

5 March 2021

Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
Parliament House
Canberra

By email: legcon.sen@aph.gov.au

Dear Ms Dunstone

**Migration and Citizenship Legislation Amendment
(Strengthening Information Provisions) Bill 2020**

On Tuesday 2 March 2021 Legal Aid NSW gave evidence to the Committee's hearing on this Bill by video link. In the course of the hearing Senator The Hon Kim Carr asked, in general, about access to legal aid for applicants (see page 34 of the draft transcript).

We thought that it may be useful to provide the Committee with some information about the availability of legal aid in the visa cancellation area in NSW, specifically in relation to character refusals, cancellations, and requests to revoke mandatory visa cancellations. We note that the Bill is aimed, at least in part, at these types of decisions.

Background

Legal Aid NSW receives a high volume of calls from people seeking assistance regarding visa cancellation on criminal grounds. This includes people seeking to request that the mandatory cancellation of their visa be revoked, and people seeking judicial or administrative review of decisions by the Minister or the Minister's delegate.

According to the Department of Home Affairs website, between the 2013–14 and 2019–20 financial years, the number of visa cancellations on character grounds increased by over 1,240 per cent due to December 2014 legislative amendments to the *Migration Act 1958*. These amendments introduced, among other things, a new mandatory cancellation provision under section 501(3A) of the *Migration Act*.¹

¹ See <https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>, accessed on 4 March 2021.

Availability of legal aid in NSW

- **Advice and minor assistance**

Legal Aid NSW provides an extensive advice service to clients whose visas have been cancelled, but it is generally unable to actively assist at the departmental stage. Access to advice is not means tested, and the majority of the advice is to clients who are in custody or detention after having their visa mandatorily cancelled under section 501(3A). This client group is one Legal Aid NSW's top areas of legal need.

Advice work

According to statistics drawn from Legal Aid NSW's case management system the following advice services were provided for visa cancellation matters.

Calendar year	Number of advices
2018	489
2019	525
2020	421

Minor assistance work

Grants of legal aid are not available at the departmental stage of a visa cancellation matter (that is, a request for revocation or a response to a notice of intention to cancel a visa). Legal Aid NSW provides a very limited and targeted minor assistance program aimed at assisting clients with mental health issues or cognitive impairments, which may include services such as checking someone's revocation request, making minor amendments to representations to the Department and assisting the client to obtain relevant documents and information.

According to statistics drawn from Legal Aid NSW's case management systems the following services were provided for visa cancellation matters by way of minor assistance.

Calendar year	Number of minor assistance services
2018	125
2019	150
2020	51

- **Representation services**

Grants of legal aid are available for merits review of visa cancellation decisions in the Administrative Appeals Tribunal (AAT) and for judicial review in the courts in limited circumstances. Grants of legal aid can be made to in-house legal aid lawyers or to private practitioners (called *assigned* matters) to conduct these cases where the guidelines are met.

The full text of the Legal Aid NSW policy guidelines in relation to migration matters is attached (see especially guidelines 6.18.3 and 6.18.4 for visa cancellation matters).

In general, as well as meeting Legal Aid NSW's means test and merit test (that is, the matter must have reasonable prospects of success), 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.

According to statistics drawn from Legal Aid NSW's case management systems, grants of legal aid were made for visa cancellation matters as follows²:

	AAT	Judicial review
2018		
• In-house	0	4
• Assigned	2	3
2019		
• In-house	3	11
• Assigned	6	3
2020		
• In-house	8	10
• Assigned	7	9

If you have any questions about the content of this letter, please contact me.

Yours sincerely

Bill Gerogiannis
Senior solicitor, Civil Law Division

Enclosure:
Legal Aid policy guidelines for migration matters

² A grant refers to both a grant of aid and an authorisation under section 33 of the *Legal Aid Commission Act 1979* (NSW)

6. Civil law matters - when legal aid is available

6.18. Migration matters

6.18.1 When legal aid is available in migration matters

Legal aid is available for limited types of migration matters. It is available for limited types of migration matters as set out in sections 6.18.2 to 6.18.5 below.

6.18.2 Representation in a migration matter

Legal aid is available for representation in migration matters, including refugee matters, in the Federal Court, the Federal Circuit Court or the High Court.

Legal aid is only available in the following circumstances:

- where there is an arguable error of law, or
- where the proceedings seek to challenge the lawfulness of detention, not including a challenge to a decision about a visa or a deportation order.

For legal aid to be granted in these types of matters the following tests must be satisfied:

- the Means Test
- Merit Test A
- the Availability of Funds Test

See Civil Law Guideline 3.2 on requirements to attend ADR.

See Civil Law Guideline 3.10 on applying tests in Commonwealth matters .

6.18.3 Visa cancellation matters – representation in the Administrative Appeals Tribunal, the Federal Circuit Court and the Federal Court of Australia

Legal aid is available for representation in the Administrative Appeals Tribunal, the Federal Circuit Court and the Federal Court of Australia to applicants who are challenging a cancellation of a visa under s501 of the *Migration Act 1958* (Cth).

For legal aid to be granted in these types of matters the following tests must be satisfied:

- the Means Test
- Merit Test A
- the Availability of Funds Test, **and**
- Legal Aid NSW is satisfied the matter raises a significant human rights issue. See Civil Law Guideline 3.4.

6.18.4 Appeals from the AAT, Federal Circuit Court and Federal Court

Legal aid is available for appeals from the Administrative Appeals Tribunal, the Federal Circuit Court and the Federal Court in relation to the cancellation of a permanent visa under s501 of the *Migration Act 1958* (Cth).

For legal aid to be granted in these types of matters the following tests must be satisfied:

- the Means Test
- Merit Test A
- the Availability of Funds Test, **and**
- Legal Aid NSW is satisfied the matter raises a significant human rights issue, **and**
- Legal Aid NSW is satisfied there may be a strong prospect of a substantial benefit to be gained by the applicant in appealing from a decision of the AAT or the Federal Court.

6.18.5 Visa applications and representation in the AAT (Migration and Refugee Division)

Legal aid is available for representation by in-house legal practitioners at Legal Aid NSW for the following visa applications:

- Partner Visas where the applicant is eligible for an exemption under the family violence, child of the relationship or death of a sponsor exemption provisions; and
- XA-866 onshore Protection Visas

For legal aid to be granted in these types of matters the following tests must be satisfied:

- the Means Test
- Merit Test A
- the Availability of Funds Test.

Where a grant of legal aid was made to the legally assisted person at the primary stage, legal aid is available for representation in appeal proceedings in the Administrative Appeals Tribunal (Migration and Refugee Division).

For legal aid to be granted in these types of matters the following tests must be satisfied:

- the Means Test
- Merit Test A
- the Availability of Funds Test.

Date last published: 14/01/2019

3. Civil law matters

3.4. Visa cancellation matters

For Legal Aid NSW to be satisfied that a matter in relation to a visa cancellation under s501 of the *Migration Act 1958 (Cth)* raises a significant human rights issue, one or more of the following criteria must be satisfied:

the applicant would be at risk of persecution or death if returned to their country of origin

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

- 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.

Date Last Published: 07/05/2015



Policies

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8. Merit Test

8.2. Merit Test A – State and some Commonwealth matters

Merit Test A is the merit test applied in State matters and in Commonwealth civil and criminal matters. The purpose of Merit Test A is to assess whether it is reasonable in all the circumstances to grant legal aid.

In deciding whether it is reasonable Legal Aid NSW will take into account amongst other issues:

- the nature and extent of
 - any benefit that the applicant might expect to gain by receiving legal aid, or
 - any disadvantage or harm to the applicant that might result from being refused legal aid, **and**
- whether the applicant has reasonable prospects of success.

Note: Merit test A has additional criteria in certain state matters such as coronial inquest matters.

Note: See Criminal Law Guideline 1.14 for guidance on considering whether there are reasonable prospects of success for an appeal to the Court of Criminal Appeal.