



JUSTICE BEHIND BARS



## Visa cancellation under s116(1)(e)

This factsheet is about the cancellation of a person's visa under s116(1)(e) of the Migration Act 1958 (Cth) and how they can challenge a decision to cancel their visa.

### What is the law?

Section 116(1)(e) provides that the Minister for Immigration may cancel a visa if they:

*“are satisfied that the presence of the visa holder in Australia is, or may be, or would be, or might be, a risk to*

- (i) the health, safety or good order of the Australian community or a segment of the Australian community; or*
- (ii) the health or safety of an individual or individuals”.*

### Who do the laws apply to?

The laws can be applied to any person in Australia who does not have Australian citizenship or a permanent visa. This includes New Zealanders who were automatically granted Special Category subclass 444 visas upon their arrival to Australia.

The laws can be applied to any prisoners who are considered a risk, including prisoners have been charged with offences and remanded into custody.

You do not have to be convicted of an offence to be considered a risk. It is enough that you have been charged with an offence for these laws to apply to you.

### What information will be considered?

In order to successfully challenge the cancellation, you will need to show that:

1. You do not pose a risk to the health, safety or good order of the Australian community; or
2. That there are other reasons why your visa should not be cancelled which outweigh the reasons for cancelling your visa. For example: because all of your family are in Australia or because you may be at risk of harm if you are sent back to your country of origin.



## The s116(1)(e) cancellation process – how it works for prisoners

### Step One

The Department of Immigration will send you a “Notice of Intention to Consider Cancellation”. This Notice lets you know the Department are considering cancelling your visa.

You can make submissions in response explaining why you think you are not a risk and/or why your visa should not be cancelled. You must provide your response within **five working days** of receiving the Notice.



### Step Two

If the Department still decides to cancel your visa, they will send you a “Notification of Cancellation” saying that your visa has been cancelled.

The Department will either post your Notification to you directly or email it to correctional staff to give to you.



### Step Three

You can appeal the Department’s decision to cancel your visa in the Administrative Appeals Tribunal (AAT).

You need to lodge a review application to the AAT within **seven working days** of receiving your Notification of Cancellation. This timeframe cannot be extended.



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## **What if I'm taken into immigration detention after being sentenced?**

Even if you have not received a Notice of Intention to Consider Cancellation while being held on remand, it is not uncommon for the Department of Immigration to attend sentencing hearings. If you are granted immediate parole or are otherwise released, you may be immediately detained in immigration detention for questioning.

If you're in immigration detention, the Department can use a different process to cancel your visa under s116(1)(e). In this process, the Department can interview you and ask you to provide reasons why your visa should not be cancelled. They must then decide whether to cancel your visa within four hours of the interview.

If the Department cancels your visa, they may inform you in person rather than providing you with a written notice. You will have seven working days to lodge a review application to the AAT once you have been told that your visa has been cancelled.

## **How can I apply for a review to the AAT?**

You can lodge your review application online or by post, email or fax.

There is a \$1,731 application fee (current as of 19 October 2017). You can apply to pay a reduced fee of \$865.50 on grounds of financial hardship. To do this, you need to complete a Request for Fee Reduction Form and include this with your review application.

## **What happens at the AAT?**

If you are successful at the AAT, you will be given back your visa.

If you are unsuccessful at the AAT, you can apply to the Federal Circuit Court for judicial review of the AAT's decision.

Judicial review is concerned with whether a decision has been made lawfully and all relevant laws and procedures have been followed in making the decision. The court does not have the power to give you back your visa. If the AAT's decision is found to be unlawful, the Federal Circuit Court can only set the decision aside and send it back to the AAT to remake the decision.



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## **What are the consequences?**

If your visa is cancelled under s116(1)(e) and you do not successfully challenge the decision, you will be taken into immigration detention and will be removed from Australia unless you are granted another type of visa. You are barred from applying from most types of visas but you can apply for a protection visa, partner visa or a temporary bridging visa.

You will be subject to a condition that will prevent you from obtaining another temporary visa for three years. After three years have passed, you can apply for a visa to return to Australia but you will have to satisfy the character test and your criminal history will be considered.

Please note that if you are a New Zealand citizen and you are removed from Australia as a result of a visa cancellation **or** you have been sentenced to one or more terms of imprisonment that add up to 12 months or more, you cannot be granted a Special Category (subclass 444) visa again.