# Impacts of Migration Amendment (Aggregate Sentences) Act 2023

**Note**: This document does not provide legal advice to those impacted by the introduction of the *Migration Amendment (Aggregate Sentences) Act 2023.* Those impacted should seek assistance from a registered migration agent, or engage independent legal advice.

### Aggregate Sentences Act

On 17 February 2023, the *Migration Amendment (Aggregate Sentences) Act 2023* (Aggregate Sentences Act) commenced. The Aggregate Sentences Act amends the *Migration Act 1958* (Migration Act) to specify that an aggregate sentence is considered a sentence throughout the Migration Act. This means a person who has been sentenced to a term of imprisonment for a period of 12 months or longer, whether imposed as a sentence in respect of one or more offences, has a 'substantial criminal record' and fails the character test in s501 of the Migration Act.

The Aggregate Sentences Act responds to the decision by the Full Federal Court in *Pearson v Minster for Home Affairs* [2022] FCFAC 203 (*Pearson*) to ensure the safety and security of the Australian community.

### What does the Aggregate Sentences Act do?

The Aggregate Sentences Act inserts a new provision in the Migration Act, to make it clear that the Migration Act applies no differently in relation to a single sentence imposed in respect of a single offence, or a single sentence imposed in respect of two or more offences.

This includes where a sentence imposed on a person for more than one offence will count towards establishing if that person has a substantial criminal record for the purpose of the character test. This is consistent with the Government's understanding of 'substantial criminal record' for this purpose, prior to the *Pearson* judgment.

### Why was the Aggregate Sentences Act implemented?

The Aggregate Sentences Act was implemented to allow the Government to take urgent action to address the inconsistencies arising from the Full Federal Court's decision in *Pearson*, but does not otherwise change the framework within which the character test operates.

The character test of the Migration Act serves as an important pillar within Australia's migration framework to protect the community from the risks posed by non-citizens with serious criminal histories, and ensures that non-citizens who are not of good character will have their visa refused or cancelled.

The Aggregate Sentences Act does not change or expand the circumstances in which aggregate sentences are considered for all relevant purposes of the Migration Act. The Aggregate Sentences Act simply confirms the long-held understanding that aggregate sentences can be taken into account for all relevant purposes under the Migration Act.

**What does this mean for the visa status of non-citizens who were impacted by the *Pearson* decision?**

The effect of the Aggregate Sentences Act is that the original decision to refuse or cancel a visa under s501 that relied on an aggregate sentence remains valid, and the non-citizen is an unlawful non-citizen (i.e. does not hold or no longer holds a valid visa to remain in Australia). Unlawful non-citizens are liable for detention and removal from Australia.

The Department has written to those impacted by the Aggregate Sentence Act to inform them of their immigration status and any review rights they may have. Those impacted are encouraged to seek independent legal advice, or engage a migration agent, in respect of the implications of the Aggregate Sentences Act on their individual case.

Further information on the Aggregate Sentences Act can be accessed on the Home Affairs Website at https://immi.homeaffairs.gov.au/news-media/archive/article?itemId=1027.

**Does the Aggregate Sentences Act impact the right to seek review or revocation of the original decision?**

The Government recognises that some individuals who were impacted by the Full Federal Court's decision in *Pearson* may have chosen not to seek review or revocation of a mandatory cancellation decision in light of the judgment, or may have otherwise discontinued review processes.

The Aggregate Sentences Act makes provision for refreshed review periods for impacted individuals, on commencement of the legislation, as long as they were within the appropriate timeframe to seek review prior to the *Pearson* decision.

Where a person's visa cancellation or refusal has been validated on commencement of the legislation, they will be restored any review or revocation rights they had immediately before 22 December 2022 (the date the Full Federal Court handed down its judgment in *Pearson*). Any person whose review or revocation proceedings remain on-hand will not be impacted, and those applications will continue to be considered by the Department or the relevant body.

Any person whose revocation and review rights were exhausted as at 22 December 2022 will not have any new review or revocation right re-enlivened due to the passage of the Aggregate Sentences Act.

**Will all people who received letters relating to the Aggregate Sentences Act be re-detained? Will ABF communicate with people and their lawyers regarding timeframes in which they will be re-detained so that people have time to farewell family and prepare to re-enter detention?**

Those who had a visa cancellation or refusal decision validated by operation of the Aggregate Sentences Act are unlawful non-citizens, and are liable to be detained and removed from Australia. The Department actively took steps to notify those impacted by the passing of the Aggregate Sentences Act to inform them of their immigration status and any review rights they may have.

Those impacted by the Aggregate Sentences Act are encouraged to self-report to the ABF, who will work with them or their legal representative to arrange an appropriate time for re-detention.

The Australian Border Force (ABF) has prioritised cases to ensure persons of interest are located and detained having regard to risk to the community. The ABF acknowledges the sensitivities associated with receiving people back into immigration detention. Particular care will be paid to the mental and physical health of any person re-entering the immigration detention network.

**Will the ABF take into consideration the placement of people re-detained as a result of the Aggregate Sentence Act?**

The ABF is committed to the good order of the Immigration Detention Network and will continue to ensure that Australia's immigration detention facilities are safe and secure. Placement decisions are made on a case-by case basis which involve the consideration of a number of factors, including the operational capacity of each facility, individual detainee needs and the need to ensure the safety and security of detainees, staff, and visitors.

**Is the Minister currently considering community detention arrangements under s197AB of the Migration Act or the grant of a Bridging E visa under s195A, for anyone who is liable for re-detention?**

Prior to the *Pearson* decision, the Department had commenced a review of detention cases, in order to identify non-citizens for possible Ministerial intervention through the Minister's personal intervention powers under s195A and s197AB of the Migration Act. The Department identified cohorts of detainees that present compelling or compassionate circumstances which may justify the consideration of the use of the Minister's public interest powers. These groups include detainees identified as being likely to be subject to protracted detention due to complex barriers to their status resolution.

A small number of the individuals who were *Pearson* affected fall in scope of the identified cohorts and may be referred for Ministerial intervention consideration.

The Department notes the Ministerial intervention powers under s197AB and s195A of the Act are enlivened when a person is detained under s189 of the Migration Act. The Minister's intervention powers are non-compellable and non-delegable, and the Minister is not required to consider intervening in any case.

**For people whose revocation requests under s501CA were pending with the Department at the time of their release:**

a. **Will it be necessary to resubmit revocation requests (and thus effectively re-start the revocation process)?**

   For those who had an active request for revocation of a mandatory cancellation on 22 December 2022, that request remains valid and the Department will continue to consider their representations.

   There is no need for individuals to make any further representations or submissions. However, should individuals have new information they wish to be considered as part of this process, they are encouraged to provide it to the Department as soon as possible for consideration. Additional information can be provided to the National Character Consideration Centre via the following email: *501Revocations@homeaffairs.gov.au.*

b. **Will the revocation process be expedited, given the unique circumstances of people who have been re-detained? (We understand that several people at risk of re-detention have had their sentences reduced to less than 12 months on appeal, meaning they no longer have a 'substantial criminal record')**

   The Department is actively taking steps to prioritise this caseload, focussing on individuals who are considered a lower community protection risk.

Any new information available to the Department, including changes to an individual's criminal record, will be considered as part of the revocation process. Those who have new information are encouraged to provide it to the Department as soon as possible for consideration.

**c. Please provide details of any guidance that has been provided to the Department as to the consideration of these requests.**

There has been no change in processes for managing these requests. Delegates will continue to assess representations against Ministerial Direction 90 (or, from 3 March 2023, Ministerial Direction 99). Ministerial Directions are publicly available on the Home Affairs website, you access Ministerial Direction 90 via the following link: https://immi.homeaffairs.gov.au/support-subsite/files/ministerial-direction-no-90.pdf.

**For people who were before the Administrative Appeals Tribunal (AAT) seeking review of a non-revocation decision at the time of their release:**

**a. Will it be necessary to resubmit revocation requests (and thus effectively re-start the revocation process)?**

Individuals who, on 22 December 2022, were within time to seek merits review at the AAT, or had an active merits review process before the AAT do not need to resubmit a revocation request. The original non-revocation decision remains valid and will not be re-considered.

**b. Assuming non-revocation decision under s501CA are considered effective, will it be necessary for those people to re-submit applications for review to the AAT?**

The Aggregate Sentences Act contains provisions to restore a person's right to seek review provided they had not done so before the *Pearson* decision was made and they were still within the relevant timeframes to do so. In addition, those who had a review process dismissed as a result of the *Pearson* decision also have restored review rights.

In order for an individual to pursue merits review of the non-revocation, refusal or cancellation decision, they must apply (if they had not applied previously) or reapply (if the AAT had dismissed a review process on the basis it was unnecessary due to the *Pearson* decision) to the AAT within nine days from the day on which the Aggregated Sentences Act came into effect, that is, from 17 February 2023.

If a review had been lodged with the AAT prior to the *Pearson* decision, and no decision has been made by the AAT, that review will continue. Individuals who are in that situation should contact the AAT if they have any questions about the status of their merits review.

**For people who were party to judicial review proceedings in Court at the time of their release from immigration detention:**

**a. Will it be necessary for those people to resubmit revocation requests under s501CA (and thus effectively re-start the revocation process)?**

Those who had active judicial review proceedings before the courts at the time of the *Pearson* decision are not required to submit new revocation representations to the Department, as the original non-revocation decision and any subsequent decisions made by the AAT remain valid.

**b. Assuming that the original non-revocation and decision on review of the AAT are considered effective, will the Minister consent to reinstatement of proceedings in the Court (if the proceedings were discontinued due to their release from detention)?**

The Aggregate Sentences Act contains provisions to restore a person's right to seek judicial review of an adverse decision before the courts, if proceedings were dismissed or they had withdrawn from proceedings, as the result of the *Pearson* decision.

In order for an individual to pursue judicial review of a decision, they must apply (if they had not applied previously) or reapply (if an application was dismissed or discontinued on the basis it was unnecessary due to the *Pearson* decision) to the courts within 35 days from the day the Aggregate Sentences Act came into effect, that is, from 17 February 2023. Decisions to accept applications for judicial review outside of that timeframe are made by the court.

If an individual had an ongoing judicial review of a *Pearson* impacted matter, and that matter was not finalised, the matter will continue to be reviewed by the relevant court. Individuals who are in that situation should contact the relevant court if they have any questions about the status of that application.

**People impacted by the *Pearson* decision who then had their visa personally cancelled by the Minister under s501(3) have received letters relating to the Aggregate Sentences Act advising that their original mandatory cancellation is in effect.**

**a. Will it be necessary for this cohort to resubmit revocation requests (and thus effectively re-start the revocation process)?**

As previously noted, for those who had an active request for revocation of a mandatory cancellation impacted by the *Pearson* decision and then validated by operation of the Aggregate Sentences Act, and the Department has not yet reached a decision, the original request remains valid and the Department will continue to consider their representations. There is no need for them to make any further representations or submissions. Those who have new information are encouraged to provide it to the Department as soon as possible for consideration.

**b. Will the Minister's later decision under s501(3) become invalid, as these persons will be deemed not to have held a visa at the time that decision was made?**

The effect of the Aggregate Sentences Act is that the original decision to cancel or refuse a visa under s501 of the Migration Act, where aggregate sentencing was relied upon when applying the character test, is valid and therefore any subsequent cancellation or action prior to cancellation (such as the giving of a notice indicating visa cancellation is being considered) is taken to have not occurred.