

The Auditor-General
Audit Report No.55 2010–11
Performance Audit

Administering the Character Requirements of the *Migration Act 1958*

Department of Immigration and Citizenship

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of Australia 2011

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Canberra ACT
23 June 2011

Dear Mr President
Dear Mr Speaker

The Australian National Audit Office has undertaken an independent performance audit in the Department of Immigration and Citizenship with the authority contained in the *Auditor-General Act 1997*. I present the report of this audit and the accompanying brochure to the Parliament. The report is titled *Administering the Character Requirements of the Migration Act 1958*.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's Homepage—<http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian McPhee', is positioned above the printed name and title.

Ian McPhee
Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office (ANAO). The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act 1997* to undertake performance audits and financial statement audits of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Australian Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

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Abbreviations

AF	administrative finalisations
ANAO	Australian National Audit Office
CCRD	Compliance and Case Resolution Division
Citizenship Act	<i>Australian Citizenship Act 2007</i>
D41	<i>Direction [No.41]–Visa refusal and cancellation under s501</i>
DIAC	Department of Immigration and Citizenship
GM	Global Manager
MAL	Movement Alert List
Migration Act	<i>Migration Act 1958</i>
Migration Regulations	<i>Migration Regulations 1994</i>
Minister	Minister for Immigration and Citizenship
NatO	national office
NCCC	National Character Consideration Centre
NOICR/C	Notice of Intention to Consider Refusal/Cancellation
PAM	<i>Procedures Advice Manual3</i>
PAM – Character	<i>Procedures Advice Manual3: Act – Character – s501 – The character test visa refusal and visa cancellation</i>
PAM – Penal checking procedures	<i>Procedures Advice Manual3: Sch4/4001 Penal checking procedures</i>

PBS	<i>Portfolio Budget Statements</i>
s501	Section 501 of the Migration Act
s65	Section 65 of the Migration Act

Summary and Recommendations

Summary

Introduction

1. The Department of Immigration and Citizenship's (DIAC's) purpose is to build Australia's future through the well-managed entry and settlement of people. To achieve its purpose, in 2010–11 DIAC had a budget of \$2.2 billion and 7284 full-time staff in Australia and overseas.¹

2. An important part of DIAC's role is to implement the Government's immigration policies in accordance with the *Migration Act 1958* (Migration Act), the objective of which is to '... regulate, in the national interest, the coming into, and presence in, Australia of non-citizens'. A non-citizen must apply for and be granted a visa to lawfully enter and remain in Australia. To be eligible for a visa, applicants must satisfy DIAC's decision-makers that they meet certain criteria, including the character requirements. Once a visa has been granted, a visa applicant becomes a visa holder. DIAC may cancel a visa in certain circumstances, such as when a visa holder no longer satisfies the character requirements.

The character requirements

3. Section 501 of the Migration Act (s501) establishes the character requirements. The purpose of the character requirements is to protect the public through the refusal of visa applications or cancellation of visas to non-citizens who may be of concern for reasons such as their criminal record or associations, past and present criminal or general conduct, or the risk they pose to the community if allowed to enter or remain in Australia.²

4. Character decisions are made in two stages. Firstly, a visa applicant or holder must satisfy the decision-maker that they pass the character test.³ Secondly, if a visa applicant or holder fails the character test, the decision-maker may exercise discretion to refuse a visa application or cancel a

¹ Department of Immigration and Citizenship, *Portfolio Budget Statements 2010–11, Immigration and Citizenship Portfolio, Budget Related Paper No.1.13*, Commonwealth of Australia, May 2010, pp.6, 13, 21, 30, 39, 46, 64 and 72.

² *Migration Act 1958* (Cth), s501(6).

³ The character test is described in Appendix 2.

visa on character grounds.⁴ A Ministerial Direction, *Direction [No.41]–Visa refusal and cancellation under s501*, provides further guidance to DIAC officers when exercising this discretionary power.⁵

5. The initial character screening of visa applicants is undertaken by DIAC's network of processing centres in Australia and overseas. Visa applicants identified to be of potential character concern are to be referred to DIAC's National Character Consideration Centre (NCCC) for character assessment under s501 of the Act. In relation to visa holders, the NCCC directly identifies persons for character assessment primarily through prisoner lists provided by state and territory departments of corrections. Staff of the NCCC assess visa applicants and holders against s501 of the Act and decision-makers make the decision whether or not to refuse the visa application or cancel the visa.

6. The majority of character decisions are positive. Most visa applications pass unhindered through the character screening process, and only a small minority of visa holders are identified for consideration under s501 of the Act. In 2009–10, DIAC processed 4 322 710 temporary and permanent visas, while the NCCC administered 1519 cases, refusing 156 visa applications and cancelling 58 visas on character grounds.

Audit objectives and scope

7. The objective of this audit was to assess the effectiveness of DIAC's administration of the character requirements of the Migration Act. Particular emphasis was given to the following areas, as they related to the character requirements:

- policies, guidance and training for staff to support the administration of s501 of the Act;
- processes to identify visa applicants and holders of character concern, administer cases and make decisions; and
- management arrangements supporting s501 processing.

⁴ Factors the decision-maker must consider in exercising this discretionary power include: the risk to the Australian public; international obligations; length of time in Australia; and age upon arrival.

⁵ Minister for Immigration and Citizenship, *Direction [No.41] – Visa refusal and cancellation under s501*, Commonwealth of Australia, 3 June 2009.

8. Concurrent with this audit, the ANAO audited the effectiveness of DIAC's administration of the character requirements of the *Australian Citizenship Act 2007* (Citizenship Act). The citizenship audit (ANAO Audit Report No.56 2010–11, *Administering the Character Requirements of the Australian Citizenship Act 2007*) has been tabled as a compendium report to this audit.

Overall conclusion

9. DIAC grants approximately 4.3 million visas annually and, at any point in time, there are around 1.4 million non-citizens in Australia. Managing the flow of people across Australia's borders requires a balance between facilitating movement and control. To lawfully enter and stay in Australia, a non-citizen must apply for and be granted a visa. To be eligible for a visa, applicants must satisfy DIAC's decision-makers that they meet the criteria specific to the visa for which they have applied, including the character requirements outlined in s501 of the Act. Once granted a visa, a visa applicant becomes a visa holder. DIAC may cancel a visa if the visa holder no longer satisfies the character requirements.

10. Overall, DIAC has established a sound framework for identifying and processing visa applicants and holders of potential character concern. DIAC has provided extensive guidance to its staff about the character requirements, and established processes to identify and assess visa applicants and holders with criminal histories. The department's relatively new centralised s501 decision-making unit, the NCCC, has also implemented adequate arrangements to manage the assessment of s501 cases that have been referred to it by visa processing centres. However, there are shortcomings in the implementation of this framework that reduce its effectiveness. These shortcomings arise from the:

- narrow administrative focus adopted to identify and assess persons of potential character concern; and
- limitations in the arrangements to assure the completeness and reliability of the information needed to identify and assess persons of potential character concern.

11. The Migration Act, and the associated Ministerial Direction, establish the legislative framework for administering the character requirements. The requirements are quite broad, requiring consideration of a person's documented criminal convictions (substantial criminal record) to the more general consideration of their associations, general conduct and risk they

might pose to the Australian community. In practice, the department's assessment of s501 cases primarily focuses on whether a person's background constitutes a substantial criminal record. This focus does not give full effect to the Migration Act, Ministerial Direction and DIAC's guidance, which support the broader interpretation of the character requirements. Consequently, cases that do not meet the strict thresholds set for substantial criminal record are not routinely assessed by the NCCC. The ANAO identified a number of cases where such assessment may have been warranted. The focus on substantial criminal record has also resulted in a practice of some staff in DIAC's visa processing centres being reluctant to refer visa applications to the NCCC from applicants that are potentially of character concern but do not meet the substantial criminal record element.

12. To conduct character assessments the NCCC relies on information provided to it by internal and external stakeholders. DIAC's visa processing centres are to refer visa applicants of potential character concern to the NCCC. The information provided in this referral is used by the NCCC to determine if, in the first instance, a visa applicant should be considered under s501 of the Act and, in the second instance, as the basis for further investigation of the applicant's character. External stakeholders, particularly state and territory departments of corrections, provide the NCCC with the names and other relevant details about visa holders. This information enables the NCCC to identify and assess visa holders for potential cancellation of their visa under s501 of the Act.

13. DIAC has put in place arrangements that facilitate the flow of this information to the NCCC. However, the current arrangements do not give DIAC assurance that the information received by the NCCC from external stakeholders is reliable, and that all relevant visa applications of character concern are being referred to the NCCC from visa processing centres. These limitations can be addressed by:

- formalising arrangements with external stakeholders, particularly departments of corrections, that provide DIAC with the information necessary to identify and assess visa holders of character concern under s501 of the Act; and
- implementing a quality review process to check that visa applicants of character concern are consistently identified and referred, by visa processing centres to the NCCC, for consideration under s501 of the Act.

14. With DIAC's focus on the substantial criminal record element of the character test, together with shortcomings in the completeness and reliability of information flows to the NCCC, the department's ability to identify and assess the character of visa applicants and visa holders is constrained. Consequently, there is a small but potentially significant risk that persons of character concern may enter and remain in Australia. To this end, the ANAO has made four recommendations aimed at improving the effectiveness of DIAC's administration of the character requirements of the Migration Act.

Key findings

Policy, guidance and training

15. The Migration Act and the Ministerial *Direction [No.41]–Visa refusal and cancellation under s501* establish the character requirements that apply to visa applicants and holders. The requirements include a broad character test and discretionary power to refuse an application or cancel a visa. To support the administration of the character requirements, DIAC has developed operational guidance for all staff administering the character requirements.⁶ However, this guidance does not reflect DIAC's more recent administrative changes. Other NCCC resource documents and the Character Helpdesk also provide assistance to staff administering s501 of the Act.

16. DIAC's visa processing centres in Australia and overseas, the NCCC and DIAC's national office share responsibility for administering the character requirements. While the arrangements for administering s501 of the Act are complex, the ANAO observed that each of these stakeholders generally understands their role and the role of others in administering character cases. With the centralisation of s501 assessments in the NCCC in 2010, the NCCC's Principal Assessor should be making the majority of s501 decisions. However, the delegation of s501 powers has not been updated to reflect these new arrangements. Consequently, at the time of the audit, there were 181 officers throughout the DIAC processing network still authorised to make character decisions.

⁶ Department of Immigration and Citizenship, *Procedures Advice Manual3: Act – Character – s501 – The character test, visa refusal and visa cancellation*, (unpublished) 1 January 2010.

17. Section 501 induction and training for staff administering the character requirements is generally developed and delivered on an ad hoc basis. DIAC does not have a consistent national approach for the delivery of induction and training, except for overseas posted staff. DIAC is currently re-designing its training curriculum, including a role specific course for s501 administrators.

Identifying clients of character concern

18. Visa applications are assessed by processing centres, and persons of character concern should be referred to the NCCC for assessment and decision about whether or not their application should be refused under s501 of the Act. DIAC uses several strategies to identify visa applicants of character concern. These strategies include requiring visa applicants to make declarations about character, checking DIAC's MAL during visa application processing and requiring some applicants to provide penal certificates. This information is included in referrals from visa processing centres to the NCCC. However, DIAC's quality review of the referral process is limited and, currently, does not verify whether visa applicants of character concern are consistently being identified and referred by visa processing centre staff to the NCCC. Furthermore, requiring persons of potential character concern to declare these matters relies on their honesty and MAL will only alert officers to applicants whose identity has been entered on the database due to previous immigration concerns. Also, penal certificates from many countries are either not required, not reliable or not available.

19. Once applicants are granted visas, they become visa holders. Visa holders must continue to satisfy the character requirements or risk visa cancellation under s501 of the Act. DIAC's strategies to identify visa holders of character concern include: checking incoming passenger cards for character declarations; checking entries on MAL when holders enter Australia; and the NCCC receiving prisoner lists from state and territory departments of corrections to identify visa holders who have been imprisoned in Australia. The information the NCCC receives from state and territory departments of corrections contain the details of, on average, 2743 incoming prisoners per month.

20. DIAC has not developed a standard approach to receiving incoming prisoner lists, and the number and type of prisoners referred varies between states and territories. Also, while DIAC has been receiving incoming prisoner lists since 2007, little progress has been made on a project to identify prisoners who entered prison prior to this time. In addition, the arrangements to obtain

these lists are informal—there is no formal agreement with the states and territories to provide incoming prisoner lists to DIAC. Without the prisoner lists, DIAC's ability to identify visa holders who should be considered under s501 of the Act would be severely restricted.

Processing and deciding character cases

21. The NCCC has a number of processes for assessing character cases. After a preliminary assessment to determine if further assessment of the visa applicant or visa holder's character is appropriate, NCCC case officers decide which of the processes (administrative finalisation, streamlined issues paper or full issues paper) to use in the first instance. Each of the processes, from the preliminary assessment to the full issues paper, increases in complexity, as does the information available to the NCCC to assess a visa applicant's or holder's character. The ability to select the most appropriate process for each case allows DIAC to filter and risk manage the character caseload, thereby enhancing administrative efficiency. The NCCC has developed a Refusal Risk Matrix to guide case officers in determining whether a visa applicant's character should be further assessed and, if so, through which process. A similar risk matrix for the processing of visa holder cases has not been developed.

22. The proportion of character cases processed using the least complex approach (the administrative finalisation) is comparatively few in comparison with the proportion of s501 cases that did not result in visa refusal or cancellation.⁷ Conversely, a comparatively large proportion of cases were progressed through the more complex issues paper processes, but were not refused or not cancelled. As such, there may be value in the NCCC identifying opportunities to increase the number of cases processed using processes of lesser complexity and devote more time and effort to the fewer cases with a higher likelihood of being refused or cancelled.

23. The information DIAC seeks for character assessments depends on the processes applied and accumulates from one process to the next. This information includes penal certificates, information provided by the visa applicant or holder and, for visa holders, sentencing remarks and prison

⁷ Of the ANAO's sample, 25 per cent of visa applicants and 20 per cent of visa holders were processed as an administrative finalisation. In 2009–10, 79 per cent of visa applicants and 90 per cent of visa holders were not refused or cancelled on character grounds.

reports. The information available for each process was generally sufficient and appropriate. However, as previously discussed, DIAC has not developed formal arrangements to facilitate access to information provided by third parties.

24. DIAC's approach to identifying and processing character cases is primarily focused on the substantial criminal record element. Visa applicants and holders who could be considered under other elements of the character test, such as association or past and present criminal conduct are often not considered by the NCCC. In 2009–10, the NCCC's preliminary assessment of 639 visa holders resulted in decisions not to conduct further character assessment processes because their prison sentences had generally not met the substantial criminal record element of the character test. There is no evidence that the NCCC assessed these visa holders against the other elements of the character test. The ANAO's analysis of these cases identified 65 visa holders for whom further assessment under the past and present criminal conduct element of the character test may have been warranted. These cases involved visa holders convicted of assault or grievous bodily harm (42 cases) and supplying or manufacturing drugs (15 cases), and eight cases where the visa holder had received multiple sentences. For visa applicant cases, only five of the ANAO's sample of 56 cases were assessed under elements other than substantial criminal record—these cases were considered under the past and present criminal and/or general conduct element of the test. Three of the five applicants were not refused a visa under s501 and two cases were undecided at the time of the ANAO's analysis.

25. For those visa cases that are referred to the NCCC and progress beyond preliminary assessment to the final processing stage, the Principal Assessor decides whether the visa application is refused or, for visa holders, whether the visa is cancelled. These character decisions are based on the information provided in the issues paper prepared by case officers in the NCCC. The 80 issues papers reviewed by the ANAO provided sufficient information to enable the Principal Assessor to make decisions about the character of visa applicants and holders who had failed the character test because of their

substantial criminal records.⁸ In addition, decisions were effectively documented in all cases reviewed.

26. The NCCC generally issues warnings to a visa applicant or holder who fails the character test, but whose visa has not been refused or cancelled. Whether the visa applicant or holder has received a prior warning is a consideration for the decision-maker when deciding whether to refuse or cancel a visa on character grounds. However, only a small proportion of visa applicants or holders who had been issued with a warning on one or more previous occasions had their visa refused or cancelled as a result of the most recent s501 consideration. While the decision to refuse or cancel a visa on character grounds rests with the Principal Assessor, DIAC could consider giving more guidance on the weight to be given to circumstances where multiple warnings have been previously issued.

27. The quality control officer reviews visa holder cases where it is likely that the Principal Assessor will cancel a visa; visa application cases that are likely to be refused are generally not reviewed. However, the consequences of refusing a visa application from an applicant who is in Australia are similar to cancelling a visa holder's visa—removal and exclusion and the person from Australia. As such, there would be benefit in expanding the quality control officer's role to include all onshore visa applicant cases likely to be refused.

28. Most s501 decisions can be appealed to the Administrative Appeals Tribunal and to the federal courts. In 2009–10, 77 s501 decisions were appealed, with DIAC winning or the appellant withdrawing from 48 cases (62 per cent). DIAC does not generally analyse appeal decisions to identify trends in the reasons for decisions which may have relevance to the broader caseload. The ANAO's analysis of appeal decisions over the past two years indicates that the Administrative Appeals Tribunal had interpreted the considerations in the ministerial directions differently from DIAC.⁹ There are opportunities for DIAC to improve its administration of s501 of the Act by reviewing the information available to the Appeals Tribunal and identifying processes for seeking access to similar information as part of the assessment process.

⁸ Visa applicants and holders who fail the substantial criminal record element of the character test do not have to be assessed against the other elements of the character test, such as associations and general conduct.

⁹ *Direction [No.41] – Visa refusal and cancellation under s501* replaced *Direction No.21 – Visa refusal and cancellation under s501* in June 2009.

Management arrangements to support s501 processing

29. DIAC's Strategic Plan identifies the risk that persons of national security concern or with serious health issues or serious criminal records will enter Australia. DIAC's business plans at the group, divisional and branch levels are aligned to the PBS and Strategic Plan and generally reflect the contribution required by each stakeholder. However, they do not include a number of significant tasks, such as a prison census project to identify visa holders who entered prison prior to 2007.

30. DIAC's Strategic Risk Profile also identifies the entry into Australia of persons of national security concern, with serious health issues or with serious criminal records as a risk. A Risk Assessment Summary, for which DIAC's national office is responsible, supports the Strategic Risk Profile. However, the NCCC and visa processing centres, which are responsible for administering s501 cases, have not developed s501 risk plans or outlined their approach to managing risks in administering the character requirements. A particular risk that has not been formally assessed is the practice of primarily assessing only one element of the character test, namely the substantial criminal record element.

31. The key performance indicator for administering s501 of the Act relates to the effective character screening of visa applications offshore. The key performance indicator is difficult to measure and no performance target has been set. Also, the indicator does not include the processing of visa holders in Australia.

32. There are inconsistencies, within and between, the information that DIAC publicly reports and its internal management data on the administration of the character requirements. DIAC was not able to replicate some of its internal management data, including the number of visa applicants and holders considered under s501 of the Act in 2009–10. The NCCC's indicators and service standards measure timeliness of decision-making. While some standards were met occasionally, the majority were not. For example, throughout 2009–10, the NCCC did not achieve the service standards that require it to finalise 95 per cent of visa applicant cases and 100 per cent of visa holder cases within 180 days of referral.

Summary of DIAC's response

33. DIAC provided the following summary response, and its full response is shown at Appendix 1.

34. The Department of Immigration and Citizenship (DIAC) welcomes the opportunity to contribute to the ANAO performance audit *Administering the Character Requirements of the Migration Act 1958* and agrees with the recommendations. DIAC notes that overall, the ANAO has concluded that DIAC has established a sound framework for identifying and processing visa applicants and holders of potential character concern.

35. DIAC notes the suggested improvements to the character framework to improve effectiveness. DIAC is committed to continually improving the administration of the character requirements and integrity of the character program and welcomes these suggestions.

36. The department accepts the recommendations of this report and notes that work has commenced on a number of measures which address many of the issues raised. Other initiatives will be considered as a result of this report.

Recommendations

Recommendation No. 1

Paragraph 3.28

To gain assurance that its processes for identifying and referring visa applicants of character concern to the NCCC are effective, the ANAO recommends that DIAC implement a risk-based approach to quality reviewing the processing of visa applications.

DIAC's response: Agreed.

Recommendation No. 2

Paragraph 3.49

To provide a formal basis for obtaining the information necessary to support the identification and assessment of visa holders of character concern against the character requirements of the *Migration Act 1958*, the ANAO recommends that DIAC:

- takes steps to establish appropriate arrangements with the relevant authorities to provide this information; and
- clearly defines its information requirements.

DIAC's response: Agreed.

Recommendation No. 3

Paragraph 5.12

To better manage the risks associated with administering the character requirements of the *Migration Act 1958*, the ANAO recommends that DIAC develop a risk management plan that identifies and assesses these risks, as well as appropriate mitigation strategies.

DIAC's response: Agreed.

**Recommendation
No.4****Paragraph 5.25**

To improve its capacity to measure the performance of its administration of the *Migration Act 1958* as it relates to the character requirements, the ANAO recommends that DIAC:

- develop and implement a range of relevant performance indicators; and
- collect, analyse and report performance data against these performance indicators.

DIAC's response: Agreed.

Audit Findings

1. Introduction

This chapter provides an overview of the character requirements of the Migration Act 1958, and DIAC's administration of the requirements. The audit objective and scope are also outlined.

1.1 The Department of Immigration and Citizenship's (DIAC's) purpose is to build Australia's future through the well-managed entry and settlement of people. To achieve its purpose, in 2010–11 DIAC had a budget of \$2.2 billion and 7284 full-time staff located in offices in all Australian states and territories and in Australian embassies and high commissions in over 60 countries.¹⁰

1.2 DIAC grants approximately 4.3 million permanent and temporary visas annually¹¹ and, at any point in time, there are around 1.4 million non-citizens in Australia.¹² Managing the flow of people is a complex task requiring a balance between facilitating movement and control. DIAC principally seeks to strike this balance through the administration of Australia's universal visa system. It is responsible for administering the visa system in accordance with the *Migration Act 1958* (Migration Act) and *Migration Regulations 1994* (Migration Regulations). The objective of the Migration Act is to '... regulate, in the national interest, the coming into, and presence in, Australia of non-citizens'.¹³

1.3 To lawfully enter and remain in Australia, a non-citizen must apply for, and be granted, a visa. To be eligible for a visa, applicants must satisfy DIAC's decision-makers that they meet certain criteria, which include the character requirements, as defined by the Migration Act and Regulations. Alternatively, DIAC may refuse to grant a visa if the applicant does not meet the eligibility requirements.

¹⁰ Department of Immigration and Citizenship, *Portfolio Budget Statements 2010–11, Immigration and Citizenship Portfolio, Budget Related Paper No. 1.13*, Commonwealth of Australia, May 2010, pp.6, 13, 21, 30, 39, 46, 64 and 72.

¹¹ Department of Immigration and Citizenship, *Department of Immigration and Citizenship Annual Report 2009–10*, Commonwealth of Australia, October 2010, p.2.

¹² Based on 2006 Australian Census data (ABS Cat.No.2068.0–2006 Census Tables). In the 2006 census, 1.4 million people identified themselves as non-citizens, 17.1 million people identified themselves as citizens, and 1.3 million people did not respond to the question.

¹³ *Migration Act 1958* (Cth) s 4(1).

1.4 Once a visa has been granted, a visa applicant becomes a visa holder. DIAC may cancel a visa in certain circumstances, such as when a visa holder no longer satisfies the visa conditions. Appendix 3 provides a brief description of the visa refusal and cancellation powers under the Migration Act. One of these refusal and cancellation powers relates to the character of a visa applicant or visa holder.

The character requirements

1.5 The character requirements that apply to visa applicants and holders are outlined in section 501 (s501) of the Migration Act. These requirements include a character test. In this respect, the Migration Act differs from the *Australian Citizenship Act 2007* (Citizenship Act), which also refers to character but does not define it. The purpose of the s501 character requirements is to protect the public through the refusal of visa applications or cancellation of visas to non-citizens who may be of concern to the public.¹⁴ Character assessments, and the decision to refuse a visa application or cancel a visa, are undertaken in two stages.

1.6 Firstly, a visa applicant or holder must satisfy the decision-maker that they pass the character test. The elements of the character test are described in more detail in Appendix 2. A visa applicant or holder may not pass the character test if they:

- have a substantial criminal record;
- have, or had, an association with a person, organisation or group reasonably suspected of involvement in criminal conduct;
- are not of good character with regard to their past and present criminal conduct and/or general conduct; or
- would be at significant risk of: engaging in criminal conduct; harassing, molesting, intimidating or stalking another person; vilifying, inciting discord or being a danger to the community if allowed to enter or remain in Australia.¹⁵

¹⁴ Department of Immigration and Citizenship, *Portfolio Budget Statements 2010–11, Immigration and Citizenship Portfolio, Budget Related Paper No. 1.13*, Commonwealth of Australia, May 2010, p.47.

¹⁵ *Migration Act 1958* (Cth), s 501(6).

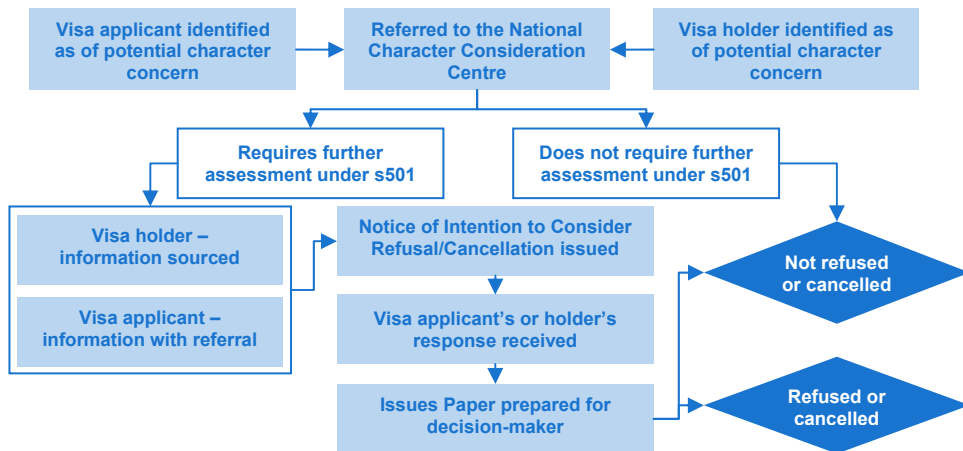
1.7 Secondly, if a visa applicant or holder fails the character test, the decision-maker may exercise a discretionary power to refuse a visa application or cancel a visa on character grounds. Factors the decision-maker must consider in exercising this discretionary power include: the risk to the public should a visa applicant or holder be allowed to enter or stay in Australia; international obligations; the length of time the person has been in Australia; and their age on arrival.

1.8 In 2009, the Minister issued *Direction [No.41] – Visa refusal and cancellation under s501* (D41), which provides further guidance to DIAC officers implementing the Migration Act and Regulations.¹⁶ D41 is supported by the *Procedures Advice Manual3* (PAM), which includes a chapter that outlines the policy and procedures for administering character decisions.¹⁷

1.9 Figure 1.1 and subsequent paragraphs outline the key steps in DIAC's s501 processes. Appendix 4 describes this process in more detail.

Figure 1.1

Key steps—processing s501 visa cases



Source: ANAO representation.

1.10 The initial character screening of visa applicants is undertaken by processing centres in Australia and overseas. Visa applicants identified to be of potential character concern are to be referred to DIAC's National Character

¹⁶ Minister for Immigration and Citizenship, *Direction [No.41] – Visa refusal and cancellation under s501*, Commonwealth of Australia, 3 June 2009.

¹⁷ Department of Immigration and Citizenship, *PAM3: Act – Character s501 – The character test, visa refusal & visa cancellation*, (unpublished) 1 January 2010.

Consideration Centre (NCCC) for character assessment under s501 of the Act. Visa holders are primarily identified by the NCCC for character assessment through incoming prisoner lists provided by state and territory departments of corrections. The NCCC assesses visa applicants or holders against the character test and makes a decision about whether or not to refuse the visa application or cancel the visa.

1.11 The majority of character decisions are positive. Most visa applications pass unhindered through the character screening process, and only a small minority of visa holders are identified for consideration under s501 of the Act. In 2009–10, DIAC processed 4 322 710 temporary and permanent visas, while the NCCC administered 1519 cases, refusing 156 visa applications and cancelling 58 visas on character grounds. This represents less than one per cent of total visa refusals and less than one per cent of total visa cancellations respectively.¹⁸ Table 1.1 provides an overview of the NCCC’s caseload for 2009–10.

Table 1.1

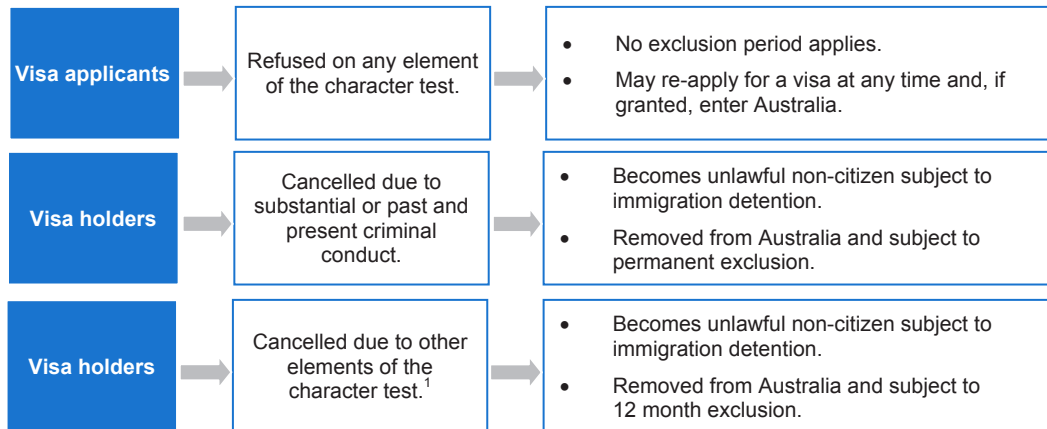
The NCCC character caseload for 2009–10

	Total	Undecided cases as at 1/07/2010	Applicant passed the character test	Applicant failed the character test but visa granted or retained	Visa applications refused and visas cancelled
Visa Applicants	968	232	89	491	156
Visa Holders	1 502	911	20	513	58
Total	2 470	1 143	109	1 004	214

Source: ANAO analysis of DIAC’s 2009–10 Annual Report, the NCCC Performance Dashboard and data provided to the ANAO by DIAC.

1.12 The impact of a decision to refuse a visa application or cancel a visa can be significant. Section 503(1) of the Migration Act states that visa applicants who have had their visa application refused and visa holders who have had their visa cancelled under s501 of the Act are excluded from Australia for a period determined by the Migration Regulations. As outlined in Figure 1.2, the impact of character decisions, including exclusion periods, vary depending on the location of the applicant and grounds for refusal or cancellation.

¹⁸ In 2009–10, DIAC refused 173 754 and cancelled 38 633 visas. DIAC’s systems identify the section of the Act under which a visa was refused or cancelled, but do not record the reasons for refusal or cancellation. For example, of the visas cancelled in 2009–10, the majority (22 024 visas) were cancelled under section 128 of the Migration Act (Cancellation of visas of people outside Australia).

Figure 1.2**Impact of visa refusal or cancellation**

Note 1: Other elements of the character test include association and the risk that a visa applicant or holder may vilify a segment of the community if allowed to enter or remain in Australia.

Source: ANAO representation of the exclusion periods for decisions to refuse a visa application or cancel a visa under s501, as prescribed by sections 198 and 503 of the Migration Act and special return criteria 5001 and 5002 in Schedule 5 of the Migration Regulations.

Previous ANAO audits

1.13 The ANAO has not previously audited DIAC's administration of the character requirements of the Migration Act. In 2006–07, the ANAO audited the department's administration of the health requirement of the Migration Act¹⁹ and, in 2008–09, DIAC's management of the Movement Alert List.²⁰

¹⁹ ANAO Audit Report No.37 2006–07, *Administration of the Health Requirement of the Migration Act 1958*.

²⁰ ANAO Audit Report No.35 2008–09, *Management of the Movement Alert List*.

The audit

Audit objective and scope

1.14 The objective of this audit was to assess the effectiveness of DIAC's administration of the character requirements of the Migration Act. Particular emphasis was given to the following areas:

- policies, guidance and training for staff to support the administration of s501 of the Act;
- processes to identify visa applicants and holders of character concern, administer cases and make decisions; and
- management arrangements supporting s501 of the Act processing.

1.15 The ANAO's audit focused on s501 of the Migration Act. The audit did not assess the administration of the public interest criteria or behaviour concern non-citizen requirements.²¹

1.16 Concurrent with this audit, the ANAO audited the effectiveness of DIAC's administration of the character requirements of the *Australian Citizenship Act 2007* (Citizenship Act). The citizenship audit (ANAO Audit Report No.56 2010–11, *Administering the Character Requirements of the Australian Citizenship Act 2007*) examined similar areas to those described above, and has been tabled as a compendium report to this audit.

Audit methodology

1.17 In undertaking this audit, the ANAO reviewed DIAC files in its national office (NatO) and the NCCC. The audit team also interviewed DIAC personnel in three of DIAC's visa processing centres, the NCCC and NatO.

1.18 The ANAO examined a sample of 111 (56 visa applicant and 55 visa holder) cases that had been referred to the NCCC. The judgemental sample included 34 undecided cases and 77 cases that had been decided in 2009–10.

²¹ The Migration Regulations prescribe a number of public interest criteria (PIC) relevant to s501. PIC 4001 re-states the character test and is the mechanism by which s501 is applied to most visa types. PIC 4002 states that an applicant cannot be granted a visa if the Australian Security Intelligence Organisation assesses the person to be a risk to Australia's security. PIC 4003 states that an applicant cannot be granted a visa if the Minister for Foreign Affairs determines that the person's presence in Australia would be contrary to Australia's foreign policy interests. The behaviour concern non-citizen requirements apply to New Zealand citizens arriving in Australia (see Chapter 3).

Cases were selected to ensure a mixture of decision outcomes, processes employed to reach a decision and decision-makers. The sample cases were also selected to ensure a variety of visa applicant and holder attributes, such as age of a visa applicant or holder, nationality and visa type applied for or held.

1.19 The audit was conducted in accordance with the ANAO Auditing Standards at a cost of \$222 000.²²

Report structure

1.20 This report has a further four chapters, as described in Figure 1.3.

Figure 1.3

Report structure

Chapter 2 Policy, Guidance and Training	This chapter describes the legislative and policy framework of the character requirements and examines the guidance developed by DIAC to support its administration of the requirements. The chapter also analyses the roles and responsibilities of DIAC's officers administering s501 of the Act and the training provided for them.
Chapter 3 Identifying Clients of Character Concern	This chapter examines the strategies used by DIAC to identify visa applicants and holders of character concern.
Chapter 4 Processing and Deciding Character Cases	This chapter examines DIAC's processes for assessing persons of character concern and deciding character cases. The chapter also analyses appeals of DIAC's character decisions and how it seeks to learn from appeal outcomes.
Chapter 5 Management Arrangements to Support s501 Processing	This chapter examines DIAC's management arrangements to support the administration of the character requirements of the Migration Act. DIAC's planning processes, risk management strategies and reporting against program objectives in relation to character requirements is also discussed.

²² As mentioned in paragraph 1.16, this report is one of a compendium (with ANAO Audit Report No.56). The combined cost was \$444 000.

2. Policy, Guidance and Training

This chapter describes the legislative and policy framework of the character requirements and examines the guidance developed by DIAC to support its administration of the requirements. The chapter also analyses the roles and responsibilities of DIAC's officers administering s501 of the Act and the training provided for them.

2.1 Legislation and policy provide the framework for administering the functions and services of government. Staff administering legislation and government policy should be supported by clearly defined roles and responsibilities, appropriate training and current guidance materials.

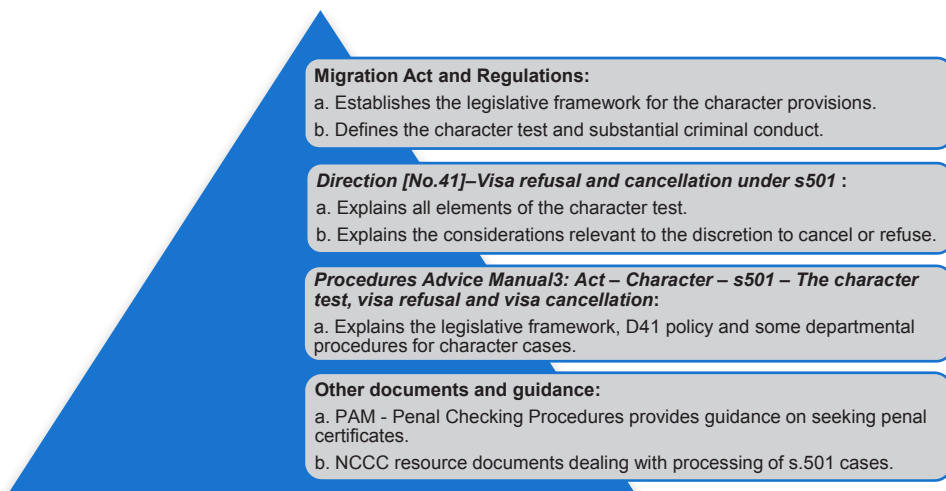
2.2 The ANAO reviewed the legislation and policy governing the administration of the character requirements of the Migration Act, including the roles and responsibilities of staff. The guidance, induction and training provided by DIAC to staff administering the character requirements of the Migration Act were also examined.

Legislation, policy and guidance framework

2.3 Figure 2.1 illustrates the hierarchy of legislation, policy and guidance relevant to the character requirements.

Figure 2.1

Character policy and guidance hierarchy



Source: ANAO representation.

The Migration Act and Direction No.41

2.4 The Migration Act sets out the visa eligibility requirements, including s501, which establishes the character requirements. D41 provides further guidance to support DIAC officers administering s501. Section 501 of the Act places the onus on a visa applicant or holder to satisfy the Minister or delegated decision-makers that they pass the character test. If a visa applicant or holder does not satisfy the character test, the Minister has discretion to refuse an application or cancel a visa on character grounds.²³

The character test

2.5 Unlike the character requirements of the Citizenship Act, s501 of the Migration Act is detailed and prescribes a broad character test.²⁴ The character test has four elements. Firstly, a visa applicant or holder may not pass the character test if, under s501(6)(a), they have a substantial criminal record. The reasons a person would fail the character test due to a substantial criminal record include: where they have been sentenced to prison for more than 12 months or received multiple sentences in excess of two years.²⁵

2.6 Sections 501(6)(b),(c) and (d) contain the three other elements, which are more subjective and include where a visa applicant or holder:

- has or had an association with a person, organisation or group reasonably suspected of involvement in criminal conduct;
- is not of good character with regard to their past and present criminal conduct and/or their general conduct; or
- would be at significant risk of: engaging in criminal conduct; harassing, molesting, intimidating or stalking another person; vilifying, inciting discord or being a danger to the community if allowed to enter or remain in Australia.²⁶

²³ *Migration Act 1958* (Cth) ss 501(1), (2), (3). Note: for visa holders, the Minister must also reasonably suspect that the person does not pass the character test.

²⁴ The Citizenship Act requires an applicant for citizenship to satisfy the Minister that they are of good character at the time of the decision on their application, but does not define this concept.

²⁵ *Migration Act 1958* (Cth) s 501(7). A person may also fail the character test due to a substantial criminal record if they were sentenced to death, life imprisonment, or were acquitted of offences due to insanity.

²⁶ *Migration Act 1958* (Cth) s 501(6).

2.7 The Migration Act does not further define these latter three elements of the character test. However, D41 provides direction for DIAC officers implementing the character test. For example, D41 identifies the factors that contribute to a visa applicant or holder failing the association grounds of the character test. These factors include the nature, degree, frequency and duration of the association, and the person’s sympathy or support for an associate’s criminal conduct.

Discretionary decision to cancel or refuse

2.8 The second stage of character decision-making is the discretionary power to refuse an application or cancel a visa once a person is found to fail the test. The Migration Act does not describe this power. However, D41 lists and describes the considerations that the decision-maker must reflect on when exercising the discretionary power (see Table 2.1).

Table 2.1

Primary and other considerations

Primary considerations	Other considerations
Protection of the Australian community, including seriousness of the relevant conduct and risk the conduct may be repeated.	The nature and extent of any relationships in Australia, including business, family or other ties.
Whether the person was a minor when they began living in Australia.	The person’s age, such as whether they are elderly or a minor.
Length of time a person had been resident in Australia before engaging in criminal conduct.	The person’s health and access to relevant treatment for illness offshore.
Relevant international obligations, including but not limited to, the best interests of the child and non-refoulement obligations. ¹	Links to the country of removal.
	Hardship that may be caused to the person or family members resident in Australia.
	Level of education, including capacity of the person to advocate against cancellation or refusal, or efforts made to improve their education and increase capacity to positively contribute to society.
	Whether DIAC has previously warned the person about conduct that may result in cancellation of their visa under s501 of the Act.

Note 1: Non-refoulement is a principle in international law that, in general, prevents the return of refugees to a country where they are likely to be persecuted.²⁷

Source: Minister for Immigration and Citizenship, *Direction [No.41] – Visa refusal and cancellation under s501*, Commonwealth of Australia, 3 June 2009, pp.11-19.

²⁷ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, ATS 1954 No.5, art 33, (entered into force 22 April 1954).

2.9 Decision-makers are required to take into account all primary considerations and any other considerations relevant to each case. D41 states that the other considerations should normally be given less weight than the primary considerations. DIAC officers advised the ANAO that the Migration Act and D41 were useful for administering character cases and decision-making. Taken together, the Migration Act and D41 provide adequate direction about the elements of the character test and the discretionary power to refuse an application or cancel a visa.²⁸

Procedures Advice Manual

2.10 The Procedures Advice Manual (PAM) provides operational guidance to DIAC staff implementing the Migration Act and Regulations. PAM contains a chapter on character entitled *Procedures Advice Manual3: Act – Character – s501 – The character test, visa refusal and visa cancellation* (PAM – Character). PAM – Character provides guidance on the:

- legislative and policy framework, including the application of the character test and power to refuse a visa application or cancel a visa on character grounds; and
- procedures for assessing the character of visa applicants and holders under s501 of the Act.

2.11 PAM – Character is intended to be used by all staff administering the character requirements. It was updated and reissued on 1 January 2010. The update addressed significant changes in character processes, such as the consolidation of character cases in the NCCC and introduction of D41 on 15 June 2009. However, more recent changes to s501 processes, such as the appointment of the Principal Assessor, are not reflected in the PAM – Character. DIAC is reviewing PAM – Character and has advised the ANAO that an updated version will be available to staff in mid-August 2011.

2.12 The ANAO explored with DIAC staff their views of PAM – Character. DIAC officers interviewed by the ANAO were generally aware of the document and could access it through the department's central information repository, Legend.²⁹ However, staff opinions about its relevance and

²⁸ The Migration Act and D41 do not describe the process for assessing character cases under s501. This administrative guidance is covered by PAM – Character (described later in this section).

²⁹ Legend is DIAC's central repository for legislation, regulations and departmental guidelines. It can be accessed through the DIAC's intranet homepage.

usefulness varied. NCCC staff stated that, generally, the Migration Act and D41 provide sufficient guidance about the character test and discretion to refuse or cancel a visa and that they had a good understanding of character processes without further guidance. Other staff in visa processing centres viewed PAM – Character guidance as necessary and satisfactory; but reported that it provided a substantial amount of information that could be better focused.

2.13 Staff in the NCCC specialise in the administration of s501 cases. As such, NCCC staff informed the ANAO that they require guidance on only key policy and operational issues. On the other hand, the processing centres deal with few character cases and only require sufficient guidance to identify applicants of character concern and refer cases to the NCCC. Therefore, there may be value in DIAC targeting PAM – Character to the needs of the different stakeholders, rather than having one document addressing all requirements.

2.14 PAM also contains a separate chapter on penal checking procedures entitled *PAM3: Sch4/4001 Penal checking procedures* (PAM – Penal checking procedures). The chapter outlines the requirement to seek penal certificates from visa applicants and the procedures to be followed by applicants to obtain penal certificates from specific countries.

NCCC resource documents

2.15 The NCCC has developed two resource documents that provide operational guidance for its staff processing s501 cases. The first document provides guidance on receiving visa holder referrals, checking the visa holder's status and determining s501 liability, and seeking relevant information for character assessments. The second provides guidance on engaging with the visa applicant or holder, drafting decision-making documents, and post-decision procedures.

2.16 The ANAO observed that parts of the first resource document were out-of-date³⁰, while the second had been updated in May 2010. Nevertheless, the resource documents are useful tools to assist NCCC case officers administering s501 cases. DIAC advised the ANAO that it has assigned responsibility for periodically reviewing these documents to a newly

³⁰ For example, the first resource document advised case officers to seek state corrections information for Australian Capital Territory prisoners from New South Wales contacts until December 2008, with no information provided on the processes to be applied post-2008.

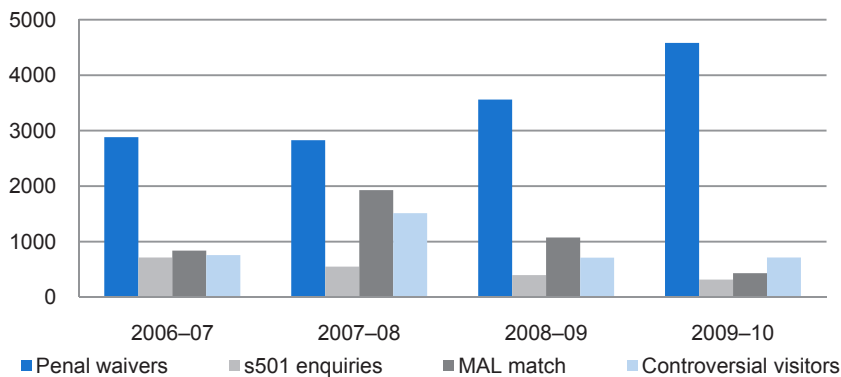
appointed decision support officer, to ensure that they remain current and relevant.

Character Helpdesk

2.17 The Character Helpdesk provides character policy and procedural advice to visa processing centres. It also administers requests from processing centres seeking approval to grant a visa application without receiving an otherwise required penal certificate (penal waivers).³¹ The Character Helpdesk receives around 6000 requests for support each year. Figure 2.2 shows the breakdown of requests for the past four years and illustrates that the profile of requests to the Character Helpdesk has changed.

Figure 2.2

Character Helpdesk requests, by main classifications



Source: ANAO analysis.

2.18 DIAC informed the ANAO that it does not analyse Helpdesk data because its database has limited functionality for searching and extracting meaningful information, making analysis time consuming and costly. Nevertheless, while a balance needs to be achieved between the costs and benefits of analysing Helpdesk data, the ANAO suggests that analysis would assist DIAC to better understand the reasons for trends in the data, such as why the number of penal waiver requests is increasing, and to identify training needs and areas in PAM – Character that require review and updating.

³¹ Penal certificates and waivers are discussed in more detail in Chapter 3.

Roles and responsibilities

2.19 DIAC’s visa processing centres in Australia and overseas, the NCCC and NatO share responsibility for administering the character requirements of the Migration Act. The arrangements, which are outlined in Figure 2.3, are complex, but the ANAO observed that each stakeholder generally understands their role, and the role of others, in administering character cases. The following section outlines the role of these key stakeholders.

Figure 2.3

Key stakeholders involved in administering s501 of the Migration Act

Visa processing centres and posts	Client Services Group			
	Visa processing centres			
	Receive and process visa applications.	Conduct character checking requirements.	Identify individuals of character concern.	Complete a referral to the NCCC.
NCCC	Client Services Group			
	Global Manager Character and Principal Assessor ¹			
	Review prison lists and referrals to assess liability.	Develop issues papers to inform decision-making.	Quality control of cases where cancellation is likely.	Refer cases to the relevant decision-maker.
NatO	Policy and Program Management Group			
	Compliance and Case Resolution Division			
	Strategic Framework and Stakeholder Engagement Branch		Character and Case Management Branch	
	Character and Cancellation Framework Section develops policy and is responsible for the legislative framework and D41.		Character Program Management Section manages the character helpdesk and program management unit.	

Note 1: The Principal Assessor is physically located in Melbourne but is part of the Policy and Program Management Group.

Source: ANAO representation.

Visa processing centres

2.20 Visa processing officers located in processing centres in DIAC’s state and territory offices and overseas posts receive and process visa applications. These processing officers are delegated power under s65 of the Migration Act (s65) to grant visas to applicants who meet all visa conditions, including the character requirements. Processing officers may also refuse visa applications, but should not refuse on character grounds under s65 of the Act. If concerns

about a visa applicant's character are identified, the processing officer decides whether to refer the applicant to the NCCC for an assessment under s501 of the Act.

2.21 Once an applicant has been referred to the NCCC for character assessment, the processing officer should wait for the NCCC to refuse a visa application on character grounds, or refer the application back to the processing officer with advice that it will not be refused under s501 of the Act. If the application is referred back to the processing officer, a visa is granted if all other criteria are met.

National Character Consideration Centre

2.22 The NCCC is responsible for assessing all visa applicants and holders referred to it against s501 of the Act. The Global Manager (GM)-Character oversees the operations of the NCCC. There are a number of different teams in the NCCC responsible for different processing functions. These functions include receiving and assessing referred visa applicants, identifying visa holders liable for character consideration and developing issues papers to inform s501 decision-makers. These functions are discussed in detail later in this report.

National office

2.23 The Compliance and Case Resolution Division (CCRD) in NatO provides policy advice and operational support to visa processing centres and the NCCC. Positioned within CCRD, the Character and Cancellation Framework Section is responsible for developing the legislative and policy framework for s501 processing and decision-making. This includes identifying the need for and seeking legislative amendments, monitoring and reporting on policy issues relevant to D41 and providing other relevant policy advice.

2.24 The Character Program Management Section, also located within CCRD, has a number of units with functions relevant to the administration of s501 of the Act. One of the units, the Character Helpdesk, is responsible for providing procedural support and policy advice to a visa processing network about referring visa applicants to the NCCC. Another unit is the Program Management Unit, which was established to improve the administration of a number of key character program functions. The unit is currently focused on updating PAM and working with the College of Immigration to develop character training courses.

Section 501 decision-makers

2.25 Under DIAC's current processes, officers in the NCCC or the Principal Assessor should make all character decisions. The GM-Character and Deputy GM-Character are responsible for s501 decisions in low risk cases. The Principal Assessor is responsible for decisions in all serious, sensitive and complex s501 cases.³² The Minister delegates the decision-making powers under s501 of the Act through the Instrument of Delegation and Authorisation.

2.26 However, DIAC has not updated the Instrument of Delegation and Authorisation to reflect current processes and pre-existing delegations (from when character decision-making was less centralised) had not been removed at the time of the audit. As at March 2011, 181 officers located throughout the DIAC network were delegated the power to make character decisions under s501 of the Act. This means that DIAC staff with s501 powers, including some junior staff in visa processing centres, can still make a valid character decision. DIAC advised the ANAO that some senior offices located in state and territory offices and overseas posts need to have s501 power for emergencies. However, DIAC does not know if this power is being exercised and how many s501 decisions are being made by non-NCCC staff. Updating the Instrument of Delegation and Authorisation to reflect current processes, including reducing the number of s501 delegates in state and territory offices and overseas posts to a few senior staff, would strengthen DIAC's oversight of s501 decisions.

Training

Character training for processing staff

2.27 DIAC officers posted overseas and in processing centres are responsible for screening applicants against s501 of the Act to identify persons of potential character concern. This role requires knowledge of the character test and how to administer it.

2.28 DIAC does not have a consistent national approach to delivering induction and training about the character requirements to officers in onshore processing centres. The induction and training programs provided to staff in onshore processing centres are developed in-house and delivered on an ad hoc basis. When reviewing the training programs from two processing centres, the

³² The First Assistant Secretary, CCRD, and the Deputy Secretary, Policy and Program Management Group, may make decisions in complex cases where the Principal Assessor has a conflict of interest.

ANAO noted that their content and completeness varied. For example, one of the programs focused on the public interest criteria and only very briefly mentioned s501 of the Act, while the other program described s501, including the character test, in more detail.

2.29 In its 2010–11 business plan, the NCCC identified regular engagement with the processing centres that are its main referrers of s501 visa applicant cases as one of its objectives.³³ To fulfil its objective, the NCCC conducts regular teleconferences with some processing centres and NCCC officers held a character workshop in early 2010 at the Global Processing Centre in Hobart. The NCCC plans to hold a similar workshop for processing centres in Sydney during 2010–11.

2.30 Given that all processing officers need to understand the character requirements, the ANAO considers that similar visits to other onshore processing centres would be beneficial. Analysis of Character Helpdesk data, as discussed above, would assist DIAC to refine the program and identify the processing centres that would benefit from a workshop with the NCCC.

2.31 In contrast to the current approach for onshore processing centres, all staff selected for an overseas posting attend the Overseas Training Course prior to taking up their positions. This course includes a character module presented by NCCC officers, which provides information on the legislative framework, roles and responsibilities of key stakeholders, procedural issues such as referrals and penal checking, and important points of contact. The ANAO considers that the Overseas Training Course provides adequate training for overseas posted staff administering the s501 character test.

Character training for NCCC staff

2.32 The NCCC generally delivers induction through a buddy system. The buddy system involves experienced officers mentoring new staff for up to three weeks, after which time they learn on-the-job through managers and informal staff networks. There is generally no guidance provided to officers performing the buddy role and different induction programs have been developed by individual officers. There would be benefit in DIAC reviewing

³³ The NCCC identified the Auckland and London posts and processing centres in Hobart and Sydney as its main referrers of visa applicant cases.

the documents currently used to induct staff and consolidating them into a formal package to guide the induction process.

2.33 The NCCC analyses difficult subject matter, sometimes involving very serious crimes and violent offenders. To assist NCCC staff through the emotional rigours of character cases, there may also be benefit in the NCCC team leaders discussing this issue with new starters during induction and with all staff during performance discussions.

2.34 Since its inception in 2007, the NCCC has developed two training programs for its staff. The first provided training to new staff when the NCCC was established and the second provided training to new staff commencing as a result of the transfer of the visa applicant caseload from the Brisbane Character Assessment Unit to the NCCC.³⁴ These programs covered topics such as the character test, the power to cancel or refuse, accessing relevant information, merits and judicial review and some other significant policy and procedural issues. While two NCCC staff members reported that they were involved in developing the second program, none of the nine staff interviewed by the ANAO had attended this training or had received any training on the character requirements. The training has not been repeated.

2.35 The ANAO noted that training attended by NCCC staff in 2009–10 focused on systems. Only two officers had attended a good decision-making course and none had attended training to enhance essential skills such as writing or interviewing clients. Table 2.2 shows the training programs most attended by NCCC officers in 2009–10.

Table 2.2

Training programs attended by NCCC officers in 2009–10

Training program attended	No. of Staff
CMAL/MAL	16
Legend	6
Records Management & Basic TRIM	5
Intermediate TRIM Training	3

Source: Department of Immigration and Citizenship, *NCCC Performance Dashboard*, 30 June 2010.

³⁴ Prior to 1 January 2010, the Brisbane Character Assessment Unit was responsible for assessing the character of visa applicants.

2.36 The NCCC employed a decision support officer in late 2010. The role of the decision support officer is still developing. However, NCCC management indicated that this officer will develop an induction program and will be the central point of contact for training requirements in the NCCC.

Character training for NatO staff

2.37 Officers in NatO are responsible for a number of character-related roles and functions, such as developing policy and managing the Character Helpdesk. Nevertheless, these officers do not receive training about the character requirements. This is a particular risk in the context of high staff turnover. For example, during the course of the ANAO's audit fieldwork, the Character Helpdesk turned over its staff of two within three weeks. The new Character Helpdesk staff were required to provide guidance without any s501 training.

A new training program – the College of Immigration

2.38 As discussed above, character training for staff involved in administering s501 of the Act has been developed and delivered on an ad hoc basis. In addition, DIAC has not identified core competencies for staff involved in character roles. DIAC's College of Immigration³⁵ is currently re-designing its training curriculum and the new programs, including some relating to the character requirements, are expected to be delivered in late 2011.

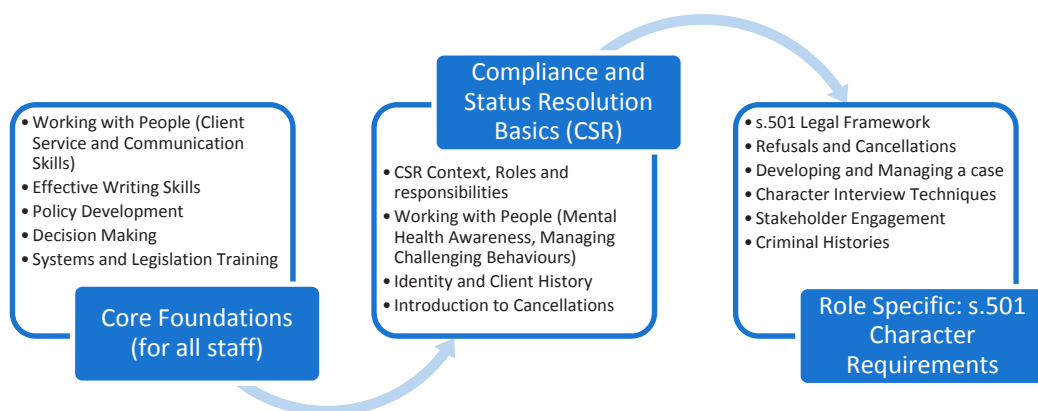
2.39 The draft training program for staff administering s501 of the Act has three tiers (illustrated in Figure 2.4), including:

- Core Foundations training curriculum for all DIAC staff;
- Compliance and Status Resolution Basics course for all staff with compliance and status resolution roles, including processing centres, NCCC and NatO officers; and
- role specific courses, such as a s501 course for NCCC staff.

³⁵ The College of Immigration was established by DIAC on 3 July 2006 to improve the quality of training packages delivered to its staff.

Figure 2.4

Elements of the College of Immigration's draft training model



Source: ANAO representation.

2.40 As the new training program is in development, the ANAO did not review its coverage of the character requirements or the extent to which it will resolve the lack of training for certain staff and inconsistencies in the quality and completeness of training provided to others.

Conclusion

2.41 The Migration Act and the Ministerial Direction provide adequate direction to DIAC officers about the character test and discretionary power to refuse an application or cancel a visa. To support the administration of the character requirements, DIAC has developed operational guidance, specifically PAM – Character. This document is detailed, but does not reflect DIAC's current administrative arrangements, including the role of the Principal Assessor. Targeting the contents of PAM – Character to the needs of specific users (processing centre staff and the NCCC) would increase its usefulness. Staff administering s501 of the Act also have access to other useful guidance, including NCCC resource documents and the Character Helpdesk.

2.42 Responsibility for administering the character requirements is shared by DIAC's visa processing centres in Australia and overseas, the NCCC and DIAC's national office. While the arrangements for administering s501 of the Act are complex, each stakeholder generally understands their role and the role of others in administering character cases. However, the delegation of s501 powers has not been updated to reflect the centralisation of character decisions

in the NCCC in 2010. Consequently, at the time of the audit, there were 181 officers throughout the DIAC processing network still authorised to make character decisions. Updating the s501 delegation instrument to reflect current practice would strengthen DIAC's oversight of s501 decisions.

2.43 DIAC does not have a consistent national approach to delivering induction and training about s501 administration to staff in processing centres in Australia or the NCCC. Induction and training is generally developed locally and delivered on an ad hoc basis. DIAC is currently re-designing its training curriculum, including a specific course for s501 administrators.

3. Identifying Clients of Character Concern

This chapter examines the strategies used by DIAC to identify visa applicants and holders of character concern.

3.1 The large numbers of visa applicants and holders makes it difficult to conduct comprehensive character assessments on all non-citizens seeking to enter or remain in Australia. Nevertheless, due to the small but potentially significant impact of allowing visa applicants and holders of character concern to enter or remain in Australia, it is important that DIAC establish effective and reliable information flows that enable the NCCC to identify those persons who should be assessed under s501 of the Act. These arrangements should balance compliance with the character requirements and the need to facilitate the movement of non-citizens.

3.2 The ANAO reviewed DIAC's strategies to identify visa applicants of character concern, including:

- requiring that visa applicants make declarations about character;
- checking visa applicants' details on the Movement Alert List (MAL);
- requiring that visa applicants provide penal certificates; and
- providing guidelines for referring visa applicants to the NCCC.

3.3 Once applicants are granted a visa, they become visa holders. The strategies DIAC uses to identify visa holders who may no longer satisfy the character requirements were also examined by the ANAO. These strategies include:

- checking visa holders as they enter Australia;
- referring visa holders that have been refused citizenship on character grounds to the NCCC; and
- receiving incoming prisoner lists from relevant state and territory departments of corrections and checking them to identify visa holders.

Identifying visa applicants of character concern

Visa application forms and character declarations

3.4 Visa applicants are required to complete visa application forms. To promote compliance with visa conditions, including the character requirements, DIAC provides information on visa eligibility and information requirements to applicants through its website and the Australian Visa Wizard.³⁶ DIAC's website directs visa applicants to information about the character requirements that allows them to understand the context of character questions on the application form. These character questions include whether the applicant has:

- previous criminal convictions;
- criminal charges pending trial;
- acquittals on the basis of mental illness;
- instances of deportation from other countries;
- involvement in war crimes; and/or
- any other activity that may represent a risk to Australia's national security.

3.5 The questions do not address, however, all elements of the character test, such as whether the person has associated with known criminals. Also, character questions are not included on all visa application forms.³⁷ For some electronic application forms that do not include character questions, the automated system directs applicants to lodge their visa application at the nearest DIAC office if they have potential character issues.

3.6 Therefore, identifying visa applicants as persons of character concern relies partly on the person declaring character issues to DIAC. It is unlikely that applicants with serious criminal records, war criminals or those posing a threat to national security would declare these matters. For example, the ANAO identified four applicants, in its sample of 56 cases, who did not declare convictions on past visits to Australia and had not been identified for

³⁶ <<http://www.immi.gov.au/visawizard/>>.

³⁷ For example, the application for a student visa (Form 157A) does not ask questions about the applicant's association with persons or groups involved in criminal conduct.

consideration under s501 of the Act at that time.³⁸ Furthermore, applicants of character concern under certain parts of the character test cannot be identified because the application forms do not seek this information. Therefore, requiring applicants to declare is not, in itself, a reliable method for identifying visa applicants of character concern.

Movement Alert List

3.7 DIAC also uses MAL to identify visa applicants of character concern.³⁹ A person may be listed on MAL for a number of reasons, including if they have a serious criminal record or if their presence in Australia might constitute a risk to the Australian community. DIAC checks the personal details of visa applicants against MAL prior to granting a visa and when visa holders attempt to enter Australia. MAL alerts can include potential war criminals and persons subject to Interpol Red Notices, which are discussed below. However, the database has limitations. For example, it includes the personal details of only non-citizens who have been identified as warranting an entry on MAL.

3.8 ANAO Audit No.35 2008–09 *Management of the Movement Alert List* identified a number of problems with the database, including lack of ownership of data and poor data quality. DIAC agreed to an ANAO recommendation that the department monitor and record when MAL information has been used to support decision-making. During the current audit, the ANAO found that this recommendation has not been implemented and, consequently, DIAC does not assess how effectively MAL supports the administration of s501 of the Act. So that DIAC can better understand the effectiveness of MAL checks to identify visa applicants and holders of character concern, implementation of the previous audit's recommendation should remain a priority. In particular, DIAC should record instances where MAL information is used to identify applicants who should be referred to the NCCC.

³⁸ These cases were subsequently referred to the NCCC for consideration because of the applicants' substantial criminal records.

³⁹ MAL is a computer database, developed by DIAC to store personal details and information on travel documents of immigration concern. As at 30 June 2010, there were 660 000 identities of interest listed on MAL.

War criminals

3.9 The character section of the visa application forms asks applicants if they have committed, or been involved in, the commission of war crimes or crimes against humanity or human rights. Even if the applicant ticks the no box at the relevant question, processing officers may become suspicious of war crime activity through MAL checks or inconsistent answers to questions. However, these methods are not guaranteed to identify all applicants who have been involved in such crimes.

3.10 If a processing officer is suspicious about an applicant's possible involvement in war crimes, he/she is expected to advise the War Crimes Unit, which undertakes a War Crimes Assessment. Where an adverse assessment is recorded, the processing officer may refer the applicant to the NCCC for character assessment. An adverse War Crimes Assessment may be recorded where it is reasonable to suspect that the applicant was involved in war crimes/crimes against humanity.

3.11 The ANAO reviewed two cases (one visa applicant and one visa holder case) involving adverse War Crimes Assessments. In the visa applicant case, a character decision was still pending. In the visa holder case, the holder was referred to the NCCC as a result of a community dob-in and after the War Crimes Unit completed an adverse assessment. After considering the visa holder's response to the adverse finding, the s501 decision-maker determined that the person passed the character test. This example highlights the difficulties in making an adverse s501 decision even when the evidence to support a decision is based on a reasonable suspicion and is strongly contested by the holder.

Interpol Red Notices

3.12 Interpol, on behalf of member countries, circulates Interpol Red Notices to seek the arrest or provisional arrest of persons wanted for prosecution or to serve a sentence as decided by a court. Interpol Red Notices issued for persons wanted for prosecution pose a dilemma for DIAC applying the character requirements of the Migration Act and the Citizenship Act. These persons may not have been found guilty of a crime and, in some cases, they may not have been formally charged. If the Interpol Red Notice is the only basis for determining that a person does not pass the character test, evidence to support a decision is limited. In these cases, DIAC must balance the presumption of innocence with its responsibility to ensure that persons granted a visa or citizenship have satisfied the character requirements.

3.13 PAM – Character does not contain any guidance about Interpol Red Notices for processing officers or the NCCC. Nor do the Australian Citizenship Instructions.⁴⁰ There would be benefit in DIAC developing a national policy for processing visa and citizenship applicants and visa holders subject to Interpol Red Notices.

Penal certificates

3.14 DIAC requires that some applicants, depending on the type of visa applied for, provide penal certificates. Penal certificates provide a visa applicant's criminal history as recorded in Australian and/or international law enforcement databases. Visa processing officers use penal certificates to assess an applicant against elements of the character test, such as whether he or she has a substantial criminal record. Where required, penal certificates must be provided from every country that the applicant has lived in or visited for more than 12 months. Even if a penal certificate is not required, to comply with guidance in the PAM – Penal checking procedures, visa processing officers should request that the applicant provide one if they have any concerns about the applicant's character. In 2009–10, around 87 per cent of visa applicants applied for the types of visas where penal certificates were not generally required.

3.15 The PAM – Penal checking procedures identifies the processes for accessing penal certificates from different countries. While useful for decision-makers, the fact that each country has different processes and rules for recording criminal convictions impacts on the availability and reliability of penal certificates. In addition, the lack of centralised criminal databases, rules for non-recording of spent convictions, and corruption in some countries means that penal certificates may be incomplete and/or unreliable. Furthermore, in some countries, it is not possible to obtain penal certificates and, in others countries, law enforcement agencies will not provide penal certificates to non-citizens or citizens overseas.

3.16 If satisfied that visa applicants have made genuine attempts to obtain a required penal certificate from a particular country but cannot do so, the PAM – Penal checking procedures states that processing officers should seek a penal waiver from the Character Helpdesk. In circumstances where the

⁴⁰ The Australian Citizenship Instructions are the PAM – Character equivalent for citizenship processing.

PAM – Penal checking procedures suggests penal certificates are not accessible, it is unreasonable and unnecessarily time consuming to require that visa applicants satisfy processing officers that they have made genuine attempts to obtain the certificate in order to receive a penal waiver. Furthermore, the ANAO observed that not all processing centres were aware of the penal waiver process. One processing centre, which is one of the main referrers of s501 cases, places applications on hold if applicants cannot provide penal certificates. This process is inappropriate given the costs to applicants in seeking visas and the availability of an alternative process (the penal waiver process).

3.17 The Character Helpdesk received 4583 penal waiver requests in 2009–10, an increase of 29 per cent over the previous year and 59 per cent since 2006–07.⁴¹ DIAC has not analysed its penal waiver data to determine why this increase has occurred. Nor has it sought to confirm whether the countries from which applicants have received penal waivers are consistent with the guidance provided in PAM – Penal checking procedures.

3.18 If a visa applicant is granted a penal waiver, DIAC seeks a statutory declaration about character from the applicant in lieu of the penal certificate. The statutory declaration provides an avenue for criminal prosecution if falsely made. Nevertheless, applicants that do not declare character issues in their application may also not declare them in a statutory declaration.

NCCC referral guidelines

3.19 Once processing officers have identified a visa applicant of character concern, they are required to refer the application to the NCCC for s501 consideration. The information provided in a referral from visa processing centres is used by the NCCC to determine if, in the first instance, a visa applicant should be considered under s501 of the Act and, in the second instance, as the basis for further investigation of the applicant's character.

3.20 The NCCC has developed referral guidelines for processing centres, which are available to all staff on DIAC's intranet. The guidelines state that applicants must be referred if they have a substantial criminal record, are likely to engage in criminal conduct in Australia or have previously been found not

⁴¹ The number of penal waiver requests includes requests for advice or information about the waiver process.

to pass the character test. Also, due to the discretionary nature of some elements of the character test, processing officers may apply their own judgement when deciding whether to refer an applicant to the NCCC. The ANAO considers that the NCCC's referral guidelines are clear and consistent with the guidance in PAM – Character.

3.21 Processing centres refer visa applicants to the NCCC using standard electronic templates. A complete referral includes all relevant penal certificates (or where relevant, penal waivers), a statement from the visa applicant about the circumstances of their adverse conduct and, where applicable, a completed War Crimes Assessment.⁴²

3.22 The NCCC does not accept incomplete referrals and returns them to the referring processing centre. Processing centres reported to the ANAO that they sometimes find it difficult to provide complete referrals to the NCCC, particularly in regards to the requirement to provide penal certificates. In some cases a visa applicant may refuse to provide a penal certificate. Consequently, the applicant is ineligible for a penal waiver because they cannot demonstrate that they have taken reasonable steps to obtain a penal certificate. However, there is no power to compel a visa applicant to provide a penal certificate under the Migration Act. There is also no power under the Migration Act to refuse the application for failure to provide this information. This places the processing officer in a bind—under legislation they can not grant a visa; under DIAC policy they should not refer these applications to the NCCC.

3.23 To resolve this problem, DIAC informed the ANAO that the department will seek legislative change to grant s65 delegates the power to refuse a visa application if the applicant fails to provide a penal certificate or evidence that they have made genuine attempts to obtain one.⁴³ However, DIAC advised that this change is not currently a priority. Pending consideration of legislative change, DIAC could change the NCCC's referral policies to allow referral and consideration of the applicant's character based on the available information.

⁴² The processing centre must also affirm that all other visa criteria have been met and have all foreign language documents translated into English.

⁴³ This would not impact on the use of penal waivers where a person has made genuine attempts to provide penal certificates.

3.24 DIAC's quality review of the referral process is limited and currently does not verify whether or not applicants of potential character concern, including applicants granted a penal waiver, are consistently being identified by visa processing centres and referred to the NCCC where necessary. A closer quality review process for referrals, and the source of information leading to referrals, would assist DIAC to assess the effectiveness of its strategies to identify visa applicants of character concern and for it to obtain reasonable assurance that applicants are referred to the NCCC where necessary. To this end, the ANAO has made a recommendation to implement a risk-based approach to quality reviewing the processing of visa applications (see Recommendation No.1). This review process should include sampling cases, in each of the following strata, where the processing centre:

- has identified the applicant as being of potential character concern and referred the application to the NCCC;
- has identified the applicant as being of potential character concern and has not referred the application to the NCCC; and
- has not identified the applicant as being of potential character concern.

Conclusion

3.25 DIAC provides sufficient information about the eligibility and information requirements to potential visa applicants. However, the questions on the visa application forms do not address all the elements of the character test and some of the electronic forms do not include character questions.

3.26 To identify visa applicants of character concern, DIAC requires that visa applicants make declarations about character, checks MAL during visa application processing, and requires some applicants to provide penal certificates. This information is included in referrals from visa processing centres to the NCCC. However, DIAC's quality review of the referral process is limited and, currently, does not verify whether visa applicants of character concern are consistently being identified and referred by visa processing centre staff to the NCCC. Therefore, while DIAC has established a framework for the referral of character cases to the NCCC, it does not know how effectively it is being implemented. Furthermore, requiring persons of potential character concern to declare these matters relies on their honesty and MAL will only alert officers to applicants whose identity has been entered on the database due to previous immigration concerns. Penal certificates from overseas may not be

available or reliable and, for many visa classes, may not be required. Also, DIAC's penal waiver process is not operating effectively.

3.27 Implementing a quality review process for visa application processing would provide the department with greater assurance that visa applicants of character concern were identified and referred, by visa processing centres to the NCCC, for consideration under s501 of the Act. Also, DIAC could more effectively identify visa applicants of character concern by revising the PAM – Penal checking procedures, analysing the available penal waiver data to understand the reasons for the increasing numbers, and confirm that all processing centres are aware of the role of the Character Helpdesk.

Recommendation No.1

3.28 To gain assurance that its processes for identifying and referring visa applicants of character concern to the NCCC are effective, the ANAO recommends that DIAC implement a risk-based approach to quality reviewing the processing of visa applications.

DIAC's response: Agreed.

3.29 DIAC agrees with the recommendation and acknowledges the importance of a risk based approach to the quality review of processing of visa applications for clients of character concern.

3.30 DIAC acknowledges that a review of the process for referrals would assist in the assessment of the effectiveness of identifying visa applicants of character concern. However, DIAC highlights the challenges that are presented in developing such a quality review process given that the large numbers of visa applicants in any given time period, make sampling and targeting of review work difficult.

3.31 With this in mind, DIAC has plans to develop a Quality Assurance Review of the referrals process which may be used to appropriately target any future Quality Assurance work surrounding the processing of visa applications for clients of character concern in an ongoing capacity.

3.32 Despite the challenges this recommendation presents, DIAC agrees that there is benefit to be gained from a more robust, systemic and risk based approach to quality reviewing the visa application process for clients of character concern.

Identifying visa holders of character concern

3.33 As previously discussed, once applicants are granted visas, they become visa holders. Visa holders must continue to satisfy the character requirements or risk visa cancellation under s501 of the Act.

Visa holders entering Australia

3.34 When entering Australia, visa holders are 'immigration cleared'. The Australian Customs and Border Protection Service manages the initial immigration clearance process on behalf of DIAC. The Australian Customs and Border Protection Service assesses incoming visa holders against the character requirements by: checking the Passenger Analysis and Clearance Evaluation system⁴⁴; checking incoming passenger cards for declarations of criminal convictions; and observing the behaviour of incoming passengers. The risks associated with identifying visa applicants of character concern through MAL checks and declarations about character also apply to visa holders entering Australia.

3.35 If the Australian Customs and Border Protection Service identifies a visa holder of potential character concern, it refers them to DIAC officers at the airport (immigration inspectors). Immigration inspectors can use a number of cancellation powers at the border, however they cannot cancel a visa under s501 of the Act. This is because the holder must be given a legislated minimum of 14 days to respond to any adverse information DIAC holds and which it might rely on to make a s501 decision.

3.36 Immigration inspectors refer incoming passengers to the NCCC if a visa holder is granted entry but there are residual character concerns. Since 2007, inspectors have referred 16 visa holders for character assessment, which, after its preliminary assessment, the NCCC decided not to further assess against the character requirements. However, the NCCC's data does not identify referrals from inspectors that proceeded to further consideration under s501 of the Act. Therefore, DIAC has no record of the total number of referrals by immigration inspectors to the NCCC nor their outcomes. Recording the source of referrals, including from immigration inspectors, would provide the NCCC with a more complete management information.

⁴⁴ The Passenger Analysis Clearance Evaluation system is linked to, and automatically checks, MAL.

New Zealand citizens at the border

3.37 New Zealand citizens are permitted to travel to Australia without a current visa and can apply for a Special Category Visa on arrival in immigration clearance.⁴⁵ New Zealand applicants are ineligible for a Special Category Visa if they are classified as behaviour concern non-citizens under the Migration Act. Applicants are classified as behaviour concern non-citizens if they have been: convicted of a crime or crimes and sentenced to prison for one year or more; acquitted due to unsound mind; or deported from another country in certain circumstances.⁴⁶ New Zealand citizens refused a Special Category Visa on behaviour concern non-citizens grounds have their personal details entered on MAL and are, in future, required to apply for a visa prior to arriving in Australia.

3.38 The Australian Customs and Border Protection Service assesses New Zealand entrants against the behaviour concern non-citizens conditions in the same way it assesses character for visa holders seeking to enter Australia. However, New Zealand citizens do not provide any character details until they arrive in Australia and the incoming passenger card only focuses on criminal convictions and not the other elements of the character test. Therefore, the risk that New Zealand citizens of character concern will be allowed entry to Australia without further consideration of their character is higher than for other non-citizens. The behaviour concern non-citizens requirements are not a s501 decision and, as such, were not included in the scope of the ANAO's audit.

Visa holders in Australia

3.39 While visa holders are required to continue to satisfy the character requirements, it would be impractical for DIAC to actively monitor all visa holders in Australia. As such, DIAC does not consider cancelling a person's visa under s501 of the Act unless it receives adverse information about their character. Sources of adverse information can include community dob-ins and referrals from within the department, such as applicants for citizenship refused on character grounds. However, visa holders in Australia are primarily

⁴⁵ *Migration Act 1958* (Cth) ss 32 and 42. The Special Category Visa is a temporary visa that allows its holders to reside in Australia for as long as they remain New Zealand citizens and stay in Australia, or until a visa is cancelled.

⁴⁶ *Migration Act 1958* (Cth) s 5.

identified for consideration by the NCCC through incoming prisoner lists provided by departments of corrections in each state and territory.

Citizenship applicants refused citizenship on character grounds

3.40 Citizenship applicants must satisfy the Minister that they are of ‘good character’ at the time of a decision on their application. When a citizenship application is refused on character grounds, the severity of the character concern may warrant consideration of the citizenship applicant’s visa under s501 of the Act. However, DIAC has not established a protocol for interaction between the citizenship areas and the NCCC. As a result, applicants refused citizenship on character grounds are not routinely referred to the NCCC when referral may be warranted. This issue is assessed further in ANAO Audit Report No.56 2010–11, *Administering the Character Requirements of the Australian Citizenship Act 2007*.

Incoming prisoner lists

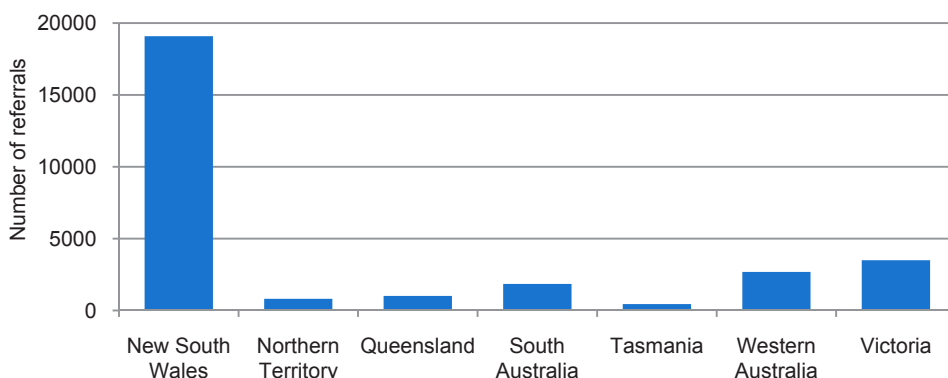
3.41 DIAC receives incoming prisoner lists, which identify new prisoners, from all states and territories except the Australian Capital Territory (see Figure 3.1).⁴⁷ All but one of the 55 visa holder cases reviewed by the ANAO were referred to the NCCC through its analysis of incoming prisoner lists.⁴⁸ In 2009–10, the NCCC received 32 919 prisoner referrals; an average of 2743 referrals per month.

⁴⁷ The Australian Capital Territory opened its prison, which houses 350 prisoners, in 2009. Prisoners from the Australian Capital Territory were previously imprisoned in New South Wales. The NCCC has not established any arrangements to receive prison lists from the Australian Capital Territory.

⁴⁸ One visa holder suspected of involvement in war crimes was referred to the NCCC as a result of a community dob-in.

Figure 3.1

Incoming prisoner list referrals by state/territory, for the period July 2009 to May 2010



Source: ANAO analysis of DIAC data.

3.42 The NCCC has not determined the information it requires to guide states and territory in preparing incoming prisoner lists. Consequently, the number of prisoners included on the lists provided to DIAC varies. For example, New South Wales provides multiple entries for single prisoners, which inflates the total number of names included on the list. Also, some other states seek only to provide information for prisoners they identify as non-citizens, which may result in some visa holders of character concern not being referred.⁴⁹ The NCCC has also not clarified how the states and territory determine that prisoners are non-citizens.

3.43 DIAC has been receiving incoming prisoner lists since 2007. Prior to that time, DIAC did not have a systematic method for identifying visa holders for consideration under s501 of the Act. In 2007, DIAC initiated a prison census project to identify prisoners who entered prison prior to the introduction of this system and who had not previously been considered. DIAC has not progressed this project. Finalising this project would give DIAC reasonable

⁴⁹ In 2006, a report by the Commonwealth Ombudsman entitled *Department of Immigration and Multicultural Affairs: Administration of s 501 of the Migration Act 1958 as it applies to long-term residents*, Commonwealth of Australia, February 2006, p.20, stated that:

... it may not be apparent that someone who has been in Australia from early childhood is not an Australian citizen ... In part, this may be because not even the long-term residents themselves realise they are not citizens.

assurance that these potentially high-risk visa holders in prison are considered by the NCCC as appropriate.

3.44 There is no formal basis for DIAC to require state and territory departments of corrections to provide incoming prisoner lists. The informal arrangement by which this information is currently provided was established in 2007 as a short-term measure pending the finalisation of formal arrangements. No progress has been made in this regard. However, all states and territories, except the Australian Capital Territory, continue to provide the information.

3.45 Unless appropriate steps are taken to establish a more formal basis for the ongoing provision of this information from the states and territories, DIAC's ability to identify visa holders who should be considered under s501 of the Act would be severely restricted. Therefore, it is important that DIAC take appropriate steps to establish ongoing relationships with the providers of this information, such as seeking legislative changes to require stakeholders to provide information and/or formalising its relationships with each of the state and territory departments of corrections.

Conclusion

3.46 DIAC's processes to identify visa applicants of character concern are usually straightforward and do not reveal any character concerns for the majority of visa applicants. The processes are designed to provide layers of assurance that applicants of character concern are identified for consideration under s501 of the Act. However, each process has limitations. To provide DIAC with assurance that visa applicants of character concern are identified and referred to the NCCC for consideration under s501 of the Act, the ANAO has recommended that DIAC implement a risk-based approach to reviewing visa application processing.

3.47 To identify visa holders of character concern entering Australia, DIAC checks incoming passenger cards for character declarations and entries on MAL. It also reviews prisoner lists received from state and territory departments of corrections to identify visa holders who have been imprisoned in Australia. The number and type of prisoners referred varies from state to state and DIAC has not clarified how each state determines that prisoners are non-citizens.

3.48 DIAC has only been receiving prisoner lists since 2007 and it has made little progress on a project to identify prisoners who entered prison prior to

this time. Finalising its project to identify non-citizens who entered prison in Australia prior to 2007 would enable the department to identify these potentially high-risk visa holders for consideration under s501 of the Act. In addition, there is no formal agreement with the states and territories to provide incoming prisoner lists. To improve its identification of visa holders imprisoned in Australia, DIAC should define its information requirements and seek to establish formal arrangements with the relevant state and territory authorities to receive the information necessary to identify and assess visa holders under s501 of the Act.

Recommendation No.2

3.49 To provide a formal basis for obtaining the information necessary to support the identification and assessment of visa holders of character concern against the character requirements of the *Migration Act 1958*, the ANAO recommends that DIAC:

- takes steps to establish appropriate arrangements with the relevant authorities to provide this information; and
- clearly defines its information requirements.

DIAC's response: Agreed.

3.50 DIAC agrees with the recommendation and advises that work is already underway to both identify the scope of information required to support character decision-making under the *Migration Act 1958* (the Act), and to ensure that DIAC has a clear legislative basis on which to request and require this information from the relevant authorities.

4. Processing and Deciding Character Cases

This chapter examines DIAC's processes for assessing persons of character concern and deciding character cases. The chapter also analyses appeals of DIAC's character decisions and how it seeks to learn from appeal outcomes.

4.1 To adequately assess visa applicants and holders against the character requirements, the NCCC requires effective processes to access and review sufficient information to make a character assessment. These processes should also support decision-makers in making appropriate character decisions.

4.2 The ANAO examined the NCCC's processes for assessing character cases, focusing on:

- its approach to filtering and risk-managing the character caseload;
- the information it seeks to support character assessments;
- cases involving a substantial criminal record; and
- locating visa holders in the community subject to s501 consideration (cold cases).

4.3 DIAC's decision-making processes, including the documenting of case decisions and its administration of appeals of s501 decisions were also examined.

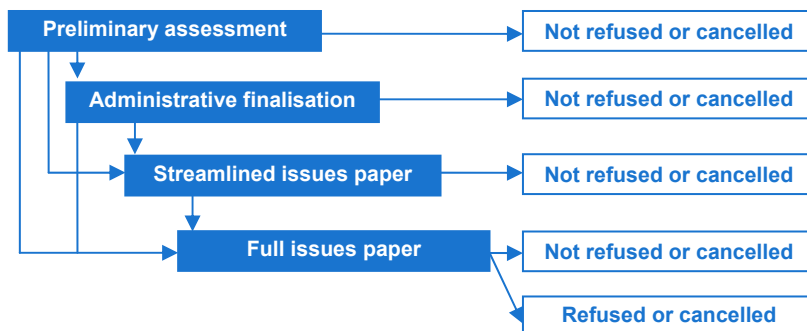
Processes for s501 assessments

4.4 On receipt of a referral from a visa processing officer, the NCCC conducts a preliminary assessment to determine whether it should further consider refusing a visa application or cancelling a visa under s501 of the Act. Where the NCCC decides not to conduct further character assessment, visa applicants are referred back to the processing centre for it to complete the application process and no further action is taken in regard to visa holders.

4.5 If a further character assessment is required, the NCCC progresses a character case through an administrative finalisations (AF) process and/or an issues paper (either streamlined or full) process. Figure 4.1 shows the processes and their possible outcomes.

Figure 4.1

Character processes and possible outcomes



Source: ANAO representation.

4.6 After the preliminary assessment, NCCC case officers decide which of the processes is most appropriate for assessing the case in the first instance. This may be any one of the three processes—AF, streamlined issues paper or full issues paper. If, in the first instance, the case officer decides to assess the case as an AF or a streamlined issues paper, the decision-maker may decide to finalise the case (not refuse or not cancel under s501 of the Act) or to progress it to the next or a later process. Therefore, character cases can progress through several processes. Alternatively, the case officer may commence with the final stage—full issues paper. The decision-maker does not have the option to refuse an application or cancel a visa on character grounds unless the case has been progressed through the full issues paper process.

Risk-managing the character caseload

4.7 The aim of the different processes is to filter and risk-manage the character caseload to enhance administrative efficiency. Each of the NCCC's processes, from the preliminary assessment through to the full issues paper, increases in complexity.

4.8 For visa application cases, the NCCC has developed a Refusal Risk Matrix to guide case officers in determining whether an applicant's character should be further assessed, and where relevant, which process is appropriate in the first instance. Generally, the AF process should be applied to visa applications with a medium or low risk of being refused on character grounds. A streamlined issues paper is prepared for medium to high risk cases and a full issues paper for high risk cases where refusal is likely.

4.9 The NCCC has not developed a similar risk matrix to guide case officers about which process is appropriate in the first instance for visa holder

cases.⁵⁰ However, one of the NCCC resource documents lists the types of cases to be progressed as an AF in the first instance, but it does not refer to risk. There is no guidance regarding the type of visa holder cases that should be progressed through the streamlined or full issues paper processes.

4.10 The NCCC stated that filtering character cases through less complex processes allows it to dedicate more time and effort to cases with a higher likelihood of being refused or cancelled. However, the NCCC does not record the number of cases it progresses through each process. Of the ANAO's sample of 111 cases, 14 (25 per cent) of visa applicant cases and 11 (20 per cent) of visa holder cases were processed as an AF. This is comparatively few considering the number of s501 cases that did not result in visa refusal or cancellation.⁵¹ Therefore, a comparatively large proportion of cases, which progressed through the more complex issues paper processes, were not, ultimately, refused or cancelled. To enhance administrative efficiency, there may be benefit in DIAC identifying opportunities to increase the number of cases processed as an AF.

4.11 DIAC could also consider reviewing and updating its guidance. In particular, to maintain a consistent, risk-based approach to conducting its preliminary assessments and to determining the most appropriate process to use in the first instance, the ANAO suggests that DIAC develop a risk matrix, or equivalent, for visa holder cases. This will improve clarity regarding which process to use first and to better filter and risk-manage the character caseload.

4.12 Furthermore, the PAM – Character does not distinguish between a streamlined and full issues paper. NCCC case officers reported to the ANAO a preference for developing a full issues paper in the first instance because the streamlined issues paper offers only marginal opportunities to enhance the efficiency of the process.⁵² The rationale for the streamlined issues paper was unclear to the ANAO. If DIAC intends to retain the two types of issues paper, there may be value in it clearly articulating the role of the streamlined issues paper in PAM – Character.

⁵⁰ In June 2011, in response to the proposed audit report, DIAC advised that it has developed a risk matrix for the visa holder caseload.

⁵¹ In 2009–10, 79 per cent of visa applicant cases and 90 per cent of visa holder cases were not refused or not cancelled on character grounds.

⁵² The streamlined issues paper is based on a briefer template than the full issues paper. Nevertheless, where the decision-maker decides after a streamlined issues paper to progress to a full issues paper, the case officer is required to review all of the information and prepare a second issues paper.

Information to support character assessments

4.13 DIAC relies on information provided by processing centres, visa applicants and holders and third parties to conduct character assessment. The information DIAC seeks for its character assessments depends on the process conducted. In general, the information available accumulates from one process to the next. Table 4.1 lists the information acquired for each assessment process. In addition to this information, case officers can seek, at any stage, any other information they consider relevant to the process.

Table 4.1

Information requirements for each character assessment process

Process	Visa applicant cases	Visa holder cases
Preliminary assessment	<ul style="list-style-type: none"> A complete referral from the visa processing centre. 	<ul style="list-style-type: none"> Information provided on a prisoner list. Australian Federal Police penal certificate.
Administrative finalisation	<ul style="list-style-type: none"> A complete referral from the visa processing centre. 	Information acquired for prior processes plus: <ul style="list-style-type: none"> Sentencing remarks provided by the relevant state/territory court. Prisoner administration and conduct reports provided by the relevant state/territory department of corrections.
Streamlined issues paper	Information acquired for prior processes plus: <ul style="list-style-type: none"> The client's response to the Notice of Intention to Consider Refusal. Where NCCC case officers decide to conduct interviews, information provided verbally by the visa applicant and/or their family members. 	Information acquired for prior processes plus: <ul style="list-style-type: none"> The client's response to the Notice of Intention to Consider Cancellation. Where NCCC case officers decide to conduct interviews, information provided verbally by the visa applicant and/or their family members.
Full issues paper	Information acquired for prior processes plus: <ul style="list-style-type: none"> The client's response to the Notice of Intention to Consider Refusal. Where NCCC case officers decide to conduct interviews, information provided verbally by the visa applicant and/or their family members. 	Information acquired for prior processes plus: <ul style="list-style-type: none"> The client's response to the Notice of Intention to Consider Cancellation. Where NCCC case officers decide to conduct interviews, information provided verbally by the visa applicant and/or their family members.

Source: ANAO.

4.14 DIAC has not developed formal arrangements, such as memoranda of understanding, to facilitate access to information provided by third parties. For example, sentencing remarks and prisoner administration and conduct reports are accessed by DIAC through informal arrangements with each state and territory court and department of corrections. However, one court does not currently provide sentencing remarks because it does not record them, and, as previously mentioned, the NCCC does not seek prisoner administration and conduct reports from the Australian Capital Territory. If DIAC does not formalise its current arrangements there is a risk that stakeholders will no

longer provide the information required for identifying or assessing clients against the character requirements.⁵³

4.15 As shown in Table 4.1, for cases that are progressed as issues papers the NCCC issues a Notice of Intention to Consider Refusal/Cancellation (NOICR/C).⁵⁴ The NOICR/C provides a visa applicant or holder with the information, other than protected information, that DIAC will rely on to make a decision about their character.⁵⁵ The NOICR/C gives a visa applicant or holder the opportunity to provide additional information, such as details about their links to the Australian community, marital status and details of dependent children. Following a visa applicant or holder's response to the NOICR/C, the case officer may interview the client and/or their family members. The ANAO observed that case officers conducted interviews in only a small number of cases and those interviews were held to clarify specific matters, not to seek additional information. Furthermore, case officers generally take the information provided by visa applicants and holders at face value; they do not take steps to verify its authenticity or reliability.

4.16 The ANAO's analysis of 55 visa holder cases confirmed that the NCCC consistently sought and accessed sentencing remarks and prison reports when processing character cases. Also, the NCCC had issued NOICR/Cs appropriately in all the cases reviewed that had progressed to an issues paper and had given visa applicants and holders adequate opportunities to respond to adverse information held about them. Overall, the ANAO considers that the information available for each process was generally sufficient and appropriate to the decision outcomes (as shown in Figure 4.1 earlier in this chapter) available to the decision-maker.

⁵³ The ANAO has recommended that DIAC establish formal arrangements to obtain the relevant information to assess visa holders of character concern under s501 (see Recommendation No.2).

⁵⁴ In this report, NOICR/C is used to refer to notices of intention to consider refusal and/or cancellation in general. When specifically referring to a Notice of Intention to Consider Refusal, NOICR is used. When specifically referring to a Notice of Intention to Consider Cancellation, NOICC is used.

⁵⁵ Under s503A of the Migration Act, DIAC is not required to provide protected information to the visa applicant or holder. Protected information is information provided by gazetted agencies, such as the Australian Federal Police, to DIAC for character decisions. Potentially, this section has broad implications for the administration of s501, such as encouraging the sharing of sensitive information to enhance DIAC's ability to identify clients of character concern under elements of the character test other than the substantial criminal record limb. However, DIAC's current approach does not involve the use of protected information.

A focus on substantial criminal records

4.17 The character test is broad and provides for the refusal or cancellation of a visa on grounds such as association or general conduct. However, DIAC's approach to identifying and processing clients of character concern focuses primarily on the substantial criminal record element of the test. For example, questions on the visa application form focus on criminal activity, and penal certificates provide a criminal history. For cases involving substantial criminal records, the applicant has been convicted of a crime, and persuasive information is often available to indicate the person fails this element of the character test. In contrast, evidence of general record or associations with criminal individuals or groups is not always readily available and may not be reliable. Such information, where available from intelligence and law-enforcement sources, may attract a security classification that requires particular care to be taken in its use and storage.

4.18 Focusing on one element of the character test does not give full effect to the character requirements and may have unintended consequences. For example, the NCCC's preliminary assessment of 639 visa holders in 2009–10 resulted in decisions not to proceed to further character assessment processes because the prison sentences had generally not met the substantial criminal record element of the character test. However, the ANAO's analysis of these visa holder cases suggests that further assessment under the past and present criminal conduct element of the character test may have been warranted in 65 cases. Noting that D41 states that in considering the discretion to refuse or cancel on character grounds, serious crimes, such as those involving commercial quantities of drugs or violence, are of special concern to the welfare of the community, ANAO analysis identified:

- forty-two cases involving visa holders convicted of assault or grievous bodily harm and sentenced to a minimum of six months but less than one year in prison;
- fifteen cases involving visa holders convicted of supplying or manufacturing drugs, although the data available did not identify whether these included commercial quantities; and
- eight cases where the person had displayed recidivist behaviour and received multiple sentences.

4.19 For visa application cases, DIAC's systems do not record the particular element(s) of the character test that were considered by the NCCC in its

preliminary assessment of each case. Consequently, it is not known how many visa application cases are referred to the NCCC on grounds other than substantial criminal conduct nor how many of these proceed to further consideration. However, only five of the ANAO's sample of 56 visa application cases were assessed under elements other than substantial criminal record—these cases were considered under the past and present criminal and/or general conduct element of the test. Three of the five applicants were not refused a visa under s501 and two cases were undecided at the time of the ANAO's analysis.

4.20 The NCCC's implementation of the character requirements shapes the approach taken by visa processing centres. The focus on character cases involving substantial criminal records has resulted in a practice of some staff in DIAC's visa processing centres being reluctant to refer applicants to the NCCC for consideration where there are character concerns but if they do not meet the substantial criminal record element of the test. Indeed, one processing centre informed the ANAO that the NCCC is not interested in cases that do not involve substantial criminal records. As previously discussed, DIAC's review of the referral process is limited and currently does not verify whether visa applicants of character concern are consistently being identified and referred by visa processing centre staff to the NCCC. As such, DIAC does not know the extent to which the non-referral of visa applicants who do not meet the other elements of the character test is occurring.

Locating cold case visa holders

4.21 Where a visa holder of character concern is in the community but DIAC cannot locate them, the holder becomes a cold case. The NCCC had 20 cold cases on hand as at 3 November 2010.

4.22 PAM – Character states that, prior to designating a visa holder as a cold case and quarterly thereafter, the NCCC should take reasonable steps to locate them. These steps include seeking contact details from Medicare and Centrelink, the police and/or correctional facilities and a private source such as a utility company. The NCCC informed the ANAO that this process rarely assists it to locate cold case visa holders and that they are generally located because they committed additional crimes, contacted the department or attempted to leave Australia.

4.23 The ANAO's analysis of six cold case files identified that quarterly reviews were not occurring as required by PAM – Character. The cases analysed had not been reviewed since mid-2009 and, in one case, the NCCC had not taken any steps to locate a visa holder since 2007. These cold cases involved visa holders who had committed armed robbery, drugs cultivation, indecent assault, assaults occasioning bodily harm and stalking. Therefore, the lack of cold case reviews and effective processes to locate visa holders of character concern poses potential risks to the community.

4.24 The ANAO suggests that DIAC review the appropriateness of its guidance in PAM – Character, including the frequency of cold case reviews. In addition, DIAC could do more to locate cold case visa holders by seeking further information from other government departments, such as the Australian Taxation Office⁵⁶, and broadening its search of publicly available information, such as social networking websites.

Making s501 decisions

4.25 Each of the processes and documents discussed above are designed to assist the decision-maker in making a character determination. Making appropriate decisions is a balancing act in many character cases. Australia retains the right to determine the level of risk it will tolerate in allowing non-citizens to enter or remain within its borders. In some cases it may be appropriate for DIAC to accept a higher level of risk, for example, in visa holder cases where the non-citizen has lived in Australia for a long time and has significant ties to the Australian community.

4.26 The ANAO assessed the NCCC's decision-making processes. Noting that the potential outcomes of the AF and streamlined issues paper are to either not refuse/not cancel or to elevate the case to the next process, this section focuses on cases that have progressed to a full issues paper and where refusal of a visa application or cancellation of a visa is possible.

⁵⁶ DIAC previously entered into a MOU with the Australian Taxation Office to assist it to locate unlawful non-citizens. A similar arrangement could assist DIAC to locate lawful non-citizens who are subject to character consideration.

Decision-making processes

4.27 In contrast to decision-making processes under the Citizenship Act, one decision-maker, the Principal Assessor, is responsible for all complex character decisions under s501 of the Act.⁵⁷ Where a full issues paper has been prepared, the Principal Assessor makes a decision based on this information, including all the source documents attached to the issues paper for review by the decision-maker. The ANAO reviewed 80 issues papers and observed that case officers generally presented information in a neutral tone and the issues papers provided sufficient information to enable the Principal Assessor to make decisions about the character of visa applicants and holders who had failed the character test because of their substantial criminal records.⁵⁸ These papers included the case officers' findings against each element of the character test and discretionary considerations. However, the Principal Assessor is not specifically informed whether the information in the issues paper has been verified. The ANAO considers that the information upon which decisions are made could be improved if case officers identify in the issues paper when information may not be reliable.

4.28 Case officers advise the Principal Assessor, in the issues paper, if DIAC has previously issued a warning to the person. DIAC generally issues warnings where a visa applicant or holder fails the character test, but their visa has not been refused or cancelled. A warning informs the person of the s501 decision and explains the possible consequences of future conduct that may cause their character to be re-assessed under s501 of the Act. D41 lists the issuing of previous warnings as an 'other' consideration for the decision-maker when deciding whether to refuse or cancel a visa on character grounds. In 2009–10, the NCCC issued warnings to 75 per cent (368) of visa applicants and 98 per cent (513) of visa holders who failed the character test but were not refused or not cancelled.

4.29 The ANAO found, in the sample of cases reviewed, that three (of 56) visa applicants and 12 (of 55) visa holders had previously been warned. Only three of these 15 cases subsequently resulted in refusal or cancellation. In addition, there were four visa holders with two or more warnings, but only

⁵⁷ Responsibility for making character decisions under the Citizenship Act is delegated to case officers in DIAC's Australian and overseas offices.

⁵⁸ Visa applicants and holders who fail the substantial criminal record element of the character test do not have to be assessed against the other elements of the character test, such as associations and general conduct.

one of these had their visa cancelled. While the issuing of warnings may have a deterrent effect on some clients, the issuing of multiple warnings without further consequences may diminish this effect.

4.30 If it is likely that the Principal Assessor will cancel a visa after considering the issues paper, the paper is reviewed by a quality control officer prior to a final decision being made. The quality control officer's role is to verify that natural justice has been served and there were no errors of law in administering the case. The department's aim is to make the decision prior to the visa holder's release from prison so that, if the decision is to cancel their visa, they can be deported on release. However, meeting this timeframe may leave insufficient time for the quality control officer to review the case and for the case officer to implement any recommendations prior to the visa holder's release from prison. In 2009–10, 20 per cent of visa holder cases were not decided before the holder was released from prison. The quality control process would benefit from the NCCC seeking to make its decisions to cancel earlier relevant to the earliest date of release.

4.31 The quality control officer does not generally review visa application cases where refusal is likely. Nevertheless, the consequences of refusing a visa applicant who is in Australia (the removal and exclusion of the person from Australia) are similar to cancellation of a visa holder's visa.⁵⁹ It is logical, therefore, that an onshore visa application case would warrant the same quality control measures as a visa holder case. The ANAO suggests that the NCCC consider extending the quality control officer's role to reviewing all onshore visa applicant cases when the Principal Assessor is likely to refuse.

Documenting decisions

4.32 If the Principal Assessor decides that refusal of a visa application or cancellation of a visa on character grounds is likely, the case officer prepares a statement of reasons. A decision not to refuse or cancel is recorded in DIAC's information systems. The NCCC does not prepare statements of reasons in cases where the decision is to not refuse or cancel on character grounds.⁶⁰ The ANAO reviewed 111 cases and found that decisions were effectively documented.

⁵⁹ Where DIAC refuses to grant a visa to an onshore visa applicant under s501, any other visa application or visa held by that applicant is consequently cancelled under s501F of the Migration Act.

⁶⁰ In some borderline complex cases, the reason for a decision not to refuse a visa application or cancel a visa is also recorded in DIAC's systems.

Appeals of s501 decisions

4.33 Most of DIAC's decisions to refuse a visa application or cancel a visa on character grounds can be appealed to the Administrative Appeals Tribunal and to the federal courts.⁶¹ In 2009–10, there were 76 appeals of s501 decisions. DIAC won or the appellant withdrew from 62 per cent of the cases. Table 4.2 shows the number of appeals to each tribunal and court for 2009–10, along with the outcomes.

Table 4.2

Appeal outcomes for 2009–10

	DIAC win	DIAC loss	DIAC withdrawal	Appellant withdrawal	Total
Administrative Appeals Tribunal	25	19	4	10	58
Federal Court	7	4	0	1	12
Full Federal Court	3	2	0	0	5
High Court of Australia	1	0	0	0	1
Total	36	25	4	11	76

Source: ANAO analysis of DIAC data.

4.34 DIAC's Enforcement and Citizenship Litigation Section compiles Litigation Reports, which are fortnightly summaries of litigation outcomes for the preceding two week period. These Litigation Reports include notes about significant matters that affect future administration of s501, which DIAC incorporates into its processes as appropriate.

4.35 However, DIAC does not generally analyse decisions of the Administrative Appeals Tribunal to identify trends in the reasons for decisions which may have relevance to the broader caseload. The ANAO's analysis of Administrative Appeals Tribunal decisions over the past two years indicates that it had interpreted the considerations in the ministerial directions differently from DIAC.⁶² For example:

- in approximately two-thirds of the cases DIAC lost, the Administrative Appeals Tribunal had taken a different view of the risk the appellant

⁶¹ The federal courts include the Federal Court and the High Court of Australia. Decisions made personally by the Minister and those that involve an offshore visa applicant cannot be appealed to the Administrative Appeals Tribunal.

⁶² *Direction [No.41] – Visa refusal and cancellation under s501* replaced *Direction No.21 – Visa refusal and cancellation under s501* in June 2009.

poses to the community due to their efforts to rehabilitate and risks of recidivism; and

- in around half of the cases DIAC lost, the Administrative Appeals Tribunal gave primacy to factors such as the impact of cancellation or refusal on family and children.

4.36 Where eligible to appeal, the appellant can provide any information to the Administrative Appeals Tribunal relevant to the consideration of character and is not restricted to information previously made available to DIAC. There are opportunities for DIAC to improve its administration of s501 by reviewing the information available to the Administrative Appeals Tribunal and identifying processes for seeking access to similar information, such as through interviews with the visa applicant or holder.

Conclusion

4.37 The NCCC has developed processes for assessing character cases (administrative finalisation, streamlined issues paper or full issues paper) that assist it to filter and risk-manage the character caseload. Developing a risk matrix for visa holder cases, similar to the Refusal Risk Matrix used for visa application cases, would provide better guidance to case officers on the most appropriate process to adopt in the first instance, and assist them to manage their caseload. Also, as a large proportion of cases were progressed through the more complex issues paper processes but were not refused or not cancelled, there may be opportunities for DIAC to increase the number of cases processed using the less complex administrative finalisation processes. This would allow more time and effort to be directed towards cases that have a higher likelihood of being refused or cancelled.

4.38 The information DIAC seeks for character assessments was generally sufficient and appropriate to the process in which it was used and the decision outcomes available to the decision-maker at each stage. In addition, NCCC case officers consistently sought the necessary information when processing character cases. However, DIAC has not developed formal arrangements to facilitate access to information provided by third parties. Without this information, DIAC would not be able to effectively identify and assess clients against the character requirements.

4.39 DIAC has developed generally adequate processes for identifying and processing visa applicants and holders in Australia who do not or may no longer satisfy the substantial criminal record element of the character test.

However, DIAC does not have systematic processes in relation to the other elements of the character test. That is, its current approaches do not actively seek to identify visa applicants and holders who may not satisfy the other elements of the character requirements (for example, associations and past or present conduct) or seek information relevant to processing them.

4.40 The ANAO's analysis identified 65 cases that may have warranted assessment under the past and present criminal conduct element of the character test. Decisions about the allocation of administrative effort are for DIAC's management, taking into account an assessment of risks and available resources. However, focusing narrowly on one element of the character test may have unintended consequences, including that visa processing centres are reluctant to refer applicants to the NCCC that do not meet that element of the test. DIAC does not know the extent to which this practice may be occurring.

4.41 The issues papers, which detail case officers' findings against each element of the character test and the discretionary considerations, provided sufficient information to enable the Principal Assessor to make decisions about the character of visa applicants and holders who had failed the character test because of their substantial criminal records. In addition, decisions were effectively documented in all cases reviewed. The quality control officer reviews visa holder cases where it is likely that the Principal Assessor will cancel a visa. Visa application cases that are likely to be refused are generally not reviewed. However, as the consequences of refusing a visa application from an applicant who is in Australia are similar to cancelling a visa holder's visa, the quality control officer's role should include all onshore visa applicant cases likely to be refused.

4.42 Only a small proportion of visa applicants or holders who had been issued with a warning on one or more previous occasions had their visa refused or cancelled as a result of the most recent s501 consideration. While the decision to refuse or cancel a visa on character grounds rests with the Principal Assessor, DIAC could consider giving more guidance on the weight to be given to circumstances where multiple warnings have been previously issued.

4.43 Most s501 decisions can be appealed to the Administrative Appeals Tribunal and to the federal courts. DIAC won or the appellant withdrew from 48 of the 77 s501 decisions appealed in 2009–10. DIAC could improve its administration of s501 of the Act by reviewing the information available to the Administrative Appeals Tribunal and identify processes for seeking access to similar information as part of the assessment process.

5. Management Arrangements to Support s501 Processing

This chapter examines DIAC's management arrangements to support the administration of the character requirements of the Migration Act. DIAC's planning processes, risk management strategies and reporting against program objectives in relation to character requirements are also discussed.

5.1 Implementing appropriate planning processes, including risk strategies and reporting on the outcomes of a program's performance, are important components for effectively managing government programs. A level of risk is inevitable in administering programs; but it must be actively managed within considered tolerances. Not adequately managing risk in the context of administering s501 of the Act may mean that visa applicants or holders who pose a significant threat are allowed to enter or remain in the Australian community. Conversely, inappropriate refusal or cancellation may have a significant impact on individuals. DIAC's role is to balance the potential threat to society with individual interests in a manner that satisfies government and community expectations.

5.2 The ANAO examined DIAC's planning processes, strategies for managing risk, and measuring and reporting against program objectives as it relates to its administration of the character requirements.

Planning process

5.3 DIAC has developed a suite of planning documents to guide its activities. At the departmental level, *The DIAC Strategic Plan 2010–11*, which supports the *Portfolio Budget Statements 2010–11* (PBS), identifies the department's seven key priorities. Business plans at the group, divisional and branch levels further support the implementation of the objectives, deliverables and key performance indicators expressed in the PBS and Strategic Plan. For example, the Compliance and Case Resolution Division (CCRD) Business Plan outlines the division's objectives for 2010–11, which includes some s501 issues. At the branch level, the relevant NatO branch business plans for 2010–11 had not been finalised as at 4 November 2010, although there was a GM-Character/NCCC business plan for 2010–11.

5.4 Plans at the group, divisional and branch levels are aligned to the PBS and Strategic Plan and generally reflect the contribution required by each

stakeholder. However, the ANAO observed that a number of significant tasks and priorities, such as the prisoner census project⁶³ and the need to resolve information access issues⁶⁴, were not included in current or previous business plans.

Managing risk

5.5 Annually, DIAC develops a Strategic Risk Profile, which identifies key risks, its risk mitigation strategies and the inherent and residual risk ratings relevant to each of these risks. One of the risks identified in the Strategic Risk Profile 2010-11 is the 'entry into Australia of persons of national security concern, persons with serious health issues or serious criminal records'. DIAC rates the residual risk, after mitigation, as moderate.

5.6 Supporting the Strategic Risk Profile, DIAC has developed a Risk Assessment Summary for the CCRD that restates this risk. The summary also identifies the controls in place to mitigate the likelihood or consequences of the risk occurring, responsibility for the risk and how the control will be monitored. While the Risk Assessment Summary sufficiently identifies and addresses the risks for which CCRD is responsible, it does not include the risks managed by other stakeholders involved in administering the character requirements. No other stakeholders directly involved in the administration of character under s501 of the Act, such as the NCCC, processing centres and policy areas, have developed risk plans for relevant character risks.

5.7 DIAC has adopted various strategies to mitigate the risks, including providing guidance and training to its officers, implementing processes to identify visa applicants and holders of character concern and requiring evidence to support s501 decisions. As a result, the ANAO considers that the residual risk is generally moderate. However, the impact of making an inappropriate decision in a character case can be significant.

5.8 As discussed in the previous chapter, DIAC's administration of the character requirements focuses on the substantial criminal record element of the character test. DIAC does not have systematic processes in relation to the other elements of the character test, such as associations with criminal individuals and groups and general conduct. These other elements of the

⁶³ Discussed in paragraph 3.43.

⁶⁴ See Recommendation No.2.

character test are inherently more subjective in nature. As such, they represent a potentially higher level of risk to DIAC's administration of the character requirements and require an appropriate and effective risk management approach.

5.9 Within the context of DIAC's administration of the character requirements, a number of different functional areas are responsible for developing policy and guidance, identifying and processing character cases, and making s501 decisions. Therefore, to be effective, DIAC's risk management approach for administering s501 of the Act would best be achieved through an integrated risk framework and articulated in a risk management plan. Such an approach would assist DIAC to better understand the risks it faces and to put in place strategies to minimise the likelihood and/or consequence of those risks occurring. To recognise and acknowledge the issues common to DIAC's administration of the character requirements of both the Migration Act and the Citizenship Act and to reduce the risk that applicants refused citizenship on character grounds are not routinely referred to the NCCC when appropriate, the risk management plan should identify risks common to both DIAC's administration of both Acts.

Conclusion

5.10 DIAC has articulated its objectives and deliverables in a range of planning documents. The strategic plan, which supports the PBS, identifies the department's priorities and is supported by plans at the group, divisional and branch levels. However, the plans do not take a holistic view of the work required and do not include a number of significant tasks. Finalising and including in the plans priority tasks and projects, would help to encourage timely completion of these activities.

5.11 DIAC's Strategic Risk Profile identifies the entry into Australia of persons of national security concern, with serious health issues or with serious criminal records, as a risk. A Risk Assessment Summary, for which DIAC's national office is responsible, supports the Strategic Risk Profile. However, the NCCC and visa processing centres, which are responsible for administering s501 cases, have not developed s501 risk plans or outlined their approach to managing risks in administering the character requirements. Effective risk management strategies should be an integral component of DIAC's administration of the character requirements of the Migration Act. Adopting an integrated risk management approach for administering s501 of the Act, including articulating the risks and mitigation strategies in a risk management

plan, would assist DIAC to better understand the risks it faces and put in place strategies to minimise the likelihood and/or consequence of those risks occurring.

Recommendation No.3

5.12 To better manage the risks associated with administering the character requirements of the *Migration Act 1958*, the ANAO recommends that DIAC develop a risk management plan that identifies and assesses these risks, as well as appropriate mitigation strategies.

DIAC's response: Agreed.

5.13 DIAC agrees that further work could usefully be done to better integrate risk mitigation strategies across the Migration and Citizenship Programs. Compliance and Case Resolution Division and the NCCC will include a formal Risk Assessment and Treatment Plan as part of their 2011-2012 Business Planning.

Measuring and reporting performance

5.14 DIAC is responsible for achieving six government outcomes. The department's administration of the character requirements of the Migration Act contributes to Program 4.1 of Outcome 4.⁶⁵ The PBS outline the relevant program objective, deliverable and key performance indicator, which are shown in Table 5.1.

⁶⁵ Outcome 4: Lawful stay of visa holders and access to citizenship rights for eligible people through promotion of visa compliance responsibilities, status resolution, citizenship acquisition integrity, case management, removal and detention, and policy advice and program design. Department of Immigration and Citizenship, *Portfolio Budget Statements 2010–11, Budget Related Paper No.1.13, Immigration and Citizenship Portfolio*, Commonwealth of Australia, May 2010, p.5.

Table 5.1**Character objective, deliverable and performance indicator**

Program objective	To undertake an effective program of prevention and deterrence with enforcement used as a last resort that seeks to ... protect the public through the cancellation or refusal of visas to non-citizens who may be of concern to the public for reasons such as their involvement in serious criminal activity.
Deliverable	The program delivers services to develop, implement and undertake ... the cancellation or refusal of visas particularly for individuals who are in breach of their visa conditions or present a risk to the Australian community.
Key performance indicator	Effective screening of visa applications offshore to prevent people of character concern from travelling to Australia.

Note: The program objective noted above is one of six relating to Program 4.1.

Source: Department of Immigration and Citizenship, *Portfolio Budget Statements 2010–11, Budget Related Paper No.1.13, Immigration and Citizenship Portfolio*, Commonwealth of Australia, May 2010, pp.47–49.

5.15 The indicator in the PBS is incomplete in that it only refers to the screening of offshore visa applications; it does not cover visa holders in Australia. It is also difficult to measure. Currently, DIAC does not have performance indicators that measure the quality of its processes or decision-making in character cases. As a consequence, it reports performance in its annual report in terms of the number of decisions made. The 2009–10 annual report states that a total of 1078 character-related decisions were made in 2009–10, including 156 visa refusals and 58 visa cancellations under s501 of the Act.⁶⁶ DIAC does not report information regarding its administration of the character requirements on its website.

5.16 Internally, DIAC's ability to measure and report its performance is variable. For example, the NCCC collects a range of data, which it analyses and reports in a Performance Dashboard for internal management use. There were inconsistencies between the data represented in the Annual Report, Performance Dashboard and data obtained by the ANAO. The Performance Dashboard reported a total of 1231 s501 decisions in 2009–10, including 158 visa applications refused and 58 visas cancelled, which differs from the numbers reported in the annual report.⁶⁷ When the ANAO queried the inconsistencies in the data, NatO could not replicate the data reported in the

⁶⁶ Department of Immigration and Citizenship, *Department of Immigration and Citizenship Annual Report 2009–10*, Commonwealth of Australia, October 2010, pp.157–158. DIAC advised the ANAO that the 1078 character related decisions consisted of 156 refusals, 58 cancellations and 864 warnings issued.

⁶⁷ DIAC informed the ANAO that the data reported in its annual report is correct.

NCCC's Performance Dashboard, including the number of visa applicants and holders considered under s501 of the Act in 2009–10.

Data Integrity

5.17 The ANAO assessed the integrity of the data supporting DIAC's management information. For the 2009–10 data, the following issues were identified:

- fields had not been updated to reflect the current status of the case, for example, cases where a decision had been made were listed as active or decision pending;
- incomplete entries and blank fields, such as for visa held, citizenship or nationality of the client, and the decision-maker; and
- cases incorrectly identified as part of a visa holder or visa application s501 caseload.

5.18 DIAC staff also informed the ANAO of several data integrity issues with the current systems for recording and reporting character data that make administering the character requirements and measuring performance difficult. These include:

- multiple information systems that are time consuming for staff to populate and result in multiple records for single visa applicants and holders that contain different information;
- information systems that are not user friendly and for which there is limited training available;
- poorly designed data fields, the purpose for which was not clear to users; and
- a lack of data fields to capture relevant information.

5.19 As a consequence, DIAC management does not have reliable character data for reporting and administrative purposes. During the audit, DIAC established a working group to resolve its data integrity issues and has proposed that one area will be responsible for performance reporting in future.

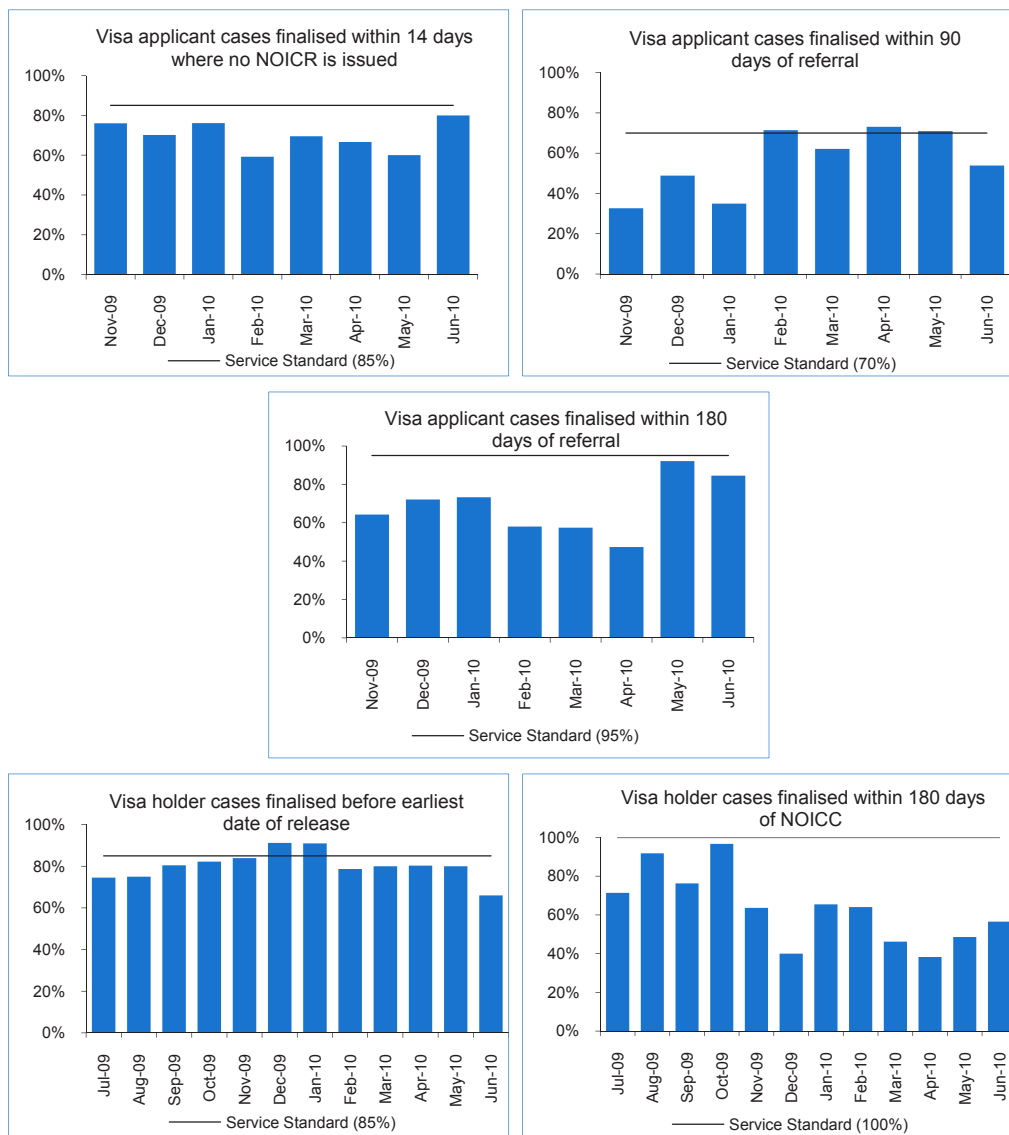
Meeting service standards

5.20 DIAC has developed a series of service standards to measure its service delivery performance. Service standards for the NCCC focus on timeframes for finalising visa applicant and visa holder character cases and include:

- 95 per cent of visa application cases finalised within 180 days of referral;
- 85 per cent of visa holder cases finalised prior to earliest date of release from prison;
- 85 per cent of visa applicant cases finalised within 14 days where a NOICR has not been issued;
- 70 per cent of visa applicant cases finalised within 90 days; and
- 100 per cent of visa holder cases finalised within 180 days of issuing the NOICC.

5.21 The NCCC reports to DIAC executive against the first two service standards. The NCCC developed the other service standards to assist it to measure and manage its character caseload. Figure 5.1 shows the NCCC's performance against the five service standards, and demonstrates that since it assumed responsibility for the visa applicant caseload in late 2009:

- the NCCC has made improvements in its management of visa applicant cases; and
- there has been a decline in the NCCC's performance in administering the visa holder caseload.

Figure 5.1**NCCC service standards, 2009–10**

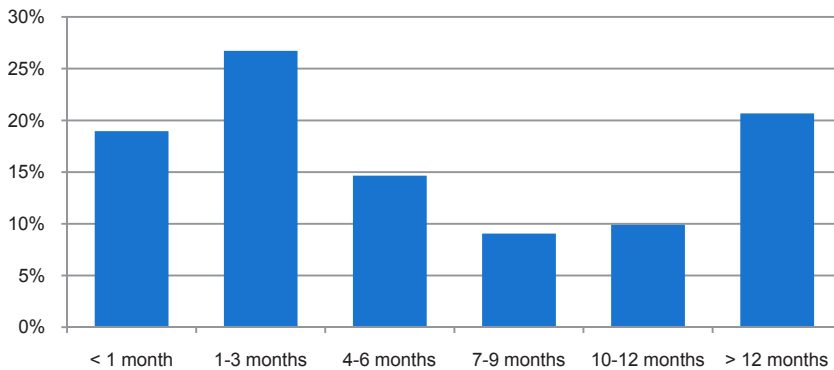
Note: The visa applicant data commences in November 2009, the month that DIAC commenced the transfer of responsibility for this caseload to the NCCC.

Source: NCCC Performance Dashboard.

5.22 As these figures show, the NCCC consistently underperforms against its service standards.⁶⁸ The ANAO's analysis indicates that the time taken to consider some visa applications is considerably longer than the service standard. For example, over 20 per cent of application cases undecided as at 1 July 2010 were over 12 months old (see Figure 5.2).

Figure 5.2

Age of undecided visa applicant cases, as at 1 July 2010



Source: ANAO analysis of DIAC data.

5.23 Similar to the key performance indicator relevant to s501 processing, the service standards focus on the timeliness of decision-making in character cases. There are no service standards to measure the effectiveness and quality of DIAC's s501 processes or decision-making.

Conclusion

5.24 The key performance indicator relevant to the administration of s501 of the Act, as outlined in the PBS, only addresses offshore visa applications and is difficult to measure. DIAC's indicators, as well as its service standards, measure timeliness; they do not measure the quality of its processes or decision-making in character cases. As a consequence, DIAC's external reporting is limited to reporting the number of s501 decisions made. In addition, the department's ability to measure and report its performance internally is variable and it does not have effective systems in place to ensure that character data is accurate and is consistently reported to DIAC

⁶⁸ In June 2011, in response to the proposed audit report, DIAC advised that performance has improved since mid 2010.

management and key external stakeholders such as the Parliament and the Australian public. While it is necessary to balance the cost and effort required to develop and implement performance indicators with the value they provide, implementing meaningful indicators would assist DIAC to more effectively measure its administration of the character requirements.

Recommendation No.4

5.25 To improve its capacity to measure the performance of its administration of the *Migration Act 1958* as it relates to the character requirements, the ANAO recommends that DIAC:

- develop and implement a range of relevant performance indicators; and
- collect, analyse and report performance data against these performance indicators.

DIAC's response: Agreed.

5.26 Performance indicators to measure the efficiency and timeliness of processes in National Character Consideration Centre (NCCC) were developed through consultation with the NCCC and implemented by the Operational Performance Branch in December 2009. These measures were aimed at ensuring a focus on timely decision making in the referral caseload, so as to not impact on overall DIAC performance with finalising applications, and in cancellations, where appropriate, ensuring visas were cancelled prior to a prisoners release.

5.27 Existing performance reporting for NCCC business is limited to the following two measures:

- Visa Applicant decisions made within 180 days, with a specified Service Standard (Target) of 95 per cent
- Visa Holder decisions completed prior to release date, with a specified Service Standard (Target) of 85 per cent.

5.28 Performance against these two measures is assessed on a weekly and monthly basis, with results provided to all Senior Managers and Global Managers through the Service Delivery Network Weekly and Monthly Performance Reports. These reports are also available to all departmental staff, both onshore and offshore, and included on an internal intranet webpage.

5.29 Measures will be reviewed on an ongoing basis in order to reflect the program management and policy objectives, and the shifting priorities of the department.



Ian McPhee
Auditor-General

Canberra ACT
23 June 2011

Appendices

Appendix 1: DIAC's Response to the Proposed Report

The Department of Immigration and Citizenship (DIAC) welcomes the opportunity to contribute to the ANAO performance audit *Administering the Character Requirements of the Migration Act 1958* and agrees with the recommendations. DIAC notes that overall, the ANAO has concluded that DIAC has established a sound framework for identifying and processing visa applicants and holders of potential character concern.

DIAC notes the suggested improvements to the character framework to improve effectiveness. DIAC is committed to continually improving the administration of the character requirements and integrity of the character program and welcomes these suggestions.

The department accepts the recommendations of this report and notes that work has commenced on a number of measures which address many of the issues raised. Other initiatives will be considered as a result of this report.

Recommendation No.1

To gain assurance that its processes for identifying and referring visa applicants of character concerns to the NCCC are effective, the ANAO recommends that DIAC implement a risk-based approach to quality reviewing the processing of visa applications.

DIAC's response: Agreed.

DIAC agrees with the recommendation and acknowledges the importance of a risk based approach to the quality review of processing of visa applications for clients of character concern.

DIAC acknowledges that a review of the process for referrals would assist in the assessment of the effectiveness of identifying visa applicants of character concern. However, DIAC highlights the challenges that are presented in developing such a quality review process given that the large numbers of visa applicants in any given time period, make sampling and targeting of review work difficult.

With this in mind, DIAC has plans to develop a Quality Assurance Review of the referrals process which may be used to appropriately target any future Quality Assurance work surrounding the processing of visa applications for clients of character concern in an ongoing capacity.

Despite the challenges this recommendation presents, DIAC agrees that there is benefit to be gained from a more robust, systemic and risk based approach to quality reviewing the visa application process for clients of character concern.

Recommendation No.2

To provide a formal basis for obtaining the information necessary to support the identification and assessment of visa holders of character concern against the character requirements of the *Migration Act 1958*, the ANAO recommends that DIAC:

- takes steps to establish appropriate arrangements with the relevant authorities to provide this information; and
- clearly defines its information requirements.

DIAC's response: Agreed.

DIAC agrees with the recommendation and advises that work is already underway to both identify the scope of information required to support character decision-making under the *Migration Act 1958* (the Act), and to ensure that DIAC has a clear legislative basis on which to request and require this information from the relevant authorities.

Recommendation No.3

To better manage the risks associated with administering the character requirements of the *Migration Act 1958*, the ANAO recommends that DIAC develop a risk management plan that identifies and assesses these risks, as well as appropriate mitigation strategies.

DIAC's response: Agreed.

DIAC agrees that further work could usefully be done to better integrate risk mitigation strategies across the Migration and Citizenship Programs. Compliance and Case Resolution Division and the NCCC will include a formal Risk Assessment and Treatment Plan as part of their 2011-2012 Business Planning.

Recommendation No. 4

To improve its capacity to measure the performance of its administration of the *Migration Act 1958* as it relates to the character requirements, the ANAO recommends that DIAC:

- develop and implement a range of relevant performance indicators; and

- collect, analyse and report performance data against these performance indicators.

DIAC's response: Agreed.

Performance indicators to measure the efficiency and timeliness of processes in National Character Consideration Centre (NCCC) were developed through consultation with the NCCC and implemented by the Operational Performance Branch in December 2009. These measures were aimed at ensuring a focus on timely decision making in the referral caseload, so as to not impact on overall DIAC performance with finalising applications, and in cancellations, where appropriate, ensuring visas were cancelled prior to a prisoners release.

Existing performance reporting for NCCC business is limited to the following two measures:

- Visa Applicant decisions made within 180 days, with a specified Service Standard (Target) of 95 per cent;
- Visa Holder decisions completed prior to release date, with a specified Service Standard (Target) of 85 per cent.

Performance against these two measures is assessed on a weekly and monthly basis, with results provided to all Senior Managers and Global Managers through the Service Delivery Network Weekly and Monthly Performance Reports. These reports are also available to all departmental staff, both onshore and offshore, and included on an internal intranet webpage.

Measures will be reviewed on an ongoing basis in order to reflect the program management and policy objectives, and the shifting priorities of the department.

Appendix 2: The Character Test

The Ministerial Direction (D41) outlines the factors that DIAC must consider when exercising its judgement about whether a visa applicant or holder fails the character test. The elements and factors are summarised below.

Substantial criminal record (paragraph 7.1)

A visa applicant or holder fails the character test if the person has a substantial criminal record. The person has a substantial criminal record if they have:

- been sentenced to a term of imprisonment of 12 months or more, or received multiple sentences with more than two years imprisonment;
- been sentenced to death or imprisonment for life; or
- been acquitted of an offence due to unsoundness of mind or insanity, and as a result was detained in a facility or institution.

Association (paragraph 7.2)

A visa applicant or holder fails the character test if the person associates with an individual or group suspected of engaging in criminal conduct. To establish whether an association exists, the decision-maker considers:

- the nature, degree, frequency and duration of the association; and
- whether the association has a negative bearing on the visa applicant or holder's character (such as that they support the criminal conduct—mere knowledge is not sufficient to establish association).

Past and present criminal or general conduct (paragraph 7.3)

A visa applicant or holder fails the character test if they are not of good character, having regard to their past and present criminal and/or general conduct.

For past and present criminal conduct, the factors that are considered include:

- the nature, severity and frequency of the offence/s and the period since the crime/s were committed;
- any evidence of recidivism, continuing association with criminals or pattern of continued disregard or contempt for the law; and
- any extenuating circumstances that may explain the criminal conduct or any good acts to suggest the person has since reformed.

For past and present general conduct, the factors that are considered include:

- the person's involvement in activities indicating contempt or disregard for the law or for human rights (for example, war crimes);

- whether the person has been deported from any country, or been dishonourably discharged from the armed forces of any country;
- whether the person has criminal charges pending overseas; and
- any recent good conduct since the reprehensible conduct which suggests the person's character may have reformed.

Significant risk in regards to future conduct (paragraph 7.4)

A visa applicant or holder does not pass the character test if there is a significant risk that, while in Australia, the person would: engage in criminal conduct; harass, molest, intimidate or stalk another person; or vilify a segment of the community, incite discord or represent a danger through involvement in disruptive and/or violent activities.

When considering the risk that a person may engage in criminal conduct, the decision-maker must assess that the likely conduct could result in a criminal conviction being recorded.

When considering the risk that a person may harass, molest, intimidate or stalk another person, conduct that may fall under this category includes:

- breaches of an apprehended or domestic violence order or unwelcome and/or inappropriate approaches to children; or
- any conduct that would reasonably cause an individual to be severely fearful or distressed regarding the person's behaviour towards them.

When considering whether a person may vilify a segment of the community, incite discord or represent a danger, the factors include whether the person:

- advocates extremist views or encourages disregard for law and order;
- has engaged in conduct incompatible with a multicultural society or participates in politically motivated violence and is likely to encourage such action in Australia; and
- is likely to provoke unrest because the timing of their visit and activities coincide with others holding opposing views.

DIAC balances these considerations against Australia's tradition of free expression.

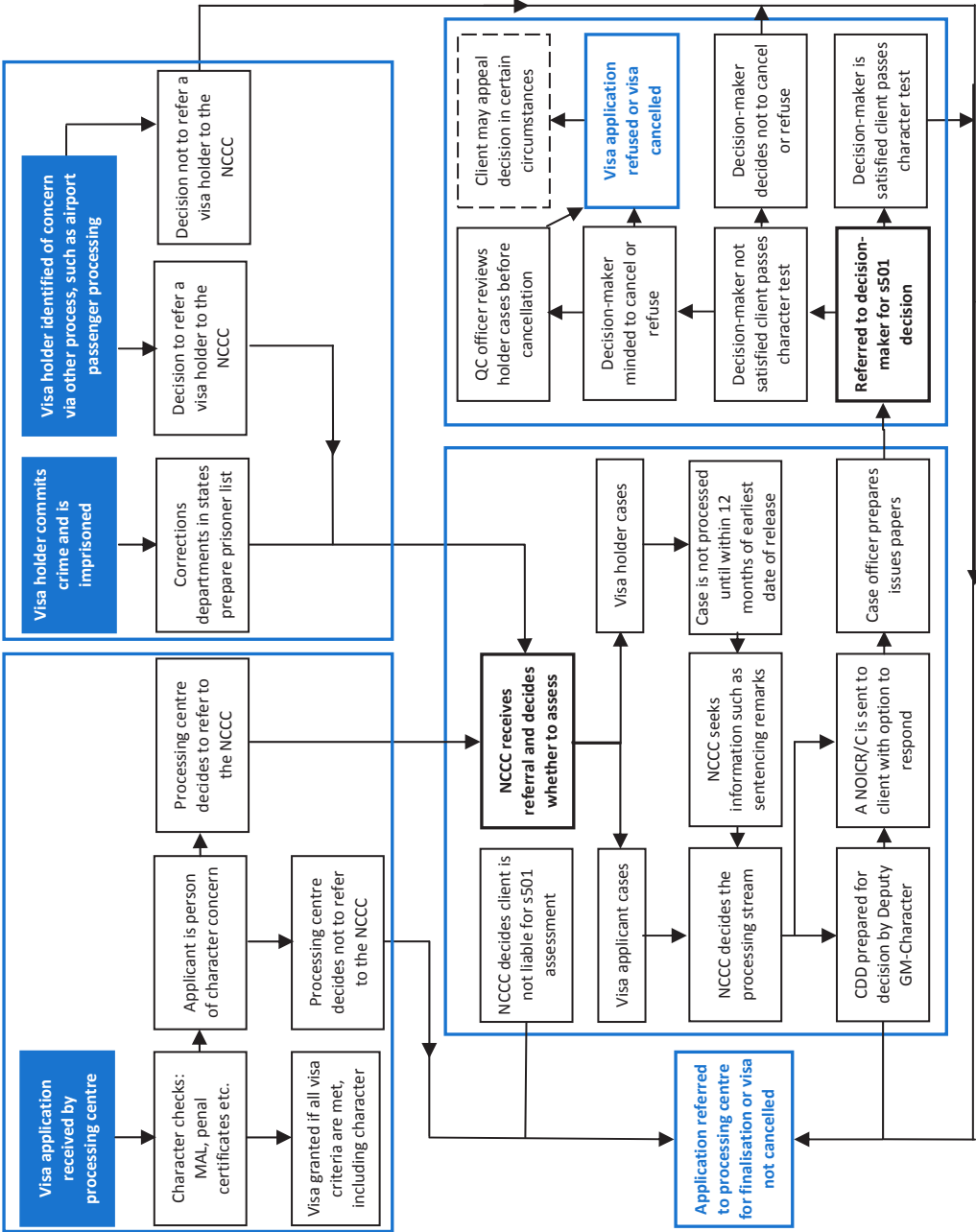
Source: Minister for Immigration and Citizenship, *Direction [No.41] – Visa refusal and cancellation under s501*, Commonwealth of Australia, 3 June 2009.

Appendix 3: Refusal and Cancellation Powers under the Migration Act

Section	Description
s109	Cancellation of a visa on the basis that a visa holder has provided incorrect information or fake documents.
s116	General and prescribed grounds for cancellation of temporary visas.
s128	Cancellation of a visa without notice where a visa holder is outside Australia in circumstances described under s116.
s134	Cancellation of a business visa when a visa holder fails to meet the conditions of their visa.
s137J	Cancellation of a student visa when a visa holder fails to meet the conditions of their visa.
s137Q	Cancellation of a regional sponsored employment visa when a visa holder fails to meet the conditions of their visa.
s137T	Cancellation of a visa when a visa holder is dependent on a regional sponsored visa cancelled under s137Q.
s140	Cancellation of a dependent visa when a visa held by the primary applicant is cancelled.
s501	Refusal and cancellation of a visa application/visa on character grounds.

Source: ANAO.

Appendix 4: Processing s501 Visa Cases



Source: ANAO representation.

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