# Mandatory visa cancellations: Information for lawyers

[Section 501](http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/s501.html) of the *Migration Act* *1958* (Cth) (the Act) prescribes circumstances where a non-citizen may have their visa cancelled or refused on character grounds.

This fact sheet is for use by criminal lawyers when advising clients whose criminal law proceedings may trigger application of the mandatory visa cancellation provisions under the Act. It can be used in conjunction with VLA’s [Self-help kit for prisoners facing mandatory visa cancellation](https://www.legalaid.vic.gov.au/mandatory-visa-cancellations#self-help-kit-for-prisoners-facing-mandatory-visa-cancellation) (https://www.legalaid.vic.gov.au/mandatory-visa-cancellations#self-help-kit-for-prisoners-facing-mandatory-visa-cancellation).

This fact sheet includes:

* [Is my client at risk of having their visa mandatorily cancelled?](#_Is_my_client)
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## Is my client at risk of having their visa mandatorily cancelled?

If your client is currently serving (or is likely to receive) a prison sentence and is not an Australian citizen, they may be at risk of having their visa cancelled.

The Department **must** automatically cancel a non-citizen’s visa if they:

* are currently serving a full-time prison sentence **AND**
* have been sentenced to 12 months or more imprisonment (this includes time already served) **or**
* have been sentenced to life imprisonment **or**
* have been sentenced to death **or**
* have been found guilty of a sexual offence involving a child ([s 501(3A)](http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/s501.html)).

**Questions to ask your client:**

1. Are you an Australian citizen?

2. If you are unsure:

 **a.** Were you born in Australia?

 **b.** At the time of your birth, was one of your parents an Australian citizen?

 **c.** Have you had a citizenship ceremony?

 **d.** Do you hold an Australian passport?

*If the answer is* ***no*** *to any of these questions, then your client may be at risk of having their visa cancelled, depending on their answer to the next question:*

3. Are you currently serving a sentence in prison, or at risk of receiving a prison sentence? If so:

 **a.** have you ever been sentenced to 12 months’ imprisonment (the sentence to 12 months
or more could be the current or impending sentence, or a past sentence in Australia or
overseas) or

 **b.** have you ever been found guilty of a sexual offence against a child?

*If* ***yes****, then your client is facing the mandatory cancellation of their visa and should be advised of the likelihood of deportation at the conclusion of their sentence. Refer to* [*Part 2*](#_Advice_to_clients)*.*

*If no, then your client is not subject to the mandatory visa cancellation regime. However, it is important to advise your client that even if the sentence imposed is less than 12 months and their visa is not mandatorily cancelled, it may still be subject to discretionary cancellation on character grounds. The Department still has other powers to cancel visas and may still send your client a letter called a ‘Notice of intention to consider cancelling your visa’.*

### Calculating the length of sentence

When considering whether your client has been, or is likely to be, sentenced to a term of 12 months’ imprisonment or more, please note the following:

* **Time served** – the reference to 12 months’ imprisonment or more in s 501(3A) relates to an actual sentence imposed, regardless of whether it was for a past sentence or of time served.
* **Aggregate sentences** – for the mandatory provisions to be triggered, there must be a sentence of 12 months’ imprisonment or more **for one or more offences**. If your client receives an aggregate sentence of 12 months or more for multiple offences, this will meet the definition of a ‘substantial criminal record’ under s 501 and place them at risk of having their visa cancelled.
* **Time on remand** – s 501 provides that 'imprisonment' includes ‘any form of punitive detention in a facility or institution’. Therefore, a person on remand would not be at risk of a mandatory cancellation. However, if the person was later sentenced, and the period on remand counted as pre-sentence detention, it could be counted as part of a sentence to a period of imprisonment adding up to more than 12 months. You should bear this in mind when preparing a plea in mitigation.
* **Suspended sentences** – count for the purposes of calculating a period of imprisonment of 12 months or more ([Meng Kok Te v Minister for Immigration & Ethnic Affairs [1999] FCA 111](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/1999/111.html?stem=0&synonyms=0&query=title(Meng%20Kok%20Te%20and%20Minister%20for%20Immigration) and [Stretton v Minister for Immigration and Border Protection (No. 2) [2015] FCA 559](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2015/559.html?stem=0&synonyms=0&query=title(Stretton%20and%20Minister%20for%20Immigration%20and%20Border%20Protection%20))).
* **Youth detention** – a 12 month detention order in a youth residential centre has been found to count as imprisonment for the purposes of s 501 ([Nuon v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 653)](http://www.austlii.edu.au/cgi-bin/sign.cgi/au/cases/cth/FCA/2022/653). Therefore, the mandatory cancellation provisions are potentially applicable to children and young people. Note also that under [s 459](http://www.austlii.edu.au/au/legis/vic/consol_act/cyafa2005252/s459.html) of the *Children, Youth & Families Act 2005* (Vic), a person is still considered under sentence until the end of their parole period.

## Advice to clients at risk of having their visa cancelled

It is important that lawyers have a good understanding of the character cancellation provisions and can advise clients of the possible consequences of a guilty plea (or finding of guilt) on their visa status.

### Explaining to your client how mandatory visa cancellation works

If you have identified that your client is at risk of having their visa mandatorily cancelled, you should explain the process for mandatory cancellation to your client as follows:

1. The Department is notified that you have a ‘substantial criminal record’. This will happen while you are still in prison before your release date.
2. The Department makes a decision to cancel your visa.
3. The Department will hand deliver or send a Notice cancelling your visa.
4. The Department can cancel your visa anytime during your sentence. The cancellation decision may occur at the end of your sentence.

You should also explain the following important information:

* The Notice lets you know that you can apply to revoke the Department’s decision. A person whose visa is cancelled in these circumstances has **28 days** to request revocation of the mandatory cancellation decision.
* If you miss the 28-day deadline, you lose the right to request revocation.
* If you finish serving your sentence during this time, you will be moved to immigration detention whilst awaiting the outcome of your request for revocation.
* If the Department does not agree to give back your visa, you will have to leave Australia as soon as possible after your sentence is completed. If you have already finished your sentence and are being detained in immigration detention when the Department decides not to give your visa back, you will be removed from Australia as soon as possible.
* Even if your visa is not mandatorily cancelled, the Department still has other powers to cancel visas on ‘character grounds’ and may still send you a letter called a ‘Notice of intention to consider cancelling your visa’.

### Explaining to your client how to apply for revocation of the cancellation decision

**If your client wants to apply to get their visa back, they must invoke their right to seek revocation by sending the request for revocation form to the Department within 28 days**.

The revocation request form, along with a prepaid envelope, is sent with the Notice cancelling a person’s visa. Not much more is required other than briefly filling in the form, signing and sending it back to the Department.

Supplementary material in support of the revocation request may be sent in later, but nothing can be done if this right is not exercised within the prescribed period.

**Advising your client that they will be sent to immigration detention**

If your client has had their visa cancelled, and they are coming up to the expiry of their sentence, you will need to explain the following:

* You have no lawful visa status to return to the community.
* Once your sentence is served you will be transferred into immigration detention (unless you get your visa back before then).
* You may be waiting for a decision on your revocation request for a long time.
* Detention will continue until the visa cancellation is revoked or you are removed from Australia.
* There is no provision for release on a bridging visa, pending the revocation decision.
* If you are stateless, a refugee or have been found to be owed protection and cannot be removed from Australia, it is likely that you will be released from immigration detention on a bridging visa R (BVR) and subject to strict conditions, including electronic monitoring and curfew.
* The immigration detention environment is very difficult. There are not the same opportunities to work or undertake education as the corrections system provides. The Department can and does move detainees to remote detention facilities – for their own operational reasons. Those transfers can be extremely harsh and can result in detainees being geographically isolated from their families, which only exacerbates the stress that everyone is under.
* Your migration status will be taken into account by the Adult Parole Board when considering whether to grant you parole. If your visa has been cancelled, it is unlikely that you will be granted parole because of the risk that you may be placed in immigration detention outside of Victoria and then released interstate if your revocation application is successful. This would result in a breach of a mandatory condition of your parole that you must not leave Victoria. For this reason, in most cases, the Board will await the outcome of a revocation application before considering whether to grant parole. Despite this, if you have special considerations that support your application for parole, or otherwise suggest that immigration detention may be a suitable option, then you should still raise these with the Board.
* For the remainder of your sentence you should focus on your rehabilitation, and maintaining or building relationships with your family and support networks. You will be able to obtain copies of prison records that support your participation and rehabilitation. Further, your family will want to provide letters of support and make submissions on your behalf.

### Advising your client on what will happen if they do not get their visa back

You will need to explain the following:

* If the Department cancels your client’s visa and the Department or the Minister deny your client’s revocation application, they will have to leave Australia and go back to the country where they are a citizen. This is usually where they were born.
* Your client will never be able to return to Australia.

**Mandatory visa cancellation self-help kit**

Remember to provide your client with a copy of VLA’s [Self-help kit for prisoners facing mandatory visa cancellation](https://www.legalaid.vic.gov.au/mandatory-visa-cancellations#self-help-kit-for-prisoners-facing-mandatory-visa-cancellation) (https://www.legalaid.vic.gov.au/mandatory-visa-cancellations#self-help-kit-for-prisoners-facing-mandatory-visa-cancellation).

Developed by VLA’s Migration team, the kit includes:

* **fact sheets** explaining the mandatory cancellation process and how to prepare a response to the Department
* an **FOI request** to the Department of Justice and Community Safety seeking prison records
* a suggested **list of supporting documentation** and
* a **guide to writing a letter in support**.

## Submissions at the plea hearing

### Potential deportation

The prospect of deportation at the conclusion of your client’s sentence is a relevant consideration in the sentencing process. Therefore, a failure by a sentencing judge to take into account possible cancellation and removal from Australia may give good grounds for an appeal.

Probable deportation can be used in two ways:

1. the prospect of deportation will usually increase the burden of imprisonment and
2. the fact that the accused will lose the opportunity to settle in Australia is a significant punishing consequence of itself ([Guden v The Queen [2010] VSCA 196](http://www7.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2010/196.html)).

It is also necessary for an accused to demonstrate that deportation would in fact be a hardship.

**Possibility or probability? Discretionary versus mandatory cancellations**

Prior to the introduction of the mandatory visa cancellation provisions in 2014, the additional burden or punishment faced by an accused, at risk of having their visa cancelled, could be taken into account by the sentencing judge, although only as a mere ‘speculative possibility’ ([R v Yildirim [2011] VSCA 219](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSCA/2011/219.html?stem=0&synonyms=0&query=Yildirim); [Guden v The Queen [2010] VSCA 196; 28 VR 288](http://www.austlii.edu.au/au/cases/vic/VSCA/2010/196.html); [Darcie v The Queen [2012] VSCA 11](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSCA/2012/11.html?stem=0&synonyms=0&query=darcie); [DPP v Zhuang [2015] VSCA 96](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSCA/2015/96.html?stem=0&synonyms=0&query=Zhuang)). In other words, the sentencing judge could not be asked to speculate on the likelihood that incarceration exceeding twelve months would negatively affect the accused’s immigration status. Proper consideration of a likelihood required sufficient evidence to permit a sensible quantification of the risk, and demonstration that deportation would actually be a hardship.

The same approach to sentencing is required, despite visa cancellation now being mandatory in certain circumstances, rather than discretionary. The likelihood of deportation is still considered speculative ([Lima Da Costa Junior v The Queen [2016] VSCA 49](http://www.austlii.edu.au/au/cases/vic/VSCA/2016/49.html) and [Konamala v The Queen [2016] VSCA 48](http://www.austlii.edu.au/au/cases/vic/VSCA/2016/48.html)).

In *Lima Da Costa Junior* and *Konamala*, the Court of Appeal held that under the former provisions the decision to cancel a visa was where the discretion lay, and under the 2014 amendments the same discretion applies but in the decision to revoke any cancellation. It was considered that the Minister would approach the discretionary task in the same way.

The requirement for evidence of increased burden of imprisonment (looked at subjectively) or additional punishment due to loss of opportunity to settle in Australia (looked at objectively) per *Guden* still applies.

### Detention of an uncertain duration

In [Director of Public Prosecutions v Za Lian [2019] VSCA 75](https://jade.io/article/649438?at.p=index), the Court of Appeal considered that the fact that the respondents (who were both refugees) were likely to be detained in immigration detention for an indefinite period following completion of their sentences was an ‘important and significant mitigating factor in determining the sentence to be imposed on each of them’. The Court accepted that the uncertainty of their immigration status would ‘add significantly to the burden of the term of imprisonment to be served by each of them’.

In November 2023, the High Court ruled that, at least in some circumstances, indefinite detention is unconstitutional: [NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs [2023] HCA 37](https://jade.io/article/1055542). Consequently, people who are stateless, refugees or owed protection can no longer be detained under the Migration Act where there is no real prospect that it will become practicable to remove them from Australia in the reasonably foreseeable future. This cohort may still be detained for indeterminate periods whilst the government makes enquiries of other countries who may be willing to resettle them. Even if released from detention on a bridging visa R, they will be subject to strict conditions such as reporting, electronic monitoring, travel restrictions and a curfew for an indefinite period. In addition to these draconian limitations on their liberty, this cohort face mandatory prison sentences if found to be in breach of some of these visa conditions. See: [Migration Amendment (Bridging Visa Conditions) Act 2023 (Cth).](https://www.legislation.gov.au/Details/C2023A00093)

The uncertainty of their immigration status for this cohort, coupled with the prospect of strict visa conditions upon their release (for an indeterminate period), would add significantly to the burden of any term of imprisonment served.

### For *NZYQ*-affected **non-citizens who** have committed serious violent or sexual offences and are considered to pose **an ongoing risk to community safety,** the government has introduced a preventative detention regime. See: [Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023](https://www.legislation.gov.au/Details/C2023A00110). To be considered a ‘serious offence’, the person must have been previously convicted of a crime which carries a penalty of at least seven years’ imprisonment (although they don’t have to have served seven years). The Community Safety Order (CSO) scheme allows the Immigration Minister to apply to the Supreme Court for a community safety detention order (CSDO) or community safety supervision order (CSSO) in relation to non-citizens who have no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future. The Court is required to be satisfied that the offender poses an unacceptable risk of committing a serious violent or sexual offence before making any order.

### Guidance for lawyers

A few points to consider when preparing your plea submissions for a client facing mandatory cancellation of their visa:

* make your submissions in mitigation in line with [Guden v The Queen (2010) 28 VR 288](http://www.austlii.edu.au/au/cases/vic/VSCA/2010/196.html) [25], [27]
* provide as much subjective evidence as possible of the impact of likely deportation on your client (i.e. increased burden of imprisonment, effect on mental health etc)
* if your client is a refugee (i.e. was on a protection visa) obtain evidence about the circumstances of their departure from their country of origin and be aware that under the principles of non-refoulement they cannot be returned to their home country. This means that following any sentence imposed they may be held in immigration detention or released on a bridging visa R with conditions such as reporting, electronic monitoring, work and travel restrictions and a curfew, for an indeterminate period of time
* seek to rely upon loss of opportunity to settle in Australia as an additional punishment, and point to any facts which support the argument that your client will be deported, with some degree of certainty
* highlight any factors which would go against your client in their attempt to make an application for revocation of cancellation of visa, referring to the **Ministerial Direction No 99** (i.e. no familial ties to Australia, short duration of residence in Australia, type of visa held etc)
* consider submitting a Freedom of Information request to the Department to find out the recent number of matters where the Minister, or their delegate, has revoked a cancellation of a visa.

### Where your client is a child or young person

The mandatory visa cancellation provisions in s 501 potentially apply to children and young people.

[Section 362](http://www.austlii.edu.au/au/legis/vic/consol_act/cyafa2005252/s362.html) of the *Children Youth and Families Act 2005* (Vic) allows sentencing judges broader considerations when sentencing children.

It is arguable that mandatory visa cancellation could be one of these considerations as it relates to the:

* need to strengthen and preserve the relationship between child and the child’s family
* desirability of allowing the child to live at home and
* desirability of allowing the education, training or employment of the child to continue without interruption or disturbance.

## Prison advice service: clients undergoing sentence

It is important that lawyers provide all clients with a copy of VLA’s [Self-help kit for prisoners facing mandatory visa cancellation](https://www.legalaid.vic.gov.au/mandatory-visa-cancellations#self-help-kit-for-prisoners-facing-mandatory-visa-cancellation) (https://www.legalaid.vic.gov.au/mandatory-visa-cancellations#self-help-kit-for-prisoners-facing-mandatory-visa-cancellation), and advise them of the following:

* If their visa has been cancelled under the mandatory cancellation provisions, there is no right of appeal to the Administrative Appeals Tribunal. Instead, a person has the **right to apply for revocation of the cancellation decision** (s 501CA). This is done by a written request to the Department.
* **Strict time limits apply** when seeking a revocation of the mandatory cancellation decision:
	+ if a staff member from the Department handed your client the letter, they only have **28 days** to apply for revocation from the date of the letter
	+ if the Department sent your client the letter in the post, they only have **35 days** to apply from the date of the letter.
* **No provision for an extension of time**. Failure to apply for a revocation means your client can be removed from Australia immediately, once they finish their prison sentence.
* A **Revocation request form** will have been provided to your client with the cancellation Notice, along with a Personal Details form, copy of **Ministerial Direction No 99** (or Ministerial Direction 90 if prior to 3 March 2023) and prepaid envelope. The Revocation Request form must be returned to the Department within the required timeframe. Clients need to fill out the form and include their reasons for wanting the cancellation of the visa revoked. Additional supporting material can be provided up until a decision is made on the revocation request (which can take some time).
* The **Personal Details Form** requires your client to provide details about their family, employment history, health information and arrival in Australia. It also provides them with an opportunity to say whether they have any concerns or fears about being returned to their country of citizenship.
* VLA’s Self-help kit for prisoners facing mandatory visa cancellation, and in particular, the factsheet **‘What to do when your visa has been mandatorily cancelled’**will guide them through the process of applying to get their visa back.
* Clients need to start gathering **documents to support their revocation request** as soon as possible. Supporting documents may include letters from family, friends, health professionals and community members. See ‘List of supporting documentation’ in the kit.
* Your client’s **prison records** can be obtained under a Freedom of Information (FOI) request to the Department of Justice and Community Safety. These documents may be useful in supporting the revocation request by confirming your client’s participation in rehabilitation programs, or the existence and treatment of any medical conditions. The kit includes an FOI request.
* Your client’s response to the Department needs to address the relevant considerations contained in **Ministerial Direction No 99**. Put simply, the Direction is a guide to decision-makers about how to exercise their discretion whether to give a visa back or not. It makes a distinction between ‘Primary Considerations’ (which are the most important issues a decision-maker has to take into account) and ‘Other Considerations’ (which a decision-maker must also take into account if they are relevant in a given case).

**More about Ministerial Direction No 99**

The Immigration Minister has power to make directions on how functions are to be performed under the Act generally, pursuant to s 499 of the Act. Ministerial Direction No 99 relates to the decision-making process for character cancellations.

The Direction sets out primary and other considerations which must be taken into account by the decision-maker.

It is imperative to address these considerations when seeking revocation.

Clause 8 of the Direction sets out the **five** **primary** considerations:

* Protection of the Australian Community (8.1)

 – The nature and seriousness of the conduct (8.1.1)

 – The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct (8.1.2)

* Whether the conduct engaged in constituted family violence (8.2)
* The strength, nature and duration of ties to Australia (8.3)
* Best interests of minor children in Australia (8.4)
* Expectations of the Australian Community (8.5).

Clause 9 of the Direction contains **other** considerations that must be taken into account where relevant. These considerations include (but are not limited to):

* Legal consequences of the decision (9.1) – this includes a consideration of whether non-refoulement obligations are engaged in relation to the non-citizen
* Extent of impediments if removed (9.2)
* Impact on victims (9.3)
* Impact on Australian business interests (9.4).

### Challenging a revocation request refusal

There are two options if a revocation request is refused:

1. if a delegate of the Minister makes the decision, there is a right of review to the Administrative Appeals Tribunal which must be made within **9 days**.
2. if the Minister makes the decision personally, there may be grounds for judicial review of the Minister’s decision by the Federal Court.

However, note that even if an appeal is successful, the Minister retains power to personally cancel a visa under other clauses of s 501 of the Act.

Challenging a decision about revocation can be very hard. Advise your client to get further legal advice if their revocation request is refused.

## Further assistance

If your client is seeking further assistance with their visa cancellation, make them aware of the following options:

* VLA’s [Self-help kit for prisoners facing mandatory visa cancellation](https://www.legalaid.vic.gov.au/mandatory-visa-cancellations#self-help-kit-for-prisoners-facing-mandatory-visa-cancellation) (https://www.legalaid.vic.gov.au/mandatory-visa-cancellations#self-help-kit-for-prisoners-facing-mandatory-visa-cancellation).
* VLA’s Legal Helpline **1300 792 387**
* Prisoner mentors
* Speak to prison officers – they have a duty to facilitate the process so that prisoners are able to exercise their right to seek revocation within the strict time frame that has been imposed.
* If the client has financial means you should advise them to instruct a private migration lawyer. The [Law Institute of Victoria](http://www.liv.asn.au/LIV-Home/For-the-Community/Find-a-Lawyer-and-Other-Professionals/Find-a-Lawyer-Referral-Service) can assist with referrals.

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