

**Review processes associated
with visa cancellations made
on criminal grounds**

**Legal Aid NSW submission to the
Joint Standing Committee on
Migration**

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Legal Aid 
NEW SOUTH WALES

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW's Immigration Service provides legal advice, assistance and representation about family, refugee and humanitarian visas and Australian

citizenship. The service also gives advice on detention, removal, cancellation procedures and exclusion periods.

Legal Aid NSW welcomes the opportunity to make a submission to the Joint Committee on Migration's Inquiry into the review processes associated with visa cancellation made on criminal grounds. Should you require any further information, please contact:

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Introduction

Legal Aid NSW welcomes the opportunity to respond to the Joint Standing Committee on Migration's Inquiry into the review processes associated with visa cancellations made on criminal grounds.

Visa cancellation on criminal grounds has life altering and permanent consequences for affected people and their families. In these circumstances, it is imperative for the review process in respect of decisions under section 501 of the *Migration Act 1958* (Cth) (**the Migration Act**) to be robust, fair and accessible.

Legal Aid NSW does not support the mandatory visa cancellation regime, which was introduced in December 2014. The law operates in a punitive way that, as explained further below, adversely impacts on highly vulnerable people who have little or no access to free legal assistance. Legal Aid NSW acknowledges that the Government should have the ability to cancel non-citizens' Australian visas where there are character concerns. However, the mandatory visa cancellation regime places an unfair burden on the affected person to argue for the revocation of cancellation, which they often cannot meet due to language and mental health issues, and the fact that they are in custody.

Most of our comments in the following submission relate to the operation of the mandatory visa cancellation regime, but many comments also apply more generally to the cancellation provisions under section 501(2) (the discretionary power of the Minister to cancel a visa on character grounds).

ToR 1: The efficiency of the existing review processes

The Terms of Reference require the Committee to have particular regard to the efficiency of existing review processes as they relate to decisions made under section 501 of the Migration Act.

In that context, Legal Aid NSW has concerns about several aspects of the current review process that impact on the accessibility and effectiveness of that process. These include:

- the lack of funding for free legal assistance to request revocation of a mandatory visa cancellation
- the short time limits to request revocation and appeal certain decisions to the Administrative Appeals Tribunal (**the AAT**)
- the difficulty faced by people in custody who must prepare and submit revocation requests
- the remote location where affected people are often detained, and
- the requirement for the AAT to determine reviews within 84 days.

Each of these is discussed below.

Funding for legal assistance to request revocation

Legal Aid NSW receives a high volume of calls from people seeking assistance regarding visa cancellation on criminal grounds. Callers include people seeking revocation of the mandatory cancellation of their visa on criminal grounds, and people seeking judicial or administrative review of decisions by the Minister or the Minister's delegate.¹

The number of people seeking assistance from Legal Aid NSW regarding visa cancellation has increased sharply since mandatory visa cancellation provisions were introduced into the Migration Act in December 2014. This significant increase reflects figures published by the Department of Home Affairs indicating that visa cancellations under section 501 have increased from 84 in 2013–14 to 1,284 in 2016–17.²

Legal Aid NSW is not funded to assist with revocation requests, and grants of legal aid are not available at the revocation stage. While Legal Aid NSW provides some limited advice about revocation requests out of its existing resources, it is generally unable to actively assist.³ Legal Aid NSW understands that there are no free services in NSW funded to advise or assist people with revocation requests. We are not aware of any services funded for this purpose elsewhere in Australia. Grants of legal aid are available for judicial or merits review of visa cancellation decisions in limited circumstances.⁴

Legal assistance for those whose visas are cancelled is essential because of the vulnerabilities of the affected group. Legal Aid NSW solicitors have observed that many of the affected people we work with do not understand that their visa has been cancelled and the consequences of this, and/or do not understand the review process, or are unable to engage with it unassisted. This is often due to:

- mental illness or cognitive impairment. Legal Aid NSW solicitors have observed a high prevalence of mental illness and cognitive impairment among affected people seeking assistance. This is consistent with research indicating that half of all adult inmates have been assessed or treated for a mental health problem,⁵ and with

¹ In the 2017–18 financial year to date, Legal Aid NSW has provided 560 advices and 143 minor assistance services regarding visa cancellation and made 10 grants of aid. In financial year 2016–17, Legal Aid NSW provided 546 advices and 194 minor assistance services regarding visa cancellation, and made 16 grants of aid.

² See: <https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/key-cancellation-statistics>

³ Legal Aid NSW may provide minor assistance with a revocation request in exceptional circumstances.

⁴ In addition to meeting Legal Aid NSW's means test, merit test and unpaid contribution test, a matter must also raise a significant human rights issue because the applicant would be at risk of persecution or death if returned to their country of origin; or it is in the best interests of the child or children because it is clearly the child or children who will suffer if the applicant is deported; or the applicant is a person who has either substantial mental health problems or significant cognitive difficulties or a significant physical difficulty, and if deported back to their country of origin he or she would be denied significant family support: Legal Aid NSW Policy Online, Guideline 3.4.

⁵ Indig D et al (2010) *2009 NSW Inmate Health Survey: Key Findings Report* Justice Health [6.1]. See further Mental Health Commission of NSW (2017). *Towards a just system: mental illness and cognitive impairment in the criminal justice system*. Sydney, Mental Health Commission of NSW available at <https://nswmentalhealthcommission.com.au/resources/towards-just-system>

estimates suggesting that between 20 and 25 per cent of people in the criminal justice system have a cognitive impairment.⁶

- difficulties communicating in English. A substantial number of people whose visa is cancelled on criminal grounds do not speak English as a first language.
- low levels of literacy, even where English is spoken. This creates particular challenges completing the paper-based revocation request form.
- being in prison or immigration detention where a person's ability to seek assistance is severely limited.

These vulnerabilities significantly reduce the ability of many affected people to articulate why the cancellation of their visa should be revoked, or to submit their request within the required timeframe.

Legal Aid NSW is aware that some affected people seek assistance to request revocation from other inmates, or prison or immigration detention staff. This assistance is of uneven quality, and in our view, generally inadequate. A poorly presented revocation request that lacks sufficient detail is more likely to be refused, and undermines an applicant's position when seeking merits or judicial review. These issues are demonstrated in the following case study:

Case Study – Mr X

Mr X was serving a sentence of imprisonment when he received a Notice of Cancellation letter in December 2017. He suffered from severe mental health issues, including auditory hallucinations. He prepared his revocation request unaided and submitted it within the time limit via a Corrective Services Officer in his gaol.

He called the Department of Home Affairs in March 2018 to get a status update regarding his revocation request. He was informed that several pages were missing from the revocation request he had prepared, including the actual revocation request form. They told him that he was outside the 28 day time limit to submit the revocation request forms and they would not be accepted.

Given the significance of visa cancellation and the vulnerability of many affected people, Legal Aid NSW submits that funding for legal services to assist people to request revocation of visa cancellation on criminal grounds is urgently required.

⁶ Joint Standing Committee on the National Disability Insurance Scheme, *The provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition*, August 2017 [5.4].

Short time frame to request revocation compounds difficulties

A request to revoke mandatory visa cancellation must be made within 28 days after the person receives notice that their visa has been cancelled, with no scope for extension.⁷ Legal Aid NSW is concerned that this short time frame means that preparation in haste results in poor quality requests, which do not properly set out the individual's circumstances.

Some affected people are unable to comply with this time frame due to the vulnerabilities outlined above including mental illness, cognitive impairment, literacy difficulties and reliance on others, such as Corrective Services NSW staff, for assistance.

People affected by visa cancellation who are in prison do not have access to email or fax machines to lodge their revocation requests, and must rely on welfare officers or other Corrective Services NSW staff to submit their revocation request to the Department of Home Affairs. As the case studies of Mr Y and Mr Z below, sometimes the revocation request is not submitted at all, is submitted out of time, or is posted and received outside the 28 day time limit.

The effect of missing the 28 day time frame is that a revocation request will not be considered and an affected person's circumstances will not be taken into account.

Given the profound effect of a visa cancellation, Legal Aid NSW considers that the 28 day time limit is too short, particularly in the absence of a discretion to extend the period in appropriate circumstances (such as in Mr X's case above). The effects on the individual are so significant that it is desirable to allow a longer period in all cases and the flexibility to allow more time where the circumstances demand it.

Legal Aid NSW submits that the time limit for an application for revocation of a mandatory visa cancellation should be increased to eight weeks, with the discretion for that time to be extended in appropriate circumstances.

Case Study – Mr Y

Mr Y was serving a jail term when he received a Notice of Cancellation of his permanent visa on 7 February 2017 under section 501(3A) of the Migration Act. Mr Y is illiterate and was unable to independently understand or complete the revocation request forms. As he was in prison, Mr Y was entirely dependent on Corrective Services NSW staff for assistance.

Mr Y was unable to get assistance quickly enough, and submitted his revocation request outside the 28 day time limit on 17 March 2017. Mr Y called his Department of Immigration (as it then was) case manager to explain his circumstances and that his request was submitted slightly late as he did not understand the forms and was waiting for someone to help him.

The Department did not accept Mr Y's revocation request because it was out of time.

⁷ Regulation 2.52 of the *Migration Regulation* 1994 (Cth).

Case Study – Mr Z

Mr Z was in prison when he received a Notice of Cancellation under section 501(3A) of the Migration Act on 1 March 2017. He completed a revocation request on 28 March 2017 and asked a Corrective Services NSW officer (**CSO**) to submit it for him and explained the 28 day time limit.

The CSO did not submit Mr Z's revocation request until 30 March 2017, one day after the 28 day period expired, and sent it to an incorrect email address. On 22 February 2018, Mr Z received a notice from the Department of Home Affairs stating that his revocation request was received out of time, making it invalid.

Mr Z then submitted a request to the Department of Justice under the *Government Information (Public Access) Act 2009* (NSW). Mr Z was provided with an email from the CSO to the Department of Immigration explaining that the documents were completed and given to the CSO before the time limit, but were submitted one day late.

Prohibitively short time limit to appeal to the AAT

Legal Aid NSW considers the nine day time limit to appeal a decision by the Minister's delegate under section 501 or 501CA of the Migration Act to the AAT to be prohibitively short. This time limit commences the day after the person is notified of the delegate's decision, and there is no scope for extension.⁸

Legal Aid NSW considers nine days to be a very short time frame to seek advice, prepare and lodge an application. Legal Aid NSW has observed that many people encounter significant difficulty complying with this time limit, particularly people in custody or immigration detention where facilities to prepare and file an application are very limited.

This short time limit also creates difficulties for Legal Aid NSW and other legal representatives, as it is often very difficult to obtain instructions and prepare an application, particularly when clients are detained in remote locations.

The nine day time limit is:

- significantly less than the standard time limit to appeal decisions to the AAT, which is generally 28 days, with the possibility of extension⁹, and
- inconsistent with the time limit for seeking judicial review of decisions of the Minister under section 501 or 501CA(4) of the Migration Act, which is 35 days, and may be extended.¹⁰

⁸ Section 500(6B) of the Migration Act.

⁹ Section 29(2) of the *Administrative Appeals Tribunal Act 1975* (Cth)

¹⁰ Section 477A of the Migration Act.

Legal Aid NSW considers that the nine day time limit to appeal to the AAT is too short. For those affected, reducing the accessibility of the review process in this way effectively removes their right to administrative review. Legal Aid NSW would strongly support a 28 day time limit to appeal decisions under section 501 or 501CA(4) of the Migration Act to the AAT, with provision for extension in appropriate circumstances.

Remote location of affected people hinders review process

Legal Aid NSW has observed that people affected by visa cancellation are often detained in remote locations, including Christmas Island. This creates significant difficulties for affected people and their legal representatives when seeking administrative or judicial review, particularly in preparing evidence and arranging expert reports that rely on assessments of the affected person, such as psychological reports. In most instances, expert assessments are unable to be undertaken in person and are instead completed via telephone or video link. Similar concerns arise in relation to obtaining of legal instructions and the provision of evidence to the AAT. The lack of reliable access to these facilities creates further difficulties.

These problems were illustrated in the case of *LMYW and Minister for Immigration and Border Protection (Migration)* [2016] AATA 936 (24 November 2016). In this AAT matter, the representative of the Minister challenged the weight that should be given to a psychological report concerning the applicant. The report was prepared after a phone interview as the applicant was detained on Christmas Island and other facilities such as video conferencing were unavailable. The AAT hearing was held in Sydney, with the applicant attending via audio-visual link from Christmas Island. Deputy President McCabe commented:

38. [The Minister's legal representative] challenged Ms Davidson's evidence. [The Minister's legal representative] pointed out Ms Davidson had only interviewed the applicant over the phone from Christmas Island on one occasion. Ms Davidson agreed that sort of remote contact was not ideal. She preferred to see clients face-to-face; she noted she was supposed to speak with the applicant in a video-conference but the video-conference facilities provided by the respondent were unavailable...But she said she was confident she had sufficient exposure to the applicant to form a reliable view.

39. I agree it would have been better if the applicant had seen Ms Davidson in person. It is always easier to establish a rapport and make a more nuanced assessment of a person's character and testimony if they are in the same room. (That is precisely why the Tribunal generally conducts hearings in person.) But the limitations were inevitable given the respondent chose to detain the applicant in one of the most remote places on earth and failed to provide functioning video-conferencing facilities. As it happens, Ms Davidson's oral evidence and her detailed response to the criticisms persuaded me that she was not at such a

disadvantage in the preparation of her report that I should discount her conclusions.

Legal Aid NSW considers that people affected by visa cancellation who have appealed to the AAT should be detained in a location that makes them accessible in person to consult their legal representatives and be available to undergo assessments by appropriate experts. Given the significance of the issue at stake, the affected person should also be detained in a location which allows them to attend their AAT hearing in person.

Time frame for AAT decision should be able to be extended

The AAT is required to make a decision to vary or affirm a decision by the Minister's delegate under section 501 or 501CA of the Migration Act within 84 days after the day the affected person was notified of the decision.¹¹ It is not possible to extend this time limit, and if a decision is not made within this time frame, the AAT is considered to have affirmed the decision of the Minister's delegate.¹²

Legal Aid NSW appreciates the need to expeditiously deal with visa cancellation matters and the benefits of doing so for the affected person, who is in immigration detention, and the Australian Government. However, Legal Aid NSW considers that there are instances where this strict timeframe leads to unfairness to the affected person. In Legal Aid NSW's experience it can be extremely difficult to prepare evidence within this time frame, particularly expert evidence such as psychiatric reports. These challenges are further compounded when, as noted above, an affected person is in prison or immigration detention in a remote location.

Legal Aid NSW considers that the 84 day time limit for the AAT to determine review applications under sections 501 or 501CA of the Migration Act should be able to be extended by four weeks (28 days) where the AAT considers this is appropriate to ensure fairness to all parties.

ToR 2: Present levels of duplication with the merits review process

Legal Aid NSW does not consider there is duplication associated with the merits review process. While both the delegate (at the primary stage) and the AAT member (at the review stage) are bound by the same ministerial direction, the processes followed by the respective decision makers are distinct.

At the primary stage, the applicant is required to put their case in writing. The delegate then makes a decision on the papers. This process obviously disadvantages applicants with poor written communication skills who have been unable to provide full details of their situation. It can lead to decisions that only superficially engage with the individual circumstances of the applicant.

¹¹ Section 500(6L) of the Migration Act.

¹² Section 500(6L) of the Migration Act.

By contrast, the merits review process allows the applicant and supporting witnesses to attend in person and give evidence. Importantly, the tribunal member is able to ask questions to clarify evidence that may be unclear. In this way, merits review leads to a more informed view of both the subjective and objective factors that go to the applicant's character. It is indispensable as it provides administrative fairness to applicants faced with the very serious penalty of deportation and consequential permanent exclusion from Australia.

ToR 3: The scope of the AAT's jurisdiction to review ministerial decisions

Minister's ability to set aside decisions of AAT is problematic

Legal Aid NSW considers that the Minister's power set to aside decisions of the AAT under sections 501A and 501BA of the Migration Act undermines the AAT's jurisdiction and the proper functioning of the review process.

The AAT is a longstanding and credible institution that is widely regarded as delivering a high level of administrative review. It plays a vital role in the system of checks and balances on the exercise of executive power in a democratic society, and is an important safeguard against the exercise of arbitrary power.¹³ The Minister is always represented in AAT proceedings and has the opportunity to cross-examine the applicant and witnesses, and put forward the arguments of the Minister regarding visa cancellation and revocation. Where the AAT finds in the applicant's favour, the Minister can appeal decisions of the AAT to the Federal Court if the Minister considers there has been an error of law.

The Minister's power to set aside an AAT decision can be exercised in the absence of any change in circumstances following the AAT's decision, such as adverse conduct by the applicant or new information which would give rise to character concerns. The Minister's power is also exercised without affording natural justice to the affected party. Legal Aid NSW considers the Minister's power to override decisions of the AAT is especially problematic where the affected person's offending is relatively minor and the initial decision had been assigned to a delegate.

Our view is that the Minister's power to set aside decisions of the AAT is contrary to the purpose of administrative review, which seeks to ensure accountability of government decision making. This power undermines the integrity of the review process and should be removed.

Alternatively, if the Minister is to retain the power, then the wide scope of this executive power should be balanced by a degree of transparency and supervision from Parliament. Legal Aid NSW suggests that the Minister should be required annually to table in Parliament a report detailing each time a decision of the AAT was set aside in the past 12 months, and the reasons the power has been exercised.

¹³ See observations of the Acting President of the AAT in *Singh (Migration)* [2017] AATA 850 (16 June 2017) at [17]

Minister's personal power should be used more sparingly

Legal Aid NSW considers that the AAT's merits review jurisdiction should generally be available for decisions to cancel visas on criminal grounds.

Where the Minister or Assistant Minister personally makes a decision to cancel or not to revoke a visa cancellation, merits review at the AAT is not available, and the only avenue for appeal is judicial review. The Minister's power in this respect is very broad. It can be exercised in the absence of any conduct by the applicant or other new information arising subsequent to the AAT hearing which would give rise to character concerns of the types covered by the visa cancellation regime. The power is also exercised without affording natural justice to the affected party.

The Commonwealth Ombudsman's 2016 Report *The Administration of Section 501 of the Migration Act 1958 (2016 Ombudsman's Report)* describes decisions being allocated to either the Minister, the Assistant Minister or a delegate in accordance with a Character Case Prioritisation Matrix (**the Matrix**).¹⁴ The Matrix divides non-revocation decisions into four categories: Exceptional, High, Moderate and Low. Under the Matrix, only decisions determined to be 'Low' are made by a delegate.¹⁵ Particularly where decisions are categorised as 'Low' and the initial decision has been assigned to a delegate, there is no apparent justification for the Minister to intervene personally following a merits review hearing by the AAT.

Legal Aid NSW acknowledges that the Minister and Assistant Minister should be able to personally make visa cancellation and revocation decisions in appropriate circumstances. However, we consider that this power is being increasingly used in circumstances where it is not warranted, limiting access to merits review. The 2016 Ombudsman's Report noted that as at 27 April 2016, only 13 per cent of on-hand revocation cases were to be decided by a delegate, with 87 per cent to be decided by the Assistant Minister (12 per cent) or Minister (75 per cent).¹⁶

The Minister's decisions are subject to judicial review, but as this is limited to errors of law, the affected person's full circumstances cannot be taken into account by the Court. In order to facilitate administrative justice and a system of rigorous merits review, Legal Aid NSW considers that the Minister's power should be used only where strictly necessary and, in any event, more sparingly than it appears to be used at present.

¹⁴ Commonwealth Ombudsman *The Administration of Section 501 of the Migration Act 1958* Report No 08/2016, 13.

¹⁵ The Low Category is described as "All other cases including with imprisonment below one year and also low level repeat offenders, including offences such as theft, shoplifting, minor assaults, possession and or use of illicit drugs, and public order offences such as disorderly conduct and affray."

¹⁶ Commonwealth Ombudsman *The Administration of Section 501 of the Migration Act 1958* Report No 08/2016 [4.16].