



Department of Immigration and Multicultural Affairs

ADMINISTRATION OF S 501 OF THE *MIGRATION ACT 1958*
AS IT APPLIES TO LONG-TERM RESIDENTS

February 2006

Report by the Commonwealth and Immigration Ombudsman,
Prof. John McMillan, under the *Ombudsman Act 1976*

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Reports by the Ombudsman

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EXECUTIVE SUMMARY

Introduction

Several serious complaints have been made to the Ombudsman in the last few years about the adequacy of administration by the Department of Immigration and Multicultural Affairs (DIMA) of s 501 of the *Migration Act 1958*. Under this section of the Act, non-citizens who, because of their criminal record, do not satisfy the Minister responsible for immigration matters that they are of good character can be removed from the country. The complaints concerned the application of s 501 to long-term permanent residents of Australia.

The desirability of protecting the Australian community from non-citizens who have committed serious crimes, and are likely to reoffend, is not questioned. However, the permanent residents affected by the removal decisions under examination in this investigation have been here so long that they, and the communities they live in, see them as Australians. All have lived in Australia for more than 10 years, often much longer. They came as babies or children and have spent the bulk of their formative years, and all their adult years, in Australia. They have well-established family and community ties here, and often have children themselves. They have served, or are serving, the correctional sentence imposed after conviction for their criminal activities.

I decided that my office would undertake an investigation on an own motion basis, in accordance with s 5(1)(b) of the *Ombudsman Act 1976*, into matters of administration relating to actions of DIMA concerning cancellation under s 501 of the Migration Act of visas held by long-term permanent residents. The aim of the investigation was to determine:

- the circumstances in which s 501 is applied to long-term permanent residents
- whether, in recognition of the profound and enduring consequences of visa cancellation, decisions were being made to the highest standard of procedural and substantive fairness.

Scope of Investigation

The investigation was not intended to be a comprehensive analysis of the operation of s 501. It focused on long-term permanent residents who had been in Australia since childhood and were likely to have dependents in this country.

Historically, the majority of s 501 decisions have been made by the Minister rather than an officer of DIMA acting as the Minister's delegate. Decisions made by Ministers personally are not within the jurisdiction of my office to investigate. However, in making a decision the Minister relies on advice from the Department. The quality and appropriateness of such advice does fall within my jurisdiction.

In considering the application of s 501 to long-term permanent residents, the investigation examined whether:

- the policies and procedures for identification, assessment and notification of permanent residents liable for cancellation of their visas under s 501 were appropriate
- the implementation of these procedures was undertaken to a uniformly high standard of procedural fairness
- the outcomes for those permanent residents and their families affected by a decision to cancel were reasonable and fair, taking account of the implications of the decision to cancel.

Details of the methodology used can be found in Part 1 of the report.

Summary of recommendations

Based on the outcomes of this investigation the following recommendations are made to improve the administration of certain aspects of s 501 of the Migration Act, particularly in relation to long-term permanent residents.

Recommendation 1:

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

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

Recommendation 2:

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

Recommendation 3:

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

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

Recommendation 4:

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

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

Recommendation 5:

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

- all 'primary considerations' are fully canvassed, especially 'the best interests of the children'
- any international or protection obligations to the visa holder are thoroughly pursued, whether raised by the visa holder or not. This should include considering the circumstances in which refugee, humanitarian or protection status was originally granted
- the hardship likely to be faced by the visa holder's family is fully canvassed, especially when family members are themselves Australian citizens or long-term permanent residents

- copies of all relevant information, whether supporting the case to cancel or not, are provided to the visa holder for comment prior to decision-making. This includes any material relating to the best interests of the children, and the implications of cancellation for any health concerns and necessary medical treatment
- the visa proposed for cancellation has been correctly identified
- a decision to cancel the visa of a long-term permanent resident is made either by the Minister, or an authorised delegate in accordance with the MSI, and
- the grounds for the decision follow logically from the information presented in the Paper and are clearly articulated in the reasons for decision.

Recommendation 6:

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

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

Recommendation 7:

That DIMA review the application of ss 200–201 and s 501 with a view to providing advice to government on whether s 501 should be applied to long-term permanent residents. In particular, the review could examine whether it would be appropriate to raise the threshold for cancellation under s 501 in relation to permanent residents. One option that should be considered by DIMA in that review is whether visa holders who came to Australia as minors and have lived here for more than ten years before committing an offence should not be considered for cancellation under s 501 unless either:

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

Recommendation 8:

That DIMA review:

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

Recommendation 9:

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

Conclusion

The investigation has highlighted many deficiencies in the content and application of policies and procedures for cancellation of long-term permanent residents' visas under s 501. The majority of cases examined had at least one, often several, significant omissions or inaccuracies in the information provided to decision makers. The standard of procedural fairness provided to those liable for cancellation was inconsistent and often fell below that which might be expected given the gravity of the decisions. The outcomes for affected long-term permanent residents can, in many instances, be characterised as unfair and unreasonable.

In my view, a review of the application of s 501 to long-term residents is urgently required. If the results of this investigation are indicative of the standards applying generally to the operation of s 501, DIMA needs to review both the content and application of all relevant policies and procedures. Stringent quality assurance mechanisms must be developed, with emphasis on ensuring procedural fairness for all affected by s 501 decisions.

DIMA's Response to the Report

The Secretary of the Department of Immigration and Multicultural Affairs in his response to my draft report advised that he agreed with all but one of the recommendations.

I welcome this positive and constructive response to the report. The Secretary's comments in relation to each recommendation are included in Part 4 of this report.

The Secretary's response was as follows:

'Thank you for the opportunity to comment on the draft report on your own motion investigation into the character provisions under section 501 of the *Migration Act 1958* and their application to long-term permanent residents.

Your draft report highlights deficiencies in the application of policies and procedures used for cancelling long-term permanent residents' visas on character grounds, and I accept your comments and recommendations in this regard. Your report reflects many of the themes raised in the Palmer and Comrie Reports – particularly insofar as it expresses concerns about this department's case management processes and quality assurance and training programmes.

I would like to discuss broad improvements that are already underway before addressing your recommendations as they relate to the application of the character provisions.

Change in DIMA: Stronger Accountability and Governance

Since the publication of the Palmer and Comrie reports, and with the strong support of the Minister, Senator the Hon. Amanda Vanstone, I have implemented broad changes within this department, which lay the groundwork for redressing your concerns. These include a new organisational structure with clear lines of responsibility and accountability; a strong focus on fair, reasonable and lawful decision-making; and processes for escalating sensitive decisions and issues to senior executive levels.

You are aware that the government has provided an additional \$232 million to the department over five years to implement a wide-ranging improvement and reform programme. As part of this improvement process, new branches have been established with responsibility for department-wide internal audit processes and training. Furthermore, a strategic national training framework is being developed, which is informed by:

- individual business needs
- the department's existing capabilities framework
- 'best practice' training models
- ongoing evaluation of the training's effectiveness, and
- the need for national coordination and consistency.

In addition, a departmental case management framework is being developed by trained case management teams in place in National Office, Sydney and Melbourne. This will be incrementally implemented from late January 2006 and will guide the department's policy, practice and service delivery.

A holistic, comprehensive and planned approach to delivering direct services for clients is being developed initially for the compliance, detention and removals functions, with a view to

expanding over time to all areas of client interaction. The case management framework will clearly define the collaborative processes of assessment, planning, facilitation and evaluation of appropriate services and interventions to meet the diverse and, at times, complex needs of this department's clients.

Overall, these changes form part of a programme of reform to ensure that DIMIA:

- is more open and accountable
- deals fairly and reasonably with clients, and
- has staff that are well-trained and supported.

Character Provisions of the Migration Act: Policy

Where your report discusses issues specifically relating to current policy (as opposed to its application), I believe it is important to be mindful that this policy was implemented by the government and is based on legislation passed by Parliament in 1998.

The purpose of the character provisions, as stated by the then Minister for Immigration and Multicultural Affairs, the Hon Philip Ruddock MP, in his Second Reading Speech, is “to safeguard the Australian community and to enable the government to effectively discharge its duties and responsibilities to the Australian people”.

Current policy requires decision-makers to balance multiple factors – including the non-citizen's ties to Australia as well as the protection of the Australian community – before reaching a decision as to whether to cancel a visa on character grounds. This balancing process is sometimes extraordinarily difficult, and decisions to cancel a visa are not taken lightly. It is, of course, incumbent upon this department to perform its responsibilities in administering the character provisions fairly and rigorously and we have initiated a comprehensive review of decision-making processes relating to the character cancellation powers.

I would also like to note that, while particular decisions may have been affected by process deficiencies, it cannot be assumed that the outcome of those cases would have necessarily been different had the deficiencies not occurred. Even when a non-citizen and their family may suffer hardship as a consequence of that non-citizen's removal from Australia, a decision to cancel the non-citizen's visa may, on balance, be necessary to protect the Australian community from an unacceptable risk of harm.

Your report includes recommendations for substantial policy review – particularly of whether the character powers under section 501 should be applied to long-term permanent residents. Any change to existing policy on this issue is solely a matter for Government.

The Way Forward

Your report contains a number of recommendations in relation to this department's administration of the character powers. I support the thrust and direction of all these recommendations.

The department has already implemented a number of specific measures to improve the administration of the character powers, including:

- a 'help desk' to provide assistance to decision-makers in applying the relevant legal and policy framework

- a sensitive case register to ensure any case requiring high level consideration (including those relating to long-term permanent residents) is referred to the senior executive as early as possible in the decision-making process, and
- a review of the relevant departmental Instruction with a view to providing an up-to-date, comprehensive and user-friendly document to aid decision-makers.

I further propose to immediately commence developing and implementing a programme of administrative reform to comprehensively address the concerns you have raised. This will entail consideration of how to best implement the initiatives that you have recommended, including:

- a code of procedural fairness to guide the administration of the character provisions
- guidelines for sourcing information that is relevant to the decision as to whether a visa should be cancelled on character grounds, and
- standard procedures for the accurate and consistent identification of convicted non-citizen criminals who may be liable to visa cancellation on character grounds.

A more detailed response, addressing each of your recommendations in turn, is attached.

I look forward to the opportunity to work closely with you in future to ensure that these measures will result in tangible improvements to this department's decision-making processes.'

During the next six months, I will seek an update from the Secretary on DIMA's progress in implementing the recommendations in this report.

Acknowledgement of assistance

I would like to acknowledge the valuable assistance provided by DIMA and by my investigation staff during the course of this investigation. I would also like to acknowledge the extensive research conducted by Mr Ben Wickham who was brought on as a consultant to work on this own motion investigation.

Prof. John McMillan
Commonwealth and Immigration Ombudsman

PART 1 – BACKGROUND TO THE INVESTIGATION

1.1 Several complaints raising substantial issues have been made to the Ombudsman in the last few years about the administration by the Department of Immigration and Multicultural Affairs (DIMA) of s 501 of the *Migration Act 1958*. Under this section of the Act, non-citizens who, because of their criminal record, do not satisfy the Minister responsible for immigration matters that they are of good character can be removed from the country. The types of offences committed by such people have typically been drug-related, or have involved property and theft crimes, armed robbery or assault. The complaints raised concerns about how s 501 was being used to deal with those non-citizens who are long-term permanent residents - that is, they have lived in Australia for more than 10 years.

1.2 In many cases, the permanent residents came to Australia as babies or children at least ten years ago, and often much longer. They have well-established family and community ties and often parental responsibilities, and face the prospect of permanent separation from their children, partners and immediate family. They may be sent to a country where they have no connections, do not understand the culture and do not speak the language. Decisions to remove permanent residents from Australia in these circumstances can – to use the language of the Full Federal Court¹ - result in the permanent ‘banishment’ of permanent residents who are only aliens by the ‘barest threads’.

1.3 I decided that my office would undertake an investigation on an own motion basis, in accordance with s 5(1)(b) of the *Ombudsman Act 1976*, into matters of administration relating to actions of DIMA concerning visa cancellations for permanent residents under s 501 of the Act.

Scope of Investigation

1.4 The investigation was not intended to be a comprehensive analysis of the operation of s 501. It focussed on long-term permanent residents who had been in Australia since childhood and were likely to have dependents in this country. The aim of the investigation was to examine whether:

- the policies and procedures for identification, assessment and notification of long-term permanent residents for cancellation of their visas under s 501 were appropriate
- the implementation of the relevant procedures was undertaken to a uniformly high standard of procedural fairness
- the outcomes for long-term permanent residents and their families affected by the decision to cancel were reasonable and fair, taking account of the gravity and enduring consequences of the decision.

1.5 Historically, the majority of s 501 decisions have been made by the Minister rather than by an officer of DIMA acting as the Minister’s delegate. Figures provided by the Department show that, of the 236 decisions under s 501 to cancel visas in 2002-2003, the Minister made 189 (80%) and delegates made 47 (20%). The Department has advised that the then Minister had made clear his wish to personally consider proposed cancellations for long-term residents. Decisions made by the Minister are not reviewable on the merits by the Administrative Appeals Tribunal, but are reviewable on the narrower ground of jurisdictional error by the Federal Court or the High Court.

¹ *N v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121 at [1].

1.6 Over the last two years there has been a higher proportion of decisions under s 501 made by delegates of the Minister, in accordance with the preference of the new Minister who asked only to see exceptional cases involving proposed cancellation of long-term residents' visas. Of the 112 decisions under s 501 in 2003-04, 17 (15%) were made by the Minister and 95 (85%) by delegates. In July 2004–March 2005, the Minister made 13 (12%) of the 105 decisions, with the other 92 made by delegates.

1.7 Many of the complaints to my office about the administration of s 501 have concerned decisions made by the Minister. Decisions made by Ministers personally are not within the jurisdiction of my office to investigate (Ombudsman Act s 5(2)(a)). However, in making a decision the Minister relies on advice from the Department. The quality and appropriateness of Departmental advice does fall within my jurisdiction. So too does action taken by the Department to implement a decision of the Minister. It is relevant in that respect that a number of the cases considered in the preparation of this Report involve people who were the subject of a decision by the Minister and who have remained in immigration detention for a considerable period of time.

1.8 The jurisdiction of the Ombudsman extends as well to making a report under s 15 of the Ombudsman Act where, in the opinion of the Ombudsman, administrative action has been taken in accordance with a legislative or administrative rule that is or may be unreasonable, unjust, oppressive or improperly discriminatory. It is on that basis that, as explained below, the methodology for this Report included a review of the Ministerial Direction and Migration Series Instruction implementing s 501.

Methodology

1.9 The investigation methodology adopted by my office in preparing this Report was designed to clarify the legal and policy framework underpinning decisions to cancel visas under s 501. A sample of 35 instances where the visa of a long-term resident had been cancelled under s 501 was then examined in detail to determine how well the policy and procedures were being implemented. DIMA also provided for examination examples of cases where a decision was made not to cancel the visa under s 501.

1.10 The investigation was conducted largely on the basis of paper records relating to the administration of s 501. The methodology included:

- examination of amendments to the *Migration Act 1958* in 1998 that introduced the current s 501, including the Explanatory Memorandum to the Bill (*Migration Legislative Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1998*) and the Second Reading Speech
- review of the Ministerial Direction under s 499 relevant to s 501 (Direction No 21)
- review of the Migration Series Instruction relevant to s 501 (Instruction No 254)
- review of all complaints received by the Ombudsman's office concerning cancellation of visas under s 501 since 1998
- review of complaints from long-term residents who remain in immigration detention after cancellation of their visas under s 501 (a total of seven complaints)
- searches of cases involving the cancellation of a visa under s 501 heard by the Administrative Appeals Tribunal (AAT) or Federal Court since 2002
- review of the DIMA files relating to those AAT and Federal Court cases involving long-term permanent residents
- Interviews with:

- seven long-term Australian residents whose visas had been cancelled under s 501 and who were, at the time of the investigation, in immigration detention
- senior staff in DIMA's Canberra office responsible for oversight of s 501 cancellations.

1.11 The policies, procedures and practices for cancellation of visas under s 501 were assessed against the following criteria:

- **comprehensiveness:** whether the policies and practices in place to support s 501 meet legal and other obligations applying to that function; and whether decisions made under s 501 are based on accurate, current and complete information
- **commitment and consistency:** whether advice provided to the Minister and s 501 delegates is both consistent and of a high quality; and whether DIMA has quality assurance processes to monitor that advice
- **procedural fairness:** whether those affected by a decision to cancel a visa under s 501, including the immediate family, were given a proper opportunity to make their views known; and whether DIMA procedures for this purpose took account of difficulties that long-term residents may face in presenting their case to decision-makers
- **reasonableness and fairness:** whether decisions made under s 501 by delegates of the Minister were reasonable and fair, and consistent with the intention of Parliament as embodied in the amendments made to the Migration Act in 1998.

PART 2 – LEGAL AND POLICY FRAMEWORK

2.1 The decision to cancel a visa under s 501 of the Migration Act 1958 is subject to a complex legal and policy framework. This comprises:

- the relevant sections of the Act itself (which are reproduced in the Appendix to this Report)
- a legally binding Direction (No 21) issued pursuant to s 499 by the Minister for Immigration, providing the framework for decision-making
- a Migration Series Instruction (No 254), issued by the Department, setting out the procedures to be followed and general guidance for staff in implementing the policy framework.

1998 Amendments to the Migration Act 1958

2.2 The Migration Act contains a range of powers for cancelling a visa, including s 501. Two powers that are relevant to this Report are conferred by ss 200–201 and s 501.

- **Sections 200-201:** these sections provide that the Minister may deport a non-citizen who has been in Australia for less than ten years, and who had been convicted of an offence that is punishable by imprisonment for one year or more. There was no power to deport permanent residents convicted of serious crime if they had been living in Australia for over ten years before committing the offence.
- **Section 501:** this section provides that the Minister may cancel the visa of a person if the Minister is not satisfied that the person passes the character test. One ground for not passing the character test is that the person has a substantial criminal record. A person whose visa has been cancelled thereby becomes an unlawful non-citizen (s 15); the person is then subject to mandatory detention (s 189) and removal from Australia (s 198). A decision made by the Minister or delegate under s 501 must be made in accordance with the requirements of natural justice (procedural fairness) (s 501(2)), unless the Minister personally decides that the cancellation of the person's visa is in the national interest (s 501(3), (4)).

2.3 Section 501 in its present form was introduced into the Migration Act in 1998 by the *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998*. It is not clear in what way the amended s 501 was intended to relate to the power in ss 200–201. It is clear that both sections cover some common ground. If s 501 were intended to supersede the operation of ss 200–201, then it would be reasonable to expect those sections of the Act to be repealed when the amendments were made. This did not occur, nor is there any reference to ss 200–201 in the Explanatory Memorandum or the Second Reading Speech.

2.4 According to the Explanatory Memorandum² to the Amendment Bill, key changes were the introduction of a character test; deeming certain persons not to pass the character test; and imposing the burden of proof on visa holders or applicants being considered for refusal or cancellation of visas on character grounds to convince the Minister (or delegate) that they pass the character test.

² *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1998 Explanatory Memorandum*.

2.5 The amended section 501 contains the power to cancel a visa where the visa-holder has been found not to pass the character test. The character test is defined in s 501(6). The reasons for failure include a substantial criminal record, an association with a person, group or organisation involved in criminal activity, or the visa holder's past and present criminal or general conduct. Persons with a 'substantial criminal record' are deemed not to pass the character test.

2.6 For the purposes of this Report, I have considered only cases where a visa was cancelled in accordance with one of the following:

Section 501(6) A person will not pass the character test if:

- (a) the person has a substantial criminal record ... or ... (c) having regard to either or both of the following:*
 - (i) the person's past and present criminal conduct*
 - (ii) the person's past and present general conduct*
- the person is not of good character.*

2.7 A 'substantial criminal record' is defined in s 501(7) as being where:

- (a) the person has been sentenced to death; or*
- (b) the person has been sentenced to imprisonment for life; or*
- (c) the person has been sentenced to a term of imprisonment of 12 months or more; or*
- (d) the person has been sentenced to 2 or more terms of imprisonment (whether on one or more occasions), where the total of those terms is 2 years or more; or*
- (e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution.*

2.8 For the purposes of this report, I have considered only cases falling under s 501(7)(c) or (d).

2.9 The Explanatory Memorandum to the Amendment Bill foreshadowed that the new provisions would 'strengthen the Minister's personal powers ... to cancel a visa on character grounds' and 'enable the Minister to personally exercise a power to intervene in any case and substitute his/her own decision ... to cancel. It indicated that one of the purposes of the new character provisions was to 'ensure that the Minister's personal decisions are not reviewable'.

2.10 Over recent years, s 501 has been used increasingly to cancel visas for long-term permanent residents, that is, people who have lived in Australia for more than 10 years. This is a use that is not made explicit in either the Explanatory Memorandum or the Second Reading speech by the then Minister. Nor was it clear that the majority of cancellation decisions of permanent residence visas would be made personally by the Minister.

2.11 Decisions that are made by delegates of the Minister to cancel a visa on character grounds under s 501 are reviewable by the Administrative Appeals Tribunal (AAT) under s 500 of the Act. Decisions that are made personally by the Minister are not merits reviewable. They are also subject to the privative clause in the Act contained in s 474. Section 474 provides that a privative clause decision is final and conclusive and cannot be challenged in any Court. The courts are able to review such decisions only on the narrow ground of jurisdictional error.

Direction No 21 – Visa Refusal and Cancellation under s 501

2.12 Under s 499(1) of the Migration Act the Minister is empowered to give written directions for the exercise of powers under the Act. Direction No 21 – Visa Refusal and Cancellation, which came into effect on 23 August 2001, is the current direction governing cancellation of visas under s 501. It is binding on Ministerial delegates and on the AAT in considering the factors to be taken into account in arriving at cancellation decisions and the relative weight to be attached to those factors.

2.13 The Preamble to the Direction states that in exercising the power to cancel visas, ‘the Minister has a responsibility to protect the community from criminal or other reprehensible conduct and to ... cancel visas held by non-citizens whose actions are so abhorrent to the community that they should not be allowed ... to remain within it’. The Direction identifies ‘primary’ and ‘other’ considerations relevant to decision-making.

2.14 The primary considerations are:

- (a) the protection of the Australian community
- (b) the expectations of the Australian community
- (c) where the non-citizen is a parent or has some other close relationship with a child or children, the best interests of the child or children.

The protection of the Australian community

2.15 The Direction emphasises the need to protect the more vulnerable members of the community, such as children and young people, who are especially at risk in relation to drugs and crimes of violence. Factors identified in Direction 21 as relevant to the assessment of risk to the community are:

- the seriousness and nature of the conduct
- the likelihood of recidivism
- whether visa cancellation might deter similar criminal conduct in others.

2.16 Offences considered ‘very serious’ include the production, importation, distribution, trafficking (including possession for this purpose), and commercial dealing or selling of illicit drugs. Financial gain from selling drugs is regarded as ‘extremely serious’. Other ‘very serious’ offences include organised criminal activity, sexual assaults, particularly against children, armed robbery and home invasion, murder, manslaughter or any other form of violence, terrorist activity, kidnapping, blackmail, extortion, arson, serious theft and crimes against children.

2.17 In assessing the seriousness of the visa holder’s crime, decision-makers are required by Direction 21 to consider:

- the sentence imposed for the crime
- the extent of the person’s criminal record and the nature of the offences
- the ‘repugnance’ of the crime(s), with emphasis on crimes involving violence or fraud against a defenceless person
- any ‘mitigating factors’.

2.18 In assessing the likelihood of recidivism, factors decision-makers are required to consider include:

- whether the visa holder commits a further offence after having been warned previously about the risk of cancellation
- the extent of rehabilitation already achieved, the prospect of further rehabilitation, and the positive contribution to the community the person may reasonably be expected to make.

2.19 The Direction also indicates that decision-makers should consider whether the nature of the offence is such that visa cancellation may deter others from committing similar offences. However, no advice is provided about what might be relevant to making such an assessment.

Expectations of the Australian community

2.20 The thrust of this consideration is that the Australian community expects visa holders to obey Australian laws while in Australia. If a non-citizen has breached this trust, or there is a significant risk that they will breach it, or the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to cancel the visa. It may also be appropriate to cancel the visa simply because the nature of the character concerns or the offences is such the community would expect the person to be removed from Australia. However, no advice is provided on assessing the level of risk of breaching Australian laws, or what types of offences or character concerns would lead necessarily to a community expectation that the visa holder be removed.

The best interests of the child

2.21 This is a primary consideration if a child is, or would be, less than 18 years of age when the decision to cancel is intended to come into effect. If the child/ren will be over 18, the impact on them may only be taken into account under 'other considerations' (see below).

2.22 The Direction acknowledges that, in general terms, the child's best interests will be served if the child remains with its parents. The exception is where there is evidence that the visa holder has abused or neglected the child, or the child has experienced physical or emotional trauma from the visa holder's conduct. In considering the best interests of the child, decision-makers are to consider factors such as:

- the nature and duration of the relationship between the child and the visa holder, including the number and length of any separations, and the reasons for separation
- the age of the child and the amount of time the child has spent in Australia
- whether the child is an Australian citizen or permanent resident
- the likely effect that any separation would have on the child
- the circumstances of the probable receiving country, including education and health services
- any language or cultural barriers for the child in the probable receiving country, taking into account the relative ease with which younger children acquire new languages and adapt to new circumstances.

2.23 The Direction does not indicate which considerations might outweigh a decision-maker's finding that cancellation would not be in the best interests of a child. However, in many instances, the best interests of children have, albeit implicitly, been outweighed by other primary considerations.

Other considerations

2.24 The Direction also identifies other considerations that may be relevant. These include:

- the extent of disruption to the visa holder's family, business and other ties to the Australia community
- genuine marriage to, or de facto or interdependent relationship with, an Australian citizen, permanent resident or eligible New Zealand citizen
- the degree of hardship which would be caused to the immediate family members lawfully resident in Australia. This includes whether the immediate family members are able to travel overseas to visit the visa holder; the nature of the relationship between the visa holder and the immediate family members; and whether immediate family members are in some way dependent on the visa holder for support that cannot be provided elsewhere
- the composition of the visa holder's family in Australia and overseas
- any evidence of the visa holder's rehabilitation or recent good conduct
- any formal advice to the visa holder in the past by DIMA about conduct that might lead to visa cancellation in the future.

2.25 Where such considerations are relevant, the Direction states that 'it is appropriate that these matters be taken into account, but that generally they be given less individual weight than that given to the primary considerations'. Hardship likely to be faced by the visa holder and the visa holder's family is seen as a secondary consideration. However, there is no guidance for a decision-maker on how to balance competing considerations. For example, under what circumstances might the 'other considerations' hardship faced by the visa holder and his or her family outweigh the 'primary' expectation of the Australian community that permanent residents obey Australian laws?

International obligations

2.26 Decision-makers are also required to consider international obligations owed to the visa holder. These include where refoulement (or return to the country of origin) would place the person in real risk of violation of his or her rights under international agreements to which Australia is a signatory. These include the International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

2.27 The Direction makes it clear that there is no discretion to cancel a visa and remove a person where refoulement would lead to violation of the right to life, freedom from torture and cruel, inhuman or degrading treatment or punishment, or where the person would face the death penalty. The Direction also refers to obligations under the Convention and the Protocol Relating to the Status of Refugees that need to be considered.

2.28 However, these international obligations are subject to an overriding qualification: that 'notwithstanding international obligations, the power to refuse or cancel must inherently remain a fundamental exercise of Australian sovereignty. The responsibility to determine who should be allowed to enter or to remain in Australia in the interests of the Australian community ultimately lies within the discretion of the responsible Minister'.

Migration Series Instructions (MSI) No 254: The Character Requirement – Visa Refusal and Cancellation under s 501

2.29 MSI 254 provides advice to decision-makers on the process to be followed in deciding whether a non-citizen fails the character test. The MSI came into force on 20 September 1999 and continues to govern the process for the cancellation of visas held by permanent residents. It explains how to prepare advice for the decision-maker, what to do when the decision to cancel is made, and in what circumstances the discretion not to cancel the visa should be exercised. It includes a series of attachments setting out decision-making pathways and proformas for related correspondence and reports.

2.30 Unfortunately, the current version of the MSI refers to an outdated Direction relating to the operation of s 501 – No 17 – rather than the current Direction, No 21. Direction No 21 is materially different to its predecessor.

2.31 The MSI does not draw a distinction between criteria and weightings relevant to cancellation of permanent residence visas and those relevant to other categories of visas that might be liable for cancellation on character grounds. The MSI is also silent as to how people of interest are identified for possible cancellation, and it only describes the process to be followed once a person has been identified.

2.32 The MSI touches upon the situation where the Minister's personal powers to cancel a visa are exercised, noting that the Minister's personal decisions are not reviewable by the Migration Review Tribunal, the Refugee Review Tribunal or the AAT. The MSI appears to suggest the Minister is only likely to consider a proposed cancellation if the visa holder is controversial, notorious or highly disreputable, or has committed major crimes.

Best Practice Procedure for cancellation under s 501

2.33 This section provides an outline of how the decision-making and notification procedures under s 501 should ideally occur, taking account of the requirements in the Migration Act, Direction 21 and MSI 254. It is against this broad approach that the procedures followed in the individual cases examined in the course of the investigation were assessed.

Identifying the visa holder as a person who may not meet the character test

2.34 Identification procedures should be clearly stated and consistently applied across all States/Territories. Once a person has been identified, all Departmental records (such as the Movement Alert List, Registry, Movements, Citizenship and Visa Cancellation systems, and the visa holder's personal DIMA file, if there is one) should be checked to confirm the class of visa held by the visa holder. All relevant information should be considered, including the visa holder's criminal record, sentencing remarks and any parole reports. Ideally, a person who is likely to be liable for visa cancellation under s 501 should have been warned previously that their activities had brought them within the ambit of s 501. They should be aware that continuing those activities could lead to visa cancellation and have explained to them the consequences of cancellation, that is, they would be removed from Australia permanently.

2.35 A preliminary determination should be made by a Departmental officer that the visa holder may not pass the character test. The case should then be referred to a s 501 delegate. If the delegate considers the visa holder meets the criteria in s 501(6)(a) or (c), he

or she will be deemed automatically to be not of good character. The onus is then on the visa holder to demonstrate otherwise.

Notifying the visa holder of intention to cancel

2.36 The delegate should then provide to the visa holder a Notice of Intention to cancel. This can be given orally but preferably should be done in writing. The notice should include:

- a full description of the nature of the alleged activities bringing the visa holder within the scope of s 501
- the part of s 501 that will be relied on in making a decision, and the evidence or information about the alleged activities on which the proposed intention to cancel is based. Care should be taken to ensure that wherever possible all relevant information is provided. Information that might be classified 'protected' under s 503A should be withheld from the visa holder only when absolutely necessary
- the reasons for which it is considered that the visa may be cancelled
- the source of this evidence and how it supports the liability for visa cancellation under s 501, to the extent that it is legally possible to do so
- copies of documents to be relied on in making the decision
- a copy of the Minister's Direction.

2.37 Procedural fairness requires that the visa holder and interested third parties, such as immediate family, be invited to comment or present argument that the claimed ground for cancellation does not exist, or that there are other reasons why the visa should not be cancelled. A reasonable timeframe for responding to the notice and guidance for preparation of the response should be provided. Attachment 12 to the MSI contains the basis for a proforma questionnaire that can be attached to the Notice of Intention to cancel to help the visa holder in preparing a response. The visa holder and his or her family may be interviewed by DIMA to help obtain a clearer picture of his or her circumstances. Attachment 12 provides a standard format for such interviews. The visa holder should be advised if it is expected the Minister will make the decision on cancellation personally, and the implications of this.

Preparation of an Issues Paper

2.38 The Issues Paper is the key decision-making document. It is on the basis of the information and analysis contained in the Issues Paper that the Minister or s 501 delegate will decide whether a visa should be cancelled. The Paper should be a balanced and comprehensive assessment of the visa holder's circumstances, reflecting the requirements of the Direction and MSI. Information in the Paper must be accurate, current and complete. If there are gaps or inconsistencies in the evidence, additional relevant information should be obtained where it is fair and reasonable to do so. In accordance with Attachment 1 to the MSI, cancellation of permanent entry visas held by people currently in Australia is only to be considered by the Minister, Secretary or Deputy Secretary.

Making the decision

2.39 If the decision is made by a delegate, all considerations set out in the Direction must be taken into account in decision-making and in line with the weighting prescribed. The Minister, however, is not bound by the Direction³, and can place whatever weight he or she chooses on the considerations.

³ The matter has been tested in the Federal Court on numerous occasions.

2.40 The decision, the information relied on in reaching the decision, and the reasons for the decision, should be recorded in full. Attachment 13 to the MSI provides a structure for decision making with a series of questions to guide the process. Of particular relevance to long-term residents is whether the visa holder is owed protection under international obligations, such as non-refoulement and the ICCPR. Decision-makers may not remove a person to a country where they would face a real risk of breach of their fundamental human rights. The attachment also includes a pro-forma for formally recording the decision.

2.41 Consideration of the Paper will lead to one of four decisions:

- the visa holder passes the character test
- the visa holder does not pass the character test, but the decision-maker decides not to cancel the visa
- the visa holder does not pass the character test, but the decision-maker decides not to cancel the visa, and to warn the visa holder that a fresh assessment will be made with a view to cancelling the visa if the visa holder is convicted of any further offences
- the visa holder does not pass the character test and the decision-maker decides to cancel the visa.

Notifying the visa holder of cancellation

2.42 If the decision to cancel a visa is made, the visa holder should be provided with a written notice, in accordance with Attachment 14 to the MSI, that

- sets out in writing the decision of the cancellation
- specifies the class of visa cancelled, the provision under which the decision was made and the effect of the provision
- sets out the reasons for the decision (other than information protected under s 503(A))
- provides two copies of every document that was relevant to the making of the decision
- indicates if there is a right of appeal and how to pursue that right. Copies of relevant sections of the Act must to be enclosed in the cancellation notice.

PART 3 – AREAS OF CONCERN

3.1 This section outlines areas of concern in the administration of the s 501 cancellation provisions identified in the investigation. The Department was unable to advise what proportion of visas considered for cancellation under s 501 were held by long-term permanent residents. All files drawn on in the preparation of the comments below related to proposed cancellation of the visas of long-term permanent residents. Where individual cases have been mentioned, the visa holder has been identified only by a capital letter for privacy reasons. Full details of all cases have been provided separately to DIMA.

Identification and notification of visa holders for possible cancellation

Consistency across Australia

3.2 The process of identifying those liable for cancellation might best be described as ad hoc. The investigator was unable to locate any information in the s 501 policy and procedural framework indicating how visa holders liable for cancellation should be identified. In practice, the way such visa holders come to DIMA's attention varies between States, and often depends on the relationship between the local DIMA office and the State police and correctional services. Sometimes State police or correctional services will advise the Department when they believe a person convicted of a crime or undertaking a custodial sentence is not, or may not be, an Australian citizen. Sometimes former police officers now working in DIMA's Compliance area will be aware of the visa status of a convicted person. Sometimes non-citizens will be identified through dob-ins or information from community organisations.

3.3 However, it may not be apparent that someone who has been in Australia from early childhood is not an Australian citizen. Anecdotal information from DIMA staff suggests that, in many instances, the Department is simply not identifying persons who might meet the criteria for cancellation. In part, this may be because not even the long-term residents themselves realise that they are not citizens. DIMA files indicate that many of those proposed for cancellation said they were unaware they were only permanent residents. They said they did not know what type of visa they held.

3.4 This seems likely. Until 1994, there was no requirement for persons granted permanent residence in Australia to have a specific subclass of visa. From that date, by force of operation of the law, all permanent residents were deemed to have a particular type of visa – often a transitional (permanent) visa. But they were not necessarily advised of this by DIMA. Nor were they advised that, after enactment of the 1998 amendments to the Migration Act, the new s 501 provisions could be applied to them. If long-term residents had arrived as babies or small children, they often assumed they were, in fact, Australian citizens. This was a recurring comment made to the investigator.

Identification of visa to be cancelled

3.5 Prior to 1994, a number of different visas existed which permitted permanent residence in Australia. After the Migration Act was amended in 1994, most permanent residents then in Australia were deemed to have transitional (permanent) visas. Some of these permanent residents would have held absorbed person visas in accordance with s 34 of the Act. The status of absorbed persons under s 34 is dealt with later in this report.

3.6 It is axiomatic that where there is an intention to exercise the discretion to cancel a visa, the class of visa has been correctly identified. However, the investigation revealed several instances where the wrong visa was cited for cancellation in Departmental documentation. In some cases, the visa class named in the Notice of Intention to cancel is different from that in the Issues Paper. In others, the visa proposed for cancellation has not been identified in either the Notice of Intention or the Issues Paper on which the decision is based.

3.7 For example, in Mr GA's case, the Issues Paper identifies his visa as being a transitional (permanent) visa. The Notice of Intention to cancel states he held a special category visa granted in 1995, yet Mr GA has not left Australia since he arrived in 1967. In Mr DD's case, the Notice refers to a subclass 156 visa, the Issues Paper to a transitional (permanent) visa, and the reasons prepared for Ministerial adoption, a return resident visa. These are not mere matters of nomenclature. Failure to identify the correct visa for cancellation can result in jurisdictional error.

3.8 This occurred in the case of Mr S who arrived in Australia from Germany in 1984 at the age of four. The Issues Paper on Mr S initially stated he held a subclass 155 visa, which is a five year return resident visa. Later in the paper his visa is referred to as a return residence K1412 visa. When he was advised of cancellation, he was told his visa was a special category subclass 444, a category that applies only to New Zealand citizens. The Federal Court, in ruling on Mr S's application for judicial review, observed that:

'the result may appear to be a technical one. However, (it) is an unfortunate example of sloppiness ... Where the entitlement of an individual to remain in Australia is in issue ... the Australian community is entitled to expect the documentation ... is prepared with care'⁴.

Ombudsman opinion

3.9 Lack of consistency in the process for identifying permanent residents who may be liable for visa cancellation raises fundamental concerns about fairness. Clear guidance is required on how such people are to be identified. In some instances it appears identification may have been simply a matter of bad luck.

3.10 While the system of subclasses of visa is undoubtedly complex, it is reasonable to expect the Department, as architect of the system, would be in the best position to determine the class of visa held by an individual. Failure to give this basic matter due attention is unsettling in view of the grave consequences of a cancellation decision. A much higher standard of quality assurance would be expected in routine administrative matters. It is essential where a visa holder's future is being decided.

⁴ *S v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 299 at [32].

Quality and balance of Issues Papers prepared on proposed cancellation

3.11 The Issues Paper is the primary source of information for the decision-maker. The information it contains must be accurate, current and complete, and the paper must provide a balanced assessment of the evidence for and against cancellation of a visa.

Accuracy and relevance of information

3.12 In a number of the cases examined, information provided about the visa holder was incorrect or of doubtful relevance. Examples include the following.

Characterising criminal activity

3.13 The seriousness of the crime is a primary consideration in protection of the Australian community under Direction 21. It is rudimentary in characterising the seriousness of a crime that the nature and circumstances of the criminal conduct be considered.

3.14 Characterisation of the crime is often inaccurate. For example, Mr RH arrived in Australia from Chile with his family in 1986 aged six. He became addicted to heroin at 17 and has an extensive criminal record for the period 1999--2001, including larceny, assault, and possession of drugs. However, he has no convictions for trafficking, supply or possession of a commercial quantity of drugs. Despite this, in assessing the seriousness and nature of his offences in the Issues Paper, reference is made to such offences as trafficking, and possession of a commercial quantity of drugs. The Paper seems to suggest that his offences are of this kind and all 'very serious' under Direction 21 when this is not the case.

3.15 A similar concern arises in relation to the Issues Paper prepared on Mr IPN. Mr IPN came to Australia from Chile at the age of 11. The Issues Paper refers to a number of offences committed by Mr IPN, including possession and intent to supply drugs, common assault and breach of an apprehended violence order, as only 'some' of his offences. This creates a misleading impression of the extent of his criminal record, because these were, in fact, his only offences. In addition, there is no information about the circumstances of the offences: for example, common assault can be constituted by simply touching someone without their consent.

Sources of information

3.16 Often the sources from which information is drawn for inclusion in the Issues Paper are not the most appropriate to provide a complete understanding of the offences committed by the visa holder. The following example demonstrates this.

3.17 Mr DL arrived in Australia in 1964 from Croatia aged four. He was granted permanent resident status and has not left Australia since. He committed a number of offences including possession and supply of a prohibited drug, stealing a vehicle, larceny and receiving stolen property. In the Issues Paper Mr DL's crimes are described as 'very serious', an inference apparently drawn from a police report. These reports are effectively the case against an accused. There is no information in the Paper about the circumstances or the nature of the offences, such as might be found in the pre-sentencing or sentencing comments by the judge. It would seem reasonable to expect this type of information would be obtained as a matter of course.

Currency and completeness of information

3.18 Currency of information is important in assessing the rehabilitation of the visa holder and prospects for recidivism. 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.

3.19 For example, Mr DL (see 3.17) was assessed as being at high risk of recidivism. This might be a reasonable conclusion, based on the length of his criminal record. But it would also be reasonable to expect that his most recent parole report and any relevant prison reports would be obtained to see whether there was recent evidence of rehabilitation. The only such information was provided by Mr DL himself in the form of a letter from his chaplain at the correctional facility. No attempt appears to have been made to contact the relevant authorities for a current assessment on Mr DL.

Use of 'protected' information

3.20 Visa holders are entitled to full information about the reasons why they are considered liable for visa cancellation. But often, only limited information was provided to the visa holder. Sometimes the reason given was that material relating to the visa holder's criminal record was classified 'protected', in accordance with s 503(A) of the Act.

3.21 Investigation revealed that in some cases a visa holder's criminal history was deemed 'protected' despite the fact that the information was generally a matter of public record. Sometimes information from the same source, for example, State police records, has been classified as 'protected' in one case but not in another. In Mr GA's case, the Notice of Intention to cancel indicates 'protected information' will be relied upon in making a decision. But the record deemed 'protected' contains no sensitive information and is of the type routinely provided to visa holders in other States. In Mr DL's case (see 3.17), his criminal record appears to be 'protected' simply on the basis of the facsimile coversheet containing the standard legal professional privilege caveat.

3.22 There is no doubt that some information may need to be classified 'protected'. But it can hardly be the case that a visa holder's bare criminal record should have the status of 'protected' information. And it is certain that a visa holder will not be in the best position to prepare a case against cancellation if the evidence on which the decision is based is not made available.

Assessment of 'primary considerations'

3.23 Direction 21 and MSI 254 envisage that decision-makers will take full account of the importance government places on the three primary considerations. The Direction notes the need for a 'balancing process' that takes into account all other relevant considerations. But little guidance is provided on how this balancing should be done. The investigator looked at the quality of the assessments made against the primary considerations in the cases reviewed, as well as the weight that appears to have been given to them in decision-making.

Protection of the Australian community

3.24 Key factors for consideration in protection of the community are the seriousness of the offences committed by the visa holder, and the likelihood of recidivism. Several of the cases reviewed suggested more balance is required in the assessments of these matters in the Issues Papers.

3.25 For example, Mr TW came to Australia from the United Kingdom aged five. He and his family had lived here for 20 years at the time his visa was proposed for cancellation. Mr TW had been convicted of a number of property and dishonesty offences, many of them drug related. Mr TW's crimes, while not among those regarded as 'serious' under the Direction, were nevertheless found to represent a serious disregard for Australian law. Risk of recidivism was assessed as high.

3.26 The lack of specific reference to the type of offences committed by Mr TW (some are very minor, such as stealing \$25 worth of property, and being found in the front seat of someone else's car), has arguably given a misleading impression as to their seriousness. In addition, there is no reference to a magistrate's statement to the effect that Mr TW's age, supportive family, lack of significant mental health issues, and efforts he has made to reduce dependency on drugs, indicate there is real prospect for rehabilitation. This seems at odds with the assessment he is at high risk of reoffending.

3.27 Lack of balance is also evident in the case of Mr FT. He came to Australia from Turkey in 1972 aged six. Mr FT was convicted of several offences that were assessed as 'very serious'. However, there was little reference in the Issues Paper to sentencing remarks favourable to Mr FT – that his youth, lack of previous prison sentences, plea of guilty, health, and family support bode well for his rehabilitation. While the sentencing remarks were attached to the Paper, it would have been preferable to draw the mitigating factors to the decision-maker's attention, particularly since the decision maker was the Minister. It is unrealistic to expect that a Minister will examine the minutiae of lengthy annexures to an Issues Paper.

3.28 The general deterrence value that cancellation of a visa may have on others who might be contemplating committing similar offences is usually mentioned briefly under this heading. However, in none of the cases reviewed was there a serious attempt to analyse how the proposed cancellation would achieve a deterrent effect. It would seem obvious that for deterrence to be effective, non-citizens who are likely to commit an offence would have to be aware of the possible consequences of their actions. This would seem difficult to achieve with long-term residents who may be unaware they are non-citizens and therefore liable to cancellation under s 501.

Expectations of the Australian Community

3.29 The advice provided for decision-makers under this heading relates to the community expectation that non-citizens should obey Australian laws while in Australia. Reference to 'while in Australia' raises a question about applying s 501 to long-term residents. These people are not spending a short time in Australia – they have lived here almost all their lives. Expecting non-citizens as well as citizens to obey Australian laws is self evident.

3.30 Interestingly, there is no reference to that most Australian of expectations – that everyone should be given 'a fair go'. In several of the cases considered, there was reference to the fact that the Australian community may feel some compassion for the visa holder. But there was no attempt to assess what the community's expectation might be for treatment of someone who, for example, came to Australia as a young child, has never departed, has an Australian wife and Australian children, and no continuing connection at all with the country of birth. In none of the cases reviewed has the expectation of compassion in the Australian community for the visa holder's situation outweighed the expectation that the visa holder be removed.

The best interests of the child

3.31 The best interests of the visa holder's child/ren who are under the age of 18 have, rightly, been given prominence in the decision making process. However, in many of the cases reviewed, assessment of the best interests of the child is characterised by a paucity of evidence and failure to determine what those best interests might be. Nor is it clear what considerations might outweigh a finding that the cancellation of a visa would have a detrimental effect on the visa holder's children. Several examples illustrate these concerns.

3.32 Mr DD came to Australia from the former Yugoslavia aged five and has not left since. He has two adolescent children in Australia and, at the time the Issues Paper was prepared, Mr DD advised DIMA they were living with his mother. He said he hoped to stay with his mother when he had completed his correctional custody so he could be with his children.

3.33 The assessment of the best interests of the children in the Issues Paper left some obvious questions unanswered. They included: whether Mr DD's mother was involved in the children's care long-term; what role the children's mother played in their care; whether, if Mr DD were removed from Australia, his children would accompany him; if they did not, who would care for them and how they would be supported; and if they did accompany Mr DD, whether their language skills were adequate for the transition. In fact, it appears no attempt was made to fill these gaps. DIMA relied almost exclusively on information provided by Mr DD. It is clear from Mr DD's responses that his level of education is not high and he was not in a position to advocate with any real force how the best interests of his children might be served.

3.34 The Issues Paper could not provide a balanced assessment of the impact of visa cancellation on Mr DD's children in the absence of all the relevant information. In Mr DD's case, the decision-maker was the Minister, and he decided to cancel Mr DD's visa. The Minister concluded that the detrimental effect cancellation would have on Mr DD's children was outweighed by other considerations.

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

3.36 Again, it is difficult to see how the best interests of the children have been treated as a primary consideration in the Issues Paper. There appears to have been no assessment of what the best interests of the children might be. No reference is made to the hardship resulting from separation from their father and grandparents. Limited consideration of the children was also evident in the conduct of the Department when Ms NJ was taken into immigration detention. Both her children were at school at the time and no arrangements were made for how they would get home, let alone who would care for them in the absence of their mother.

3.37 Yet another example is that of Mr VN who was born in Vietnam in 1969 and came to Australia as a refugee when he was 13. Mr VN married an Australian citizen and has two

children, both Australian citizens, who were aged four and eight years at the time the Issues Paper was prepared. The Paper notes that Mr VN is close to his children and that separation from their father would be traumatic. If the children were to move to Vietnam with Mr VN, they would face substandard education and health care, as well as language and cultural barriers.

3.38 What the Issues Paper does not mention is that, since both children suffered significant health problems, there was evidence they needed to live near a hospital. Nor is there reference to Mr VN's wife's statement that the family would need to live with Mr VN's parents in a rural area in Vietnam where there is no hospital readily available. There was no indication that DIMA had attempted to clarify the nature of either child's health problem, what treatment they might require, and whether it was available in Vietnam.

Ombudsman opinion

3.39 I am concerned about the poor quality and lack of balance in assessments of primary considerations in almost all the Issues Papers examined. There are significant gaps in relevant information, and inaccuracies in the information that is provided. These deficiencies in the primary decision making tool could seriously mislead the Minister or s 501 delegate on such key issues as the seriousness of a crime, or the likelihood of recidivism. In my view, inadequate attention has been given to the compassionate expectation the Australian community would have that long-term residents deserve full consideration of the impact of cancellation on their lives and the lives of their families. The implications for fair and reasonable decision-making are profound.

3.40 This is most striking where the best interests of the child are considered. There is no explanation of why, in cases where the best interests of the children would appear to be served by declining to cancel the visa, the decision-maker has decided to proceed with cancellation. The guidelines state unequivocally that the best interests of the child are a primary consideration. This suggests that the decision-maker must have to determine, and clearly identify in the reasons for decision, what consideration(s), whether 'primary' or 'other', were of sufficient weight to take precedence over the interests of the child. I am not satisfied that this has occurred in many of the cases examined.

Assessment of 'other considerations'

International obligations

3.41 The Minister's Direction requires decision-makers to consider any international obligations owed to the visa holder. In some of the cases examined for this investigation it would have been appropriate for the Issues Paper to give close consideration to one or more international conventions. Those of special relevance were the 1951 Convention relating to the Status of Refugees; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; and the International Covenant on Civil and Political Rights (ICCPR). The failure of an Issues Paper to discuss adequately the relevance of an international obligation is worrying when the Issues Paper provides the basis for a decision of the Minister or other decision-maker.

3.42 Mr SVT's was one case that warranted a fuller assessment against the provisions of the Refugees Convention. He had come to Australia from Vietnam, aged 11, as a refugee. The quality of the assessment in the Issues Paper of any protection obligation which might still be owed to Mr SVT was pitched at an abstract level and did not give individual consideration to his situation were he to be returned to Vietnam. There was no information

about the precise circumstances in which Mr SVT was initially granted refugee status. Discussion about the current situation in Vietnam relating to civil and political rights was very general, noting only that there is no evidence of general persecution of returnees. Mr SVT was not given the opportunity to comment on the assessment that there was no evidence he would face adverse treatment if returned to Vietnam.

3.43 In several of the cases examined, the civil and political rights of visa holders required consideration in accordance with the ICCPR. This convention has an implicit non-refoulement obligation if, as a necessary and foreseeable consequence of removal from Australia, a person would face a real risk of violation of his or her rights under Article 6 (right to life). It is reasonable to consider that the right to life obligation may be enlivened when a visa holder has a serious illness that could not be treated adequately in the receiving country, as the following example illustrates.

3.44 Mr SZ came to Australia at the age of nine from the Former Yugoslav Republic of Macedonia (FYROM). His mother apparently abandoned him after birth. He was raised by his grandparents in FYROM, and then by his father in Australia until he was placed in foster care at age 11. He became a drug addict and was subsequently diagnosed with paranoid schizophrenia and hepatitis C. The Issues Paper on Mr SZ's proposed visa cancellation notes that many of his crimes were committed to support his drug addiction. The Paper also notes that Mr SZ has a history of paranoid schizophrenia, depression, self-harm (he has attempted suicide on a number of occasions) and difficulty coping: Mr SZ is taking anti-psychotic medication for schizophrenia and is on the methadone program.

3.45 Mr SZ is clearly facing significant health problems, that could be life threatening. There was no independent assessment in the Issues Paper of his mental illness, nor of how Mr SZ's paranoid schizophrenia or hepatitis C might be treated in the event that he were returned to FYROM. In assessing his prospects for obtaining treatment, it would be important to know that Mr SZ was not fluent in the language, knew no one in the country and would have great difficulty earning a living there. None of this information was provided in the Paper. In deciding to cancel Mr SZ's visa, the Minister noted that there appears to be little prospect of Mr SZ receiving access to appropriate health treatment. Nevertheless, the disruption to the community caused by his crimes and the expectation of the Australia community that he be removed outweighed all other considerations.

Health Issues

3.46 The case of Mr SZ also highlights the importance of giving adequate attention to the impact of health issues on the overall behaviour of a visa holder. The decision-maker needs to be in a position to assess the extent to which health problems may have contributed to a visa holder's offending, and may mitigate the seriousness of a crime. The seriousness of Mr SZ's crimes and the risk he would re-offend were apparently the deciding factors in cancellation of his visa. The circumstances of the crimes and Mr SZ's medical condition were relevant to the seriousness of the crime as well as the likelihood Mr SZ would re-offend. Neither issue was adequately covered in the Issues Paper.

3.47 A similar concern arises in the case of Mr FT (see 3.27) who suffers from a rare and life-threatening condition. Treatment requires an extensive regime of medication that must be carefully monitored. Mr FT also has an intellectual disability that ought to be relevant to consideration of the seriousness of his crimes, the risk of recidivism and the expectations of the Australian community.

3.48 The Paper refers to Mr FT's medical condition but not to his intellectual disability. Mr FT himself made no mention of either in his response to the Notice of Intention to cancel. It is

arguable that someone with an intellectual disability is not ideally placed to advocate fully on his own behalf or to understand the potential import of his circumstances on the decision whether to cancel his visa. In these circumstances, an onus falls on the Department to ensure that the visa holder's circumstances are fully understood by the decision-maker.

3.49 There was also incomplete consideration given to the impact on Mr FT's health were he to be removed to Turkey. The assessment appears to be based on a file note of a conversation between a DIMA officer and a representative of the Turkish consulate. This comprised an assurance that Turkey has a Medicare type system and that medical services are commensurate with those available in Australia. The file note made no mention of Mr FT's case being specifically discussed. It was apparently inferred that Mr FT would receive adequate medical attention in Turkey.

3.50 After the Minister decided to cancel Mr FT's visa, the Turkish Ambassador apparently intervened and asked the Minister to allow Mr FT to remain in Australia. This request resulted in belated consideration by the Minister's office and the Department of what might actually happen to Mr FT were he to be returned to Turkey. Advice from the Turkish consulate confirmed Mr FT would not be eligible for the Turkish equivalent of Medicare without a history of employment in Turkey, nor would he be able to access social security. Disabled or unemployed people are looked after by family members or are 'on the street'. Mr FT apparently has no family in Turkey. During the course of this investigation Mr FT was released from detention. He holds a Removal Pending Bridging Visa and could still be removed from Australia.

Hardship issues

3.51 The hardship caused to the visa holder's immediate family as a result of cancellation is mentioned under 'other considerations' in the Minister's Direction. Long-term residents generally have their immediate and extended family in Australia. They often have children, partners, elderly parents or siblings who may be dependent on them. Usually these family members will be Australian citizens or long-term permanent residents themselves. But it is by no means clear how an assessment of the degree of hardship likely to be experienced by the family should be undertaken, or what comparative weight should be attached to it. In many of the cases reviewed, there is limited reference to the hardship to be faced by the visa holder's immediate family, apart from any children under 18 years. The impact on these children is a 'primary' consideration.

3.52 The hardship likely to be faced by the visa holder after removal is not mentioned specifically under any consideration. Often removal will mean separation from close family members, having to live in an unfamiliar country, perhaps unable to speak the language, and with no prospect of return to Australia. An example is the case of Mr TW (see 3.25). He has a drug addiction and many of his crimes, which appear to be of a relatively minor nature, were committed to support his drug habit. He has lived here for over 20 years, his parents and his siblings, to whom he is very close, live in Australia. His only relative in the country to which he would be sent is an aged grandmother, whom he has not seen since coming here. The Issues Paper on Mr TW's visa cancellation does not attempt to grapple with the impact cancellation would have on him and his family. Nor does it discuss the impact on Mr TW were he to be deprived of the support of his family in continuing to address his drug addiction when released from prison.

Ombudsman opinion

3.53 The examples above indicate that there were a number of deficiencies in the assessment of 'other considerations' in the Issues Papers. In Mr FT's case, the combined

effect of the shortcomings was serious. There was evidence before the Department of Mr FT's illness and his intellectual disability. This evidence related directly to assessment of the seriousness of Mr FT's crimes as well as the consequences for Mr FT of removal to Turkey. To the extent that Mr FT's life may have been endangered by his removal to Turkey, his case raises a human rights issue of a serious nature.

3.54 The lack of guidance in the Direction and the MSI about how to weight competing considerations may have contributed to inconsistency in application of the procedures. It is essential to the integrity of the process that there is a balanced précis of the circumstances of the offences and the visa holder. When relevant information was available, the officer preparing the Issues Paper did not always choose to include it. When relevant information was not available, the officer has not necessarily seen it as his or her responsibility to obtain it. Greater attention to quality assurance would ensure that Issues Papers are prepared to a high standard of accuracy and completeness.

Procedural fairness for visa holders proposed for cancellation

3.55 Providing procedural fairness to those who are affected by government decision-making is an integral part of good administration. It is particularly important where the consequences of decisions are profound and those affected by the decisions may be disadvantaged in terms of their capacity to represent their own best interests. Both these conditions apply to long-term permanent residents liable for visa cancellation under s 501.

Issuing of a warning

3.56 As noted, many of the long-term residents found liable for visa cancellation under s 501 expressed surprise that they were not in fact Australian citizens. Even if they did know that they were not Australian citizens, they may not have been aware that as permanent residents who had been convicted of a crime, s 501 might be applied to them. Ideally, in the interests of procedural fairness, any permanent resident convicted of an offence who is thereby at risk of visa cancellation if a further offence is committed should be warned of that possibility.

3.57 Section 501 does not itself require that a formal warning be given or procedure followed. There are administrative procedures to this effect, but they are not rigorous. The consideration of an Issues Paper can be followed by a warning given to the visa holder. This takes the form of a letter to the visa holder advising that he or she has come to the Department's attention but that no further action will be taken on this occasion. It also appears that, in some instances, an Issues Paper has been prepared but has not proceeded to formal consideration. When this has happened, DIMA has sometimes sent a letter to the visa holder anyway, notifying them of their liability for visa cancellation in future. But this is by no means routine. Whether a visa holder has received a warning before a notice of cancellation appears to depend solely on the discretion of the DIMA officer involved when the visa holder first came to the Department's attention. Such an ad hoc approach seems inherently unfair.

Quality and completeness of information provided to the visa holder

3.58 Central to a fair process is provision to the visa holder of complete and accurate advice about the alleged activities leading to liability for visa cancellation, and the evidence DIMA is relying upon in forming its view. Otherwise, the visa holder may not be able to respond adequately to the issues under consideration. The MSI specifies that full information supporting the intention to cancel be provided to the visa holder wherever legally possible.

3.59 The cases examined suggest that the quality and completeness of information provided to visa holders is variable. For example, Mr FT (see 3.23 and 3.48-51) was not provided with a copy of the judge's sentencing remarks even though he was advised these would be taken into account in decision-making. He was not advised that information had been received from the Turkish consulate indicating he would be able to receive adequate health care in Turkey. He was, therefore, not in a position to comment on any of this information. These omissions are the more serious because of Mr FT's intellectual disability.

3.60 In several other cases, the visa holder was advised that the criminal record would be taken into account in determining whether to cancel the visa, but a copy of the record was not included with the Notice of Intention to cancel. In some files, there was also evidence of discrepancy between different criminal history reports on the visa holder obtained by DIMA. For example, in Mr GC's case, there were discrepancies between separate criminal history reports prepared by the State police service and the same State's correctional service. The police report was deemed to be 'protected' while the correctional report was not. The Issues Paper noted that Mr GC had been sent a copy of the correctional service report only. In fact, it appears Mr GC did not receive a copy of either report and was not advised of the discrepancies between the two reports. Nor is there any indication that DIMA sought to clarify the discrepancies by examining the court records, which must be regarded as the most accurate evidence of a person's criminal history.

Assistance in preparing responses

3.61 Further requirements for fairness are that information is provided in a form that the visa holder will be able to understand; and that, where necessary, the visa holder is assisted in preparing a response to the Notice of Intention to cancel.

3.62 Unfortunately in some of the cases examined, it appears the visa holders might not have understood fully the seriousness of their situation, or the implications of failure to respond in detail to the issues raised by the Department. The majority of long-term permanent residents are incarcerated at the time they receive their Notice of Intention to cancel. This can restrict their access to assistance in preparing a response, especially if the response is due at a time when legal and migration advisers are likely to be unavailable, such as just prior to Christmas. For example, Mr DD (see 3.32) received his Notice in prison on 13 December 2002 and was given until 24 December 2002 to respond.

3.63 Many visa holders liable for cancellation are also poorly educated, and may have limited capacity to understand what might be expected by the Department in a response. In these circumstances, it would be reasonable for the Department to assist the visa holder by providing an indication of the issues that ought to be covered. Sometimes the DIMA case officer will attach to the Notice of Intention to cancel a copy of a questionnaire to guide the visa holder in preparing a response. The format for the questionnaire is based on the format for recording an interview with a visa holder, set out in Attachment 12 to the MSI. But whether the questionnaire is attached appears to be at the discretion of the officer handling the notification process.

Interviews

3.64 The procedure for assessing a visa holder for cancellation includes reference to a representative of the Department interviewing the visa holder to obtain information relevant to his or her circumstances (see Attachment 12 to the MSI). However, interviews appear to be undertaken infrequently and, again, entirely at the discretion of the case officer. There seems to be no link between the conduct of an interview and the complexity of the case issues or the difficulties that might be faced by the visa holder in preparing a response to the Department.

3.65 Among the cases reviewed, very few involved an interview with either the visa holder or the visa holder's immediate family. Where, as a result of visa cancellation, there is likely to be hardship experienced by the visa holder's partner, siblings or parents, or the interests of children require assessment, the value of interviews with those affected would seem self evident. There is some evidence that, even when interviews are conducted, they do not receive a high priority. For example, in Mr SZ's case (see 3.44) the interview was cut short by prison authorities before Mr SZ had the chance to address the hardship likely to be faced by himself, his family and his girlfriend if cancellation were to proceed. Although there was further communication between the Department and Mr SZ, the interview was not resumed.

Ombudsman opinion

3.66 The investigation has revealed inconsistencies in both the extent to which visa holders are informed of the case against them and the quality of information provided to them. It appears to be standard practice to provide visa holders with copies of the Direction and the text of s 501. Beyond this, the information made available seems to be determined on an ad hoc basis by individual case officers.

3.67 The evidence suggests that visa holders may have been disadvantaged by being given unnecessarily inaccurate or incomplete information about why they have been identified as liable for cancellation. Without full details of the evidence against them, it is difficult to see how an incarcerated visa holder could prepare the best response. There is also evidence that some visa holders may have been disadvantaged because they did not fully understand what was required of them or how they might best present their case.

3.68 In my view, in a context as serious as visa cancellation, the Department must be assiduous in meeting its procedural fairness obligations. Instructions on what information should be provided to visa holders, and how that information is to be provided must be specific. More structured and regular use should be made of options already available to assist visa holders, such as the proforma questionnaire and interviews with those likely to be affected by a cancellation decision. Greater attention to quality assurance is needed to ensure staff comply with these requirements.

Notification of visa cancellation decision

Provision of reasons for decision

3.69 The procedures for notifying a visa holder of visa cancellation are set out in detail in the MSI. A central obligation on the decision-maker is to provide a statement of reasons for the decision, (except for any information deemed 'protected' under s 503(A)). The Federal Court⁵ has referred to the clear legislative intention that the reasons are to be given concurrently with the notification of the decision, even though failure to comply does not affect the validity of the decision.

3.70 Until recently, providing reasons for cancellation often meant providing to the visa holder a copy of the Issues Paper prepared for the decision-maker. This was at odds with a decision of the Full Federal Court⁶ in September 2002 that this did not discharge the statutory obligation to give reasons. It seems to have taken some time for the Departmental practice to change.

⁵ *Tuncok v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1069 (10 Oct 2003).

⁶ *Minister of Immigration and Multicultural and Indigenous Affairs v W157/00A* [2002] FCAFC 281.

3.71 In many of the cases examined, the obligation to provide contemporaneous reasons had not been adequately discharged. For example, Mr DD (see 3.32), whose visa was cancelled by the Minister in early 2003, received a copy of the Issues Paper, but was given no reasons for decision. Reasons were adopted by the Minister some nine months later, with the caveat that they represented his 'best recollection' of the reasons for decision. The reasons appear to have been provided in response to Mr DD's commencing judicial review of the decision in the Federal Court.

3.72 Mr DD's situation is by no means isolated. In a majority of the cases examined, the advice to visa holders of the cancellation of their visa did not include contemporaneous reasons for the decision. In some, such as that of Mr RH (see 3.14), reasons were never provided. Failure to give reasons makes it difficult for the visa holder to establish whether a particular matter was taken into account or not; and if so, what weight was attached to it. This limits even further the opportunity for judicial review already circumscribed by the privative clause in s 474 of the Migration Act.

3.73 Even when reasons have been provided belatedly, this has generally been done after the grounds for review had crystallised. There is a danger that such reasons may, consciously or unconsciously, be fashioned in such a way as to address the grounds for judicial review cited by the applicant. In Mr VN's case (see 3.37), for example, it appears that the Australian Government Solicitor (AGS) was asked to comment on a copy of the draft reasons for decision. The draft reasons had been prepared by a Departmental officer some months after the decision was taken, presumably in connection with a Federal Court review sought by Mr VN. The comment provided by the AGS referred to ways in which the draft reasons could be changed to make them less susceptible to challenge. The Federal Court judge hearing Mr VN's case referred to these 'reasons' as 'a non-contemporaneous self-serving statement prepared outside the terms of the Act.'⁷

Ombudsman opinion

3.74 There is evidence that until recently there was recurrent failure by the Department to prepare contemporaneous reasons for decision to cancel a visa. When a decision of such gravity as cancellation of a permanent resident's visa is taken, it is integral to good administration and procedural fairness that those affected know why the decision was made. It is also rudimentary that an accurate, complete and concurrent record of the decision be made, consistent with statutory requirements.

3.75 The Department has advised that procedures have recently been tightened and reasons are now provided in all instances of cancellation under s 501. It is nevertheless important to draw attention to this issue in this report, partly to emphasise its importance, but also because of the possible continuing effect of past administrative practice. Many of the long-term residents affected by this problem remain in detention or have been removed, often without knowing the reasons why other than in the broadest of terms.

Reasonableness and fairness of the use of s 501

3.76 This report has identified a series of administrative deficiencies affecting the quality of decision-making under s 501. The concern is that those deficiencies may have led to decisions that were neither fair nor reasonable for long-term permanent residents and their families. Hovering over those decisions is a broader issue to do with the appropriateness of using s 501 to cancel the visas of long-term permanent residents. I preface my comments with the observation that it is beyond the jurisdiction of the Ombudsman to comment directly

⁷ *N v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 757 at [49].

on the fairness of decisions made personally by the Minister. However, my comments are relevant in two other respects: to decisions made under s 501 by delegates of the Minister; and to whether Issues Papers prepared for the Minister should draw attention to some of the broader issues in the following discussion.

Relationship between ss 200–201 and s 501 of the Migration Act

3.77 The discussion earlier in this paper drew attention to the relationship between s 501 and s 200 and 201. Under s 200 and 201, the Minister has the power to deport from Australia a non-citizen who has been resident here for less than 10 years at the time of committing a criminal offence. Until s 501 was introduced, deportation of permanent residents who had committed criminal offences was covered by s 200-203 of the Act. There was no power to deport long-term permanent residents, even where they had been convicted of serious crimes, if those crimes were committed more than 10 years after arrival in Australia.

3.78 The new provisions were intended to strengthen the Minister's personal powers to refuse or cancel the visas of non-citizens. An aspect of those new powers was that there would be no right to a merit review by the Administrative Appeals Tribunal of decisions made by the Minister. It was not apparent at the time the new powers were introduced that s 501 would actively be used to make visa cancellation decisions. Nor was it apparent that the section would apply to people whose parents had brought them as babies or young children to settle in Australia. In at least some if not many instances, the children had not taken out Australian citizenship simply because they, or their parents on their behalf, did not get around to applying for citizenship. They did not realise the possible consequences of this oversight. Nor is it irrelevant that the criminal conduct on which the visa cancellation decisions were based occurred in Australia, sometimes during the formative years of a child's development, for which an Australian court had imposed a sentence that had been served.

3.79 It was not made explicit in either the Explanatory Memorandum to the 1998 Migration Amendment Bill, or the Second Reading speech by the then Minister, that s 501 was to apply to long-term permanent residents, outside the operation of s 200 and 201 of the Act. In concluding his Second Reading Speech the then Minister stated:

'This bill sends a clear and unequivocal message on behalf of the Australian community. The Australian community expects that non-citizens coming to Australia should be of good character. To discharge this expectation, the government must be able to act quickly and decisively, wherever necessary, to remove non-citizens who are not of good character.'

3.80 This statement could be read as applying to people who had come, or intended to come, to Australia as adults and who had demonstrated, through their behaviour, that they were not of good character. It is unlikely that those reading the statement would assume that it referred primarily to people whose parents had brought them as babies or young children to settle in Australia.

3.81 It was foreshadowed at the time that the 1998 amendments were enacted that a broader review of the criminal deportation provisions would be undertaken. The Minister made the following statement during the Second Reading debate:

'In relation to this bill, there were some other points made during the debate. The honourable member for Calwell was concerned about the Joint Standing Committee on Migration report into criminal deportations. There will be more legislation arising from the committee's work. This was dealing with character

issues in the broad. It was not dealing with criminal deportation and obviously the report is one we will be responding to.'

The broader review foreshadowed by the Minister has not occurred. Nor has there been any response from the Government to the Committee's report.

Absorbed persons

3.82 Another provision of the Migration Act that can interact with s 501 is s 34, relating to absorbed persons. Section 34 describes a class of permanent visa known as an absorbed person visa that allows the holder to remain in Australia, but not to re-enter. The basic test for an absorbed person visa contained in s 34 is that on 2 April 1984 the visa holder was in Australia; before that date, the person ceased to be an immigrant (that is, was absorbed into the Australian community); and on or after that date until 1 September 1994, had not left Australia.

3.83 The evident purpose of s 34 was to regularise the immigration status of those who had been resident in Australia for some time, by confirming that they had permanent resident status. There is nothing in the Migration Act, explicitly at least, to prevent a decision being made under s 501 to cancel an absorbed person visa. Whether there is an implicit restriction, or whether it is appropriate for s 501 to be used in this way, is an issue that has been raised but not resolved.

3.84 Factors relevant to whether a person has become a member of the Australian community, and therefore an absorbed person for the purposes of s 34, (and that are relevant to many of the cases considered in this review) can be taken to include:

- 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 the commitment of family members to come to Australia to join the person
- employment history
- economic ties including property ownership
- contribution to and participation in the community.

3.85 There are instances where it appears the Department failed to identify that a permanent resident held an absorbed person visa. This meant that the wrong visa was cancelled, resulting in jurisdictional error. For example, Mr SJ arrived in Australia from New Zealand in 1981 at the age of six. The Issues Paper relating to Mr SJ stated that he held a special category subclass 444 visa and the Minister cancelled this visa. Mr SJ appealed to the Federal Court that found this to be the incorrect visa. The Court concluded that Mr SJ was, in fact, an absorbed person⁸.

3.86 The case of Mr SN raises more pointedly the further question of whether it is appropriate to use s 501 to cancel the absorbed person visa of a person who has spent almost his or her whole life in Australia. Mr SN's parents migrated permanently to Australia from Sweden in 1966. Mr SN was born in 1973 when his mother was on holiday in Sweden. She returned to Australia with her baby, Mr SN, when he was three weeks old. Mr SN has

⁸ *J v Minister for Immigration and Multicultural and Indigenous Affairs (No 3)* [2004] FCA 13.

not left Australia since then, he does not speak Swedish and all his immediate family live in Australia. Mr SN was identified by the Department as the holder of a transitional (permanent) visa, and the visa was cancelled by the Minister under s 501 in 2004. Mr SN sought review in the Federal Court.

3.87 The Federal Court in 2005 found that the wrong visa had been identified by the Department and cancelled by the Minister. The Full Federal Court, in declaring the decision to be invalid, was critical both of the decision that had been made in that case and of the reliance upon s 501 to circumvent the restrictions in ss 200–201:

‘... It is timely for there to be a review by the Minister of the proper approach to matters such as this ... in our opinion, it is difficult to envisage the bona fide use of s 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 of his relevant family in Australia, by reason of criminal conduct in Australia so leading to his deportation to Sweden and permanent banishment from Australia.

The first issue requiring reconsideration is the use of s 501 in circumstances where the directly relevant substantive section (ss 200 and 201) is not applicable. Section 501 should not be used to circumvent the limitations in s 201. Apart from anything else, to do so is to retrospectively disadvantage permanent visa holders who happen to be non-citizens.

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) ...⁹

Stateless persons

3.88 The plight of long-term residents who, for whatever reason, have become effectively stateless, and whose visas are cancelled under s 501, is another area of concern. People may find themselves stateless for a variety of reasons. For example, some countries do not accept that a citizen who leaves to live in another country can retain citizenship of the birth country. Sometimes people cannot prove where they were born to the satisfaction of the country they claim is their birthplace.

3.89 If the visa of a long-term resident of Australia, who is also a stateless person, is cancelled under s 501, the non-citizen must remain in immigration detention until he or she leaves Australia. These people face indefinite detention. There are instances where DIMA, aware of the long-term resident’s stateless status, has attempted to find a third country prepared to accept him or her. If a third country were to agree, the long-term resident would be then faced with the option of remaining incarcerated indefinitely or being sent to a country with which they are entirely unfamiliar and where they know no one. This was not considered or implied in any of the material presented to Parliament when the s 501 amendments were debated.

Ombudsman opinion

3.90 It is my view that the relationship between the application of s 200 and 201, and s 501 of the Act should be reviewed. Sections 200 and 201 allow for removal of permanent residents only if they have lived in this country for 10 years or less before committing the

⁹ *N v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 121 at [26-27].*

crimes for which they have been convicted. Taking account of these provisions, a clear indication is required from the Government of the circumstances in which s 501 should be applied to long-term permanent residents of this country. Use of s 501 where a long-term resident is known to be stateless should be given particular attention.

3.91 The need for a review of decisions made under s 501 was highlighted in a recent case, in which a judge of the Federal Court (in a minority judgment), raised concerns about the fairness and reasonableness of applying s 501 to permanent long-term residents. Mr JS came to Australia aged 18 months from the UK. Mr JS's offences included production of drugs and a large number of theft charges. The Minister cancelled Mr JS's visa under s 501. The judge's comments included¹⁰:

'... [This is] a decision which is in my opinion perverse, irrational ... to deport to the United Kingdom a person who has spent almost the entirety of his life in Australia, who has an Australian wife and two Australian sons, who has absolutely no connection with the United Kingdom, other than being born there of parents who were then nationals but who later became Australian citizens, and having spent the first eighteen months of his life there, simply because he is a criminal.

... The deportation order ... is punitive in nature, done because the long-term Australian resident is guilty of wrongdoing. Deportation of such a person is therefore penal...'

3.92 A further difficulty that has been noted above is that if there is no prospect of early removal of a person whose long-term permanent resident visa has been cancelled, the person can be held in an immigration detention centre in the meantime. There are now a variety of alternative arrangements available for non-citizens who are not judged to be a significant risk to the community, ranging from home detention to release on some form of temporary visa. Most long-term permanent residents are unlikely to abscond – being near their families is one of the reasons they want to stay in Australia. Particular consideration should be given to those who are found to be stateless, and who would otherwise remain in detention indefinitely.

3.93 An essential requirement for good administration is that staff involved in all aspects of the decision making process are adequately trained. Quality assurance mechanisms are also required to ensure consistent, high quality outcomes across Australia.

3.94 Preparation of a Notice of Intention to cancel a visa under s 501 and the relevant Issues Paper is undertaken generally by staff in the visa holder's local DIMA office. DIMA has advised that there is no formal staff training program that specifically addresses decision-making under s 501. An overview session on s 501 may be included in general staff training and specific training may be provided in response to ad hoc requests. But DIMA advises delivery of focused training is limited by a shortage of resources, especially training staff. Local DIMA managers are relied on to ensure that the appropriate procedures are followed and the documentation prepared meets the requirements in the Direction and the MSI.

3.95 The frequency of inaccurate and incomplete information in decision-making documentation, and inconsistent application of the established procedures, suggests both training and quality assurance need urgent attention. There is evidence that even the

¹⁰ *S v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCAFC 106 at [3] and [35].*

exercise of the Ministerial delegation under s 501 has not always been consistent with Departmental guidelines.

3.96 For example, Attachment 1 to the MSI specifies that cancellation of permanent entry visas held by people who are currently in Australia is only to be considered by the Minister, Secretary or Deputy Secretary of the Department. But in Mr TW's case (see 3.26), the decision to cancel was made by the Assistant Director of the local office Compliance Unit (four levels below Deputy Secretary). In none of the cases provided by the Department as examples of instances where the delegate's discretion was exercised not to cancel the visa of a permanent resident was the delegate either the Secretary or Deputy Secretary.

3.97 The variable quality of the material relevant to s 501 decisions that were considered in this investigation indicates that both staff training and quality assurance fall well short of best practice administrative standards. These deficiencies have grave implications for procedural fairness for visa holders. In view of the nature of the decisions being made, the limited attention given to adequately training and oversighting staff is unsatisfactory.

PART 4 – CONCLUSIONS AND RECOMMENDATIONS

4.1 Many of the cases examined in this Report revealed administrative deficiencies and inconsistencies that could affect the quality of decision-making. The concerns were identified from a relatively small proportion of the cancellations under s 501 (around 35 of the 346 cancellations made in the period 2002–2004). The frequency of deficiencies may point to a widespread problem with the decision-making process in relation to cancellation of long-term residents' visas under s 501. The recommendations that follow identify areas where action might be taken to improve the administration of s 501.

Legal and policy framework

4.2 The framework for administration of s 501 is very specific in some respects but open to considerable discretion in others. Decision-maker discretion can be useful, providing those exercising the discretion are adequately trained and have all the facts at their disposal. In this instance, however, greater guidance in some critical areas could reduce the incidence of inconsistent outcomes for visa holders in similar circumstances.

Recommendation 1:

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

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

DIMA's response: Support this recommendation in principle

We recognise that the existing instructions relating to decision-making under section 501 require updating and work has already commenced to address this issue.

A review of the relevant departmental Instruction (Migration Series Instruction [MSI]) was initiated during 2005, with a view to providing an up-to-date, comprehensive and user friendly document for decision-makers. Finalisation of the re-drafted MSI is one of the highest priorities of the newly created Character and Cancellations Policy and Procedures Section.

This review will now be informed by a major review of the operation of section 501 that was initiated by the Minister in November 2005. The terms of reference of this review are to:

‘Review the application of the character test contained in section 501 of the Migration Act to:

- A. Identify whether Ministerial Direction 21 and Migration Series Instruction 254 provide clear guidance to decision makers of the circumstances where a visa should be refused on the basis that the applicant does not pass the character test.
- B. Identify whether the standards and procedures in Ministerial Direction 21 and Migration Series Instruction 254 are being followed and applied in deciding visa applications.
- C. Identify whether the Ministerial Direction and MSI should be revised to reflect the Government’s expectations of the circumstances where a person’s visa should be cancelled under sub-section 501(2).’

The results of this review will be finalised in early 2006 and provided to the Minister for her consideration.

A number of new mechanisms for providing guidance to decision-makers exercising powers under section 501 have also been established – specifically:

- A decision support unit (or ‘help desk’).
 - This help desk, which is managed at the executive level, provides a service for DIMA officers requiring assistance with understanding or applying the relevant legal and policy framework. It can provide DIMA officers with immediate advice over the telephone, or brief written advice in response to email queries.
- A sensitive case registry.
 - Procedures have been implemented to ensure that all sensitive character matters, including any case involving the possible cancellation of a long-term permanent resident’s visa, are identified and brought to senior executive level attention at the earliest possible time.

It should be recognised, however, that neither Direction 21 nor MSI 254 can prescribe the weight that decision-makers must give to particular considerations in deciding whether to refuse to grant, or to cancel, a visa under section 501 of the Act.

Policy directions, including Direction 21, can be used to ensure that decision-makers consistently take into account matters that the government believes to be important considerations when exercising a discretion. They cannot prescribe how a decision-maker balances those considerations in order to arrive at their own decision – this would amount to an unlawful fetter on the scope of an unfettered legislative discretion such as that contained in section 501 of the Act. This is consistent with the decision of the Federal Court in *Aksu v MIMA* [2001] FCA 514, in which Dowsett J held that the Direction that was in force at that time unlawfully fettered the balancing exercise to be undertaken by decision-makers, by providing that some factors in that Direction could never have more weight than others.

Character-related training programmes are currently being developed to provide guidance on how decision-makers can make decisions to refuse to grant and to cancel visas under section 501 that are both lawful and reasonable. These new training programmes will illustrate how a decision-maker might balance the competing considerations in Direction 21 in deciding to refuse to grant and cancel visas under section 501 of the Act. However, the

precise weight to be accorded to each consideration is not and cannot be prescribed in a Direction or in an MSI. That is an issue for the decision-maker and will depend on the circumstances of the case in question.

Identification of visa holders for possible cancellation

4.3 The process by which persons liable for possible cancellation of their visas under s 501 are identified should be clear and consistently applied across Australia.

Recommendation 2:

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

DIMA's response: Support this recommendation

The existence of standard procedures for identifying non-citizens who might be liable to visa cancellation under section 501 would contribute to the consistency with which those cancellation provisions are applied and thereby to the overall integrity of the migration programme.

The department will be seeking legal advice from the Attorney-General's Department as to whether there are any legal impediments to implementing such procedures (particularly in relation to the widely differing privacy and corrections legislation in the various state and territory jurisdictions). This advice will enable us to determine the most effective approach to implementing this recommendation.

Notification to visa holder of intention to cancel a visa

4.4 The material provided to a permanent resident about proposed visa cancellation must be as accurate and complete as possible. This is essential to ensure the visa holder is fully informed of the evidence on which the cancellation proposal is based. Procedural fairness requires that the visa holder's circumstances are assessed and any barriers to preparing a response to the notice of cancellation are identified and addressed by DIMA.

Recommendation 3:

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

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

DIMA's response: Support this recommendation

Many of the initiatives discussed elsewhere in this response – such as the issuance of up-to-date and comprehensive policy instructions (in response to recommendation 1) and the provision of more frequent and better targeted training as well as regular audits of the section 501 caseload (in response to recommendation 5) – will be specifically directed at ensuring procedural compliance.

One procedural issue that you have mentioned has already been addressed – specifically, ensuring that documents are not inappropriately 'protected' under section 503A.

Section 503A is not a discretionary provision. It requires that information with certain characteristics must be protected from disclosure. Information that is a matter of public record may constitute protected information under section 503A if it is provided to this department by law enforcement or correctional authorities and if this department is asked to treat it as confidential.

You expressed particular concerns about the fact that visa holders' criminal records have been withheld from them in the past. I agree with you that such documents should not be withheld, particularly as this could prevent the visa holder from being able to prepare an effective case against cancellation. Accordingly, in 2004 (subsequent to the most recent cases that you have examined), this department implemented standard procedures whereby criminal records that inadvertently attract the protection of section 503A can be 'unprotected'. These procedures entail a formal request to the relevant law enforcement or correctional authority that the protection be waived so that the document can be provided to the visa holder – a process which is centrally managed within National Office. The importance of these procedures will be reinforced in the new MSI that is currently being developed.

Preparation of Issues Paper

4.5 The Issues Papers – the prime decision-making document under s 501 – must be a balanced précis of the visa holder's circumstances, based on information that is accurate, complete and up to date. If an Issues Paper does not meet these standards, the decision-maker may well be misled.

Recommendation 4:

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

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

DIMA's response: Support this recommendation in principle

It will be important to ensure that the practices outlined in our guidelines will tangibly improve the administration of the character powers under the Migration Act. Given your office's expertise in issues of public administration, I would welcome your participation in discussions to develop further guidelines for sourcing information that is both appropriate and relevant, and which would substantially enhance our decision-making processes.

Recommendation 5:

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

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

DIMA's response: Support recommendation in principle

The broad departmental changes that are being implemented have already provided for a greater investment in quality assurance and training. For example, I have established a new Governance and Assurance Branch and have expanded the internal audit programme to ensure that the concerns raised by the Palmer and Comrie reports in relation to quality assurance are adequately addressed. In addition, the department will also be developing an audit framework specifically to review character decisions and to ensure that processes are being complied with and that fair and reasonable decisions are being made. This framework would need to be developed subject to the requirements of any new policy directions and procedures that might result from the current reviews of the relevant MSI and Direction.

I have also established a new National Training Branch, which will be responsible for coordinating effective and targeted training programmes to address specific training needs across the department. Character-related training will be an area of particular focus over the coming year, and a training unit has been established within the new Character and

Cancellations Policy and Procedures Section to assist in the administration of training programmes for State and Territory Offices. This will ultimately form part of the curriculum of the new College of Immigration, Border Security and Compliance that is being established in response to the Palmer report. Along with the development of the aforementioned Character 'help desk' and referral mechanisms for complicated and sensitive cases, these training initiatives will ensure that decision-makers are kept informed of the implications of legal and policy changes and will ensure greater consistency in section 501 decisions.

I would emphasise that the relevant MSI and Ministerial Direction already recognise that Australia's international obligations are relevant to consideration of visa cancellation under section 501. The Ministerial Direction acknowledges the explicit non-refoulement obligations that arise where persons in Australia have been granted protection visas or have held other humanitarian visas and where persons are affected by Article 3 of the Convention against Torture. In addition, the implicit non-refoulement obligations arising from the International Convention on Civil and Political Rights are specifically identified as a relevant consideration in the Ministerial Direction, thus requiring delegated decision-makers to have regard to these obligations as well when exercising their discretion under section 501. Procedures and training for the provision of international treaties obligations assessments are already in place to assist decision-makers with this consideration.

Procedural fairness for decision makers

4.6 High standards of procedural fairness are integral to best practice decision-making.

Recommendation 6:

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

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

DIMA's response: Support recommendation in principle

The review of the existing MSI as well as the broader review of section 501 policy and procedures, both of which are currently underway, will provide the foundation for the development of such a code of procedure. This code would formalise existing but ad hoc arrangements (for example, it is standard practice in State and Territory Offices to provide extensions of time in which to respond to Notices of Intention to Consider Cancellation when a reasonable request is received, but this practice is not elucidated in any formal procedures)

as well as provide new procedures designed to improve the administration of the character powers. I would welcome your participation in discussions to develop guidelines for appropriate and practical processes that could be implemented as part of a code of procedural fairness.

It is important to emphasise that one of the issues that you have raised has, as you have recognised, already been addressed by the department – specifically, the tightening of procedures to require that contemporaneous reasons are provided with every section 501 decision. Previously, a formal record of the reasons for a decision was not always provided at the same time as notification of a decision. It was considered that the reasons for the decision could readily be inferred from the decision record, which outlined all of the factors that were taken into account in coming to a decision and which was provided to the cancellee in every instance. Following judicial statements that this practice was not sufficient to fully discharge our legislative obligations, the department moved to develop standard procedures for supplementing the decision record with a full statement of reasons in all subsequent cases. These procedures were implemented by June 2003.

Application of s 501 to long-term permanent residents

4.7 The quality of DIMA's administration of s 501 cases could be significantly enhanced if the recommendations outlined above are accepted and implemented.

4.8 Even if this were to occur, there is a remaining issue to do with the fairness and reasonableness of the extensive application of s 501 to long-term permanent residents. This concern is the more acute in cases where s 501 has been used in circumstances where s 201 could not be used. It is ultimately for the Minister to decide when s 501 is to be used, but it is nevertheless appropriate in this report to question whether s 501 should be applied to a person who meets the following criteria:

- arrived in Australia as a minor and spent his or her formative years in Australia
- has effectively been absorbed into the Australian community, using criteria similar to those considered in relation to s 34
- has strong ties – particularly strong family ties – to the Australian community
- has no ties with the likely receiving country and return there would impose hardship in terms of language, culture, education and employment
- has family members in Australia who would face hardship as a result of the visa holder's separation from them
- could not be removed under s 200 criminal deportation provisions
- would not constitute a significant risk to the Australian community if released from detention.

Recommendation 7:

That DIMA review the application of ss 200–201 and s 501 with a view to providing advice to government on whether s 501 should be applied to long-term permanent residents. In particular, the review could examine whether it would be appropriate to raise the threshold for cancellation under s 501 in relation to permanent residents. One option that should be considered by DIMA in that review is whether visa holders who came to Australia as minors and have lived here for more than ten years before committing an offence should not be considered for cancellation under s 501 unless either:

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

DIMA's response: This is a matter for Government

The application of section 501 to long-term permanent residents is being considered in the aforementioned review that commenced in November 2005. However, it is a matter for Government as to whether it wishes to undertake a full review of this issue, given its broad policy implications.

Recommendation 8:

That DIMA review:

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

Recommendation 9:

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

DIMA's response to Recommendations 8 and 9: Support these recommendations

The Minister has sought further information on any person remaining in immigration detention, who was directly considered by you in this report. These persons' cases are currently being considered.

Preparations are also underway to commence the second stage of the review that you have recommended (that of cases where the visa of a long-term resident has been cancelled

under section 501 in the last three years¹¹ and the person is awaiting removal). It should be noted, however, that the nature of the cases cancelled in the past three years differs from those considered in the course of this investigation.

As you have stated in your report, the number of cases decided by the Minister personally has reduced dramatically. In the last financial year (04/05) only 14 cases were decided by the Minister. The significance of this is that a majority of character decisions may now be independently reviewed by the Administrative Appeals Tribunal (AAT), which would have considered whether the preferable decision was made in each instance. I expect that, if any decisions were made by this department that did not meet the requirements of natural justice or that were otherwise unreasonable, they should have been overturned in most instances where AAT review was sought.

It should also be emphasised that a decision to cancel a visa under section 501 cannot be overturned by the department or by the Minister. Furthermore, while powers do exist to grant a visa to a person in detention whose visa has been previously cancelled under section 501, such a decision can only be made by the Minister personally (apart from the grant of a protection visa). The Minister has two key methods of granting a visa in these circumstances: through the exercise of a non-compellable, non-delegable public interest power (section 195A, for example), or through the grant of a Removal Pending Bridging Visa. As noted, the decision to grant a person a visa in these circumstances will ultimately be a decision for the Minister.

¹¹ In the draft of my report I had recommended that the Department review cases in which decisions had been made in the last three years. In light of further consideration, I now recommend that the Department review all such cases where a person is awaiting removal.