].

[862] Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth), Outline. On 4 December 2012, the Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2014 was introduced in the House of Representatives. The Bill, which is currently before the Senate, "amends the Migration Act 1958 ('the Act') to remove the criterion for grant of a protection visa on "complementary protection" grounds …", giving "effect to the government's position that it is not appropriate for complementary protection to be considered as part of a protection visa application and that non-refoulement obligations are a matter for the government to attend to in other ways": Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth), Outline. In addition, the *Migration Act* was recently amended to provide that Australia's non-refoulement obligations are irrelevant to the removal of unlawful non-citizens (s 197C).

[863] Department of Immigration and Border Protection, *Complementary Protection Fact Sheet 61A* <http://www.immi.gov.au/media/fact-sheets/61a-complementary.htm>.

[864] Migration Regulations 1994, sch 4, cl 4001.

[865] See *Minister for Immigration and Citizenship v Anochie* (2012) 209 FCR 497 and *Re Liang and Minister for Immigration and Citizenship* (2013) 135 ALD 638.

detainee a Removal Pending Bridging Visa (RPBV).[866] The visa was introduced in 2005 "to enable the release pending removal of people in immigration detention who have been cooperating with efforts to remove them from Australia, but whose removal is not reasonably practicable at that time".[867] Holders of this type of visa must make themselves "available for removal from Australia", including regularly reporting to the Department.[868] Although entitled to work and to receive certain benefits including Medicare, the visa "does not allow for sponsorship of family members or provide any right of re-entry if the visa holder departs Australia".[869] In this section, I focus on decision-making obligations under the Directions relating to Australia's non-refoulement obligations.

All Directions required decision-makers to consider Australia's international obligations, although the approach to weight differed. Under Directions No 17 and No 21, international obligations, which were not limited to non-refoulement obligations, were treated as "other considerations".[870] Direction No 41 provided that relevant international obligations, including but not limited to the best interests of the child and non-refoulement obligations constituted a primary consideration.[871]

Before discussing Direction No 55, I first discuss an important judgment concerning Direction No 41, in which Perram J raises important questions relating to the interaction between the Direction and Australia's non-refoulement obligations and which undoubtedly shaped the approach taken to non-refoulement in Direction No 55. In *Minister for Immigration and Citizenship v Anochie* ('*Anochie*'), the visa of the applicant, a Nigerian citizen, was cancelled after he was sentenced to more than eight-years' imprisonment for importing cocaine.[872] The Tribunal accepted the applicant's argument that Australia was obliged not to remove him because he was at risk of "mistreatment in the Nigerian criminal justice system" and set aside the decision.[873] The Minister successfully appealed, arguing that the Tribunal "misdirected itself as to the correct test to be applied in cases of nonrefoulement".[874]

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[866] Department of Immigration and Border Protection, *Removal Pending Bridging Visa Fact Sheet No 85* <http://www.immi.gov.au/media/fact-sheets/85removalpending.htm>.

[867] Ibid.

[868] Ibid.

[869] Ibid.

[870] Direction No 17 [2.18]; Direction No 21 [2.17(a)]. For example, the extent of disruption to the non-citizen's family was an "other" consideration: [2.18].

[871] Direction no 41 [10.4.1].

[872] *Minister for Immigration and Citizenship v Anochie* (2012) 209 FCR 497.

[873] Ibid 499.

[874] Ibid 503.

At the outset, Perram J observed that decision-makers are bound by Direction No 41, a direction made under section 499 by the Minister, who was "empowered to give authoritative guidance on the approach to the Act's application provided always that the directions so given are not inconsistent with the Act itself".[875] The Direction constituted "a set of rules of general application, albeit operating within a confined zone of activity".[876] Noting that the Direction was "a species of delegated legislation", the Direction had to be interpreted "in accordance with the general principles relating to the interpretation of Acts of Parliament".[877] Perram J held that when international instruments are referred to in an enactment or delegated legislation, "[t]he first step is to ascertain, with precision, what the Australian law is, that is to say what and how much of an international instrument Australian law requires to be implemented".[878] The second step is "the construction of so much only of the instrument, and any qualifications or modifications of it, as Australian law requires".[879]

In undertaking the first step, Perram J observed that in Direction No 41 the general clauses provided that decision-makers were required, where relevant, to consider any non-refoulement obligation while the specific clauses appeared "to identify a non-refoulement obligation and, at the same time, specify what the content of that obligation [was]".[880] He noted that "implementation of the first step requires one to apply ordinary principles of Australian statutory interpretation to the specific clause, on the one hand, and the general clauses, on the other, to determine what recourse is to be had to the ICCPR".[881] After considering "the structural hierarchy" of Direction No 41, he held that the general clauses were the lead provisions while the specific clauses dealing with non-refoulement were the subordinate clauses on the basis that the specific clauses were "an attempt to restate in a helpful fashion the obligations identified in the general clauses".[882] Unfortunately, the specific clauses contained "a materially erroneous statement of the non-refoulement obligation", which was unlikely to foster the Commonwealth's compliance with its obligations.[883]

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[875] Ibid 504.

[876] Ibid.

[877] Ibid.

[878] Ibid 505.

[879] Ibid quoting *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52 at [61] per Callinan, Heydon and Crennan JJ.

[880] Ibid 502.

[881] Ibid 505.

[882] Ibid 506: Perram J applied *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

[883] Ibid: Perram J held, at 514, that the correct test differed from the test set out in the Direction.

He noted that the general clauses did not have "the effect of purporting to give the non-refoulement obligation in the ICCPR the force of domestic law".[884] Instead, they "command the decision-maker to consult, as a matter to be considered in the exercise of discretion, the content of any non-refoulement obligation to which Australia may be subject".[885] As a result, the general clauses required decision-makers "to ascertain what the Commonwealth's obligations under the ICCPR [were] in relation to non-refoulement, regardless of what the specific clause [said]".[886]

In relation to the second step, having had regard to various international materials, Perram J identified the correct test under public international law.[887] He held that the Tribunal applied another "more liberal" test.[888] Accordingly, "the Tribunal failed to take into account a relevant consideration, namely, the correct principles of international law".[889] Although in no way critical, he observed that the Tribunal "derived its approach to the Commonwealth's non-refoulement obligations from the text of the specific clause itself, rather than by any direct examination of international law".[890] Perram J's judgment serves as an important reminder that the Directions are "rules of law binding on all relevant decision-makers"[891] and, as such, must accurately state the law, particularly in relation to complex and critical matters such as Australia's non-refoulement obligations.

Direction No 55 attempts to avert the issue arising in *Anochie*. International non-refoulement obligations continue to be a primary consideration under the current Direction.[892] This time, however, the current Direction refers to particular provisions of the *Migration Act* and notes that they "reflect Australia's interpretation of these [non-refoulement] obligations and, where relevant, decision-makers should follow the tests enunciated in those provisions".[893]

Perram J raised another important issue in his judgment, which he ultimately decided was unnecessary to determine. He observed that it was "no accident" that the general clauses in Direction No 41 were not "a command" to implement Australia's non-refoulement

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[884] Ibid.

[885] Ibid.

[886] Ibid 507.

[887] Ibid 516: He held that "the correct test is whether deportation carries with it, as a necessary and foreseeable consequence a real risk of irreparable harm, such as is found in Arts 6 and 7 of the ICCPR".

[888] Ibid 503.

[889] Ibid 517.

[890] Ibid 503.

[891] Ibid 504.

[892] Direction No 55 [9.4(1)].

[893] Direction No 55 [9.4(3)].

obligations.[894] He explained that if the Direction commanded the decision-maker to give effect to a non-refoulement obligation, "it would very likely be *ultra vires* s 501(2)".[895] Such a requirement would be inconsistent with the discretion in section 501(2) and therefore would "be inconsistent with the terms of the Act and would not be authorised by s 499".[896] Direction No 41 and the previous Directions did in fact provide that the non-refoulement prohibition was "absolute" and that there was "no balancing of other factors if refusal or cancellation would amount to refoulement under the CAT or ICCPR".[897] Again, Direction No 55 takes a different approach, providing that the existence of a non-refoulement obligation does not preclude cancellation of a person's visa:

> This is because Australia will not necessarily remove a person as a consequence of the cancellation of their visa to the country in respect of which the non-refoulement obligations exists. However, any non-refoulement obligation should be weighed carefully against the seriousness of the person's criminal offending or other serious conduct in deciding whether or not the person should continue to hold a visa.[898]

In *Re BHFC and Minister for Immigration and Border Protection* ('*Re BHFC*'), a case decided under Direction No 55, the applicant, an Iranian refugee, had lived in Australia for 22 years of which 15 years were served in prison. It was accepted by the parties and the Tribunal that the applicant was owed non-refoulement obligations and that the Minister had "no statutory power to remove the applicant from Australian to any country where the applicant would have a well-founded fear of persecution for grounds recognised in the Refugees Convention".[899] It was argued before the Tribunal that if the decision were affirmed three options were available, namely the applicant would be granted a RPBV, the applicant would be deported to a third country or the applicant would remain in immigration detention.[900] The Tribunal found that given the applicant's criminal record, it would be unlikely that the Minister would be able to find a third country but was unable on the evidence to determine which of the remaining two options were more likely to apply in the particular case.[901] The Tribunal further observed that

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[894] Ibid 506.

[895] Ibid 507.

[896] Ibid.

[897] Direction No 41 [10.4.3(c)]; Direction No 21 [2.21]; see also Direction No 17 [2.20] which is in similar terms in relation to CAT.

[898] Direction No 55 [9.4(2)].

[899] *Re BHFC and Minister for Immigration and Citizenship* [2013] AAT 166 (Unreported, Deputy President Jarvis) 25 March 2013 [43] citing *MZYYO v Minister for Immigration and Citizenship* (2013) 214 FCR 68.

[900] Ibid [44].

[901] Ibid [45].

following *MZYYO v Minister for Immigration and Citizenship*, "a decision to refuse a protection visa on character grounds does not amount, in itself, to a decision to remove the applicant from Australia, because at any time prior to removal, it would be open to the Minister to exercise his power under section 195A of the Act to grant the applicant a visa of a particular class, if satisfied that it was in the public interest to do so".[902] Although the Tribunal affirmed the decision, Deputy President Jarvis's decision highlights the difficulties for decision-makers in applying this consideration under Direction No 55. Besanko J dismissed BHFC's judicial review application, holding that the Tribunal "appropriately" considered section 501, Australia's non-refoulement obligations and the effects of the decision under section 501.[903] Although his appeal was dismissed by the Full Federal Court,[904] Marshall and Perry JJ observed that the applicant found himself "in an extremely unfortunate situation".[905] They noted that "had he committed his crimes as an Australian citizen, he would have been released from prison after completing his sentence", rather than being held in immigration detention.[906]

Two recent judgments of the Full Federal Court considered how the Minister should take into account Australia's non-refoulement obligations in the section 501 context, which bring into question Direction No 55's approach to non-refoulement and the approach taken in BHFC's case. The facts are taken from Buchanan J's judgment. In *NBMZ v Minister for Immigration and Border Protection* ('*NBMZ*'), the applicant, an Iranian citizen, arrived on Christmas Island in 2011.[907] While in detention, his mental health declined and he attempted suicide. Shortly after his discharge from hospital and his return to immigration detention, he overturned several pool and tennis tables, knocked over two fridges and damaged electrical goods. After pleading guilty, he was convicted of intentionally damaging property belonging to the Commonwealth and was sentenced to be of good behaviour for 18 months with a recognisance of $1000 and ordered to pay reparations. He was permitted to apply for a protection visa and was eventually released into community detention. In 2013, although found to be a refugee, his protection visa application was nevertheless refused by the Minister on the basis that he did not pass the character test under section 501(6)(aa) of the *Migration Act*.

Buchanan J reviewed the *Migration Act* and relevant case law. He cited Hayne J in *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship*, who had said that

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[902] Ibid.
[903] [2013] FCA 1049 [43].
[904] [2014] FCAFC 25.
[905] Ibid [15].
[906] Ibid [15].
[907] (2014) 220 FCR 1.

the *Migration Act* has a "binary structure", dividing non-citizens into lawful non-citizens and unlawful non-citizens:[908]

> No provision of the Act countenances any middle ground between being a lawful non-citizen (who is entitled to remain in Australia in accordance with any applicable visa requirements) and being an unlawful non-citizen (who may, and who usually must, be detained and who, assuming no other relevant provision or procedure under the Act remains unperformed, must be removed from Australia as soon as reasonably practicable).[909]

He refused to accept the Minister's submission that the case "should be approached by reference to the possibility (perhaps the assumption) that at some time in the future (but who knows when) the executive government might favour the applicant with the exercise of discretion which might in some way ameliorate his position".[910] Buchanan J held that the applicant was in "legal limbo, caught between an obligation upon the executive government to achieve his removal from Australia and his continuing and indefinite detention until, at some indeterminate point in the future, if at all, that can be achieved".[911] While acknowledging that the applicant was actually in community detention, which "was no doubt less oppressive", he noted that it had no effect on the applicant's "legal status, his liability to be removed from Australia as soon as reasonably practicable or the requirement under the Act that he be detained while that is accomplished".[912] He held that the Minister erred in proceeding on the basis that the applicant was permitted to remain because of the practical difficulties of removing him, when in fact he was not permitted to remain.[913] The Minister either "gave no thought to, or alternatively regarded as irrelevant or not significant, that the applicant would, as both a legal or practical consequence of the decision, face the prospect of indefinite detention if a visa was refused", thereby constituting another reason to set aside the Minister's decision.[914] Furthermore, the Minister erred by failing to take into account that the applicant was "a refugee in respect of whom Australia had voluntarily accepted protection obligations".[915] Allsop CJ and Katzmann J

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[908] Ibid 23 quoting *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 88 ALR 324 [116].

[909] Ibid quoting *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 88 ALR 324 [118].

[910] Ibid 25.

[911] Ibid.

[912] Ibid 25.

[913] Ibid 37.

[914] Ibid 39.

[915] Ibid 40.

concurred with Buchanan J and, for similar reasons, *NBNB v Minister for Immigration and Border Protection* ('*NBNB*') was also remitted.[916]

In summary, it is thus apparent that the manner in which Australia's non-refoulement obligations are dealt with when exercising the discretion under section 501 is not satisfactory. Australia is bound by non-refoulement obligations under various international treaties. In *Anochie*, Perram J held that Direction No 41 misstated Australia's non-refoulement obligations. More significantly, Perram J held that, under the current state of the law, the Directions cannot require decision-makers to do anything more than have regard to these non-refoulement obligations. In addition to highlighting the need to correctly state the law in the Directions, Perram J's judgment underscores the critical importance of clarifying the relationship between section 501 and Australia's non-refoulement obligations.

The current Direction provides that the existence of a non-refoulement obligation does not preclude refusal or cancellation of a person's visa because the decision to refuse or cancel visa does not equate with removal. In my view, however, this is not a satisfactory solution. As highlighted by Buchanan J in *NBMZ*, under the *Migration Act* a person is either lawful or unlawful. It is one or the other, with all the attendant consequences. For unlawful non-citizens, it generally means indefinite detention, unless the person is granted a RPBV. If granted such a visa, however, the person continues to remain liable for removal at any time. It is these consequences, which the Full Federal Court found must be considered when exercising the discretion pursuant to section 501. It is important to remember, however, that it is a duty to consider only. It does not prevent the Minister or decision-makers from deciding to refuse or cancel the visa, thereby enabling indefinite detention. From a legal and moral perspective, however, indefinite detention does not appropriately solve the current uncertainty as to how Australia's non-refoulement obligations and section 501 interact.[917] Clearly, the interaction needs urgent review.

C 6 *Expectations of the Australian Community*

Previous directions provided that a primary consideration was the expectations of the Australian community, which stated that the community expected non-citizens to obey the law in

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[916] Ibid 48.

[917] *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 312 ALR 537; see also Joyce Chia, 'High Court Verdict spells the end for Australian Immigration Detention as we know it', *The Guardian* (online) 11 September 2014 <http://www.theguardian.com/commentisfree/2014/sep/11/high-court-verdict-spells-the-end-for-australian-immigration-detention-as-we-know-it>.

Australia.[918] These Directions provided that "visa refusal or cancellation and removal of the non-citizen may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person would not be granted a visa or should be removed from Australia".[919]

In applying this consideration, the Tribunal could take a "quantitative or evidential" approach, for example, by considering affidavits from interested people, such as church ministers or other interested members of the community.[920] If such an approach was taken, however, procedural fairness generally required the decision-maker to put the evidence to the applicant.[921] Alternatively, the Tribunal could bring to bear its "own knowledge and experience" in making a judgment about the character of the offences and the Government's view of community expectations relating to the appropriateness of the offender being removed.[922] In taking this approach, the Tribunal developed certain principles. The expectations of the community were considered from the perspective of the "middle-of-the-road reasonable members of the Australian community who do not hold extreme views one way or another.[923] The Tribunal further found that the expectations of the community imported knowledge of all the evidence.[924] As one Tribunal member noted:

> If told only and concisely that a person incarcerated for armed robbery was seeking to come to live in Australia, there might well be a general view that this should not be allowed. On one facile view, these are the facts of the case. They entirely ignore the fact that the event happened nearly 20 years ago, since which time there has been a complete rehabilitation transforming a young drug-addicted person into a responsible family man.[925]

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[918] Direction No 21 [2.12].

[919] Direction No 21 [2.12].

[920] *M238/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 260 [59] and [39].

[921] Ibid.

[922] *Bukvic v Minister for Immigration and Multicultural Affairs* (2011) 110 FCR 554.

[923] *Re Jupp and Minister for Immigration and Multicultural and Indigenous Affairs* [2002] AATA 458 (Unreported, Deputy President Block) 14 June 2002 [m]; see also *Re Afoa and Minister for Immigration and Citizenship* [1999] AATA 82 (Unreported, Deputy President Forrest) 12 September 1999, where the Tribunal observed the following: "Community expectation will of course mean different things to different people. I think the phrase 'community expectation' is meant to reflect the view of the community as represented by the objective bystander. It is not an assessment reflecting his or her social or personal values simply in response to the question, Do you think non-citizens who commit serious crimes of violence should be deported? but instead requires a dispassionate response when all of the relevant facts and circumstances have been examined".

[924] Ibid.

[925] Ibid.

The Tribunal frequently observed that it was expected "on all sides in Australia that migration must be conducted in a legally regulated manner".[926] However, there was the expectation that migration law would also be administered "fairly and humanely".[927]

In assessing the expectations of the community, relevant factors included the applicant's length of residence in Australia,[928] successful treatment of a mental disorder,[929] achievement of rehabilitation [930] and enjoyment of a "strongly supportive environment".[931]

While not listed as a primary or other consideration in the current Direction, it may still be considered relevant by the decision-maker.[932] In Chapter nine, I will argue that this consideration is highly problematic and should not be a consideration.

C 7 *The Effect of Cancellation/Refusal on Family and Other Ties in Australia*

The previous Directions provided that decision-makers were required to consider a genuine marriage or de facto or interdependent relationship, although the Directions noted that it was the Government's view that these considerations generally be accorded less individual weight than the primary considerations.[933] The Directions further required decision-makers to consider "the circumstances under which the relationship was established and whether the Australian partner knew that the non-citizen was of character concern at the time of entering into or establishing the relationship".[934] Direction No 41 provided that decision-makers were required to consider "the degree to which the partner is financially, physically or psychologically dependent on the non citizen".[935]

The Directions also required decision-makers to consider the extent of disruption to the non-citizen's family, business and other ties to the Australian community and the "degree of

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[926] *Re Lavea v Minister for Immigration and Citizenship* (2008) 104 ALD 684, 698; *Re Zhou and Minister for Immigration and Citizenship* (2007) 46 AAR 543 [90]–[99]; *Re Rauhina and Minister for Immigration and Citzenship* [2007] AATA 1359 (Unreported, Deputy President Walker) 25 May 2007 [77].

[927] *Re Leha and Minister for Immigration and Multicultural Affairs* [2000] AATA 1054 (Unreported, Deputy President McMahon) 29 November 2000; *Re Lesuma and Minister for Immigration and Citizenship* [2007] AATA 1731 (Unreported, Deputy President Walker) 4 September 2007 [72].

[928] *Re Can So Phung and Minister for Immigration and Citizenship* (2007) 96 ALD 151.

[929] *Re Lavea and Minister for Immigration and Citizenship* (2008) 104 ALD 684, 698.

[930] *Re Rauhina and Minister for Immigration and Citizenship* [2007] AATA 1359 (Unreported, Deputy President Walker) 25 May 2007 [78].

[931] *Re Lavea and Minister for Immigration and Citizenship* (2008) 104 ALD 684, 698.

[932] Nor was it listed as a primary or secondary consideration in Direction No 41.

[933] Direction No 17 [2.17(b)]; Direction No 21 [2.17(b)]; Direction No 41 [11(3)(a)(ii)].

[934] Direction No 17 [2.17(b)]; Direction No 21 [2.17(b)]; Direction No 41 [11(3)(a)(ii)].

[935] Direction No 41 [11(3)(a)(ii)(A)].

hardship" caused to immediate family members in Australia, including the nature of the relationship and whether those family members are able to travel overseas. Whether immediate family members were dependent on the person was also relevant.[936]

In contrast, Direction No 55 does not specifically require decision-makers to consider partner relationships. Like previous directions, however, it does require decision-makers to consider "the effect of cancellation of the person's visa on the person's immediate family in Australia, if those family members are Australian citizens, permanent residents or people who have a right to remain in Australia indefinitely".[937] In chapter nine, I discuss whether the approach taken towards family members, including whether they ought to be treated as a primary consideration, is appropriate, particularly given that they may be members of the Australian community.

C 8 *Hardship to the Person*

Previous directions did not require decision-makers to consider the effect of removal on the person. Direction No 41 marked a substantial shift in approach, with the introduction of two additional primary considerations, which specifically required decision-makers to consider the effect of removal on the person. First, the Direction provided that a primary consideration was "whether the person was a minor when they began living in Australia".[938] The Direction provided as follows:

> If the person was a minor when they began living in Australia and spent their formative years in Australia, thereby increasing the likelihood of establishment of greater ties and linkages to the Australian community, this is to be given favourable consideration.[939]

If, however, the person was close to "attaining adulthood" when he or she began living in Australia, less weight was to be accorded.[940] Secondly, the Direction provided that the length of time the person was ordinarily resident in Australia prior to engaging in criminal activity or other relevant conduct was a primary consideration.[941] The Direction provided as follows:

> Reflecting the fact that the longer a period of residence in Australia the greater the likelihood of significant ties to the Australian community, more favourable consideration is to be given the

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[936] Direction No 17 [2.17(a),(c)]; Direction No 21 [2.17(a),(c)]; Direction No 41 [11(3)(a)(ii)].
[937] Direction No 10 [(1)(a)].
[938] Direction No 41 [10.2].
[939] Direction No 41 [10.2(1)].
[940] Direction No 41 [10.2(2)].
[941] Direction No 41 [10.3(1)].

> longer the person has been ordinarily resident in Australia prior to engaging in criminal activity or activity that bears negatively on their character.[942]

Interestingly, the Direction further provided that more than 10 years of residence in Australia prior to engaging in criminal or other conduct would be an important consideration.[943]

Under the rubric of "other considerations", Direction No 41 provided that a host of factors relating to the impact of removal from the perspective of the person to be removed were to be considered, including the person's age, health, links to the country to which he or she would be removed, hardship likely to be experienced by the person or immediate family members, including their ability to acquire language skills and capacity to obtain support and the person's level of education.[944] Of note, when considering the person's health, decision-makers were directed that they should obtain from appropriately qualified professionals information which outlined the nature and extent of the health condition and its effect on the person, care or assistance required and access to medication and treatment, if removed.[945]

Direction No 55 also provides that "the strength, duration and nature of the person's ties", including family, social and employment links, to Australia is a primary consideration.[946] Like Direction No 41, it requires consideration of how long the person has lived in Australia and whether the person arrived as a young child. The extent of impediments, if removed to his or her home country, in establishing himself or herself and maintaining basic living standards, having regard to his or her age, health, any substantial language or cultural barriers, social, medical and economic support must also be considered under other considerations.[947] In due course, I argue that the hardship to the person being removed should be considered a primary consideration.

C 9 *Conclusion in Relation to the Directions*

As Davis and others argue, it is important to have the "right mix" of discretion and rules. The lack of discretion may stifle individual justice while the lack of rules may produce inconsistent and unfair results. In the section 501 context, the Directions effectively structure what is an extraordinarily wide power, providing certainty and clarity and promoting consistency not just between primary decision-makers but also the primary decision-makers and the Tribunal. For these reasons, the use of Directions to structure the exercise of discretion in section 501 should

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[942] Direction No 41 [10.3(1)].
[943] Direction No 41 [10.3(1)].
[944] Direction No 41 [11].
[945] Direction No 41 [11(3)(c)].
[946] Direction No 55 [9.2].
[947] Direction No 55 [10(d)].

continue. The Directions, however, must be neither unlawful nor unfair. As the courts clearly indicated, the Directions cannot unlawfully fetter Tribunal independence. Given the level of detail specified in the Directions, however, is there sufficient room for the Tribunal to come to the preferable decision, a question to which I turn in the next chapter? Assuming for the time being that the Directions do influence Tribunal decision-making, I then address the thornier question of what constitutes fair and just Directions. Informed by my discussion of membership of the community in chapter seven, I eventually argue in chapter nine that certain considerations ought to always be a primary consideration while others ought never constitute a consideration, primary or otherwise.

CHAPTER VI

TRIBUNAL DECISION-MAKING

A *Introduction*

In this chapter, I consider three core aspects of Tribunal decision-making in this area of law, namely its independence and the process and quality of its decision-making. In the first part, following a review of Tribunal files over a five-year period, I examine the effect of Direction No 21 on Tribunal decision-making in order to assess its independence. Bearing in mind the factors, which may impact upon an assessment of its independence, I nevertheless conclude that the Tribunal retains independence of thought. Although its independence is laudable, it raises wider questions relating to the role of the Tribunal in the broader system, which I address in chapter nine.

In the second part, I explore the Tribunal's ability to afford procedural fairness throughout the section 501 merits review process. I argue that while the Tribunal is required to provide procedural fairness, its ability to do so is hampered by systemic factors as well as the procedural rules governing the section 501 review process. To ensure that applicants are able to effectively participate in the review process, changes, which are discussed in chapter nine, are required. The suggested reforms are designed to improve the prospect of more accurate outcomes and to promote fairer treatment of applicants.

Finally, in the third part, I discuss my observations of Tribunal fact-finding based on my file review. In short, I observed that the Tribunal relied upon poor quality material relating to applicants and other contentious sources, which raises further questions about the quality and impartiality of Tribunal decision-making. While the file review was based on decision-making from 2003 to 2008 and two further Directions have been issued since it was conducted, I believe that the observations remain pertinent and are worthy of further research in the future.

B *Tribunal Independence*

As I noted in chapter three, the Tribunal was set up to provide independent, merits review of primary decision-making. The Tribunal, however, has a different and perhaps, more serious, problem. In the closely related section 501 and criminal deportation jurisdictions, there is a longstanding view that the Tribunal acts too independently because it fails to follow government policies relating to the removal of non-citizens.

Since its inception, the Tribunal has reviewed deportation decisions, although, until 1992, the Tribunal only had the power to make recommendations.[948] The otherwise "harmonious"[949] relationship between the government and the Tribunal was disturbed when the Tribunal began to "reach a different conclusion" from the Department or the Minister.[950] In 1988 for example, Senator Ray, the then Minister for Immigration, issued a statement criticising the Tribunal's decision-making on the basis that the Tribunal gave insufficient weight to people's criminal history and too much weight to their potential difficulties upon return to the country of origin.[951] Senator Ray was not the only Minister concerned about the Tribunal's decision-making. Mr Ruddock was so troubled by the Tribunal's decisions, particularly following the cases of *Jia* [952] and *Ram*,[953] that he launched a parliamentary inquiry into criminal deportation,[954] criticised the Tribunal in the media [955] and personally wrote to the then President of the Tribunal to express his dissatisfaction with the small but significant "number of recent decisions made by the AAT, allowing convicted offenders to remain in Australia".[956] The Minister periodically exercised his personal powers to overcome the effect of a Tribunal decision.[957] Concern with Tribunal decision-making continues. Following a number of controversial Tribunal decisions, the current Minister for Immigration is personally deciding all section 501 cases, thus excluding Tribunal review.[958]

Dissatisfaction with the Tribunal's track record in this jurisdiction is not limited to the Minister and the Department of Immigration. Victims, families of victims, and organisations, such as the Police Force Association, have also expressed strong views about Tribunal decisions allowing

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[948] Joint Standing Committee on Migration, *Deportation of Non-Citizen Criminals*, Parliament of the Commonwealth of Australia, June 1998 [3.1].

[949] Mary Crock, *Immigration and Refugee Law in Australia* (The Federation Press, 1998), 235.

[950] Joint Standing Committee on Migration, above n 948, [3.1].

[951] Margaret Allars, 'Human Rights, UKASES and Merits Review Tribunals: The Impact of *Teoh's* Case on the Administrative Appeals Tribunal in Australia' in Michael Harris and Martin Partington (eds), *Administrative Justice in the 21st Century* (Hart Publishing, 1999), 344.

[952] *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507.

[953] *Department of Immigration and Ethnic Affairs v Ram* (1996) 69 FCR 431.

[954] Joint Standing Committee on Migration, above n 948.

[955] *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 [215]: the Minister's comments on the radio included the following: "I'm very unhappy about the way in which the Administrative Appeals Tribunal has been dealing with numbers of matters involving the Immigration Department, in the way in which these discretions have been exercised by members of the Tribunal".

[956] Ibid [217].

[957] See, for example, *Minister for Immigration and Multicultural Affairs v Gunner* (1998) 84 FCR 400.

[958] See, for example, Jessica Marszalek, 'Immigration Minister Scott Morrison to Personally Decide Visa Cancellations' (*Herald Sun*), 13 January 2014 <http://www.heraldsun.com.au/news/victoria/immigration-minister-scott-morrison-to-personally-decide-visa-cancellations/story-fni0fit3-1226800975967 >.

convicted criminals to remain in Australia. For example, as discussed in chapter one, in *Taufahema v Minister for Immigration and Citizenship*,[959] which involved the manslaughter of a police officer, following the Tribunal decision to set aside the decision to cancel the applicant's visa, the NSW Police Commissioner and the Police Association of NSW wrote to the Minister. The NSW Police Commissioner said:

> On behalf of all police officers in NSW we would ask [the Federal Government] to do everything within their power to make sure that this guy does not become or remain an Australian citizen. He's not a good character. He doesn't deserve to stay here.[960]

Community concerns relate to two particular issues: first, it is contended that the Tribunal acts irresponsibly by setting aside the Department's decision and allowing the person to remain. In *Re Pemberton and Minister for Immigration and Citizenship*, for example, Amanda Pemberton, a 17-year-old New Zealander, participated in the torture and murder of a school girl.[961] The Tribunal's decision to allow her to remain created a backlash. The victim's mother said:

> I think she should be sent back to where she came from. Anyone who commits murder, doesn't matter where they come from, should never be allowed back into Australia.[962]

Secondly, having set aside the decision, the Tribunal is criticised when the person re-offends. For example, in the case of *Re JSFD and Minister for Immigration and Citizenship*,[963] the *Herald Sun* noted that "there was widespread public outrage", when it revealed that the applicant had re-offended "just weeks after the federal Administrative Appeals Tribunal ruled he [could] not be deported".[964] In relation to the same case, the *Herald Sun* editorial observed:

> This young man has an appalling history of violence and disrespect for Australian law. We can well and truly do without him. A Federal Government agency, the AAT is supposed to provide fair and just reviews of administrative decisions. This one seems quite wrong.[965]

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[959] *Taufahema v Minister for Immigration and Citizenship* [2009] AATA 898 (Unreported, Deputy President Handley) 23 November 2009.

[960] 'Police Want Cop Killer Motekiai Taufahema Deported from Australia', *The Herald Sun* (online) 9 April 2010 < http://www.news.com.au/breaking-news/police-want-cop-killer-motekiai-taufahema-deported-from-australia/story-e6frfku0-1225851848721>.

[961] (2009) 111 ALD 483.

[962] S Hewitt Renato Castello, 'Teen Killer Allowed to Stay', *Sunday Mail* (online) 27 September 2009 <http://www.adelaidenow.com.au/news/south-australia/teen-killer-allowed-to-stay/story-e6frea83-1225779993722>.

[963] (2009) 111 ALD 685.

[964] M Buttler, 'Teenage Thug on the Loose', *Herald Sun* (online) 1 February 2010 <http://www.heraldsun.com.au/news/victoria/teenage-thug-on-loose/story-e6frf7kx-1225825263970>.

[965] *Herald Sun* (Melbourne) 23 November 2009, 24.

Given this context, it is not surprising that Ministers have turned to directions to influence Tribunal decision-making.

B 1 *The Effect of the Directions on Tribunal Independence*

I reviewed all section 501 cases heard and determined by the Tribunal over a five-year period.[966] The then current Direction clearly channelled Tribunal decision-making. Although the Tribunal is required to consider all relevant considerations, the file review indicates a correlation between the considerations specified in the Direction and the factors considered by the Tribunal. Furthermore, factors, which were not specified in the Direction were generally omitted from the decisions. During the relevant time period, 38% of decisions were set aside, although no conclusion can be drawn from the set aside rate. It is possible to argue, however, that the fact that the Tribunal sets aside a significant number of cases supports the conclusion that it acts independently. Alternatively, it could also be argued that were it not for the Direction, perhaps the set aside rate would be much higher.

The Direction appeared to strongly influence Tribunal decision-making in one particular group of cases, namely cases where the crime was particularly violent or reprehensible. The crimes falling into this category include murder and attempted murder, particularly of vulnerable people, incest and child abuse. The general community would consider these crimes "vilely, inexcusably wrong".[967] Direction No 21 commanded the Tribunal to consider the crime in two of the three primary considerations. In considering the protection of the Australian community, the first primary consideration, the Tribunal was required to consider the seriousness and the nature of the crime. In the Direction's hierarchy of crimes, "murder, manslaughter, assault or any other form of violence against persons" was considered "very serious". Sexual assaults in general, and specifically against children, were "particularly repugnant". In relation to the expectations of the community, the second primary consideration, the Direction stated as follows:

> Visa refusal or cancellation and removal of the non-citizen may be appropriate simply because the nature of the character concerns or offences are such that that [sic] the Australian community

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[966] I reviewed all section 501 cases heard and determined by the Tribunal between July 2003 and July 2008, of which there were 146. I presented the findings of my research at the Australian Institute of Administrative Law Forum in 2011, which were subsequently published (see 'The Effect of Ministerial Directions on Tribunal Independence' (2011) 66 *AIAL Forum* 33 and 'The Effect of Ministerial Directions on Tribunal Independence' (2011) 18(3) *Australian Journal of Administrative Law* 161) My co-presenter at the AIAL Forum, Yee-Fui Ng subsequently considered similar issues but ultimately came to a different conclusion: see Yee-Fui Ng, 'Tribunal Independence in an Age of Migration Control' (2012) 19 *Australian Journal of Administrative Law* 203.

[967] Elizabeth Farrelly, 'Something Rotten in our Sterile World' *Sydney Morning Herald* (Spectrum) 29–30 May 2010, 12.

> would expect that the person would not be granted a visa or should be removed from Australia.[968]

In these types of cases, the decision was almost always affirmed by the Tribunal.[969] In *Re Tumanako v Minister for Immigration and Multicultural Affairs* (‘*Re Tumanako*’), for example, the applicant went to meet his former de facto wife at their daughter’s kindergarten.[970] When he saw that she was accompanied by another man, he stabbed her to death, in front of their daughter. In considering the protection of the community, the Tribunal found that the crime was “very serious”, the applicant’s risk of re-offending was low to moderate and that general deterrence weighed “against disturbing the reviewable decision”.[971] The community expectations also favoured visa cancellation, given the nature of the crime and the risk of recidivism. The Tribunal affirmed the decision on the basis that the protection and expectations of the community outweighed all other factors, which included 14 years of lawful residence in Australia prior to the commission of the crime and his extensive and remaining family in Australia.

One of the rare cases to buck the trend was *Re Holland and Minister for Immigration and Citizenship* (‘ *Re Holland*’), which involved a man who had persistently sexually assaulted his daughter and grandchildren, crimes described by the Tribunal as “revolting” and “wicked”.[972] The applicant, a 74-year-old UK national, was married to a 73-year-old Australian citizen. The applicant had type 2 insulin-dependent diabetes, emphysema, ischaemic heart disease and stabilised angina while his wife was in remission from cancer and had had a heart attack. Despite the nature of the crimes, the Tribunal set aside the decision. In an oral decision, the Tribunal explained the reasons for its decision as follows:

> Your relationship with your wife over a 54-year period; the fact that three of your children support you staying in Australia and are prepared to provide you with financial support to have ongoing treatment; your own attitude that you would not go to your children’s houses unless

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[968] Direction No 21 — Visa Refusal and Cancellation under Section 501 of the Migration Act 1958 (23 August 2001) (‘*Direction No 21*’) [2.12].

[969] Oral decisions: *Re Middleton v Minister for Immigration and Multicultural and Indigenous Affairs* (W2004/61)12 May 2004 (murdered his wife); *Re Norman Hogermeer v Minister for Immigration and Multicultural Affairs* (W2006/27) 24 April 2006 (incest); *Re Rocky Hogermeer v Minister for Immigration and Multicultural Affairs* (W2004/477) 2 March 2005 (incest); *Re Iordanishvili v Minister for Immigration and Multicultural and Indigenous Affairs* (V2004/1106) 9 December 2004 (attempted murder of his wife); *Re Anderson v Minister for Immigration and Citizenship* (N2008/2300) 15 July 2008 (murdered his wife).

[970] [2006] AATA 848 (Unreported, Deputy President Walker) 4 October 2006 (‘*Tumanako*’).

[971] Ibid [73].

[972] (2008) 106 ALD 170: see also *Re Baskin and Minister for Immigration and Citizenship* [2008] AATA 420 (Unreported, Senior Member Fice) 22 May 2008 where the Tribunal set aside the decision to cancel following the applicant’s conviction for murder.

> invited; your and your wife's health problems, your likely foreshortened life expectancy; the terms of your parole which should ensure you will not have contact with any of the victims or any under age child without the consent of your parole officer being first obtained; the fact that you have little or no family support if you are returned to the United Kingdom; the uncertainty of what, if any, official support you would receive if returned as against the guaranteed support you will receive if you remain in Australia. What I conclude is the reduced risk of recidivism; all combine to leave me satisfied that the decision under review should be set aside and the case remitted to the respondent with a direction to reinstate your cancelled visa.[973]

It is not surprising that the Tribunal rarely sets aside these types of decisions, given the importance, as expressed in the Direction, the government places on the nature of the crime. It is not, however, possible to state that the Direction produced this effect as it is not known whether the Tribunal would have affirmed the decision in any event, particularly in light of the nature of the crimes.

Although shaped by the Direction, the decision-making process retains sufficient flexibility to enable the Tribunal to reach the preferable decision. First, as noted earlier, the Direction cannot force the Tribunal to reach a particular conclusion in individual cases. As in all highly discretionary areas of decision-making, the Tribunal must "search for the preferable view of the law"[974] and "choose" the preferable decision. In *Holland*, for example, the Tribunal would have been justified in affirming the decision, given the Direction's emphasis on the nature of the crime. Instead, it chose to set aside the decision, on the basis of the applicant's limited life expectancy and other factors. Ironically, in searching for the preferable decision, the Tribunal gains little guidance from the Direction, as its language is general, requiring the Tribunal to import its own "connotation"[975] of the considerations. The concept of the expectations of the community, for example, is vague, "necessarily evaluative and conclusionary in character ...".[976] It can mean "different things to different people".[977]

Secondly, the range of factual circumstances in individual cases is extensive and includes the applicant's age, family ties in Australia, education, employment, criminal history, mental and physical health problems. The range of facts allows the Tribunal to "shape" its findings of fact to enable it to apply the Direction in a way which is in keeping with the member's view of the

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[973] The Department did not seek judicial review of the Tribunal's decision.

[974] Michael Kirby, Review on the Merits — the Right or Preferable Decision (Seminar on Review of Administrative Action Mechanisms of Accountability Canberra, 14 November 1979), 15.

[975] Ibid 27.

[976] *Preston v Minister for Immigration and Multicultural Affairs and Indigenous Affairs* (No 2) [2004] FCA 107, [923].

[977] *Re Afoa and Minister for Immigration and Citizenship* [1999] AATA 82 (Unreported, Deputy President Forrest) 12 February 1999.

justice of the case and which may be publicly justified.[978] *Re Tumanako* exemplifies this phenomenon: the applicant gave evidence indicating that he was genuinely remorseful, was a model prisoner, had performed part-time jobs well on weekend release, had been offered full-time employment and was able to live with his twin brother and his wife, where they would attend church. The Tribunal, however, observed as follows:

> ... some might question whether any combination of remorse, rehabilitation courses, religious renewal, family support and good works could atone for a crime so atrocious as stabbing a young mother to death in front of her four year old daughter.[979]

The Tribunal found that the nature of the crime, in combination with his low to moderate risk of re-offending, favoured visa cancellation. However it could be argued that the material was there for the Tribunal to set aside the decision. His length of residence in Australia alone would have protected him from removal under the criminal deportation provisions.

Thirdly, the language of the decisions is not always transparent.[980] As Kirby J notes, the willingness of Tribunal members to affirm or set aside decisions may ultimately depend on "their own value system".[981] In such a "vexed area of administration",[982] Tribunal members may well have their own views relating to the outcome of the case, which are not fully articulated in the decision. Under the umbrella of the Direction, these three elements — the generality of the Direction, the flexibility of fact-finding and the opaqueness of the reasoning — secure for the Tribunal the opportunity for independence of thought and allow it to make what it considers to be the just decision.

Although two further Directions have been issued, it is interesting to briefly consider the impact on Tribunal independence of Direction No 41, the Direction issued immediately after Direction No 21, given its significant shift in policy direction.

The then government revoked Direction No 21 and issued Direction No 41 in its stead on 15 June 2009. The new Direction addressed the concerns relating to Direction No 21, which I discussed in part two of chapter five: in addition to the protection of the Australian community, there were three new primary considerations, namely whether the person arrived as

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[978] Peter Bayne, 'The Proposed Administrative Review Tribunal — Is there a Silver Lining in the Dark Cloud?' (2000) 7 *Australian Journal of Administrative Law* 86, 98.

[979] *Tumanako* [2006] AATA 848 (Unreported, Deputy President Walker) 4 October 2006 [77].

[980] Fiona McKenzie, 'The Immigration Review Tribunal and Government Policy: To follow or not to follow?' (1997) 4 *Australian Journal of Administrative Law* 117, 128.

[981] Kirby, above n 974, 27.

[982] Joint Standing Committee on Migration, above n 948, [3.4].

a minor, the length of residence and relevant international obligations.[983] The expectations of the Australian community were no longer explicitly mentioned as a consideration. The "other considerations" included numerous new considerations, such as the applicant's age, health and level of education, links to the country to which he or she would be removed and hardship to members of the applicant's family in Australia.[984]

In a similar fashion to Direction No 21, Direction No 41 seemed to influence Tribunal decision-making, as evidenced by the decisions themselves, which took into account the new considerations. The new Direction appeared to produce an increase in the set aside rate, although, as noted earlier, that effect may have been caused by a number of other factors.[985] The number of ministerial judicial review applications, however, also increased.[986] Despite the deliberate shift in policy, as in the past, the Tribunal is still perceived as being too independent. Again, the issue is the Tribunal's approach to the exercise of discretion.

In *Re Taufahema*, for example, a decision reviewed under Direction No 41, the Minister cancelled the applicant's visa under section 501, following numerous convictions, including the manslaughter of a police officer.[987] The Tribunal found that although the applicant had lived in Australia since the age of 11, had close ties to the Australian community and had taken steps towards rehabilitation, the protection of the Australian community was more important. However, the Tribunal set aside the Minister's decision on the basis of the best interests of the applicant's daughter as well as the interests of his partner. The Minister sought judicial review on the basis that the Tribunal failed to take into account primary and other considerations. Buchanan J found that the Tribunal's discussion of the competing primary and other considerations to be "lucid and balanced".[988] The Tribunal had not committed a jurisdictional

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[983] Direction No 41 — Visa Refusal and Cancellation under Section 501 of the Migration Act 1958 (3 June 2009) ('*Direction No 41*') [10]: Relevant international considerations include the best interests of the child, a primary consideration under the previous directions, as well as *non-refoulement* obligations under treaties such as the Convention and the Protocol Relating to the Status of Refugees.

[984] Ibid [11].

[985] Following the coming into force of Direction No 41, the Tribunal heard and determined 31 cases, 15 of which were set aside and 16 affirmed. In the year prior to Direction No 41 coming into force, 40 cases were heard and determined of which 15 were set aside and 25 affirmed. The numbers are small and there may be a range of factors affecting the set-aside rate, such as the appointment of new Tribunal members.

[986] In the year prior to Direction No 41 coming into force, excluding discontinued appeals, 13 appeals were lodged by applicants. No appeals were lodged by the Minister. In the year following Direction No 41 coming into force, excluding discontinued appeals, 11 appeals were lodged by applicants and four lodged by the Minister.

[987] *Re Taufahema v Minister for Immigration and Multicultural Affairs* [2009] AATA 898 (Unreported, Deputy President Handley) 23 November 2009.

[988] *Minister for Immigration and Citizenship v Taufahema* (2010) 114 ALD 537, 546.

error: "the Minister's criticism amounts to a complaint ... that the AAT did not reach a conclusion that the risk to the Australian community outweighed all other, countervailing, considerations".[989] In the end, the Minister used his personal power under the *Migration Act* to cancel the applicant's visa.[990]

B 2 *Conclusion in Relation to Tribunal Independence*

In the criminal deportation and section 501 jurisdiction, the Tribunal is considered to be far too independent, far too willing to allow non-citizens to remain in Australia. In response to this perception, the government made legally binding directions designed to influence the Tribunal's decision-making process. The file review indicates that Direction No 21 influenced Tribunal decision-making. The decisions adopted the structure of primary and, where relevant, other considerations and assessed their weight in accordance with the Direction. The Tribunal rarely considered factors outside the Direction. Furthermore, the Direction appeared to strongly influence cases involving violent crimes. However, although the Direction had force, there was sufficient scope within the decision-making process to enable the Tribunal to exercise independent thought and to reach what it considered to be the just decision.

Direction No 41 replaced Direction No 21. It represented a significant shift in government policy, seeking to redress the previous imbalance by creating three new primary considerations, namely whether the person was a minor when he or she began living in Australia, the length of residence in Australia and relevant international obligations. With such a clear and markedly different approach, it is unsurprising that Direction No 41 influenced Tribunal decision-making and may have led to an increase in decisions being set aside. There is, however, renewed criticism of the Tribunal. Given the high level of emotion and the lack of understanding of the role of the Tribunal, the response of victims, their families and law enforcement bodies is comprehensible. Of much greater concern, however, is the overturning of Tribunal decisions by the Minister personally, a power which I consider in chapter nine.

C *Tribunal Process*

In chapter three, I explained that the Tribunal must act in a procedurally fair manner. Procedural fairness consists of the right to a hearing and the right to an unbiased decision-maker. A critical element of the right to a hearing is that the affected person has "an opportunity to state their case and to know the case they are to meet".[991] In the Tribunal context, it also involves the

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[989] Ibid [30].

[990] Yuko Narushima, 'Police Killer will be Deported', *Sydney Morning Herald*, 30 April 2010. 4.

[991] *Kioa v West* (1985) 159 CLR 550, 582.

"opportunity to adduce additional information of probative value".[992] A fair hearing is therefore predicated on a meaningful exchange between the parties and the Tribunal throughout the proceedings, whereby the parties are informed of the issues in the case and are able to respond, for example, by providing further evidence or making submissions. Participation of the parties is thus vital. As will be demonstrated, however, the procedural framework makes it particularly difficult for applicants to participate.[993] While the Tribunal attempts to afford procedural fairness, there is little discretion, if any, in the application of the procedural rules.

C 1 *Pre-Hearing Process*

In reviewing visa cancellation decisions, many of the Tribunal's procedural powers under the *Administrative Appeals Tribunal Act* have been specifically displaced by rules codified in the *Migration Act*.[994] The procedural rules were designed to ensure that the review process was not used as a mechanism to prolong the stay of applicants in Australia[995] and, they therefore place "serious restrictions on an applicant for review".[996] While the *Migration Act* sets out the principal procedural framework for the onshore review of visa cancellation and refusal cases on character grounds, it does not, however, displace the Tribunal's obligation to afford procedural fairness.

Before outlining the procedural rules, it is important to remember that detainees are generally incarcerated either in prison or more frequently, immigration detention. As I explained in chapter five, conditions in detention centres are harsh and "prison-like".[997] Based on its 2008 visits, the Australian Human Rights Commission observed that "high wire fences, lack of open green space, walled-in courtyards, ageing buildings, pervasive security features, cramped conditions and lack of privacy combine to create an oppressive atmosphere",[998] criticisms acknowledged as justified by the then Minister.[999]

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[992] Hayley Katzen, 'Procedural Fairness and Specialist Members of the Administrative Appeals Tribunal' (1995) 2 *Australian Journal of Administrative Law* 168, 172.

[993] My findings were published: see 'Procedural Fairness and the AAT's Review of Visa Cancellation Decisions on Character Grounds' (2010) 17 *Australian Journal of Administrative Law* 77.

[994] *Goldie v Minister for Immigration and Multicultural Affairs* (2001) 111 FCR 378, 388.

[995] Explanatory Memorandum, Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998, Item 21.

[996] *Goldie v Minister for Immigration and Multicultural Affairs* (2001) 111 FCR 378, 389 (Gray J).

[997] Australian Human Right Commission, *Immigration Detention Report*: *Summary of Observations following Visits to Australia's Immigration Detention Facilities* (Sydney, December 2008) <http://www.hreoc.gov.au/Human_Rights/immigration/idc2008.html > [2].

[998] Ibid [10.1].

[999] Ibid [10.1].

Detainees have limited access to the outside world. Generally, detainees may make free local calls but must pay for interstate and international calls.[1000] Access to the internet is limited and dependent on the availability of computers.[1001] At Sydney's Villawood immigration detention centre (Villawood), where many section 501 detainees are held, "mail can sometimes take up to three to five days to get from administration to the correct detainee".[1002] Detainees are also reliant on detention officers to send outgoing faxes and deliver incoming faxes.[1003]

Poor communication channels also make it difficult for representatives and detainees to contact one another. In the past, the Legal Aid Commission of NSW called for an increase in the number of interview rooms available for legal advisers, improved soundproofing of the rooms to ensure privacy, and a better telephone communication system at Villawood.[1004] The poor channels of communication affect the ability of detainees and their representatives to prepare their case.

Applicants must lodge the review application at the Tribunal within nine days after the day on which he or she was notified of the decision to cancel.[1005] The *Migration Act* and *Migration Regulations 1994* provide detailed provisions relating to, amongst other things, the manner in which the notice must be served on the applicant, where the notice must be sent and how the notice period is calculated. In contrast to review powers in non-migration matters, the Tribunal's discretion to extend the time in which to lodge an application has been specifically excluded under the *Migration Act*.

The Tribunal must determine the application within 84 days after the day on which the applicant was notified of the decision: otherwise the decision is deemed to have been affirmed.[1006] Given the urgency, upon receipt of the application, the Tribunal allocates the application to a Tribunal member and provisional dates for the telephone directions hearing and the hearing are set immediately. The Tribunal is required to inform the Department within seven working days of receiving the review application.[1007] The Department must then provide the Tribunal within 14 days of lodgement of the review application two copies of documents that are in the Minister's

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[1000] Ibid [10.8].

[1001] Ibid [10.8].

[1002] Ibid [10.8].

[1003] Ibid [10.8].

[1004] Legal Aid Commission of NSW Submission to Senate Legal and Constitutional References Committee, *Inquiry into the Administration and Operation of the Migration Act 1958* 5 August 2005 at 29 <http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2004-07/migration/submissions/sublist.htm >.

[1005] *Migration Act 1958* (Cth) s 500(6B).

[1006] *Migration Act 1958* (Cth) s 500(6L).

[1007] *Migration Act 1958* (Cth) s 500(6E).

possession or control and are relevant to the making of the decision.[1008] This requirement is once again in contrast to the usual practice, namely that the respondent Departments provide a copy of all documents held on file.[1009] These documents frequently constitute the principal material upon which the Tribunal makes a decision.

Where applicants are unrepresented, the Tribunal conducts outreach, which is a program designed to provide information about the Tribunal's processes to unrepresented applicants. The District or Deputy Registrar contacts the applicant by telephone and identifies whether the applicant requires additional assistance, such as an interpreter.[1010] The Registrar discusses the issues in dispute with the applicant and whether further evidence is required. The Registrar also explains the effect of sections 500(6H) and (6J) of the *Migration Act*: these sections provide that the Tribunal cannot have regard to any oral information or document in support of the applicant's case unless the information was set out in a written statement given to the Minister at least two business days before the Tribunal hearing, other than a directions hearing.[1011]

The applicant, any representative and the Department's legal representative are required to attend a telephone directions hearing before the Member who will decide the case. At the directions hearing, the Member may discuss the Department's reasons for the decision, the reasons why the applicant believes the decision is wrong, the type of information, which might support the applicant's case and how to obtain it, and the time limits for providing further evidence and submissions to the Department. If it becomes apparent that the applicant will struggle to serve material on the Minister two business days before the hearing, the Tribunal may reschedule hearing dates to allow applicants more time, provided that the Department consents and the Tribunal will still be able to meet its obligation to determine the application within 84 days. The Tribunal may also adjourn on the day of the hearing to allow the applicant more time in which to provide material, provided that the adjournment is granted prior to the commencement of the hearing.[1012]

[1008] *Migration Act 1958* (Cth) s 500(6F)(c).

[1009] *Administrative Appeals Tribunal Act 1975* (Cth) s 37.

[1010] Administrative Appeal Tribunal, *Further Information for Non-Citizens of Australia seeking a Review of a Decision under s 501 of the Migration Act* <http://www.aat.gov.au/ApplyingToTheAAT/Section501.htm > 2.

[1011] *Migration Act 1958* (Cth) ss 500(6J), (6H).

[1012] *Jagroop v Minister for Immigration and Border Protection* [2014] FCAFC 123. In that case, the Full Federal Court held at [77] that "the entitlement of an applicant to present information or documents to the AAT in proceedings to which subs (6H) and (6J) apply crystallises on the commencement of the AAT's hearing, with the effect that it may have regard only to that information or those documents provided to the Minister at least two business days before the hearing began". See also *Re Lu and Minister for Immigration and Citizenship* [2008] AATA 93 (Unreported, Deputy President Walker) 5 February 2008.

C 2 *The Hearing*

The Tribunal is not bound by the rules of evidence and proceedings must be conducted "with as little formality and technicality, and with as much expedition as the statutory requirements and a proper consideration of the matters before the Tribunal permit".[1013] Generally, in the normal course of the conduct of review, the applicant's representative will open the case, although where the applicant is unrepresented, the Tribunal usually requests the Department's representative to open the case. When presenting their case, if applicants have not complied with sections 500(6H) or 500(6J) they may only "explain" or "amplify" material in written statements provided within the necessary time frame and make submissions.[1014] If applicants have complied with sections 500(6H) and 500(6J), they are permitted to recount their "situation".[1015]

C 3 *The Value of Procedural Fairness*

Instrumentalists and dignitarians alike acknowledge the importance of participation in hearings but for different reasons. Instrumentalists believe that fair procedures are necessary to ensure that decision-makers make the accurate decision. Galligan, a well-known instrumentalist, claims as follows:

> The main object of procedures at the general social level is to provide for the proper application of the law, to achieve whatever the law stipulates, while at the level of the individual person affected, procedures also invoke the additional element of fair treatment.[1016]

Galligan explains how participation is instrumental to accuracy and fair treatment: first, "procedures should recognise the contingency of any one point of view; they should allow for sceptical scrutiny of evidence and material, and they should encourage reasoned judgement".[1017] Secondly, confidence in the process depends to a significant degree upon confidence in the

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[1013] *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1)(b).

[1014] *Re SAAC and Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 85 ALD 202. In *Jagroop v Minister for Immigration and Border Protection* [2014] FCAFC 123, the Court held at [96] that the prohibition in ss 500(6H) and (6J) "relates only to information and documents presented as part of an applicant's case-in-chief to support his or her case, and not to information or documents which an applicant may wish to present in answer to the case presented by the Minister and which, at the least, the applicant could not have reasonably anticipated". The Court also held at [101] that the prohibition does not extend to "an answer to the AAT's question or invitation" as the information was not presented as part of the applicant's evidence-in-chief. In addition, at [102], it held that 'information' does not encompass submissions.

[1015] Administrative Appeals Tribunal, above n 1010, 7.

[1016] Denis Galligan, *Due Process and Legal Procedures: A Study of Administrative Procedures* (Clarendon Press, 1996) xviii.

[1017] Ibid 66.

procedures as means to those outcomes, particularly where there is no certainty relating to whether the best outcome has been achieved.[1018] What is critical is that there is public confidence in the procedure, which allows confidence in the result.[1019] Thirdly, "the duty of respect requires that attention be paid to the person's case, that such level of enquiry and consideration should be made as is compatible with the seriousness of the interests at stake and the gravity of the consequences for them, and that the final judgment should take proper account of those factors".[1020] In addition, participation legitimises the administrative state by representing "the surest means of fostering the belief that government may not act against the governed in a clandestine or arbitrary manner".[1021]

Dignitarians, such as Mashaw, believe that fair treatment is important because it respects fundamental dignity, which encompasses "the values inherent in or intrinsic to our common humanity — values such as autonomy, self-respect or equality".[1022] Respect for fundamental dignity is not limited to the law-abiding. "Politically powerless" and "socially threatening" prisoners must also be treated with dignity, regardless of their crimes as "confinement with dignity should be society's hallmark". [1023] The ability to participate is consistent with respect for dignity. Even if the hearing does not change the outcome, "we ought to be allowed to participate in decisions that affect our destiny, especially in a context in which those decisions are value-laden".[1024] Participation therefore supports human dignity and self-respect.

In short, enabling the parties to participate fully and effectively is vital to procedural fairness. Participation respects the fundamental dignity of applicants and produces more accurate outcomes.

C 4 *Procedural Fairness in the Tribunal's Review of Section 501 Decisions*

In *Shi v Migration Agents Registration Authority*, the High Court confirmed that the Tribunal may come to the correct or preferable decision based on information available at the time of review.[1025] In section 501 decisions, however, there may be little new material upon which the

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[1018] Ibid.

[1019] Ibid 67.

[1020] Ibid 68.

[1021] Laurence Tribe, *Developments in the Law — Zoning* (1977–78) 91 Harvard Law Review 1427, 1507–8.

[1022] Jerry Mashaw, *Due Process in the Administrative State* (Yale University Press, 1985) 171.

[1023] Melvin Gutterman, 'Prison Objectives and Human Dignity: Reaching a Mutual Accommodation' (1992) 4 *Brigham Young University Law Review* 857, 898.

[1024] Philip Bryden, 'Fundamental Justice and Family Class Immigration: The Example of *Pangli v Minister for Employment and Immigration*' (1991) 41 *University of Toronto Law Journal* 520, 527.

[1025] (2008) 235 CLR 286.

Tribunal may make a fresh decision. In *Re Tran and Minister for Immigration and Citizenship*, for example, the applicant arrived in Australia at the age of 16 from Vietnam.[1026] His visa was cancelled following many convictions related to drug and other related offences. The applicant, a previous drug addict, had a daughter and other family members living in Australia. As he had submitted no evidence before either the Department or the Tribunal, the Tribunal arranged for the applicant to dictate a statement, through an interpreter, which was typed by the Tribunal member's associate. No other evidence was submitted on behalf of the applicant.[1027]

The ability of applicants to participate may be seriously compromised by a number of factors. These factors, each of which will be discussed in turn, are the power imbalance between the applicant and the state, the adversarial nature of the process and the lack of representation, the complexity of the law and the rules codified in the *Migration Act.*

C 4(a*)* *Power Imbalance*

I noted earlier that applicants are generally poorly educated with limited financial resources. Furthermore, applicants are either in prison or in detention, which also impacts on their ability to prepare their case. By way of example, in *Rountree v Minister for Immigration and Citizenship* ('*Rountree*'), the unrepresented applicant sought judicial review of the Tribunal's decision to affirm the visa cancellation. The applicant argued that, as a result of his imprisonment, he could not obtain favourable evidence such as prison reports and letters from a prison sponsor and Alcoholics Anonymous, resulting in an unbalanced assessment of his character. The Court held that while the material could have assisted his case, the Tribunal could make its own decision on whatever material was before it at the time of making its decision.[1028] If the applicant needed further time to obtain evidence, he should have sought an adjournment. The Court acknowledged that it was a "daunting prospect" to represent oneself in such circumstances and that his entitlement to seek an adjournment was not necessarily apparent.[1029] However, although the applicant had written to the Tribunal member's associate about the issue, the applicant failed to press his need for the unavailable material or explain to the Tribunal why it was necessary to its decision at the hearing.[1030] In any event, the Tribunal hearing was fairly conducted on the basis of favourable and unfavourable material to the applicant that was before the Tribunal. *Rountree* illustrates the inherent difficulties of obtaining evidence when a person is incarcerated and without representation.

[1026] [2008] AATA 82 (Unreported, Deputy President Walker) 1 February 2008.
[1027] Ibid [10].
[1028] (2008) 100 ALD 251 [46].
[1029] Ibid.
[1030] Ibid.

C 4(b) *Adversarial Process, the Lack of Legal Representation and Poor Representation*

The Tribunal employs a modified adversarial approach. A "central weakness of the adversarial process," however, is the effect of financial inequality, which affects the ability to obtain legal representation (and its quality, if obtained) and the capacity to obtain evidence.[1031] Only 37% of applicants were represented throughout the entire process. While the Tribunal operates a duty lawyer scheme, whereby applicants may receive preliminary advice and representation throughout the proceedings, in practice, there is "very limited funding" to represent applicants in merits review.[1032] By contrast, the Department is always legally represented. Representation is a key factor in the ability of applicants to participate in the review process.[1033] As well as providing vital support, representatives help in the "construction of winnable cases".[1034]

A statistical analysis of the cases reviewed revealed that represented applicants had a significantly increased chance of having the Department's decision set aside. Where applicants had legal representation, 49% of decisions were set aside.[1035] In cases where the applicants were unrepresented, the set aside rate was only 21%. The results accord with numerous empirical studies, conducted in Australia and overseas, which examined the relationship between legal representation and outcome.

The Australian Law Reform Commission ('*ALRC*') reviewed 1665 Tribunal case files from a range of jurisdictions, including immigration, and found that the impact of representation was statistically significant across all Tribunal review jurisdictions.[1036] After excluding government appeals, applicants were successful in 42.1% of all sampled Tribunal cases.[1037] Following a final hearing, unrepresented applicants "won" 16.7% of the time, compared to 53.5%, if represented.[1038]

[1031] Tom Thawley, 'Adversarial and Inquisitorial Procedures in the Administrative Appeals Tribunal' (1997) 4 *Australian Journal of Administrative Law* 61, 69.

[1032] Submission on behalf of Legal Aid Commission of NSW to Senate Legal and Constitutional References Committee, above n 1004, 14.

[1033] The Australian Law Reform Commission observes, however, that representatives need not be legally qualified to assist parties in federal merits review tribunals: Australian Law Reform Commission, *Discussion Paper 62: Review of the Federal Civil Justice System* (Commonwealth of Australia, 1999) [12.183].

[1034] Hazel Genn, 'Tribunals and Informal Justice' (1993) 56 *Modern Law Review* 393, 404.

[1035] Forty-five of 91 cases.

[1036] Australian Law Reform Commission, *Part One: Empirical Information about the Administrative Appeals Tribunal* (Commonwealth of Australia, 1999) [7.5].

[1037] Ibid.

[1038] Ibid.

The ALRC acknowledged that it was possible that the relationship between representation and outcome was affected by the merits of the case and the consequent reluctance of lawyers to take on weak cases, the capacity of individual applicants to effectively represent themselves and the desire of applicants to be heard in relation to their concerns regardless of the merits of the case.[1039] These variables may also play a role in the present results. However, international research using multiple regression analysis also found that representation significantly increased the likelihood of success.[1040]

In the United Kingdom, Genn and Genn analysed more than 4000 case files across four tribunals dealing with immigration, welfare, employment and detention under mental health legislation.[1041] They also found that in all four tribunals, "the presence of a skilled representative significantly and independently increased the probability that a case would succeed".[1042]

> In hearings before immigration adjudicators, the overall likelihood of success was increased by the presence of a representative from 20 to 38%.[1043]

In the United States, Ramji-Nogales, Schoenholtz and Schrag reviewed 133 000 decisions made by asylum officers, 140 000 immigration judge decisions, 126 000 Board of Immigration decisions and 4215 decisions of the US courts of appeals.[1044] They found that "represented clients win their cases at a rate that is about three times higher than the rate for unrepresented clients".[1045]

The results of these studies are hardly surprising. As Genn notes, "case preparation and the provision of evidence is fundamental to the outcome of tribunal hearings".[1046] Representatives can carefully examine the facts of the applicant's case and within the confines of the law, "marshal such evidence as is necessary to convince a tribunal of the truth of the facts".[1047] Furthermore, representatives understand Tribunal practices and procedures, are able to identify and apply the relevant legislation, policy and case law and "test evidence according to

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[1039] Australian Law Reform Commission, above n 1033, [12.222, 12.223].

[1040] Multiple regression analysis quantifies the effect of one variable, while ensuring that the other variables remain constant.

[1041] Hazel Genn and Yvette Genn, *The Effectiveness of Representation at Tribunals* Report to the Lord Chancellor Queen Mary College, University of London, 1989.

[1042] Genn, above n 1034, 400.

[1043] Ibid 400.

[1044] Jaya Ramji-Nogales, Andrew Schoenholtz and Philip Schrag, 'Russian Roulette: Disparities in Asylum Adjudication' (2007–08) 60 *Stanford Law Review* 295, 296.

[1045] Ibid 376.

[1046] Genn, above n 1034, 404.

[1047] Genn, above n 1034, 404.

relevance" as well as "present coherent and concise submissions during the hearing".[1048] In section 501 cases, for example, a skilled representative knows that evidence supporting the primary and other considerations contained in the Ministerial Direction is crucial. The representative knows the utility of obtaining expert evidence in relation to the risk of recidivism and rehabilitation, and evidence from any children with whom the applicant has a close relationship.

The Tribunal has put in place several informal procedures to assist applicants to put forward their case throughout the proceedings. Tribunal members, however, differ in their willingness to assist, presenting a further source of potential unfairness. Furthermore, the informality of the process contains "hidden dangers" as applicants may gain a false sense of security about the process.[1049] The hearing room is less formal than a court room and the conduct of the review can be adapted to meet the needs of the applicant, for example, with the Department's representative opening the case, rather than the applicant. The information sheet provided to applicants notes that help need "not have to be from a lawyer or a migration agent".[1050] The help can be from a family member or friend or the application can be "handled" by the applicant himself or herself.[1051] If the applicants have complied with sections 500(6H) and 500(6J), applicants are encouraged to recount their "situation".[1052] Unfortunately, the recounting of one's situation rarely equates to providing "legally relevant and sufficient accounts". [1053] As Genn observes:

> ... none of the procedural informality of tribunals can overcome or alter the need for applicants to bring their cases within regulations or statute, and prove their factual situation with evidence. Nor do informal procedures relieve tribunals from the obligation to make reasoned and consistent decisions.[1054]

In practice, without representation, the ability of applicants to provide a legally relevant and sufficient account is seriously compromised.

For the sake of completeness, I now briefly consider the legal position of applicants who are poorly represented. In general, applicants are "bound by the acts of their agent".[1055] As Groves notes, this principle, known as the surrogacy principle, has "cold logic" in that "people cannot

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[1048] Australian Law Reform Commission, above n 1033, [12.193].
[1049] Genn, above n 1034, 403.
[1050] Administrative Appeals Tribunal, above n 1010, 2.
[1051] Ibid.
[1052] Ibid 7.
[1053] Genn, above n 1034, 403.
[1054] Genn, above n 1034, 403.
[1055] Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co., 5th ed., 2013) 327.

complain about the mistakes of their lawyers and other agents, no matter how disastrous the consequences might be".[1056] As French J in *Minister for Immigration and Multicultural Affairs v SZFDE* held:

> There are sound policy reasons why a person, whose conduct before an administrative tribunal has been affected, to his or her detriment, by bad or negligent advice, should not be heard to complain that the detriment was unfair in any sense that would vitiate the decision made.[1057]

There is an exception to the surrogacy principle, namely where the applicant's agent has perpetrated fraud upon the Tribunal, undermining and "corrupt[ing]" the decision-making process.[1058] The exception, however, does not "stretch to the case that was on the appellant alone".[1059] Given the need to demonstrate that the fraud was perpetrated on the Tribunal, applicants will undoubtedly have difficulties seeking recourse arising out of poor representation.

The effects of a lack of representation or poor representation dovetail into the next factor which impacts upon applicants' ability to participate, namely the complexity of the law.

C 4(c) *The Complexity of the Law*

Australian immigration law, including the *Migration Act*, the *Migration Regulations*, a myriad of directions and policies as well as case law, all create a complex and dense body of law. The cancellation and refusal of visas on the grounds of character is no exception. *Martinez v Minister for Immigration and Citizenship* is a good example of the complex legal issues which can arise.[1060] In this case, the applicant was represented. In March 2008, the applicant's visa was cancelled on character grounds. He unsuccessfully sought review before the Tribunal, following which he applied for judicial review in the Federal Court. In the meantime, the Full Federal Court published a decision in another matter, which had the effect of rendering the applicant's visa cancellation invalid. [1061] The Department informed the applicant of the invalid visa cancellation and released him from detention. The applicant filed a notice of discontinuance in

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[1056] Matthew Groves, 'The Surrogacy Principle and Motherhood Statements in Administrative Law' in Linda Pearson, Carol Harlow and Michael Taggart (eds) *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 71.

[1057] (2006) 236 ALR 42, 73.

[1058] *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189, 206. The High Court held, at 206, that where the Tribunal was "disabled from the due discharge of its imperative statutory functions with respect to the conduct of the review", "the decision made by the Tribunal is properly regarded, in law, as no decision at all".

[1059] Aronson and Groves, above n 1055, 327.

[1060] *Martinez v Minister for Immigration and Citizenship* [2009] AATA 715 (Unreported, Deputy President Handley) 21 September 2009 from which the procedural history of the case is extracted and reproduced here.

[1061] *Sales v Minister for Immigration and Citizenship* (2008) 171 FCR 56.

relation to his application to the Federal Court. In September 2008, however, the *Migration Legislation Amendment Act (No 1) 2008* ('*Amending Act*') was passed, which, amongst other things, dealt with the consequences of the Full Federal Court's decision. In September 2008, the Department informed the applicant that as a result of the legislative amendments, the decision to cancel his visa was valid. He was immediately detained again, whereupon he filed a fresh application to the Federal Court. In December 2008, the Federal Court ruled that his new application was incompetent but granted him leave to withdraw his notice of discontinuance.[1062] In March 2009, the Federal Court heard the original application and held that the Tribunal had made a jurisdictional error. It quashed the Tribunal's decision and ordered the Tribunal to hear and determine the proceedings according to law.

Back before the Tribunal, the Tribunal was required to consider the effect of the *Amending Act*. In an interlocutory application, the Tribunal found that the power to cancel under section 501(2) could be applied in the applicant's case, which Martinez further appealed, although unsuccessfully.[1063] The Tribunal ultimately set aside the decision to cancel his visa.[1064]

The *Martinez* case highlights the potentially extraordinary complexity of this area of law. Even the more "routine" section 501 cases are complicated. In addition to the substantive law, including the *Migration Act*, the Ministerial Direction, the case law and their interrelationship, applicants are expected to understand the procedural framework as well as the Tribunal's practices and procedures. Given the background of applicants, discussed above, without representation they are not armed with the knowledge and the resources to effectively present their case.

C 4(c) *The Migration Act Procedures*

Finally, but not least, the strict legislative procedural framework makes it difficult for applicants to participate, particularly without representation.

Unrepresented applicants, who do not know or understand the detailed statutory provisions, face potentially disastrous consequences. In *Re Otineru and Minister for Immigration and Citizenship*, for example, the applicant, a Samoan national, who had lived in Australia continuously since the age of 14, was convicted of aggravated breaking and entering with intent,

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[1062] *Martinez v Minister for Immigration and Citizenship* (No 2) [2008] FCA 1995 (Unreported, Emmett J) 5 December 2008.

[1063] *Toro Martinez v Minister for Immigration and Citizenship* (2010) 115 ALD 363.

[1064] *Re Toro Martinez v Minister for Immigration and Citizenship* (2011) 122 ALD 406.

and was sentenced to five years and six months imprisonment.[1065] On 14 August 2007, the applicant, who was in prison, was notified by fax that his visa had been cancelled pursuant to section 501. The applicant received the notice of visa cancellation from the Department, which informed him of his review rights but not the actual date by which he was to lodge the review application. The applicant signed an acknowledgement of receipt of the notice, which was received by the Department on 16 August. The regulations provided that he was taken to have received the decision at the end of the day on which the document was transmitted. The ninth day after service of the document, which under the Migration Regulations was the last day upon which the applicant could lodge his review application, was 23 August. The applicant's review application was sent by fax to the Tribunal by the prison welfare officer on 24 August. The welfare officer believed that the nine-day period began to run after the acknowledgement of receipt was received by the Department. At the Tribunal's jurisdictional hearing, the welfare officer argued that the applicant, as a prison inmate, was "at the mercy of those who [could] help her to help him".[1066] The Tribunal noted that the welfare officer had many preoccupations, including seven other visa cancellation matters and had difficulty obtaining access to a fax machine. With respect to her understanding of when time began to run, the Tribunal noted:

> It is quite understandable that a non-lawyer would be under a misunderstanding about the commencement and the expiration of time limits in this context, which is a very technical context, laying down very specific rules and in relation to which this tribunal has no discretion.[1067]

Although sympathetic, the Tribunal found that the application was lodged one day out of time and therefore it had no jurisdiction to review the application.

If applicants manage to successfully lodge a review application, the "relentless ticking of the decision-making clock"[1068] places "a burden on the applicant to assemble quickly any evidence, which he or she may wish to put forward".[1069] The Tribunal has no discretion to stop the clock, regardless of the circumstances of the case. The ticking clock is "not conducive" to the Tribunal

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[1065] (2007) 46 AAR 122.

[1066] Ibid 124.

[1067] Ibid.

[1068] *Re Broadbent and Minister for Immigration and Multicultural Affairs* [2000] AATA 822 (Unreported, Deputy President Chappell), 25 August 2000 [63].

[1069] *Re Msumba and Department of Immigration and Multicultural Affairs* (2000) 31 AAR 192; See also Deane Jarvis, 'Procedural Fairness as it applies in the Administrative Appeals Tribunal' (2007) 81 *Australian Law Journal* 465, 474.

requiring the Minister to lodge material relevant to the making of the decision[1070] or granting the applicant an adjournment to obtain legal representation.[1071]

The hearing may provide applicants with no further opportunity to present information in support of their case because of the operation of sections 500(6H) and 500(6J). These provisions are "cast in inflexible terms" providing the Tribunal with no discretion.[1072] In *Re Pupungatoa and Minister for Immigration and Multicultural and Indigenous Affairs ('Re Pupungatoa')*, for example, the evidence of the applicant's parents and children of the primarily unrepresented applicant was excluded by operation of section 500(6H).[1073] The Tribunal, noting that it was "handicapped" by the lack of relevant evidence, found that it was impossible to evaluate the applicant's relationship with his children. *Re Pupungatoa* is not an isolated case.[1074] The Tribunal is regularly required to exclude evidence because of sections 500(6H) and 500(6J).

C 5 *Conclusion in Relation to Tribunal Process*

The hindered capacity of applicants to engage and participate in the process, by understanding the issues and providing further probative material, such as relevant statements, is problematic.

A review of the Tribunal's decision-making process reveals a significant power imbalance between the applicant and the state. The power imbalance is exacerbated by an essentially adversarial process, which makes few allowances for applicants without representation. The Ombudsman has criticised Departmental processes on the basis that applicants are not made sufficiently aware of the case against them and do not understand how to prepare their case.[1075] In the review process, the Department provides the Tribunal with documents that it considers

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[1070] *Re Zefis and Minister for Immigration and Multicultural and Indigenous Affairs* [2002] AATA 700 (Unreported, Deputy President Forgie) 16 August 2002 [33].

[1071] *Re Brown and Minister for Immigration and Citizenship* [2009] AATA 78 (unreported, Deputy President Walker) (6 February 2009) [16].

[1072] *Re Broadbent and Minister for Immigration and Multicultural Affairs* [2000] AATA 822 (Unreported, Deputy President Chappell) 25 August 2000; *Re Msumba and Department of Immigration and Multicultural Affairs* (2000) 31 AAR 192; *Re SAAC and Minister for Immigration and Multicultural and Indigenous Affairs* 85 ALD 202; *Re Blanco and Minister for Immigration and Multicultural and Indigenous Affairs* [2004] AATA 989 (Unreported; Deputy President Block) 21 September 2004; *Re Lu and Minister for Immigration and Citizenship* [2008] AATA 93 (Unreported, Deputy President Walker) 5 February 2008; *Re Mitiau and Minister for Immigration and Citizenship* [2007] AATA 1955 (Unreported, Deputy President Walker) 15 November 2007.

[1073] *Re Pupungatoa v Minister for Immigration and Multicultural and Indigenous Affairs*, 2005] AATA 1160 (Unreported, Deputy President Block) 23 November 2005 at [106]. The applicant acquired representation during the proceedings.

[1074] See *Re Broadbent and Minister for Immigration and Multicultural Affairs* [2000] AATA 822 (Unreported, Deputy President Chappell), 25 August 2000 [63].

[1075] Commonwealth and Immigration Ombudsman, *Administration of s 501 under the Migration Act 1958 as it applies to long-term residents* Report 01/2006 (2006) [3.66]–[3.67].

relevant. This may be the only information the Tribunal has upon which to make a decision, a matter discussed further in the next part.

In recognition of the generally difficult circumstances of applicants, the Tribunal has established informal systems, such as the duty lawyer and the outreach schemes, as well as a telephone directions hearing for all applicants. While informality may benefit applicants in so far as the Tribunal may grant an adjournment or change the order of the presentation of evidence at the hearing, it may also mislead them into believing that by recounting their story they will "win" their case. The nature of the adversarial process, however, dictates that the person who proves, wins.[1076] In chapter nine, I make recommendations aimed at improving applicants' ability to engage and participate in the review process.

The Tribunal's capacity to afford procedural fairness, however, is limited by its obligation to apply the *Migration Act* procedures, which impose heavy penalties on those who fail to comply with the strict time limits, regardless of their circumstances. Procedural fairness requires that the decision-maker adopt fair procedures, which are "appropriate and adjusted to the circumstances of the case".[1077] Yet the Tribunal is severely constrained by its lack of discretion. It has, for example, neither the power to extend the time in which to lodge a review application nor the power to admit evidence at the hearing, when applicants have not complied with the requirement to serve the material on the Minister two business days before the hearing. This loss of power materially affects the fairness of the process. Another indicator of procedural fairness is public confidence in the procedures. The process of cancelling or refusing a visa on character grounds has attracted trenchant criticism from wide-ranging and respected sources. In chapter nine, I propose the abolition of certain procedural rules and the grant of greater procedural discretion to the Tribunal.

Finally the procedures should be compatible with the seriousness of the interests at stake and the gravity of the circumstances. As noted previously, many visa applicants and holders are well-established long-term permanent residents, with Australian families. Visa cancellation and refusal may result in mandatory detention, removal and permanent exclusion. These consequences merit a process that ensures a thorough examination of all relevant facts, both for and against applicants. At present, this does not always occur. Ultimately, applicants are caught in an expedited process, in relation to which they have very little control, and where their dignity is not respected.

[1076] Dennis Pearce, *Administrative Appeals Tribunal* (2nd ed, LexisNexis Butterworths, 2007) 100.
[1077] *Kioa v West* (1985) 159 CLR 550, 585.

D *Quality of Tribunal Decision-Making*

After I reviewed the Tribunal's files from 2003 to 2008, it became apparent that its fact-finding process was troubling. Contrary to Departmental policy, discussed in chapter three, there was a lack of "accurate, current and complete" information held on the Department's file, a matter which caused the Ombudsman concern.[1078] Theoretically, this initial deficiency in fact-finding may be overcome at Tribunal level as it conducts a de novo review of the case, standing in the shoes of the primary decision-maker. For historical, cultural and resource-related reasons, however, the Tribunal generally relies on a "modified adversarial" approach, in other words, "it ordinarily leaves to the parties the decision on what evidence will be produced and the expense and organisation of producing that evidence".[1079] This approach was borne out in my file review, which indicated that the Tribunal rarely exercised its investigative powers, an approach generally endorsed by the courts. As a result, the lack of accurate, current and complete information was not remedied during the merits review process. Certain well-resourced applicants were able to submit further information to the Tribunal, including updated expert evidence. Others who were not so well-positioned, however, did not lodge further material with the Tribunal. In this context, I refer to, but do not repeat, my earlier observations relating to the profile of certain applicants, which is marked by their lack of resources. Although the Tribunal's approach to fact-finding is generally endorsed by the courts, in chapter nine, I put forward a number of changes aimed at ensuring that the Tribunal has more information at hand when making its decision.

Another troubling aspect of the Tribunal's decision-making process, arising out the file review, is its use of official notice. Official notice refers to the Tribunal's reliance on its "knowledge or expertise" accumulated from previous cases.[1080] Official notice is designed to improve the quality of decision-making, by ensuring "informed decisions".[1081] As will be demonstrated, at times, the Tribunal relied on its own research in section 501 decision-making. The research, however, was at the very least contentious and unsurprisingly its use gave rise to judicial review applications on the grounds of bias and apprehended bias, breach of procedural fairness and a failure of the Tribunal to genuinely turn its mind to, and engage, with the applicant's claims. With the rise of serious irrationality as a ground of judicial review, the Tribunal's approach to

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[1078] Commonwealth and Immigration Ombudsman, *Administration of s 501 of the Migration Act 1958 as it applies to Long-term Residents* Report 01/2006 (2006) [3.11] ('Commonwealth Ombudsman Report').

[1079] Scott Henchliffe, 'Theory, Practice and Procedural Fairness at the Administrative Appeals Tribunal Hearings' (1995) 13 *Australian Bar Review* 243, 247.

[1080] *Scorgie v Minister for Immigration and Citizenship* (2007) 47 AAR 314, 318.

[1081] Ibid 318.

fact-finding may be the subject of further scrutiny. While inevitable and, in fact, desirable that Tribunal members rely on official notice, it is critical that its use does not cast doubt on the fairness of the review process.

D 1 *Fact-Finding by the Tribunal*

I have already noted that the Department has been criticised for failing to obtain accurate, current and complete information when making a decision in section 501 cases, a criticism borne out in my review of section 501 files at the Tribunal. The Tribunal's modified adversarial approach means that this deficiency is generally not rectified at Tribunal level. The few applicants who were legally represented, and or well-resourced, were able to lodge further material with the Tribunal and were able to overcome the deficiencies in the Department's fact-finding process. In *Re Tiatia and Minister for Immigration, Multicultural and Indigenous Affairs*, for example, the applicant arrived in Australia as a 12-year-old and had lived in Australia for 18 years.[1082] He was convicted of various serious offences, including assaulting police officers. The applicant, who was legally represented, submitted further material to the Tribunal, including evidence from his family, a psychologist and officers of the Department of Corrective Services and psychological and medical evidence in relation his mother, who lived in Australia. In setting aside the decision, the Tribunal observed as follows:

> The applicant's criminal history would normally by itself constitute an almost overwhelming case for visa cancellation, notwithstanding his difficult childhood, his lack of supervision because of his mother's need to work at two jobs full-time, and his resulting involvement with bad company, drugs and alcohol abuse. What makes this case unusual, however, is the strength and quantity of the evidence of rehabilitation and recent good conduct which importantly began before there was any question of visa cancellation.[1083]

Where applicants were particularly isolated, however, at times, there was little material before the Tribunal. In *Re Huynh and Minister for Immigration, Multicultural and Indigenous Affairs*, the applicant was 16-years-old when he arrived in Australia and had lived in Australia for 13 years.[1084] He became a heroin addict following the death of his father and grandmother and acquired a serious drug-related criminal history. His mother and four siblings lived in Australia. Apart from his cousin, he had no family in Vietnam. The applicant, who was unrepresented, was the only person who gave evidence at the hearing, at which he asked to be "given a last chance

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[1082] [2005] AATA 1173 (Unreported, Deputy President Walker) 29 November 2011.
[1083] Ibid [18].
[1084] [2004] AATA 938 (Unreported, Deputy President Walker) 3 September 2004.

to become a better citizen".[1085] The Tribunal, however, found that there was "little objective evidence of rehabilitation":

> But even if his words are sincerely meant (and I think they are at this point), such words alone, after a decade of wrongdoing, can provide no reliable assurance against further law-breaking in the future.[1086]

The Tribunal considered the impact of the applicant's separation from his family in Australia and observed that "one can presume that his mother would suffer substantial emotional distress if the applicant were deported to Vietnam".[1087] The Tribunal acknowledged the applicant's "pitiable story" of his early life, which "was tinged with tragedy" and "must have left deep emotional scars" but ultimately decided to affirm the decision.[1088]

The file review also revealed that there was a lack of up-to-date material from qualified professionals in relation to matters such as the applicant's risk of recidivism and rehabilitation. *Re Baker and Minister for Immigration, Multicultural and Indigenous Affairs* is such an example, [1089] of which there are others.[1090] The applicant arrived in Australia when he was two-weeks-old. With the exception of a four-year period in New Zealand, his country of citizenship, he had lived in Australia for 26 years. The applicant had an "extensive criminal history" relating to property and traffic offences, anti-social behaviour and violent offences arising out of his "excessive use of drugs or alcohol".[1091] In considering the protection of the community, the Tribunal considered the applicant's criminal history. Although legally represented, no oral evidence was called and no statutory declarations or other documents were submitted to the Tribunal.[1092] Based on the G-documents, the Tribunal found that there was a "fair inference" that the applicant's criminal activity showed "no signs of moderating" and therefore the applicant's risk of recidivism was high.[1093]

[1085] Ibid [29].
[1086] Ibid.
[1087] Ibid [37].
[1088] Ibid [40].
[1089] [2004] AATA 1338 (Unreported, Deputy President Wright) 14 December 2004.
[1090] See also *Re Pitman and Minister for Immigration and Multicultural and Indigenous Affairs* [2005] AATA 337 (Unreported, Deputy President Block) 15 April 2005 and *Re Mitiau and Minister for Immigration and Citizenship* [2007] AATA 1955 (Unreported, Deputy President Walker) 15 November 2007.
[1091] [2004] AATA 1338 [4]–[5].
[1092] Ibid [7].
[1093] Ibid [14].

Yet professionals may provide useful information, which assists the Tribunal to make the preferable decision. In *Re Kuo and Minister for Immigration and Multicultural Affairs,* for example, the applicant, at the age of 13, was run over by a car and suffered "extremely severe" brain injury, resulting in "moderate cognitive deficits in a wide range of areas, but particularly in the functions related to frontal lobe function such as concentration, impulsivity and a poor assessment of social behaviours and significance".[1094] The applicant accumulated a 12-year property and drug-related criminal history. Dr Lennings, a clinical psychologist explained the effect of the head injury on the applicant in his report:

> The car accident has caused two problems — the first is disruption of cognitive abilities and emotional behavioural regulation abilities, and the second is physical limitations that have caused pain. Simon's response to use drugs can be seen as a function of both features of his accident. His use of pain killing medication such as heroin is in Simon's mind directly attributable to its capacity to dull his constant pain, just as his poorly thought through decision making around his drug use is attributable to frontal lobe damage sustained in the car accident …[1095]

The expert evidence was crucial in assessing the applicant's risk of recidivism and rehabilitation prospects. The Tribunal found that because the offences were committed in order to feed his drug habit and that intensive rehabilitation was available, the risk of recidivism was low. For that and other reasons, it set aside the decision.

D 1(a) *The Tribunal's Duty to Inquire in the Section 501 Context*

It is now well established that "the fact that proceedings before the Tribunal are inquisitorial does not involve any form of a general duty to inquire".[1096] Having said that, there is a line of authority, which indicates that "in certain rare or exceptional circumstances"[1097] there may be a duty to inquire, namely "where it is obvious that there is material that is readily available to the

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[1094] [2006] AATA 1503 [3].

[1095] Ibid [31]; see also *Re Lavea and Minister for Immigration and Citizenship* (2008) 104 ALD 684, where the Tribunal received evidence from a forensic psychiatrist that the applicant was suffering either a drug-induced psychosis or schizophrenia. It set aside the decision.

[1096] *Sami v Minister for Immigration and Citizenship* (2013) 139 ALD 1, citing *Minister for Immigration and Citizenship v SZIAI* (2009) 111 ALD 15.

[1097] *Minister for Immigration and Citizenship v Le* (2007) 164 FCR 151 cited in *Minister for Immigration and Citizenship v SZIAI* (2009) 111 ALD 15, 20. Manifestly unreasonable was used in the sense used in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 [60]: For example, he noted, "a failure by a decision maker to obtain important information on a critical issue, which the decision maker knows or ought reasonably to know is readily available, may be characterized as so unreasonable that no reasonable decision-maker would proceeded [sic] to make the decision without making the enquiry".[1097]

decision-maker that is centrally relevant to an issue for determination".[1098] The High Court in *Minister for Immigration and Citizenship v SZIAI* recently stated as follows:

> It may be that failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review.[1099]

In the section 501 context, however, applicants who have argued on judicial review that the Tribunal should have made enquiries have met with little success. In *Le v Minister for Immigration and Multicultural and Indigenous Affairs*, for example, the applicant, a 35-year-old unrepresented Vietnamese, claimed that he had been hit by a train at Town Hall station, for which he was on medication and which made him do "wrong things".[1100] There was corroboration of this fact from the comments of a sentencing judge. The Tribunal found that while the applicant "probably did suffer a head injury in 1995 causing brain damage and epilepsy, for which medication was prescribed, neither the injury nor the medication was responsible for the continuance of his pattern of regular law-breaking".[1101] The Federal Court dismissed the applicant's judicial review application on the basis that the Tribunal's conclusions may have been "a matter for expert evidence; but in the context of the Tribunal's decision making process it fell to the applicant to adduce such evidence and he did not do so".[1102]

In *Aporo v Minister for Immigration and Citizenship*, the applicant, who had lived in Australia for almost 20 years, sought judicial review of the Tribunal's decision on various grounds, including its failure to enquire into the reliability of material, which it used to make its decision.[1103] His criminal record and sentencing reports contained factual discrepancies and the report prepared by his parole officer, which indicated that his risk of recidivism was high, failed to give information about the parole officer's training, study or experience. He claimed that the Tribunal should have made enquiries about these matters particularly given that he was "illiterate, dyslexic and had verbal, analytical and problem solving difficulties".[1104] The Federal Court found that it was reasonable for the Tribunal to rely on the material, given that the applicant was represented and the issue was raised during the Tribunal hearing.[1105]

[1098] *Brown v Minister for Immigration and Citizenship* (2009) 112 ALD 67, 85 citing *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155, 169–70.

[1099] (2009) 111 ALD 15, 21.

[1100] [2005] FCA 1530.

[1101] Ibid [21].

[1102] Ibid [22].

[1103] (2009) 107 ALD 54.

[1104] (2009) 107 ALD 54, 70.

[1105] Ibid 70–1.

I noted earlier that Direction No 41 identified material considered relevant to the assessment of considerations. In *Basile v Minister for Immigration and Citizenship (Basile)*, the applicant had lived in Australia for almost 20 years, where his Australian citizen children lived.[1106] He was convicted of, amongst other things, manslaughter. He argued that as result of the terms of Direction No 41, the Tribunal was under an obligation to obtain psychological reports and parole assessments, in order to determine his prospects of rehabilitation. The Federal Court rejected his argument on the basis that the applicant had the benefit of legal advice and had not sought an adjournment to obtain professional reports. The Tribunal had before it "a range of material", which the Tribunal considered and upon which it decided that there was an unacceptable risk that the applicant would re-offend. Furthermore, there was no evidence that the applicant was "receiving treatment from a psychologist or other professional person who might be in a position to express an opinion on the likelihood of recidivism":

> … there was nothing to suggest that relevant information would readily be available from such persons.[1107]

Accordingly, "it was open to the Tribunal to supplement the material on which it acted …but it did not err, in the circumstances of this case, by failing to exercise this power".[1108] Given its particular factual circumstances, *Basile* was not an appropriate vehicle in which to test the parameters of the duty to inquire.

D.1(b) Conclusion in Relation to Tribunal Fact-Finding

It is evident from my file review that Departmental decision-makers and Tribunal members did not necessarily have up-to-date, relevant and correct information when making a decision. While legally, the practical onus is on applicants to mount their own case, in practice, as I have shown, many are simply not in a position to do so, in part because they are unrepresented. In addition, as discussed, applicants are generally bound by the actions of their representative and thus have little recourse in the event of poor representation.

As I have demonstrated, several factors impact upon the quality of fact-finding, not least of which is the Department's workload, consisting of millions of visa applications per annum, and its undoubtedly limited resources. Section 501 is an area of law, however, where it is imperative to have careful and accurate fact-finding, given its impact on applicants and family members. Holistic reform of section 501 decision-making initially would require a thorough review of the

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[1106] (2011) 193 FCR 329.
[1107] Ibid 346.
[1108] Ibid 347.

Department's current processes, similar to the review conducted by the Ombudsman in 2006. Various issues would need to be considered, including clarifying when interviews with visa applicants and holders ought to be held, the purpose of the interview and whether assistance, including the use of an interpreter and or welfare officer, was routinely provided during the interview.[1109] There is also a need for further consideration of whether a warning ought to be given prior to visa cancellation or refusal.[1110] Ideally, the review would also consider whether there ought to be a practical onus on the Department, for example, expressed in the Directions, to obtain certain types of information, and whether and when it was appropriate to acquire more recent expert evidence relating to matters such as the applicant's risk of recidivism and rehabilitation and the best interests of children.

So far, I have discussed the Department's obligation to obtain information. In terms of the Tribunal, as I have explained, numerous factors also impede its ability to acquire more information, some of which relate specifically to the section 501 context, and others of which pertain to the manner in which the Tribunal operates more generally, such as its modified adversarial approach. I make a number of suggestions in chapter nine, which deal with the section 501 - specific factors, including changes to the procedural rules and the provision of legal representation. Although the manner in which Australian tribunals operate was thoroughly considered and the subject of recommendations in the Australian Institute of Judicial Administration's *Inquisitorial Processes in Australian Tribunals*, a more detailed review of the impact of the Tribunal's modified adversarial approach in the section 501 jurisdiction, with a view to proposing Tribunal-specific reform would also be beneficial.[1111] In order to develop practical, sustainable reform, such a review would require an in-depth analysis of matters such as the Tribunal's budget, member numbers, workload, administrative and research assistance and the use of technology, to name but a few. It would be timely, given the impending merger of the tribunals at Federal level, in which Tribunal procedures and practices will be closely examined.[1112] Without such a review, I acknowledge that reforms specific to section 501 would only in part address issues in Tribunal fact-finding.

[1109] *Commonwealth Ombudsman Report*, as above n 1078, [3.61]–[3.65].

[1110] Ibid [3.56]–[3.57].

[1111] Narelle Bedford and Robin Creyke, *Inquisitorial Processes in Australian Tribunals* The Australian Institute of Judicial Administration Inc (2006).

[1112] Commonwealth Attorney-General's Department, 'Commonwealth Tribunals Reform' <http://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/Commonwealthtribunalreform.aspx>

D 2 *Use of Independent Research*

The Tribunal may supplement the parties' evidence and arguments with its "knowledge, information and expertise" accumulated in previous cases.[1113] This practice, known as official notice, is designed to improve the quality of decision-making by ensuring "informed decisions".[1114] The file review showed that the Tribunal regularly relied on its own research when addressing the various primary considerations. The use of independent research, however, was problematic for two reasons because it was either inappropriate or controversial.

First, at times the Tribunal inappropriately applied the research to the circumstances of the case. An example is found in the case of *Re Sam and Minister for Immigration and Citizenship*.[1115] In that case, the applicant fled to a Vietnamese refugee camp with his grandparents and older brother following the murder of his parents by the Pol Pot regime. He obtained little schooling and suffered deprivation in the camp. He arrived in Australia at the age of 14 and became a heroin addict by the age of 16, selling the drug to support himself. At the age of 26, his visa was cancelled following his convictions for drug-related and other offences. The Tribunal cited research, which concluded that "an increase in both the probability of punishment and the severity of punishment appears to have a significant negative impact on crime".[1116] The Tribunal found that "deterrence, and the need to maintain a visible probability of sanctions, pointed in favour of cancelling the applicant's visa in this case".[1117] The Tribunal relied on the research in several cases in support of the decision to cancel to the visa.[1118]

It is helpful in this context to briefly explain the background to the conclusions arrived at in the research relied upon by the Tribunal. The authors of the paper, Bodman and Maultby, are economists who reject sociological explanations of crime on the grounds that such theories were not "based on any rigorous empirical investigation, but rather constituted rhetorical statements that were often based on the individual's own belief".[1119] Instead, they turn to an economic theory of criminal behaviour, which "posits that the decision on the part of the potential

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[1113] Geoffrey Flick, *Natural Justice: Principles and Practical Application* (Butterworths, 1979) 65.

[1114] *Scorgie v Minister for Immigration and Citizenship* (2007) 47 AAR 314, 318.

[1115] [2004] AATA 1003 (Unreported, Deputy President Walker) 24 September 2004.

[1116] Ibid [31]; Philip Bodman and Cameron Maultby, 'Crime, Punishment and Deterrence in Australia: a further empirical investigation' (1997) 24 *International Journal of Social Economics* 884, 896.

[1117] [2004] AATA 1003 (Unreported, Deputy President Walker) 24 September 2004 [31].

[1118] See, for example, *Re Huynh and Minister for Immigration and Multicultural and Indigenous Affairs* [2004] AATA 938 (Unreported, Deputy President Walker) 3 September 2004 and *Re Le and Minister for Immigration and Multicultural and Indigenous Affairs* [2005] AATA 407 (Unreported, Deputy President Walker) 6 May 2008.

[1119] Philip Bodman and Cameron Maultby, 'Crime, Punishment and Deterrence in Australia: a further empirical investigation' (1997) 24 *International Journal of Social Economics* 884, 884.

criminal whether to participate in illegitimate activities represents the outcome of a rational consideration of the benefits and costs of alternative form of action".[1120] Accordingly, the theory offers "predictions regarding the effect on the potential criminal's decision as to whether to commit an offence of a broad range of economic and demographic factors related to the costs and benefits of criminal behaviour as well as the effect of punishment on that decision".[1121]

Bodman and Maultby make it clear that their conclusions were limited to property crimes, such as robbery, motor vehicle fraud and fraud.[1122] In *Re Baskin and Minister for Immigration and Citizenship* ('*Re Baskin*'), for example, a case involving a drug and alcohol addict convicted of murder, a differently constituted Tribunal observed that it would be inappropriate to apply Bodman and Maultby's research to non-property crimes. [1123]

In addition, Bodman and Maultby failed to control for trends in heroin dependence, a factor "strongly linked to trends in property crime".[1124] In *Re Baskin,* the Tribunal also recognised the limitations of their research. In considering the effect of drug and alcohol addiction on general deterrence, the Tribunal found that:

> While such an addiction persists, it seems to me to be highly unlikely that the person affected by addiction would even consider the possibility that his or her visa might be cancelled. In fact, as such person's crimes are fuelled by their addiction, it is only a breaking of the addiction that might cause such a person to reconsider their position and the possibility of cancellation of their visa.[1125]

The use of Bodman and Maultby's research was therefore inappropriate in *Re Sam* as the applicant, a heroin user, was convicted of a range of offences, including driving, drug and violent offences and in the other cases in which the research was applied.

[1120] Ibid 896.

[1121] Ibid 885.

[1122] *Re Baskin and Minister for Immigration and Citizenship* [2008] AATA 420 (Unreported, Member Fice) 22 May 2008 [42]–[44].

[1123] Ibid, where the Tribunal stated, at [43], that in his opinion, "it would almost be erroneous to apply the findings of this empirical research to crimes of violence against the person".

[1124] Don Weatherburn, Jiuzhao Hua and Steve Moffatt, 'How much crime does prison stop? The incapacitation effect of prison on burglary' (2006) No 93 *Crime and Justice Bulletin* 1, 3: The authors state at 3: "Omitting important variables is not a problem when the omitted variables are not strongly correlated with those whose effects are being measured. When, however, the omitted variables are correlated with imprisonment estimates of the effect of imprisonment on crime can give biased and misleading results. Imprisonment, in effect, ends up acting as a proxy for other factors that influence crime but which have not been included in the analysis".

[1125] *Re Baskin and Minister for Immigration and Citizenship* [2008] AATA 420 (Unreported, Member Fice) 22 May 2008 [44].

Secondly, the use of the independent research was controversial because the research was based on ideological theories which remain unproven. In *Re Vo and Minister for Immigration and Citizenship*, for example, the applicant arrived in Australia as a 20-year-old from Vietnam and developed a heroin addiction.[1126] Shortly after his arrival, he was convicted of numerous offences, including drug-related offences, armed robbery and manslaughter. Before the Tribunal, the applicant claimed that he was in a de facto relationship with Ms Tran and that he acted as a father figure to Ms Tran's children. The Tribunal found that while there was "some kind of association" between the applicant and Ms Tran, it did not show "the degree of commitment and stability that is needed to assure any lasting benefit for the boys' upbringing …".[1127] In considering the best interests of children, the Tribunal found that "in many s 501 cases, this tribunal sees replayed a depressing scenario in which an adolescent boy, because of a dislike for his step father or his mother's latest de facto, leaves home or takes the wrong path or both".[1128] Given the "tenuous evidence" relating to the relationship between the applicant and Ms Tran, it was "hard to feel confident that in the medium to longer term, Mr Vo's full-time presence in the household would on balance be beneficial for the boys".[1129] That conclusion was based on the evidence in the case and Tribunal experience. The Tribunal noted that the conclusion was not inconsistent with the findings of recent social science research which demonstrated as follows:

> Paternal deprivation is often associated with personal insecurity and poor self-concept. In our society, young children who do not have a close relationship with their biological fathers are unlikely to receive consistent attention from any other male adult ... With less commitment to the child, the step-parent is not likely to be as effective a check on the mother's behaviour as the biological father. Nor does the presence of a stepfather ensure that the mother will have more time and energy for parenting. Rather, a stepfather often competes with the children for the mother's time and attention, leaving the mother more stretched than ever ...[1130]

The Tribunal relied upon the same material in *Re Tuivuya and Minister for Immigration and Multicultural and Indigenous Affairs*.[1131] In that case the applicant claimed to be close to two children, including his fiancee's 13-month-old daughter. When asked about his relationship with his fiancée during the hearing, the applicant claimed that it was stable but was not sure about the

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[1126] [2007] AATA 1465 (Unreported, Deputy President Walker) 25 June 2007.

[1127] Ibid [141].

[1128] Ibid [141].

[1129] Ibid [141].

[1130] Ibid [143]. The Tribunal cited Barry Maley, *Family and Marriage in Australia* (The Centre for Independent Studies, 2001) 135, 149.

[1131] [2005] AATA 954 (Unreported, Deputy President Walker) 30 September 2005.

future. In its decision, the Tribunal noted that the applicant's "caveat was well placed" as stepfamilies were more likely to break up than were first marriage families, and stepchildren were at greater risk of behavioural problems and at greater risk of serious abuse.[1132]

The source relied upon by the Tribunal in the two abovementioned cases is a book called *Family and Marriage in Australia* in which the author, a former UNSW academic, argues that "changes - from the de-stigmatisation of premarital sex and illegitimacy to the introduction of sole parent pensions, no fault divorce, the mass entry of women into the workforce and the growth of child care" have led to "family dysfunction" and "the growing instability of the nuclear family".[1133] Clearly, such assertions are highly contentious.

D 2(a) *Judicial Review of Decisions where Tribunal Relied on its Own Research*

The Tribunal's use of its own independent research has led to judicial review applications on various grounds, including bias, apprehended bias, breach of procedural fairness and failure to take into account a relevant (and mandatory) consideration.

In *Re Le and Minister for Immigration and Multicultural and Indigenous Affairs*, cited above, in the context of community expectations, the Tribunal noted as follows:

> It is now the case that the percentage of the population who were born abroad exerts a significant positive impact on crime rates, and that there is in fact "an important link between immigration, demography and crime" ... Failure to give adequate weight to community expectations in cases such as this one could tend to undermine public support for the immigration program.[1134]

The applicant sought judicial review on various grounds, including bias and or apprehended bias. The applicant claimed that "the Tribunal pre-judged the applicant's application in the light of its expressed views that the crime rate is higher as a result of immigration and that there is a significant correlation between immigration, demography and crime".[1135] The Federal Court, however, held that the Tribunal's comments merely "emphasise ... why the expectations of the Australian community should be a primary consideration".[1136]

In another example, in *Scorgie v Minister for Immigration and Citizenship*, the Tribunal stated as follows in the context of general deterrence:

[1132] [2005] AATA 954 [6].

[1133] Barry Maley, *Family and Marriage in Australia* (The Centre for Independent Studies, 2001) Blurb.

[1134] *Re Le and Minister for Immigration and Multicultural and Indigenous Affairs* [2005] AATA 407 [40] citing Philip Bodman and Cameron Maultby, 'Crime, Punishment and Deterrence in Australia: a further empirical investigation' (1997) 24 *International Journal of Social Economics* 884, 895.

[1135] [2005] FCA 1530 [10].

[1136] Ibid [20].

> It is true that the deterrent effect of a particular decision is impossible to prove in advance. The concept is perhaps better expressed in positive form by saying that if bad behaviour is rewarded, there will be more of it. That is a principle well known to parents, teachers, managers and most other members of the community.[1137]

Although the Tribunal did not refer to the research upon which the concept was based, it referred to one of its previous decisions in which texts were cited. That previous decision, in turn, cited two other decisions, which cited three further texts. The Federal Court dismissed the application.[1138] There was no breach of procedural fairness when the decision-maker simply "referred" to evidence provided in other proceedings but did not rely on the material.[1139] Procedural fairness did "not require the disclosure to a party of the manner in which material may be used or disclosure of an evolving process of deliberation or decision making".[1140] The material in question was in "the nature of accumulated knowledge or experience", the use of which "should obviously not be discouraged as to do so could prejudice the ability of the Tribunal to make informed decisions".[1141] The Full Federal Court dismissed the applicant's appeal.[1142] Because the texts and publications referred to in the previous decisions "did not play any part in the Deputy President reaching his decision in the matter", the Tribunal was under no obligation to bring those texts to the attention of the appellant to inspect them or make submissions.[1143]

That same research gave rise to another judicial review application, which was ultimately successful. In *Re Lafu and Minister for Immigration and Citizenship*, following imprisonment for grievous bodily harm, the Department cancelled the applicant's visa.[1144] The applicant argued before the Tribunal that the cancellation would have no deterrent effect because of the lack of the publicity relating to the case and the lack of gang involvement. The Tribunal found that general deterrence should be taken into account on the ground that if rewarded, bad behaviour would increase but did not address the applicant's claims. It affirmed the decision.

[1137] *Re Scorgie and Minister for Immigration and Citizenship* [2007] AATA 1654 (Unreported, Deputy President Walker) 10 August 2007 [96].

[1138] *Scorgie v Minister for Immigration and Citizenship* (2007) 47 AAR 314.

[1139] *Scorgie v Minister for Immigration and Citizenship* (2007) 47 AAR 314 [7].

[1140] Ibid [10].

[1141] Ibid [14].

[1142] *Scorgie v Minister for Immigration and Citizenship* [2008] FCAFC 101.

[1143] Ibid [41].

[1144] (2009) 107 ALD 678.

At first instance, the applicant was unsuccessful.[1145] The Full Federal Court, however, unanimously granted relief, holding that the Tribunal's reasons failed to "show an active intellectual engagement with the question how the factor or consideration of general deterrence was taken into account, and therefore whether it was taken into account at all, in the exercise of a discretion to cancel".[1146] It held that the Tribunal could not set out a "bland statement that as a matter of conceptual analysis, general deterrence must always tell in favour of cancellation" and not apply it to the facts of the case.[1147]

In September 2014, the Full Federal Court published its joint judgment in *Jagroop v Minister for Immigration and Border Protection* ('*Jagroop*'), a case which also deals with the Tribunal's use of independent research.[1148] The Court allowed the appellant's appeal because the Tribunal relied "on other materials in its decision without giving notice of those materials to the appellant".[1149] In brief, in the context of considering specific and general deterrence and the appellant's rehabilitation and parole, the Tribunal relied on an article and the book which contained the article, no mention of which were made during the hearing.[1150] The Court held that the Tribunal attached "significance" to the conclusions of the authors of the book on sentencing, "in implicitly rejecting the submission of the appellant's counsel as to the salutary effect of his having served a period of imprisonment", which was "directly relevant to the AAT's assessment of the risk of the appellant engaging in further violent conduct if permitted to remain in Australia".[1151]

The appellant's counsel also argued that having located and regarded the article, the Tribunal must have considered its critique of the psychological test (HCR–20) used by the appellant's psychologist, Dr Cunningham. Accordingly, the article constituted "credible, relevant and significant"[1152] information capable of creating a real risk of unconscious prejudice against acceptance of Dr Cunningham's opinion, with the consequence that procedural fairness required the AAT to disclose it to the appellant", an argument accepted by the Court.[1153] The Court held that it was "immaterial that the AAT did not rely expressly on the article's critique of the HCR–

[1145] *Lafu v Minister for Immigration and Citizenship* (2009) 110 ALD 302.
[1146] *Lafu v Minister for Immigration and Citizenship* (2009) 112 ALD 1, 7.
[1147] Ibid 8.
[1148] [2014] FCAFC 123.
[1149] Ibid [6].
[1150] Ibid [43]–[44].
[1151] Ibid [64].
[1152] *Kioa v West* (1985) 159 CLR 550, 628–9 (Brennan J).
[1153] [2014] FCAFC 123 [67].

20 and instead rejected Dr Cunningham's opinion for other reasons".[1154] The Court further held that "the article was capable of having a subconscious effect on the Senior Member's mind and, in particular, to prejudice him, albeit unconsciously, against acceptance of Dr Cunningham's opinion".[1155]

D 2(b*)* *Serious Irrationality*

Challenging Tribunal fact-finding by way of judicial review is difficult, undoubtedly because of "the common law's general refusal to contemplate fact review".[1156] With the development of the ground of serious irrationality, however, in future, there may be greater scope for a successful challenge. Serious irrationality or illogicality refers to a process of reasoning that is "illogical, irrational and not based on findings or inferences of fact supported by logical grounds".[1157] It is "measured against the standard that it is not enough for the question of fact to be one on which reasonable minds may come to a different conclusion and against the framework of the inquiry being as to whether or not there has been jurisdictional error on the part of the tribunal".[1158] While there continues to be debate about whether consideration of the illogicality or irrationality is limited to discretionary choices rather than the reasoning process,[1159] it is clear that a "very high" standard is required for the challenge to succeed.[1160] Given "the overall tendency" for the grounds of judicial review, including serious irrationality, to expand,[1161] the Tribunal needs to be mindful of its approach to fact-finding, particularly in light of the impact of the decision on review applicants.

[1154] Ibid [70].

[1155] Ibid [70].

[1156] Aronson and Groves, above n 1055, [4.690].

[1157] *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99, 132–3 (Robertson J).

[1158] Ibid 137 (Robertson J).

[1159] Aronson and Groves, above n 1055, [4.730] discussing the treatment of *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 in subsequent cases. The Full Federal Court in *Minister for Immigration and Border Protection v MZYTS* (2013) 136 ALD 547 at [70] cited with approval Robertson J in *Minister for Immigration and Citizenship v SZRKT,* where he held that the identification of jurisdictional error could not "put out of account the actual course of decision-making by the Tribunal". The Full Court further held at [70] that Robertson J "disavow[ed] any jurisdictional/non-jurisdictional distinction between claims and evidence and instead [found], correctly in our respectful opinion, that the "fundamental question must be the importance of the material to the exercise of the Tribunal's function and thus the seriousness of any error".

[1160] Ibid [4.750].

[1161] Ibid [4.690].

D 2(c) *Conclusion in Relation to the Tribunal's Use of Independent Research*

Professor Smillie observes that "an adjudicator's background of personal knowledge acquired without regard to the particular case before him includes a wide range of ingredients from a great variety of sources":[1162]

> It includes knowledge of a wide range of facts, from the most specific and concrete to the most general and abstract; general propositions or assumptions based on past experience; general understanding acquired through repeated contact with similar problems; scientific and technical information; mental processes such as logic, reasoning and guessing; ideas about questions of policy and expediency; intuition, instinctive judgments and emotional reactions.[1163]

As he notes, "all of these aspects or ingredients of an adjudicator's background of knowledge and experience may influence his (sic) final decision" and that often his or her decision will be based on "conclusions or impressions derived from a mixture and interaction of these diverse factors".[1164]

Although the use of official notice "should obviously not be discouraged", and, as Professor Smillie points out, is probably impossible to avoid anyway, it is subject to "the necessary qualification … that care should be taken to ensure that the proceedings before the Tribunal remain fair and permit all parties a reasonable opportunity to present their cases".[1165]

I have two concerns relating to the Tribunal's use of independent research that arise out of my file review, namely that, at times the Tribunal's use of research was inappropriate, and at other times the research itself was based on contentious ideas, open to serious doubt.

Although judicial review claims have on the whole been unsuccessful, independent research gives rise to valid concerns relating to the overall fairness of the decision-making process and may bring into question the Tribunal's impartiality. Use of particular research itself is a value-laden process, which requires sifting, assessing, analysing and ultimately, agreeing with its conclusions. Otherwise why rely on it? The Full Federal Court made this point in *Jagroop*:

> …[T]he very fact that the AAT referred to the authors' discussion of the efficacy of sanctions in personal and general deterrence, and of the efficacy of rehabilitation, as well as its selection of the quoted passages, seems to indicate that it regarded this material as, at the least, casting doubt

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[1162] JA Smillie, 'The Problem of Official Notice: Reliance by Administrative Tribunals on the Personal Knowledge of their Members' [1975] *Public Law* 64, 68.

[1163] Ibid.

[1164] Ibid.

[1165] *Scorgie v Minister for Immigration and Citizenship* (2007) 47 AAR 314 [15].

> on the claimed deterrent and rehabilitative effect of the period of imprisonment served by the appellant. In this way, the AAT used, indirectly the conclusions in the criminological literature summarised by Edney and Bagaric in a way which was adverse to the appellant.[1166]

In addition, what struck me while reviewing these Tribunal cases is how little the research added to the decision and in fact, it detracted from the Tribunal's reasons. In the cases analysed, there was sufficient material to justifiably affirm the decision. It diminishes the quality of Tribunal decision-making and therefore its reputation and should be abandoned. Otherwise, if serious illogicality does extend to the reasoning process, the wrong decision may be reached.

[1166] *Jagroop v Minister for Immigration and Border Protection* [2014] FCAFC 123 [55].

CHAPTER VII

MEMBERSHIP OF THE AUSTRALIAN COMMUNITY

A *Introduction*

Although within the law, the Australian government's treatment of non-citizens in some significant respects is not just or so I shall argue. For reasons, which I explain shortly, I use "just" in Walzer's sense, in other words, an idea that is to be understood in terms of the inherited standards and traditions of a particular community, in this case, the Australian community.

In this context, the treatment of non-citizens is unjust because at times they are treated unjustifiably differently from citizens, defined here as those who hold "the legal status of citizenship".[1167] I have in mind unequal treatment in two key respects, namely in terms of their procedural rights underpinning the review process, discussed in detail in the previous chapter, and in the imposition of an additional punishment for their crimes, namely the removal itself.

The differential treatment of non-citizens is justified on the grounds that the person is not a citizen, as narrowly defined. The argument is untenable, however, because the notion of membership usually encompasses three different meanings. I use the term membership throughout although I note that there is overlap with and interchange with the term "citizenship". In general, citizenship "designates some form of community membership".[1168] First, there is membership of the political community, which "forms the basis of most discussions of citizenship from Aristotle onwards".[1169] Secondly, there is membership of the legal community. Thus, within the Australian territory non-citizens are entitled to, and enjoy, many of the same rights held by citizens. Finally, there is membership of the social community, which "asserts that people can be members of a society even when they are not citizens and that their membership gives them moral claims to legal rights".[1170] I discuss each sense of membership in due course.

In this chapter, I argue that non-citizens should be treated in accordance with the values, as found in Australia's multicultural, liberal democratic structures and traditions. Values such as

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[1167] Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press, 2006) 19.

[1168] Ibid 18.

[1169] Kim Rubenstein, 'Globalisation and Citizenship and Nationality' in Catherine Dauvergne (ed), *Jurisprudence for an Interconnected World* (Ashgate, 2003) 160.

[1170] Joseph Carens, *The Ethics of Immigration* (Oxford University Press, 2013) 160.

"respect for the equal worth, dignity and freedom of the individual" [1171] and equality before the law require that the treatment of non-citizens in Tribunal proceedings under section 501 should be the same as the treatment of citizens who take their disputes to the Tribunal.

B *Internal Standards of Justice*

Justice is a much contested concept. In this chapter, I am going to apply the approach developed by Michael Walzer, a prominent political philosopher. Walzer bucks the more "commonly-held philosophical view" that only one system of distributive justice exists.[1172] Instead, he argues that "justice is a human construction",[1173] shaped by "history, culture and membership".[1174] Walzer accordingly believes that justice can only be a "local account".[1175] He claims that "a given society is just if its substantive life is lived in a certain way — that is, in a way faithful to the shared understandings of the members".[1176] Because distributive justice in this account depends on the shared meaning of social goods in each distributive sphere, he believes that it presupposes a bounded, political community,[1177] with its own distinct and cohesive culture.[1178] The political community must have the right to admit and exclude non-members to ensure "communities of character", defined as "historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life".[1179] He observes that "the restraint of entry [and presumably exclusion] serves to defend the liberty and welfare, the politics and culture of a group committed to one another and to their common life".[1180] Social goods which are "justly distributed", in other words, distributed in accordance with the community's internal principles, however, are not necessarily "good societies" for everyone, as Walzer openly acknowledges.[1181] However, his inability to articulate an "inclusive formula that can be used to measure social justice in any society" leaves him open to criticism.[1182] Dworkin, for example, fears that Walzer is too relativistic:

[1171] Department of Immigration and Citizenship, *Life in Australia* (Commonwealth of Australia, 2007) 1.
[1172] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1983) 5.
[1173] Ibid.
[1174] Ibid.
[1175] Ibid 214.
[1176] Ibid 313.
[1177] Ibid 31.
[1178] Ibid 39.
[1179] Ibid 62.
[1180] Ibid 39.
[1181] Ibid 312, 320.
[1182] Ronald Dworkin, 'To Each His Own' (14 April 1983) *New York Review of Books*, 2

> For it is part of our common political life, if anything is, that justice is our critic not our mirror, that any decision about the distribution of any good — wealth, welfare, honors, education, recognition, office — may be reopened no matter how firm the traditions that are then challenged, that we may always ask of some settled institutional scheme whether it is fair.[1183]

Although Dworkin's criticism raises a significant point, Walzer's approach remains attractive because he recognises that "radically different cultural traditions" impact on views of justice.[1184] As he says:

> I don't hope to make arguments that are conclusive for all human beings in all societies that exist or will exist or have ever existed. I don't subscribe to the idea — it seems to me distinctly odd — that the principles of justice appropriate to Americans must be appropriate as well to ancient Babylonians. Not that such an idea makes it impossibly hard to arrive at principles of justice; it makes it too easy, for the principles need not apply to anyone in particular. The hard task is to find principles latent in the lives of people Dworkin and I live with, principles that they can recognize and adopt.[1185]

Professor Dauvergne adopts Walzer's approach when comparing Canadian and Australian immigration systems. While also acknowledging the limitations of his approach, she argues that nevertheless these "internal standards of justice are a crucially important device"[1186] because they "guard against capricious or self-serving political decision making".[1187] As she notes, these standards "articulate goals for immigration law and policy that, in practical terms, would be a marked improvement on political reality".[1188] Furthermore, these standards are "more compelling" precisely because they have been developed by the members of the community.[1189]

How then is it possible to identify internal standards of justice? One method is to examine a community's values.[1190] Values are a "portmanteau type expression", used to denote, amongst other things, standards, such as community standards.[1191] Although the identification of values is necessarily imprecise, I note that this approach has been taken by a number of academics. In discussing "the ethical issues raised by immigration", Joseph Carens, for example, argues that

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[1183] Ibid 6.

[1184] Michael Walzer, 'Spheres of Justice: An Exchange' (21 July 1983) *New York Review of Books*, 4.

[1185] Ibid 4–5.

[1186] Catherine Dauvergne, *Humanitarianism, Identity, and Nation: Migration Laws in Canada and Australia* (UBC Press, 2005) 70.

[1187] Ibid 68.

[1188] Ibid 70.

[1189] Ibid.

[1190] Ibid.

[1191] Anthony Mason, 'Rights, Values and Legal Institutions: Reshaping Australian Institutions' (1997) *Australian International Law Journal* 1, 1.

"a commitment to democratic principles greatly constrains" the regulation of entry and stay of non-citizens.[1192] Those democratic principles "refer to the broad moral commitments that underlie and justify contemporary and political institutions and policies".[1193] Such democratic principles include the following: "all human beings are of equal moral worth"; "a duty to respect the rights and freedoms of individuals"; "all citizens should be equal under the law"; "people should not be subject to discrimination on the basis of characteristics like race, religion, or gender" and that "we should respect norms like fairness and reciprocity in our policies and so on".[1194] In a similar manner, Claus Offe also refers to a "minimal moral standard" which applies to formal and procedural rules, such as acting in accordance with "legal norms and constitutional principles".[1195]

C *Australian Values in General*

The fact that Australia is a liberal democracy immediately says something about its values. Liberalism is a political ideology that seeks "to limit the power of the government in order to protect citizens' rights and liberties".[1196] As is evident throughout the world, the election of a government by the majority "is no guarantee that it will respect individual rights and liberties".[1197] Liberals believe that in order to be a "fully fledged" human being, people should be free to set and pursue personal goals in their private life.[1198] No one's personal choice about what constitutes the good life is superior to others [1199] because "each human being is of equal worth individually, whatever his or her social utility".[1200] Everyone's freedom and equality highlights another important value, namely dignity. It is because of this fear of oppression by the government itself that liberal democracy "combines representative democracy (including free and fair elections with universal suffrage) with a variety of safeguards that are designed to limit government power, such as the rule of law, constitutions, the dispersal and fragmentation

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[1192] Joseph Carens, *The Ethics of Immigration* (Oxford University Press, 2013) 2.

[1193] Ibid.

[1194] Ibid 2.

[1195] Claus Offe, 'From Migration in Geographic Space to Migration in Biographic Time: Views from Europe' (2011) 19(3) *The Journal of Political Philosophy* 333, 335.

[1196] Narelle Miragliotta, Wayne Errington and Nicholas Barry, *The Australian Political System in Action* (Oxford University Press, 2010) 4.

[1197] Ibid.

[1198] Nicholas Wolterstorff and Terence Cuneo, 'Grounding the Rights we have as Human Persons' *Oxford Scholarship Online* 2012; Anonymous, 'Developments in the Law: Immigration Policy and the Rights of Aliens' (1982–83) 96 *Harvard Law Review* 1286, 1292, 1293.

[1199] Norman Barry, *An Introduction to Modern Political Theory* (The Macmillan Press, 3rd edition, 1995) 189.

[1200] Miragliotta, above n 1196, 4.

of power, and a flourishing civil society".[1201] Importantly, the rule of law encompasses the notion that "the law applies equally to all people"[1202] or, in other words, no one is above the law.[1203] Professor Waldron observes that the rule of law includes its formal components, namely "generality, prospectivity, stability, publicity, clarity" and its "procedural and institutional considerations" such as the independence of the judiciary, the observation of the principles of natural justice and accessibility of the courts, including the right to appeal to a higher court.[1204] In sum, "liberals support individual rights because of their belief in the autonomy and equal moral status of human beings, and, given this belief, it makes sense for them to endorse democracy, which aims to give citizens an equal say in resolving political disagreements".[1205] Liberalism offers an important counter to mob rule.

Australia inherited an imperfect form of democracy upon British colonisation.[1206] In 1901, it adopted a Constitution that enshrined representative government[1207] and expressed and implicit checks and balances on state power, such as federalism, the separation of powers and responsible government.[1208] The rule of law "underpins the way Australian society is governed".[1209]

The Australian institutional framework thus promotes various core values, such as "respect for the equal worth, dignity and freedom of the individuals" and equality under the law, which enjoy "broad community agreement and underpin Australian society and culture",[1210] as recently found by the National Human Rights Consultation Committee ('*the Committee*').[1211] After travelling around Australia for four months conducting community consultations and public

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[1201] Ibid.

[1202] Mirko Bagaric, Peter Faris and Theo Alexander, *Australian Human Rights Law* (CCH Australia Limited, 2011) 10–050.

[1203] Murray Gleeson, 'A Core Value' (Paper presented at the Judicial Conference of Australia, Canberra, 6 October 2006) 3.

[1204] Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' (Public Law and Legal Theory Research Paper Series Working Paper No 10–73, New York University School of Law, October 2010), 9.

[1205] Miragliotta, above n 1196, 4.

[1206] Patrick Weller, 'Parliamentary Democracy in Australia' (2004) 57(3) *Parliamentary Affairs* 630, 630.

[1207] *Australian Constitution* ss 7, 24.

[1208] George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 2002) 50, 51.

[1209] Australian Government: The Attorney-General's Department <http://www.ag.gov.au/About/Pages/Ruleoflaw.aspx >.

[1210] Department of Immigration and Citizenship, Living in Australia, What are the Australian Values? <https://www.immi.gov.au/living-in-australia/values/background/#d >.

[1211] Department of Immigration and Citizenship, Commonwealth of Australia, *Fact Sheet No 7 Life in Australia: Australian Values* (September 2011) < http://www.immi.gov.au/media/fact-sheets/07values.htm>.

hearings and receiving more than 35 000 submissions, the Committee confirmed that, amongst other things, "Australia's strengths lie in its democratic values and traditions" and generally, "Australia measured well against many other countries in terms of its human rights protection".[1212]

Following the dismantling of the White Australia policy during the 1960s and 1970s, discussed in chapter two, Australia gradually adopted multiculturalism, a multidimensional policy consisting of government measures designed to respond to the cultural and ethnic diversity of Australia.[1213] Although "the policy and concept of multiculturalism have undergone considerable debate and change in both governmental and academic discourses" throughout the past 30 years, in this context it is noteworthy that the policy seeks to balance cultural expression with, amongst other things, the right of all Australians to equality of treatment and the removal of barriers of race, ethnicity, culture, religion, language, gender or place of birth and the need to maintain, develop and utilise effectively the skills and talents of all Australians.[1214] These principles apply to everyone, regardless of background. In short, the policy promotes "participation and inclusion", with the aim of encouraging non-citizens to become self-reliant with resulting benefits not only to the individual but the wider community. [1215] Under the policy, however, everyone in the community must accept "the basic structures and principles of Australian society", including the Constitution and the rule of law, equality and parliamentary democracy.[1216]

D *Australian Values Found in its Immigration System*

With the exception of its treatment of asylum seekers, in this next section I argue that Australia's core values such as respect for the equal worth, dignity and freedom of the individuals and equality under the law, which underpin Australia's institutions, traditions and

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[1212] National Human Rights Consultation Committee, *National Human Rights Consultation Committee Report*, Chapter 5, 97. It further found, however, at 97, that Australia's record was "far from perfect" on many issues and "the rights and benefits enjoyed by the majority are not shared by all".

[1213] Department of Social Services, National Agenda for a Multicultural Australia, <http://www.dss.gov.au/our-responsibilities/settlement-and-multicultural-affairs/programs-policy/a-multicultural-australia/national-agenda-for-a-multicultural-australia/what-is-multiculturalism >.

[1214] Ibid.

[1215] Senator Chris Evans, *Multicultural Policy to Speak to all Australians*, 30 April 2010 <http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/L6MW6/upload_binary/l6mw61.pdf;fileType=application%2Fpdf#search=%22media/pressrel/L6MW6%22 >.

[1216] Department of Social Services, National Agenda for a Multicultural Australia, <http://www.dss.gov.au/our-responsibilities/settlement-and-multicultural-affairs/programs-policy/a-multicultural-australia/national-agenda-for-a-multicultural-australia/what-is-multiculturalism >.

social practices, are also expressed in Australia's immigration system. As Dauvergne notes, national identity can be discerned from migration law.[1217]

Before explaining how permanent and temporary migrants are treated legally within Australian territory, it is important to understand that Australia embraces temporary and permanent migration because it needs it. In order to encourage this migration, it is in Australia's interests to treat migrants in accordance with its core values.

A review of the Department's recent annual report reveals why this migration is so important to Australia, as it is reflected in the scale of the temporary and permanent migration programs. According to the Department of Immigration and Border Protection, "permanent migration and temporary entry is a key contributor to Australia's economic, demographic, cultural and social needs".[1218] Non-citizens may apply for a visa to enter and stay in Australia under various programs, including the visitor and working holiday-maker, temporary resident, economic and family migration streams. In 2012–13, 190 000 places were allocated under the permanent migration program. The program reserved 67.9% of these places for the skilled stream, "which supported Australia's businesses to address skill shortages" and 31.7% for "the socially important family stream", which facilitated "the reunion of Australians with their close family members".[1219]

The temporary migration program is no less important to Australian society. The student visa program contributes to "Australia's society and economy by facilitating the lawful entry and temporary stay of international students".[1220] Almost 260 000 student visas were granted in 2012–13.[1221] The visitor visa program is encouraged as "the entry of foreign tourists supports the hospitality and tourism industries, while family visitors support the Australian community".[1222] Over the same period, 3 264 978 different types of visitor visas were granted. Under the business part of the visitor visa program, which "supports the Australian economy and business community", 463 558 business visitor visas were issued.[1223] Finally, 258 248 visas were granted under the working holiday-maker program. The Department noted that the program provided "ongoing support to the agricultural, mining and construction sectors" and that "for every 100 working holiday-makers arriving in Australia, there is a net gain to the

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[1217] Dauvergne, above n 1186, 10.

[1218] Department of Immigration and Border Protection, *Annual Report 2012–13* (Commonwealth of Australia, 2013) 44.

[1219] Ibid 45.

[1220] Ibid 50. The remaining 0.4% of the program was reserved for the special eligibility stream.

[1221] Ibid.

[1222] Ibid.

[1223] Ibid.

Australian economy of 6.3 full time jobs".[1224] As we can see, Australia actively encourages temporary and permanent migration on the grounds of national interest.

Australia's core values underpin visa processing. First, visa requirements are set out in the form of clear, although complicated, generally applicable, transparent rules. Changes to the rules are publicly announced. Secondly, while the government enjoys considerable discretion setting the parameters of entry and stay, it must do so under the umbrella of non-discrimination. All immigration programs must be administered in a non-discriminatory manner, in other words, without regard to anyone's "race, colour, national or ethnic origin, sex and religion".[1225] Thirdly, the government articulates its expectations of visa holders, which accord with the expectations of formal citizens. Prior to granting visas, the government requires most visa applicants over the age of 18 to sign a values statement that requires them to respect Australia's core liberal democratic values and to obey Australian law.[1226] The values statement is not intended to "make everyone the same".[1227] Quite the contrary, "respect for the free-thinking individual and the right to be 'different' are the foundations of Australian democracy".[1228] However, everyone is "expected to treat each other with dignity and respect".[1229] Decision-makers are under a common law duty to act fairly when dealing with Australian citizens and non-citizens alike. If a visa is refused or cancelled, Departmental officers must provide reasons for their decision and information on appeal rights. People adversely affected by a decision may generally seek review of decisions before informal, independent merits review tribunals or the courts, whose decisions bind the Department.

Once in Australia, in addition to receiving the protection of the law, non-citizens are granted additional rights, according to the type of visa held. For example, sponsored family-stream visitor visa holders are granted short term visas, generally between three and six months and are not permitted to remain longer, to work, study or train in Australia.[1230] The subclass 457 temporary work (skilled) visa enables employers with a genuine need to sponsor a skilled

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[1224] Ibid.

[1225] Angela Chan, 'Playing with Words' in Ghassan Hage and Rowanne Couch (eds.) *The Future of Australian Multiculturalism* (The University of Sydney, 1999), 11; See, for example, the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth).

[1226] Department of Immigration and Citizenship, *Life in Australia* (Commonwealth of Australia, 2007) 2.

[1227] Ibid 4.

[1228] Ibid 4.

[1229] Ibid 4.

[1230] Department of Immigration and Border Protection, *Factsheet 54 — Sponsored Family Stream* <http://www.immi.gov.au/media/fact-sheets/54sponsored.htm>.

person.[1231] The person is allowed to work for up to four years and their dependants may work and study in Australia.[1232] Permanent residents enjoy greater rights, as they are able to "live, work and study without restriction".[1233] They are entitled to Medicare and, generally after two years, gain access to social security benefits.[1234] While non-citizens may be "at a disadvantage compared to many citizens in exercising their rights — especially if they are not fluent in the local language", "these sorts of disadvantages are not the direct result of not possessing the status of a citizen".[1235]

To summarise, in keeping with its liberal democratic institutions and traditions and its multicultural policy, Australia encourages lawful non-citizens to participate fully in the community, thereby becoming productive members of society. Reflecting this goal, subject to the restrictions imposed by the type of visa held, "migrants face few legal barriers to full participation in Australian society".[1236]

Immigration law recognises that those without the legal status of citizenship can and do become members of the Australian community. In chapter two, for example, I noted that previously the government relied on the immigration and emigration power in the Constitution to effect deportations. Immigrants could not be deported, however, if they had become absorbed into the community, a test, which involved an assessment of the immigrant's "family, employment and other social and economic ties".[1237]

Section 34 of the Migration Act provides that in certain circumstances, by operation of law, people are taken to have been granted an absorbed person visa.[1238] In *Johnson v Minister for Immigration & Multicultural & Indigenous Affairs (No 3)*, French J, as he then was, held that it was "reasonably settled law," that, in the absence of statutory bars, "a non citizen who has lawfully entered Australia and has been absorbed into the Australian community ceases to be an

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[1231] Department of Immigration and Border Protection, *Factsheet 48B — Temporary Worker (Skilled) (subclass 457) visa* <https://www.immi.gov.au/media/fact-sheets/48b-temporary-business-visa.htm >.

[1232] Ibid.

[1233] Department of Immigration and Border Protection, *Australian Permanent Resident Information*, <http://www.immi.gov.au/Live/Pages/australian-permanent-resident-information.aspx >.

[1234] Katherine Betts and Bob Birrell, 'Making Australian Citizenship Mean More' (2007) 15(1) *People and Place* 45, 48.

[1235] Richard Bellamy, 'Introduction' in Richard Bellamy and Antonino Palumbo (eds) *Citizenship* (Ashgate, 2010) xv.

[1236] Betts, above n 1234, 48.

[1237] David Wood, 'Deportation, the Immigration Power and Absorption into the Australian Community' (1986) 16 *Federal Law Review* 288, 288–9.

[1238] See John Vrachnas, Mirko Bagaric, Penny Dimopoulos and Athula Pathinayake, *Migration and Refugee Law: Principles and Practice in Australia* (Cambridge University Press, 3rd ed, 2012) 143–5.

immigrant and passes beyond the scope of the immigration power".[1239] He held that "the word 'absorption' is "an evaluative metaphor which invites consideration of a variety of factors relevant to its application".[1240] Following a review of the law relating to absorption, he held that the following factors were relevant: "the time that has elapsed since the person's entry into Australia; the existence and timing of the formation of an intention to settle permanently in Australia; the number and duration of absences; family or other close personal ties in Australia; the presence of family members in Australia or commitment of family members to come to Australia to join the person; employment history; economic ties including property ownership; contribution to, and participation in, community activities; any criminal record".[1241] French J warned that the list was not exhaustive, but served to illustrate "the multidimensional character of the judgment involved".[1242]

In addition, within the section 501 context itself, more recent Ministerial Directions obliged decision-makers to consider the non-citizen's ties to the community. Under Ministerial Direction No 41, decision-makers were required to consider whether the person was a minor when he or she began living in Australia and the length of time he or she was ordinarily resident in Australia prior to engaging in criminal or other activity. The current Direction also requires decision-makers to consider the strength, duration and nature of the person's ties to Australia.

Finally, I note that Australia's values are also reflected in its approach to citizenship, discussed earlier. Australia has traditionally had a high number of permanent residents living in the community, owing perhaps to the fact that the difference between permanent residence and citizenship is "slight".[1243] In considering strategies to encourage a greater take up of citizenship, in seeking to enhance the value of Australian citizenship, one inquiry recommended "restrict[ing] the non-survival benefits and privileges available to non-citizens", a recommendation which was firmly rejected.[1244] The National Multicultural Advisory Council made the following recommendation:

> The Council believes there is a close and positive relationship between multiculturalism and the legal status of Australian citizenship as well as the wider concept of 'citizenship' which refers to

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[1239] Ibid.

[1240] Ibid.

[1241] Ibid 510–11.

[1242] Ibid 511.

[1243] Betts, above n 1234, 52.

[1244] Committee to Advise on Australia's Immigration Policies, *Immigration: A Commitment to Australia* (Australian Government Publishing Service, 1988) Executive Summary; Commonwealth of Australia, *A New Agenda for Multicultural Australia* (Commonwealth of Australia, December 1999) Recommendation 7.

> membership of the Australian community that in enjoyed by Australian citizens and permanent residents ... The Council believes that it is highly desirable for Australian permanent residents to acquire Australian citizenship when they become eligible to do so, and recommends the active promotion of the benefits of Australian citizenship to encourage its take up. However it must be recognised that permanent residents, who are not yet eligible for or have not yet chosen to acquire Australian citizenship, are nonetheless members of the Australian community and have all the rights and obligations except those that arise exclusively from Australian citizenship.[1245]

In response, the government agreed that the decision to naturalise should be voluntary. While recent changes to Australian citizenship law indicate "a restrictive turn", it is "only at the level of political rhetoric, not of law and policy, which remain liberal and inclusive".[1246] Australia continues to display an inclusive approach to membership of the community. As one former Australian prime minister observed, an Australian is "someone who chooses to live here, obeys the law and pays taxes".[1247]

E *Given Australia's Values, Can the Treatment of Non-Citizens in this Context be Justified?*

As I noted earlier, the government's differential treatment of non-citizens in the section 501 context is founded on the fact that non-citizens lack Australian citizenship, which, for reasons, which I now explain, is an erroneous approach.

E 1 *The Meaning of Community*

I explained in this chapter how people can be members of three different types of communities, namely the political, legal and social communities. In the political community, citizens "are entitled to participate on an equal basis with their fellow citizens in making the collective decisions that regulate social life".[1248] In other words, membership of the political community denotes "democratic self-government, deliberative democracy, and the practice of active engagement in the life of the political community".[1249] This form of membership is "based on

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[1245] National Multicultural Advisory Council, *Australian Multiculturalism for a New Century:Ttowards inclusiveness* (Commonwealth of Australia, 1999) 5.

[1246] Christian Joppke, 'Through the European Looking Glass: Citizenship Tests in the USA, Australia and Canada' (2013) 17(1) *Citizenship Studies* 1,1.

[1247] Betts, above n 1234, 48, quoting former Australian Prime Minister Hawke.

[1248] Bellamy, above n 1235, xi.

[1249] Bosniak, above n 1167, 19.

the liberal ideal of the mutual consent of the citizen and the polity", namely, the social contract.[1250]

Non-citizens are also members of a legal community. In liberal democracies, everyone within the territory, whether citizen or not, is equal before the law. Speaking about Australia, Deane J made the following observation:

> An alien who is unlawfully within this country is not an outlaw. Neither public officer nor private person can physically detain or deal with his person or property without his consent except under and in accordance with the positive authority of the law. Nor is such an alien without status or standing in the land. He can invoke the protection of the law, including the protection of the writ of habeas corpus, against any government official or private citizen who acts unlawfully against him or his property.[1251]

Everyone is also expected to obey the law. In its final report relating to the impact of multiculturalism on the law, the ALRC rejected submissions that "special laws" should apply to particular ethnic groups, finding instead that the "law should apply equally to all without discrimination".[1252]

Finally, non-citizens may become members of the social community, which may be defined as "the affective elements of identification and solidarity that people maintain with others in the wider world".[1253] Non-citizens "participate in labour and housing markets, they pay taxes, they have families that connect them to others in the society in myriad ways, they send children to schools, they participate in neighbourhood and other associations, and they are involved in cultural and recreational activities".[1254] Their active participation in civil society leads to the creation of "a wide range of human ties and social attachments that affect their lives in many ways".[1255] The building of these social ties occurs as soon as a person starts living in a community, regardless of their immigration status and cannot be "ordered by parliament and the

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[1250] Peter Schuck, 'Three Models of Citizenship' in Michael Greve and Michael Zoller (eds), *Citizenship in America and Europe: Beyond the nation state?* (AEI Press, 2009) 159.

[1251] *Kioa v West* (1985) 159 CLR 550, 631.

[1252] Australian Law Reform Commission, *Multiculturalism and the Law,* ALRC No 57 (Commonwealth of Australia, 1992) [1.24]–[1.29].

[1253] Bosniak, above n 1167, 20.

[1254] Joseph Carens, 'Citizenship and Civil Society: What rights for residents' in Randall Hansen and Patrick Weil (eds). *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe: The Reinvention of Citizenship* (Berghahn Books, 2002) 100, 102–3.

[1255] Ibid 103.

law".[1256] It is frequently said that non-citizens who commit crimes renounce any right to remain within the community, an argument to which I return shortly.

E 2 *An Unjust Practice*

As I noted at the outset, at times, the treatment of non-citizens is unjust in the section 501 context in two respects, each of which I now address. First, non-citizens are treated differently procedurally throughout the Tribunal's review process. I have already discussed in detail the unusual statutory procedures governing section 501 in chapter six. For example, applicants must lodge the review application at the Tribunal within nine days after the day on which he or she was notified of the decision to cancel.[1257] The standard deadline is 28 days. The Tribunal's usual discretion to extend the time in which to lodge an application has been specifically excluded under the *Migration Act*. Unlike other review applications, the Tribunal must determine the application within 84 days after the day on which the applicant was notified of the decision: otherwise the decision is deemed to have been affirmed.[1258] Again, unusually, if applicants seek to rely on oral or documentary information in support of their case at the hearing, that information must be provided to the Minister in writing at least two business days before the Tribunal hearing.[1259] Notably, these provisions "are not counterbalanced by any express obligation on the Minister to disclose the entire case against the applicant prior to the hearing".[1260]

While the procedures are designed to "prevent the use of the procedure of merits review to prolong the stay in Australia of a person denied a visa by the application of the character test",[1261] this goal does not provide a sufficient justification for the difference in treatment of non-citizens procedurally. As I have shown, these procedures severely impact on the right of non-citizens to a fair hearing. However, non-citizens are members of the legal community and as a consequence, they are entitled to the same procedural rights as citizens.

Secondly, the government's practice of removing long-term residents is unjust because it treats, without good reason, non-citizens differently to other members of the community used in its broader sense. Having gained entry into Australia, they are free to participate in the life of the

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[1256] Katherine Betts, 'The Issues Paper on Citizenship' (1994) 2(2) *People and Place*, 46, 47.
[1257] *Migration Act 1958* (Cth) s 500(6B).
[1258] *Migration Act 1958* (Cth) s 500 (6L).
[1259] *Migration Act 1958* (Cth) ss 500(6J), (6H).
[1260] *Goldie v Minister for Immigration and Multicultural Affairs* (2001) 111 FCR 378, 390.
[1261] Ibid.

community, to "join the team".[1262] They are accorded the rights needed "to secure a dignified, participatory, independent life ... ",[1263] regardless of their immigration status. With this freedom, they participate in society, building a network of personal relationships, which contributes to the formation of their identity. In so doing, they become integrated into a culture, which prides itself on its core values, such as equality before the law, freedom and dignity. Once non-citizens become members of society, the state's right to deport them is "radically constrained":[1264]

> In brief, people who live in a society over an extended period of time become members of that society and moral claims to legal status follow from that membership. Thus the allocation of legal rights by the state should not be regarded as a morally unfettered political choice. The relationships established in civil society significantly limit and constrain the kinds of allocations of rights that a political society can properly make.[1265]

It is for that reason that there is significant opposition within Australia, discussed earlier, to the use of section 501 to remove long-term residents. As the Ombudsman observed, the fairness and reasonableness of removing people who arrived in Australia as minors, have effectively been absorbed into the Australian community and have no ties elsewhere is highly questionable.[1266]

Before concluding, I deal with three arguments, two of which are raised by Carens, used to justify removal. First, non-citizens are not allowed to remain because they possess citizenship of another country. As he notes, however, the right of non-citizens to remain in their country of residence is "not lessened if their parents' country of origin happens to grant them citizenship because that citizenship does not secure their place in the society to which they most clearly belong":[1267]

> If they are members of any society, they are members of the society where they have lived their entire lives, the society whose language they speak and whose culture they share ... [T]o refuse them the right to stay in the land where they live, and thus formal legal recognition and protection of their status as members of society, is to treat them unjustly.

[1262] Bob Birrell and Katharine Betts, 'Australians' Attitudes to Migration' (December 2001) *Review*, 3, 5.

[1263] Schuck, above n 1250, 155.

[1264] Carens, above n 1254, 103.

[1265] Joseph Carens, 'Immigration, Democracy and Citizenship' in Oliver Schmidtke and Saime Ozcurumez (eds), *Of States, Rights and Social Closure* (Palgrave Macmillan, 2008) 28.

[1266] Commonwealth and Immigration Ombudsman, *Administration of s 501 of the Migration Act 1958 as it applies to Long-term Residents* (Report 01/2006, Commonwealth of Australia) 5.

[1267] Carens, above n 1254, 103.

In Nystrom's case, for example, the Federal Court was unhappy about "the permanent banishment of an absorbed member of the Australian community with no relevant ties elsewhere".[1268]

Secondly, it is argued that the failure of non-citizens to naturalise "when they had the opportunity to do so implies a tacit consent to the conditions that distinguish permanent residents from citizens, including being subject to deportation for criminal behaviour".[1269] Carens observes that "consent counts as justification only when it reflects a genuine choice or at least a free affirmation".[1270] He notes that "in many cases, children do not become citizens because of their parents' choice (or inaction), and by the time they are old enough to choose for themselves, they have already become embroiled in the legal system in ways that preclude naturalisation":[1271]

> Even if these obstacles do not exist, it is unreasonable to infer from inaction the deliberate forfeiture of such a vital interest as the right to stay in one's homeland (even if it is not the place of one's birth). If people are to give up that sort of fundamental right, it must be done as a deliberate and conscious choice in circumstances that are not coercive.[1272]

Carens' concerns are borne out in Nystrom's case. Nystrom arrived in Australia as a 27-day-old baby. He "thought he was an Australian citizen, having lived all his life in Australia".[1273] His visas were conferred automatically by legislation. His mother believed that he was an Australian citizen, a belief compounded by letters received by the Department of Immigration inviting her and her husband to acquire citizenship, without mentioning her children.[1274]

A third argument frequently raised is that non-citizens committing crimes renounce their membership of the community. As Prince notes, however, "within every community there will be those who implicitly renounce the accepted values of a peaceful and ordered society to commit crimes":[1275]

[1268] N*ystrom v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 420, [29].

[1269] Carens, above n 1254, 103.

[1270] Ibid 104.

[1271] Ibid 104.

[1272] Ibid 104.

[1273] Human Rights Committee, *Views: Communication No 1557/2007*, 102nd session, UN Doc CCPR/C/102/D/1557/2007 (18 August 2011).

[1274] Ibid.

[1275] Peter Prince, *The High Court and Deportation under the Australian Constitution*, Current Issues Brief No 26 2002–03 (Department of the Parliamentary Library, Commonwealth of Australia, 15 April 2003) 9.

> Society punishes them, but they are not outside the community or 'unabsorbed' because they commit such actions.[1276]

In Nystrom's case, the Federal Court acknowledged that he had "indeed behaved badly, but no worse than many of his age who have also lived as members of the community all their lives but who happen to be citizens".[1277] The fact remains that many long-term residents are "Australians in all but law".[1278] It is for these reasons that the attempt to justify the removal of long-term residents is not tenable.

F *Conclusion*

The process rules regulating the review proceedings and the banishment of long-term residents, some of whom have lived in Australia for more than 30 years and consider Australia home, are unjust because they are not in accordance with Australian liberal democratic and multicultural values, as expressed in its institutions, traditions and practices. Attempts to justify the difference in treatment do not stand up to scrutiny as membership of the community means far more than being a formal citizen, a member of the political community. It also encompasses social and legal membership, a fact implicitly recognised by the Australian people and the government. The government relies on the need to protect the public to justify removal, yet with too little attempt to harness existing mechanisms within Australia, such as policing, treatment programs and the criminal law, to protect the public.

[1276] Ibid.

[1277] *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 420, 429–30.

[1278] *Minister for Immigration, Local Government and Ethnic Affairs v Roberts* (1993) 41 FCR 82, 86.

CHAPTER VIII

THE LATEST AMENDMENT

A *Introduction*

The *Migration Amendment (Character and General Visa Cancellation) Bill 2014* was introduced in September 2014 and was passed on 26 November 2014. As foreshadowed in the Introduction, the *Migration Amendment (Character and General Visa Cancellation) Act 2014* ("latest Amendment") makes broad-ranging changes to section 501 of the *Migration Act*, some of which I have briefly discussed in the context of the character test in chapter five. In this chapter, I briefly outline the principal changes relevant to my thesis arising from the latest amendment. I then argue that my concerns relating to the law prior to these amendments apply with even greater force to the changes.

The latest Amendment came about following a Departmental review of the character provisions, which had "remained largely unchanged since 1994".[1279] The Explanatory Memorandum states that "since that time, the environment in relation to the entry and stay in Australia of non-citizens has changed dramatically, with higher numbers of temporary visa holders entering Australia for a variety of purposes".[1280] The purpose of the latest Amendment is "to strengthen the character and general visa cancellation provisions in the Migration Act to ensure that non-citizens who commit crimes in Australia, pose a risk to the Australian community or represent an integrity concern are appropriately considered for visa refusal or cancellation".[1281]

B *The Character Test*

The latest Amendment inserts new grounds and amends various, existing grounds of the character test, contained in section 501(6) of the *Migration Act*.[1282] I discuss some of these

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[1279] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth), Outline.

[1280] Ibid.

[1281] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 2014, 2 (Scott Morrison).

[1282] (6) For the purposes of this section, a person does not pass the character test if:

…

(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;

amendments in chapter nine. In this chapter, however, I want to only focus on the changes to the meaning of "substantial criminal record" because those found to have such a record are henceforth subject to a new, more draconian regime discussed in the next section of this chapter.

In chapter five, I showed how ambiguous the definition of substantial criminal record was. The latest Amendment aims to clarify its meaning. First, it provides that a person has a substantial criminal record, where the person has been sentenced to two or more terms of imprisonment, which total 12 months, replacing two years, as the law previously stated. The latest amendment's Explanatory Memorandum explains that its rationale is as follows:

> The purpose of this amendment is to ensure that repeat or serial offenders who may have been sentenced to a series of lesser terms of imprisonment for multiple offences at the lower end of the scale but which cumulatively add up to a period of 12 months or more, objectively do not pass the character test. A series of sentences such as these raise significant concerns as to the person's character, including that there may be a history and high risk of recidivism and a clear disregard for the law.[1283]

Secondly, the latest Amendment inserts section 501(7A), which specifically deals with concurrent sentences, thus specifically dealing with a matter upon which the *Migration Act* was previously silent. The new subsection provides that "if a person has been sentenced to two or more terms of imprisonment to be served concurrently (whether in whole or in part), the whole

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

See chapter five in relation to other changes made to the character test pursuant to the *Migration Amendment (Character and General Visa Cancellation) Act 2014*.

[1283] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) [59].

of each term is to be counted in working out the total of the terms".[1284] The Explanatory Memorandum states that "the purpose of this amendment is to clarify that the terms of imprisonment count towards the total of 12 months' imprisonment irrespective of how the sentences are to be served (whether consecutively or concurrently)".[1285]

The latest Amendment therefore makes significant changes to the meaning of substantial criminal record. While it is important to clarify the law, particularly when its previous lack of clarity had generated substantial litigation and different judicial approaches as discussed in chapter five, the amendments will no doubt lead to a sharp increase in the number of people found to hold a substantial criminal record. Such an increase is problematic, given the new consequences of having a substantial criminal record, brought about by the latest Amendment.

C *New Cancellation Ground*

The latest Amendment inserts a new cancellation ground, namely section 501(3A), which may be exercised by the Minister personally or his or her delegate. The Explanatory Memorandum sets out how the new ground is designed to work.[1286] In effect, it provides that "the visa of a non-citizen who is in prison and objectively does not pass the character test because they have a substantial criminal record … or because of a sexually based offence involving a child … must be cancelled without notice to the visa holder".[1287] Regardless of whether made by the Minister personally or a delegate of the Minister, decisions made under section 501(3A) are not subject to Tribunal review.[1288] Where a decision has been made pursuant to section 501(3A), the Minister or a delegate must as soon as practicable give the person "in the way that the Minister considers appropriate in the circumstances" a written notice setting out the original decision and particulars of the reasons for making the decision, which specifically relate to the person and invite that person to make representations about the revocation of the decision.[1289] Following representations from the person, which must be in accordance with the invitation to respond, if satisfied, the Minister or his or her delegate may decide that the person passes the character test or that there is another reason why the original decision should be revoked.[1290] The decision of a

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[1284] Ibid [72].

[1285] Ibid [73].

[1286] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth), Outline.

[1287] Ibid [32].

[1288] *Migration Act 1958* (Cth) section 500(4A).

[1289] *Migration Act 1958* (Cth) section 501CA.

[1290] *Migration Act 1958* (Cth) section 501CA(4).

delegate to refuse to revoke the cancellation of the visa is reviewable by the Tribunal,[1291] but, if the decision is set aside on review, "the Minister may, acting personally, set aside that revocation decision and cancel the visa if satisfied that the person does not pass the character test and the cancellation of the visa is in the national interest".[1292]

Following the latest Amendment, more visas are being cancelled.[1293] In accordance with the approach that I have taken throughout the thesis, I believe that the new cancellation ground fails to strike the appropriate balance between the interests of non-citizens, particularly long-term residents and those of the wider community for the reasons that follow.

First, I noted in chapter seven that the procedural and substantive difference in the treatment of non-citizens under section 501 was justified on the grounds that they were not citizens. I argued, however, that this difference in treatment did not stand up to scrutiny, given the different senses of membership of the community. I argued in that chapter that the manner in which non-citizens are treated under section 501 fails to respect their dignity and worth and violates their right to equality before the law, values enshrined in Australia's institutions and traditions. As members of Australia's social community, long-term residents, who commit crimes, should not face the additional punishment of removal.[1294] As members of the legal community, residents should be entitled to the same procedural regime as citizens. This argument applies with even more force to the changes affected by the latest Amendment. The treatment of non-citizens under section 501 remains fundamentally unjust and for that reason alone, the law should be amended. In addition, I have other concerns about the changes under the latest Amendment.

Secondly, as I noted above, the new cancellation ground provides that the Minister must cancel the visa where the person is in prison and fails the character test on account of having a substantial criminal record or has committed a sexually-based offence against a child (a new ground of the character test). The new cancellation ground abolishes the discretion whether to cancel the visa. Given that the circumstances of the crime, mitigating factors, risk of recidivism and rehabilitation are no longer considered at this stage, the ground has become too broad and will no doubt capture people who have committed less serious crimes. From a financial perspective, I believe that the Department should be concentrating its resources on assessing the risk to the Australian community posed by serious offenders. In addition, the new cancellation

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[1291] *Migration Act 1958* (Cth) section 500(1)(ba).

[1292] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth), Outline.

[1293] Caitlyn Gribbin, 'Hundreds of convicted criminals have visas revoked under Migration Act amendment', *ABC* (online) 25 February 2015 <http://www.abc.net.au/news/2015-02-24/convicted-criminals-have-visas-cancelled/6254120>.

[1294] Ibid.

ground may also lead to a significant increase in the number of review applications, also an expensive exercise.

Thirdly, a recent media report indicated that the Minister is making the decisions under the new cancellation ground, thereby excluding merits review.[1295] In my view, given the potentially political nature of this type of decision-making (discussed in more detail in chapter nine), it is critical that decision-making is undertaken by the Department and be subject to merits review.

I have a related concern. As I noted earlier, if revoked by a delegate, the decision is reviewable by the Tribunal. However, if the Tribunal sets aside the revocation decision, the Minister has the power to set aside the Tribunal's decision in the national interest. This amendment brings into question the purpose of Tribunal review, a matter which I deal with in more detail in chapter nine. In short, my view is that Tribunal proceedings are a waste of time and money if the Minister is able to set aside its decision. Furthermore, in my view, when the Minister sets aside the Tribunal's decision, it damages the Tribunal's reputation and undermines its role within the administrative law system, as well as diminishes the justness of the decision reached.

Fourthly, the cancellation decision may be revoked if applicants are able to show that they pass the character test or "there is another reason why the original decision should be revoked"[1296], an exceedingly vague legal test. Without further guidance as to when to revoke the decision to cancel the visa, there is a greater risk of inconsistent and unfair decision-making at Tribunal level.

Finally, section 501(3A) provides that the visa must be cancelled without notice to the visa holder, a particularly retrograde aspect of the new cancellation ground. I noted in chapter three that in his review of section 501, the previous Commonwealth Ombudsman found that the Department's fact-finding processes were deficient. Information in relation to the person's criminal record was inaccurate or incomplete. While not perfect, the previous process, namely the Notice of Intention to Cancel a Visa, at least allowed applicants to respond to the proposed cancellation and gave them an opportunity to point out errors in calculating the substantial criminal record. The new cancellation ground prohibits input from applicants throughout that stage of the process, a matter of great concern.

In addition, when inviting the person to make representations about revocation of the decision, the Minister is granted significant discretion to decide what, and how, information is put to the person. Again, the breadth of the Minister's procedural discretion is worrying.

[1295] Ibid.

[1296] *Migration Act 1958* (Cth) section 501CA(4)(b)(ii).

Furthermore, because of the way in which section 501(3A) operates, applicants seeking revocation of their visa cancellation will either be in prison or immigration detention. In previous chapters, I have highlighted the practical obstacles incarcerated applicants face in conducting their "defence". It is likely that these hurdles will continue to impact on the ability of applicants to obtain a fair hearing. The implications of section 501(3A) and section 501CA for procedural fairness are therefore weighty.

For these reasons, in my view, the latest Amendment adversely impacts on the interests of non-citizens and represents a wholly retrograde approach to the assessment of "bad" character under migration law and to the consequences of that assessment.

CHAPTER IX

REFORM PROPOSALS

A *Introduction*

In this chapter, I set out my proposals in relation to three key aspects of the pre-December 2014 section 501 system, namely the substantive and procedural law and broader matters such as the interrelationship between the executive and the Tribunal. I do deal, however, with some of the changes that relate to the character test brought about by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* in this chapter, namely in the context of the reform of the character test. As I noted in chapter three, the latest Amendment came into force after I had written the thesis. While some of the reform proposals may now seem otiose, I note that the remaining cancellation grounds apply, where the new cancellation ground does not apply.[1297] The previous system therefore remains in existence. Working hand-in-hand, the present reform proposals are put forward with a view to creating a new system, which more justly balances the interests of criminal non-citizens with the need to protect the Australian community. My reform proposals do not deal with the broader aspects, for example, the new cancellation ground, of the post-December 2014 system.

B *No Removal after Ten Years' Residence*

In this section, I argue that Australia needs a system that first, protects non-citizens from removal after a certain period of residence and secondly, allows discretion in relation to non-citizens whose length of residence falls short of the residence rule.

In a helpful discussion of "the concept of absorption into the Australian community as it pertains to the constitutional issue of the scope of the immigration power",[1298] Wood explains that there are two interpretations of absorption, namely "thin" interpretations which "treat the concept in a reasonably straightforward and mechanical way" by reference to "basically quantitative factors" such as length of residence and non-criminality and a "rich" interpretation

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[1297] *Migration Act 1958* (Cth) section 501(3B). The Explanatory Memorandum notes that this subsection "puts beyond doubt that the visa of a person who is in prison may alternatively be cancelled under existing subsection 501(2) (cancellation with notice by the Minister personally or a delegate) or existing subsection 501(3) (cancellation without notice by the Minister personally) in a situation where subsection 501(3A) does not apply": Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth), Item 35.

[1298] David Wood, 'Deportation — Absorption into the Australian Community' (1986) 16 *Federal Law Review* 288, 292.

[1298] Ibid 297.

that requires consideration of the "quality" of the non-citizen's period of residence.[1299] He argues for an "ultra-thin" conception of absorption, whereby "absorption is limited to nothing more than a flat period of legal residence in Australia", a position which I also adopt.[1300]

In arguing for a flat period of legal residence, Wood abandons the "non-criminality" requirement on two grounds. First, "deportation can amount to double punishment", resulting in the non-citizen being treated far "more harshly than his Australian counterpart".[1301] He notes that the demands of justice require that "the two be treated similarly, and one not punished more severely than the other".[1302] In addition, he notes, it is in the best interests of the community that "individuals be treated as fairly as possible":[1303]

> It can scarcely be questioned that justice is the most important social virtue. Any reasonable interpretation of the notion of a community's best interests must, it seems, give due regard to this fact. It seems equally the case that justice is an indivisible notion, and therefore it is the community as a whole, which loses if one of its members is denied justice.[1304]

Wood's arguments accord with my views, discussed in chapter seven, that the removal of long-term residents breaches Australia's own standards of justice. There is something profoundly unjust about banishing a social member of the Australian community, no matter what crimes they have committed.

Secondly, Wood argues that "it is quite repugnant to suppose that despite having lived in the country for a considerable time an immigrant is still 'on probation' and liable, if certain circumstances arise, to be deported".[1305] It is also for that reason that I believe that non-citizens should be protected from removal after a certain period of residence. The view that non-citizens remain "on probation" is disturbing when one considers that many long-term residents arrive as children and are unaware that they are not citizens. Although not formal members, nevertheless these people are social members of the Australian community. As Wood observes:[1306]

> ... [I]t seems inconsistent to demand of immigrants that they satisfy a more stringent criterion than native-born Australians in order to be treated as members of the Australian community ...

[1299] Ibid 292.
[1300] Ibid 297.
[1301] Ibid 298.
[1302] Ibid.
[1303] Ibid.
[1304] Ibid.
[1305] Ibid 299.
[1306] Ibid 300.

> The more that is required of immigrants to be regarded as fully-fledged members of the Australian community, the more deportation looks like exile.[1307]

Related to this argument is the effect of removal of criminal non-citizens on their country of citizenship. By removing them, Australia is said to be "dumping" its problematic members of the community on other countries. But as Carens notes, given that "every society has people who are involved in criminal activity and who create social problems", "it seems only fair that a society should deal with its own problems, not try to foist them off someplace else".[1308] I agree with Carens' further observation that:

> The argument is especially powerful with regard to people who have grown up in the society that seeks to expel them. It is that society, not the one of their nominal citizenship, that is responsible for their social formation, for successes and failures in the inculcation of social norms and values and for the creation of opportunities and obstacles in social life. [1309]

It is for these reasons that non-citizens who are members of the social community should not be removed.

Currently, Australia has a system in which there are two sources of power relating to the removal of criminal non-citizens that operate side by side. They are sections 200 and 201, which in effect constitutes a residence rule, and section 501. Legally, the government may rely on either source of power to remove non-citizens. The evidence, however, demonstrates that the section 501 power has come to "supersede the traditional criminal deportation process", which has fallen into "disuse".[1310] As I have shown throughout the thesis, section 501 is a much broader power, which "captures a far wider range of behaviour".[1311]

Wood puts forward a compelling argument for an ultra-thin rule in a different but related context. The creation and application of a residence rule is attractive as it promotes transparency, consistency and certainty in decision-making.

One solution is to rely on existing law. Sections 200 and 201 implicitly recognise that, after a certain point in time, non-citizens do become members of the community, even after conviction

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[1307] Ibid.

[1308] Joseph Carens, 'Citizenship and Civil Society: What rights for residents' in Randall Hansen and Patrick Weil (eds). *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe: The Reinvention of Citizenship* (Berghahn Books, 2002) 100, 103.

[1309] Ibid.

[1310] Glenn Nicholls, 'Gone with hardly a Trace: Deportees in Immigration Policy' in Klaus Neumann and Gwenda Tavan (eds) *Does History matter? Making and Debating Citizenship, Immigration and Refugee Policy in Australia and New Zealand* (ANU E Press, 2009) 18.

[1311] Senate Legal and Constitutional References Committee, Parliament of Australia, *Administration and Operation of the Migration Act 1958* (2006) ('*Senate Report 2006*') [9.41].

for crimes. Following strenuous debate, the deportation provisions were passed by Parliament, and, as such, enjoy democratic legitimacy. Sections 200 and 201 constitute clear, public rules, which promote consistency and certainty in decision-making. By aligning the treatment of criminal non-citizens and citizens in certain circumstances, sections 200 and 201 constitute a more just response to the "problem" of criminal non-citizens.

A number of issues arise, however, including whether 10 years should be the period of residence required and whether the person must have resided lawfully throughout that period.

The 10-year period provided for in sections 200 and 201 is lengthy. Many writers argue for lesser periods. Wood suggests that the period should range from three to five years, while Carens suggests five years. Whatever period is suggested, it is going to be, to a degree, arbitrary. The requisite length of residence underscores the importance of a comprehensive public debate about what time period should equate to belonging to the social community. Debate was what in fact occurred in relation to these provisions. Sections 200 and 201 and a criminal deportation policy were introduced in the early 1980s by the Hawke government.[1312] Following initial rejection by the Senate, the government eventually succeeded in having the amendment passed on the following grounds:

> The 10-year period reflects the Government's belief that if a non-citizen has arrived legally in the country and has 10 years of lawful residence that person should not be subject to the possibility of deportation except for conviction of security-related crimes under the Crimes Act. Under the current Act there have been many cases of long-term residents, who have no affinity whatsoever with their home country, being subject to deportation for relatively minor breaches of the law. Worse still is the possibility of the inconsistent use of ministerial discretion. It was decided by the Government that ten years was a reasonable period to limit the operation of the Minister's discretion as it fairly balanced the need to protect the community from criminal acts of non-citizens against the fundamental human rights of these people after a lengthy period of lawful residence in Australia.[1313]

While it is by no means obvious that 10 years should constitute the required period of residence, it is what is provided for in the existing law. Following discussion and debate, the law was passed and currently represents what is considered to be a fair balance of the interests of the applicant and the community.

[1312] Nicholls, above n 1310, 18.

[1313] Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1983, 2775 (Stewart West).

In relation to whether the period of residence should be lawful, Wood, who admits that the issue is not "straightforward", argues that residence should be lawful because to provide otherwise would encourage illegal immigrants.[1314] His position is defensible, particularly as it is in keeping with the notion that people who are unlawful should not obtain an unfair advantage over people seeking to enter Australia.

C *If Less than Ten Years' Residence, Modified Section 501 Applies*

Wood argues that "the various criteria for selecting immigrants should operate only at the initial stage of assessing applications to come to Australia as a permanent resident", rather than "viewed as a continuing process which can go on even years after an immigrant has arrived in Australia".[1315] I would not accept this proposition in the section 501 context as there may be instances where a criminal non-citizen who has only lived in Australia for a short period ought to be removed.[1316]

While providing certainty, consistency and other benefits, rules, such as a residence rule, may produce unjust results. Ten years is an arbitrary period. Non-citizens may become members of the social community earlier. Accordingly, in the interests of justice, it is necessary to have a system that recognises that certain non-citizens may not be protected by the residence rule yet still be social members of the community, and which enables the assessment of their claims. Accordingly, I endorse retaining the existing section 501 system but subject to amendment. The first substantive change required to section 501 is the insertion of a rule protecting non-citizens from removal after a certain period of residence. In addition, further changes are required, including to the character test and the Directions.

D *Retain Modified Character Test*

The concept of character is highly context-specific and affected by complex, multilayered interests. The review of character in migration and citizenship law and the regulation of legal and medical practitioners reveals the different approaches taken in law to confining and structuring of what is a highly discretionary task.

Although character underpins section 501, nowhere is it defined. Instead, section 501 contains a character test, which sets out the circumstances in which a person is taken to fail the character

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[1314] Wood, above n 1298, 302.

[1315] Ibid 299.

[1316] Carens also agrees with this proposition: see Joseph Carens, 'Immigration, Democracy and Citizenship' in Oliver Schmidtke and Saime Ozcurumez (eds). *Of States, Rights and Social Closure: Governing Migration and Citizenship* (Palgrave McMillan, 2008) 17, 31.

test. Leaving aside for a moment the difficulties with the current character test, to which I return shortly, the alternative approaches to the assessment of character in other areas of law highlight the challenges of a highly discretionary approach. Under citizenship law, the applicant must be of good character in order to obtain citizenship. As in the migration context, "good character" is undefined under the *Australian Citizenship Act*, although there is policy guidance in relation to its interpretation. While the approach to good character is discretionary, it is confined by statutory bars under that Act, which prevent consideration of the grant of citizenship for periods of up to 10 years following conviction.

The assessment of the character of legal and medical practitioners again represents alternative legal approaches. Conviction and sentence do not result in the automatic failure of the common law "fit and proper" test which underpins the various Legal Profession Acts, which exist in almost every Australian state and territory. Instead the law requires consideration of any conduct relevant to the assessment, including recent and distant behaviour, a very broad assessment indeed.[1317] Importantly, the conduct leading to a finding of unfitness does not have to be connected to the practice of law. The case study, *A Solicitor*, showed the different, but equally legitimate, approaches of decision-makers to the weighing of the interests in a particular case. It is unsurprising that decision-makers take different approaches to the extraordinary constellation of variables such as mental illness, the impact of grief and stress, alcohol, drug and other addictions, the risk of recidivism, rehabilitation, the impact on family members of the decision, the applicant's and witnesses' credibility and what is needed to protect the public and the profession. The weighing process is further complicated by a purpose, namely the protection of the public, which contains subsidiary and sometimes conflicting goals, such as the maintenance of standards of the profession and general deterrence. Various influences such as negative media attention and political comment may also play a role in the weighing process.

The assessment of the character of medical practitioners is also discretionary, requiring a balancing of considerations, goals and interests. As with legal practitioners, a balance between the protective and punitive goals of regulation is required. The balancing act is further complicated by the need to consider the specialised skills of doctors, which have been acquired over many years and paid for in part by the public. In Dr Wingate's case, for example, he was an ophthalmologist, who undertook pro bono work, treating the macular degeneration of the elderly and the indigenous. The procedures regulating the conduct of medical practitioners also reflect the wider social utility of doctors. Investigations are channelled into the conduct, performance and health pathways, constituting a shift away from a disciplinary to a pro-

[1317] *Re Davis* (1947) CLR 409, 416.

therapeutic approach, which emphasises guidance, mentoring and enhancement of performance.[1318] While there is no doubt that decision-making in the regulation of legal and medical practitioners is confined and structured in various ways, the assessment of character nevertheless remains highly discretionary.

These alternative legal approaches to the assessment of character highlight the benefits of the use of a legislative device such as the character test. The character test consists of a combination of precise and broader rules, which confines and structures discretion. The substantial criminal conduct ground is the most commonly invoked ground. The lack of reliance on the other grounds is telling, perhaps highlighting decision-makers' need for clear rules, particularly in high volume areas of decision-making. There are dangers, however, in the setting of clear-cut rules, one of which is that too many are caught in the net. Earlier I referred to the findings of the ANAO which found that in 2009–10, 1519 cases were referred to the NCCC for character assessment, of which 491 visa applicants and 513 visa holders failed the character test, representing approximately 66% of referrals. The NCCC ultimately refused 156 visa applications and cancelled 58 visas. These figures strongly suggest that the substantial criminal record ground of the character test is not working as a proper filter. My reform suggestions, to which I now turn, address this issue.

E *Reform Certain Aspects of the Character Test*

As discussed in chapter five, the government introduced the substantial criminal record ground in order to simplify decision-making, by providing an "objective, easily identified" criterion. By setting out "clear benchmarks for criminal behaviour", it would expedite the assessment process and provide more certainty in relation to who passed the character test.[1319]

My discussion of the interpretation of the substantial criminal record ground, particularly in relation to the combining of terms of imprisonment and whether terms of imprisonment imposed concurrently count as a single term, revealed that its scope of application remained unclear, given the lack of express legislative intention, the volume of litigation and the differing judicial views. The latest Amendment has since addressed this uncertainty. Clarification of the law is always welcome as it promotes greater transparency, consistency and fairness. The amendments, however, adopt a far tougher approach and have no doubt contributed to more people failing the character test. The ground was already a victim of its own success, with

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[1318] Ian Freckleton, 'Regulation of Health Practitioners: Grappling with Temptations and Transgressions' (2004) 11 *Journal of Law and Medicine* 401, 402.

[1319] See chapter five.

decision-makers displaying an overwhelming reliance on the substantial criminal record ground, a matter of concern to the ANAO.

Professor Cunneen observes that Australia has seen "an unprecedented rise in the levels of imprisonment over recent decades", with "the more marginalised and less powerful social groups … experience[ing] the brunt of growing prison numbers".[1320] He notes that "the rise of imprisonment is consistent with the broader political agenda of the neo-liberal state, a move away from rehabilitative aims towards a culture of control".[1321] Importantly, the rise is due to "changes in sentencing law and practice, restrictions on judicial discretion, changes in bail eligibility, changes in administrative procedures and practices, changes in parole and post-release surveillance and a judicial and political perception of the need for 'tougher' penalties".[1322]

Research is currently being conducted into the criminological aspects of section 501, an important avenue of research. Grewcock, for example, is exploring the link between deportation and the assessment of risk.[1323] I mention these developments because I believe that further research into whether a sentence of 12 months ought to be the trigger for the failure of the character test is required, in light of the changed political and social climate in which harsher penalties are de rigueur. Given the number of cases which fell into the substantial criminal record category prior to the December 2014 amendments, there may be a case for increasing the term of imprisonment necessary to trigger the failure of the character test, particularly if it can be shown that people are receiving harsher sentences for the same offences.

I also recommend that the existing provision extending to non-citizens acquitted on the grounds of unsoundness of mind or insanity should be repealed. The case law relating to character under section 501 emphasises "a degree of moral culpability or turpitude" and "a lack of enduring moral quality".[1324] Given that acquittal on the grounds of unsoundness of mind and insanity indicates that these non-citizens have a serious mental illness to such a degree of being absolved of legal culpability for their actions, it is extraordinarily unjust that they may fail the character test on this ground and consequently, be subject to removal. Furthermore, in light of their

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[1320] Chris Cunneen, 'Fear: Crime and Punishment' (2010) 29, *Academy of the Social Sciences Dialogue* 44, 44.

[1321] Ibid 45.

[1322] Ibid.

[1323] See Michael Grewcock, 'Punishment, Deportation and Parole: the Detention and Removal of Former Prisoners under Section 501 Migration Act 1958' (2011) 44 *Australian and New Zealand Journal of Criminology* 56.

[1324] *Godley v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 83 ALD 411, 427.

mental state, it would be unlikely that mentally ill applicants would be able to understand, much less be able to successfully mount a "defence". I have not seen any cases upon which a person failed the character test on this ground. Regardless of whether and how frequently it is invoked, it should nevertheless be abolished.

The second ground of the character test, the immigration detention-related offences ground, was inserted in 2011 as a political response to riots in detention centres across Australia. I recommend that this ground be abolished on the grounds that it is both unfair and unnecessary. It is unfair because any conviction related to offences committed in, during or following escape from immigration detention is sufficient to satisfy this ground and the ability of detainees to satisfy decision-makers that their visas should not be refused or cancelled in seriously compromised. It is unnecessary as detainees are already subject to Commonwealth and state law and their conduct may fall under alternative grounds of the character test, such as the substantial criminal record ground or the past or present criminal or general conduct ground.

In relation to the association ground of the character test, long ago the Court took the approach that affiliation with an organisation with "undesirable members or attributes" may, but does not necessarily, bear upon a person's character.[1325] More recently, in *Haneef*, the Court clarified that the association must "have some negative bearing upon the person's character", an important constraint on what is a broad ground.[1326] The *Migration Amendment (Character and General Visa Cancellation) Act 2014* amends the *Migration Act* by repealing the existing association ground and replacing it with the following ground:

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

(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 …[1327]

As before, "membership of the group or organisation alone [will be] sufficient to cause a person to not pass the character test".[1328] In addition, the amendment is designed to "lower the threshold of evidence required to show that a person who is a member of a criminal group or

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[1325] *Hand v Hell's Angels Motorcycle Club Inc* (1991) 25 ALD 659, 675.

[1326] Direction No 55 — Visa Refusal and Cancellation under Section 501 of the Migration Act 1958 (25 July 2012) ('*Direction No 55*') Annex A—Application of the character test, s 3.

[1327] *Migration Act 1958* (Cth) section 501(6)(b).

[1328] Ibid [41].

organisation" does not pass the character test as only "a reasonable suspicion of such membership or association is sufficient to not pass the character test".[1329]

The latest Amendment seeks to override the judicial interpretation of the association ground, which is unsurprising given the political pressure on the government to act against "bikies".[1330] For various reasons, the amendment is of concern. First, the provision assumes that membership of, or association with, a particular group involved in criminal conduct either in the present or the past equates to "bad character", regardless of whether the person knows about or is involved in that criminal conduct. There is every possibility that the test will capture what Spender J in *Haneef* called innocent associations, an undesirable consequence of the amendment. Secondly, the reduced evidentiary threshold will make it easier to find that a person has failed the character test. As I have shown, having been found to fail the character test, people may find it difficult to construct their own "defence", given the systemic obstacles they face.

The remaining two grounds of the character test, namely the past and present criminal or general conduct ground and significant risk of certain type of conduct/danger to the community ground, particularly section 501(6)(d)(v), are also highly discretionary.[1331] The past and present criminal or general conduct ground requires an assessment of the non-citizen's "enduring moral qualities reflected in soundness and reliability in moral judgment in the performance of day-to-day activities and in dealing with fellow citizens", a very difficult task.[1332] Furthermore, the standard is elastic reflecting the fact that the length and the purpose of the residence require "different emphases to be placed on matters that are relevant to each application".[1333] Case law provides some assistance in interpreting and applying this provision: "the totality of the circumstances" must be examined, particularly the person's recent conduct[1334] and the absence of further criminal conduct is relevant in determining a lack of enduring moral quality.[1335] The guidance, however, is limited.

[1329] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) [41].

[1330] See chapter five.

[1331] That subsection provides as follows: In the event that the person were allowed to remain or to enter in Australia, there is a significant risk that the person would … (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".

[1332] *Godley v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 83 ALD 411, 426.

[1333] *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 68 FCR 422, 433.

[1334] *Godley v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 83 ALD 411, 427.

[1335] *Mujedenovski v Minister for Immigration and Citizenship* (2009) 112 ALD 10, 23.

The significant risk of certain type of conduct/danger to the community ground, in particular section 501(6)(d)(v), is also broad, vague and elusive. As Maher noted, even with the assistance of judicial interpretation, it is "very difficult, if not impossible, to determine whether any proposed conduct will fall within the would-be standard of 'activities disruptive ... to the Australian community' ".[1336] Furthermore, its discretionary nature enables its use as "a censorship mechanism".[1337] The *Migration Amendment (Character and General Visa Cancellation) Act 2014* omits the word "significant" from the subsection in order "to clarify the threshold of risk that a decision-maker can accept before making a finding that the person does not pass the character test".[1338] In keeping with other amendments set out in that Act, the reduction in the threshold of risk constitutes a hardened approach in the character test, making it easier to use this subsection as a way, amongst other things, of barring non-citizens' entry into Australia.

Although these last two grounds are problematic, I would not go so far as recommending that they be abolished, particularly as there may be instances where non-citizens have not been convicted or sentenced yet their conduct may properly give rise to concern. In light of the uncertainty relating to their scope of application, however, the grounds ought to be amended to ensure greater clarity in relation to their purpose and what type of conduct ought to be captured by the grounds.

F *Retain Use of Directions and Division of Primary and Other Considerations*

As section 501 is extraordinarily broad, I believe that Directions are critical. Consisting of clear, public rules, they apply to all non-citizens facing action under section 501. Without directions, or some form of rules regulating the exercise of discretion, there would be a significant risk of inconsistent decision-making. Although directions have the force of law, and in that respect are not merely "policy", Brennan J's discussion of policy in *Drake No 2* is nevertheless relevant:

> Inconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice. In matters of deportation, which so profoundly affect the interests of deportees and his family and which are of relevance to the community at large, inconsistency born of the application of differing standards and values should be reduced as far as it is possible to do so.[1339]

[1336] Laurence Maher, 'Migration Act Visitor Entry Controls and Free Speech: The case of David Irving' (1994) 16 *Sydney Law Review* 358, 379.

[1337] Ibid 379.

[1338] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) [44], [46].

[1339] *Re Drake and Minister for Immigration and Ethnic Affairs* (No 2) (1979) 2 ALD 634, 639.

Directions, like policy, promote consistency not only within primary decision-making but also the Tribunal, thereby "enhancing the sense of satisfaction with the fairness and continuity of the administrative process".[1340]

The Directions promote consistency and fairness by requiring primary decision-makers and the Tribunal to consider certain factors and to accord those factors more or less weight, depending on the terms of the relevant Direction. Each of the four Directions has adopted this approach of distinguishing between primary and other considerations, which have differed in content. The Directions represent the views of the government of the day on how the discretion to refuse or cancel a visa should be exercised, for which it is held accountable.

Given that the views of governments change, the continued use of primary and other considerations is acceptable. I also believe that the primary and other considerations should apply to visa holders and visa applicants alike for reasons, which I explain shortly. Furthermore, given that the considerations and their weighting have an important effect on decision-making, I make recommendations in relation to the content of the Directions. In *Black v Minister for Immigration and Citizenship* ('*Black*'), for example, a case decided under Direction No 21, the applicant, who was born in 1940 and had lived in Australia for 51 years, was convicted of child sex offences.[1341] In dismissing his appeal, the Full Federal Court held as follows:

> None the less, the absence of any children was, in a practical sense, of considerable significance, given the circumstances of this case and the identification in the direction of the three primary considerations ... There being no children whose interests had to be considered, the other primary considerations — protection of the Australian community and Australian community expectations — were inevitably significant aspects in the process. These matters were closely related to the seriousness of the offences, although the minister conceded that the Australian community might 'have some compassion' for the appellant in view of his age and long period of residence in this country. Exclusion of one of the three primary considerations (the best interests of the children) left the matter very much dependent upon the other two, both of which inevitably reflected the seriousness of the offences and, in the minister's view, weighed in favour of cancellation.[1342]

As illustrated by *Black*, the considerations, particularly primary considerations, play an important role in shaping decision-making. In the past, primary considerations weighed heavily in favour of the community's interests, which potentially failed to recognise the importance of the non-citizen's ties to the community. Before I discuss what factors ought and ought not be in

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[1340] Ibid 640.

[1341] (2007) 99 ALD 1.

[1342] (2007) 99 ALD 1, 8–9.

the Directions, I believe that it is important that the Direction make clear that while nevertheless bound to apply the relevant Direction, the Tribunal's discretion cannot be fettered.

G Abolish Application of Different Considerations to Visa Holders and Visa Applicants

In contrast to previous directions, Direction No 55 draws a distinction between the considerations that apply to visa applicants and visa holders. The primary considerations applicable to visa holders are the protection of the Australian community, the strength, duration and nature of the person's ties to Australia, the best interests of minor children in Australia and whether any international non-refoulement obligations are owed to the person.[1343] The same primary considerations apply to visa applicants, with the exception of the strength, duration and nature of the person's ties to Australia, which is neither a primary nor other consideration.[1344] In making the distinction, it is perhaps assumed that visa applicants have fewer ties to the Australian community, an assumption which is not always correct. In a world characterised by international migration, it is conceivable that a person could live in Australia for many years, leave and seek to return. The fact that a person is applying for a visa for Australia may in itself signify existing ties. In *Godley*, for example, the visa applicant, who was living in London, UK had previously lived in Australia for 16 years and continued to have significant ties to the Australia, including his children, his brothers and his third wife, who were all Australian citizens.[1345] For this reason, I believe that the Directions should continue to use the approach of the previous three Directions, namely the same considerations applied to visa applicants and visa holders.

H *Factors that Ought to be in the Directions*

In the following section, I argue that there are a number of considerations that ought to always be taken into account in the exercise of discretion under section 501, such as protection of the Australian community, the applicant's hardship and the best interests of the children. I also discuss whether the impact of the person's removal on family members should be considered. Finally, I suggest that two factors, namely general deterrence and the expectations of the community, should not be a primary or other consideration.

[1343] Direction No 55 [9].

[1344] Direction No 55 [11].

[1345] (2005) 141 FCR 552. See also *Godley v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 83 ALD 411.

H 1 *The Protection of the Australian Community*

As the underlying purpose of section 501 is to protect the Australian community, this factor should continue to be an important focus of decision-making. As Buchanan J observed in *NBMZ*, "the discretion to be exercised under section 501 is fundamentally forward, rather than backward looking":[1346]

> It concerns the future, not the past.[1347]

The protection of the community generally requires consideration of the nature and seriousness of the conduct and the risk that the person will re-offend. While the former is relatively straightforward, the latter is problematic. In a passage frequently cited by the Tribunal, the former President said that "once a person has shown a disregard for the law, it can never be said that there is no risk of re-offending".[1348] It is not clear upon what evidence this statement was made. Contrary to this statement, Grewcock, a criminologist, notes that "the fact that someone has offended in the past is, in itself, no guarantee of recidivism".[1349] He observes that "there are no exact scientific predictors of future offending that can take into account the often complex socioeconomic, medical and other personal characteristics associated with individual offenders".[1350] While the protection of the Australian community must remain a primary consideration, in chapter six, I highlighted deficiencies in Departmental and Tribunal fact-finding, including the lack of accurate and up-to-date information and the lack of expert evidence on matters such as the risk of recidivism and rehabilitation. Clearly improvements in fact-finding in relation to this factor are required.

H 2 *Best Interests of the Child*

In keeping with its international obligations, the best interests of children in Australia should be a critical consideration in deciding whether to refuse or cancel a visa. Interestingly, the Full Federal Court has recently brought into question previous authority, which established that the Tribunal is required to determine the best interests of the children, then decide whether those interests are outweighed by other considerations. Of particular concern is the judgment in *Paerau v Minister for Immigration and Border Protection* ('*Paerau*'), where, by majority, the

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[1346] *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1, 41.

[1347] Ibid.

[1348] *Re Lam and Minister for Immigration and Multicultural Affairs* (1999) 28 AAR 421 [51].

[1349] Michael Grewcock, 'Punishment, Deportation and Parole: the Detention and Removal of Former Prisoners under section 501 Migration Act 1958' (2011) 44 *Australian and New Zealand Journal of Criminology* 56, 62.

[1350] Ibid.

Full Federal Court held that the procedural prohibition upon admitting unforwarded evidence left the Tribunal with no option but to decide that it was unable to make a determination relating to the best interests of the children.[1351]

Barker J's dissenting opinion in that case is worth analysing in detail as he raises important questions about the Tribunal's fact-finding obligations. He was concerned with the Tribunal's approach in that case for three reasons. First, the Tribunal regarded the primary consideration of the best interests of the children as neutral, without making an initial determination of whether the cancellation was in the best interests of the children, as required by the Direction.[1352] As Barker J noted, "the best interests of the child consideration cannot be regarded and weighted without first making a determination".[1353] Secondly, he held that "unless it can be said in a particular case that there is no relevant information or evidence concerning the child, then I consider a decision-maker must do the best they can to make the determination on the available evidence, however difficult or sub-optimal that decision-making process may be considered to be by a decision-maker and regardless of how unreliable they may consider a determination made in such circumstances may be as a result".[1354] As he notes:

> ... nothing in the Act or Direction No 55 requires that the decision-maker's decision be to any particular standard or that the AAT only make a determination if it considers it is appraised of what it considers to be sufficient information or evidence to make an optimal or "proper" determination.[1355]

Thirdly, Barker J held that "the approach taken by the AAT results in a decision-making process under which the best interests of any minor child is completely ignored, contrary to the clear intent of Direction No 55 that this should not happen".[1356] I agree with Barker J's view that the Tribunal must make a determination on the material available, given that under the *Administrative Appeals Tribunal Act*, the Tribunal is required to make findings on material questions of fact, in other words, "the substantial issues on which the case turns".[1357] As I noted in chapter three, the material questions of fact are discerned from the evidence and the relevant legislation, under which the application is made, which in section 501 cases, include the primary and other considerations.

[1351] See chapter five.
[1352] (2014) 219 FCR 504, 518.
[1353] Ibid.
[1354] Ibid.
[1355] Ibid.
[1356] Ibid.
[1357] *Muralidharan v Minister for Immigration and Ethnic Affairs* (1996) 62 FCR 401.

It is difficult to accept Barker J's caveat, however, that a determination is not required in the absence of relevant information, given that the Tribunal has powers, which could be used to obtain further information. Again the Department's and the Tribunal's approach to fact-finding arises in this context. International obligations are meaningless if insufficient information is sought about children to allow the primary decision-maker or the Tribunal to make a considered assessment of the relationship and the impact of the cancellation or refusal on the relationship. I discuss the broader issue of the standard of Tribunal decision-making in the concluding chapter.

H 3 *Impact on Family Members*

Aside from the approach taken to the best interests of children, which has already been considered, the Directions took different approaches to the weight to be placed on the non-citizen's ties to the community such as the person's partner, family, business and other ties. All directions, including the current Direction, required decision-makers to consider the impact of the refusal or cancellation on the person's ties under "other" considerations. The impact therefore had to be considered but was accorded less weight than the primary considerations. I believe that this approach is correct. As family members may be members of the Australian community, it is just that their interests be taken into account, a fact recognised by the courts.[1358] In the context of deportation, Brennan J observed as follows:

> ... it is certain that the deportation would destroy or gravely damage a growing Australian family and that would be a grave detriment not only to them but to Australia. His deportation separating him from his Australian wife and children or requiring them to accompany him to a country that the children do not know, would be destructive of their prospects in life ...[1359]

If this factor were accorded the status of a primary consideration, however, it would in effect penalise persons who may have less ties to the community, for example, those with mental illness.

Carens considers that the impact of cancellation or refusal on the person's ties to be a "weaker" argument against deportation than other arguments "because the same objection can be posed against any sanction".[1360] He further notes that "ironically it is this sort of argument, constructed on the basis of guarantees to family life, that has proved most effective in European courts in

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[1358] See, for example, *Pochi v MacPhee* (1982) 151 CLR 101.

[1359] *Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33, 58.

[1360] Joseph Carens, 'Citizenship and Civil Society: What rights for residents' in Randall Hansen and Patrick Weil (eds). *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe: The Reinvention of Citizenship* (Berghahn Books, 2002) 100, 105.

providing a barrier to deportation".[1361] In the view of some academics, however, the European Court of Human Rights may not strictly speaking be relying on the impact of deportation on the family members. Marin and O'Connell observed that in *Beldjoudi*, the European Court of Human Rights ('ECHR') found that expulsion constituted "an excessive interference with the plaintiff's family life", reasoning which they found "odd".[1362] They argued that, in that case, like other expulsion cases, "the Court consider[ed] as relevant many factors which, properly speaking, belong more to one's personal (or private) life than to one's family life".[1363] If borne out by subsequent case law, their analysis brings into question the notion that the ECHR relies on the effect of removal on the family, rather than the applicant. Even if they are correct, in my view, while the impact on family members is a relevant consideration, what is more significant and therefore ought to be a primary consideration, is the personal impact on non-citizens.

H 4 *Hardship to the Applicant*

Direction No 41 broke new ground, specifically requiring decision-makers to consider the effect of the removal on the person. It did this by requiring decision-makers to consider whether people arrived in Australia as a minor and their length of residence, factors which are in effect proxies for membership of the community. Factors listed as other considerations included the person's age, health, links to the country of citizenship and level of education.

Under Direction No 55, the current Direction, "the strength, duration and nature of the person's ties to Australia" constitute a primary consideration applicable to visa holders. Under this consideration, decision-makers must have regard to the person's length of residence and "the strength, duration and nature of any family, social and/or employment links with Australian citizens, Australian permanent residents and/or people who have an indefinite right to remain in Australia".[1364]

Decision-makers are required under other considerations to consider "the extent of any impediments that the person may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country) taking into account: (i) the person's age and

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[1361] Ibid.

[1362] Rut Rubio Marin and Rory O'Connell, 'The European Convention and the Relative Rights of Resident Aliens' (1999) 5(1) *European Law Journal* 4, 11. *Beldjoudi* (1992) 14 EHRR 801.

[1363] Ibid.

[1364] Direction No 55 [9.2(1)(b)].

health; (ii) whether there are substantial language or cultural barriers; and (iii) any social, medical and/or economic support available to them in that country".[1365]

The present requirement to examine "the strength, duration and nature of the person's ties to Australia" is a critical factor in assessing whether the person is a social member of the Australian community and should therefore always be treated as a primary consideration. An assessment of the person's ties and ability to integrate in the country of origin is also helpful as it provides an insight into the person's level of integration into the Australian community. In Nystrom's case, for example, he was unable to speak Swedish, had not been educated in Sweden and had few family ties in Sweden, thus indicating how profoundly integrated he was into Australian society.

I *Factors that Ought Not be in the Directions*

I 1 *General Deterrence*

General deterrence has been considered a related aspect of the protection of the community. There is no question that, under the law as it presently stands, general deterrence is considered an appropriate consideration. It was considered in detail by the Full Federal Court in *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* ('*Djalic*').[1366] In that case, the applicant had arrived in Australia at the age of five. The applicant's visa was cancelled on the basis of his lengthy criminal record. In seeking review of the Minister's decision, the applicant argued, amongst other things, that "the Minister's decision had been made for an improper purpose, or that the Minister had taken into account irrelevant considerations, in that "a substantial purpose of the decision was the imposition of additional punishment on the Applicant'".[1367] He further argued that the power in section 501 was unconstitutional because it allowed the Minister to punish an individual, a power which could only be exercised in the context of criminal proceedings in accordance with Chapter III of the Constitution.[1368]

Following a review of authorities, in a joint judgment, the Full Federal Court developed the principles that follow. Unless prohibited by the Constitution, Parliament may make a law providing for the deportation of aliens. Under the Constitution, "the adjudication and punishment of criminal guilt by reason of an alleged breach of a law of the Commonwealth appertains to the judicial power of the Commonwealth and cannot be entrusted to the

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[1365] Direction No 55 [10(1)(d)].
[1366] (2004) 139 FCR 292.
[1367] Ibid 295.
[1368] Ibid.

Executive".[1369] For that reason, Commonwealth legislation, which authorises the executive to impose punishment for criminal conduct, will infringe the Constitution. Furthermore, "whether legislation conferring power to cancel the visa or order the deportation of a non-citizen is punitive in character is to be determined by construction of the legislation, not by a consideration of the consequences of detention or removal of the individual".[1370] The power to cancel a visa or order deportation is therefore not punitive, simply because it "involves interference with the liberty of the individual".[1371] The Court then said this:

> Legislation conferring a discretion on the Executive to cancel the visa of a non-citizen or to deport a non-citizen is not characterised as punitive if it can fairly be said to protect the Australian community ... Nonetheless, if in a particular case the decision-maker purports to exercise a statutory power to cancel the visa of a non-citizen or to deport the non-citizen or [in] order to punish the non-citizen and not for the protection of the Australian community or some other legitimate objective, the exercise of the power may be ultra vires the statute.[1372]

The Court held that "by discouraging non-citizens from engaging in criminal conduct", deterrence was "squarely concerned" with the protection of the Australian community,[1373] although there may exist different views on how a cancellation decision had a deterrent effect.[1374] The fact that deterrence was taken into account in sentencing did not render the visa cancellation decision punitive.[1375] Accordingly, the Minister did not take into account an irrelevant consideration. *Djalic* was endorsed by the Full Federal Court in *Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs* ('*Tuncok*').[1376] A more recent Full Federal Court judgment, already discussed in a different context, however, has brought into question the role of general deterrence in the visa cancellation and refusal context. In *NBMZ*, Allsop CJ and Katzmann J considered *Djalic*, *Tuncok* and other authorities but did not explicitly adopt them. Instead, they said that "whether or not deterrence (in the sense of general deterrence) is a proper consideration in respect of a decision under s 501(1) and if so, whether it is impermissible once it becomes the substantial or main reason for the decision would require the detailed examination of the above cases set against fundamental notions of punishment".[1377] Assuming it was "a legitimate consideration", "its utilisation may not be lawful without

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[1369] Ibid 309.
[1370] Ibid.
[1371] Ibid.
[1372] Ibid.
[1373] Ibid 312.
[1374] Ibid 312.
[1375] Ibid 312.
[1376] [2004] FCAFC 172.
[1377] Ibid 8.

appropriate recognition or weight being given to a necessary aspect of its operation; the mental health of the person and whether or not he or she is an appropriate vehicle to stand as an example".[1378] *NBMZ* may represent a welcome change in the judiciary's approach to the role of general deterrence in section 501 decision-making.

As stressed earlier, the purpose of section 501 is to protect the Australian community. General deterrence, considered to be a legitimate goal of the criminal law, is already taken into account in the sentence pronounced by the criminal court. In the section 501 context, it is thus already considered by decision-makers when determining the seriousness of the conduct in question.

Furthermore, general deterrence is empirically difficult to validate, particularly when the "deterred" community is smaller and, quite likely, less cohesive. As previously discussed, the Tribunal found general deterrence difficult to apply, either refusing to have regard to it or taking a generally unsatisfactory approach to its application.

Finally, although presently a lawful consideration, in my view, to place weight on general deterrence as a factor in favour of affirming the decision is unjust. As Smithers J said in *Re Gungor and Minister for Immigration and Ethnic Affairs*:

> To use the powers conferred by the Migration Act 1958 for the purposes of punishment and deterrence is in substance to discriminate against immigrants and aliens by subjecting them to an additional sanction not applicable to other persons for breaches of the criminal law ... It is one thing to deport a person because he is a danger to Australian citizens but it is quite another to do so as additional punishment or as a deterrence to others. Obviously such a procedure even if technically lawful, will inevitably inflict injustice to or at least operate oppressively in the case of persons who are themselves not a danger to Australia. Both for the reputation of Australia and as a matter of good government based on justice and a reasonable respect for the individual such a procedure has unfortunate aspects ... [I]t is a serious matter to take action against an individual based, not on the necessity for further action against that person, but on a policy decision thought to be justified by a long range social policy.[1379]

In brief, it is unnecessary, impractical and unfair for general deterrence to constitute an additional consideration in the Directions.

[1378] Ibid 9. In considering general deterrence in that case, at 41, Buchanan J held that "a reading of the reasons as a whole leaves me with the firm impression that the Minister's decision was made with an invincible disregard for the circumstances of the applicant".

[1379] (1980) 3 ALD 225, 227–8.

I 2 *Expectations of the Community*

Like general deterrence, the expectations of the community were a difficult factor to apply. I noted also in chapter five that this consideration could be approached in a number of ways, including upon an evidential basis. *Re Heyward and Minister for Immigration and Citizenship* ('*Re Heyward*') provides an example of the difficulties of such an approach.[1380] In that case, the applicant was convicted of wounding with intent to murder his former partner and was sentenced to a term of imprisonment of nine years and four months. By way of background, the Direction in force at the time of lodgment of the Tribunal application following his visa cancellation was Direction No 21, under which a primary consideration was the expectations of the community. During the course of the proceedings, it was revoked and Direction No 41 came into force, which removed community expectations as a primary consideration.

Upon learning of Heyward's review application, his former partner sought to be joined in the proceedings. The Tribunal noted in its decision that "the respondent, concerned about the complications potentially arising from having a second unrepresented party in the proceedings, offered to prepare affidavits on behalf of Ms Monthule and her supporting witnesses and present them as part of his case".[1381] Accordingly, the Tribunal received an affidavit from the applicant's former partner, containing 21 annexures from various people, including her dentist, GP, naturopath, family, friends and a petition from her local community, which "expressed strong views opposing the prospect that Mr Heyward might be permitted to remain in Australia".[1382] In addition, it received an affidavit from her son and her former partner, the biological father of her son.

The applicant received pro bono legal advice in relation to the admission of the affidavits, which was made available to the Tribunal and is worth discussing. In his letter, the solicitor, Simon Jeans, stated that the acceptance of the affidavits into evidence "would establish a dangerous precedent, leading to the applicant being tried for the same crime for which he had served his prison sentence".[1383] If relied upon, the deponents ought to appear to give evidence in order to be cross-examined. If unrepresented, the applicant would have a right to cross-examine his former partner, a position "contrary to public policy concerning the rights of victims" and which would place the applicant in "an invidious position" in that, if he wished to test her evidence, he might appear to be acting inconsistently with the expressions of remorse that he

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[1380] [2009] AATA 536 (Unreported, Deputy President Walker) 17 July 2009.
[1381] Ibid [5].
[1382] *Heyward v Minister for Immigration and Citizenship* (2009) 113 ALD 65, 66.
[1383] (2009) 112 ALD 226, 228.

had made".[1384] He noted that "the attitude of a victim was not identified as a relevant factor in Direction No 21" and that the material was not relevant given that "the community protection issue related to whether he was likely to re-offend, having regard to subjective and objective elements" while "the expectations of the community relates to the general community and not specific members of it".[1385]

At the hearing, the applicant objected to the admission of the evidence but did not cross-examine the deponents. The Tribunal ruled that the evidence was admissible. It observed that evidence of health practitioners was relevant under Direction No 41[1386] and that lay evidence was relevant to the seriousness and nature of the relevant conduct and the nature of the harm that may be caused to the Australian community.[1387] Furthermore, as the Tribunal was required to take into account mitigating factors, it was "only logical and fair that the victim should be permitted to lead evidence that may include aggravating factors, though such evidence may merit less weight than victim impact statements and statements from independent and authoritative sources".[1388]

In the context of the protection of the Australian community, the Tribunal found that "the applicant's principal offence was an extremely serious instance of premeditated violence causing lasting and in some respects permanent injury to the victim, as well as injuriously affecting her younger son and her wider family".[1389] Deputy President Walker further stated that he "would have reached the same conclusion even without the evidence of the victim and the material tendered in support of her evidence, on the basis of the sentence and the sentencing remarks alone".[1390] The Tribunal affirmed the decision and the applicant sought judicial review.

As Emmett J observed, the applicant's complaint was essentially that "the Tribunal admitted into evidence the three affidavits and their annexures, notwithstanding that they contained opinion evidence, had little or no probative value, constituted hearsay and were not amenable to

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[1384] Ibid 228–9.

[1385] Ibid 228–9.

[1386] *Re Heyward and Minister for Immigration and Citizenship* [2009] AATA 536 (Unreported, Deputy President Walker) 17 July 2009 [265]. In considering the seriousness and nature of the conduct, paragraph 10.1.1(4) of Direction No 41 provides that "the following factors are also to be considered: any relevant information, including, but not limited to, evidence from independent and authoritative sources in respect of the person such as judicial comments in an individual's case, professional psychological reports, pre-sentence reports for the courts, parole assessments, victim impact statements and similar sources of authoritative information or assessment".

[1387] Ibid.

[1388] Ibid [266].

[1389] Ibid [270].

[1390] Ibid [271].

challenge".[1391] Essentially it was a complaint that the Tribunal did not exercise its discretion to exclude the material.[1392] Emmett J held that "the mere fact of admission did not constitute jurisdictional error".[1393] He held that "it could not be said that the material had no probative value for the reasons given by the Tribunal".[1394] The Tribunal did not act in a manner, which was procedurally unfair in having regard to the affidavits.[1395] The Tribunal observed that even without the material, its decision on that question would have been the same.[1396] As Emmett J observed, the weight accorded to the material is "entirely a matter for the Tribunal".[1397] As revealed in the transcript of the hearing, the Tribunal gave the applicant "every opportunity to cross-examine the deponents of the affidavits or to ensure that Mr Heyward understood the consequences of not doing so".[1398]

In a joint judgment, the Full Federal Court held that the applicant took the position that "he would not attempt to excuse his conduct", instead arguing that he had rehabilitated.[1399] For that reason, he decided not to cross-examine any of the deponents. The Tribunal was under no obligation "to counsel him further about his rights",[1400] particularly given that "there was no suggestion that Mr Heyward was inarticulate, overborne by the occasion or labouring under any disability or disadvantage which might have affected his ability to make reasonable decisions".[1401]

What *Re Heyward* shows is that an approach guided by the curial rules of evidence law to the expectations of the community is highly problematic, as highlighted by the solicitor who advised Heyward. There is a risk that highly prejudicial material may be admitted, leading to the possibility of the applicant being "re-tried" for crimes already dealt with in the criminal justice system and detracting from the assessment of the risk of re-offending. In addition, as in this case, applicants are frequently unrepresented and required to respond to complex legal issues, which directly affects their right to remain in Australia. In my opinion, given their lack of legal training and the emotional context, it is unrealistic to expect applicants to cross-examine

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[1391] (2009) 112 ALD 226, 240.
[1392] Ibid.
[1393] Ibid.
[1394] Ibid 239.
[1395] Ibid.
[1396] Ibid.
[1397] Ibid.
[1398] Ibid 240.
[1399] *Heyward v Minister for Immigration and Citizenship* (2009) 113 ALD 65, 68.
[1400] Ibid 69.
[1401] Ibid 68.

witnesses, particularly victims of their own crimes. In addition, by doing so, as *Re Heyward* demonstrates, ultimately applicants may be undermining their own case.

Furthermore, as highlighted here, it is not clear who the community is for the purposes of this consideration, much less what the community's expectations are. It was for those reasons that Finn J in *Bukvic v Minister for Immigration and Multicultural Affairs* held that "the provision does not require the decision-maker to ascertain what the actual expectation of the Australian community would, or would be likely to, be in relation to a given case — an impossible task in any event".[1402] He observed that "the provision clearly [did] not envisage the gathering of evidence on the subject of the community's expectations in the given case", [1403] although this is exactly what occurred in *Re Heyward*. He further noted that "the decision-maker is being asked to do no more than bring to bear his or her own knowledge and experience" when making a judgment "as to the appropriateness of visa cancellation because the nature of the offences were such that the 'Australian community would expect that the person ... should be removed from Australia' ".[1404] In all Directions, however, the nature of the offence must be considered in the context of the protection of the Australian community and it is therefore unnecessary to reconsider this factor. For these reasons, the expectations of the community add little to the decision-making process and should be removed as a relevant factor for consideration.

Re Heyward also serves as a timely reminder that in many section 501 cases the crimes committed may be extraordinarily violent, often against current and former female partners of the applicants and that section 501 is not just about the rights of applicants. Direction No 55 appears to respond to *Re Heyward*, taking into account these issues. It requires decision-makers to consider "the impact of a decision not to cancel a visa on members of the Australian community, including victims of the person's criminal behaviour, and the family members of the victim or victims where that information is available and the person being considered for the visa cancellation has been afforded procedural fairness".[1405]

J *Retain Merits Review*

I have focused on the Tribunal in the section 501 decision-making system throughout the thesis. In this section, I propose reform in so far as it relates to Tribunal review, although I acknowledge that holistic reform would require detailed examination of the extent and

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[1402] (2001) 110 FCR 554, 559.
[1403] Ibid.
[1404] Ibid.
[1405] Direction No 55 [10(1)(c)].

appropriateness of the Minister's personal powers under section 501, especially in light of the most recent amendment.

Although previously discussed in chapter three, it is worthwhile briefly reviewing the reasons for the Tribunal's establishment in 1976. The 1970s was characterised by "the great expansion of government activity", "accompanied by a substantial increase in the number, variety and breadth of statutory powers and discretions exercised by Ministers, departmental officers and statutory authorities".[1406] While "the flexibility achieved by the creation of discretions rather than rigid rules is an essential and desirable part of modern government", "their exercise is open to abuse".[1407] It was in this context that the Tribunal was set up to provide "independent, external review".[1408] Its "function [was] to focus on the individual's circumstances and interests to a greater extent than [was] required of officials responsible for making decisions in the first instance," who sought to promote "the social purposes of general rules".[1409] It was empowered to make the correct or preferable decision based on the facts in existence at the time of review. As Cane observes, "fact finding is at the very core of merits review".[1410] It was also granted significant latitude to conduct reviews as it saw fit, in other words, it was granted "procedural autonomy and flexibility".[1411]

From the outset, the Tribunal adopted a judicial approach and "court-like procedures", in part to "assert its authority and independence".[1412] By undertaking "administrative adjudication",[1413] the Tribunal's establishment was "a major step" towards addressing "the arbitrary, discretionary and unreviewable decision-making", which was "a blight on the democratic landscape".[1414] Thus independent review was foremost in the minds of those who established the Tribunal. It was critical that the Tribunal be free from "improper influence",[1415] including from government,

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[1406] Jennifer Sharpe, *Administrative Appeals Tribunal* (The Law Book Company Ltd., 1986) 1.

[1407] Ibid 2.

[1408] Peter Cane, 'Judicial Review in the Age of Tribunals' [2009] *Public Law* 479, 485.

[1409] Ibid 487.

[1410] Ibid 490.

[1411] Laurence Maher, 'The Australian Experiment in Merits Review Tribunals' in Oliver Mendelsohn and Laurence Maher (eds), *Courts, Tribunals and New Approaches to Justice* (La Trobe University Press, 1994) 73, 79.

[1412] Garry Downes, *The Tribunal Dilemma: Rigorous Informality*, 17 September 2008 <http://www.aat.gov.au/SpeechesPapersAndResearch/speeches/downes/WhitmoreLectureSeptember2008.htm> 9.

[1413] Cane, above n 1408, 485; Maher, above n 1411, 82.

[1414] Maher, above n 1411, 77.

[1415] Ibid.

to ensure that it provided a meaningful "check against injustice and abuse of power",[1416] thereby fulfilling its intended role and gaining respect as an institution.

The Tribunal's ability to undertake independent review is particularly critical in section 501 decision-making. Most section 501 cases are triggered when non-citizens acquire a substantial criminal record, sometimes, as a result of "crimes of exceptional gravity".[1417] The circumstances of the crimes may be "highly emotionally and politically charged", garnering significant media attention.[1418] In the existing context of a broader "trend of decreasing interest in and sympathy for prisoners, a hardened public sensibility against offenders and a lack of concern over the treatment of offenders",[1419] decision-makers may be unduly influenced by "electors, law and order lobbyists and media pundits".[1420] The case of Michael Moore provides such an example. Moore, whose visa was personally cancelled by the Minister following his conviction for manslaughter, had lived in Australia for 32 years.[1421] His case received adverse coverage from Derryn Hinch, a populist radio announcer.[1422] Grewcock observes that "while no direct link can be shown between Hinch's outburst and the Minister's refusal to allow Moore to stay, it seems unlikely any favourable decision would have gone unnoticed by the media".[1423] Furthermore, "it was also noticeable that those who had been so hostile to Moore had little to say about his death" in England, shortly after his removal from Australia.[1424] The adverse media attention in Moore's case is not unique.[1425] The Tribunal's distance from the political environment, which is significantly influenced by the law and order agenda and the media means that it is more suited to section 501 decision-making. Prisoners, particularly criminal non-citizens are not only some of the most unpopular but also the most vulnerable members of society. As Grewcock observes, section 501 applicants are viewed as "human trash".[1426] The Tribunal's distance allows it to

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[1416] Jennifer Sharpe, *Administrative Appeals Tribunal* (The Law Book Company Ltd., 1986) 2.

[1417] Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998) 4.

[1418] Ibid.

[1419] David Brown, "Continuity, Rupture or just more of the 'Volatile and Contradictory'? Glimpses of New South Wales' Penal Practice behind and through the discursive" in John Pratt, David Brown, Mark Brown, Simon Hallsworth and Wayne Morrison (eds) *The New Punitiveness: Trends, theories and perspectives* (Willan Publishing, 2005) 27, 35.

[1420] Hogg and Brown, above n 1417, 4.

[1421] Grewcock, above n 1323, 56–7.

[1422] Ibid 63.

[1423] Ibid 64.

[1424] Ibid.

[1425] See, for example, the discussion of the Taufahema brothers' cases in chapter one.

[1426] Grewcock, above n 1323, 63.

make "impartial, informed, calm and considered judgments affecting the rights and responsibilities of particular individuals".[1427]

K *Remove Minister's Power to Set Aside the Tribunal Decision*

Under the *Migration Act*, the Minister may set aside a decision of the Tribunal, and refuse or cancel a visa. While there is no doubt that the Tribunal's decision to set aside a decision to cancel or refuse a visa troubles the executive and wider interests, the Tribunal is performing the role for which it was established. What is the purpose of Tribunal proceedings if its decisions are subsequently set aside by the Minister? A former President of the Tribunal dealt with this very question in the context of discretionary decision-making in *Re Visa Cancellation Applicant and Minister for Immigration and Citizenship* ('*Re Visa Cancellation Applicant*'), where he observed that the Tribunal is "part of Australia's federal government administration".[1428] Although acknowledging "the very important role of the Tribunal in ensuring that individual justice is done", he notes that "the ideals of individual justice do not, however, replace the demands of good administration".[1429] When making the preferable decision, the Tribunal may be "called on to make decisions which require an evaluation of the consequence of a decision in terms of public interest".[1430] The public interest is determined by reference to community standards or values "found in more permanent values" particularly in the "legislation applicable to the decision-making" and "the decision-maker's belief based on experience".[1431] A decision made by reference to community standards or values "will still be likely to lead to better decision-making than if no attempt at such an assessment is made".[1432] He notes that in the section 501 context, the Minister's exercise of the power under section 501A to set aside the Tribunal's decision not to cancel a visa in six cases suggested that the Minister "formed the opinion that community values or standards have pointed in favour of cancelling visas when the Tribunal has come to a different conclusion".[1433] These cases were "matters which the Tribunal should take into account for the future in assessing in similar cases what "is in the national interest" and what is required by community values or standards".[1434] Downes J noted that when making a decision under section 501A, "the Minister is in a special position" and that "a

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[1427] Hogg, above n 1417, 4.
[1428] [2011] AATA 690 (Unreported, President Downes J; Senior Member McCabe) 6 October 2011 [57].
[1429] Ibid [59] and [60].
[1430] Ibid [63].
[1431] Ibid [79].
[1432] Ibid [81].
[1433] Ibid [86].
[1434] Ibid.

necessary consequence of the Minister having this unusual power to overrule the Tribunal is that the Tribunal should take note of occasions in which the power is exercised":[1435]

> None of this affects or threatens the independence of the Tribunal, which has never been in doubt, as the Tribunal's recent decisions show ... It is not appropriate, as some commentators have done, to identify a supposed competition or conflict between a Minister and the Tribunal and to support one side or the other. We are all constituent parts of the one Commonwealth administration which should work together through our respective roles to advance good administration. Where the Tribunal makes a final decision within power, where a Minister makes a final decision within power, they are both contributing to good administration.[1436]

Downes J raises interesting issues of relevance in this context. He emphasises the importance of taking into account the demands of good administration, which includes, for example, "contributing to the many decisions within government which together determine how the population of Australia should be made up".[1437] He draws a distinction between "the demands of good administration" and the "ideals of individual justice".[1438] I believe, however, that the Tribunal's greatest contribution to good administration is its capacity to provide individual administrative justice. The purpose of the establishment of the Tribunal was to provide independent review of government decision-making, which, by its very nature, is more focused on implementing general rules promoting social purposes.[1439] Tribunal review must be capable of providing relief when general rules produce a manifestly unjust result. When individual injustice is remedied, it benefits the entire community.

In making the preferable decision, Downes J emphasises that it is important that the Tribunal refer to community standards or values. Senior Member McCabe, the Tribunal member who sat with Downes J in *Re Visa Cancellation Applicant,* warned of the dangers of relying on community standards or values, namely that the decision-makers "may not understand the distinction between 'permanent values' and 'transient or fashionable thinking' ".[1440] He observed that reliance may be placed on media reports as evidence of community values, as was the case in *Re Visa Cancellation Applicant*:

> [The media reports] were apparently tendered as evidence to support the claim the offences in question were particularly serious. The offences were serious, of course, but there were better

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[1435] Ibid [87].
[1436] Ibid [91].
[1437] Ibid [58].
[1438] Ibid [60].
[1439] Cane, above n 1408, 487.
[1440] Bernard McCabe, 'Community Values and Correct or Preferable Decisions in Administrative Tribunals' (2013) 32(1) *University of Queensland Law Journal* 103, 118–19.

> ways to establish that fact than relying on inaccurate reports. At best, these reports were evidence of what the editors in question thought their readers wanted to read.[1441]

McCabe, however, did not argue that decision-makers should not refer to community values. However, "they should be circumspect about the language they use, and present their arguments in the knowledge their claims are liable to be contested in an increasingly fractious market-place of ideas".[1442] Furthermore, decision-makers should refer to all appropriate community values.[1443]

Earlier, I argued that community expectations, another way of referring to community standards or values, should not be an additional primary or other consideration as it adds little to the decision-making process and it is difficult to apply. Despite the opinion of Downes J and McCabe, I remain of that view for the reasons, which I explained there.

In *Re Visa Cancellation Applicant,* Downes J noted that because of the Minister's "special position", the Tribunal should take note, for future reference, that the Minister took a different view of community standards and values in cases in which the Tribunal's decision was set aside. I do not believe, however, that the Minister is always best placed to make the final decision under section 501 for reasons set out by Lord Brown of Eaton under Heywood, who was speaking of the role of judges conducting judicial review, but whose comments apply equally in this context:

> [T]he huge advantage enjoyed by judges over government in these fields is that they are *not* answerable to an electorate for the decisions they take. Unlike governments, therefore, they can be expected not to be influenced by popular prejudice and emotion, by powerful factions of one sort or another (religious bodies, trade unions, big business and so forth), still less by a clamorous and often vengeful tabloid press. Not being subject to the pressures of the moment they can take a longer-term view of the issues arising. Nor are they required to be 'on message' to a particular party line or policy; rather their sole touchstone is the rule of law and their concern to do justice in the individual case before them.[1444]

As I noted in the preceding section, criminal non-citizens are some of the most unpopular members of society, whose actions often appear in the glare of the media. It may be difficult to

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[1441] Ibid 119.

[1442] Ibid.

[1443] Ibid.

[1444] Lord Brown of Eaton-under-Heywood, 'The Unaccountability of Judges: Surely their Strength not their Weakness' in Christopher Forsyth, Mark Elliott, Swati Jhaveri, Michael Ramsden and Anne Scully-Hill (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, 2010) 208, 210.

publicly justify a decision to not cancel or refuse a visa, particularly when the public does not understand the legal context in which the decision is made. It is therefore important to provide independent review, in which the applicant's rights and interests may be balanced against wider interests. While Downes J is keen to emphasise the different roles of the Tribunal and the Minister, each of which "advances good administration", I believe that when the Minister sets aside the Tribunal's decision it does affect the Tribunal's standing. In my opinion, it expresses a lack of confidence in the Tribunal's ability to come to the correct or preferable decision in the particular context. Furthermore, as Wilcox J noted, in the context of the review of criminal deportation cases:

> The making of an application to the Tribunal, in a deportation case, involves the applicant, and usually members of the applicant's family, in a distressing recapitulation of events for which the applicant has already undergone punishment. It involves the applicant, or members of the applicant's family, in a considerable burden of costs at a time when financial resources are likely to be low. And, of course, it involves expenditure by the taxpayer, both in the presentation of the Department's case and in connection with the Administrative Appeals Tribunal. Unless the decisions of the Tribunal are customarily accepted, all of this effort and expense is wasted. The decisions of the Tribunal fall into disrepute.[1445]

I agree that it is difficult to justify the time, effort and expense to applicants, their family and the taxpayer, particularly if concerned with matters of good administration. Furthermore, the goal of decision-making in this difficult area is justice, not political expediency.

For these reasons, it is critical that the Minister's personal powers to set aside the Tribunal's decision be abolished. The Tribunal has been given a challenging and unpopular task. In order to retain public confidence in the Tribunal's independence, however, it is imperative that the government sees the interests at stake when it does not abide by the Tribunal's decisions, regardless of the outcome. Where a decision is considered legally wrong, the appropriate forum to challenge the decision is the judicial system. Overturning the Tribunal's decision will only damage the Tribunal's standing and bring into question the Tribunal's role in our system of administrative justice.

L *Remove Procedures Set Out in Migration Act*

Chapters three and six discussed the procedures set out in *Migration Act* governing section 501 decision-making. These rules were introduced in order to expedite the decision-making process, thus ensuring that applicants were removed as expeditiously as possible. There are three

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[1445] *Nikac v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 65, 84.

procedural rules in particular which I believe should be abolished, for the reasons I set out now. First, the review application must be lodged within nine days after the day on which the person was notified of the decision. Unlike other jurisdictions, the *Migration Act* provides that the Tribunal cannot extend the time in which the review application must be lodged. While it is important to have a time frame in which to lodge a review application, I believe that the Tribunal should be granted the power to extend the period in which the application can be lodged. I noted earlier that section 501 applicants are often at a serious disadvantage. Many section 501 applicants are in prison or immigration detention where communication channels are poor. The Ombudsman found that many applicants are poorly educated, with limited English and a limited understanding of the immigration process. Furthermore, the impact of the decision on the applicant and family members, who may be members of the Australian community, may be enormous. While I acknowledge that the policy intention underpinning this rule is to prevent the drawing out of Tribunal proceedings in order to extend the applicant's stay in Australia, I argue that the Tribunal is capable of taking this factor into account when determining the extension of time application.[1446]

Secondly, I believe that the rule which provides that the Tribunal must decide the application within 84 days, otherwise it is taken to have affirmed the decision, should also be abolished. The government introduced the rule in response to what it perceived to be excessively lengthy Tribunal proceedings and the delaying tactics of applicants. The Tribunal, however, is conscious of its legal obligation to conduct all proceedings in a timely manner. For example, its Listing and Adjournment Practice Direction provides that "an application for an adjournment will not be granted unless there are good reasons to justify the adjournment".[1447] I believe that the Tribunal is capable of managing procedural requests throughout the proceedings, taking into account all relevant considerations, including the timeliness of the proceedings.

Thirdly, sections 500(6H) and (6J) of the *Migration Act* should also be abolished. These sections provide that any oral or documentary information upon which applicants intend to rely in support of their case at the hearing must be provided to the Minister in writing at least two business days before the Tribunal hearing. As observed in chapter six, the hearing is a fundamental aspect of the modified adversarial system in operation in Tribunal review proceedings. Generally, the hearing allows the parties to present evidence and make submissions and the Tribunal to clarify the parties' evidence and claims and assess the

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[1446] *Hunter Valley Developments Pty Ltd v Minister for Home Affairs and Environment* (1984) 3 FCR 344: it must have regard to factors such as the merits of the application, prejudice to the respondent and considerations of fairness

[1447] Administrative Appeals Tribunal, *Listing and Adjournment Practice Direction*, 2005 [4].

credibility of the applicant and witnesses. In the section 501 context, however, for the reasons explained in chapter six, applicants are at a serious disadvantage. Their capacity to participate in the proceedings is often compromised by their personal backgrounds, their lack of financial resources and legal representation and by their incarceration, which limits their ability to contact the outside world. These applicants depend heavily on the hearing to put forward their case. However, these legal provisions regularly result in the exclusion of information, which applicants wish to rely upon during the proceedings, and severely constrain the Tribunal's ability to conduct a hearing fairly and justly.

In summary, flexibility is often the key to procedural fairness.[1448] Accordingly, the Tribunal should be vested with the "individual management of individual applications".[1449] Such an approach would increase the Tribunal's ability to afford procedural fairness by allowing it to take into account individual circumstances, thereby ensuring a fairer hearing and increasing the likelihood of the preferable decision being made.

M *Legal Representation for All Applicants*

I observed in chapter six that a statistical analysis of cases reviewed in my file review revealed that where applicants were legally represented, 49% of cases were set aside, a significantly higher proportion than for applicants who were not legally represented. While I acknowledge that other variables affect the outcome of cases, the results accord with domestic and international studies that found that representation significantly increased the likelihood of success. Such a result is not surprising, given that legal representatives assist applicants in various ways to participate effectively in the process. In addition, not only does representation increase the chance of an accurate outcome, it makes applicants feel "protected" and "helped in a difficult situation".[1450]

Given the Tribunal's continued use of a principally adversarial approach, which is unlikely to change in the near future, I recommend that applicants receive publicly funded representation to help them acquire the evidence they require and to present their optimal case. However, funding would not diminish the need for improvements in the Department's decision-making process and changes to the Tribunal's fact-finding approach, discussed in chapter six. Furthermore, the point at which a representative is appointed needs careful consideration, as it may be more

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[1448] John Fitzgerald, 'The Commonwealth Administrative Appeals Tribunal: Aspects of the System of Fact-Finding and Rules of Evidence' (1996) 79 *Canberra Bulletin of Public Administration* 127, 134.

[1449] *Re Msumba and Department of Immigration and Multicultural Affairs* (2000) 31 AAR 192.

[1450] Tom Mullen, 'Representation at Tribunals' (1990) 53 *Modern Law Review* 230, 237.

effective at the beginning of the Departmental decision-making process, rather than at the merits review stage.

N *Conclusion*

In this chapter, I have put forward various proposals to reform the section 501 system. In my view, the single, most important reform of this area of law should be the prohibition on removal of non-citizens after a certain period of residence in Australia, thus providing a more just approach. In addition, there must also be discretion, which permits non-citizens to remain members of the Australian community, where it is in the interests of justice. Section 501 could continue to provide the framework for assessing social membership claims, although it must also be amended to prevent the removal of non-citizens following a certain period of residence.

Section 501 is an example of structured discretion. Does it achieve the optimum level of control appropriate for a discretionary power, as Sharpe asks? For the reasons I gave, I think that two important aspects of the manner in which the discretion is structured in section 501, namely the character test and the Directions, could be improved, in order to better balance the various interests. In addition, other aspects of the system need reform. The Tribunal's role in section 501 decision-making must be respected and protected, in a particularly controversial, emotive area of law. Because of its distance from the politics of immigration and law and order, it is well placed to decide which way the balance of interests should be struck. In short, that means retaining merits review and abolishing the Minister's power to overturn a decision of the Tribunal. Furthermore, it is imperative that applicants have legal representation. Finally, as discussed above, I believe that certain procedural rules structure and inhibit discretion too much, at times preventing the Tribunal from acting in a just manner and therefore should be removed.

CHAPTER X

CONCLUSION

From the outset, aided by its geographic isolation, the Australian government evinced a desire to control who entered and remained in Australia. Its early approach to immigration was discriminatory, as exemplified by its now infamous White Australia policy. Unsurprisingly, immigration policy was highly discretionary, thereby facilitating this discriminatory approach. Galvanised by the need to "populate or perish", however, Australia was forced to broaden its concept of the ideal migrant. It liberalised migration channels, allowing non-British-born people to move to Australia. As a result, population growth has increased exponentially, with almost 30% of the Australian population born overseas.[1451]

The 1970s and 1980s saw the dismantling of the White Australia policy, the growth of multiculturalism and widespread administrative law reform, including the establishment of the Tribunal. Unfettered executive action became unacceptable, leading to a massive push for greater transparency and accountability in relation to all areas of decision-making, including immigration. Against this background, migration law was developed, government policies were made public and merits review was established. That, however, was not the end of the matter. The government's eagerness to control migration, including who should be removed, continues unabated. The scene is thus set for continued tension, if not outright conflict, between on the one hand, the government's intention to have the final say in relation to migration decision-making and on the other, its devolution of decision-making to external legal institutions. The dynamics of section 501 illustrate this strain.

Rather than relying on section 201, the government generally relies on section 501 to remove criminal non-citizens from Australia.[1452] It is used to effectively banish people who have grown up and lived in Australia for many years, encircled by family and friends. In addition, as a result of the procedures set out in the *Migration Act*, non-citizens are treated differently procedurally throughout Tribunal review. In examining whether the use of section 501 is just, I had regard to Walzer's approach to questions of social justice, namely they were assessed in light of the inherited standards and traditions of a community. I argued that these standards and traditions may be discerned from a community's values. I therefore reviewed Australian values in general and in its immigration system and observed that as a multicultural liberal democracy, the values

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[1451] See chapter two.

[1452] *Senate Legal and Constitutional References Committee, Parliament of Australia, Administration and Operation of the Migration Act 1958* (2006) *('Senate Report 2006')* [9.50].

underpinning Australian society include equality in general and before the law, and freedom and dignity. I reviewed the three different senses of communities and argued that although non-citizens were not members of the political community, they are members of the legal community and, possibly, members of the social community. As members of the legal community, non-citizens are entitled to the same procedural rights as formal members of the community. By virtue of their length of residence in Australia, non-citizens can develop ties to the community, which amount to social membership of the community. I concluded that the difference in treatment procedurally and, at times, substantively is not just, having regard to Australian values such as equality before the law.

Nonetheless the government continues to rely on section 501 to remove non-citizens on the grounds that it is necessary for the protection of the Australian community. In recognition of the enormous impact on applicants and their families, certain orders made under section 501 are reviewable before the Tribunal. While the relationship between the Tribunal and the Minister has generally been harmonious,[1453] at times, Tribunal decisions have caused concern and led to the view that the Tribunal is too independent. In other words, it has not fully taken into account the views of government. It is worth mentioning that following a number of recent, controversial Tribunal decisions, the former Minister for Immigration was recently personally making all decisions under section 501, thereby excluding merits review.[1454] Recent changes to the *Migration Act* altogether exclude merits review in certain circumstances.

As I have focused on the role of the Tribunal in the section 501 system, I considered in detail the appropriateness of merits review and an additional power contained in the *Migration Act*, namely the Minister's power to set aside decisions made by the Tribunal. The Tribunal is an independent and impartial decision-maker that is able to take a step back and examine the various interests involved and is well placed to review section 501 decisions. Section 501 cases have the potential to ignite intense emotions from victims and their families, which may be shared with the wider community, particularly following media interest, which is always on the look out for a law and order story.[1455] Politicians are undoubtedly aware of this environment, in which sympathy for offenders is dwindling.[1456] As Hogg and Brown observe:

[1453] Mary Crock, *Immigration and Refugee Law in Australia* (The Federation Press, 1998) 235.

[1454] *Re Gabriel and Minister for Immigration and Border Protection* [2013] AATA 906 (Unreported, Deputy President Constance) 18 December 2013; *Re Hoang and Minister for Immigration and Border Protection* [2013] AATA 932 (Unreported, Deputy President Tamberlin) 23 December 2013.

[1455] Crimes committed by non-citizens that have been in the spotlight include the murder of a police officer and cardiac surgeon, the torture and murder of a teenage girl and the abuse of young children.

[1456] Russell Hogg and David Brown, *Rethinking Law and Order* (Pluto Press, 1998) 1.

> Governments and politicians these days are constantly attentive to their standing on the crime question. Many appear to welcome any opportunity to show their virility by adopting harsh law and order measures. Political oppositions and the tabloid media are similarly poised to launch moral salvos at the slightest sign of government faint-heartedness towards crime or criminals …[1457]

To counter the potential to politicise section 501 decision-making, the Tribunal should continue to review these decisions. Furthermore, in my view, the power of the Minister to set aside the Tribunal's decision must be abolished. The Tribunal's greatest contribution in this context is its ability to provide individualised justice, free from undue influence. In my view, when the Minister sets aside Tribunal decisions, it affects the Tribunal's standing, undermining its role as an independent reviewer. It also constitutes a significant waste of resources to all concerned, including applicants and their family, the Tribunal and the taxpayer. Finally, it allows politics to enter what should be a decision based on justice.

In addition to holding the ultimate decision-making trump card, the government has relied on existing legal provisions to ensure that it retains control of who is permitted to enter and to remain in Australia. Thus, the government invokes section 501 instead of the criminal deportation provisions. For that reason, the most important reform required is a residence rule that prevents removal after a certain period of time. Relying on the existing criminal deportation provisions is one way to effect this reform, although a 10-year lawful residence rule is lengthy. Further debate within the community is required to determine what is an appropriate period of residence. In addition, it is imperative to have a system, which enables consideration of social membership claims of non-citizens, who fail to reach the safe harbours of a residence rule. I propose that section 501 continue to fulfil this function, although many changes, including the insertion of a residence rule into section 501 itself, are required to ensure that applicants receive a fair hearing and their claims of social membership are adequately considered.

A review of other areas of law, such as citizenship law and the regulation of legal and medical practitioners, revealed that because it serves particular goals and is influenced by the various interests involved, the concept of character in law varies in accordance with the differing legal contexts.

A test of "bad character" operates as section 501's gateway to the exercise of discretion. The grounds of the character test are highly problematic and require reform. The most commonly invoked ground, the substantial criminal record ground, is far too wide, particularly post-

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[1457] Ibid 1.

December 2014. It extends to any non-citizen sentenced to incarceration for at least one year. Many non-citizens fall within its terms, yet few ultimately have their visas cancelled or refused.

In addition, while expressed as a clear, relatively certain criterion, this ground permits no consideration of the circumstances of the offences or non-citizens' subsequent behaviour, including rehabilitation. Although recognising the benefit of clarity and certainty, I argue that the ground needs to be amended, perhaps by increasing the term of imprisonment, to reduce the numbers it covers and to ensure that it works better as a filter mechanism for the exercise of the discretion. Reducing the number of non-citizens falling into this category would enable the Department to concentrate its resources on the discretion to refuse or cancel the visa, including conducting a thorough examination of the circumstances of the crime and subsequent behaviour. An appropriate targeting of resources would assist in improving decision-making. The extension of the character test to unsoundness of mind or insanity should also be repealed in the interests of justice.

I also considered the remaining grounds of the character test. I argued that the recently introduced immigration detention-related offences ground should be abolished because it is unnecessary and unfair. Although clarified in *Haneef*, the association ground remained challenging to apply, principally because it required a more holistic assessment of the person's character. The past and present criminal or general conduct and the risk of certain types of conduct/danger to the community grounds also require a more complex assessment of the person's character. I propose that these grounds be amended to clarify their purpose and scope of application.

Once applicants have been found to fail the character test, decision-makers must then decide whether to refuse or cancel the visa. The *Migration Act* was amended to enable the Minister to better regulate the exercise of this discretion using Ministerial Directions. As a threshold question, I considered whether the Tribunal's independence was hamstrung by virtue of these Directions. Having reviewed all section 501 Tribunal cases decided over a five-year period, I found that Direction No 21, the Direction in force during the survey period, channelled but did not stifle decision-making for three reasons. First, the Directions cannot "force" the Tribunal to come to a certain conclusion in particular cases. The Tribunal must take into account all relevant considerations and weigh them as it sees fit. Secondly, given the range of factual circumstances, the Tribunal, to some extent, can shape its findings of fact, to fit its view of the justice of the case in a manner, which is publicly justifiable. Finally, Tribunal members can form a personal view of the case in accordance with their own value system, which is not necessarily always articulated in the decision. I thus concluded that Tribunal members enjoyed independence of thought and were able to make the preferable decision. Subject to a residence rule, I concluded

that the use of Directions should be retained to structure the decision to refuse or cancel the visa, principally on the grounds of transparency and consistency in decision-making.

I subsequently compared and contrasted the terms of the four Directions made under the amended provision of the *Migration Act* and concluded that certain Directions were unjust on the basis that the interests of applicants were inadequately protected. While I argued that the protection of the Australian community should always be a primary consideration, given that it lies at the heart of section 501 decision-making, the best interests of children and hardship to applicants must also be taken into account. These considerations ensure that the purpose of section 501 is respected, while nonetheless having regard to applicants' claims of social membership. In contrast, general deterrence and the expectations of the community must never be listed in the Directions for various reasons. First, these factors have already been taken into account in the sentencing process and in the context of considering the protection of the Australian community under the Direction. Secondly, these factors are difficult to apply, resulting in speculation, which detracts from the decision.

Having reviewed the substantive law, I then focused on the decision-making process, specifically whether applicants were accorded procedural fairness throughout Tribunal proceedings. I observed that a fair hearing was predicated on a meaningful exchange between the parties and the Tribunal, where parties were informed of the substantive issues and given an opportunity to respond, including by providing further information. I found that the Tribunal's ability to afford procedural fairness was hampered by numerous factors. Although the practical onus falls on applicants to satisfy decision-makers, including the Tribunal, that the visa should not be refused or cancelled, in practice many applicants are unable to mount their own "defence". I considered the profile of section 501 applicants and noted that while some have lived in Australia for many years, others had a limited grasp of English, having arrived as adolescents, fleeing war-torn countries. Many applicants are poorly educated and have an inadequate understanding of the immigration and legal process. This is exacerbated by their incarceration, which results in limited methods of communicating with the Tribunal and those who could assist them to prepare their case.

Since its inception, the Tribunal has employed a modified adversarial approach, whereby it relies on the parties to organise, pay for and submit evidence. However, in addition to the barriers to participation described above and the complexity of the law, as many applicants were not legally represented they did not know what information to provide. In terms of reform, I proposed the provision of legal representation to all applicants on instrumentalist and dignitarian grounds.

Finally, the procedures contained in the *Migration Act*, which are also used to structure the discretion, played a significant role in the conduct of proceedings. The procedures include that the Tribunal must determine applications within 84 days, or else the decision is deemed to be affirmed. In addition, the Tribunal cannot consider oral or documentary information, which applicants intend to rely upon at the hearing unless the information has been provided to the Minister in writing at least two days before the hearing. The Tribunal cannot grant applicants an extension of time in which to lodge review applications. Designed to expedite proceedings, I showed how these process rules seriously impact upon the fairness of the hearing process. I recommended that the rules relating to the exclusion of applicants' evidence in certain circumstances and the 84-day time limit be abolished and that the Tribunal be granted the discretion to extend the period in which applicants may lodge their review application.

I also discussed a key aspect of Tribunal decision-making, namely its approach to fact-finding. Based on my file review, I found that, for numerous reasons, the Tribunal did not always have accurate, complete and relevant information, when making its decision. In addition to deficiencies in the Department's fact-finding processes, the factors hindering the Tribunal's ability to provide procedural fairness impacted on its capacity to obtain further information. Thus the general profile of applicants, their lack of legal representation, the complexity of the law, the Tribunal's modified adversarial approach and the process rules all affected what information the Tribunal had.

Under the *Administrative Appeals Tribunal Act*, the Tribunal is obliged to make findings on material questions of fact.[1458] As the Administrative Review Council notes, "the findings in relation to material facts are the crucial points on which a decision maker's decision turns".[1459] In section 501 cases, these crucial points include the considerations specified in the Directions. In some instances, however, the Tribunal was quite unable to make findings on matters, such as the best interests of children. This was a direct result of the procedural rule relating to the exclusion of applicants' late evidence.[1460]

If the Tribunal is lawfully compelled to decide that it cannot make a determination, for example, in relation to the best interests of children, as Barker J held in *Paerau*, it results in a primary consideration being "completely ignored",[1461] thus undermining the purpose of the Directions. The Directions require decision-makers to consider, amongst other things, Australia's

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[1458] *Administrative Appeals Tribunal Act 1975* (Cth) s 43(2).

[1459] 'Administrative Review Council, Decision-Making: Evidence, Facts and Findings' Best Practice Guide 3 (Commonwealth of Australia, 2007) 11.

[1460] *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 534.

[1461] (2014) 219 FCR 504, 518.

international legal obligations and applicants' claims of social membership. The effective neutralisation of such considerations is unfair to applicants, who are already at a distinct disadvantage. I agree with Barker J's view that the Tribunal must make a determination on the evidence, no matter how "difficult or sub-optimal" the process or "unreliable" the determination.[1462] The impact of the process rules on the Tribunal's fact-finding obligations constitutes another reason for the repeal of these rules. But, as I said earlier, many factors affect the Tribunal's approach to fact-finding. While I do not propose additional reform suggestions in the present context, I believe that further work is required to improve the quality of material upon which the Tribunal makes a decision. As Kirby J noted in *Shi*:

> When making a decision, administrative decision-makers are generally obliged to have regard to the best and most current information available. This rule of practice is no more than a feature of good public administration. When, therefore, the Tribunal elects to make "a decision in substitution for the decision so set aside", as the Act permits, it would be surprising in the extreme if the substituted decision did not have to conform to such a standard.[1463]

Having the best and most current information also contributes to administrative justice, a core goal of the Tribunal.

My examination of the files also raised questions about the Tribunal's use of its own independent research. As a practice, official notice should be encouraged because it promotes informed decision-making. Although generally regarded as lawful by the courts, however, I have concerns about the Tribunal's controversial use and or misapplication of research. While it is understandable that Tribunal members conduct independent research, particularly in light of the paucity of information, in the cases considered its use brought into question the Tribunal's impartiality. Rather than adding to the quality of the decision, it diminished it. I argued that the Tribunal's use of questionable and controversial research should be abandoned.

While my file review unearthed several issues relating to the Tribunal's approach to fact-finding and reasoning, which ultimately require further research, I believe that the Tribunal must continue to provide independent, merits review in section 501 cases. As the former President of the Tribunal noted:

> The Tribunal has played a significant role in relation to the availability of administrative justice in Australia during its almost 30 year history. I am confident that it will continue to offer individuals and others independent and high-quality review of administrative decisions into the

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[1462] Ibid.

[1463] *Shi v Migration Agents' Registration Authority* (2008) 235 CLR 286, 299–300.

> future. The availability of merits review is an important aspect of democratic system of government.[1464]

The Tribunal performs an important adjudicative function, in a manner distanced from the potential politics of the decision. Merits review is one of the few checks on this broad executive power and thus provides an important avenue of redress for non-citizens facing the possibility of permanent exclusion from the Australian community. In addition to retaining merits review, my reform proposals are designed to achieve a better balance between the various interests involved, thus providing a fairer, more just decision-making system.

[1464] Garry Downes, *The Administrative Review Tribunal: Its Role in the Regulation of the Insurance Industry*, 11 April 2006 <http://www.aat.gov.au/Publications/SpeechesAndPapers/Downes/RoleRegulationInsuranceIndustryApril2006.htm>.

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