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JOINT STANDING COMMITTEE ON MIGRATION

Review processes associated with visa cancellations made on criminal grounds

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SYDNEY

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JOINT STANDING COMMITTEE ON MIGRATION

Monday, 16 July 2018

Members in attendance: Mr Georganas, Mr Neumann, Ms Vamvakinou, Mr Wood.

Terms of Reference for the Inquiry:

To inquire into and report on:

The review processes associated with visa cancellations made on criminal grounds. In conducting its inquiry, the Committee shall have particular regard to:

- The efficiency of existing review processes as they relate to decisions made under section 501 of the Migration Act.
- Present levels of duplication associated with the merits review process.
- The scope of the Administrative Appeals Tribunal's jurisdiction to review ministerial decisions.

WITNESSES

LEATHEM, Ms Sian, Registrar, Administrative Appeals Tribunal

MATTHIES, Mr Chris, Executive Director, Strategy and Policy, Administrative Appeals Tribunal

Committee met at 14:01

CHAIR (Mr Wood): I declare open this public hearing of the Joint Standing Committee on Migration for inquiry into the review processes associated with visa cancellations made on criminal grounds. In accordance with the committee's resolution of 12 October 2016, this hearing will be broadcast on the parliament's website and proof and official transcripts of proceedings will be published on the parliament's website. I remind members of the media who may be present or listening on the web of the need to fairly and accurately report proceedings of the committee.

I now call representatives of the Administrative Appeals Tribunal to give evidence. Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and therefore has the same starting as proceedings of the respective houses. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The evidence given today will be recorded by Hansard and attracts parliamentary privilege. I now invite you to make a brief opening statement before we proceed.

Ms Leathem: On behalf of the Administrative Appeals Tribunal, AAT, I welcome this opportunity to assist the committee with its inquiry. I'd like to make a brief opening statement about the role of the AAT and its jurisdiction to review decisions about visas on character grounds. The AAT was established by the parliament more than 40 years ago to give people affected by government decisions the opportunity to seek independent merits review. The AAT can now review decisions made under more than 400 Commonwealth laws, including those relating to visas, child support, family assistance, social security, the National Disability Insurance Scheme, freedom of information, taxation and veterans' appeals. More than 58,000 applications were lodged with the AAT in the 2017-18 financial year.

The role of the AAT is to review a decision on the merits. This means the tribunal takes a fresh look at the facts, law and policy relating to the decision. The AAT must consider not only information that was available to the original decision-maker but any new information it is given during the review process. The AAT conducts hearings during which the parties can present information and make submissions. Hearings also provide an opportunity for the AAT team member to ask questions of the parties and to test the evidence. Critically, and in contrast to judicial review, the AAT is not looking to see if the original decision-maker made an error based on the information before them; it is making a new decision with the benefit of all the information and evidence, using a different process from that of the original decision-maker.

As part of the review process the AAT can affirm or agree with a decision, vary the decision, set the decision aside and substitute a new decision, or remit the matter for reconsideration by the original decision-maker. The AAT can review visa cancellation decisions made under sections 501 and 501CA of the Migration Act, including by a delegate of the Minister for Home Affairs. If the minister personally makes a decision of this type it is not reviewable by the AAT.

In the 2017-18 year the AAT finalised around 40,000 applications. Of these, 146, or fewer than 0.4 per cent, were decisions relating to visa cancellations under sections 501 and 501CA of the act. These matters are dealt with in the tribunal's General Division. While they represent a very small component of the AAT's overall case load, they are weighty decisions. Unlike matters in the Migration and Refugee division, where the respondent doesn't participate in the review, the minister is legally represented in these types of cases, including at all hearings. This means the minister has the opportunity to present evidence, call and question witnesses and make submissions in support of the visa cancellation or its nonrevocation. These types of decisions generally involve exercising a discretion. However, that is not a matter of personal preference. In considering and deciding these matters AAT team members must apply the provisions of the Migration Act and are bound to apply the direction made by the minister under the act. The current direction, No. 65, has been in effect since December 2014. It sets out and describes three primary considerations that AAT members must take into account when reviewing visa cancellation decisions on character grounds. These are the protection of the Australian community from criminal or other serious conduct, the best interests of minor children in Australia and the expectations of the Australian community. The direction also sets out and describes other considerations that must also be taken into account. These include international nonrefoulement obligations; the impact on members of the Australian community, including victims and their family members; the strength, nature and duration of the applicant's ties to Australia; impact on Australian business interests; and the extent of impediments if it is decided they should be removed. Any other relevant considerations must also be taken into account. The AAT must weigh up the relevant factors

based on the information it has before it to reach the decision. The member must give reasons for the decision. Written reasons are published by default explaining how decisions have been reached. The AAT is one of the highest volume publishers of decisions amongst all courts and tribunals in Australia.

AAT decisions should be and are subject to scrutiny. Decisions relating to visa cancellations are subject to review by the Federal Court and can be appealed and overturned by the court if they're found to be affected by legal error. In addition, the Minister for Home Affairs has the power to substitute a decision made by the AAT under section 501, 501CA or any visa cancellation. To exercise this power, the minister does not have to appeal the decision or apply to a court. While these types of decisions represent a small proportion of the AAT's overall caseload they have attracted a high level of media interest. Some recent reporting has incorrectly suggested the AAT overturns or sets aside more visa decisions than it affirms.

The AAT's submission to this inquiry explains in more detail our review processes and provides data in relation to the jurisdiction. Merits review undertaken by the AAT is different from the process undertaken by delegates of the minister within the Department of Home Affairs. Both play an important role in the system of executive decision-making that exists under Australian law. Thank you, and I invite questions from the committee.

CHAIR: Thanks very much for your attendance here today. You mentioned earlier the small number of cases regarding the character test. I note that the panel overturned roughly 20 per cent of delegates' decisions, would that be correct?

Ms Leathem: It depends what type of decisions you're talking about.

CHAIR: I'm talking about 501 character test.

Ms Leathem: If you combine the cancellations and the refusals, I believe it's 20 per cent—

Mr Matthies: That's correct.

Ms Leathem: Yes.

Mr Matthies: That's for the three years from 1 July 2015 to 30 June 2018.

CHAIR: I'm looking at a table—it's marked as appendix A—which is, on your numbering, No. 36 of 150. It's a table titled 'Outcomes of applications for review of decisions made under section 501 and 501CA of the Migration Act—2015-16 to 2017-18'. The table says 'decisions affirmed'—obviously in agreement or, I assume, where the appeal has been lost by the applicant. If you look at, for example, '2017-18 to 31 March 2018' under Section 501, it's saying 32 decisions affirmed and 22 decisions varied or set aside. To me, that seems to be an awfully high amount of decisions overturned by the Administrative Appeals Tribunal. When it comes to appeals compared to other courts, is that standard?

Ms Leathem: You're referring to Section 501 matters as opposed to 501CA.

CHAIR: Correct.

Ms Leathem: I couldn't speculate as to the particular reasons for why there is a higher set aside rate, except to make the observation that for the 501CAs we are dealing with, in general, serious criminal conduct, whereas in the 501s there is a much broader range of character-related grounds that may be considered as part of a decision.

CHAIR: For the benefit of committee members, could you explain the difference between 501 and 501CA?

Mr Matthies: The minister has the power to refuse to grant a visa under section 501 if a person doesn't meet the character test, and also has the power to cancel a visa if the person doesn't meet the character test.

CHAIR: That's 12 months or more imprisonment—correct?

Ms Leathem: That would be one of the grounds.

Mr Matthies: There are a range of grounds under the character test, one of which includes a substantial criminal record.

CHAIR: I understand.

Mr Matthies: In certain circumstances, a visa held by a non-citizen must be cancelled under section 501 subsection 3A. When that occurs, the person has the opportunity to request that that decision be revoked, and then a decision is made under Section 501CA as to whether or not to revoke that mandatory visa cancellation.

CHAIR: Obviously, this is where the public are very concerned. I've got a list of murderers where the decisions have been overturned, and rapists and people who have committed the offence of incest. Then I go to your guidelines—and this is what I want to work out. Is there confusion with the decision-makers? Your own submission, in section 53, says:

The primary considerations which must be taken into account, whenever relevant, are:

- protection of the Australian community from criminal or other serious conduct, comprising:
  – the nature and seriousness of the conduct; and
  – the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct;
- the best interests of minor children in Australia; and
- the expectations of the Australian community.

Section 54 then says:

- the impact on members of the Australian community, including victims of the noncitizen's criminal behaviour and the family members of the victim or victims, where that information is available …

How much does that weigh on the decision-maker compared to section 55, which says:

Where the decision under review is to cancel a visa under section 501 of the Migration Act or not to revoke under section 501CA a mandatory visa cancellation, the following other considerations must also be taken into account …

And then it talks about how long the non-citizen has resided in Australia and the strength, duration and nature of any family or social links with Australian citizens. Has one got a greater weight? To me, the primary consideration has a greater weight—is that the case or not?

Ms Leathem: Chair, just to be clear, we've extracted ministerial direction 65 in our submission. That's directly taken from the ministerial direction we're bound to apply

CHAIR: I understand.

Ms Leathem: Obviously, each of those considerations needs to be taken into account by the decision-makers. We did anticipate that there would be significant interest in some of the decisions that have been reported. We have created a table that collates all of those different decisions that have been referenced, particularly in some coverage in the *Herald Sun.* It then gives you the information to the published reasons, which go through in significant detail the various different considerations that the member has taken into account.

Mr NEUMANN: Which section of your submission are you talking about?

Ms Leathem: If you look at pages 12 and 13, the submission is extracting the ministerial direction. What we have done is create a table of references of the cases that have been the subject of coverage—

Mr NEUMANN: Which section is that in?

Ms Leathem: It's here. It's available—

CHAIR: You haven't submitted it?

Ms Leathem: You haven't seen it yet. We have made that for the convenience of the committee. Each of the members has to weigh up the considerations by reference to the particular facts, laws and circumstances of those cases. Their written reasons go into significant detail about which factors they believe have weighed in favour or against revocation of a cancellation decision. Not all of them will be relevant to all applicants. Some of them will be particularly pertinent to some applicants.

CHAIR: My question was very specific. When we're comparing section 53, which says 'the primary considerations', my question was: does that have more weight, about the seriousness of the offense, protecting the Australian community and the expectations of the Australian community, compared to section 54, which is more talking about, in this case, the defendant. Is that an equal balance or does one have more weight because it uses the word 'primary'?

Ms Leathem: I believe primary considerations would have the primary impact. They do have priority, but they all have to be taken into account in relation to the decision-making.

Mr Matthies: The direction states specifically that primary considerations should generally be given greater weight than the other considerations and that one or more primary considerations may outweigh other primary consideration. That's the framework that the direction clearly sets up for how members must—

Mr NEUMANN: Those are common statutory proceedings. You find that, for instance, in the Family Law Act, where federal circuit judges and family court judges make consideration of the primary consideration, whether they are in the best interests of children, when listing the need to protect them, the need to have a relationship with each parent and then protect them from family violence and other considerations. It's a common statutory instrument and tool that they use, isn't it?

Ms Leathem: Yes.

CHAIR: That's crystal clear?

Ms Leathem: That's what the direction says itself.

CHAIR: That's where the public gets concerned, when you see these cases reported, when you're looking at paedophiles and the delegates decision being overturned by the Administrative Appeals Tribunal. That's the concern I and, obviously, the public have. But you're saying that you need to balance the primary consideration with the family needs of the offender et cetera?

Ms Leathem: One of the primary considerations is the interests of children in Australia. That is sometimes a factor that is weighed up as part of that exercise.

CHAIR: Are there any specific qualifications for the people on the panels making these decisions?

Ms Leathem: Members, of course, are appointed by government. We do have people assigned to the general division, which is where these matters are dealt with. I would say that, in general, it's deputy presidents and senior members who would deal with these types of cases. The significant majority of the members who deal with these cases are legally qualified.

Mr NEUMANN: Obviously, Section 501 provides statutory guidelines. There are certain things that hit the character test—if you don't get that you're out—a substantial criminal record et cetera. The Chair asked you a number of questions about the ministerial direction. The actual statutory obligations have primacy, don't they, over a ministerial direction from a legal point of view?

Ms Leathem: So the Migration Act is the starting point for those decisions, yes.

Mr NEUMANN: Exactly. Section 501 and 501CA of the Migration Act are the most important provisions, and the ministerial direction is guidance for the member to make decisions in relation to the issue.

Mr Matthies: So, in particular, the ministerial direction is around the exercise of the discretion. A visa may be refused or may be cancelled. A mandatory cancellation decision may be revoked, and so the direction really goes to the exercise of that discretion whether or not the decision should be made.

Mr NEUMANN: Why is it the general division for a start rather than the other division? It seems a bit odd, doesn't it?

Ms Leathem: I think it's more a legacy. The tribunals of course were combined in July 2015. It had always been the case that these types of matters were dealt with in the former AAT as opposed to the MRT or RRT. So it's largely preserved what had been the organisation of business prior to amalgamation.

Mr NEUMANN: Has there been any consideration internally in the AAT about making sure the migration and refugee division could deal with this?

Ms Leathem: It's a legislative requirement. There's already been a review looking into opportunities to potentially further harmonise aspects of the tribunal, and the arrangement of business is obviously something that will be considered as part of the statutory review, which will be kicking off shortly—the Attorney General's Department will be having carriage of that. There are a number of elements of, if you like, the amalgamation, which has preserved some aspects that may not make as much sense.

Mr NEUMANN: So when a member in the AAT is considering an individual case, they look at the legislation, the Migration Act, which is the principal statutory requirement. They then look at the ministerial direction section No. 65, do they not? They would look at case law in relation to this, and precedent and principles, wouldn't they?

Ms Leathem: It would be full Federal Court or High Court authority in relation to some aspects of our decision-making function, and of course members are required to comply with that.

Mr NEUMANN: The common law—any judge or magistrate would look at precedent and case law in a case. The Federal Court's made this decision in relation to this issue similar to this. We look at that on the law as well as the facts.

Ms Leathem: And because these matters are the subject of hearings where both the applicant and respondent participate, there may be submissions made on behalf of the applicant or respondent about relevant precedent.

Mr NEUMANN: Beyond the migration regulations, are there any proclamations or other regulations that guide the AAT decision-making when looking at section 501s and 501CAs?

Ms Leathem: I don't think there are any other instruments that would guide their decision-making in this area.

Mr NEUMANN: The minister's got the power to overturn AAT decisions in visa cancellation. Does that commonly occur? You would know that, because decisions are made by members. Does the minister often come in and say: 'We don't like this decision. Whether or not he or she's discussed that in the *Herald Sun* or any other newspaper or discussed that publicly, we don't like this decision. I'll come in and make that call. I'll make that decision. I'm going to overturn the AAT's decision.'

Ms Leathem: We actually don't get informed, generally speaking—

Mr NEUMANN: You don't get informed?

Ms Leathem: if a decision has been substituted.

Mr NEUMANN: Why is that? That's a bit strange, is it not?

Ms Leathem: It's not part of our role; it's a matter for Home Affairs once a decision's been made by—

Mr NEUMANN: So you don't know, for example, how many times in the last 10 years a minister has intervened in relation to an AAT decision and overturned it?

Ms Leathem: No.

Mr NEUMANN: You don't know—that'll be a matter for the Department of Home Affairs?

Ms Leathem: That's correct.

Mr NEUMANN: Can you tell us the kind of cases that you deal with under section 116 as opposed to 501 and 501CA?

Ms Leathem: We have some information. We focused our submission and our preparation pretty squarely in relation to the 501s and 501CAs, but there obviously is, within the migration and refugee division, the ability to deal with some cancellations under 116.

Mr NEUMANN: Perhaps if I can come back to that one and just ask this question in the interim. Decisions are made by the member in the AAT. Their appeal is to the Federal Circuit Court, is it?

Ms Leathem: Only if they are a Migration and Refugee Division decision. If it's one of the 501 or 501CA, it proceeds to the Federal Court.

Mr NEUMANN: That's right. Now, do you have any information about the number of appeals made by the minister in relation to the decisions of the AAT?

Ms Leathem: If you are referring to 501 or 501CA—

Mr NEUMANN: Yes, 501 or 501CA.

Ms Leathem: In the last three years, there haven't been any ministerial appeals.

Mr NEUMANN: You're telling me that, even when the AAT has made a decision that the minister may or may not like, there have been no ministerial appeals under 501 or 501CA?

Ms Leathem: That's correct.

Mr NEUMANN: Going back five years, during the duration of this government, have there been any appeals made by a minister for immigration or home affairs at any stage when they've been unhappy with the decision of the AAT?

Ms Leathem: I would have to take the five-year question on notice. We've gone back to amalgamation, which is three years of data.

Mr NEUMANN: Can you go back for this particular government?

Ms Leathem: We can take that on notice.

Mr NEUMANN: Since September 2013, have there been any appeals instituted by Minister Morrison and Minister Dutton, in that they're unhappy with an AAT decision in relation to 501 and 501CA? Are you telling me that, in the last three years, there have been none?

Ms Leathem: None in the last three years.

Mr NEUMANN: Can you go back to section 116 and compare and contrast it to 501 and 501CA?

Ms Leathem: Section 116 of the Migration Act provides for visas to be cancelled on grounds of criminal conduct; breach of visa conditions; or risk to health, safety or good order of the Australian community or the health and safety of individuals. Generally, if a person's visa is cancelled while they're in Australia, they can seek review of that decision by the AAT. The Migration and Refugee Division, as opposed to the General Division, reviews those cancellation decisions under 116 of the Migration Act.

Mr NEUMANN: It's a broader power.

Ms Leathem: It is. We actually have some information about the direction. It is the ministerial direction 63 that applies to cancellation decisions in relation to those matters.

Mr NEUMANN: Is that similar to 65?

Mr Matthies: The ministerial direction 63 applies when a bridging visa E is cancelled under a particular provision of the migration regulations. It is similar to the ministerial direction 65 in terms of setting out primary and secondary considerations that need to be taken into account.

Mr NEUMANN: Are they identical?

Mr Matthies: They do cover some similar grounds.

Mr NEUMANN: They look very similar to me.

Mr Matthies: There are some similarities between the considerations that need to be taken into account, but it applies particularly to those bridging visa Es that are cancelled under that particular provision.

Mr NEUMANN: I will ask this question about the non-refoulement: don't we have an overriding non-refoulement obligation? It's listed as a secondary consideration or other consideration in ministerial direction 65. Is it listed as another consideration in ministerial direction 63?

Ms Leathem: Yes, there's a reference: it's a secondary consideration under the ministerial direction.

Mr NEUMANN: How does that fit in with our international obligations, in that non-refoulement is a secondary consideration?

Ms Leathem: I think you're for policy or legal advice there, which I don't think is probably appropriate for me to answer.

Mr NEUMANN: I'm trying my best. That's my questions done.

Mr GEORGANAS: I have two questions. One is more of the view of someone who knows the system, sees it every day, lives it every day and understands it far better than any of us here. We've seen some media reports over the last period where there is an impression that says that many people under section 501, where they have been charged and found guilty of criminal offenses, are remaining in the country with their visas. Is that a perception? What's the reality? I know there were some figures thrown around earlier. What is it, in terms of a perception that the Australian public may have or our Australian media may have, as compared to reality?

Ms Leathem: The first observation is, if you look at the combined set aside rate of those particular decisions over the last three years, it's only 14 per cent that actually have been set aside. The other thing to bear in mind is the fact that there may have been serious criminal conduct is not the end of the story. There is this range of considerations then that need to be weighed up in determining whether or not the mandatory cancellation, for example, should be revoked or not. Of course, the coverage tends to focus on the criminal conduct and not on the other considerations that the member will have spent a significant amount of time on. There will be a lot of evidence going to the range of considerations they have to weigh up. The best way for members of the public or, indeed, the committee to understand more about that reasoning process is to read some of those decisions.

Mr GEORGANAS: Could you give an example of one of the other considerations? I know you spoke about children earlier, but what sort of other considerations are there?

Ms Leathem: There are sometimes issues that might relate to the particular health of the individual, and there will often be expert evidence adduced in relation to whether it's their mental health or their physical health. There's obviously an opportunity for people to obtain expert witness reports or, indeed, even call witnesses to provide evidence at the hearing. That might be one of the factors, for example, that is taken into account. There are other considerations too that will be more or less relevant to each particular instance.

Mr GEORGANAS: My other question is regarding the AAT follow-up: when there's a decision made to reverse a visa or continue on with the visa on certain conditions, is there any follow-up to see where that person ends up? Let's say the visa has been cancelled due to section 501; they've been found guilty, et cetera. Is there follow-up by the AAT to see if they actually do leave the country?

Ms Leathem: No, our role in ends once—

Mr GEORGANAS: Is there any reporting back?

Ms Leathem: Once the decision has been communicated to the applicant and the respondent, that's really the end of our role in the process.

Mr GEORGANAS: I know you did actually recommend it, but just for the record: do you think it would be a good idea for us to actually look at some case studies of decisions that have different considerations put in place?

Ms Leathem: Absolutely. I think it is the best way to understand the range of different considerations and the evidence that is often dealt with in these matters.

Mr NEUMANN: I asked a question about appeals initiated by the minister in relation to 501 and 501CA in the last three years, and you're going to get information for the last five years. You can take this one notice: in the

last three or five years, have there been appeals initiated by the minister in relation to section 116, when the minister has been unhappy or otherwise with that decision?

Ms Leathem: We would have to take that on notice, but we can certainly provide that.

Mr NEUMANN: For the last three and five years. Thank you.

CHAIR: Thank you very much for providing this list. It doesn't mention the offence the person was charged with; it just states a name. With that, though, are you saying that—and I think you've listed here 164 cases in the last eight years—in every one of these, where the AAT has made a decision in favour of the applicant to overturn the delegate's decision to be deported, none of these decisions have been appealed? Is that correct?

Ms Leathem: We haven't received any ministerial appeals and these are all set aside decisions, so that's effectively correct. None of these decisions have been the subject of a ministerial appeal.

CHAIR: Is there another way that an appeal can be made or is it only by the minister making the appeal?

Ms Leathem: No, applicants appeal decisions. But obviously set aside decisions wouldn't be subject to appeal by them.

CHAIR: If they were going to be appealed, it would need to go to the Federal Court. Is that the process in place?

Ms Leathem: Correct.

CHAIR: Out of all these names here, I assume again—because you don't keep records—that you wouldn't be familiar with whether these people have actually gone on to commit other offences?

Ms Leathem: Again, we're not provided with that information.

CHAIR: When it comes to the process, how does the process work? When the delegate makes the decision to cancel a person's visa, how does the Administrative Appeals Tribunal get involved in the process? I assume the applicant obviously would make an appeal or someone on their behalf would make an appeal. Is that the way it normally works?

Ms Leathem: Yes. It depends on whether it's an expedited application or not, but there are different time frames and processes that apply to each of those two pathways.

CHAIR: What does an expedited application involved?

Ms Leathem: That would require the person to lodge the application for review within nine days of receiving notification of the decision from the department. We have to make a decision within 84 days of that notification being provided to the AAT.

CHAIR: Then the appeal has to be held within 84 days—is that correct?

Ms Leathem: A decision has to be made.

CHAIR: A decision; okay. How often do you keep to that time frame? And is that a sufficient time frame?

Ms Leathem: It obviously is challenging, but we do manage to comply with that time frame.

CHAIR: You may not be able to give this advice, but once the department has put in place a visa cancellation, is that person held within detention? How do you deal with that person?

Ms Leathem: Many of them are either in jail or detention at the time that the application is received by us. Obviously there are different ways of dealing with those people, either by telephone or video or bringing them physically into the hearing when they ultimately have their hearing.

CHAIR: Once a decision has been made—say it is in favour of the applicant—they would be released. Obviously, if they were serving a prison term, they wouldn't be. But otherwise, if they were in detention, they would be released—straight away, I assume, because you're saying the minister has made no decision to appeal?

Ms Leathem: I think it would depend entirely on the actual circumstances of that applicant.

CHAIR: I'm just looking at: do we have people, as to whom the Administrative Appeals Tribunal have said they're going to overturn the delegate's decision, who then remain in some sort of detention? I assume that wouldn't be the case.

Ms Leathem: That's a matter for Home Affairs, once they've received notification of the decision, to comply with that.

CHAIR: Obviously there has been media talk on this and concerns raised in the community. Without going into complete changes in policy, are there any recommendations as to where the process could be streamlined or

made more effective, or, as you said before, as to giving the public more knowledge of decisions being made? Are there any recommendations at all you can make to us?

Ms Leathem: We ourselves have understood, through this process, that there is a need to communicate more effectively and to help the public understand. So, for example, we've implemented recently a monthly review bulletin which tries to explain in plain English the decisions that have been made by the tribunal. So, from our perspective, we're working hard to communicate more effectively and in easier-to-understand terms how those decisions have been arrived at, because they are often very lengthy and it's difficult for people to be able to read a lengthy decision. That has been, I think, an important change in the way in which we try and communicate effectively. But we wouldn't seek to enter the policy debate about the actual law.

CHAIR: When it comes to the experience of the delegates appearing—representing the minister—are they legally qualified, from your knowledge?

Ms Leathem: Generally speaking, they're using panel firms. So they are legal practitioners that are effectively engaged by the Department of Home Affairs.

CHAIR: So they would go out and engage a firm to come and make representations on behalf of the government—is that correct?

Ms Leathem: Correct.

CHAIR: So they would be like a prosecutor for a day? Does that weaken the government's case, trying to overturn decisions, or support the decisions made by the minister, or is that just normally the way it has been done?

Ms Leathem: Generally speaking, you'll have a respondent representative on behalf of the minister who is then in a position to present evidence or make submissions in favour of the decision that has been made by the delegate.

CHAIR: What sort of legal resources does the applicant have?

Ms Leathem: That varies. If you look at the collective number, about 50 per cent in total are represented by either a lawyer or a migration agent, and it's about 40 per cent legal practitioners and about 10 per cent migration agents. Probably around 40 per cent in the 501CA matters are self-represented. Mr Matthies, is that correct?

CHAIR: What percentage was that, sorry?

Ms Leathem: There's a fairly high proportion of self-represented people in the 501CAs. We've got the representation data, and I recollect it was around 40 per cent—

Mr Matthies: Yes, who don't have professional representation in those section 501CA matters.

CHAIR: So they're just in there batting for themselves?

Ms Leathem: Correct.

Mr Matthies: Or they may have the assistance of a friend or a relative, for example.

CHAIR: Does that greatly increase the likelihood that they will not have their decision overturned by the Administrative Appeals Tribunal compared to someone who has good representation?

Ms Leathem: I don't think we've analysed the data by outcome or against representation, so I couldn't make a comment about that. Obviously for the member who is conducting the hearing it can sometimes be of great assistance if the person has a legal representative, but it is not an unusual situation in the tribunal for people to be self-represented. Members, generally, are very accustomed to managing those sorts of processes.

Mr NEUMANN: And that's commonly the case in the Federal Circuit Court, the Federal Court and the Family Court.

Ms Leathem: Absolutely.

Mr NEUMANN: Self-represented litigants is an increasing phenomenon, is it not, in our federal court systems with cutbacks to legal aid and a whole range of issues?

Ms Leathem: I won't comment on my colleagues—

Mr NEUMANN: Yes, you can't comment on them.

Ms Leathem: but the tribunal obviously is very accustomed to self-representation.

Mr NEUMANN: Exactly. And so are the Federal Circuit Court, as well as Federal Court judges and Family Court judges. They deal with self-represented litigants every day. Isn't that the case?

Ms Leathem: Yes.

CHAIR: I know there is no run-of-the-mill case, but how long are the hearings generally booked in for—a couple of hours or a couple of days?

Ms Leathem: It is difficult to say with precision, but generally speaking these types of hearings take between one and two days to be conducted in total.

CHAIR: Does the tribunal accept hearsay evidence? I assume so.

Ms Leathem: The tribunal is not bound by the rules of evidence, but members will often be guided by those rules in terms of the weight that they might give particular types of evidence. So they are able to listen to different types of evidence without those strict rules applying, but obviously they will be guided about which is more persuasive.

CHAIR: Do the victims get an opportunity to appear to give their side of the story?

Ms Leathem: The applicants?

CHAIR: No, the victims. Say you've got a victim of a crime. Obviously the applicant has his or her support from various groups. What about the victim? Do they get notified?

Ms Leathem: The tribunal itself doesn't seek that evidence but often the respondent will be in a position to present evidence. For example, sentencing remarks might include things such as victim impact statements. If they want to provide a statement from a victim as part of the evidence they have the ability to do so, but it is a matter for the parties to decide what evidence and which witnesses they might call for hearings.

CHAIR: I assume that most applicants would have evidence from community leaders or other people giving them support. Would that be correct?

Ms Leathem: They may. If they wish to present that, they are able to do so.

CHAIR: So any notification of the victim is not by the Administrative Appeals Tribunal, because they're the court. It would have to be done by—

Ms Leathem: It is a matter for the party, the respondent.

Mr NEUMANN: That would be a matter for the Crown, wouldn't it? It would be a matter for the minister or the department if they wanted to—

Ms Leathem: Correct.

Mr NEUMANN: It's not up to the member to actually ask for that. It's up to them, if they feel that it will support their position. The department will actually gather victim impact statements and a whole range of evidence to support their position; isn't that the case?

Ms Leathem: If they wish to do that, they may.

CHAIR: Thank you very much for your attendance here today. If the committee has any further questions they will be put to you in writing. You will be sent a copy of the transcript of the evidence and will have an opportunity to request corrections to transcription errors. Thank you very much.

GROSART, Mr Alexander, Senior Solicitor, Civil Law Division, Government Law Group, Legal Aid NSW

[14:51]

CHAIR: Welcome. Do you have any comments to make on the capacity in which you appear?

Mr Grosart: I'm the solicitor at Legal Aid with primary responsibility for visa cancellation matters.

CHAIR: Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and therefore has the same standing as proceedings of the respective houses. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The evidence given today will be recorded by Hansard and attracts parliamentary privilege. I now invite you to make a brief opening statement before we proceed to discussions.

Mr Grosart: There are only two additional matters that I'd like to raise. Our submission concentrated on section 501, particularly mandatory cancellations. Many of the issues raised in our submission apply equally to section 116. Also, an additional concern that wasn't raised in the submission but is a real one is the length of time the revocation requests take to be determined. For example, if someone receives a 12-month sentence of imprisonment, that will trigger visa cancellation. That 12 months can comprise, for example, a six-month non-parole period where they remain in custody and a six-month parole period where they are to be released into the community under the supervision of probation and parole, for example, to conduct rehabilitation courses. What happens is they are released from custody after six months and they go to detention, where they can remain for a considerable period of time while the revocation request is determined. They are the only two additional matters.

CHAIR: Thank you. Are you happy to proceed with questions now?

Mr Grosart: Yes.

CHAIR: You would have heard the evidence before. With the mandatory cancellation under 501 and people appearing before the Administrative Appeals Tribunal, they were saying 40 per cent don't receive legal representation. Is that the same in New South Wales?

Mr Grosart: I can't speak directly to statistics, but from my day-to-day experience from reading cases it's quite common for people to proceed unrepresented in the AAT.

CHAIR: Is that the same in courts within New South Wales through magistrates? The only reason I say that is I was a bit surprised—in the police force you'd always go to a Magistrates Court and if a person didn't have representation they would have a duty solicitor for the day or those days.

Mr Grosart: There are some restrictions on legal aid, but it largely provides a comprehensive service to the socially and economically disadvantaged in criminal law and family law.

CHAIR: You mentioned delays in the process. How long can it take before decisions are made?

Mr Grosart: From our experience delays can be 12 months; they can be longer. That can become problematic. In the past someone might have been moved to Christmas Island.

CHAIR: It's not so much the Administrative Appeals Tribunal has made the decision—obviously, the minister or the minister's delegate has made a decision. Is your concern the time to get to the Administrative Appeals Tribunal? I'm just trying to work out where the delay is taking place.

Mr Grosart: The cancellation is mandatory. The period from cancellation to the decision on whether or not to revoke that decision can take 12 months; it could even take 18 months.

CHAIR: And that's before they hit the Administrative Appeals Tribunal?

Mr Grosart: Yes. The Administrative Appeals Tribunal determines whether or not the revocation decision is correct.

CHAIR: Obviously that's a huge stress for the person and it's also a waste of money for the taxpayer. Have you got recommendations on how that can actually improve and be more streamlined?

Mr Grosart: It's clearly a resources issue and it clearly costs a lot of money to keep somebody in detention. Resources need to be directed towards making decisions quicker. That would be my recommendation.

CHAIR: And what resources?

Mr Grosart: Clearly financial.

CHAIR: I understand that, but are you saying it is financial resources for hearings to be dealt with more quickly at the Administrative Appeals Tribunal? We had evidence today that they make their decision—I think they had to have it within 28 days or so.

Mr Grosart: It's seven weeks.

CHAIR: Eighty-four days, sorry.

Mr Grosart: Our concern isn't with the AAT making decisions within 84 days so much. That seems to work quite well. There are some concerns around the AAT—for example, the short time limit given to appeal to the AAT. Our concern is more that someone can remain in detention for a long period of time.

CHAIR: I understand that. I'm just trying to find out specifically what resources would streamline it. You're saying financial resources, but financial resources to do what?

Mr Grosart: More delegates to make the decision.

CHAIR: Okay.

Mr GEORGANAS: On this particular matter of the delays, I know you've got that period of 84 days, but in terms of other jurisdictions, other courts, would you say there would be a longer delay? We hear of delays all the time in all our legal systems, constantly. In the AAT, would you say that that delay is far greater than most other jurisdictions, in other courts?

Mr Grosart: What we'd say is that the 84 days or the seven weeks, which is introduced by legislation, isn't a delay; that's a very quick decision.

Mr GEORGANAS: But you mentioned in your opening statement a concern with the length of time.

Mr Grosart: Yes, and that's that somebody's visa is cancelled mandatorily on the basis of the sentence of imprisonment and they then have to apply to have that decision revoked. When a decision is made whether to revoke or not—

Mr GEORGANAS: To be revoked from—

Mr Grosart: They apply to have the cancellation set aside and to have their visa back, and some are successful. But if they're not successful it's that matter that goes to the AAT, and then the AAT relatively quickly determines the matter.

Mr GEORGANAS: So the length of time is by the time it leaves that—

Mr Grosart: Between cancellation and the decision whether or not to overturn the cancellation decision—that's the length of time.

Mr GEORGANAS: You spoke about a six-month non-parole period.

Mr Grosart: When a judge sentences someone they have to turn their mind to what period of time they should stay in custody and whether it's suitable for them to be released into the community on parole under supervision. That can vary. It can be, for example, nine months in custody and three months under supervision. It could also be four months in custody with eight months supervision. Each of those, because the total amount adds up to 12 months, is considered a serious sentence which leads to visa cancellation.

CHAIR: Thank you. I just wanted to clarify that.

Mr NEUMANN: I just have one question, in relation to the nine-day period. Can you give us some examples of your view in relation to the shortness. It seems an extraordinarily short period of time in which to lodge an application to the AAT. What are your recommendations for an extension, and why?

Mr Grosart: I'll start with why first. If somebody is in custody, they have no ability to access the internet and download a form. They cannot fax it to the AAT. They're completely reliant on welfare workers to do that for them. They may not be able to see a welfare worker within that time, or they may but the welfare worker, through their own pressures of other work, may not fax it to the AAT in time. We have had experience where the form has reached the AAT after the nine-day limit. The AAT then has no jurisdiction to hear the matter.

Mr NEUMANN: So there's no extension to lodge?

Mr Grosart: No. They'll have a hearing and determine they have no jurisdiction.

Mr NEUMANN: Have there been instances, in your experience, where the application made within the nine-day period has been faulty or inadequate and that's prejudiced the case, the likely outcome or the prospects of that person?

Mr Grosart: The application form to the AAT is very straightforward and contains a guide on how to complete it. It's not the case that someone has to set out very detailed grounds. They can simply say, 'I don't like the decision; it didn't give enough weight to the fact that I need to see my children.' It's a very simple form to fill out.

Mr NEUMANN: But have there been consequences in your experience—how many years have you been working in this area?

Mr Grosart: In this area, I started in 2007 or 2009 and then had a break and came back to it in 2016.

Mr NEUMANN: So you're very experienced in this area in terms of these migration issues. You'd accept that you're an experienced lawyer?

Mr Grosart: In this area, yes.

Mr NEUMANN: In your experience, have you seen people who are, for instance, self-represented litigants who've inadequately or inappropriately filled that form in or just failed to address the issues that a member would need to look at in making a decision in their favour or otherwise?

Mr Grosart: No, I haven't seen somebody filling the form in incorrectly. It's more that someone who represents themselves prepares their case inadequately. They don't focus on what are the most relevant factors. One example may be that they don't obtain any report from an expert to address the issue of recidivism.

Mr NEUMANN: Do they have to make reference to the nature of the reasons that they're appealing that decision when they go to the member of the AAT? In the form itself, do they have to say, 'I'm appealing the decision from the department for this reason'?

Mr Grosart: It's my understanding that it can be simply, 'I disagree with the decision,' but it would be better if they gave a reason for that. It might be a very simple one such as, 'The delegate didn't have sufficient regard to the fact that I have two teenage kids who need my support.'

Mr NEUMANN: There must be circumstances, for example, where a person does that and then gets some legal advice and then discovers that's not the strongest argument that he or she has. There must be other arguments that would be more germane to the outcome of the merits review.

Mr Grosart: Yes.

Mr NEUMANN: If that's the case, what is the reason, therefore, that you think the nine days an inadequate period if it's a simple form?

Mr Grosart: That somebody in custody could simply be locked down.

Mr NEUMANN: So it's not the nature of the form?

Mr Grosart: No, it's not the form.

Mr NEUMANN: It's the opportunity?

Mr Grosart: It's that someone in custody is completely dependent on somebody else to do that for them.

Mr NEUMANN: I understand. Thanks very much for that.

CHAIR: Thank you for your attendance here today. If the committee has any further questions, they will be put to you in writing. You will be sent a copy of the transcript of your evidence and will have an opportunity to request corrections to transcription errors. Thank you very much.

Mr Grosart: Thank you.

ANAGNOS, Ms Dianne, Solicitor, Kingsford Legal Centre

DEEGAN, Ms Theresa, Solicitor, Kingsford Legal Centre

[15:05]

CHAIR: Welcome. Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and therefore has the same standing as proceedings of the respective houses. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. The evidence given today will be recorded by Hansard and attracts parliamentary privilege. I now invite you to make a brief opening statement before we proceed to discussions.

Ms Anagnos: Thank you, Chair and committee, for this opportunity to contribute to this inquiry. We thought we'd just speak a little bit about our work at Kingsford Legal Centre in this field of visa cancellations. We're a community legal centre in south-east Sydney. We provide free legal advice to our community, which is the Randwick and Botany local government areas. Our catchment includes Long Bay correctional centre, which has a few different correctional centres as part of it, including Long Bay Hospital and a forensic hospital. Even though we're not migration specialists, we do this work to respond to this need in our community, primarily coming from Long Bay. We provide assistance to people whose visas have been cancelled under section 501 of the Migration Act, at the initial phase, at that original decision phase. The extent of our work has varied over the years due to funding and who we've got on staff. At the moment, our assistance is at that original decision-maker level. We don't represent at the AAT. We assist at that departmental review level.

The experience of our clients: the majority of the people who come to us for help have had their visas cancelled under the mandatory cancellation process. They have been incarcerated following criminal proceedings and find out, often towards the end of the sentence that they're serving, that, instead of being released, they've had their visa cancelled and may be going to immigration detention. In many cases, Australia has been their home and the home of their family for many years. These people find out that the visa has been cancelled and they've got 28 days to request consideration of the revocation of their visa at the departmental level. They generally have to go and find a welfare worker to help them figure out what's going on, if one is available. In New South Wales, we've had a massive increase in the number of prisoners, and, in our experience, that hasn't corresponded with an increase in the number of welfare workers in prisons to help people go through this process and other processes. They've got a very short period of time, and most, in our experience, don't get legal advice before completing the form. When we can, we will go to the prison to meet with the person to help them fill out the forms. A lot of our clients are illiterate. We were contacted by someone just last week who only managed to see their welfare worker a week before their 28 days was up, to tell them: 'I've got this bundle of paperwork. What does it mean?' That person was illiterate. While they try to go through this process, they also face being moved between prisons and sometimes moved between immigration detention centres, which makes accessing legal advice and assistance pretty difficult. The other important part of what we do to try to assist is we help that person's family, because that family needs assistance as well to put together their letters of support, their evidence, and their way of showing to the department what would happen to the family and to other Australian citizens if this person were deported. So we deal with the family members as well.

Ms Deegan: I will take this opportunity to quickly summarise our position. We're concerned that the current system of review for visa cancellation decisions made on criminal grounds doesn't provide people with a fair opportunity, especially in the first instance, to put their case and receive a just decision made on the basis of accurate and full information. We think that having a preferable decision made as early as possible would lead to a fair and efficient system. For that reason, we've recommended in our submission that all visa cancellation decisions be made in accordance with the principles of natural justice and in accordance with the ministerial direction for decision-making in this area. We've recommended that time limits for applications to the department and to the AAT be extended and that legal assistance services be funded to provide assistance to people who are affected by visa cancellation decisions.

We're also concerned, as you'll see in our submission, that our current system doesn't give full effect to Australia's commitment to the rule of law and to our obligations under international law. For those reasons, we recommend that individual ministerial discretion should be limited; ministerial decisions should be reviewable by the AAT in all cases; immigration detention should not be mandatory but should be used with caution and for limited periods of time; and that international human rights law obligations should be a primary consideration for decision-makers when making visa cancellation decisions. Thank you for the opportunity to talk to you about this.

CHAIR: Thanks very much for appearing before us. On the visa cancellations from Long Bay Jail, roughly, how many would you get a year?

Ms Anagnos: That's a bit tricky. It comes and goes. Our stats are a little bit skewed because, for a period of time, we had some additional funding to have extra staff and we did other Sydney metropolitan jails as well. We've done assistance to 71 clients since 2011. I'd say it would be somewhere between five and 10 over the last 12 months.

CHAIR: You raised concerns about the cancellations. If someone has, say, a three-year sentence, are they getting notification at the start of that three-year sentence that they will have their visa cancelled? Or is more at the crunch time, at the end, when they are about to be released? What do you find?

Ms Anagnos: On the whole, it's towards the end. People generally don't go into prison knowing that this could happen to them at the end of this sentence. We're usually notified as the person is coming up to their first eligible non-parole date.

CHAIR: Has that improved at all this year, to your knowledge?

Ms Anagnos: Not that I'm aware of from our casework. I'm not pretending that our stats are huge; it's just our local—

CHAIR: No; I am just interested. Are you aware of people being released and all of a sudden being picked up by Border Force and put in detention? Are you hearing of cases where a person finishes their sentence but, in the meantime, the department has decided to remove their visa under the character test?

Ms Anagnos: Because these clients come to us through Long Bay, they are still in Long Bay when we are contacted. Sometimes it's only a short period of time before their release date.

Mr GEORGANAS: Ms Deegan, I want to go to something that you touched on at the end of your submission. You spoke about human rights and basically ensuring that we come under the obligations that we're meant to come under. Are you seeing evidence that this isn't happening?

Ms Deegan: In the past we've dealt with cases where important human rights issues have been raised.

Mr GEORGANAS: Such as?

Ms Deegan: Such as the obligation not to return people to a country where they might be in fear of their lives being taken or of arbitrary detention and other dangers. That has come up for us in the past.

Mr GEORGANAS: Is it taken seriously when those concerns are raised? Is it taken seriously by the courts or the AAT?

Ms Deegan: We just work at the departmental level, so we only help people at that initial stage. I can say that a lot of our case work was done before the change to the ministerial directions. International legal obligations were a primary consideration previously under the old ministerial direction, and we had some experience working under that old system.

Mr GEORGANAS: So it's very different now under the new system?

Ms Deegan: Under the new system it's now a secondary consideration. I don't think I can comment right now on whether we've seen a practical difference.

Mr GEORGANAS: Are you aware of actual cases where perhaps people have been sent back to a danger zone or somewhere where they're in danger.

Ms Deegan: Not personally, but correct me if I'm wrong. For example, in the case study that we've used in our submission, my understanding is that that person was able to stay in Australia.

Mr NEUMANN: So would your recommendation to us in terms of the ministerial direction be that it should be returned to a primary consideration for our obligations under international law?

Ms Deegan: Yes, that's right.

Mr NEUMANN: You work at the departmental level. In your experience, to what extent are the members of the department who are making these decisions guided by those ministerial directions?

Ms Anagnos: When we represent someone and help them put in written submissions and further evidence, that's how we frame our submissions—following that ministerial direction—because that is what the departmental officer is going to be making their decision on. So that guides us in how we put our information forward. I think this is sometimes one of the trickier things for a person and their family to put together without legal assistance. Addressing international human rights obligations that we have as a nation, and putting together evidence of what's going on back home in the country of their birth to prove that they will not be safe there sometimes 15 years after they left it—that's pretty tricky to do. So one of the other recommendations that we've got is to have increased assistance at this departmental decision-making level because the earlier we can make the right decision according to the law and according to these directions, the more efficient our system is going to be overall.

Mr NEUMANN: And less likely that there will be an overturning of that decision by the AAT as well, presumably.

Ms Anagnos: Also if the person has had assistance to put together relevant submissions and relevant evidence at the early stage, the AAT will be seeing that in the bundle of documents that travel up to the AAT and form part of that review.

Mr NEUMANN: Because they look at it on the merits, don't they?

Ms Anagnos: That's right.

Mr NEUMANN: They look at it again. It's not an appeal on the legal issues or on an error of law; they review the whole thing again, don't they?

Ms Anagnos: Yes, they make a new decision based on all of the evidence.

Mr NEUMANN: So if we provide additional legal assistance to organisations like yours, departmental people will make decisions with better information. Presumably, therefore, we would be less likely to see appeals to the AAT because, more likely than not, decisions will be made correctly on the proper grounds, with adequate and appropriate evidence. Isn't that the case?

Ms Anagnos: It's hard to comment on numbers—

Mr NEUMANN: But, generally, if legal aid is provided to an organisation like yours and you give adequate legal advice and people prepare their cases properly to the department, the departmental people are more likely to make a correct decision and it'll less likely that there will be appeals in the first place. Secondly, it will be less likely that those appeals will be successful. Isn't that the case?

Ms Anagnos: I think our position is that it's always a good idea to give people the help they need to provide all of that relevant material about the decision, how it'll affect them and their families, and what they've got to show at that earlier level. So yes.

Mr NEUMANN: So the answer to that question is yes.

Ms VAMVAKINOU: That's considering the decision goes in the favour of the applicant; otherwise you wouldn't have an appeal. You've made recommendations about removing ministerial power—501A and 501B. Can you just expand on that a little bit? Also, within that, exploring what kind of recourse we could have for very violent noncitizens in the case where there was no ministerial discretion to impose 501A and 501B? What would be the alternative, if at all?

Ms Deegan: Our recommendation there is that the minister doesn't have the power to overturn decisions of the AAT. To expand on that a bit, we think it's really important that ministerial decisions are reviewable and that government is held accountable for the decisions that they make. For decisions with such serious consequences, it's really important that there's a process that involves more than one decision-maker and that there be opportunities to appeal in case the right information wasn't able to be provided at that first stage. In terms of other options, I think that the AAT system can still work in those situations.

Mr NEUMANN: Is that your position? I ask that because the evidence is that one in five times the AAT overturns the decision of the department on these visa cancellation issues. That's a pretty reasonable rate, isn't it, of overturning the decision?

Ms Deegan: It's hard for us to comment on that process and what's reasonable and what's not.

Mr NEUMANN: No, but that's the evidence that the AAT provides—that departmental decisions will be overturned one out of five times by the AAT over a number of years accumulatively. So the more legal assistance we can provide to people, the better the opportunity for people to get the case right in the first place. That's less cost to the taxpayer and less angst for everyone concerned.

CHAIR: Obviously you would see cases where you may have victims who've been the subject of very violent crimes come and see you. And, on the other hand, you potentially could be seeing a person who's also the applicant for visa cancellation. Does that occur or is it just simply, 'No, we can't do that,' because you're already dealing with the victim?

Ms Anagnos: As a legal service, we wouldn't be able to represent both sides of that situation.

CHAIR: I understand that. I suppose the issue I have is you've got victims coming to you and saying, 'Hey, this person has caused hell in my life, and I've got a list of offences from incest to paedophilia, rape and murder,' and the AAT's overturned that decision. Where does the balance come in place when it comes to the rights of a victim compared to the loss of liberty of someone who's committed these crimes and potentially had their visa cancelled and been deported? I know it's a tough question.

Ms Anagnos: It's a really tough question. Like all community legal centres, we serve our community. Obviously we can't get into situations where there's a direct conflict like that, but we help a lot of victims with our service. It's part of what we do. But we also perform this work as well because it's such a significant decision in someone's life and also in the lives of their Australian families in so many cases. So, yes, I get that struggle, but it's an important decision that's going to affect a lot of Australians. The person does need legal assistance to argue their case and to explain that to the department.

CHAIR: The other aspect is to the decisions, and I think the department said there have been 164 decisions overturned by the Administrative Appeals Tribunal. I know that they can then go back to the minister, who can override that decision. Are you aware of how many times that has occurred with clients you've represented?

Ms Anagnos: No—I'm really sorry.

CHAIR: Out of the clients you've dealt with—I think you said it was five or six this year—and looking at the 20 per cent figure, is one in five successful? Is that roughly what you see or not?

Ms Anagnos: I think overall, across the years we've been doing this work, most are successful at the departmental level, yes. There are other people who—

CHAIR: When you say 'departmental', do you mean at the Administrative Appeals Tribunal or beforehand?

Ms Anagnos: No, before. So, by giving extra information to the department, the department decides that that person can stay. Most of the cases we deal with are successful at that departmental level. We don't represent at the Administrative Appeals Tribunal.

CHAIR: I understand.

Ms Anagnos: Some people we can't represent even at the departmental level because we don't have the resources. They might have the resources, so we might send them off to someone else who can help them. We don't know what happens with those matters.

CHAIR: Thank you for your attendance here today. If the committee has any further questions, they'll be put to you in writing. You'll be sent a copy of the transcript of evidence, and you will have an opportunity to request corrections to transcription errors. Thank you very much.

Proceedings suspended from 15:26 to 15:38

BIBBY, Dr Martin, Convenor, Asylum Seekers Working Party, New South Wales Council for Civil Liberties

BLANKS, Mr Stephen, President, New South Wales Council for Civil Liberties

CHAIR: Welcome. Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and therefore has the same standing as proceedings of the respective houses. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The evidence given today will be recorded by Hansard and attracts parliamentary privilege. I now invite you to make a brief opening statement before we proceed to discussions.

Dr Bibby: As I argued in my submission, efficiency is a matter of achieving proper aims. If the pure aim of a banking system were to make money, then the proceedings of AMP and the Commonwealth Bank, which were reported widely recently, would be very efficient. We might call that 'AMP efficiency'. The point of the appeal system is, however, to provide justice to asylum seekers and other visa holders or visa applicants. The concern in judging the appeals system is that the procedures are proper and properly designed to produce justice. It's our view that the procedures are, in fact, not very well designed at all and have a number of serious weaknesses. In order to look at that, one must also have a brief look at the aims of the character section overall. Three are commonly adduced. It's very commonly argued that a principle aim is to protect the Australian people. It's asserted quite extensively. There is ministerial direction 65. The concern was that the Australian people want it. More than a dozen times it has been appealed. The third one is more appealed to by shock jocks and internet trolls. Basically, these people have offended and we've got to get back at them.

We'll look at the last one first because it's brief. Effectively, they're saying that, although they have been punished by the courts, they should be punished further. That's not only unconstitutional, as the High Court's held, but plainly and grossly unjust. They've been punished; they should not be punished further. To the extent that people are being kept in detention centres indefinitely in conditions which are as bad or worse than those in jail and which are deteriorating over time, with various recent changes, they are effectively being punished—whatever it's called. The middle one is the notion that this is what the Australian people want. CCL is not aware of any surveys or series of surveys that have been taken to find out what Australian people want. In any case, there has not been a debate about the range of issues that are involved for such surveys to be meaningful.

We come to the principle one, which is also in ministerial direction 65, and that is that it's a matter of protecting the Australian people. Here we would argue that what's being said is that some other country can protect its people instead. In other words, although Australia is a wealthy country with a whole range of organisations whose job it is to encourage the reform and the rehabilitation of people who've been in jail, it's appropriate for us—it's morally right for us—to send people to another country so that they can look after them as well. It may be that New Zealand and Sweden are better with this than Australia. I can't think that it's true of some of the other countries that we've sent people to. It gets more and more absurd the longer the people have lived here. So does the question of whether they're being treated rightly. You get cases that have occurred where somebody has lived in Australia since infancy, does not speak the language of the country they're sent to and has no means of support when they get there, and it is grossly unjust to the person who has perpetrated a crime. There has to be a limit set to the amount of harm you inflict on a person because of a crime that they have done. There have, after all, been limits for 40 centuries to that. I won't come back to that unless you want to pursue it.

There are a number of matters that we think really ought to be attended to. We've looked at them in our submission. I invite you to read it if you haven't had a chance. The power of a minister to overturn a decision of the Administrative Appeals Tribunal appears, to us, to be quite unacceptable. It's contrary to basic democratic values; it's contrary to the rule of law. It supposes that the minister knows better in spite of all that has been presented at the Administrative Appeals Tribunal if the department or the minister have knowledge which has not previously been put forward. Any knowledge that they have can be and should be presented to the Administrative Appeals Tribunal. The notion that the minister really knows better supposes that the minister or his delegates are not presenting the material properly to the Administrative Appeals Tribunal. I make that point partly in response to one of the questions you asked the Kingsford Legal Centre.

Decisions to cancel a visa or refuse a visa should be appealed on their merits, there should be no power to cancel the visas of people who've lived here since they were children, there should be a universal guarantee of legal representation for persons at all stages of the process, and there are a number of anomalies we've pointed out that should be corrected.

Mr Blanks: Can I just add a statement. I want to talk about a particular individual case, and I disclose that I'm acting as solicitor for the individual involved in this case, but I think it is illustrative of the way in which the minister is currently administering the policy.

CHAIR: Can I just interrupt there and ask you not to identify the person.

Mr Blanks: I won't identify the person. The individual received a notice concerning cancellation of his visa. He had been convicted of a criminal offence. He had been sentenced to a term of imprisonment but, under New South Wales law at the time, the court had the ability to suspend the sentence so that in fact he served no jail time at all. The sentence was entirely suspended because the presiding judge determined that, having regard to all of the circumstances, there was no danger to the Australian community which required the individual to be imprisoned and that, although a sentence of imprisonment was appropriate to be imposed, it was also appropriate to suspend it. Nonetheless, the minister cancelled his visa. The minister made the decision personally, so it's not subject to merits review. This is a person who is married, lives in a family home and is closely connected to a local community. Because he is a UK citizen who has been here over 50 years, he's on the Australian electoral roll and he is a constituent of one of the members of parliament.

The first he knew that his visa was cancelled was at five o'clock in the morning when 16 department of immigration officers raided his home, woke up the entire family and took him off to Villawood Detention Centre. He had been completely unaware that the submissions which he had made to the minister wouldn't be sufficient. He's not well educated. He didn't have the benefit of legal advice. He wrote to the minister: 'I love my wife and my family very much, and we would all be devastated if I were removed to another country.' This is somebody who has lived in Australia since he was seven years old. He's now 57 and, as I said, because he's a UK citizen he's been entitled to be on the electoral roll. He pays taxes. He's self-employed. Despite the criminal conviction—and it's a serious conviction—he's been a generally positive member of his community. The minister has made a decision in circumstances where it is not reviewable on the merits. Now the minister, even if it were reviewable on the merits—and we certainly advocate for the minister's decisions to be reviewable—wants to be able to ignore the merits review and impose his own decision on top of that. It shows you what kind of society we've become when a person who is regarded as a member of the community can have their home raided at five o'clock in the morning, be treated worse than a murderer and taken away. I think this is reprehensible.

Mr GEORGANAS: Without saying too much, what was the charge, or conviction?

Mr Blanks: It was a sexual offence, involving sexual conduct with a person of cognitive impairment and—

CHAIR: A person with a disability?

Mr Blanks: With a disability. I can say that the victim of that crime herself was subsequently convicted and imprisoned on other crimes—it might be unrelated. The significant facts of this are that the sentencing judge considered the need to protect the Australian community and determined that it wasn't necessary that the individual serve a term of imprisonment. The offence wasn't prosecuted until four years after it occurred, so there must have been a very long decision process involved in this particular case.

CHAIR: On that, the minister makes a decision. That decision can be appealed to the Federal Court, is that correct?

Mr Blanks: Only on legal grounds, and it is being. The only grounds of review in the Federal Court are judicial review grounds—that is, the minister has to have made a legal error. There are considerations. One of the considerations is this gentleman has an 11-year-old grandchild whose father committed suicide, and he's also got an 84-year-old father. He is involved in the care of the father and of the grandson. The minister has made his decision without consulting anybody else in the family. The minister has not consulted the grandfather, who is an Australian citizen, as it happens, as to how he's going to be affected by the removal of this person. The minister has not consulted his wife and, despite the sexual offence—

CHAIR: Did they consult the victim?

Mr Blanks: No.

CHAIR: I might open this up to questions, if that's okay.

Ms VAMVAKINOU: Have you finished with the story?

Mr Blanks: I think I've told enough of the story. I might finish off by saying that the minister has not consulted anybody else and has not provided legal assistance. If legal assistance had been provided as a matter of course then it could have been explained to him that it's not enough simply to write to the minister: 'I love my wife and my family and I'm involved in the care of my grandson,' and so on.

Ms VAMVAKINOU: What are some of the other things that could have been included in that application? In addition to the very personal obviously attachment to one's family, what do you think would have been some other things—without giving anything away—that could have made a difference?

Mr Blanks: I think a structured submission starting with the fact that he is a constituent—that is, on the electoral roll—a tax payer, economically independent and responsible for his family, that he has care responsibilities for his aged father and that although there are other children they don't live in the same country town as he and his father do. There are his family relationships. There are the particular circumstances of his grandson. Engaging with the rights-of-the-child issues affecting the grandson, a lawyer could have written a compelling submission, I believe. What was written hinted at some of those things but didn't really convey them because of lack of skill and knowledge.

Ms VAMVAKINOU: This segues, then, into a question I could ask. When that ministerial decision has been made it's assumed—and it doesn't seem like that's the case here—that all of this information would have been put before the minister beforehand. I know there are automatic things going on, but within that context one would hope that for a ministerial decision of such gravity there would be a brief put—

Mr Blanks: There certainly was, but the brief didn't go beyond what he wrote himself in his own in his own submission.

Ms VAMVAKINOU: So he provided the brief.

Mr Blanks: That's right.

Ms VAMVAKINOU: The minister is not briefed by his department or anyone else about the circumstances of the case that's before him?

Mr Blanks: The minister was given the sentencing remarks from the sentencing judge.

Mr GEORGANAS: There would have been a brief accompanying that from the department to the minister.

Mr Blanks: Yes. There was a brief to the minister. It did include the sentencing remarks from the criminal offence. It's difficult to say much because all you get is a 'tick the box' from the minister. There's no real explanation of the decision. But ultimately, although the sentencing judge having heard all of the evidence and circumstances determined there was no threat to the Australian community, the minister has made his decision to cancel the visa on the basis that there is a threat to the Australian community. That's irrational.

Ms VAMVAKINOU: Again, that didn't quite answer my question. In the sentencing judge's deposition, was there any reference to this man's life here in Australia, his obligations or his family obligations? None of that was present?

Mr Blanks: No.

Ms VAMVAKINOU: You are saying that it was because he wasn't able to put that forward. I'm getting the picture that the ministerial decision was based on a sentence that actually said he wasn't a threat but the minister went ahead and deemed him to be a threat anyway.

Mr Blanks: That's right.

Ms VAMVAKINOU: How common is that type of decision-making process, in your experience?

Mr Blanks: That's a good question. My experience in these cases is limited. I've had more experience in asylum seeker and refugee cases rather than these 501 visa cancellation cases, but I don't see anything in this case which procedurally is out of the ordinary. So I suspect that there are quite a number of cases where the minister is getting a very inadequate picture because the individual doesn't have legal assistance and is not good at writing a compelling submission.

Ms VAMVAKINOU: It builds into this possible absence in the decision-making process of the minister's. Some other aspects of your suggestions here are about our obligations as a country to those who have been here as children, who have grown up here and who have ended up in the legal system. We as a society spend a lot of time trying to rehabilitate and honour our obligations to those individuals, but we seem to be making a distinction when it comes to the ones who don't have Australian citizenship yet have lived here forever and have paid taxes. I personally think it is a very serious proposition that we have obligations and dumping them on other countries is a problem. How much of that consideration do you see at all, if it exists, in those ministerial decisions?

Mr Blanks: The minister has not considered at all that this is an absorbed person. There have been a number of cases through the courts dealing with absorbed people, people who have been here since childhood and who are, for all intents and purposes, absorbed into the Australian community and are part of the Australian community. The fact that they are not legally citizens is an accident, a loophole, and it's quite often an accident of

which they're not aware and have no reason to be aware. They've never wanted to stand for parliament and so they've never had to consider their foreign citizenship status or they've never wanted to work for the Australian Public Service and needed to regularise their citizenship for that purpose. Here is somebody in this case who votes and so considers himself to be part of the Australian community. He pays taxes and is self-employed and economically independent and believed that his parents probably sorted out his citizenship status some time when he was a child.

Mr NEUMANN: I've read your submission. If the section 501 character test is removed, what powers do you think that the minister should retain in this area?

Mr Blanks: I would advocate for a rules based system which considers all of the relevant matters but one which is not open to ministerial discretion. It's this area of how the minister in his discretion can decide that the person is a threat to the Australian community such that his removal is required in an unreviewable, unappealable way. That's the problem.

Mr NEUMANN: Your concern is not the minister's discretion. Your concern is the breadth of the minister's discretion; it's not the minister's discretion per se. Isn't it that you want the minister's discretion subject to appeal in every instance through the legal processes?

Mr Blanks: Not in every case. We advocate in our submission—and I adhere to this—that in the case of absorbed people they are absorbed into the Australian community for all purposes and it's wrong to expel them into some foreign country. For other persons, whether or not they are a threat to the Australian community is something which ought to be able to be objectively determined according to rules.

Mr NEUMANN: Surely, then, the minister makes that decision about—

Mr Blanks: Not necessarily.

Mr NEUMANN: Then who does?

Dr Bibby: You have to remember too that the courts have already made decisions about people. They have taken into account the threat to society in determining their penalties. Subsequently, if a person has been granted parole, those decisions have also already been taken. So the suggestion that the minister must be the one to make the decision seems to me to be quite mistaken.

Mr NEUMANN: What about a noncitizen, irrespective of whether they've been absorbed or otherwise into the community? I get what you're saying, but it seems a strange concept when you consider that at law you're either a citizen or not a citizen. What if a person who's a noncitizen poses a threat to our society? What powers do you think the minister should have to deport a person in those circumstances? Do you feel that the minister should have no power?

Mr Blanks: In the case of an absorbed person that's correct. Otherwise, you'd be one short step from saying, 'Australian citizens who are determined to present an unacceptable threat to the community in the future ought to be subject to some kind of regime that is protective of the community.' That's not how a free society works—unfortunately perhaps, in some people's view. In a free society you cannot be—ought not to be—restricted for something you might do in the future. That is what protecting the Australian community is about: it is restricting people, or controlling people, for what they might do in the future. All the science is that it is impossible to reliably predict what people might do in the future. Perhaps there are some narrow exceptions—serial killers, psychopaths, that kind of individual. They are very, very rare cases. Australia—or any country—has an obligation to punish people who have done the wrong thing and to try and reform their behaviour while they are undergoing the punishment in order to protect the community in the future. Once that has been done, to deal with people on the accident of their legal citizenship status is illogical.

Mr NEUMANN: So you would think citizenship means nothing?

Mr Blanks: I think we are heading into a world where citizenship means less and less. Look at what is being advocated for section 44 of the Constitution—that is, the repeal of section 44(i) of the Constitution. Why should people who are members of the Australian community and Australian citizens—who also have foreign citizenship—be precluded from election to the Australian parliament because of their foreign citizenship?

Mr GEORGANAS: It is not even foreign citizenship; it is the ability to apply for foreign citizenship as well.

Mr Blanks: That's right as well. The fact is that the Australian community is largely made up of people who have either foreign citizenship in addition to Australian citizenship or eligibility for foreign citizenship. To prevent those people from being members of parliament means that a large section of the community is not represented.

CHAIR: Even if that particular individual has allegiances to another country and wants to be a minister of the crown in the Australian government?

Mr Blanks: I wasn't talking about ministers of the crown; I was talking about members of parliament.

CHAIR: So there is a distinction. In your world they can be a citizen of another country as long as they are not the Minister for Defence or the Foreign Minister.

Dr Bibby: Can I make a point here, since I am a dual citizen. If I want to enter parliament—and be allowed to—there would be one of things I might do if the Constitution were different. One thing is that I would renounce my New Zealand citizenship, which is easy. Alternatively, I would have to make sure that I didn't take part in procedures if there was any point where there was a conflict of interest. Both of those things would be pretty straightforward, I think. Otherwise, I have to agree with Stephen.

Mr Blanks: I will give you my own circumstances, for example. Because my father, in 1941, was a stateless alien I have eligibility to apply for German citizenship. I have lived in Australia all my life. Although my father was a stateless alien in 1941, he was ultimately awarded membership of the Order of Australia. Citizenship in the modern world is a much more fluid concept than it was 50 or 100 years ago, and many people regard their citizenship as being largely accidental.

Ms VAMVAKINOU: I think it's hard to argue, before we started off—in terms of deporting people who've lived in this country forever and have family ties here and are on roles and are voting and are doing all sorts of things, like in this case—with the whole idea of dual citizenship and the Constitution. I think it's best to keep them separate. I understand where you're going, but I just don't think the two are related. I want to know whether ministerial discretions are taking into consideration the responsibility Australia has to someone who came here as a child and may have offended when they were 60. Our responsibilities and whether those things which are very important—they go to the core of an Australian resident, whether it be citizenship or not, that flick of a tick can alter someone's life so substantially and abrogate our responsibilities to people who live here and have spent their lives here. I just wanted to know if you could sum it up. That doesn't seem to be taken into consideration at all when these decisions are made, impacting on the lives of those people.

Mr Blanks: I agree with that. It doesn't seem to be—

Ms VAMVAKINOU: I think that's one of the issues that need to be looked at.

Mr Blanks: That is certainly one of the issues. I think the political dimension of this, if there is a political dimension, is that for some political perspectives it's quite appealing to sections of the community to be able to say, 'We can make decisions capriciously,' without having a rules based system, and, 'You don't need to worry about that because we're never going to pick on you.' I can tell you there is going to be a community movement in the electorate, which is a very finely balanced electorate, in relation to this one case. There are people who are waking up to the idea that they can be affected when decisions can be made capriciously.

Ms VAMVAKINOU: Fifteen years ago there were two high-profile cases that were exactly the same, if I remember correctly, and there was enormous—they were both resolved in a favourable way but they did tap into some very strong community angst around this whole issue of children growing up as adults.

CHAIR: Thank you very much for your attendance here today.

Dr Bibby: Before we go, can I make a very brief comment on a question that was asked of the Kingsford Legal Centre people?

CHAIR: Yes.

Dr Bibby: They were asked about the balance between the rights of the victim and the rights of the accused. The proper place for such balance to be considered is in the courts, and that will have been considered in the courts. It's their function. For the department or the minister to come round and say, 'We can see that the balance should be different,' is, I think, hubris. It should not be done.

CHAIR: Thank you for that. Thank you for your tendency today. If the committee has any further questions they will be put you in writing. You will be sent a copy of the transcript of the evidence and will have an opportunity to request corrections to transcription errors. Thank you very much.

METHVEN, Dr Elyse, Private capacity

VOGL, Dr Anthea, Private capacity

[16:14]

CHAIR: Welcome. Do you have any comment to make on the capacity in which you appear?

Dr Vogl: I am an academic at the UTS Faculty of Law. I'm appearing in that capacity but not representing the Faculty of Law.

Dr Methven: I am also an academic at the University of Technology, Sydney. I am appearing as an academic but in my personal capacity, not on behalf of the university.

CHAIR: Thank you. Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and therefore has the same standing as proceedings of the respective houses. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. The evidence given today will be recorded by Hansard and attracts parliamentary privilege. I now invite you to make a brief opening statement before we proceed to discussions.

Dr Methven: Thank you, Chair and members, for giving us the opportunity to speak today on visa cancellation processes. We will be addressing today the breadth of visa cancellation powers existing for criminal and low-level behavioural breaches, how merits review is already curtailed and the importance of robust and independent merits review so that the best decisions are made, according to the available evidence and the law.

Broad-ranging visa cancellation and refusal regimes for noncitizens—such as powers under section 501 and section 116 of the Migration Act as well as the asylum seeker code of behaviour—exist at the intersection of criminal law and migration law. For example, the asylum seeker code of behaviour, introduced in 2013, allows for visa cancellation, detention and deportation for so-called behavioural breaches that extend beyond the criminal law, including spitting, swearing, bullying and lying to government officials.

While criticisms can be levelled at the breadth of such laws in the first place, it is vital that, as long as broad executive powers are in place, noncitizens are able to access meaningful review mechanisms by an independent tribunal or court. This is fundamental, given the very serious and often punitive effect of a decision to cancel a person's visa and possibly detain and deport them. We believe that noncitizens living in Australia, including refugees, must be able to access independent review to ensure that all appropriate facts have been taken into account by the decision-maker and that the decision-maker has complied with any applicable laws and directions. I will now hand over to my colleague Dr Anthea Vogl.

Dr Vogl: One of our foremost concerns with regard to this inquiry is with the idea of 'duplication' as set out in the terms of reference. We want to stress to the committee that describing any form of merits review as duplication is a mischaracterisation of the role and objectives of the merits review process. Instead, we'd like to draw the committee's attention to the fundamental place and importance of merits review in the administration of justice and, very importantly, the oversight of executive power more generally.

Merits review works for both the applicant and the government. It enhances the openness and accountability of government decisions, and this was confirmed in the Attorney-General's own submission to the inquiry. It provides an accessible and cost-efficient avenue for redress for all people affected by administrative decisions. The tendency to suggest that administrative appeals mechanisms duplicate government decision-making denies the fundamental objectives of an independent oversight mechanism for government decision-making. While I think it's certainly the case that sometimes merits review decisions may be at odds with or interfere with the government's preferred outcome or policy, this should be considered an outcome where the merits review is working well rather than merits review is working poorly. Stephen Legomsky, who is a migration law scholar and former chief counsel to the Department of Homeland Security in the States, has reiterated again and again that a review tribunal, whether it's an administrative tribunal or a court, normally brings to the process a degree of independence that a politically accountable department of government simply cannot.

The secondary point that we'd like to make in our opening statement is that delimiting merits review is neither necessarily an efficient nor cost-saving measure. This is because the constitutionally enshrined judicial review function of the High Court and, by extension, of the Federal Court then becomes the only avenue of appeal available to someone affected by a government decision. Applicants will, and understandably do, then use this avenue if they wish to contest a decision, and appeals to the Federal Court are much less efficient and much more costly than merits review processes. The Administrative Appeals Tribunal exists not only because of the importance of independent review of departmental decisions but because such tribunals are much more economical and efficient than courts in reviewing government decisions. Our system of administrative

government and justice is founded on the idea that it is appropriate for an independent body to review government decisions on their merits, and, further, that such review is deliberately designed to be more accessible, more economical and more informal. Again, these contribute to the lower costs and access to justice that the AAT guarantees for those affected by visa cancellations.

Alongside other submitters to this inquiry, we recommend, at a bare minimum, that access to merits review for visa cancellations should be preserved at its current level—that is, that the existing jurisdiction of the AAT in relation to visa cancellations should not be limited any further. But beyond that, we recommend that the government should consider removing instances where review is currently being curtailed simply because the minister has made a decision personally or where the minister is able to overturn AAT decisions without further review of that overturn.

CHAIR: Thanks very much for that. I assume you're both at the faculty—you're both doctorates of law. Would I be correct in saying that?

Dr Vogl: Yes.

Dr Methven: Yes.

CHAIR: The government has made decisions when it comes to mandatory cancellation of visas, and obviously those are the laws of the country. Do you respect those laws, or do you disagree with those laws?

Dr Vogl: Absolutely—we are law-abiding citizens, insofar as we comply with the laws. But we disagree with the nature of the mandatory cancellation provision, in terms of that provision not being in line with key issues that we think the government should be abiding by in terms of how the legal system is designed—first and foremost, natural justice, in terms of the original decision to cancel the visa. I'm an administrative lawyer, so the idea of merits review I think is really fundamental to the way in which the power of the individual is balanced against the large power of government to affect individuals' lives and make decisions that really affect the ways in which we move forward. It's not just in relation to migration but to social security and tax and whatnot.

CHAIR: I understand that, but the point I'd make is that, at the end of the day, it's governments who make decisions, and, if the public's not happy with the decisions and the laws, they then get new governments to come in. As to the appeals process, a person still has the ability to appeal a ministerial decision to the Federal Court—is that correct?

Dr Vogl: Yes, that is correct, and that process is enshrined constitutionally, so we can't do anything about that. But, as we've tried to make clear in our submission, that process is far inferior in terms of the oversight mechanism that it provides. As Stephen Blanks just noted, that's on legal error. So they're very narrow. They're difficult to prove. The difference between merits review and judicial review, as I'm sure the committee knows, is that facts are simply not reassessed when a matter goes up on judicial review. So the facts as they're found stay.

Dr Methven: I'd just add to that point that, yes, of course, everyone should comply with the law. We know that governments make the law. But, at the same time, when laws afford decision-makers so much discretion, there is a question of: 'What is the law?' sometimes. So people need to know, as part of the rule of law, what the law is, so that they know how to adjust their behaviour so that they can comply with the law, and, when laws are changing all the time, as the character test is, laws that are now in place are a lot more broad in terms of the minister's discretion to cancel or refuse visas.

CHAIR: Have you got an issue with the minister's discretion and the delegate's discretion? Obviously if the delegate makes a decision, it can go to the Administrative Appeals Tribunal; if the minister makes a decision, it can't.

Dr Methven: I guess, as Anthea said, at the very least we would like to ensure that there's not any further limit of merits review, but we also believe that the minister's decision—which is not subject, at the moment, to AAT merits review—should be subject to that review.

Mr NEUMANN: As to judicial review, what are the common arguments you've seen, from looking at the case law, as to the minister's decision?

Dr Methven: Generally the judicial review turns on the idea of a jurisdictional error, and generally jurisdictional errors go to relevant or irrelevant considerations being taken into account—so whether something that shouldn't have been taken into account was, or something that should have been taken into account wasn't, or where the power was exercised for an improper purpose so that the purpose was outside of the purposes considered available under the Migration Act. As you can imagine, precisely because we don't want judicial officers performing executive functions, those grounds are read very narrowly, so it's not simply that a judicial officer might have taken another fact into account where an administrative decision-maker didn't; it's that that fact

was so essential to the decision-making process that the decision-maker entered into error. Rightly, the judiciary interpret those grounds very narrowly, I think.

Mr NEUMANN: Okay. So should the minister retain that ultimate power to make decisions in relation to deporting someone from the country where the minister perceives that person to pose a threat? If so, what are the limits of that power? I presume you're saying there should be a merits review in relation to that ministerial decision.

Dr Vogl: Yes, keeping with the terms of reference of the inquiry itself, which don't necessarily invite consideration of exactly the terms upon which visa cancellation should take place but rather concern the terms of review of those processes. It's inevitable, I think, that the immigration minister makes final decisions around who is able to remain in Australia when they are noncitizens. The substance of our submission, however, goes to the fact that, given the minister is exercising those powers and those powers have possibly the largest effect that you can imagine a government minister having on someone's life—that is, possible redetention and/or deportation—they must be subject to the most robust merits and judicial review available.

CHAIR: I just have a final question. I'm an ex-police officer, and I always fall on the side of the victim every time. Do you think the victims, when it comes to the merits review in the Administrative Appeals Tribunal, should have the opportunity to present their case too?

Dr Methven: I guess the victim is already taken into account quite extensively in the sentencing process in the first place. If we're assuming, for example, with the mandatory cancellation power, that someone has served and is serving a substantial term of imprisonment—that is, 12 months or more—there's that necessity for the sentencing court to take into account the victim and the community. I guess those two things go hand in hand: victims are part of the community, and victims can be Australian citizens or not Australian citizens as well. So I think that is something that the minister already considers in some circumstances or, I understand, would consider.

CHAIR: It's one of the guidelines for the Administrative Appeals Tribunal. I was just asking you from an academic perspective. Thank you very much for that.

Mr NEUMANN: The department's delegates are not limited to the rules of evidence in determining that issue, are they? Have you had a look at decisions that are made at that level and seen the extent to which the rules of evidence are complied with?

Dr Vogl: One of the difficulties, I think, in the way those departmental decisions proceed is that they're difficult to access—and rightly so in many circumstances, in terms of privacy and confidentiality. They're not available on the public record, so that's difficult for us to say. It probably strengthens the argument in favour of merits review, because merits review, being at arm's length from the department, is generally a much more accountable and transparent process. At times when you read an AAT decision, you are able to then see what the departmental delegate looked to, because the AAT's decision will often provide a clear account of the way in which the original decision was made. So in that instance you see that there are much more informal approaches to what evidence may be admitted and what is considered relevant to a particular decision.

Mr NEUMANN: When they look at that more informal approach where they—I don't want to use the word 'ignore'—use other evidence including, for example, hearsay or whatever it might be, how is their approach different to looking at the decisions done by the AAT? You must look at that and think: 'Oh, gee. They didn't follow what I would have thought they would, but the AAT's got that right when they've looked at that issue again.' You're experienced legal lecturers and doctors of law. You've looked at thousands and thousands of cases in your legal careers. You'd look at this and you'd say, 'Well, how is it different?' How's the approach different?

Dr Vogl: Students grapple with this concept as well. Ultimately, merits review is guided by the principle that the merits review decision-maker makes the correct and preferable decision. So what that contemplates is that the delegate may actually have made a correct decision but there are a range of preferable decisions, so there isn't only one correct decision. So sometimes you do look at the two decisions and you think, 'Well this is the range of possible decisions that are all within the principle of legality and that you would call lawful.' The idea that those two decisions could be different I think does sometimes strike you as an interesting part of the way in which administrative justice works. But the idea that those two decisions are different still comes back to that foundational principle that the AAT exist outside of the department and with a degree of independence that a departmental decision-maker doesn't necessarily have, and in that sense disciplines the way in which the department complies with or takes note of the legal and policy principles that are meant to be in operation.

Mr NEUMANN: People who deal with these issues don't necessarily have to be legally trained, as members of the AAT?

Dr Vogl: Correct.

Mr NEUMANN: But from your experience, having read probably tens of thousands of cases, what is your observation of the way in which the members of the AAT go about their work when making these decisions? When you read an AAT decision do you say, 'Well they're adopting a similar approach to what I might see in the Federal Circuit Court,' or the Federal Court or supreme court or district court? When you read that, do you look at that and think, 'That's a bit novel,' or 'a bit interesting'? You know how you might look at a registrar of child support agency decision and think, 'That's a bit unusual. When you look at that at a Family Court level that might be looked at differently'?

Dr Vogl: I would be loath to make a judgement overall based on a particular decision that I read.

Mr NEUMANN: But your impression overall, having read, I presume, tons of AAT decisions?

Dr Vogl: Absolutely.

Mr NEUMANN: So what is your impression of their professionalism, their expertise, their knowledge of the law, how they go about conducting the execution of their duties, and their adherence to the rule of law to rules of evidence and facts?

Dr Vogl: Generally, the AAT are staffed by decision-makers who have a large amount of experience in a very narrow field of law, and, as a general rule, they are they are very professional and they carefully apply not just the law but government policy in each of the decisions that they make. Where there may be inefficiencies or factors in that decision-making process that the government deems to be something that is unacceptable or unwelcome, I think those questions go potentially to the structure or efficient management of the AAT. But, as a merits review body, the AAT performs an incredibly important function and is disciplined by both the law and government policy.

Mr NEUMANN: And follow the ministerial direction 65 and 63?

Dr Vogl: Absolutely.

CHAIR: In law terms, when you see the word 'mandatory'—such as a mandatory visa cancellation—it's not that, is it? Under section 501(6)(e) if a person has committed a sexual offense against a child it's a mandatory cancellation. There are examples here of priests being involved in paedophile activity, where the victims want the person to be deported, but that means nothing because it's not mandatory at all. Is that normal in legal terms? To me, when I first heard it, I thought mandatory meant that's it, all over, but obviously not.

Dr Vogl: Obviously there are mandatory aspects in that if it fulfils those criteria it is a mandatory cancellation decision. But obviously in criminal law you have a variety of decisions along the way. For example, you first have to determine if the person should actually be convicted of the offence, and then the next question is the penalty. It's very rare in criminal law that we would have in Australia mandatory penalties—that is a very rare case indeed. So there's a lot of discretion that's exercised at every step of the way, and—

CHAIR: What about mandatory sentencing? What's the difference when you hear states having mandatory sentencing for whatever offences?

Mr NEUMANN: Are you talking about mandatory minimums?

CHAIR: Yes, mandatory minimums.

Dr Methven: The mandatory minimums are controversial in themselves, because there has been a lack of evidence connection, in many cases, between deterrence and—

CHAIR: I understand that, but is there a difference between the two? That's what I'm trying to find out.

Dr Methven: Definitely, because with mandatory minimum sentences that comes at the sentencing stage—so, for example, the decision as to whether you detain or deport that person or release them into the community because you find that they are not a threat to the community, which is, I understand, a different step. That's not necessarily mandated by the cancellation of someone's visa.

CHAIR: That's a primary concern; we went through that today. Finally, have other countries—say, the UK and the US—got something similar so that, when a minister makes a visa cancellation decision, it then goes off to another body to do a merits review? Is that quite normal around the world or not?

Dr Vogl: It would be hard to speak about in general terms.

Dr Methven: We could probably take that question on notice.

CHAIR: If you could, I'd be interested.

Dr Vogl: Yes. We would be happy to provide that information to the committee. Certainly the idea of national interest and national security is something that often delimits and in some circumstances excludes the availability of merits review.

CHAIR: Thank you very much for that. Thank you for your attendance here today. If the committee has any further questions, they will be put to you in writing. You will be sent a copy of the transcript of your evidence and will have an opportunity to request corrections to transcription errors.

DONNELLY, Mr Jason, Private capacity

[16:37]

CHAIR: Welcome. Do you have any comments to make on the capacity in which you appear?

Mr Donnelly: I'm the course convener and author of the Graduate Diploma in Australian Migration Law at Western Sydney University. I'm also a barrister-at-law in New South Wales in the High Court of Australia. I'm also a registered migration agent in Australia. I appear in my capacity as an academic.

CHAIR: Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and therefore has the same standing as proceedings of the respective houses. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The evidence given today will be recorded by Hansard and attracts parliamentary privilege. I now invite you to make a brief opening statement before we proceed to discussion.

Mr Donnelly: Thank you, Chair, and I thank the members for indulging me late this afternoon. Can I turn first, in summary, to the efficiency of the existing review processes with respect to visa cancellation decisions under section 501 of the Migration Act. In my significant professional experience as both a registered migration agent and as a barrister in Australia, it seems to me that there are substantial delays in making decisions under section 501 from the time when a noncitizen's visa is cancelled on character grounds to when a decision is made as to whether they should keep his or her visa when there has been a mandatory cancellation decision. In my experience there is mandated a time period of at least six months to two years, which has effectively meant, for a substantial period of that time, the noncitizen has spent time in immigration detention away from their family and friends and otherwise contributing to the Australian community. In my respectful view, that is a matter that the committee should give some close regard to in terms of any review reform processes.

I've recommended in my submissions that, if a noncitizen is in immigration detention and they're waiting on a decision to be made with respect to revocation of a mandatory cancellation decision, they should not be allowed to stay in detention for a period of more than six months, assuming of course they haven't committed any further criminal offences whilst in immigration detention. In my respectful view, a period of six months is a reasonable period in which they should stay in immigration detention.

Next, I turn briefly to present levels of duplicated processes associated with merits review. As the committee heard earlier today, and earlier on 27 June, last month, my respectful submission is that the AAT process itself is not a duplicated process. As someone who appears quite regularly in the Administrative Appeals Tribunal, my experience dictates that—given the AAT hears evidence orally for the first time, they hear witnesses from the noncitizen themselves, their family and friends and sometimes expert witnesses for the first time—the decision-maker gets to see the noncitizen and witnesses give evidence orally. They can see the demeanour of the witness and evidence is, of course, adduced in a different way than otherwise is on the papers.

So that process itself, apart from obviously being a de novo process, the giving of evidence orally, is a different process itself. It's a very good opportunity, for the first time, for a ministry or decision-maker to see the evidence given and to make assessments of the credibility of requisite witnesses, which the Department of Home Affairs, both the minister acting personally or the delegate, cannot do when the evidence is not given in oral form. I ask that the committee take that matter into account. It's a significant matter.

In my respectful contention, I otherwise maintain that the current statutory jurisdiction, with respect to review of AAT matters on visa cancellation decisions, should not be either abrogated or curtailed, as I contend. Otherwise, it should perhaps be extended or expanded, in the sense that where a minister makes a decision personally that's not a national interest decision. That decision should otherwise be reviewed by the AAT, as the committee is aware, in a similar but not exactly the same process. In Australian citizenship cases, AAT can review decisions made by the minister exercising his power personally.

I also remind the committee that, in my respectful view, judicial review itself should not be seen as a greater accountability mechanism for noncitizens, in the sense that the scope of judicial review is limited compared to merits view, as the committee heard not long before I appeared this afternoon. Judicial review is limited to jurisdictional error and, having appeared in a significant number of Federal Court of Australia cases, both at first instance and on appeal, the scope of matters in dispute are quite limited indeed. That's all I wish to say by way of opening.

CHAIR: Thanks very much for that. You mentioned six months to two years. This is from when the person or the department, basically, serves a notice that they're going to have their visa cancelled. They then go into detention. Is that correct?

Mr Donnelly: Yes, that's correct.

CHAIR: It eventually comes to a time—what were the dates? It has 12 weeks. So your concern is that you may have a person who receives a notice. They get picked up in detention for six months to two years but when it gets to the AAP they do their work pretty quickly, in 12 weeks. Is that correct?

Mr Donnelly: That's right. Correct.

CHAIR: So what are you hearing, the delays—why for six to two years? Is it brief preparation, or what's occurring?

Mr Donnelly: It's difficult to say but my professional experience dictates that it's a combination of the department itself undertaking a risk assessment, based on their own criteria, as to whether they want the matter to go to a delegate within the Department of Home Affairs or, alternatively, whether they want the decision to be made by the minister acting personally—for example, an assistant minister, whether it be the Hon. Alex Hawke MP in an acting capacity as parliamentary secretary, preparing the evidence itself, the case officer putting together all of the material, issuing subpoenas to the NSW Police Force, to the Federal Police force and so forth, and then calling for submissions from the noncitizen. Every time a different piece of evidence might come in that the department may have regard to, they send out another note as to the legal representative or the registered migration agent to, perhaps, comment on that additional material the department has received. That further extends the process.

CHAIR: Could it be though, and correct me if I'm wrong, that in actual fact some—would it be, potentially, too that the department's reviewing to see whether, internally, they would make a decision to say, 'We're satisfied this case can be dealt with without actually going to the AAT and having the person's visa reinstated'?

Mr Donnelly: That may be one reason but it's difficult to know because one only gets, from a legal representative perspective, the decision at the end—

Mr NEUMANN: I understand.

Mr Donnelly: which can take anywhere between six and 12 months.

Mr NEUMANN: That was given to us today by Kingsford Legal Centre. They representing a number of prisoners and most of the cases, they said, were dealt with before going to the AAT.

Mr Donnelly: That's right. Correct.

Mr NEUMANN: That would be interesting to find out. Would that be regarded in your profession as a merits review in that department or does it have to be completely independent and separate?

Mr Donnelly: My own professional perspective is that decisions made by delegates should be open to merits review. One of the reasons I advanced earlier is it's difficult to make decisions on the papers without seeing witnesses give evidence, for example, if a delegate is to make a decision that a non-citizen doesn't pose an unacceptable risk of harm—one of the reasons being because that person is a low risk of reoffending. One way to determine whether a person is at risk of reoffending is to hear them give evidence about their reform and what practical steps they've undertaken both whilst in prison and indeed in immigration detention to reform

CHAIR: What do you call the process when the department does an internal review and says, 'You know what? We've looked at the evidence before us. He is a low risk. We're not going to actually have the minister repeal his visa or even get a delegate to take it to the AAT.' Is that a merits review?

Mr Donnelly: It is a merits review because it's an administrative decision made by a delegate within a department.

CHAIR: So that's a merits review.

Mr Donnelly: Correct.

CHAIR: Then it goes to the Administrative Appeals Tribunal for another independent—

Mr Donnelly: That decision is made by the delegate. That's right.

Mr NEUMANN: I asked this question of Legal Aid New South Wales earlier today. It's about the application. You've gone before a delegate. You're unhappy with the outcome of that and then you go to the AAT and lodge your relevant court document—if I can put it like that.

Mr Donnelly: Yes.

Mr NEUMANN: You refer to that in paragraph 16 onwards under the heading of 'Government funding for legal assistance'. So I asked the question and the answer was that it was really the incarceration in prison that made it difficult to comply with a nine-day requirement that meant there were some challenges. You've expanded

to a certain extent on bullet points. Can you expand further about the challenges where someone's got a decision made by delegate, is unhappy with it, and they have to appeal to the AAT. What are the obstacles and the challenges that they face?

Mr Donnelly: The first significant obstacle that I have seen from speaking to many of these non-citizens is they don't properly comprehend the nature of government policy. For example, they get given, by way of notification requirements, ministerial direction NO. 65, which is an extensive complicated document, which has led to a train of cases in the Federal Court of Australia let alone the AAT. Often, not all but a number of these non-citizens do not have extensive educational backgrounds and so they don't understand the documents they are reading. That's the first reason.

The second reason is that, as it so happens, when a person is in prison, they're not necessarily close to legal advisers in Sydney, for example, or Melbourne or wherever they may come from. They are on circuit in, say, Wellington or three, four, five, six hours outside of Sydney itself. So they don't have access to legal representatives even if they had an opportunity to pay a lawyer or migration agent and get them to come and assist.

The third reason is an administrative one and something that has been of grave concern, the slow administrative process between getting the documents to the non-citizens to begin with from the liaison officers at prison because obviously when documents come they have to be searched by prison officers and so forth and that all takes time. I've seen quite a number of cases where, even when non-citizens have completed relevant documentations, the personal form, to go back to the department, it doesn't get served within the requisite period because it hasn't been faxed, for example, and that's beyond the capacity or power of the non-citizen to do; they have to rely upon the administrative officers at the prison to do that.

Mr NEUMANN: There is a notification for leave to extend that period of time, is there?

Mr Donnelly: That's right. Correct. I deal with that in my written submission.

Mr NEUMANN: There are a lot of logistical and not even legal issues.

Mr Donnelly: By way of example, on Friday last week—I can't talk about the name of the case because it's subject to non-publication order—there was a case where the minister criticised my client or my solicitor's client for not outlining on the personal form children that may have been affected by the decision. It was asked of the noncitizen why he didn't outline the children in his original statement. That was because it wasn't clear on the statement that he had to refer to children that weren't biological in nature. He simply did not appreciate what that actually meant. This is a person who had spent 30 years in Australia, but his English was not the best because he's from the Chinese-Australian community. Although he speaks good English his written English is not the best. So even for simple things like that, the language barriers are a significant issue.

Mr NEUMANN: You've got the fast-track process that the government has established and the AAT process. Was it better in the old days, when the Migration Review Tribunal looked at this separately?

Mr Donnelly: I think that previous ministerial directions—and this is a personal perspective—were better in the sense that there was a greater level of tolerance exercised for noncitizens, particularly noncitizens who have lived in Australia most of their natural lives. There was also the old absorbed person principle, where, if a person had been in Australia for more than 10 years, the minister didn't even have a statutory power to cancel the person's visa in those circumstances. Although in ministerial direction No. 65 there is this government principle that, if a person has lived in Australia since they were very young or for most of their natural life, there is an expectation that the Australian community would exercise a larger level of tolerance for their criminality, it's important that the word 'may' is used. So it is quite discretionary, which of course means that the tolerance can be exercised however the decision-maker likes.

Mr NEUMANN: I also wanted to ask you about ministerial directions 65 and 63. You say that the noncitizen is given a copy of direction 65 or 63 and section 116. They are couched in very legal expressions, aren't they? They are legal documents and they are couched in that way.

Mr Donnelly: In answer to the second part of your question, yes, ministerial direction No. 65, in particular, is couched in very complex terms. In fact, as recent as last Friday, I had an argument about what is meant by expectations of the Australian community, which is the third primary consideration. There's confusion in the AAT at present as to what is meant by 'expectations of the Australian community'. So, if there is confusion in the AAT amongst its members as to what is meant by 'expectations of the Australian community,' you imagine the difficulty that noncitizens, particularly those who don't have the benefit of legal representation, may have in addressing that that actually means.

As to the first part of your question, I think that, really, the answer to it is as reflected in my written submissions. This is an area of the law, whether members of the community like it or not, where I think—and I say this with the greatest amount of respect—the government does need to provide some form of funding for noncitizens who need legal assistance to assist them in the process of either getting back their visa or having their visa not cancelled, particularly given, as I'm sure the committee has heard and does duly appreciate, the significant consequences for a person whose visa is cancelled under section 501 or refused. One particular consequence is permanent exclusion from this country with no clear sign of ever being able to come back to this country ever again.

Mr NEUMANN: One of the considerations—but not a primary consideration—is our obligation internationally of non-refoulement.

Mr Donnelly: Yes.

Mr NEUMANN: Do you have any views in relation to that?

Mr Donnelly: I do. I thought about this at some length and I noted that the tribunal received evidence on 27 June, last month.

Mr NEUMANN: When you say tribunal do you mean this committee?

Mr Donnelly: Yes, this committee. The deputy chair posed this question:

A lot of the submissions raise the possibility of Australia breaching its non-refoulement obligations. Are our obligations taken into consideration when making decisions under 501?

Ms Dunn, from the Department of Home Affairs, answered:

Yes, absolutely. It's set out in ministerial direction 65 and it is one of the considerations that we take into account.

In my respectful view, expressed at that level of generality, that answer is not correct. If you look at ministerial direction 65, clause 14.1 subsection 4 effectively says that, if the visa that is being cancelled is not a protection visa, when you look at the 501 case, we don't actually take into account the non-refoulement obligation process; we just deal with the 501 case and whatever visa was cancelled. Assuming the noncitizen is unsuccessful, they don't get back their visa. Then, at a later stage, whilst they're still waiting in immigration detention and whilst we as Australian taxpayers continue to detain these people, they make a protection visa application, and then we consider the non-refoulement obligations.

Mr NEUMANN: So you're saying that the non-refoulement obligations are only dealt with in a protection visa situation?

Mr Donnelly: Correct.

Mr NEUMANN: And in 501s they're not dealt with, generally.

Mr Donnelly: That's right, yes. My respectful contention is that that should be amended so that as part of the 501 process it doesn't matter what visa is cancelled or refused by a noncitizen; that non-refoulement consideration should always be considered in that process because it just delays the inevitable. They continue to be in detention, and more money is spent whilst they're in detention, considering at a later stage a protection visa application.

Mr NEUMANN: So in fact considering non-refoulement obligation may actually save the taxpayers money, possibly.

Mr Donnelly: Yes, correct.

Mr NEUMANN: The other thing is that there's been evidence that we've received that the non-refoulement obligation should be a primary consideration in the ministerial direction rather than a secondary or other or additional obligation that the AAT should consider. What do you say about that?

Mr Donnelly: I would agree with that proposition. Not only does Australia have international obligations under requisite international conventions and agreements but there is a legal and practical consequence to any decision that could potentially be made. Although it's not reflected in ministerial direction 65, all decision-makers, according to a series of cases in the federal court, have to take into account the legal and practical consequences of the decision. It is seen as a very important aspect of the decision-making process. Plainly, if a noncitizen is potentially to be removed to their country of national origin and face risk or substantial harm, that's a significant matter on its face which the decision-maker should take into account.

Mr NEUMANN: Would your evidence today in relation to ministerial direction 65 be relevant to ministerial direction 63 as well, in relation to 116?

Mr Donnelly: No. My understanding is that only ministerial direction 65 is squarely taken into account for the purposes of the 501 matters of which I speak.

Mr NEUMANN: What about section 116 matters?

Mr Donnelly: Section 116 matters are general cancellation power matters, and they reflect a different range of considerations to the ones that are reflected in ministerial direction 65.

Mr NEUMANN: How are our non-refoulement obligations considered there?

Mr Donnelly: My understanding is that non-refoulement obligations can be taken into account in the context of the legal and practical consequences of the decision. So it's not something that would be impermissible for the decision-maker to take into account, but not necessarily something that will be taken into account directly, only in the sense that if a decision-maker is put on notice that there are potential non-refoulement obligations, that could mean there is a prospect of indefinite detention of the noncitizen whilst that process is being considered.

Mr NEUMANN: Is the same limitation in terms of protection visas germane to ministerial direction 63?

Mr Donnelly: Yes, that's the ministerial direction, as I understand it, that is utilised for the purposes of considering protection visa claims.

Mr GEORGANAS: Earlier you spoke about a particular person whose adequacy in English wasn't 100 per cent. It takes me to another question. In most services—I suspect it's the same here in New South Wales—there are interpreting services if you need access to visit a specialist or a doctor, et cetera, if English is not your first language. Are there adequate services that provide enough interpreting services for people who are going through the legal system, whether it be through the AAT or issues that deal with their visas and migration? Do they have access?

Mr Donnelly: At the first instance, when a noncitizen receives notification from the department when they're in prison, often that their visa is about to be cancelled or has been cancelled—

Mr GEORGANAS: They're not necessarily in prison.

Mr Donnelly: Or in the community. My understanding is that unless the noncitizen has an amount of money to be able to use the interpretation services, they generally have problems. Yes, there are non-government organisations and a number of other groups—RACS, for example—that may assist in getting interpretive services. However, particularly with a confined time period in which to respond to departmental decisions, there is a real problem in the interpretation process.

Mr GEORGANAS: That takes me to my next point. I'm not a lawyer and I can understand the legal decisions that are made, but wouldn't that jeopardise a decision being made when the client has no idea of what he is submitting?

Mr Donnelly: Yes, it would, and I come back to the example of the case I had last Friday. The nature of the evidence that my client gave in the tribunal was a little different to what it was in the first instance when he filled out the original personal form when he was in prison. He was criticised by the minister for that process, but there was a really good response, and that was of course that there were limited interpretive services in prison and he had the benefit of a welfare officer who had hundreds of other prisoners who needed assistance in completing the form and explaining the translation of particular material. Because of the limitation of time, it affected greatly the kind of material that could be put on and responded to the Immigration's case, absolutely.

CHAIR: Just a question from me: I know you mentioned before that the department—and I forget the actual circumstance you were talking about—pretty much had the discretion where they could use the word 'may'. What was that example?

Mr Donnelly: The example I was giving you is: in ministerial direction 65 in the principal section clause 6, it talks about fundamental principles that the Australian government mandates as being important in the decision-making process. One of them is that, when a person has lived in Australia since they were a child, or for most of their life, there's an expectation that the Australian people, the Australian community, may exercise a high level of tolerance of their criminality because they've been here for a long time. Even that expectation, that principle, is quite clear: because it's discretionary, it doesn't mean or mandate that the decision-maker must take that into account.

CHAIR: I notice we had the Administrative Appeals Tribunal this morning and it specifically mentioned, as a requirement, from memory, for the AAT to make a decision was the impact on the Australian community and then it had a secondary one with regard to the applicant, his association, family members and everything else. So how high should the first requirement be compared to second one?

Mr Donnelly: If the chair is referring to the other considerations principle about strengths, ties, the nature of connection—

CHAIR: Primary consideration which must be taken into account are:

a) The nature and seriousness of the non-citizen's conduct to date; and

b) The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.

And:

b) The best interests of minor children in Australia;

c) Expectations of the Australian Community.

It went on to talk about the victim. Under Section 55, it also talks about how long the applicant's been in Australia and family connections. So is the primary one much higher than the 'must', or how does it work in legal terms?

Mr Donnelly: As you'll see, Chair, in the principal section, generally speaking, primary considerations are given more weight than other considerations but that is not inflexible in the sense that, depending on the circumstances of the case, a decision-maker may decide that the other considerations may outweigh primary considerations. But, generally speaking, proper considerations are given more weight because they're mandated to give more weight.

CHAIR: The evidence that we've been given today is that you've got a primary one but, if you've got two or three secondary, they would outweigh—is that the way it works?

Mr Donnelly: It does depend upon the decision-maker. One must keep in mind that it's a discretionary process. It's a balancing process, and it's very difficult to say because it depends on the circumstances of the case.

CHAIR: Just finally: with your knowledge around the world, when ministers and governments are making decisions to cancel visas, do other countries, to your knowledge—and this can be on notice—have an equivalent to the Administrative Appeals Tribunal?

Mr Donnelly: I understand that the United Kingdom does; and, in fact, I referred to a decision in the United Kingdom tribunal on Friday last week in a similar scenario.

CHAIR: Thank you for your attendance here today. If the committee has any further questions, they will be put to you in writing. You'll be sent a copy the transcript of your evidence and you'll have an opportunity to request corrections to transcription errors. Before I close the public hearing, I call upon a member of the committee to move that the committee authorise the publication of evidence given before it at the public hearing today, including publication of the approved transcript on the parliamentary electronic database. There being no objection, it is resolved. Thank you very much, and I close the hearing.

Resolved that these proceedings be published.

Committee adjourned at 17:05