



**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

Contents

Part 1—Preliminary	2
1. Nature, application, purpose and effect of these instructions	2
2. Terminology	3
3. Nature of Minister's intervention powers	4
4. When the Minister's intervention powers are enlivened	5
5. My principles in considering whether to use the intervention powers	5
Part 2—Making a request	6
6. Direct requests	6
7. Tribunal request	6
Part 3—Dealing with a request	6
8. How a request is to be dealt with	6
9. Consideration of a request referred to a Minister	7
10. Notification of actions and results	8
Part 4—Requests that are not to be brought to my attention	8
11. Repeat requests	8
12. Requests that are inappropriate to refer	9
Part 5—Requests that are to be brought to a Minister's attention	10
13. Criteria for referring a request to a Minister	10
14. Evidence of relevant skills	11
Part 6—Miscellaneous	11
15. Transitional provision	11

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;

- 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:
 - o the individual first entered Australia as a minor and has lived in Australia for at least 50% of their life;
 - o 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;
 - o 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:
 - o a past or current positive skills assessment in relation to the skills required for the relevant skilled occupation; or
 - o 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*.

**Ministerial Instructions for processing requests
for Ministerial intervention under subsection
46A(2) of the *Migration Act 1958***

I, Tony Burke, Minister for Immigration and Citizenship, give the following instructions to my Department for processing requests for Ministerial intervention under subsection 46A(2) of the *Migration Act 1958*.

Dated

4.9.25



Tony Burke
Minister for Immigration and Citizenship

Contents

Part 1—Preliminary	2
1. Nature of these instructions and my principles in considering whether to use the intervention power	2
2. Nature of the Minister’s intervention power	2
3. Purpose of these instructions.....	3
4. Terminology.....	3
5. When the subsection 46A(2) power is not enlivened.....	5
Part 1A—The effect of these instructions	6
Part 2—Making a request	6
6. Who may make a request.....	6
7. How a request is to be made	6
Part 3—Processing requests	6
8. How a request is to be processed	6
9. Notification of actions and outcomes.....	6
Part 4—Requests that should not be brought to a Minister’s attention	7
10. Requests that are inappropriate to refer.....	7
Part 5—Requests that should be brought to a Minister’s attention	8
11. Requests that should be brought to a Minister’s attention on a full submission.....	8
12. Requests that should be brought to a Minister’s attention on a summary submission.....	9
Part 6—How requests should be referred to a Minister	9
13. Information to be presented to a Minister in a full submission	9
14. Information to be presented to a Minister in a summary submission	9

Part 1—Preliminary

1. Nature of these instructions and my principles in considering whether to use the intervention power

Nature

- 1.1 These instructions to the Department, on how to deal with certain requests for a Minister to exercise the intervention powers under subsection 46A(2) of the *Migration Act 1958*, are issued in the exercise of executive power.
- 1.2 These instructions do not involve making a procedural decision (see paragraph 4.2). 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 consider making a procedural decision.
- 1.3 These instructions only deal with requests for the exercise of the power in subsection 46A(2) of the *Migration Act 1958* (the Act) that are made by or on behalf of an unauthorised maritime arrival (UMA). They do not prevent the Department of Home Affairs (Department) from referring a UMA's case to a Minister where the Department forms the view that referral is appropriate.

Principles

- 1.4 I expect a person seeking protection in Australia to make all their circumstances and protection claims known to the Department during the assessment of their protection claims and to make full use of the assessment process and any avenue of review available to them. Usually, this will be an individual's only opportunity to have their protection claims considered by Australia.
- 1.5 For an individual who has previously had their protection claims assessed in a protection visa application and where no protection finding was made, or a non-statutory assessment concluded that the individual does not engage Australia's *non-refoulement* obligations, I expect the individual to depart Australia in a timely manner.
- 1.6 I consider the public interest is served by ensuring that an individual who has been found not to engage Australia's protection obligations is prevented from making unmeritorious repeat requests to prolong their stay in Australia.
- 1.7 However, the public interest may also be served by providing a way for new information, or changed country conditions or individual circumstances, in relation to an individual who has previously been found not to engage Australia's protection obligations, to be considered. In these limited circumstances, the public interest is served by allowing those new claims to be assessed through a statutory process to ensure that Australia upholds its *non-refoulement* obligations.

2. Nature of the Minister's intervention power

- 2.1 Subsection 46A(1) of the Act provides that an application for a visa is not a valid application if it is made by a UMA who is in Australia and either:

- a. is an unlawful non-citizen; or
 - b. holds a bridging visa or a temporary protection visa, or a temporary visa of a kind prescribed for the purposes of subparagraph 46A(1)(b)(ii) of the Act (this includes a SHEV, Temporary Safe Haven (subclass 449) visa (HSTV) and Temporary (Humanitarian Concern) (subclass 786) visa)).
- 2.2 Subsection 46A(2) of the Act provides that if the Minister thinks it is in the public interest to do so, the Minister may, by written notice given to a UMA, determine that subsection 46A(1) does not apply to an application by the UMA for a visa of a class specified in the determination. Such a determination is described as lifting the subsection 46A(1) application bar. The power to intervene is personal and non-compellable.
- 2.3 Under subsection 46A(2A) of the Act, the Minister can specify the period of time for which the subsection 46A(1) application bar is lifted. Under subsection 46A(2C) of the Act, the Minister may vary or revoke a subsection 46A(2) determination if they think it is in the public interest to do so.
- 2.4 The Minister does not have a duty to consider whether to exercise the power under subsection 46A(2) of the Act in respect of any UMA, whether the Minister is requested to do so by the UMA or by any other person, or in any other circumstances.

3. Purpose of these instructions

- 3.1 These are my instructions to the Department, as Minister for Immigration and Citizenship, for processing requests for a Minister to consider exercising the intervention power under subsection 46A(2) of the Act.
- 3.2 The purpose of these instructions is to explain:
- a. how a UMA may make a request that a Minister consider exercising the intervention power in their case; and
 - b. how the Department is to process such requests; and
 - c. the categories of requests I wish to have referred to a Minister in order for a Minister to be in a position to consider making a procedural decision, and the form in which they are to be referred; and
 - d. the categories of requests I do not wish to have referred to a Minister and that the Department is to finalise without referral to a Minister.

Note: The term 'procedural decision' here is defined in paragraph 4.2. It means 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.

4. Terminology

- 4.1 A number of expressions used in these instructions are already defined in the Act and will not be duplicated here, however, abbreviations for some of these expressions are set out below:
- a. bridging visa (*BV*): section 37;

- b. finally determined: s 5;
- c. Humanitarian Stay (Temporary) (subclass 449) visa (*HSTV*);
- d. lawful non-citizen: section 13;
- e. member of the same family unit: subsection 5(1);
- f. Permanent Protection (subclass 866) visa (*PPV*): subsection 35A(2);
- g. protection visa (*PV*): section 35A;
- h. Resolution of Status (subclass 851) visa (*RoS*);
- i. Safe Haven Enterprise (subclass 790) visa (*SHEV*): subsection 35A(3A);
- j. Special Purpose Visa (*SPV*): subsection 33(1);
- k. Temporary Protection (subclass 785) visa (*TPV*): subsection 35A(3);
- l. temporary visa: subsection 30(2);
- m. unauthorised maritime arrival (*UMA*): section 5AA;
- n. unlawful non-citizen: section 14.

4.2 In these instructions:

Act means the *Migration Act 1958*.

family violence has the meaning given in paragraph 4 of [Ministerial Direction 110](#), 'Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under s 501CA', issued 7 June 2024.

finalised: a request is finalised:

- by the Department—on the day that it sends one of the notifications mentioned in paragraph 9.2; or
- by the requester—on the day that the Department receives a notification from them that they wish to withdraw the request.

full submission means a submission made in accordance with paragraph 13.

non-refoulement obligations means Australia's obligations to not return a person to face certain types of harm, arising under Article 33 of the *1951 Convention Relating to the Status of Refugees*, as amended by the *1967 Protocol relating to the Status of Refugees*, under Article 3 of the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, and in relation to Articles 6 and 7 of the *International Covenant on Civil and Political Rights* and its Second Optional Protocol aimed at the abolition of the death penalty.

non-statutory assessment means a non-statutory assessment of a person's protection claims including through a departmental Refugee Status Assessment, Protection Obligations Determination, an International Treaties Obligations Assessment, or a merits review in an Independent Merits Review or Independent Protection Assessment.

paragraph 11.1 criteria means the criteria for referring a request to a Minister in a full submission, set out in paragraph 11.1.

procedural decision means a decision to consider, or to not consider, whether it is in the public interest to determine that subsection 46A(1) of the Act does not apply to an application by a UMA for a visa of a class specified in the determination.

refusal, in relation to an application for a PV, means a decision to refuse the visa application where that application has been 'finally determined'.

repeat request means any request for a Minister to consider exercising the intervention power under subsection 46A(2) of the Act made by or on behalf of the same requester at any time after the date on which the previous intervention request was finalised.

Note: A request can be a repeat request irrespective of whether the earlier request was finalised without referral to a Minister.

A request can be a repeat request irrespective of the identity of the Minister to whom the earlier request was addressed, or the Minister by whom, or under which section 46A Instructions or Guidelines, they were dealt with.

representative, of a UMA, in relation to a request, means:

- a legal practitioner or migration agent who has been notified to the Department as the UMA's representative in relation to matters that include the request by:
 - 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 UMA and (if known), the UMA'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, other than a legal practitioner or migration agent, whom the UMA has authorised to represent them in matters that include the request, in writing provided to the Department.

request means a request for a Minister to exercise the intervention power under subsection 46A(2) of the Act.

requester means the UMA who made the request, or, if they are represented, the UMA on whose behalf the request is made.

summary submission means a submission in accordance with paragraph 14.

5. When the subsection 46A(2) power is not enlivened

5.1 The intervention power under subsection 46A(2) of the Act is not enlivened if:

- a. the requester is not a UMA; or
- b. the UMA is not in Australia; or
- c. the UMA is a lawful non-citizen and holds a visa that is not a BV, a TPV, or a visa prescribed for the purposes of subparagraph 46A(1)(b)(ii) of the Act.

Part 1A—The effect of these instructions

5A. Nothing in these instructions constitutes a decision by a Minister under the Act

- 5A.1 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 UMA. As a result, the issuing of these instructions will not affect the operation of subsection 197E(1) of the Act in respect of any UMA.

Part 2—Making a request

6. Who may make a request

- 6.1 A request can be made to the Department by a UMA or their representative.

7. How a request is to be made

- 7.1 A request must be made in writing.
- 7.2 The request must identify the relevant paragraph 11.1 criterion, or criteria, that the requester relies upon.
- 7.3 The request must be accompanied by all the information relevant to assessing whether the requester satisfies that criterion or those criteria.
- 7.4 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 (NAATI)).

Part 3—Processing requests

8. How a request is to be processed

- 8.1 The Department is to finalise a request without referral to a Minister if the request is inappropriate to refer in accordance with paragraph 10.1. I do not wish a Minister to be put in a position to consider making a procedural decision in such cases.
- 8.2 The Department is to refer a request to a Minister in a full submission if:
- a. the request is not inappropriate to refer in accordance with paragraph 10.1; and
 - b. the request satisfies at least one of the paragraph 11.1 criteria.
- 8.3 Otherwise, the Department is to refer a request to a Minister in a summary submission.

9. Notification of actions and outcomes

- 9.1 Upon receiving a request, the Department will acknowledge receipt in writing.

- 9.2 Following an assessment by the Department in accordance with these instructions, the Department will notify the requester as follows:
- a. if the request is inappropriate to refer—that it has been finalised without referral to a Minister and stating the relevant subparagraph of paragraph 10.1 under which the request has been finalised; or
 - b. if the request is referred to a Minister and the Minister decides not to consider whether to exercise the power, or decides not to exercise the power—the outcome.

Part 4—Requests that should not be brought to a Minister’s attention

10. Requests that are inappropriate to refer

- 10.1 A request is inappropriate to refer (and should therefore be finalised without referral to a Minister) if any of the following circumstances apply:
- a. the intervention power is not enlivened in accordance with paragraph 5.1;
 - b. the request is not made in accordance with Part 2 of these instructions;
 - c. the requester’s PV application is not finally determined;
 - d. the request relates to a proposed application for a visa other than a TPV, SHEV, Bridging E (Class WE) visa, or RoS (where the person is eligible to apply for a RoS by operation of subitem 1127AA (3)(c) of Schedule 1 to the *Migration Regulations 1994*);
 - e. a notice of intention to remove pursuant to section 198 of the Act has been issued to the requester;
 - f. the request is a repeat request—unless:
 - i. a Minister has agreed to lift a section 48A bar and this subsection 46A(1) request is being made in conjunction with that request; or
 - ii. a Minister has previously agreed to lift the subsection 46A(1) bar but the UMA was not able to lodge an application within the specified timeframe; or
 - iii. after the date the prior request was finalised the UMA’s receiving country has been listed as a high risk country in the Pre-removal Clearance Policy Instruction; or
 - iv. the previous request was finalised for non-satisfaction of Part 2 of these instructions; or
 - v. the previous request was finalised by a personal procedural decision of the Minister, made on 4 September 2025; or
 - vi. it raises claims of family violence that have not been previously considered; or
 - vii. a Minister asks that a UMA’s repeat request be referred to them for consideration.

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

11. Requests that should be brought to a Minister’s attention on a full submission

- 11.1 The following are the relevant criteria for referring a request to a Minister on a full submission:
- a. The UMA has never had a section 46A bar lifted to allow them to lodge a PV application and has been ‘screened in’ by the Department because their protection claims warrant assessment under a statutory process in Australia.
 - b. The UMA is not subject to the section 48A statutory bar as they previously have had their protection claims assessed through a non-statutory process and there exists new country information corroborating their protection claims.
 - c. Changes have occurred in the UMA’s circumstances (including changes in the situation in their receiving country) relating to Australia’s *non-refoulement* obligations after a non-statutory assessment process, and that new information or change may mean the UMA would engage Australia’s *non-refoulement* obligations were they to be removed from Australia.
 - d. The UMA is also subject to the section 48A statutory bar and meets one of the criteria of paragraph 11.1 of the section 48B instructions, but also requires a section 46A bar lift.
 - e. The UMA did not make a TPV or SHEV application before the specified period of time for which a previous section 46A bar was lifted, or before the bar lift determination was revoked, and now wishes to make an application for a TPV or SHEV.
 - f. The UMA has had their protection claims considered through one of the Department’s non-statutory processes and has been found to engage Australia’s protection obligations under subsection 36(2) of the Act and has never been granted a substantive visa.
 - g. The UMA previously held a PV on the basis of being a member of the same family unit as a PV holder, and that PV holder’s PV was cancelled resulting in the UMA’s visa being cancelled under section 140 of the Act.
 - h. The UMA previously held a PV on the basis of being a member of the same family unit as a PV holder (such that their own protection claims have never been assessed), and their PV has since been cancelled.
 - i. The UMA is an unlawful non-citizen who has previously been granted a HSTV to allow them to lodge a Bridging E (Class WE) visa application.
 - j. The UMA has not been granted a HSTV or SPV previously to allow them to lodge a BVE application.
 - k. The UMA is a member of the family unit of an individual who has been found to engage Australia’s protection obligations but requires a section 46A bar lift in order to allow them to be included in that individual’s PV application that is before a delegate of the Minister.
 - l. A Minister asks that the UMA’s case be referred to them for consideration.

12. Requests that should be brought to a Minister's attention on a summary submission

- 12.1 A request that is not inappropriate to refer (as per paragraph 10.1), but has been assessed by the Department against the paragraph 11.1 criteria and has been found not to satisfy any of them, is to be referred to a Minister in a summary submission setting out the reasons for which the Department has arrived at that conclusion.

Part 6—How requests should be referred to a Minister

Note: The procedures set out below are to be followed to ensure the efficient administration of the intervention power.

13. Information to be presented to a Minister in a full submission

- 13.1 When referring a UMA's request to a Minister in a full submission, the Department should include any information it considers may be of assistance to that Minister. This would usually include:
- a. a brief overview of the UMA's circumstances; and
 - b. in the case of a repeat request—the relevant exception applying under paragraph 10.1(f); and
 - c. which of the paragraph 11.1 criteria is satisfied and the reasons for that conclusion; and
 - d. any character or security concerns in relation to the UMA; and
 - e. removal or return considerations; and
 - f. a copy of any assessment undertaken by the Department on their consideration of the protection claims.
- 13.2 Where there are multiple requests with similar circumstances they can be referred to a Minister as part of a bulk submission.

14. Information to be presented to a Minister in a summary submission

- 14.1 When referring a UMA's case to a Minister in a summary submission the Department should include any information it considers may be of assistance to that Minister. This would usually include:
- a. a brief overview of the circumstances of the UMA; and
 - b. in the case of a repeat request—the relevant exception applying under paragraph 10.1(f); and
 - c. a brief explanation of why the request does not satisfy any of the criteria in paragraph 11.1; and
 - d. a brief overview of any relevant supporting information such as letters of support, country information and the results of any investigations or verification conducted by the Department in relation to the claims made; and
 - e. a copy of any assessment undertaken by the Department on its consideration of the protection claims.

- 14.2 Where there are multiple cases with similar circumstances they should be referred to a Minister as part of a bulk submission.

**Ministerial Instructions for processing requests
for Ministerial intervention under subsection
48B(1) of the *Migration Act 1958***

I, Tony Burke, Minister for Immigration and Citizenship, give the following instructions to my Department for processing requests for Ministerial intervention under subsection 48B(1) of the *Migration Act 1958*.

Dated

4.9.25



Tony Burke
Minister for Immigration and Citizenship

Contents

Part 1—Preliminary	2
1. Nature of these instructions and my principles in considering whether to use the intervention power	2
2. Nature of the Minister’s intervention power	3
3. Purpose of these instructions.....	3
4. Terminology.....	4
5. When the subsection 48B(1) power is not enlivened	5
Part 1A—the effect of these instructions	6
Part 2—Making a request	6
6. Who may make a request	6
7. How a request is to be made	6
Part 3—Processing requests	6
8. How a request is to be processed	6
9. Notification of actions and outcomes	6
Part 4—Requests that should not be brought to a Minister’s attention	7
10. Requests that are inappropriate to refer.....	7
Part 5—Requests that should be brought to a Minister’s attention	8
11. Requests that should be brought to a Minister’s attention on a full submission.....	8
12. Requests that should be brought to a Minister’s attention on a summary submission.....	8
Part 6—How requests should be referred to a Minister	8
13. Information to be presented to a Minister in a full submission	9
14. Information to be presented to a Minister in a summary submission	9

Part 1—Preliminary

1. Nature of these instructions and my principles in considering whether to use the intervention power

Nature

- 1.1 These instructions to the Department, on how to deal with certain requests for the Minister to exercise the intervention powers under subsection 48B(1) of the *Migration Act 1958*, are issued in the exercise of executive power.
- 1.2 These instructions do not involve making a procedural decision (see paragraph 4.2). 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 consider making a procedural decision.
- 1.3 These instructions only deal with requests for the exercise of the power in subsection 48B(1) of the *Migration Act 1958* (Act) that are made by or on behalf of a non-citizen. They do not prevent the Department of Home Affairs (Department) from referring a non-citizen's case to a Minister where the Department forms the view that referral is appropriate.

Principles

- 1.4 Parliament's intention, in introducing the section 48A visa application bar and the subsection 48B(1) power to lift it, was to prevent repeat applications for protection visas (PVs) by non-citizens in order to delay their removal and to circumvent Australia's immigration requirements.
- 1.5 The section 48A bar is an integrity measure and the power to lift this bar provides a safety net for use in very limited circumstances where a non-citizen is making genuine protection claims that could not have been raised in their initial PV application and which now require consideration.
- 1.6 I expect a PV applicant to make all their circumstances and protection claims known to the Department during the assessment of their initial PV application and to make full use of the assessment process and any avenue of review available to them. Usually, this will be an individual's only opportunity to have their protection claims considered by Australia.
- 1.7 Following a decision to refuse to grant a PV where no protection finding is made, or a non-statutory assessment that concludes that a non-citizen does not engage Australia's *non-refoulement* obligations, I expect that individual to depart Australia in a timely manner.
- 1.8 I consider the public interest is served by ensuring that a non-citizen who has been found not to engage Australia's protection obligations is prevented from making unmeritorious repeat requests to prolong their stay in Australia.
- 1.9 However, the public interest may also be served by providing a way for new information or changed country conditions or individual circumstances, in relation to a non-citizen who has previously been found not to engage Australia's protection

obligations, to be considered. In these limited circumstances the public interest is served by allowing those new claims to be assessed through a statutory process to ensure that Australia upholds its *non-refoulement* obligations.

2. Nature of the Minister's intervention power

- 2.1 Under subsection 48A(1) and subsection 48A(1AA) of the Act, a non-citizen who, while in the migration zone, made an application for a PV, or had such an application made on their behalf, that was refused cannot make a valid application for a PV while the non-citizen remains in the migration zone. These provisions apply whether or not the application has been finally determined.
- 2.2 Under subsection 48A(1B) of the Act, the same applies to a non-citizen who held a PV that was cancelled. These provisions apply regardless of the grounds on which a new PV application would be made or whether the criteria which the non-citizen would claim to satisfy existed earlier.
- 2.3 Subsections 48A(1), (1AA) and (1B) of the Act are subject to section 48B of the Act.
- 2.4 Subsection 48B(1) of the Act provides that if the Minister considers it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine that section 48A of the Act does not apply to prevent an application for a PV made by that non-citizen in the period starting from when the notice is given and ending at the end of the seventh working day after the day on which the notice is given. Such a determination is described as lifting the section 48A application bar. The power to intervene is personal and non-compellable.
- 2.5 The Minister does not have a duty to consider whether to exercise the power under subsection 48B(1) of the Act in respect of any non-citizen, whether the Minister is requested to do so by the non-citizen or by any other person, or in any other circumstances.

3. Purpose of these instructions

- 3.1 These are my instructions to the Department, as Minister for Immigration and Citizenship, for processing requests for a Minister to consider exercising the intervention power under subsection 48B(1) of the Act.
- 3.2 The purpose of these instructions is to explain:
 - a. how a non-citizen may make a request that a Minister consider exercising the intervention power in their case; and
 - b. how the Department is to process such requests; and
 - c. the categories of requests I wish to have referred to a Minister in order for a Minister to be in a position to consider making a procedural decision, and the form in which they are to be referred; and
 - d. the categories of requests I do not wish to have referred to a Minister and that the Department is to finalise without referral to a Minister.

Note: The term 'procedural decision' here is defined in paragraph 4.2. It means 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.

4. Terminology

4.1 A number of expressions used in these instructions are already defined in the Act and will not be duplicated here, however, abbreviations for some of these expressions are set out below:

- a. bridging visa (*BV*): section 37;
- b. finally determined: section 5;
- c. member of the same family unit: subsection 5(1);
- d. Permanent Protection (subclass 866) visa: subsection 35A(2);
- e. protection visa (*PV*): section 35A;
- f. receiving country: subsection 5(1);
- g. Safe Haven Enterprise (subclass 790) visa (*SHEV*): subsection 35A(3A);
- h. Temporary Protection (subclass 785) visa (*TPV*): subsection 35A(3);
- i. Tribunal: subsection 5(1);
- j. unauthorised maritime arrival (*UMA*): section 5AA.

4.2 In these instructions:

Act means the *Migration Act 1958*.

family violence has the meaning given in paragraph 4 of [Ministerial Direction 110](#), ‘Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under s 501CA’, issued 7 June 2024.

finalised: a request is finalised:

- by the Department—on the day that it sends one of the notifications mentioned in paragraph 9.2; or
- by the requester—on the day that the Department receives a notification from them that they wish to withdraw the request.

full submission means a submission made in accordance with paragraph 13.

non-refoulement obligations means Australia’s obligations to not return a person to face certain types of harm, arising under Article 33 of the *1951 Convention Relating to the Status of Refugees* as amended by the *1967 Protocol relating to the Status of Refugees*, under Article 3 of the *Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment* and in relation to Articles 6 and 7 of the *International Covenant on Civil and Political Rights* and its Second Optional Protocol, aiming at the abolition of the death penalty.

paragraph 11.1 criteria means the criteria for referring a request to a Minister on a full submission, set out in paragraph 11.1.

procedural decision means a decision to consider, or not to consider, whether it is in the public interest to determine that section 48B of the Act does not apply to prevent an application for a protection visa.

refusal, in relation to an application for a PV, means a decision to refuse the visa application where that application has been ‘finally determined’.

repeat request means any request made for a Minister to consider exercising the intervention power under subsection 48B(1) made by or on behalf of the same requester at any time after the date on which the previous intervention request was finalised.

Note: A request can be a repeat request irrespective of whether the earlier request was finalised without referral to a Minister.

A request can be a repeat request irrespective of the identity of the Minister to whom the earlier request was addressed, or the Minister by whom, or under which section 48B Instructions or Guidelines they were dealt with.

representative, of a non-citizen, in relation to a request, means

- a legal practitioner or migration agent who has been notified to the Department as the non-citizen’s representative in relation to matters that include the request by:
 - 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 non-citizen and (if known), the non-citizen’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, other than a legal practitioner or migration agent, who the non-citizen has authorised to represent them in matters that include the request, in writing provided to the Department.

request means a request for a Minister to exercise the intervention power under subsection 48B(1) of the Act.

requester means the non-citizen who made the request, or, if they are represented, the non-citizen on whose behalf the request is made.

summary submission means a submission made in accordance with paragraph 14.

5. When the subsection 48B(1) power is not enlivened

5.1 The intervention power under subsection 48B(1) of the Act is not enlivened if:

- a. the non-citizen requesting intervention has not, while in the migration zone, been refused a PV or had a PV cancelled; or
- b. the request asks a Minister to lift the section 48A bar to permit them to lodge a valid application for a visa that is not a PV; or
- c. the non-citizen is not in the migration zone.

Part 1A—The effect of these instructions

5A. Nothing in these instructions constitutes a decision by a Minister under the Act

- 5A.1 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 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 non-citizen.

Part 2—Making a request

6. Who may make a request

- 6.1 A request can be made to the Department by a non-citizen or their representative.

7. How a request is to be made

- 7.1 A request must be made in writing.
- 7.2 The request must identify the relevant paragraph 11.1 criterion, or criteria, that the requester relies upon.
- 7.3 The request must be accompanied by all the information relevant to assessing whether the requester satisfies that criterion or those criteria.
- 7.4 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 (NAATI)).

Part 3—Processing requests

8. How a request is to be processed

- 8.1 The Department is to finalise a request without referral to a Minister if the request is inappropriate to refer in accordance with paragraph 10.1. I do not wish a Minister to be put in a position to consider making a procedural decision in such cases.
- 8.2 The Department is to refer a request to a Minister in a full submission if:
- a. the request is not inappropriate to refer in accordance with paragraph 10.1; and
 - b. the request satisfies at least one of the paragraph 11.1 criteria.
- 8.3 Otherwise, the Department is to refer a request to a Minister in a summary submission.

9. Notification of actions and outcomes

- 9.1 Upon receiving a request the Department will acknowledge receipt in writing.

9.2 Following an assessment by the Department in accordance with these instructions, the Department will notify the requester as follows:

- a. if the request is inappropriate to refer—that it has been finalised without referral to a Minister and stating the relevant subparagraph of paragraph 10.1 under which the request has been finalised; or
- b. if the request is referred to a Minister and the Minister decides not to consider whether to exercise the power, or decides not to exercise the power—the outcome.

Part 4—Requests that should not be brought to a Minister’s attention

10. Requests that are inappropriate to refer

10.1 A request is inappropriate to refer (and will therefore be finalised without referral to a Minister), if any of the following circumstances apply:

- a. the intervention power is not enlivened in accordance with paragraph 5.1;
- b. the request is not made in accordance with Part 2 of these instructions;
- c. the requester’s PV application is not finally determined;
- d. a notice of intention to remove pursuant to section 198 of the Act has been issued to the requester;
- e. the request is a repeat request—unless:
 - i. a Minister has previously agreed to lift the subsection 48A(1) bar but the non-citizen was not able to lodge an application within the specified timeframe; or
 - ii. after the date the prior request was finalised, the non-citizen’s receiving country has been listed as a high risk country in the Pre-removal Clearance Policy Instruction; or
 - iii. it raises claims of family violence that have not been previously considered; or
 - iv. the previous request was finalised for non-satisfaction of Part 2 of these instructions; or
 - v. the previous request was finalised by a personal procedural decision of the Minister, made on 4 September 2025; or
 - vi. a Minister asks that a non-citizen’s repeat request be referred to them for consideration.

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

11. Requests that should be brought to a Minister’s attention on a full submission

11.1 The following are the relevant criteria for referring a request to a Minister on a full submission:

- a. There exists new country information corroborating the non-citizen’s protection claims, or where changes in the non-citizen’s circumstances (including changes in the situation in their receiving country) relating to Australia’s *non-refoulement* obligations have occurred after a PV refusal or cancellation, and that new information or change may mean the non-citizen would engage Australia’s *non-refoulement* obligations were they to be removed from Australia.
- b. The non-citizen may engage Australia’s *non-refoulement* obligations, but a protection finding within the meaning of section 197C of the Act has not been made.
- c. The non-citizen previously held a PV on the basis of being a member of the same family unit as a PV holder and that visa was consequentially cancelled under section 140 of the Act.
- d. The non-citizen previously held a PV on the basis of being a member of the same family unit as a PV holder (such that their own protection claims have never been assessed), and their PV has since been cancelled.
- e. A Minister has previously agreed to lift the subsection 48A(1) bar but the person was not able to lodge an application within the specified timeframe.
- f. There has been a pre-removal clearance, an assessment commenced under subsection 197D(2) of the Act, or another non-statutory assessment such as an International Treaties Obligations Assessment, which has found that the non-citizen engages, or may engage, Australia’s protection obligations.
- g. A Minister asks that a non-citizen’s case be referred to them for consideration.

12. Requests that should be brought to a Minister’s attention on a summary submission

12.1 A request that is not inappropriate to refer (as per paragraph 10.1) but has been assessed by the Department against the paragraph 11.1 criteria and has been found not to satisfy any of them is to be referred to a Minister in a summary submission setting out the reasons for which the Department has arrived at that conclusion.

Part 6—How requests should be referred to a Minister

Note: The procedures set out below are to be followed to ensure the efficient administration of the intervention power.

13. Information to be presented to a Minister in a full submission

- 13.1 When referring a non-citizen's request to a Minister in a full submission the Department should include any information it considers may be of assistance to that Minister. This would usually include:
- a. a brief overview of the non-citizen's circumstances; and
 - b. in the case of a repeat request—the relevant exception applying under paragraph 10.1(e); and
 - c. which of the paragraph 11.1 criteria is satisfied and the reasons for that conclusion; and
 - d. any character or security concerns in relation to the non-citizen; and
 - e. removal or return considerations; and
 - f. a copy of any assessment undertaken by the Department on their consideration of the protection claims.
- 13.2 Where there are multiple requests with similar circumstances they can be referred to a Minister as part of a bulk submission.

14. Information to be presented to a Minister in a summary submission

- 14.1 When referring a non-citizen's request to a Minister in a summary submission the Department should include any information it considers may be of assistance to that Minister. This would usually include:
- a. a brief overview of the circumstances of the non-citizen; and
 - b. in the case of a repeat request—the relevant exception applying under paragraph 10.1(e); and
 - c. a brief explanation of why the request does not satisfy any of the criteria in paragraph 11.1; and
 - d. a brief overview of any relevant supporting information such as letters of support, country information and the results of any investigations or verification conducted by the Department in relation to the claims made; and
 - e. a copy of any assessment undertaken by the Department on their consideration of the protection claims.
- 14.2 Where there are multiple requests with similar circumstances they can be referred to a Minister as part of a bulk submission.



**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

Contents

Part 1—Preliminary	2
1. Nature, application, purpose and effect of these instructions	2
2. Terminology	3
3. Nature of Minister's intervention powers	4
4. When the Minister's intervention powers are enlivened	5
5. My principles in considering whether to use the intervention powers	5
Part 2—Making a request	6
6. Direct requests	6
7. Tribunal request	6
Part 3—Dealing with a request	6
8. How a request is to be dealt with	6
9. Consideration of a request referred to a Minister	7
10. Notification of actions and results	8
Part 4—Requests that are not to be brought to my attention	8
11. Repeat requests	8
12. Requests that are inappropriate to refer	9
Part 5—Requests that are to be brought to a Minister's attention	10
13. Criteria for referring a request to a Minister	10
14. Evidence of relevant skills	11
Part 6—Miscellaneous	11
15. Transitional provision	11

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;

- 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:
 - o the individual first entered Australia as a minor and has lived in Australia for at least 50% of their life;
 - o 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;
 - o 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:
 - o a past or current positive skills assessment in relation to the skills required for the relevant skilled occupation; or
 - o 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*.