

Refusals and Cancellations Under s 501: Information for Criminal Lawyers



Section 501 of the *Migration Act 1958* – What it means for your clients

Section 501 of the Act governs what is known as the 'character' requirements for Australian visas. On 11 December 2014, the Act was amended and provision was made for the mandatory cancellation of a person's visa where certain requirements were met. A December 2016 report by the Commonwealth Ombudsman on the Administration of Section 501 of the *Migration Act 1958* records that, since the passage of the new legislation, the number of people who have had their visas cancelled under s.501 has grown from 76 in 2013 – 2014 to 983 in 2015-2016.

Any non-citizen, whether they are a permanent or temporary resident, a visa holder or a visa applicant, and regardless of their tenure in Australia, can be affected. A refusal or cancellation under s.501 may:

- Result in your client becoming unlawful;
- Result in your client being detained in immigration detention, sometimes in remote locations;
- Result in your client's removal from Australia; and
- Prevent your client from making an application for a visa, or entering Australia, in the future.

If the Minister considers refusal or cancellation is in the national interest, there are fewer protections for your client.

There are other provisions in the Migration Act 1958 that may affect your client, leading to cancellation and immigration detention. For further information, please see the LIV's Fact Sheet 'Visa Cancellations Under s 116 of the *Migration Act 1958*: Information for Affected Individuals'.

What should I know about cancellation?

- If your client has received a sentence or a combination of sentences of 12 months or more in total (including in the past) and they are in criminal custody, their visa **will** be cancelled.
- If your client is found guilty or convicted of a sexually based offence involving a child and they are in criminal custody, their visa **will** be cancelled.
- If your client is convicted of, or even charged with or suspected of, offences, their visa **may** be cancelled.
- If your client's visa is cancelled, they may be able to seek review of that decision. A cancellation is not final. However, they must seek any review they are entitled to within strict statutory timeframes. Review processes can take substantial time.
- If your client's visa is cancelled, they will almost certainly be detained in immigration detention until review processes are complete or they otherwise depart Australia.

What should I know about refusals?

Your client can fail the character test in a number of ways. However, if they receive a substantial criminal record (including sentences totalling twelve months or more), have been assessed by ASIO as a risk to security, or have been found guilty of a sexually based offence involving a child, or have been charged with or indicted for a crime of international concern, they will certainly fail the character test.

What should I advise my client?

At present, you must be a registered migration agent to give migration assistance, and penalties apply for breach.

Ensure you ask your client what their status in Australia is at an early stage, and if your client is a visa holder, you or your client should seek advice from a reputable migration lawyer at the earliest opportunity. It may affect how your client should plead. A migration lawyer can also provide an expert affidavit that may assist with sentencing.

Ensure your client understands that timeframes for response to s.501 issues are strict. Failure to comply can mean they forfeit their right to consideration or review.

If your client has financial difficulties, many private firms may be able to assist on a *pro bono* or reduced fee basis. You or your client can also contact Legal Aid Victoria, JusticeConnect, Refugee Legal, the Asylum Seeker Resource Centre, and Salvos Legal for referrals or assistance.

What can I do?

The criminal process and outcomes will be scrutinised in any cancellation or refusal processes. The plea, the police brief, and any sentencing remarks by a judge will be of great importance. Liaise with a migration lawyer about this, and be aware that the implications of such matters go beyond the discrete criminal process.

Ensure your client focuses on rehabilitation and gathering evidence of their family, community, financial, employment and other ties to Australia, as well as of any particular compassionate aspects of their case. They should understand also that their conduct in criminal custody is important, as is any assessment of their risk of recidivism.

Be aware of relevant materials, such as Direction no. 65, and case law, including *Guden v The Queen* [2010] VSCA 196.

You can also direct your clients to the Law Institute of Victoria Fact Sheet. If they are facing mandatory cancellation of their visa, [Victoria Legal Aid](#) has helpful materials.

Your client should seek migration advice from a reputable immigration lawyer in all the situations described below at the earliest possible opportunity.

Scenario	Section	Outcome	Notes
Your client does not satisfy the Minister that they pass the character test – s.501(1).	501(1)	Possible refusal.	<ul style="list-style-type: none"> Your client will be given an opportunity to comment prior to the decision.
The Minister reasonably suspects your client does not pass the character test, and your client does not satisfy him that they do.	501(2)	Possible cancellation.	<ul style="list-style-type: none"> Your client will be given an opportunity to comment prior to the decision.
The Minister reasonably suspects your client doesn't pass the character test and is satisfied that the decision is in the national interest.	501(3)	Possible refusal or cancellation.	<ul style="list-style-type: none"> Your client will not be given an opportunity to comment prior to the decision, and may not be given details of why the decision was made. Your client can request that the decision be revoked (meaning reconsidered). Your client must request revocation within 7 days of receiving notice of cancellation. If the Minister or Assistant Minister makes a personal decision <i>not</i> to revoke the cancellation, your client will not have access to merits review. The decision can only be overturned if there was jurisdictional error.
Your client does not pass the character test because of their substantial criminal record or conviction for sexually based offences regarding a child, and your client is serving a full-time sentence of imprisonment.	501(3A)	Mandatory cancellation.	<ul style="list-style-type: none"> Your client will not be given an opportunity to comment prior to the decision. Your client can request that the decision be revoked (meaning reconsidered). Your client must request revocation within 28 days of receiving notice of cancellation. If a delegate of the Minister makes a decision <i>not</i> to revoke the cancellation, your client can appeal to the Administrative Appeals Tribunal. If the Minister or Assistant Minister makes a personal decision <i>not</i> to revoke the cancellation, your client will not have access to merits review. The decision can only be overturned if there was jurisdictional error, or potentially if a Minister makes a different decision. If a delegate or the Tribunal decide to revoke the cancellation, the Minister can overrule that decision if he is satisfied that the cancellation is in the national interest.
A delegate of the Minister or the Tribunal decides <i>not</i> to refuse or cancel your client's visa under s.501(1) or (2).	501A and B	The Minister can overrule that decision.	<ul style="list-style-type: none"> If the Minister is satisfied that refusal or cancellation is in the national interest, he or she may personally refuse or cancel your client's visa. Your client can request that the Minister's decision be revoked (meaning reconsidered). Your client must request revocation within 7 days of receiving notice of cancellation. Your client will not have access to merits review. The decision can only be overturned by a court if there was jurisdictional error, or potentially if a Minister makes a different decision.
A delegate of the Minister decides to cancel or refuse your client's visa under s.501(1) or (2).			
The Tribunal makes a decision in relation to application for or cancellation of a protection visa.	501J	The Minister can substitute a more favourable decision.	<ul style="list-style-type: none"> If the Minister considers that it is in the public interest to do so, the Minister may set aside the Tribunal's decision and substitute a more favourable decision.
If information about your client resulting in possible refusal or cancellation has been supplied by law enforcement agencies or is confidential	503A	Your client may not be given relevant information.	