

## Migration Amendment (Character Cancellation Consequential Provisions) Act 2017

Last updated: 9 March 2017

### Introduction

The Migration Amendment (Character Cancellation Consequential Provisions) Act 2017 (Cth) (the amending Act) makes a number of changes to the operation of the character cancellation regime in Australia.

Under [s 501](#) of the *Migration Act 1958 (Cth)* (the Act), a delegate of the Minister for Immigration and Border Protection or the Minister himself may cancel a visa of a non-citizen where that person does not pass the 'character test', as described in subsection 501(6).

Substantive amendments were made to the character cancellation regime by the [Migration Amendment \(Character and General Visa Cancellation\) Act 2014](#) (Cth) (the *Character Act*) that, among other changes, introduced a mandatory character cancellation power. As a result, under subsection 501(3A) of the Act, the Minister *must* cancel a person's visa without notice, if:

- the person has a 'substantial criminal record' on the basis of having been sentenced to death, life imprisonment or a single term of imprisonment of 12 months or more; or
- has been convicted of child sexual offences; and
- the person is serving the term of imprisonment on a full-time basis.

Under [s 501CA](#), the Minister is required to, as soon as practicable after making the mandatory cancellation, to give the person affected notice of the decision and the particulars of the relevant information upon which the cancellation was based.<sup>1</sup> The Minister must also invite the person to make representations about revocation of the decision to cancel the visa.<sup>2</sup> If the Minister does not exercise the discretion to revoke the cancellation, the matter can be further appealed to the Administrative Appeals Tribunal (the AAT).<sup>3</sup> However, under [s 501BA](#) the Minister retains personal powers set aside and substitute a non-adverse decision of a delegate or the AAT in relation to revocation if the Minister is satisfied that cancellation is in the national interest.

The amending Act inserts references to s 501CA and s 501BA into other provisions in the Act. The purported intention is to ensure that the effect of, and consequences flowing from, the Minister's decisions under s 501BA and CA are consistent with other cancellation powers under the Act. The amending Act ensures that:

- an immigration officer may detain a person if the immigration officer knows or reasonably suspects that that a non-citizen holds a visa that is being subject to cancellation under s 501BA, and requires the release of the person if the officer becomes aware that their visa will not be cancelled;
- 'confidential information' upon which a decision to cancel is made under s 501BA can be withheld from the person or their legal advisers;
- a non-citizen who has had their visa cancelled under s 501BA and has been detained does not need to be informed that they have 2 working days to apply for another visa;
- a non-citizen who had their visas cancelled under s 501(3A) and who does not make a representation for revocation, or does so outside specified timeframes, or whose request for revocation is refused, must be removed from Australia as soon as reasonably practicable;
- a non-citizen who has had their visa personally cancelled by the Minister under s 501BA is prevented from making an application for any another visa (except a protection visa) in Australia, any other visa they hold is also cancelled, and any other outstanding visa applications refused; and
- a non-citizen whose visa has been personally cancelled by the Minister under s 501BA can be subject to re-entry bans.

The amending Act also amends the definition of 'character concern' so that it is consistent with the 'character test' under subsection 501(6). The effect is to widen the cohort of persons who may have a personal identifier disclosed.

The Act was passed on 13 February 2017 and received Royal Assent on 22 February 2017.

## Key issues raised by the Act

### Procedural fairness issues

#### *What the amending Act will change*

The Act inserts a reference to s 501BA into [subparagraph 193\(1\)\(a\)\(iv\) of the Act](#). The effect of this change is that a non-citizen who has had their visa cancelled by the Minister personally under s 501BA need *not* be informed:

- that they may only apply for a visa within two working days (as set out in s 195); or
- about the provisions relating to the duration of their detention (as set out in s 196).

The Explanatory Memorandum justifies this change on the basis that a person who in detention would have been informed previously of the existence of s 195 and s 196, at the time they are initially detained under s 198.<sup>4</sup>

### *Comment*

This provision appears unnecessary and will disproportionately affect asylum seekers and refugees caught by s 501BA. The Parliamentary Joint Committee on Human Rights noted that the Government had not given adequate justifications for this amendment:

*‘ ... given the time critical nature of a person’s response to cancellation, no justification is provided as to how it is sufficient that such information will have been provided previously in a different context, particularly given the very serious consequences for the individual concerned and their pre-existing vulnerability as a person in detention. It is unclear how this amendment is necessary or reasonable.’*<sup>5</sup>

This amendment does not adequately recognise that detainees may not have adequate English skills to understand the effect of s 195 and s 196, or that they may not remember as notification may have occurred some time ago. Nor does it recognise that many detainees are unable to access legal advice or representation due to the remote location of many detention centres. The provision is also inconsistent with the general approach in the area of visa cancellation that persons affected are given notice of the consequences of visa cancellation, including right to appeal a decision.<sup>6</sup>

It is a fundamental tenet to the rule of law and procedural fairness that the law should be made known to those whom it affects, and be certain and clear. This amendment appears disproportionate, given that a requirement to notify a detainee would not be onerous on the Department, yet the consequences for an applicant of not making a further visa application are grave and may result in removal from Australia.

### **Withholding of confidential information**

#### *What the amending Act will change*

The amending Act inserts references to s 501BA and CA into subsections 503A(1), (2) and 503B(1). The effect of these insertions is that ‘confidential information’ given to the Department — usually by a law enforcement or security agency — that is considered in the exercise of powers under s 501CA and BA is protected from further disclosure, and may be withheld from the applicant, their legal representative or a member of public by way of a court order.

### *Comment*

This provision also risks undermining fundamental procedural fairness obligations. It means that even if a visa is cancelled, the affected non-citizen or their legal representative may not be allowed access to the information on which the visa cancellation was based. Without access to such information, the opportunity to seek judicial review is rendered meaningless.

## Consequences of cancellation under s 501BA

### *What the amending Act will change*

The amending Act inserts references to s 501BA into subsections 501E(1)(a), 501F(1) and 503(1b) of The effects of these amendments are that a non-citizen who has had a visa cancelled by the Minister personally under s 501BA will:

- be prevented from making a further application for a visa while in the migration zone (except for a protection visa);
- have any outstanding application for a visa (except for a protection visa) refused by the Minister;
- have any other visa currently held cancelled by the Minister; and
- not be entitled to enter Australia or be in Australia at any time during the period determined by the Regulations.

### *Comment*

These amendments place a non-citizen who has had their visa cancelled under s 501BA in the same position as a person who has had their visa cancelled under s 501, 501A or 501B. Cancellation and exclusion from future re-entry into Australia have been criticised by some to be 'double punishment' (i.e. after having served jail time, the person is removed and excluded from re-entry).<sup>7</sup>

## Persons to be removed as soon as practicable after cancellation under s 501BA

### *What the amending Act will change*

The amending Act inserts a reference to s 501CA into paragraphs 198(2A) and 198(2B) of the Act. The effect of these amendments is that an immigration officer *must* remove from Australia, as soon as reasonably practicable, a non-citizen who:

- has had their visa cancelled under subsection 501(3A) and has been invited under s 501CA to make representations for revocation and who has not done so, or who has made representations, but the Minister has decided not to revoke the original decision; or
- has had their visa cancelled by a delegate of the Minister under s 501(3A) and has not lodged a valid application for another visa, and if they have been invited to make representations about revocation have either not done so, or have done so but the Minister has decided not to revoke the visa cancellation.

### *Comment*

The requirement for an immigration officer to remove a non-citizen 'as soon as reasonably practicable' may result in situations where persons are removed from Australia before they have had the opportunity to seek judicial review of the cancellation decision. The ability of individuals to seek judicial review is crucial to safeguarding their rights in this instance, because decisions made by the Minister under s 501BA not to revoke the visa cancellation are not merits reviewable: the only option is judicial review.

The Law Council of Australia has argued that ‘as it may be difficult for detainees to gain access to legal advice and representation, it is likely that a detainee’s decision to pursue judicial review will be delayed. As a consequence, this amendment is likely to lead to an increase in applications for urgent injunctions to prevent removal’.<sup>8</sup>

## Expanding the definition of ‘character concern’

### *What the amending Act will change*

Under [s 336E of the Act](#), a non-citizen’s identifying information may be disclosed if it falls under a class of ‘permitted disclosures’. Under subparagraph 336E(2)(a)(iii), a permitted disclosure includes a disclosure for the purposes of data-matching in order to identify non-citizens who have a criminal history or who are of ‘character concern’. In addition, under subparagraph 336E(2)(ec), disclosures are also permitted for the broader purpose of identifying non-citizens who have a criminal history or who are of character concern.

The amending Act expands the definition of ‘character concern’ in s 5C of the Act to be consistent with the wider wording of the ‘character test’ under subsection 501(6), as amended by the *Character Act*.

### *Comment*

This amendment will significantly increase the cohort of persons whose identifying information can be disclosed on the basis that they are person of ‘character concern’. It would include, for example, a person who the Minister reasonably suspects is, or has been a member, of a group or organisation that is, or has been, involved in criminal conduct. The provisions are concerning because persons may have their identifying information disclosed, despite not having committed any crime.

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## Endnotes

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<sup>1</sup> See *Migration Act 1958* (Cth) s 501CA(3)(a)

<sup>2</sup> *Ibid* s 501CA(3)(b).

<sup>3</sup> *Ibid* s 500(1)(ba).

<sup>4</sup> [Explanatory Memorandum](#), *Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016*, 6.

<sup>5</sup> Parliamentary Joint Committee on Human Rights, [Thirty-fourth report of the 44th Parliament](#), 42.

<sup>6</sup> For example, before a decision is made by a delegate of the Minister to cancel on the basis that a person does not meet the character test under s 501, a person is issued with a ‘Notice of Intention to Cancel’ and is given an opportunity to make arguments about why the visa should be cancelled. If the visa is cancelled, the person is notified of the decision and their review rights: see *Migration Act 1958* (Cth) s 501G.

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<sup>7</sup> See eg, Michael Grewcock, '[Punishment, deportation and parole: The detention and removal of former prisoners under section 501 Migration Act 1958](#)' (2011) 44(1) *Australian & New Zealand Journal of Criminology* 56.

<sup>8</sup> Law Council of Australia, '[Submission No 3 to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Migration Amendment \(Character Cancellation and Consequential Provisions\) Bill 2016 \(Cth\)](#)' (4 March 2016).