



Director's Instruction No. 9

Criminal Justice Visas

Aim of Instruction

To set out the considerations in the DPP giving a criminal justice certificate.

To set out the procedures for obtaining a criminal justice certificate and a criminal justice visa.

This Instruction covers:

- The legislative background
- The steps for obtaining a criminal justice visa
- The matters to consider for the giving of a criminal justice certificate
- The procedure within the office for requesting a criminal justice certificate

To which matters does this instruction apply?

This instruction applies to all matters in which criminal justice certificates and criminal justice visas are sought.

BACKGROUND

Division 4 of the *Migration Act 1958* ("the Act") provides for the issue of criminal justice visas. A criminal justice visa is permission for a non-citizen to enter or remain temporarily in Australia for the purposes of the administration of criminal justice. Criminal justice visas are issued in circumstances where the non-citizen has no other right to enter and / or remain in Australia, usually where an existing visa has expired and will not be renewed.

It is a **precondition** of the grant of a criminal justice visa that the DPP has given a criminal justice certificate.

The term “administration of criminal justice” covers investigation, prosecution and punishment by way of imprisonment of a person for the commission of an offence. Criminal justice visas apply to both potential defendants and potential witnesses.

There are separate provisions in relation to offences against Commonwealth laws and offences against of State and Territory laws. (In the *Migration Act 1958* “State” includes Territory). This Instruction is confined to offences against ACT law.

This Instruction relates to the circumstances in which DPP will give a criminal justice certificate. There are two types of criminal justice certificates, entry certificates and stay certificates. This Instruction will concentrate on stay certificates as these will be the most common, however very similar considerations apply to entry certificates.

Criminal Justice Certificates

Before a criminal justice visa can be issued a State criminal justice certificate must be issued. Section 146 refers to State criminal justice entry certificates and Section 148 refers to State criminal justice stay certificates. Reference herein will be confined to State criminal justice stay certificates but similar considerations apply to both.

A criminal justice certificate is a pre cursor to the granting of a criminal justice visa.

Under section 144 the Attorney-General of the Commonwealth may appoint the DPP as an authorised officer for the purposes of Division 4. This authorises the DPP to give (and cancel) criminal justice certificates.

Under section 148 if an unlawful non-citizen is to be or is likely to be removed or deported from Australia, and the DPP considers that the non-citizen should remain in Australia temporarily for the purposes of the administration of criminal justice in relation to an offence against the law of the ACT, then the DPP may give a certificate that the stay of the non-citizen’s removal or deportation is required for the administration of criminal justice by the Australian Capital Territory.

However the DPP can only give such a certificate if the DPP “considers that satisfactory arrangements have been made to make sure that the person or organisation who wants the non-citizen for those purposes or the non-citizen or both will meet the **cost** of keeping the non-citizen in Australia.”

If a criminal justice stay certificate about a non-citizen is in force the non-citizen cannot be removed or deported.

So in summary, before a criminal justice certificate can be given:

- The non-citizen must be unlawful (ie their existing visa must have expired);
- They must be facing deportation;

- The DPP must consider that the non-citizen should remain in Australia for the purposes of the administration of criminal justice in relation to an offence against ACT law;
- The DPP must be of the opinion that satisfactory arrangements have been made to meet the cost of keeping the non-citizen in Australia.

Criminal Justice Visas

Criminal justice visas are visas permitting entry to a non-citizen or permitting a non-citizen to remain temporarily in Australia. A criterion for the grant of the criminal justice visa is that a criminal justice certificate about the non-citizen is in force.

The grant of the criminal justice visa is at the discretion of the Minister under the Migration Act. The Minister may grant criminal justice visas subject to conditions. Criminal justice **entry** visas are granted on the condition that the non-citizen must not do any work in Australia. However this does not apply to criminal justice **stay** visas.

In other words unless there is a specific condition preventing it, a person on a criminal justice stay visa can work.

It is important to note that a criminal justice visa is permission for the non-citizen to remain in Australia and entitles a non-citizen to be released from immigration detention if they are in that detention at the time of the grant of the visa.

It is also important to note that a criminal justice visa for a person does not prevent the non-citizen leaving Australia. Of course, they might be subject to bail conditions that prevent them leaving.

Cancellation of criminal justice certificates and criminal justice visas

If the presence in Australia of a non-citizen in respect of whom a criminal justice certificate has been given is no longer required then the DPP may cancel it. However before doing so the DPP is to give adequate notice to the Secretary of the Department of Immigration under section 162(2) of the Act.

Under section 164 if the criminal justice certificate is cancelled any criminal justice visa granted because of the certificate is cancelled.

THE STEPS FOR OBTAINING A CRIMINAL JUSTICE VISA

1. The first step is for DPP to consider whether to give a criminal justice certificate.

The fundamental issue is whether there are good reasons that the non citizen should remain in Australia temporarily for the purposes of the administration of criminal justice in relation

to an offence against a law of the ACT. The factors to be considered by DPP on this issue are set out below.

Before a criminal justice certificate can be given, the DPP also has to be satisfied that satisfactory arrangements have been made to meet the cost of keeping the non-citizen in Australia.

By agreement between DPP and AFP, those costs are to be met by the AFP in relation to summary matters or indictable matters up to committal, and by the DPP for matters after committal.

Before the criminal justice certificate is signed by the DPP, an undertaking as to costs needs to be given.

2. The next step is to apply to the Department of Immigration for a criminal justice visa

The following documents need to be submitted to the Department of Immigration, Criminal Visas Section:

- the criminal justice certificate;
- the undertaking as to costs;
- questionnaire.

Pro forma versions of each of these documents are attached to this Instruction.

What rate of support should be paid?

Generally, the rate will be the current rate of unemployment benefits based on advice from Centrelink and a rental subsidy again based on advice from Centrelink. It has to be borne in mind that medical and pharmaceutical expenses may also need to be met.

It is important to note that the support will only be paid up to the time the non-citizen is dealt with in court. If they receive a custodial sentence their upkeep is provided in prison. If not the certificate should be cancelled and the non-citizen deported.

MATTERS TO CONSIDER FOR THE GIVING OF A CRIMINAL JUSTICE CERTIFICATE

The issue is whether there are good reasons that the non citizen should remain in Australia temporarily for the purposes of the administration of criminal justice in relation to an offence against a law of the ACT.

Generally if a person commits an offence against a law of the ACT, they should expect to face justice in the ACT. However, different considerations do apply to non-citizens who

otherwise have no right or expectation to remain in Australia after being dealt with. The issue of the resources required in their prosecution is relevant. This is particularly so given that issues of rehabilitation are not the same, as they will not be released back into the ACT community.

The major criterion to be considered is the **seriousness of the offence**. A good measure of this is whether or not a custodial term of imprisonment is likely. If a custodial period of imprisonment is not likely, then it is less likely a criminal justice certificate will be given. If it is likely that a custodial term of imprisonment will result then it is more likely that a criminal justice certificate will be given.

However there are other factors to be taken in account. In particular, **the attitude of the victim and the attitude of the informant** should always be sought. There may be circumstances where even with an offence of comparative seriousness the interests of the victim dictate that a certificate should not be granted and the non-citizen deported.

However the interest of the victim is not the only interest to be represented - there is a public interest in a person who has committed an offence in the Territory facing justice in the Territory. It also has to be borne in mind that if a person is deported without the finalisation of charges, they may be able to obtain re-entry in Australia at a later time without the matter appearing on their criminal record.

Other matters to take into account include **the length of time that the person will require support, the level of support that will be required, and any matters personal to the non-citizen**.

What if a person facing charges is deported before the charges are finalised?

If a non-citizen is deported while facing charges because a certificate is not given, in all cases a **warrant** should be sought from the Court for the arrest of the person against the possibility that they will return to Australia. It has to be noted however that this is not necessarily a satisfactory solution. It may be that if the person re-enters Australia after some time, it will not be practically possible to continue with the prosecution.

Level at which decision taken

The Director is the only person authorised to give a criminal justice certificate.

PROCEDURE WITHIN THE OFFICE FOR REQUESTING CRIMINAL JUSTICE CERTIFICATE

If it is desired to request the giving of a criminal justice certificate, a submission should be made to the Director addressing:

- the seriousness of the case and whether a custodial sentence is likely;
- the attitude of the victim if relevant;
- the attitude of the informant;

- the length of time that the person will require support, the level of support that will be required;
- the expected costs;
- if it is a matter where the AFP gives the undertaking as to the costs of keeping the non-citizen, confirming that the undertaking has been given.

Drafts of the certificate, costs undertaking and questionnaire should be included.

Annexures:

1. Criminal justice certificate
2. Costs undertaking
3. Questionnaire

ANNEXURES

CERTIFICATE UNDER SECTION 148 MIGRATION ACT 1958

(STATE CRIMINAL JUSTICE STAY CERTIFICATE)

WHEREAS *(name)*, a citizen of *(country)* born on *(date)* is an unlawful non-citizen for the purposes of the Migration Act 1958 (the Act);

AND WHEREAS *(name)* is to be, or is likely to be removed or deported from Australia;

AND WHEREAS, I, Shane Drumgold, Director of Public Prosecutions for the Australian Capital Territory being a person authorised in writing by the Attorney-General of Australia for the purposes of Division 4 of the Act consider that *(name)* should remain in Australia temporarily for the purposes of the administration of criminal justice in relation to an offence against a law of the Australian Capital Territory; and

AND WHEREAS I consider that satisfactory arrangements have been made to ensure that the costs of keeping *(name)* in Australia will be met by the Australian Federal Police / Office of the Director of Public Prosecutions of the Australian Capital Territory *(delete one or other)*;

NOW THEREFORE I, Shane Drumgold, Director of Public Prosecutions for the Australian Capital Territory hereby certify that the stay of the removal or deportation of *(name)* from Australia is required for the administration of criminal justice by the Australian Capital Territory.

Signed this day of 2019

.....
Shane Drumgold
Director of Public Prosecutions for the Australian Capital Territory
(Signature, name and rank)

COSTS UNDERTAKING

FOR STATE CRIMINAL JUSTICE STAY CERTIFICATE

Pursuant to s148 of the Migration Act 1958

The Australian Federal Police / Office of the Director of Public Prosecutions of the Australian Capital Territory (*delete one or other*) undertakes to meet the cost of keeping (*Name of non-citizen*) in Australia, at any time when a Criminal Justice Stay Certificate is in force and he/she does not have means of support.

(*Signature of Requesting Officer*)

(*Date*)

(*Position of Requesting Officer*)

Contact officer:

Agency:

Australian Capital Territory

REQUEST FOR CRIMINAL JUSTICE CERTIFICATE

Criminal Justice Certificates and visas are administered by Part Two, Division Four of the Migration Act 1958 (the Act). The issue of a Criminal Justice Certificate is a prerequisite for any consideration to grant a Criminal Justice visa.

Under s150 of the Act, the issue of a Criminal Justice Stay Certificate about an unlawful non-citizen stays the removal or deportation of that person until the certificate is cancelled. The Minister for Immigration and Citizenship has a discretionary power to consider grant of a Criminal Justice visa under s 158 of the Act.

To facilitate consideration to issue a Criminal Justice Certificate and the grant of a Criminal Justice visa, the agency or party that seeks a Criminal Justice Certificate about a non-citizen is requested to complete the following questionnaire. This information will be used to assess the appropriateness of issuing a Criminal Justice Certificate and granting a Criminal Justice visa.

FAMILY NAME: **GIVEN NAMES:**

ALIAS:

DATE OF BIRTH: **COUNTRY OF BIRTH:**

CITIZENSHIP: **TYPE OF TRAVEL DOCUMENT:**

PASSPORT OR TRAVEL DOCUMENT NUMBER:

DATE OF EXPIRY: **ISSUING COUNTRY:**

ISSUED AT: **REQUESTING AGENCY:**

WHO HAS/WILL HAVE POSSESSION OF THE PASSPORT OR TRAVEL DOCUMENT:
.....

CONTACT OFFICER IN REQUESTING AGENCY:

CONTACT OFFICER'S PHONE NUMBER AND EMAIL:

CRIMINAL JUSTICE CERTIFICATE ISSUING AGENCY:

TYPE OF CRIMINAL JUSTICE CERTIFICATE SOUGHT (please indicate):

- COMMONWEALTH STAY**
- COMMONWEALTH ENTRY**
- STATE STAY**
- STATE ENTRY**

1 Why is the above named (a/n) required in Australia?

2 Where known, please provide details of hearing dates and court detail(s).

3 If known, what is the likely duration of the a/n's stay in Australia?

4 Does the a/n have any known relevant criminal history or behaviour? If yes, please give details.

5 To best of the requesting agency's knowledge, has the a/n ever evaded criminal justice processes or do you have any information that indicates that the a/n is likely to evade authorities? If yes, please give details.

6 Does the a/n have any known relevant medical history? If yes, please give details.

7 Do you consider that the presence of the a/n in Australia represents a danger to individuals and people in general? If yes, why?

8 If the a/n is a defendant, will he/she be kept in police custody or remand until hearing / sentencing? If yes, where?

If no, has remand been sought and at what address can the a/n currently be located?

9 Is the a/n in the community subject to bail conditions? If so, what are the conditions and is the a/n complying with these conditions?

If no, has bail been applied for and will an application for bail be opposed and on what basis?

10 Has the agency undertaken to meet the cost of keeping the a/n in Australia and signed a Cost undertaking to facilitate issue of a Criminal Justice Certificate?

If yes, is a completed Cost Undertaking attached to this Questionnaire?

11 Do you have any information that indicates that the a/n will not cooperate with their departure, removal or deportation from Australia at the end of the administration of criminal justice?

12 What is the expected location of the a/n at the conclusion of the criminal justice process?

13 Is the a/n responsible for any dependants who are in Australia or who will be required to accompany and remain with the a/n in Australia?

If yes, please advise names and date of birth for each dependant.

Name: _____

DOB: _____

Nationality: _____

Passport details: _____

Name: _____

DOB: _____

Nationality: _____

Passport details: _____

Name: _____

DOB: _____

Nationality: _____

Passport details: _____

Name: _____

DOB: _____

Nationality: _____

Passport details: _____

14 Are Criminal Justice Certificates being requested in relation to any of the dependents listed above?

Please note that a separate questionnaire for the dependents will need to be completed.

If no, please provide full details of the location and any care arrangements for the dependants.

FOR CRIMINAL JUSTICE STAY CERTIFICATES, PLEASE PROCEED TO QUESTION 22

15 If the a/n is a defendant, is an extradition order in place about the a/n? If yes, please give full details.

16 What is the a/n's travel itinerary to and from Australia?

17 Will the a/n be escorted to Australia? If yes, by who and when?

18 If the a/n will be escorted, when will the escorting authorities depart Australia?

19 Who will meet the a/n upon arrival?

20 If the a/n is a defendant, will the a/n be remanded in custody immediately upon arrival? If no, why not and where will the a/n reside?

21 What arrangements are in place to ensure that a/n will be available for removal from Australia once the Entry Certificate has been cancelled?

22 Does the agency that requests this Criminal Justice Certificate agree to advise the a/n if he/she is granted a Criminal Justice Visa and explain the conditions associated with that visa?

23 Does the agency that requests this Criminal Justice Certificate agree to advise the issuing authority and the Department of Immigration and Citizenship of any changes to the a/n's details, including location and contact details, itinerary, family composition and key dates to the criminal justice process?

24 Does the agency that requests this Criminal Justice Certificate agree to advise the issuing authority and the Department of Immigration and Citizenship 14 days prior to:

- when the Criminal Justice Certificate is scheduled to be cancelled;
- the expected whereabouts of the non-citizen upon cancellation; and
- if applicable, when the client is scheduled to travel offshore and arrangements for the non-citizen's departure from Australia?

Any updated information should be emailed to criminal.justice.visas@immi.gov.au

Updated: March 2019

DECLARATION BY REQUESTING PARTY

.....
(Name of authorised officer – please print clearly)

.....
(Requesting party)

.....
.....
.....
(Address of requesting agency)

.....
(Telephone number of authorised officer)

.....
(Signature of authorised officer)

.....
(Date)

WHO SHOULD RECEIVE THIS QUESTIONNAIRE?

This Questionnaire and a completed Cost Undertaking should be forwarded to the agency with appropriate authority to issue the Criminal Justice Certificate.

Under sections 145 and 147 of the *Migration Act 1958*, the Commonwealth Attorney-General may issue a Criminal Justice Entry Certificate or a Criminal Justice Stay Certificate. This power has been delegated to certain officers in the Attorney-General's Department. For the issue of a Criminal Justice Certificate under sections 145 or 147, this Questionnaire and Cost Undertaking should be sent to the appropriate contact for Criminal Justice Certificates at the Commonwealth Attorney-General's Department.

Under sections 146 and 148 of the *Migration Act 1958*, an authorised official for a State may issue a Criminal Justice Entry Certificate or a Criminal Justice Stay Certificate. Under section 144 of the Act, an authorised official is an officer appointed by the Commonwealth Attorney-General and is the Attorney-General of the State, a person holding an office under a law of the State that is like the office of the Director of Public Prosecutions or the highest ranking member of the police force of the State. For the issue of a Criminal Justice Certificate under sections 146 or 148, this Questionnaire and Cost Undertaking should be sent to the appropriate contact for Criminal Justice Certificates at the office of the relevant appointed official. State Criminal Justice Entry Certificates must also be endorsed by the Attorney-General's Department.

Criminal Justice Certificates, Questionnaires and Cost Undertakings must be forwarded immediately to the Character Operations Section at National Office of the Department of Immigration and Citizenship via email to criminal.justice.visas@immi.gov.au or by fax to (02) 6198 7591. The agency that sought the issue of the Criminal Justice Certificate will be advised of any decision regarding the grant or refusal of a Criminal Justice visa.