Victoria Legal Aid

Joint Standing Committee on Migration

Answers to questions asked at 24 July 2018 hearing in Melbourne

1. **How many cases (for prisoners who have received cancellation notices) are resolved through 'internal review' in the Department, before making it to the AAT?**

As Victoria Legal Aid (**VLA**) and Refugee Legal suggested to the Committee during evidence, the most comprehensive source of data on this topic will be the Department of Home Affairs (**DHA**). To guide any request for information to the DHA and analysis of this data by the Committee, VLA makes the following comments.

The resolution of a visa cancellation issue within the DHA, such that it does not result in review by the Administrative Appeals Tribunal (**AAT**) could relate to either:

- The exercise of power by the Minister (or a delegate) to revoke a mandatory visa cancellation (under s 501(3A) of the *Migration Act 1958* (Cth) (**the Act**)); or
- The process under s 501 of (a) issuing a notice of intention to cancel; (b) receiving material from a visa holder in response; and (c) determining not to cancel/determining to cancel but in circumstances where the visa holder does not seek merits review at the AAT.

In our view, it will be critical for the Committee to obtain data on both these processes and to consider and compare the data on each of the cancellation processes. It may, for example, be useful to consider the number of 'notices of intention to cancel' issued to visa holders and the number of those visa holders who receive a subsequent cancellation under s 501(1) of the Act. This would provide a clearer picture of how successfully matters are dealt with internally, and allow for comparison of the Departmental resolution of matters through processes which do provide natural justice (eg under s 501(1) and those that do not (eg under s 501(3A)).

In addition, any analysis of the data on rates of AAT review must take into account that, in the below three circumstances, irrespective of whether a visa holder is satisfied with the Departmental or Ministerial decision-making, they have no option to seek review of it at the AAT:

- Decisions to refuse to revoke a mandatory visa cancellation which have been made personally by the Minister or the Assistant Minister.
- Where a person failed to make a revocation application within the statutory timeframe.
- Where the visa holder failed to apply to the AAT for review of a decision within the statutory timeframe.

In these circumstances (which are, for our clients, not infrequent) it will be wrong to assume that a lack of a corresponding AAT application signals satisfaction of the visa holder with the cancellation decision or 'internal resolution' of the issue within the Department.

2. How much expense on legal aid would you say there is on visa cancellations?

It is difficult for VLA to specify with precision its expenditure on visa cancellation matters.

In part, this is because there are multiple ways of calculating expense (eg, by cost of matter in court against a court scale, by reference to standard professional fees, or by each individual lawyer's time). It is also a consequence of the multiple (and difficult to trace) ways the current visa cancellation scheme intersects with VLA's Civil Justice **and** Criminal Law programs.

It is not possible to provide, for example, a figure which takes into account the increased time which criminal lawyers acting for Australian visa holders now spend in preparing a matter as a result of the mandatory visa cancellation regime. This includes appropriate advice to their clients about the consequences of pleading guilty and of sentencing discussions and outcomes, given that an accumulation of sentences totalling 12 months will lead to mandatory visa cancellation under the current law if the client is in custody. It also includes additional work by criminal lawyers in each matter before the Court in response to the rigid cancellation scheme to engage with both the criminal sentencing principles and attempt to manage their consequential effect on the client's visa status.

In case it assists the Committee, however, we confirm that:

- Within VLA's Civil Justice Program, the migration team provides the most direct visa cancellation advice (as one component of the total work that team does). In the last financial year, this small team has comprised (on average) 6.5 staff. In this same period, the team provided:
  - Legal advice on character cancellation matters to 258 people.
  - Legal information on character cancellation matters to 165 people.[1]
- Issues around visa cancellation or refusal on character grounds make up around 35% of all 'one off' advice services provided by VLA. This demand has been fairly consistent since the introduction of s 501(3A) of the Act in December 2014. By contrast, in the 2014 financial year, the team recorded less than 10 visa cancellation advice sessions.
- In the 2018 financial year, character cancellation of visas was the second most common civil law issue raised by prisoners calling our Prisoner Legal Help service. Visa cancellation was the most commonly raised legal issue on the Prisoner Legal Help phoneline, other than complaints about the prison itself. The Prisoner Legal Help line has received 105 calls regarding visa cancellation (by comparison, 107 calls were complaints about the prison, 54 calls related to fines and 20 to professional negligence).
- In the 2018 financial year, our general Legal Help telephone service took 218 calls in relation to visa cancellation.
- VLA does not have a funding guideline to provide ongoing assistance to people seeking revocation of a visa cancellation or merits review of a decision to the AAT. We are, however,

[1] The team also provides a smaller number of much higher intensity case work services for clients seeking judicial review of visa cancellation decision in the Federal Courts.

acutely aware of the lack of assistance in the broader sector for this client group. We are unable to meet the demand for legal assistance with visa cancellation issues, even in relation to people who have held humanitarian or refugee visas.

Those seeking advice are primarily detained in either the state prison system or the immigration detention system. As noted in our substantive submission to the Committee, these clients are some of the most disadvantaged people we assist. They often have low levels of literacy, poor English language skills, limited ability to obtain and send information. Many clients also have serious mental or physical health problems.

3. Referring to evidence at the hearing that the mandatory visa cancellation process is a 'blunt instrument', the Committee asked, 'is there an alternative process?'

(This question was asked by the Chair of the Committee in the context of his reflection that: 'My strong view is, if a person has committed violent and serious crimes, they should just get that notice. But maybe for more minor offences there could be something where they get a potential notice and come into the department and have an initial oral interview to see whether it is worth pursuing'.)

A two-tier system would not remedy the current flaws of the mandatory visa cancellation system

VLA cautions strongly against moving toward a two-tier system that attempts to rank the seriousness of offending. In our view, the 'blunt instrument' itself – mandatory visa cancellation – cannot be improved by moving some visa-holders outside its remit. Creating a two-tier system based on offence would merely swap the current situation which sees some visa holders subject to mandatory cancellation because they fall one side of an arbitrary line (presently a 12-month sentence), for one where the arbitrary line is the offence for which they are convicted.

In our experience, neither measure (sentence duration or offence) is sufficiently nuanced to make for an accurate, efficient or cost-effective method of evaluating risk to the community. This is because people who have had their visas mandatorily cancelled have no opportunity to put forward the context of the offending or other mitigating information until the cancellation of their visa has already occurred. In our experience, this context is critical and without it the inefficiencies and unintended unfairness of the current system will continue.

While in some cases it may be that the offending giving rise to the cancellation is objectively viewed as serious or very serious pursuant to Direction 65, in many other cases there are relevant and significant mitigating factors that are given weight under the criminal law system, Direction 65 and reflected in a comparative reduction in sentencing. For example, we assist clients whose serious offending has occurred in the context of family violence, immense social strain, and as a result of childhood trauma. If the purpose of the visa cancellation regime is the regulation of risk in the community, these factors are critical to the analysis of risk. Under a two-tier system, this nuance cannot be considered before the visa is cancelled and the system's focus on managing risk to the community is undermined.

The significant consequences of visa cancellation (including indefinite detention and family dislocation, including for Australian children), which we detailed in our substantive submission, reinforce the importance of a sophisticated decision-making system **in all cases**. Any system which results in open-ended periods of detention must have fair and transparent processes which are consistently applied. This system should promote confidence, consistency, finality and transparency. It is, therefore, critical that all visa cancellation decisions are informed by the responses of the visa holder.

A consistent, clear and accurate primary decision is ideal

In our view the preferable approach is that each person has access to the same transparent and accurate primary decision-making process. This would not only encourage consistency, but would also reduce unnecessary complexity and increase the public perception of fairness of visa cancellation. In our view, non-mandatory visa cancellation processes which include an opportunity for a visa holder to provide meaningful submissions on a proposed cancellation is the only real way of resolving the current issues created by the blunt instrument of mandatory visa cancellation.

Primary decision-making about visa cancellation which takes into account a person's life, their protective factors, community connections and the context of the offending is critical. For the system to work effectively, we recommend:

- visa holders be provided with longer and more flexible timeframes for responding to a proposed cancellation; and
- enhanced legal and support services be made available in prisons to help people understand and participate in the primary decision-making process.

4. What terms of reference might you suggest to us, if we make a recommendation that there be a review in relation to this? What sort of subjects should be looked at?

Overarching comments on the framework for any review of the visa cancellation decision

Any broader review of the visa cancellation regime should start from the position that visa cancellation is a complex decision with serious consequences for an individual and the Australian community.

While we agree that the Minister should retain powers to react quickly to situations which demand urgent intervention, any review must also quantify and attribute significant importance to the very serious consequences of poor visa cancellation decision-making and of cancellation itself.

Through our work, we observe that the exercise of visa cancellation powers has a significant impact on a person's rights and ability to engage with the decision-maker in relation to the cancellation decision. This is relatively unprecedented in other similarly significant and complex regimes. Further, in many cases, flaws in the current cancellation system and visa cancelation itself often lead to long periods of detention, on top of periods which a person will already have served for the criminal offending.

These are very serious consequences faced by people who may have strong connections in the community or who may have been recognised as refugees and who continue to face the real prospect of harm if they were to be forcibly removed.

Proposed terms of reference and subject matter

If the Committee determines that a full inquiry into the system is required, we would recommend the following terms of reference:

Regarding personal decision-making by the Minister

- What should be, and what are, the circumstances in which the Minister will use the cancellation power in the 'national interest'?

- What should be, and what are, the circumstances in which visa cancellation matters (encompassing bare cancellation and revocation of mandatory visa cancellation) are referred for the Minister's personal consideration?

- Would there be greater efficiency if all visa cancellation decisions, including revocation matters or discretionary cancellations, were made by a delegate, save for those which give rise to national interest concerns?

Regarding procedural reform to enhance the fairness, accuracy and cost-efficiency of the system

- Consider methods for procedural reform of the mandatory visa cancellation system to extend the statutory time periods for applying (a) for revocation of a visa cancellation or (b) to the AAT to review a decision of a delegate to refuse to revoke a cancellation.

- Undertake a costs analysis of the use of s 501(3A), including an analysis of the costs associated with prolonged detention resulting directly from the exercise of this power, and with unsuccessful litigation defending poor primary decision-making. The inquiry could incorporate a comparative analysis of costs associated with the exercise of the discretionary s 501 powers. An associated question might be whether statutorily imposed time limits on all decision-making might reduce costs and promote efficiency.

- What resources are necessary to enable visa holders who fall within the cancellation system to meaningfully engage with and provide information as part of the decision-making process?