



Immigration Advice and Rights Centre Inc.

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DEPORTATION AND CANCELLATION INFORMATION FOR PRISONERS*

Prisoners who are Australian permanent residents or nationals of foreign countries may be faced with particular legal problems. This information sheet gives preliminary information about the most common problems faced by Australian permanent resident and non-resident prisoners.

IMMIGRATION PROBLEMS

The type of problem a prisoner may face depends upon the type of visa held by the prisoner or the Australian residency status of the prisoner.

PRACTICAL HINTS AND SUGGESTIONS

- If a letter is received from the Department of Immigration, seek advice from a registered migration agent immediately.
- Be aware of and act within any time limit that is given to make an application for review or to respond to a request for information. Failure to act within the time limit can mean that you do not have the chance to put forward your case and challenge the Department of Immigration decision. This could result in you being forced to leave Australia and stopped from ever returning.
- Request advice from one of the contact points below for more detailed information.
- As many prisoners faced with an immigration issue are from non-English speaking backgrounds, make sure that an interpreter is used whenever necessary and that the prisoner understands what is happening.
- Obtain and provide all possible information in support of the case. The information may include: reports from welfare workers, parole officers, prison chaplains and other workers within the gaol and in the community; statements (preferably in the form of statutory declarations) from the prisoner, family members, friends, and employers; and documents to prove or support claims that are made, such as a marriage certificate or birth certificate.

There are five common problems that may affect Australian permanent resident or non-resident prisoners.

1. People arrested on entering Australia.
2. People arrested while they hold a temporary visa in Australia.
3. People who overstay their visa (who are then unlawfully within Australia) and are then arrested.
4. Permanent Residents of Australia who are convicted and sentenced to imprisonment.

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5. Prisoners who are foreign nationals who have finished their sentence but do not have a travel document.

1. PEOPLE ARRESTED ON ENTERING AUSTRALIA

The most common situation is a person travelling to Australia on a temporary visa, such as a visitor visa, being arrested at an airport and being charged with a criminal offence.

If refused bail, the defendant will be held on remand to await trial. Usually, the visa that the defendant has will remain in effect, even though the defendant is in prison, until its date of expiry. On the expiry of the visa, the defendant will be “unlawful” (without a visa) whilst on remand.

If granted bail, the defendant will be released into the community on a “criminal justice visa”.

If convicted and sentenced to imprisonment, the prisoner will serve the sentence within Australia.

If the prisoner was granted bail and held a Criminal Justice visa, this visa will continue for the duration of the prisoner’s sentence.

If the prisoner was held on remand, after being sentenced the prisoner will be granted a visa by the Department of Immigration. The visa granted is known as a “Bridging E visa”. It is granted so the prisoner is lawfully within Australia whilst imprisoned. The Bridging E visa is granted for the duration of the prisoner’s sentence.

The Bridging E visa allows the prisoner to study and to work. This allows the prisoner to participate in training and rehabilitation programs and in work release programs.

Upon completion of the sentence, the Bridging E visa of the prisoner expires. The prisoner is then held within “immigration detention”. The prisoner may be transferred to an Immigration Detention Centre (“IDC”) or if there are concerns about the prisoner being held in an IDC, the prisoner will remain in prison.

Upon completion of a sentence, the prisoner will be expected to leave Australia. The prisoner can “voluntarily depart”, by paying for the air ticket. If the prisoner refuses to voluntarily depart, the prisoner will be “removed” from Australia, by being placed upon a plane and forced to leave.

Upon completion of the prison sentence and then being held in “immigration detention”, the prisoner can apply for another Bridging E visa. If granted, this allows the prisoner to be released from immigration detention until departure from Australia. However, it is very unlikely a Bridging E visa would be granted.

If a defendant is acquitted at trial, the person will be expected to leave Australia. The process for leaving Australia is the same as when completing a sentence, as described above.

2. PEOPLE ARRESTED WHILE THEY HOLD A TEMPORARY VISA IN AUSTRALIA

The most common situation is a person who has entered Australia on a temporary visa, for example as a visitor/tourist or student, and has been arrested and charged.

The process as described in 1. will apply to a person in this situation.

3. PEOPLE WHO OVERSTAY THEIR VISAS (WHO ARE THEN UNLAWFULLY WITHIN AUSTRALIA) AND ARE THEN ARRESTED

The process as described in 1. will apply to a person in this situation.

In the above three situations, it may be possible for a prisoner to make an application to remain in Australia whilst imprisoned. As an example, a prisoner may be married to or may be in a de facto relationship with an Australian citizen or Australian permanent resident and wants to remain in Australia after completion of the sentence with the partner. If a prisoner is not a permanent resident of Australia and wishes to remain in Australia after completion of the sentence, advice should be obtained about this (see contact details below).

4. PERMANENT RESIDENTS OF AUSTRALIA WHO ARE CONVICTED AND SENTENCED TO IMPRISONMENT

A permanent resident is a person who has been granted permission to stay permanently in Australia, but has not become an Australian citizen.

The following rules also apply to New Zealand citizens in Australia.

Permanent residents sentenced to imprisonment may be either:

- (a) deported from Australia; or,
- (b) have their permanent residence cancelled and then be removed from Australia.

As a general rule, if the prisoner has committed an offence within ten years of being in Australia as a permanent resident, and is sentenced to a period of imprisonment of at least twelve months, the prisoner may be deported.

If the prisoner falls within this situation and is therefore liable to be deported, the Department of Immigration will then decide whether or not the prisoner should actually be deported.

The prisoner will be given a written “Notice of Intention of Deportation”, which states that the prisoner “may” be deported and that the Department of Immigration is deciding whether or not to deport him/her.

The prisoner will be given an opportunity to give reasons why he/she should not be deported. In making a decision, a list of factors are taken into consideration. Reasons in support of deportation (such as the offence that was committed, the risk to the community if the prisoner remains in Australia) are weighed against reasons against deportation (such as family ties within Australia of the prisoner, the best interests of any children affected by deportation of the prisoner, length of residence within Australia of the prisoner).

Even if a permanent resident prisoner is not able to be deported, the prisoner may have his/her residence visa cancelled, on the basis that he/she is not of good character, and then be removed from Australia.

For example, if the prisoner had been in Australia for more than ten years as a permanent resident at the date of committing the offence, the prisoner may not be able to be deported, but may still have his/her visa cancelled and then be removed.

As with a decision to deport a permanent resident, the Department of Immigration has a discretion to cancel a prisoner’s residence visa in Australia and will request comments prior to any cancellation. The Department of Immigration will weigh the reasons for cancellation of a prisoner’s visa against the reasons against cancellation of a prisoner’s visa.

If a decision is made to deport the prisoner or to cancel the residence visa of the prisoner, a right to apply for review of the decision is available. The letter informing the prisoner of the decision to deport him/her or to cancel his/her visa, will give information about what review rights are available.

Generally (but not always) the prisoner has a right of review of these decisions to the Administrative Appeals Tribunal (“AAT”). The AAT will review the original decision and make a decision that agrees with, varies or sets aside the original decision. When the AAT sets aside the decision, it can substitute its own decision or send the case back to the original decision-maker for reconsideration.

Prisoners who receive deportation orders or have their permanent residence visas cancelled may also have a right of review to the Federal Court of Australia. Whether an appeal can be made to the Federal Court of Australia is a complex legal issue and we recommend you obtain separate legal advice in relation to this. IARC does not provide advice in relation to Federal Court matters.

The letter advising the prisoner of a decision will advise whether the prisoner can apply to the AAT or only to the Federal Court. More detailed advice can be obtained from one of the contact points below.

It is of vital importance to be aware of time limits that are given to make an application for review of a decision. Generally, the time that is given to make an application for review is strict and an application for review CANNOT be made outside of the review time that is given.

5. PRISONERS WHO ARE FOREIGN NATIONALS WHO HAVE FINISHED THEIR SENTENCE BUT DO NOT HAVE A TRAVEL DOCUMENT

A travel document, such as a passport, is needed to travel from one country to another.

People who are leaving Australia (either voluntarily, being removed or being deported) must have a valid travel document to travel back to their country of nationality.

If a prisoner is unable to obtain a travel document from their country of nationality, they can be held in “immigration detention” (see 1.) until departure.

WHERE CAN YOU GET HELP?

There are a number of Community Legal Centres specialising in immigration law. These organisations provide free advice. They can also provide referrals to private fee-charging Migration Agents/Solicitors for further assistance and representation.

The Immigration Advice and Rights Centre

Level 5, 362 Kent Street, Sydney 2000

Phone: (02) 9279 4300

Refugee and Immigration Legal Service

1st Floor, 170 Boundary Street, West End Qld 4101

Phone: (07) 3846 3189

Refugee and Immigration Legal Centre

95 Brunswick Street, Fitzroy VIC 3065

Phone: (03) 9483 1140

Migrant Resource Centres

Some Migrant Resource Centres employ accredited Migration Agents who can provide free advice. Ask a Welfare Officer for details of local Centres.

Prisoners Legal Service (PLS)

Level 2, 323 Castlereagh Street, Sydney NSW 2000

Phone: (02) 9219 5888 (reverse charges) or 1300 888 529 / 1300 889 529 (toll free)

An appointment can be made with a lawyer from the PLS visiting the gaol. An application can be made for a lawyer to represent a person for free or at a substantially reduced cost.

NSW Law Society Pro Bono Scheme

170 Phillip Street

Sydney NSW 2000

Phone: (02) 9926 0364

Bar Association of NSW

174 Phillip Street

Sydney NSW 2000

Phone: (02) 9232 4055

CONTACT INFORMATION

DEPARTMENT OF IMMIGRATION AND CITIZENSHIP (DIAC)

Counter service all NSW offices

9am–4pm Monday to Friday

Sydney CBD 26 Lee Street, Sydney 2000
GPO Box 9984, Sydney, NSW 2001

Parramatta 9 Wentworth Street
Parramatta NSW 2150
GPO Box 9984, Sydney, NSW 2001

National Telephone Inquiry Line: 131 881

Website: www.immi.gov.au

IMMIGRATION ADVICE AND RIGHTS CENTRE INC (IARC)

Administration line: (02) 9279 4300 (between 9am and 5pm)

Website: www.iarc.asn.au

IARC Telephone Advice	IARC Face-to-face advice (by appointment only)
(02) 9262 3833 Tuesday and Thursday 2.00pm–4.00pm	Contact us to make an appointment at: Immigration Advice and Rights Centre Inc. Level 5, 362 Kent Street Sydney NSW 2000 Ph: +61 2 9279 4300 (Admin Line, 9-5pm)