



Ministerial Instructions—requests for use of the Minister's intervention powers under sections 351 and 501J of the *Migration Act 1958*

I, Tony Burke, Minister for Immigration and Citizenship, give the following instructions to my Department for dealing with requests for Ministerial intervention under sections 351 and 501J of the *Migration Act 1958*.

Dated

17.9.25

Tony Burke
Minister for Immigration and Citizenship

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Part 1—Preliminary

1. Nature, application, purpose and effect of these instructions

Nature

- 1.1 These instructions to the Department, on how to deal with certain requests for the Minister to exercise the intervention powers under the *Migration Act 1958*, are issued in the exercise of executive power.
- 1.2 These instructions do not involve the exercise of the Minister's statutory power to make a procedural decision, as defined in section 2. Rather, they are non-statutory instructions to officers of the Department that will enable them, in the appropriate cases, to put a Minister in a position to make a procedural decision if the Minister so chooses.

Application

- 1.3 These instructions apply to a request for the Minister to exercise the intervention powers under the *Migration Act 1958* in relation to a review decision where, on or after the date that these instructions were issued:
 - the request was made by the individual affected by the review decision, or the individual's representative, and received by or forwarded to the Department (a *direct request*); or
 - the relevant review tribunal made the request, in relation to the individual affected by the review decision, by including the details of the request in the decision record (a *tribunal request*).

Purpose

- 1.4 The purpose of these instructions is to explain the following:
 - how a person may make a direct request to be dealt with by the Department under these instructions;
 - how the Department is to deal with direct requests and tribunal requests;
 - the categories of requests that I wish to have referred to a Minister, and the form in which they are to be referred;
 - the categories of requests that I do not wish to have referred to a Minister under these instructions, and that the Department is to finalise without referral to a Minister.

Effect

- 1.5 I have not, in issuing these instructions, decided to consider whether to exercise a Ministerial intervention power for the purposes of subsection 197E(5) of the Act in respect of any unlawful non-citizen. As a result, the issuing of these instructions will not affect the operation of subsection 197E(1) of the Act in respect of any unlawful non-citizen.

2. Terminology

2.1. In these instructions:

Act means the *Migration Act 1958*.

direct request has the meaning given in paragraph 1.3.

finalise: a request is finalised:

- by the Department, when it sends the notification mentioned in section 10; or
- by the requester, when the Department receives a notification from the requester that they wish to withdraw the request; or
- by the requester, in relation to a tribunal request, if they do not wish to proceed when consulted by the Department in accordance with paragraph 7.1.

intervention powers, in relation to a review decision, means the powers of the Minister to substitute another decision for the review decision, as described in section 3, under sections 351 and 501J of the Act.

Note: The Minister may exercise the power under section 351 of the Act in relation to a review decision that was made before the transition time—see the transitional provision in item 38 of Schedule 16 to the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024*.

permanent resident means an individual who holds a permanent visa.

procedural decision means a decision to consider, or to not consider, making a decision under subsection 351(1) or 501J(1) of the Act to substitute a decision with another decision that is more favourable to an individual.

Note: This is a procedural decision of the kind described in paragraph 14 of the reasons for judgment of the plurality in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10.

request means:

- a direct request that satisfies Part 2; or
- a tribunal request that is being treated as a direct request under paragraph 7.3.

requester means:

- in relation to a direct request—the person who made it (the individual or their representative); and
- in relation to a tribunal request—the person who is treated as having made it under paragraph 7.3.

repeat request, in relation to an individual, means a request that is related to an earlier request in the way set out in section 11.

representative, of an individual, in relation to a request, means:

- a legal practitioner or migration agent who has been notified to the Department as the individual's representative in relation to matters that include the request by:

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- providing a form 956; or
 - sending a letter to the Department, dated and signed by the legal practitioner or migration agent, that sets out the name of the individual, and (if known) the individual's departmental client number or file number, and, in the case of a migration agent, the agent's Migration Agent Registration Number; or
 - a person who the individual has otherwise authorised to represent them in matters that include the request, in writing provided to the Department.

review decision means:

- a decision made on or after the transition time under:
 - section 105 of the *Administrative Review Tribunal Act 2024*; or
 - section 349 or 368C of the Act; or
- a decision made before the transition time by the Administrative Appeals Tribunal under section 349 or 415 of the Act as it then stood; or
- a decision made before the transition time that was an AAT protection visa decision, as defined in section 501J of the Act as it then stood.

review tribunal means a body that made a relevant review decision.

section 12 circumstances means the circumstances in which a request is inappropriate to refer, set out in section 12.

section 13 criteria means the criteria for referring a request to the Minister, set out in section 13.

transition time means the day on which the *Administrative Review Tribunal Act 2024* commenced.

Note 1: At the transition time:

- the Administrative Appeals Tribunal was replaced by the Administrative Review Tribunal under the *Administrative Review Tribunal Act 2024*; and
- provisions of the Act relevant to the intervention powers were repealed or replaced under the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024*.

Note 2: The **transition time** is 14 October 2024.

tribunal request has the meaning given in paragraph 1.3.

3. Nature of Minister's intervention powers

- 3.1 The intervention powers allow the Minister to intervene in relation to a review decision by substituting a decision that is more favourable to an individual, if the Minister thinks it is in the public interest to do so.
- 3.2 What is and what is not in the public interest is for the Minister to determine.
- 3.3 The power to intervene is personal and non-compellable. This means that although the Minister's powers under the Act may be enlivened in relation to a review decision, he or she does not have a duty to exercise or consider exercising any of the powers.

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- 3.4 Under the transitional provisions set out in the Acts that replaced the former Administrative Appeals Tribunal, these powers can also be exercised in relation to the corresponding decisions of the Administrative Appeals Tribunal.

4. When the Minister's intervention powers are enlivened

- 4.1 The Minister's intervention powers are enlivened when a review decision is made.
- 4.2 The Minister's intervention powers in relation to a review decision cease to be enlivened if:
- 4.2.1 I, or another Minister, intervene in relation to the review decision by granting a visa; or
- 4.2.2 the review decision is quashed by a court; or
- 4.2.3 in the case of a review decision that remits the matter to the Department for reconsideration—a departmental officer makes a subsequent decision on the case.

Note: In the case of a review decision of the kind mentioned in subparagraph 4.2.3, which remits the matter to the Department, note that:

- even while the intervention powers are still enlivened, the matter is to be treated as inappropriate to refer for the purposes of these instructions—see paragraph 12.1.8; and
- if the departmental officer makes a decision, that new decision may be subject to review in the usual way.

5. My principles in considering whether to use the intervention powers

- 5.1 It is my general expectation that an individual who has not been granted a visa through the statutory visa process will leave Australia.
- 5.2 Consideration of a request is at my discretion and is not an extension of the visa process.
- 5.3 If an individual has an onshore visa pathway available to them, it is generally not appropriate for a Minister to consider a request.
- 5.4 If the individual who is the subject of a request is in the community when the request is made, I expect them:
- 5.4.1 to be a lawful non-citizen when the request is made; and
- 5.4.2 to remain a lawful non-citizen until that request is finalised.
- 5.5 I expect an individual who is the subject of a request:
- 5.5.1 to cooperate in ensuring that their travel documents are available and valid; and
- 5.5.2 to continue to engage with the Department and assist with any enquiries, particularly those concerning their identity; and
- 5.5.3 to continue to make arrangements to leave Australia even while their request is being progressed.

Note: Section 197E of the Act explains when and how ministerial intervention powers are relevant to the removal of unlawful non-citizens under section 198 of the Act.

Part 2—Making a request

6. Direct requests

- 6.1 A direct request must be made in writing.
- 6.2 The Department is to provide, on its website:
 - 6.2.1 a means of making a direct request online; and
 - 6.2.2 a postal address for sending a paper direct request to the Minister.
- 6.3 The request must specify:
 - 6.3.1 which of the Minister's intervention powers the requester relies on; and
 - 6.3.2 the review decision; and
 - 6.3.3 the section 13 criteria that are being relied on in the request.
- 6.4 The request must be accompanied by the information relevant to assessing whether the individual satisfies those criteria.
 - Note: It is the responsibility of the requester to provide any information about the individual and the individual's circumstances that will be relevant to the assessment by the Department.
- 6.5 Any information not in English must include accurate English translations (which should be done by a translator accredited by the National Accreditation Authority for Translators and Interpreters).

7. Tribunal request

- 7.1 Where a review tribunal makes a tribunal request, the Department is to establish:
 - 7.1.1 whether the individual or a representative of the individual is the appropriate person to communicate with in relation to the request; and
 - 7.1.2 whether the person wishes to proceed with the request.
- 7.2 If the person wishes to proceed with the request, the Department is to invite that person to provide any information needed to complete the request.
- 7.3 The Department is to then treat it as if it were a direct request made by that person.
 - Note: From this point on, the whole of Parts 3, 4 and 5 apply to a tribunal request as if it were a direct request.

Part 3—Dealing with a request

8. How a request is to be dealt with

- 8.1 A request for the Minister to exercise his or her intervention powers is to be dealt with by the Department as follows.

Are the intervention powers enlivened?

8.2 The Department is to assess whether the intervention powers have been and remain enlivened by the review decision to which the request relates, as set out in section 4.

8.3 If the intervention powers were not, or have ceased to be, enlivened, the request is to be finalised by the Department.

Is the request properly made?

8.4 The Department is to assess whether the request complies with Part 2.

8.5 If the request does not comply, the request is to be finalised by the Department.

Is the request inappropriate to refer?

8.6 If the request complies with Part 2, the Department is to assess whether it is inappropriate to refer, as set out in section 12.

8.7 If the request is inappropriate to refer, it is to be finalised without referral to a Minister.

Does the request meet one of the section 13 criteria?

8.8 If the request is not inappropriate to refer, the Department is to assess whether it meets any of the section 13 criteria.

8.9 If the request does not meet any of the section 13 criteria, it is to be finalised without referral to a Minister.

Referral on submission

8.10 If the request meets at least *one* of the section 13 criteria, it is to be referred to a Minister on a submission.

Seeking further information

8.11 If the request meets at least one of the section 13 criteria, then the Department is to make any appropriate health, character or other assessments, and may seek further information from the requester.

8.12 Where a request has been referred to a Minister, a Minister may also ask for such assessments to be carried out, or for such information to be sought.

9. Consideration of a request referred to a Minister

9.1 Even if a request is referred to a Minister in accordance with these instructions:

9.1.1 the Minister may still decline to consider the request; and

9.1.2 if the Minister considers the request, the Minister may still decline to intervene to grant a visa.

9.2 If a Minister chooses to intervene to grant a visa, the Minister will grant what they consider to be the most appropriate visa.

10. Notification of actions and results

- 10.1 If a request is referred to a Minister, the Department is to notify the requester of the outcome of the referral.
- 10.2 If a request is to be finalised by the Department in accordance with paragraph 8.3, the Department is to notify the requester that my intervention powers are not enlivened by the review decision.
- 10.3 If a request is to be finalised by the Department in accordance with paragraph 8.5, the Department is to notify the requester that the request does not comply with Part 2.
- 10.4 If a request is to be finalised without referral to a Minister in accordance with paragraph 8.7 or 8.9, the Department is to notify the requester that it did not satisfy the criteria that I have set for when a Minister will personally consider a request for me to use the intervention powers.

Part 4—Requests that are not to be brought to my attention

11. Repeat requests

- 11.1 Subject to subsection 11.3, a request in relation to an individual (the *current request*) is a *repeat request* if there was a relevant earlier request.

Meaning of relevant earlier request

- 11.2 In this section:

earlier request, in relation to the current request, means any request for a Minister to exercise the intervention powers in relation to a review decision relating to the same individual that was received by the Department before the date on which it received the current request:

- regardless of whether these instructions applied to it; and
- regardless of the Minister that they were addressed to, or the Minister by whom, or on whose instructions, they were dealt with.

relevant earlier request means an earlier request that satisfies all of the following:

- it was dealt with personally by a Minister;
- the Minister either declined to consider the request or declined to exercise the intervention powers;
- the Department notified the individual or the individual's representative of the Minister's decision;
- the notification by the Department was made less than two years before the Department received the current request.

Exception

- 11.3 The current request is not a repeat request, despite the existence of a relevant earlier request, if a Minister declined to consider the relevant earlier request in a decision made in respect of a class of requesters, and in making the decision, the Minister stated that the persons affected by that decision could make a new request.

12. Requests that are inappropriate to refer

- 12.1 For paragraph 8.6, a request in relation to an individual is inappropriate to refer (and will therefore be finalised without referral to a Minister), if any of the following circumstances apply:

- 12.1.1 a request in relation to the individual has been received and has not been finalised;

Note: A requester may provide new or updated information in relation to a request that has not been finalised; however a new request will not be referred to a Minister unless the existing request is withdrawn or finalised.

- 12.1.2 the request is a repeat request;

- 12.1.3 the individual is an unlawful non-citizen who is not in immigration detention and can make a valid bridging visa application, but has not done so at the time of lodgement of the ministerial intervention request;

- 12.1.4 the individual could apply for a Partner visa while in Australia but is subject to condition 8503 (which specifies that after entering Australia, the individual is not entitled to be granted another substantive visa other than a protection visa while they remain in Australia), and a request for a waiver of that condition has not been sought or decided within three months before the lodgement of the ministerial intervention request;

- 12.1.5 the individual is outside Australia having departed Australia;

- 12.1.6 the individual has an ongoing application for a substantive visa with the Department;

- 12.1.7 the individual has an ongoing application for merits review of a visa decision with a review tribunal;

- 12.1.8 the individual has had a visa decision remitted or set aside by a review tribunal or a court and the matter remains under consideration;

- 12.1.9 the request is made following the issuing to the individual of a notice of intention to remove;

- 12.1.10 the individual holds a Bridging visa E with visa condition 8512, which specifies that the individual must leave Australia by a specified date;

- 12.1.11 the individual:

- can make a valid application for a medical treatment visa; and
- has been refused a permanent visa on health grounds, is over the age of 50 and is unfit to depart Australia due to a permanent or deteriorating disease or health condition (as certified by a medical officer of the Commonwealth);

- 12.1.12 the individual is an Australian citizen or permanent resident;

- 12.1.13 the request raises claims only in relation to Australia's non refoulement obligations;

Note: If the individual has previously made an application for a protection visa that has been refused, a request could be made for the Minister to exercise the power under section 48B of the Act.

If the individual has not made an application for a protection visa, and is therefore not barred under section 48A from making an application for a protection visa, then they could make an application for a protection visa.

Part 5—Requests that are to be brought to a Minister’s attention

13. Criteria for referring a request to a Minister

13.1 For paragraphs 8.8 to 8.10, the following are the section 13 criteria.

- 13.1.1 the individual has provided evidence that they are the parent of an Australian citizen or permanent resident child who was a minor at the time the request for ministerial intervention was made;
- 13.1.2 the individual:
 - has the skills that are required for a relevant skilled occupation mentioned in section 14; and
 - is presently working in the relevant skilled occupation; and
 - has provided the evidence required by section 14;
- 13.1.3 the individual was previously the holder of a Subclass 188 (Business Innovation and Investment (Provisional)) visa, and would now satisfy criteria in relation to time spent in Australia for grant of a Subclass 888 (Business Innovation and Investment (Permanent)) visa;
- 13.1.4 the individual has provided evidence that they are the carer of an Australian citizen who needs care and has been issued a Carer Visa Assessment Certificate (CVAC) which has a minimum impairment rating of 30, and has also provided evidence that:
 - the individual needing care has no Australian citizen, permanent resident or eligible NZ citizen family members permanently residing in Australia; and
 - the provision of care services is otherwise unavailable to the individual because of a denial of access by care providers;
- 13.1.5 the individual is excluded from the grant of a protection visa or has had a protection visa cancelled or refused on character grounds and a protection finding has been made for the individual within the meaning of section 197C of the Act;
- 13.1.6 the individual is a member of the immediate family (within the meaning of subregulation 1.12AA(1) of the *Migration Regulations 1994*) of a child who:
 - has been found to engage Australia’s non-refoulement obligations; and
 - holds, or has held, a protection visa or a visa granted under Australia’s refugee and humanitarian program;

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- 13.1.7 the individual is under the age of 18 and in the care of the relevant Australian State or Territory welfare authority;
- 13.1.8 the individual would meet the requirements of subclause 102.211(2) of Schedule 2 to the *Migration Regulations 1994* but for subparagraph (b)(ii) of that subclause, and has been refused a visa for that reason;
- 13.1.9 the following are satisfied:
- the individual first entered Australia as a minor and has lived in Australia for at least 50% of their life;
 - a medical officer of the Commonwealth has assessed that the individual's mental or physical health would be adversely affected if they had to return to any of the countries where they have a right to reside;
 - the individual does not have any family members in any of the countries where they have a right to reside;
- 13.1.10 the individual cannot return or be returned to any of their countries of citizenship or usual residence on a voluntary basis, due to the refusal of the authorities of the country to cooperate to allow the person's return;

Note: For example, the country may refuse to recognise the person as a citizen or person with a right of residence, or may refuse to issue a necessary travel document.

14. Evidence of relevant skills

- 14.1 For paragraph 13.1.2, a *relevant skilled occupation* is an occupation listed on one of the following:
- 14.1.1 the Medium and Long-term Strategic Skills List (MLTSSL);
 - 14.1.2 the Short-term Skilled Occupation List (STSOL);
 - 14.1.3 the Regional Occupation List (ROL)
 - 14.1.4 the Core Skills Occupation List (CSOL).
- 14.2 For paragraph 13.1.2, the evidence required in relation to the relevant skilled occupation is:
- 14.2.1 either:
- a past or current positive skills assessment in relation to the skills required for the relevant skilled occupation; or
 - evidence of an appropriate qualification in those skills; and
- 14.2.2 evidence that the individual is presently working in the relevant occupation; and
- 14.2.3 if the individual is working as an employee—evidence of support from the individual's employer.

Part 6—Miscellaneous

15. Transitional provision

- 15.1 The Department is to treat a request that refers to, or relies on, the intervention powers as they existed before the transition time as if:

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- 15.1.1 the request were a request for the exercise of the intervention powers as they exist on or after the transition time; and
- 15.1.2 the review decision had been made under section 105 of the *Administrative Review Tribunal Act 2024*, or section 349 or section 368C of the Act as it stands on or after the transition time, as appropriate.

Note: See also item 38 of Schedule 16 to the *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024*.