THE IMPACT OF CRIMINAL DEPORTATION ON VICTIM-SURVIVORS OF DOMESTIC VIOLENCE IN AUSTRALIA

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I INTRODUCTION

Family violence is a global scourge, exacerbated by the COVID-19 pandemic.[1] The United Nations estimates that 47,000 women and girls were killed by intimate partner and family members in 2020.[2] It is unsurprising therefore that governments across the world consider family violence to be a critical issue, which must be urgently addressed. With on average one woman killed by an intimate partner every 10 days,[3] Australia is no exception and takes a 'zero tolerance approach' to family violence.[4] While the term 'family violence' is a broader term,[5] defined in various ways in the different Australian jurisdictions,[6] the focus in this article is on 'intimate partner violence', also known as 'domestic violence', which 'refers to any behaviour within an intimate relationship (including current or past marriages,

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1 Norman Hermant, 'Domestic Violence Surging amid COVID-19 Lockdowns, Research Shows', *ABC News* (online, 25 June 2021) <https://www.abc.net.au/news/2021-06-25/coronavirus-covid-lockdowns-and-domestic-violence-data/100237406>. See also Hayley Boxall, Anthony Morgan and Rick Brown, *The Prevalence of Domestic Violence among Women during the COVID-19 Pandemic* (Statistical Bulletin No 28, Australian Institute of Criminology, July 2020).

2 United Nations Office on Drugs and Crime, *Killings of Women and Girls by their Intimate Partner or other Family Members Global Estimates 2020* (Report, 2021) 1 <https://www.unodc.org/documents/data-and-analysis/statistics/crime/UN_BriefFem_251121.pdf>.

3 Department of Social Services (Cth), *National Plan to End Violence against Women and Children 2022–2032: Ending Gender-Based Violence in One Generation* (Report, 17 October 2022) 14 ('*National Plan to End Violence Against Women and Children 2022–2032*'), citing Ben Serpell, Tom Sullivan and Laura Doherty, *Homicide in Australia 2019–20* (Statistical Report No 39, Australian Institute of Criminology, 1 March 2022) <https://doi.org/10.52922/sr78511>.

4 Department of Social Services (Cth), *The National Plan to Reduce Violence against Women and their Children 2010–2022* (Report, February 2011) 29 ('*National Plan to Reduce Violence against Women and their Children 2010–2022*').

5 *National Plan to End Violence Against Women and Children 2022–2032* (n 3) 37.

6 *National Plan to Reduce Violence against Women and their Children 2010–2022* (n 4) 2.

domestic partnerships or dates) that causes physical, sexual or psychological harm'.[7] The term 'domestic violence' is used in this article.

One mechanism by which the Australian Government deals with perpetrators of domestic violence, who are not Australian citizens,[8] is the cancellation of their visas under section 501 of the *Migration Act 1958* (Cth) ('*Migration Act*'), one of 'various powers that may be used to cancel visas'.[9] Section 501 'consists of a series of interrelated and complex provisions'.[10] In 2014, section 501 was amended to include section 501(3A), which provides for mandatory visa cancellation in certain circumstances.[11] The change in law resulted in a significant increase in the number of visa cancellations.[12] In addition, Ministerial *Direction No 79*, which commenced on 28 February 2019, required delegates of the Minister for Immigration, Citizenship and Multicultural Affairs and, on review, the Administrative Appeals Tribunal ('the Tribunal') to specifically consider the impact of domestic violence on victim-survivors.[13] The Tribunal – the focal point of this article – reviews decisions made by delegates, deciding, amongst other things, whether to affirm or, in other words, uphold the Department's decision or set aside a primary decision.

At face value, the cancellation of visas of non-citizens who have committed domestic violence might seem to be an attractive solution. Visa cancellation may lead to detention, removal and permanent exclusion from Australia.[14] However, following a review of 99 Tribunal decisions involving mandatory visa cancellations, where *Direction No 79* was applied in situations involving domestic violence against the partner of the person challenging the adverse decision ('the review applicant'),[15] a disturbing story emerges. I argue that what becomes evident from this research is that the existing visa cancellation system is too blunt, at times working against the interests of women.

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7 *National Plan to End Violence Against Women and Children 2022–2032* (n 3) 37.

8 *Migration Act 1958* (Cth) s 5 (definition of 'non-citizen') ('*Migration Act*'). The *Migration Act* has 'a binary structure' in so far as non-citizens are divided into lawful and unlawful non-citizens, 'according to whether the non-citizen in question holds a valid visa': *Plaintiff M47/2012 v Director General of Security* (2012) 251 CLR 1, 77–8 [176] (Hayne J).

9 Chantal Bostock, 'Expulsion: A Comparative Study of Australia and France' [2018] (92) *AIAL Forum* 87, 88.

10 Chantal Bostock, 'The Value of Adjudicative Independence: Overlapping Conceptions of Administrative Justice in the Administrative Appeals Tribunal's Review of Visa Cancellations' (2020) 27(3) *Australian Journal of Administrative Law* 154, 157 ('Value of Adjudicative Independence').

11 *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) sch 1 s 8.

12 See Bostock, 'Value of Adjudicative Independence' (n 10) 154; Department of Home Affairs (Cth), *Character and General Cancellation Statistics as at 31 December 2022* (Report, 2022) <https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>.

13 Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction No 79: Visa Refusal and Cancellation under s501 and Revocation of a Mandatory Cancellation of a Visa under s501CA* (20 December 2018) [13]–[13.1] ('*Direction No 79*').

14 *Migration Act* (n 8) ss 189, 198(2B)(a); *Migration Regulations 1994* (Cth) sch 5 ('*Migration Regulations*').

15 The focus of this article has been on the families involved in the Tribunal research, which were principally heterosexual, monogamous couples. It is nevertheless acknowledged that family violence occurs in all types of families. See, eg, Annaliese Constable et al, *One Size Does Not Fit All: Gap Analysis of NSW Domestic Violence Support Services in Relation to Gay, Lesbian, Bisexual, Transgender and Intersex Communities' Needs* (Report, The Lesbian and Gay Anti-Violence Project, ACON, 2011).

In Part II of this article, I briefly explain the decision-making framework at the time of the research conducted while in Part III, I explore the impact of the changes in the law, particularly *Direction No 79*. Reflecting the gender-based nature of domestic violence,[16] which was confirmed by the research,[17] the focus of the article is on the effect of the visa cancellation on women as victim-survivors of domestic violence. The consequences for these women will necessarily vary according to the circumstances of the case, including their citizenship, visa and relationship status. Visa cancellation may have long-lasting emotional, financial, practical and other consequences for victim-survivors, who may be raising the review applicant's children. While the research indicated that many review applicants had separated from their partners, the impact of visa cancellation may continue to be felt post-separation.

In Part IV, after setting out the research methodology and key findings, I discuss issues arising in Tribunal decision-making, which emerge from the research. These issues reflect what is already known about the Australian visa cancellation system, including the consequences of the lack of legal representation and the effect of the strict procedural rules governing the review process.[18] These access to justice issues, combined with a review of *Direction No 79*, reveal that the ability of victim-survivors to participate in the review process may be compromised and their voices not heard.

Finally, in Part V, I set out proposals for systemic reform. While *Direction No 90* superseded *Direction No 79*[19] and has since been superseded by *Direction No 99*,[20] which recently came into force and which should mitigate some of the issues identified in this context, there remains scope to make further changes to the existing system, including changes to the substantive law, which would further empower victim-survivors to participate in the review process. I also argue for increased access to legal representation for victim-survivors as well as further education and training for Tribunal members in relation to the application of the law and domestic violence more generally. The Australian Government has

16 See *National Plan to Reduce Violence against Women and their Children 2010–2022* (n 4) 1: 'While a small proportion of men are victims of domestic violence and sexual assault, the majority of people who experience this kind of violence are women – in a home, at the hands of men they know'.

17 Of 99 review applicants, only two were women: see *JFSQ and Minister for Home Affairs* [2019] AATA 616; *HJHC and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2020] AATA 2958 ('*HJHC*').

18 See, eg, Chantal Bostock and Jason Cabarrús, 'Short Shrift to International *Non-Refoulement* Obligations? Australia's Approach to Criminal Deportation' (2020) 32(4) *International Journal of Refugee Law* 597 <https://doi.org/10.1093/ijrl/eeab008>; Chantal Bostock, 'Procedural Fairness and the AAT's Review of Visa Cancellation Decisions on Character Grounds' (2010) 17(2) *Australian Journal of Administrative Law* 77 ('Procedural Fairness'). See also Law Council of Australia, *The Justice Project* (Final Report, August 2018) ('*The Justice Project*').

19 Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Cth), *Direction No 90: Visa Refusal and Cancellation under Section 501 and Revocation of a Mandatory Cancellation of a Visa under Section 501CA* (8 March 2021) ('*Direction No 90*').

20 Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction No 99: Visa Refusal and Cancellation under Section 501 and Revocation of a Mandatory Cancellation of a Visa under Section 501CA* (23 January 2023) ('*Direction No 99*').

recently announced the disestablishment of the Tribunal and the creation of a new, federal administrative review body.[21] The issues identified here are therefore particularly timely. If the Australian Government is serious about achieving its stated goal of protecting and supporting women, it must make a greater effort to ensure that victim-survivors are given an opportunity to be heard.

II MANDATORY VISA CANCELLATION

In contrast to discretionary visa cancellation under section 501(2) of the *Migration Act*, section 501(3A) provides that the Minister, or their delegate, must cancel a non-citizen's visa, where, amongst other things, the person has a substantial criminal record and is serving a sentence of imprisonment.[22] A substantial criminal record includes being sentenced to a term of imprisonment of 12 months or more.[23] As intended, the cancellation usually occurs while the person is incarcerated.[24] The Minister must give the person notice of the visa cancellation and invite the person to make representations to the decision-maker,[25] if they seek revocation of the visa cancellation on either the ground that they do not fail the character test[26] or there is 'another reason' why the visa should not be cancelled.[27]

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21 Mark Dreyfus, 'Expert Advisory Group to Guide Reform to Australia's System of Administrative Review' (Media Release, 17 February 2023) <https://ministers.ag.gov.au/media-centre/expert-advisory-group-guide-reform-australias-system-administrative-review-17-02-2023>.

22 Section 501(3A) provides as follows:

> The Minister must cancel a visa that has been granted to a person if: (a) the Minister is satisfied that the person does not pass the character test because of the operation of: (i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or (ii) paragraph (6)(e) (sexually based offences involving a child); and (b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

23 *Migration Act* (n 8) s 501(7).

24 Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) Attachment A, 8:

> This amendment is aimed at reducing the risk of serious criminal non-citizens being released from prison into the community prior to the full consideration of their case. This amendment provides that a non-citizen's visa must be cancelled without notice where they are in prison and do not pass the character test on substantial criminal record grounds.

25 *Migration Act* (n 8) s 501CA(3).

26 The character test, set out in section 501(6) of the *Migration Act* (n 8), is lengthy. It includes matters such as immigration detention-related offences, people smuggling, the person's past and present criminal and general conduct, conviction for sexually-based offences involving a child, inciting discord or representing a danger to the Australian community.

27 *Migration Act* (n 8) s 501CA(4). See *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 96 ALJR 13, 17–18 [13] (Keane, Gordon, Edelman, Steward and Gleeson JJ) ('*Viane* (2021)'), where the High Court held as follows:

> What is "another reason" is a matter for the Minister. Under this scheme, Parliament has not, in any way, mandated or prescribed the reasons which might justify revocation, or not, of a cancellation decision in a given case. It follows that there may be few mandatorily relevant matters that the Minister must consider in applying s 501CA(4)(b)(ii).

Decisions made by delegates of the Minister are reviewable by the Tribunal.[28] Although the Tribunal has certain inquisitorial powers,[29] in practice, the review applicant bears the burden of satisfying the Tribunal that there is 'another reason' to revoke the decision.[30] The Tribunal's review of visa cancellations is subject to strict procedural rules: the applicant must lodge the review application within nine days[31] and the Tribunal must review the application within 84 days, otherwise the primary decision-maker's decision stands.[32] It therefore operates under a 'time constraint'.[33] Finally, section 500(6H) of the *Migration Act* provides that 'the Tribunal must not have regard to any information presented orally in support of the person's case unless the information was set out in a written statement given to the Minister at least 2 business days before the Tribunal holds [its] hearing'.[34] These rules were designed to ensure that the review process was not used by review

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28 *Migration Act* (n 8) s 500(1).

29 See *Administrative Appeals Tribunal Act 1975* (Cth) s 33 ('*AAT Act*'). See also Narelle Bedford and Robin Creyke, Australian Institute of Judicial Administration, *Inquisitorial Processes in Australian Tribunals* (Report, 2006).

30 *Hong v Minister for Immigration and Border Protection* (2019) 269 FCR 47, 66 [68] (Bromwich and Wheelahan JJ).

31 Section 500(6B) of the *Migration Act* (n 8) provides as follows:

> If a decision under section 501 of this Act, or a decision under subsection 501CA(4) of this Act not to revoke a decision to cancel a visa, relates to a person in the migration zone, an application to the Tribunal for a review of the decision must be lodged with the Tribunal within 9 days after the day on which the person was notified of the decision in accordance with subsection 501G(1).

32 Section 500(6L) of the *Migration Act* (n 8) provides as follows:

> If: (a) an application is made to the Tribunal for a review of a decision under section 501 of this Act or a decision under subsection 501CA(4) of this Act not to revoke a decision to cancel a visa; and (b) the decision relates to a person in the migration zone; and (c) the Tribunal has not made a decision under section 42A, 42B, 42C or 43 of the *Administrative Appeals Tribunal Act 1975* in relation to the decision under review within the period of 84 days after the day on which the person was notified of the decision under review in accordance with subsection 501G(1); the Tribunal is taken, at the end of that period, to have made a decision under section 43 of the *Administrative Appeals Tribunal Act 1975* to affirm the decision under review.

33 *RZSN v Minister for Home Affairs* [2019] FCA 1731, [34] (Anderson J), citing *NZA v Minister for Immigration and Citizenship* (2013) 140 ALD 555, 584–5 [144] (Kenny J). As Anderson J further observed at [35], the effect of the 84-day time limit 'may be that, depending on the volume of material and the nature of the decision to be made, the Tribunal will not have the time it would consider optimal to fully critique and synthesise the relevant matters of fact and law to be determined'.

34 Section 500(6H) of the *Migration Act* (n 8) provides as follows:

> If: (a) an application is made to the Tribunal for a review of a decision under section 501 or a decision under subsection 501CA(4) not to revoke a decision to cancel a visa; and (b) the decision relates to a person in the migration zone; the Tribunal must not have regard to any information presented orally in support of the person's case unless the information was set out in a written statement given to the Minister at least 2 business days before the Tribunal holds a hearing (other than a directions hearing) in relation to the decision under review.

Section 500(6J) provides as follows:

> If: (a) an application is made to the Tribunal for a review of a decision under section 501 or a decision under subsection 501CA(4) not to revoke a decision to cancel a visa; and (b) the decision relates to a person in the migration zone; the Tribunal must not have regard to any document submitted in support of the person's case unless a copy of the document was given to the Minister at least 2 business days before the Tribunal holds a hearing (other than a directions hearing) in relation to the decision under review.

applicants as a mechanism to prolong their stay in Australia.[35] It will become evident in the next Part, however, that this complex procedural context may work against victim-survivors who wish to participate in the review process.

In addition, the Tribunal is legally bound by Directions issued under section 499 of the *Migration Act*.[36] Directions 'set the norms by which decisions to refuse or cancel visas are made'[37] and are designed to promote consistency in decision-making.[38] Of relevance to present purposes, on 28 February 2019, *Direction No 79* came into force under the then Minister for Immigration, Citizenship and Multicultural Affairs, introducing 'strong new measures against domestic violence perpetrators'.[39] The Minister noted that 'while current provisions have been effective, these changes will further strengthen the law and make a very clear statement that Australia regards crimes against women and children as particularly abhorrent'.[40] *Direction No 79* provides that when deciding whether to revoke the mandatory cancellation of a non-citizen's visa, decision-makers are required to consider three primary considerations: 'protection of the Australian community';[41] the 'best interests of minor children in Australia affected by the decision';[42] and the 'expectations of the Australian community'.[43] *Direction No 79* sets out further so-called 'other considerations', which, where relevant, are to be considered, including the strength, nature and duration of the review applicant's ties to Australia[44] and the impact on victim-survivors.[45] As will become clear, *Direction No 79* is effective at shaping Tribunal decision-making to produce its intended goal of zero tolerance for domestic violence, by placing significant obstacles in the path of a visa cancellation revocation.[46]

35 Explanatory Memorandum, Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1998 (Cth) item 21.

36 In short, section 499 provides that the Minister may give written directions to persons or a body having functions or powers under the Act, if the directions are about the performance of those functions or the exercise of those powers.

37 *FYBR v Minister for Home Affairs* (2019) 272 FCR 454, 475 [89] (Stewart J) ('*FYBR*').

38 Ibid 471 [63] (Charlesworth J), 475 [88] (Stewart J).

39 David Coleman, 'Government Introduces Strong New Measures against Domestic Violence Perpetrators' (Media Release, 3 March 2019).

40 Ibid.

41 *Direction No 79* (n 13) [13.1].

42 Ibid [13.2].

43 Ibid [13.3].

44 Ibid [14.2].

45 Ibid [14.4].

46 Furthermore, in certain cases, the Direction is too effective, capturing female perpetrators of domestic violence as well. Often, in such cases, these female offenders are also victims of domestic violence. In *HJHC* (n 17), for example, the review applicant was a woman with a long criminal history, including a conviction for stabbing her partner. The Tribunal, Senior Member Kelly, found at [24] that 'sometimes the applicant was the victim and sometimes she was the perpetrator of the domestic violence', which in part related to the review applicant's and her partner's drug and alcohol use. Despite the review applicant having three children living in Australia, the Tribunal affirmed the decision to not revoke the visa cancellation: at [43], [77]–[78].

III CONSEQUENCES OF VISA CANCELLATION ON VICTIM-SURVIVORS OF DOMESTIC VIOLENCE

The impact of the visa cancellation on the victim-survivor will depend on a variety of factors, including her Australian citizenship, visa and relationship status. While the focus of this article is on the themes drawn out from the research conducted, it is important to note that in Australia, there are limited circumstances in which victim-survivors may be granted a visa on the grounds of domestic violence.[47] In addition, a victim-survivor's visa may be cancelled as a consequence of her partner's visa cancellation.[48] The Law Council of Australia has observed that 'women who are aware and understand the operation of the provisions may be deterred from seeking help for an act of family violence to avoid that result'.[49] The Asylum Seeker Resource Centre further noted:

> In our experience, this creates a perverse situation where survivor-victims of family violence are in fact punished for the violence committed against them. It also creates a powerful disincentive for survivor-victims to report family violence, as the prospect of losing their visa and that of their children, or if they do not want the perpetrator's visa to be cancelled, deters survivor-victims of family violence from seeking the essential protection from violence that they need.[50]

If an Australian citizen, she may remain without him or leave Australia with him. There may be many reasons as to why the victim-survivor may not be able to relocate with the review applicant, including the well-being of her children and extended family members, culture, financial resources and other practicalities.[51] In *Berryman and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)*, for example, Ms Brown had been in a relationship with Mr Berryman, a citizen of New Zealand, for 24 years and they

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47 See *Migration Regulations* (n 14) div 1.5. Generally speaking, the family violence provisions are available for those applying for permanent residence in the partner stream: at sub-cl 801.221(6). See also Marie Segrave, *Temporary Migration and Family Violence: An Analysis of Victimisation, Vulnerability and Support* (Report, School of Social Sciences, Monash University, 2017) 25.

48 As noted in Australian Law Reform Commission, *Family Violence and Commonwealth Laws: Improving Legal Frameworks* (Final Report No 117, November 2011) 497:

> secondary visa holders – usually a spouse and/or children – are especially vulnerable to family violence, as they are dependent on the relationship with the primary visa holder for a permanent migration outcome'. Accordingly, 'a victim of family violence may therefore feel compelled to stay in that violent relationship until such time as the person and his or her partner are granted permanent visas, before taking steps to ensure safety.

49 Law Council of Australia, Submission No 39 to Senate Legal and Constitutional Affairs Committee, *Migration Amendment (Strengthening the Character Test) Bill 2021 [Provisions]* (16 December 2021) [48].

50 Asylum Seeker Resource Centre, Submission No 32 to Senate Legal and Constitutional Affairs Committee, *Migration Amendment (Strengthening the Character Test) Bill 2021 [Provisions]* (16 December 2021) [70].

51 See, eg, *Tangataolakepa and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2020] AATA 798, [93] (Deputy President Boyle) ('*Tangataolakepa*'); *Chandra and Minister for Home Affairs (Migration)* [2019] AATA 4894, [107] (Senior Member Tavoularis and Member Evans) ('*Chandra*'); *HQTQ and Minister for Home Affairs (Migration)* [2019] AATA 5291, [200] (Member Eteuati).

had three children aged 23, 21 and 11 as well as a 4-year-old grand-daughter.[52] In her evidence to the Tribunal, Ms Brown stated that she came from 'a close knit indigenous family' and that she could not accompany Mr Berryman to New Zealand as her family, including her elderly parents, remained in Australia.[53]

Alternatively, also for various reasons, the victim-survivor may intend to accompany the review applicant overseas. In *Viane v Minister for Immigration and Border Protection*,[54] for example, the applicant was convicted of assault occasioning actual bodily harm to his partner for which he was sentenced to 12 months' imprisonment. The relationship, however, did not end. In seeking to have the visa cancellation revoked, Mr Viane submitted that

> as Australian citizens, and never having known any other life, I cannot expect my partner and fifteen (15) month old daughter to move overseas should I be forced to depart … Although we may be a family once more, we would be so in an unfamiliar setting, with no ties, job prospects or home. Further, they would be separated from their immediate and extended family and friends, as well as the life they know in Australia.[55]

Capturing the dilemma, Rangiah J held that 'if the decision is not revoked, the appellant's partner will suffer because either her family will be broken up, or she will be forced to move overseas with her child'.[56]

As noted earlier, in many Tribunal cases reviewed, the review applicant and the victim-survivor had separated. In these circumstances, the effect of visa cancellation on the victim-survivor may nevertheless continue to be relevant, particularly if she is the mother of the review applicant's children. As Heather Douglas observes, 'regardless of whether the victim and the perpetrator are separated there are usually complex and continuing emotional, financial and legal ties between them and continuing complex power dynamics'.[57] In this context, Tribunal fact-finding assumes significant importance, as it underpins the weighing of considerations.

IV ISSUES IN TRIBUNAL DECISION-MAKING: AN EVIDENCE-BASED APPROACH

The research examined Tribunal cases in which domestic violence occurred. The research involved searching the Australasian Legal Information Institute ('AustLII') 'AAT' database using the search terms 's 501CA', 'domestic violence' and 'Direction No 79' on 22 September 2020. The search produced 118 Tribunal decisions, of which 99 cases were reviewed. Decisions which did not directly consider issues of domestic violence between the parties were excluded from the

52 [2020] AATA 421, [44] (Deputy President Boyle).
53 Ibid [44], [46] (Deputy President Boyle).
54 (2018) 263 FCR 531 ('*Viane* (2018)').
55 Ibid 534 [11] (Rangiah J).
56 Ibid 539 [32] (Rangiah J). Note the Minister successfully appealed to the High Court: *Viane* (2021) (n 27).
57 Heather Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439, 442.

review. These decisions included where the term 'domestic violence' was used incidentally, for example, to describe experts' areas of expertise, was contained in previous Tribunal decisions cited by the member or where the domestic violence was between the review applicant's parents. Of the 99 cases reviewed, 19 cases were set aside (19%). 62 of 99 applicants did not have legal representation (63%). Of the 62 review applicants without legal representation, 11 had their cases set aside (18%).

The issues which emerge from the Tribunal research fall under two broad categories: first, in terms of access to justice, the effect of the lack of legal representation and the procedural rules may hinder the ability of victim-survivors to participate in the review process; second, even where available, little weight may be accorded to victim-survivor' views because of the application of *Direction No 79*.

A Access to Justice

As noted above, the research indicated that a large proportion of review applicants was not legally represented for reasons generally not discussed in the Tribunal decisions. Despite the importance of legal advice and assistance, it is well-known that access to publicly funded representation has been significantly eroded in recent years.[58] Without diminishing the need for victim-survivors being independently represented, where the interests of review applicants and victim-survivors align, the review applicant's legal representative may assist with promoting the increased participation of victim-survivors throughout the review process. Legal representatives perform a critical function, including assisting with the formulation and making of claims, obtaining supporting material, including expert evidence and making submissions.[59]

The lack of legal representation is compounded by the strict procedural rules, including section 500(6H) discussed earlier, which may affect the ability of the victim-survivors to adduce oral evidence at the hearing.[60] In *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v DOM19*,[61] for example, the wife of the review applicant, an unrepresented citizen of Liberia, was unable to give evidence at the hearing because the Minister had not been served with a written statement two business days before the hearing. The review applicant's wife deposed in her affidavit that she 'would have given evidence about a broad range of matters, including her relationship with the applicant, her children

58 See, eg, *The Justice Project* (n 18); Productivity Commission (Cth), *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014).

59 See, eg, Hazel Genn, 'Tribunals and Informal Justice' (1993) 56 *Modern Law Review* 393 <https://doi.org/10.1111/j.1468-2230.1993.tb02680.x>.

60 See, eg, *Mence and Minister for Home Affairs (Migration)* [2019] AATA 1309 [15] (Member Eteuati) ('*Mence*'); *NLJV and Minister for Home Affairs (Migration)* [2019] AATA 3646 ('*NLJV*').

61 (2022) 289 FCR 499 ('*DOM19*').

and how they might be affected if he were deported'.[62] The Full Federal Court held that the Tribunal had not erred in its application of section 500(6H).[63]

In *Uelese v Minister for Immigration* ('*Uelese*'),[64] the High Court held that section 500(6H) did 'not preclude the consideration of information which [was] not presented by or on behalf of an applicant for review as part of his or her case'.[65] The research indicated that applying *Uelese*, the Tribunal considered witness evidence provided in response to cross-examination by the respondent and Tribunal questioning.[66]

The High Court in *Uelese* further held that '[section] 500(6H) does not fetter the power of the Tribunal to grant an adjournment in order to ensure that its review is conducted thoroughly and fairly'.[67] In *QSBL and Minister for Home Affairs (Migration)*, the review applicant, an unrepresented Sudanese citizen with schizophrenia, failed to file and serve his former partner's statement two days prior to the hearing.[68] Here, however, the Tribunal adjourned the hearing to allow her to do so, with the effect that she could give evidence at the hearing.[69] Ultimately, the Tribunal has discretion to adjourn the hearing, however it may choose not to do so,[70] the legality of which must be determined by a reviewing court. Again, this is an issue in relation to which review applicants and victim-survivors would benefit from legal advice and assistance to ensure that the victim-survivor is able to effectively participate in the review process, if she chooses to do so.

B The Direction

The Tribunal must apply the relevant Direction in force at the time of its decision.[71] Like *Direction No 90* and the current Direction,[72] *Direction No 79* provides that 'primary considerations should generally be given greater weight than the other considerations' and that 'one or more primary considerations may outweigh other primary considerations'.[73] The weight accorded to each factor and the interaction between factors, 'is pre-eminently a matter for the Tribunal to assess'.[74]

As noted earlier, *Direction No 79* takes an uncompromising stand on domestic violence, the consideration of which arises at multiple junctures. In considering the first primary consideration, namely the protection of the Australian

62 Ibid 503 [13] (Mortimer, Halley and O'Sullivan JJ), quoting *DOM19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 862, [53] (Bromberg J).
63 Ibid 503–4 [15]–[19] (Mortimer, Halley and O'Sullivan JJ).
64 (2015) 256 CLR 203 ('*Uelese*').
65 Ibid 209 [5] (French CJ, Kiefel, Bell and Keane JJ).
66 See, eg, *Mence* (n 60) [15] (Member Eteuati); *NLJV* (n 60) [15] (Member Eteuati).
67 *Uelese* (n 64) 223 [70] (French CJ, Kiefel, Bell and Keane JJ).
68 [2018] AATA 2074, [22] (Senior Member Evans). Ultimately the decision was affirmed: at [127] (Senior Member Evans).
69 Ibid [24] (Senior Member Evans).
70 *DOM19* (n 61) 506–7 [32] (Mortimer, Halley and O'Sullivan JJ).
71 *Migration Act* (n 8) s 499(2A).
72 *Direction No 90* (n 19) [7]; *Direction No 99* (n 21) [7].
73 *Direction No 79* (n 13) [8(4)]–[8(5)].
74 *FGBP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 253, [71] (Banks-Smith J).

community, the decision-maker must consider the nature and seriousness of the non-citizen's conduct to date.[75] 'Serious conduct' is defined under *Direction No 79* as 'behaviour or conduct of concern where a conviction may not have been recorded, or where the conduct may not, strictly speaking, have constituted a criminal offence'.[76] It therefore captures, amongst other things, the range of protection orders, which may be issued in the various States and Territories.[77] *Direction No 79* further provides that 'crimes of a violent nature against women or children are viewed very seriously, regardless of the sentence imposed',[78] a 'critical difference' to the previous Direction.[79] The Tribunal may therefore decide that the circumstances of the offending are such that it 'strongly militates in favour of not revoking the mandatory cancellation decision', regardless of the victim-survivor's wishes.[80]

Domestic violence may also be relevant when assessing the best interests of minor children in Australia affected by the decision, the second primary consideration.[81] The Tribunal must therefore make findings relating to the best interests of children, which would ordinarily require input from the victim-survivor, if she is the mother of the review applicant's children. In some cases, the victim-survivor may want 'nothing to do with [the review applicant]'[82] but in other cases, she may wish him to remain in Australia. In *HGBY and Minister for Immigration and Border Protection (Migration)*, for example, the victim-survivor spoke no English and relied on the review applicant, who was in detention, every day to assist with their three young sons, for example, by speaking by telephone to their teachers and principal.[83] In revoking the visa cancellation, the Tribunal found that the primary consideration in favour of the revocation was in the best interests

75 *Direction No 79* (n 13) [13.1.1]; *Direction No 90* (n 19) [8.1.1].

76 *Direction No 79* (n 13) annex B (definition of 'serious conduct'). See also Jason Donnelly, 'Double Counting Family Violence for the Same Purpose: Permissible Decision-Making or Legal Unreasonableness?' (2022) 29(4) *Australian Journal of Administrative Law* 267.

77 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report No 114, NSWLRC Report No 128, October 2010) 111 ('*A National Legal Response*'). See also Australasian Institute of Judicial Administration, 'National Domestic and Family Violence Bench Book' (Bench Book, June 2022) <https://dfvbenchbook.aija.org.au/>.

78 *Direction No 79* (n 13) [13.1.1(1)(b)].

79 *Nathanson v Minister for Home Affairs* (2022) 403 ALR 398, 417 [61] (Gordon J).

80 *Chandra* (n 51) [35] (Senior Member Tavoularis and Member Evans).

81 *Nathanson and Minister for Home Affairs (Migration)* [2019] AATA 642, [113] (Member Burford) ('*Nathanson and Minister for Home Affairs*'), quoting *QGMJ and Minister for Immigration and Border Protection (Migration)* [2017] AATA 1537, [81] (Deputy President Kendall).

82 *Kennell and Minister for Immigration and Border Protection (Migration)* [2018] AATA 3368, [75] (Senior Member Tavoularis). At [77] (Senior Member Tavoularis):

> Having regard to (1) the very limited, indeed marginal, involvement of the Applicant in the lives of the children to date; (2) the obviously hostile state of any relationship between the Applicant and their mother, marked as it is, with domestic violence; and (3) the absence of any court-ordered or consented scheme of ongoing parental care for the children that I am aware of, I do not find that factor (b) of paragraph 13.2(4) of the Direction lends any support to a contention that the best interests of the children are served by a revocation of the Minister's decision cancelling the Applicant's visa.

83 [2019] AATA 2352, [43]–[45], [160] (Deputy President Britten-Jones) ('*HGBY*').

of the children, given that 'the applicant's wife [was] struggling to look after these children without her husband'.[84]

The third and final primary consideration is a 'kind of deeming provision' relating to the Minister's view of community expectations.[85] Therefore, it is not for the Tribunal to discern community expectations, which would be difficult to do.[86] Rather, the Tribunal must 'identify what is the "government's view" about community expectations in the particular case, to "have due regard" to that view and to "generally" afford that view more weight than other non-primary considerations'.[87] Those expectations are 'simply, and informally, expressed as follows: "if you break the law that will be held against you, the more serious the breach the more it will be held against you, and it may even be decisive"'.[88] Given the Minister's articulation of community expectations in *Direction No 79*, the application of this consideration in the review of Tribunal decision-making will generally weigh against revocation of the visa cancellation in domestic violence cases.[89]

The intention and ability of victim-survivors to accompany the review applicant overseas is regularly considered in the context of the review applicant's strength, nature and duration of ties, an 'other consideration', which often overlaps with consideration of the best interests of children.[90] Emphasising the cohesive nature of the family unit and expressing an intention to accompany the review applicant may act against revocation of the visa cancellation.[91]

Direction No 79 also requires the Tribunal to assess the impact of revocation of the cancellation on victim-survivors of the non-citizen's criminal behaviour 'where that information is available and the non-citizen being considered for revocation has been afforded procedural fairness'.[92] This consideration was interpreted as requiring the Tribunal 'to consider, when relevant, the negative impact on a victim and their family of the applicant being permitted to remain in

84 Ibid [160] (Deputy President Britten-Jones).

85 *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466, [76] (Mortimer J).

86 Ibid [74]–[76] (Mortimer J).

87 *FYBR* (n 37) 473 [74] (Charlesworth J).

88 Ibid 478 [101] (Stewart J).

89 See, eg, *WZKB and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2020] AATA 2659; *Tangataolakepa* (n 51); *Nathanson and Minister for Home Affairs* (n 81); *Scarlett and Minister for Home Affairs (Migration)* [2020] AATA 371.

90 See, eg, *HGBY* (n 83); *Nathanson and Minister for Home Affairs* (n 81).

91 See, eg, *Nathanson and Minister for Home Affairs* (n 81) [163] (Member Burford): '[t]here is no evidence before the Tribunal that suggests that they would be unable to resettle in New Zealand together as a family. In the Tribunal's view this lessens the weight to be afforded to this consideration'.

92 *Direction No 79* (n 13) [14.4(1)]. See *CGX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 284 FCR 416, where the Full Federal Court (Rares, O'Callaghan and Jackson JJ) held that despite its wording, clause 14.4 required consideration of the impact of revocation (and not non-revocation) on victims of the non-citizen's offences: at 422 [21], [23].

Australia',[93] although subsequent case law expressed a different view.[94] As Kerr J observed:

> having regard to the diversity of human dimensions as potentially may arise … I apprehend there to be no principled reason why a victim's agency is to be confined to instances in which the victim wants the offender to have his or her right of residency in Australia brought to an end.[95]

The question is no longer pressing, given the revised wording of the consideration relating to impact on victim-survivors under *Direction No 90*.[96]

The research reviewing Tribunal decisions involving domestic violence reveals a complex, decision-making matrix, in which *Direction No 79* reflects current government policy, sending a strong message that domestic violence is unacceptable. While in principle this approach is to be applauded, victim-survivors may have a range of views relating to visa cancellation, including that the review applicant should remain in Australia. Currently, however, these different voices are not reliably accommodated throughout the review process. In light of the government's stated concern to protect and support victim-survivors, there must be major changes to Australia's approach to domestic violence in the context of visa cancellation.

V REFORM

In this section, I propose reform to mitigate the unintended consequences of the existing visa cancellation system on victim-survivors of domestic violence. At the very least, section 501(3A) should be repealed as there is sufficient scope within section 501(2) to cancel visas where domestic violence has occurred.[97]

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93 *WQRJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 736, [76] (Derrington J), citing *DKN20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 1, 10–11 [36]–[37] (Collier, Markovic and Anastassiou JJ). See *Filipovich v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 846, [30] (White J): essentially, there is 'no scope' for the Tribunal to consider 'the beneficial impact of revocation of the cancellation of a visa on the family member victim'.

94 See *PGDX v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1235 ('*PGDX*'), where Kerr J held at [24] that

> there is nothing in the Full Court's reasoning in *CGX20* that requires the conclusion that a victim of offending who advances a claim that the impact on them should the cancellation of an offender's visa be revoked would be positive is disentitled from having that contention and their interest as a victim taken into account in the application of cl 14.4 of Direction No 79.

95 Ibid [55]. In this case, Kerr J held at [89] that 'Ms K PGDX's status as a victim entitled her to limited agency such that that information had to be taken into account by the Tribunal as a mandatory relevant consideration', which was denied.

96 *Direction No 90* (n 19) [9.3]. See *Manebona v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 730, [55] (Derrington J). *Direction No 90* also introduced an additional primary consideration, namely 'whether the conduct engaged in constituted family violence': at [8(2)]. This primary consideration is retained in *Direction No 99* (n 20) [8(2)].

97 See, eg, Refugee Advice and Casework Service, Submission No 2 to Senate Legal and Constitutional Affairs Committee, *Migration Amendment (Character and General Visa Cancellation) Bill 2014* (28 October 2014).

Discretionary visa cancellation provides greater scope for the voices of victim-survivors to be heard in the decision-making process as notice of an intention to cancel the visa must be provided prior to cancelling the visa.[98] There is therefore more time to access advice, gather evidence, including expert evidence and make submissions on issues such as the impact of the visa cancellation on the victim-survivor. In addition and if so desired, victim-survivors should have access to their own independent, publicly funded legal advice, assistance and representation, where they are unable to afford such services.[99] The Tribunal could work with specialist women's legal services to help them access advice in relation to what the visa cancellation means for them in practice and whether and how they would like to participate in the review process.

The procedural rules governing review should also be abandoned in favour of the Tribunal's existing, more flexible procedures.[100] While some victim-survivors may be able to overcome the effect of these rules, others may find that their ability to participate in the process is significantly hindered. Tribunal members should be given further training in relation to the procedural rules, including the power to adjourn the hearing, which could be used to increase the victim-survivor's participation in the proceedings, if she so wishes.

Direction No 99, which came into force on 3 March 2023, retains the 'expectations of the Australian community' and the 'impact on victims' considerations found in Directions No 79 and 90.[101] The 'expectations of the Australian community' consideration should be abolished given that its purpose, namely the articulation of the government's tough stance on criminal non-citizens, is already achieved by applying the substantive mandatory visa cancellation powers.[102] The 'impact on victims' consideration should also be amended to ensure that decision-makers, such as the Tribunal, are required to seek victim-survivors' views in relation to whether they would like to participate in the review process and if so, in what form.[103] In any event, regardless of whether the Direction is so amended, nothing prevents the Tribunal from instituting informal practices, designed to encourage them to participate in the process, if so desired.[104] In a welcome change, *Direction No 99* institutes 'the strength, nature and duration of

98 'Notification requirements', *LEGENDcom* (Web Page, 28 July 2023) <https://legend.online.immi.gov.au/migration/2021-2024/2023/28-07-2023/policy/Pages/_document00001/_level%20100005/level%20200060.aspx#_Toc445995449> (Notice of Intention to Consider Cancellation on Character Grounds – s 501(2)). The visa cancellation process under section 501(1) is also problematic: see Bostock, 'Procedural Fairness' (n 18).

99 See Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Eighth Periodic Report of Australia*, UN Doc CEDAW/C/AUS/CO/8 (25 July 2018) 4 [13]–[14]: the Committee expressed concern about the 'budget cuts that limit access for women and girls to legal aid' and recommended that the government ensure 'adequate funding for legal aid commissions and community-based legal services'.

100 See *AAT Act* (n 29) s 33.

101 *Direction No 99* (n 20) [8.5], [9.3].

102 *Direction No 79* (n 13) [13.3]; *Direction No 90* (n 19) [8.4].

103 *Direction No 79* (n 13) [14.4]; *Direction No 90* (n 19) [9.3].

104 *A National Legal Response* (n 78). This would necessarily have to comply with the relevant family violence frameworks of each Australian jurisdiction.

ties to Australia' as a primary consideration for decision makers.[105] It provides that 'decision makers must consider any impact of the decision on the non-citizen's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely'.[106] It is hoped that this new, primary consideration will help ensure that the impact of the visa cancellation on victim-survivors is thoroughly assessed and determined by the Tribunal.

In addition, given that 'the complexities of relationships involving domestic violence are not well understood',[107] Tribunal members would benefit from further education and training relating to domestic violence. While Tribunal members are not required to reveal their 'mental processes or provisional views',[108] there must be greater recognition of women's agency in the decision-making process, in keeping with 'the evident purpose' of the requirement to consider the impact on victim-survivors.[109]

VI CONCLUSION

The central goal of the *National Plan to End Violence against Women and Children 2022–2032* includes 'ending violence against women and children in one generation', by 'listen[ing] to and be[ing] guided by victim-survivors and people with lived experience'.[110] The Australian Government's tough approach on domestic violence is welcome; however, in the visa cancellation context, it has unintended consequences. It may act as a disincentive to reporting the violence or worse, may result in the cancellation of the victim-survivor's visa. Furthermore, as demonstrated throughout this article, its hard-line approach does not reliably accommodate the voices of women in relation to the removal of the review applicant in circumstances where it is not in their interests. In this article, I therefore propose urgently needed reform, designed to assist in hearing their voices. It is hoped that these proposed reforms will be considered when the new federal administrative review body is created.

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105 *Direction No 99* (n 20) [8.3].

106 Ibid [8.3(1)].

107 *Viane* (2018) (n 54) 539 [32] (Rangiah J).

108 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 592 (Northrop, Miles and French JJ).

109 *PGDX* (n 94) [53] (Kerr J). See, eg, *CGX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [No 2]* [2020] FCA 1842: as Colvin J noted at [10], the Tribunal had noted that it was not clear how the offending non-citizen being forced to leave Australia would impact other victims, other than positively'. As Colvin J further observed at [11], however,

> the sad reality is that it is not uncommon for the victim of a crime to be a family member' and 'in those circumstances, the prospect of a close family member being removed from Australia may cause distress to those who have been victims of past offending behaviour and it is possible that they may support the revocation application.

110 *National Plan to End Violence against Women and Children 2022–2032* (n 3) 18.