

Fact Sheet - The Character Requirement

Everyone who wants to enter or stay in Australia must satisfy the character requirement as set out in Section 501 of the *Migration Act 1958* (the Act). This includes all non-citizens, sponsors of visa applicants and non-migrating family members seeking to enter or stay in Australia.

Entering or remaining in Australia is a privilege, and it is expected that non-citizens are, and have been, law-abiding. Visa holders must also continue to satisfy the character requirement.

Irrespective of which visa you apply for, you must advise us if you have any criminal convictions inside or outside of Australia, and you may be asked to provide police certificates as part of your assessment against the character test. If you do not inform us of your criminal history, your visa application may be refused or your visa cancelled.

We and the Minister for Immigration and Border Protection have the power to refuse or cancel a visa on the basis that a person does not pass the character test.

In some cases, even if you do not pass the character test, we or the Minister can exercise discretion not to cancel your visa.

Decisions to cancel or refuse visas on the basis of the character test are made after full consideration of all the circumstances of a case.

Mandatory cancellation

If you are currently serving a full-time custodial sentence and have ever been sentenced to 12 months or more imprisonment, regardless of time actually served, or have been convicted of, had a charge proven for or have been found guilty of a sexually based crime involving a child, your visa must be cancelled. We will provide you with 28 days to request revocation of this decision if your visa is cancelled in these circumstances.

In considering requests for revocation of a mandatory cancellation decision, we will consider all circumstances of your case.

The character test

You will not pass the character test if:

- you have a substantial criminal record
- you have been convicted of escaping from immigration detention, or convicted for an offence that you committed:
 - while you were in immigration detention

- during an escape from immigration detention
 - after an escape, but before you were taken into immigration detention again.
- you are or have been a member of a group or organisation, or had or have an association with a person, group or organisation that the Minister reasonably suspects of being involved in criminal conduct
- the Minister reasonably suspects that you have been involved in people smuggling, people trafficking, genocide, a war crime, a crime against humanity, a crime involving torture or slavery, or a crime that is of serious international concern, whether or not you have been convicted of such an offence
- your past and present criminal or general conduct shows that you are not of good character
- there is a risk that while you are in Australia you would:
 - engage in criminal conduct
 - harass, molest, intimidate or stalk another person
 - vilify a segment of the Australian community
 - incite discord in the Australian community or in a part of it
 - be a danger to the Australian community or a part of it.
- you have been convicted, found guilty or had a charge proven for, one or more sexually based offences involving a child
- you are subject to an adverse security assessment by the Australian Security Intelligence Organisation
- you are subject to an Interpol notice, from which it is reasonable to infer that you are a direct or indirect risk to the Australian community, or a segment of the Australian community.

Substantial criminal record

A substantial criminal record is based on the length of a sentence imposed by a court of law, rather than the time actually spent in prison.

For the purpose of the character test, a person is deemed to have a substantial criminal record if they have been:

- sentenced to death or life imprisonment
- sentenced to a term of imprisonment of 12 months or more
- sentenced to two or more terms of imprisonment (even if served concurrently), where the total of those terms is 12 months or more
- found by a court to be not fit to plead in relation to an offence but found to have committed the offence and as a result have been detained in a facility or institution.

Discretionary powers and Ministerial Direction 65

When a person does not pass the character test, the Minister or his delegate will decide whether or not to refuse the application or sponsorship, or to cancel their visa. When

making this decision, a wide range of factors will be considered, including the protection of the Australian community, the best interests of any minor children in Australia who may be affected by a decision to refuse or cancel the person's visa and expectations of the Australian community. Other factors are also considered, such as Australia's international legal obligations, the impact of visa refusal or cancellation on a person's family in Australia, any impact on Australian business interests and the impact on the Australian community if a visa were to not be refused or cancelled.

The exercise of the discretion is guided by Ministerial Direction 65 made under section 499 of the Act.

Exclusion from Australia

A person who is removed from Australia after their visa is cancelled on character grounds will be permanently excluded from being granted another visa to re-enter Australia. The cancellation of your visa will also prevent you from applying for most other visas to remain Australia.

Appeals

Where the decision to refuse or cancel a visa is made by the Minister personally, the person has no right of appeal to the Administrative Appeals Tribunal (AAT). If a delegate of the Minister either refuses or cancels a person's visa and the person is in Australia they will have a right to have the decision reviewed by the AAT. If they are not in Australia, they may also have a right to have the decision reviewed, for example, if they have either a sponsor or nominator in Australia.

However, if a person's visa is mandatorily cancelled because they are serving a custodial sentence and have ever been sentenced to 12 months or more, or have been convicted of, had a charge proven or found guilty of a sexually based crime involving a child, they have no right of appeal at the AAT. In these circumstances, we will provide the person with 28 days to request revocation of the decision to mandatorily cancel their visa. A decision made by a delegate of the Minister to not revoke a mandatory cancellation decision is reviewable by the AAT.

Strict time limits apply on appeals to the AAT. Applicants in Australia seeking reviews of decisions must apply to the AAT within nine days of being notified of the decision.

For applicants outside Australia, the application for review must be lodged by a sponsor or nominator within 28 days of the day of being notified of the decision.

The AAT will be deemed to have confirmed the decision if it does not make its own decision within 84 days of the date on which the applicant was notified of the original decision.

Whether or not there is an appeal avenue available to the AAT, an applicant may seek judicial review of the decision, if they believe the decision was not lawfully made.

Source: Department of Immigration and Border Protection
