NSWCCL
New South Wales Council for Civil Liberties

NSW Council for Civil Liberties Inc.

Postal address: PO BOX A1386 SYDNEY SOUTH NSW 1235
Office address: suite 203, 105 Pitt Street SYDNEY NSW 2000
Phone: 02 8090 2952 Fax: 02 8580 4633
Email: office@nswccl.org.au Website: www.nswccl.org.au

Submission to the Legal and Constitutional Affairs Committee of the Australian Senate concerning the Migration Amendment (Character and Visa Cancellation Bill) 2014 (the bill).

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

CCL thanks the Senate Committee for its invitation to make a submission on this bill.

Principal points

The procedure for applying the character test should be taken out of the hands of the minster and his or her delegates and given instead to a new, genuinely independent body. There should be an appeal on the merits on leave to the Federal Magistrate's Court.

The various proposals to allow the minister to override the Administrative Appeals Tribunal (AAT) should be rejected.

The proposals to prevent an appeal to the AAT and other tribunals concerning decisions of the minister should be rejected, and replaced by entitlements to appeal.

Where convictions by foreign courts bear on the character test, provisions should ensure that only convictions for actions that would be criminal and subject to similar penalties in Australia may count. Furthermore, only convictions where the court procedures and standards of proof adopted are up to Australian standards should be accepted.

The whole bill is so full of faults and poor proposals it should be rejected.

Summary of recommendations.

<u>Matters relevant to both Schedules</u>

Recommendation 1. The character test material of the Migration Act should be amended to apply only to convictions for crimes which are recognised as serious crimes (carrying a five-year penalty) in Australia. The decision should be taken by a new, genuinely independent tribunal, whose members would have fixed terms. There should be an appeal available on leave to the Federal Magistrate's Court. If the Court gives leave to appeal, that appeal would be on the merits of the case, rather than a judicial

review.[1] The non-citizen, if already in Australia, should be able to be present at the hearings, and in any case should be represented by legal counsel of his or her choice. The rules of natural justice should apply, and the onus of proof lie with the state. The options of denying visas on this ground should not apply to person who have lived in Australia for more than ten years, nor to persons who have lived in Australia for two years without committing a crime, nor to persons who will be subjected to human rights abuses if deported.

Recommendation 2. The Committee should find that proposed subsection 501BA(2), proposed in Item 17 in Schedule 1, is contrary to the rule of law, and utterly intolerable in a democratic society.
Items 23 and 24, which are dependent on item 17, should also be rejected.

Recommendation 3. Item 12 of Schedule 2 and Items 1, 2, 10, 14, 16, 17 and 18 which depend on it should also be rejected, as utterly intolerable in a democratic society.

Recommendation 4. If any of the powers are granted to the minister to override decisions of the AAT, there should be provided an appeal on the merits of the case and by leave to the Federal Magistrates Court. Where the act provides for a former visa holder to provide reasons why the minister should revoke his or her decision, the appeal should lie after his or her refusal. There should be no pretence that the minister can override a decision of a court.

Recommendation 5. If section 133A is inserted into the Act, subsection 133B(3) should not be.

Recommendation 6. If sections 133C and 133F are inserted into the Act, there should be an appeal from the minister's decision not to revoke a cancellation on the merits and by leave to the Federal Court. Section 133D should not be included, as it is arbitrary and unreasonable.

<u>Schedule 1.</u>

Recommendation 7. Item 3, limiting access to the AAT, should be rejected.

Recommendation 8. Item 8, proposing to mandate the minster's cancellation of a visa, should be rejected.

Recommendation 9. All decisions by the minister concerning the character test should be subject to appeal on the merits of the cases. In particular, Schedule 1 Item 18 should be amended to ensure that a refusal by the minister to revoke a decision, mandatory or otherwise, can be appealed, by leave, to the Federal Magistrate's Court. If that process is rejected, then Item 18 should be amended to permit an appeal on the merits to the AAT instead.

---

[1] See Julian Burnside, Watching Brief: Reflections on Human rights, Law and Justice, scribe Publications, Carlton North, Victoria 2001 pp. 121-123 for further argument.

Recommendation 10. If it is intended that the convictions referred to in subs. 501(7) and the proposed 501(6)(e) include decision of foreign courts, then there should be introduced a restriction that the actions that led to the sentence would constitute a crime if committed in Australia, and that the offence is one that would carry a like penalty in an Australian court.

Recommendation 11. If instead the process proposed by items 3,4,7,8,12,17 and 18 is to be instituted, item 18 should be amended to permit an application by leave to the Federal Magistrate's Court, or failing that, to the AAT, against the minister's refusal to revoke the cancellation of a visa.

Recommendation 12. The restrictions on appeal in Item 5 should not be proceeded with.

Recommendation 13. Item 6 should be supported, provided the previous changes to the bill have been made.

Recommendation 14. Item 9 should be rejected.

Recommendation 15. Proposed new subparagraph 501(6)(b), contained in Item 10, should be rejected. Instead, Ministerial Direction 55 should be incorporated into the Act.

Recommendation. 16. Proposed subparagraph 501(6)(ba) should be modified to remove the words 'the minister reasonably suspects', and to remove the reference to people smuggling, substituting, if it is thought appropriate, a reference to endangering the lives of asylum seekers by the provision of unsafe ships.

Recommendation 17: Item 11 should be omitted from the Bill.

Recommendation 18. Proposed paragraph 501(6)(f) should be amended to read 'the person has committed one or more…'

Recommendation 19. Either proper procedures should be put in place to contest adverse assessment by ASIO, or proposed paragraph 501(6)(g) should be removed from the bill.

Schedule 2

Recommendation 20. that item 4 should be rejected, as a recipe for the arbitrary rejection of visa applicants.

Recommendation 21. That item 5 be rejected in respect of proposed subsection 116(1AA) as being redundant in part, and unreasonable in the expectations it relies upon. In consequence, item 9 should also be rejected.

Recommendation 22. That Item 7 should be rejected, as device for avoiding responsibility and blame.

Recommendation 23. Item 17 should be rejected, since it supposes an officer could reasonably predict that the minster may decide to override a finding by the AAT.

Recommendation 24. Items 18, 19, 20 and 21 should be rejected.

A. The time for writing a submission.

It has become common for legal and civil liberties organisations to object to the short time spans allotted for responding to extremely serious and far-reaching legislative proposals. We recognise that similar comments are made by senators and members of parliament. Far from improving, however, the practice is getting worse.

It is time to speak forthrightly about this.

It is not merely the supposition that the legislation will not benefit from the considered input of Australia's most prestigious organisations that is at fault. That is merely insulting. Nor is it the extraordinary belief that supposes that policies that have been looked at by Cabinet and some public servants cannot be mistaken in important but not immediately obvious ways. That is ignorant of history.[2]

What is most concerning about the process that is being adopted is that it does not reflect the democratic values that we require of new citizens. For the fundamentals of democracy lie in the entitlement of people to a real say in decisions that affect them and the values by which they will live. A real say requires access to the information and arguments--real arguments--supporting a proposal, and time for serious consideration and debate.

In addition, there are two vital reasons for preferring a democracy to other forms of government. One is that a decision, or a government, can be changed without bloodshed. The other is that the collective knowledge of the people is greater than that of any smaller group of people; thus policies will be better selected and shaped if it is open to everyone to contribute. The second of these is not given its due by the process that has been adopted.

To reject these, as these hasty processes do, is to reject the fundamental values of Australian society; it is to reject the values that ought to be fundamental to any society.

[2] It also ignores the complexity of the Migration Act and of the provisions in the bill. For example, a check on the innocuous looking Item 2 of schedule one requires examining nine sections of the Act, three of the ASIO Act, five provisions of the criminal code and three articles of the Refugees Convention.

B. Sections 501-503 of the Migration Act (the Act).

These 14 sections give the Minister or his or her delegates the power to reject or revoke visas on character grounds. The section is defective in multiple respects.

1. Procedural faults.
Under subsection 501(3), there is no access to an independent tribunal for review on the merits of the Minister's decision. The rules of natural justice do not apply; so the person whose visa is cancelled (the non-citizen) need not be given an opportunity to demonstrate that the Minister is misinformed or mistaken. The Minister may make a factually perverse decision, and there may be no way of combating it. Unless the Minister delegates the powers given in subsections (1) and (2), there is no appeal on the merits of the case under those subsections either.

These are recipes for mistaken and inferior decisions.

Under section 503, the consequences which follow the decision of the Minister that a person fails the character test are that eh person is not entitled to enter Australia, or to remain here. It may be that the non-citizen is detained and then deported, or if that is not possible (where a person is at risk of death if sent to the country of his or her citizenship, or where the person is stateless), may be kept in detention for long periods, or even for life. It is entirely unacceptable, and contrary to the rule of law, that a person may be detained for long periods, without trial, without a hearing, and without the opportunity for a review on the merits of the case other than by the Minister.

Section 503A compounds the problem. By protecting information supplied by law enforcement agencies and intelligence agencies, it makes it likely that the bad reasons for bad decisions will not be made public. A culture of denial will remain unchallenged. It makes it possible, and it becomes increasingly likely, that innocent persons will be scapegoated to protect reputations and careers.

2. The onus of proof.
Under subsections (1) and (2), it is left to the non-citizen to satisfy the Minister that he or she passes the character test. This reversal of proof is not reasonable. How are persons to prove that they have no criminal record in their countries of origin; that their past conduct does not show that their character is suspect; that they have had no association with criminal groups; and that there is no significant risk that they will incite discord or threaten other people's property? In particular, how is a refugee to demonstrate these things in the face of hatred and lies from the authorities in their own countries?

3. Faults in the definition of 'substantial criminal record'.
As it stands, subsection (7) defines 'substantial criminal record' on the basis of the penalty imposed. There is no requirement that the offence for which the person has been convicted is a recognised crime in Australia, one which carries a similar penalty in Australian courts.[3]

[3] For further material on this see the argument concerning Item 12 below.

4. Faults in the character test (subsection 6).
Paragraph (6)(b) allows a visa to be cancelled because of an association with a person or an organisation that the Minister suspects has been involved in criminal conduct. There is no restriction on the degree of criminality, nor on whether the criminal conduct would be criminal conduct under Australian law.[4]

Subparagraph (6)(c)(i) is vague as to what criminal conduct is sufficient to show that the non-citizen is not of good character, while (6)(c)(ii) uses the even vaguer expression 'the person's past and present general conduct'. Legislation that carries such grave consequences should be clear and explicit; decisions should be made on objective criteria.

Subparagraph (6)(d)(ii) combined with subsection (11) implies that a person fails the character test for merely threatening damage to someone's property.

5. General considerations.
The temptation of the Minister or his or her advisors to use the character test for purposes other than keeping notorious criminals out of Australia has been made plain by the Haneef case. But this is not an isolated instance. Its misuse can also be seen in the cases of Stefan Nystrom and Robert Jovcic.[5]

The CCL has in the past recommended substantial changes to these sections of the Migration Act. They are the changes that still should be made.

Recommendation 1. The character test material of the Migration Act should be amended to apply only to convictions for crimes which are recognised as serious crimes (carrying a five-year penalty) in Australia. The decision should be taken by a new, genuinely independent tribunal, whose members would have fixed terms. There should be an appeal available on leave to the Federal Magistrate's Court. If the Court gives leave to appeal, that appeal would be on the merits of the case, rather than a judicial review.[6] The non-citizen, if already in Australia, should be able to be present at the hearings, and in any case should be represented by legal counsel of his or her choice. The rules of natural justice should apply, and the onus of proof lie with the state. The options of denying visas on this ground should not apply to person who have lived in Australia for more than ten years, nor to persons who have lived in Australia for two years without committing a crime, nor to persons who will be subjected to human rights abuses if deported.

---

[4] Minsterial Direction 55 does place some restrictions on this.

[5] Both of these were long-term residents of Australia, who, having committed crimes here, were deported to their countries of citizenship. Robert Jovecic was deported to Syria, whose languages he could not speak, and became destitute. Stefan Nystrom, who had lived in Australia since he was 27 days old, was departed to Sweden.

[6] See Julian Burnside, Watching Brief: Reflections on Human rights, Law and Justice, scribe Publications, Carlton North, Victoria 2001 pp. 121-123 for further argument.

I. Problems with processes.

As argued above, the CCL's preferred position is to take the character test out of the hands of the minister and his or her delegates entirely. If it is decided instead that the minister should retain powers to apply the character test, the following processes are acceptable:
A minister makes an adverse decision about a person's character. The reasons for the decision are presented in full to the applicant or holder. The holder can appeal on the merits to the Administrative Appeals Tribunal. There is a further appeal on matters of law to the courts.
A Minster makes a decision. The reasons for the decision are presented in full to the applicant or holder. The applicant seeks a reversal of the minister's decision. If the minister rejects the request, there is an appeal to the AAT on the merits of the case. Further appeals may be made to the courts on matters or law.

The following are unacceptable, as contrary to the rule of law and against all reason:
Any irreversible decision by a minister.
Any situation where a minister purports to override a decision by the AAT or a court.

Process proposals in the Bill.

Proposals to allow the minster to override the findings of tribunals.

Schedule 1 Item 17. Proposed subs. 501BA(2

It is proposed here that the minister might make a decision under proposed subs. 501(3A), the decision is revoked on appeal to the AAT under new section 501CA, and then the minister can reverse the AAT's decision. This is truly extraordinary, a grab for power that would place the minister beyond the reach of the law on the merits of a matter.

The minister's reversal is not open to merits review by the Refugee Review Tribunal or the Migration Review Tribunal. The only reason given is that ' the government is ultimately responsible for ensuring that decisions reflect community standards and expectations'. This is nonsense. Essentially it says the minister should have this power because ministers should have this power.

But no reason is given for the introduction of the extraordinary power to be given to the minister.

Is it so long since the Haneef affair that its lessons have been forgotten? Here is a summary. The Minister for Immigration was wrong. Those officers of the Australian Federal Police who advised him were wrong. Members of the Department of Immigration were either wrong, or acceded to his or her demands without managing to show him he was wrong. None of them apparently knew what every regular supermarket shopper knew, that SIM cards were widely and cheaply available. And when these things were finally pointed out to the Minister and when a court granted Dr. Haneef bail,

the Minister used the character test in s.501 to wreck his or her reputation and have him deported. That is, the Minster refused to admit, or could not be persuaded, that he was wrong.[7]

It is true that the power is restricted to decisions that the person fails the character test because the person has a substantial criminal record (subs. 501(6)(a)) or has been convicted of a child ex offence (the proposed 501(6)(e)). But as argued below, those provisions are seriously flawed. (Since the death penalty does not exist in Australia, the reference to sentences must include sentences passed by foreign courts. There are a number of countries where death penalties can be given to the victim of a rape, or for homosexual activity, or other crimes not recognised at all in Australia. There are many countries where long sentences are passed for what would count as very minor offences in Australia.)

One might trust the minister only to override the AAT on fresh evidence and in the most serious of cases. But the law cannot rely on such trust--it is too often abused. **But even if we could trust a minister, the power to override a legal tribunal is not one that should be given to any minister. Ever.**

Recommendation 2. The Committee should find that proposed subsection 501BA(2), proposed in Item 17 in Schedule 1, is contrary to the rule of law, and utterly intolerable in a democratic society.

Items 23 and 24, which are dependent on item 17, should also be rejected.

Schedule 2, Item 12

In schedule 2, item 12, similar proposals are made to allow the minister to override a tribunal. This item proposes again that the minister have power to override decisions by a legal tribunal, in this case the AAT, the Migration Review Tribunal (MRT) or the Refugee Review Tribunal. (RRT). As before, this proposal is outrageous. As before, it should be rejected out of hand.

A liberal democratic society requires at least the following:
Executive decisions are subject to the law. (The rule of law—or part of it).
The powers of the executive, the parliament and the judiciary are separate.
In the long run, and subject to qualifications, it is the parliament that is supreme, via its power to make laws.
There is no detention without trial.
The parliament is elected by the people.

These principles were hard won. The attempt by the Stuart monarchs to make laws by fiat and to override court decisions was the prime cause of the English Civil Wars. The principle has been scrupulously observed ever since, in common law countries.

[7] And section 101.4 the Criminal Code was wrong and still is wrong, with its reference to "a thing" xxx.

This time, an attempt is made to provide reasons that are not empty. In paragraph 42 it is asserted that the community holds the minster responsible for decisions within his portfolio, even where those decisions result from a merits review. It is supposed to follow that the minister should be able to override the decisions of a legal tribunal.

The CCL is not aware of any surveys that have been conducted demonstrating that a majority of people, let alone "the community", holds this view. There has at any rate not been the kind of extensive public debate, with the arguments presented fairly across the media, that would be needed to inform such a view.

It is asserted in paragraph 49 that the reason for the approach taken is that in some circumstances there may be a need to act urgently to cancel a visa. No examples are given. It cannot be the need to prevent a major crime—a terrorist offence or some other murder. There are already laws that permit a person to be detained and charged, if necessary with auxiliary offences. What else could be of such urgency and importance that it justifies overriding the AAT?

Recommendation 3. Item 12 of Schedule 2 and Items 1, 2, 10, 14, 16, 17 and 18 which depend on it should also be rejected, as utterly intolerable in a democratic society.

Further notes on 1tem 12 of Schedule 2.

Section 133A

The Explanatory Memorandum for proposed subsection 133A(2) is misleading. The procedures in Subdivision C of Division E of Part 2 of the Act provide arrangements for a persons whose visa is at risk of being cancelled because the holder supplied false or misleading information in their applications to be able to explain the problem and correct the information, and generally to demonstrate that they should be granted the visa. The proposed subsection removes that procedure, which is intended to provide natural justice, and leaves only the line in proposed subsection 133A(1) that makes it a condition that the minister does not act if the visa holder satisfies the minister that the ground for cancelling the visa does not exist—i.e. that what was written was true. This is not natural justice.

Even worse, subsection (3) would permit the minister to cancel a visa without warning. As noted at the start, subsections (5) and (6) again would enable the minister to override the decision of the AAT. To complete the monstrous proposal, proposed subsection (4) provides that the rules of natural justice do not apply.

It is true that proposed section 133F allows the former visa holder to attempt to show that 'the ground [for cancellation] does not exist'. If this whole process goes ahead—if Item 12 is adopted—it is vital that a refusal by the minister to revoke his decision can be appealed, on the merits and by leave, to the Federal Court; and that the minister have no power to override decisions of that court. Decisions by the AAT will not be enough, since the minster could override them again.

Recommendation 4. If any of the powers are granted to the minister to override decisions of the AAT, there should be provided an appeal on the merits of the case and by leave to the Federal Court. Where the act provides for a former visa holder to provide reasons why the minister should revoke his or her decision, the appeal should lie after his or her refusal. There should be no pretence that the minister can override a decision of a court.

Proposed subsection 133B(3) compounds the iniquity of proposed section 133A by allowing the minster to cancel a visa because of *inadvertent* non-compliance, even when the visa holder, having become aware of the non-compliance, alerts the minster to the fact. And this, let it be remembered, is of cases where a tribunal has held that the ground is not a reason for cancelling a visa. There is good reason not to mirror sections 110 and 111 of the Act.

Recommendation 5. If section 133A is inserted into the Act, subsection 133B(3) should not be.

Section 133C

This is yet another proposal to permit the minister to override a decision of the AAT. It should be rejected for the same reasons as before. There is not a shred of legitimate argument for granting this power. As before, the needs to be an appeal the minister cannot overturn, to prevent arbitrary and vindictive action by the minister. Natural justice is *excluded* by subsection 133C(2), but at least under subsection 133C(1) the visa holder is permitted to attempt to satisfy the minister. No such permission is given under subsection 133(3). However, there is the opportunity to seek a revocation of the minister's decision under proposed section 133F. There should be an appeal on the merits from a refusal of the minister to revoke his or her decision.

Proposed section 133D is arbitrary and unreasonable. It is one thing to set a time limit, and to decree that if it is not met, the minister need not consider representations by the former visa holder. It is quite another to prevent him or her from so considering. It is not hard to imagine legitimate reasons why representations might be late—illness for instance.

Recommendation 6. If sections 133C and 133F are inserted into the Act, there should be an appeal from the minister's decision not to revoke a cancellation on the merits and by leave to the Federal Court. Section 133D should not be included, as it is arbitrary and unreasonable.

Further matters from Schedule 1

Schedule 1, Item 3 and Item 7 with Items 8 and 12.

Contrary to the impression given by the explanatory memorandum, Item 3 does not provide a new appeal to the AAT, but instead limits an existing one. It is wrong to do so.

At present under section 501 of the Act, a delegate of the minister may decide to reject an application for a visa, or cancel an existing visa, if it is judged that the applicant or holder fails the character test. Section 500 provides an appeal to the AAT against such a decision.

Item 3 and item 7 together introduce an exception to that appeal right, limiting it by reference to a new subsection, 501(3A) (inserted by item 8), which in turn *requires* the minister to cancel a visa once he decides that the person has failed the character test on certain grounds.

The minister may know perfectly well that there are good reasons for disregarding a sentence by an overseas court (a death sentence to a victim of rape for instance), but must cancel the visa nevertheless.

The existing grounds, now to be newly excluded from AAT review, are:
The person has been sentenced to death or
The person has been sentenced to life imprisonment or
The person has been sentenced to terms of imprisonment of 12 months or more.

A new ground is inserted by item 12. This proposed paragraph 5011(6)(e). If a court in Australia *or a foreign country* has convicted the person of one or more sexually based offences involving a child,

> or found the person guilty of such an offence,
> or found the charge proved even though the person was discharged without conviction.

In addition, the person must be in an Australian prison.

There are serious problems with the reference to foreign courts.

First, it is not clear whether the existing grounds for the character test refer to Australian courts or they include foreign ones. The fact that the death penalty has been repealed in Australia would suggest the reference *must* include foreign courts. On the other hand, the new contrast with the wording of new paragraph 501(6)(e) would suggest the reverse.

Second, there is the issue of laws in other countries that are contrary to human rights. Foreign laws for instance can see a rape victim convicted of extramarital intercourse and sentenced to death. A 15 year-old so convicted in absentia in relation to rape by a group of teenagers could be caught twice by the new proposals.

Then there are old offences, committed perhaps in a person's youth, such as the well-known cases of a couple of 15 year olds having had intercourse many years ago.

The new ground should at least be restricted to matters that would be an offence in Australia and would carry a sentence here of five years or more—and that would not be subject to Australia's spent conviction provisions.

Then there is the issue of the standards of proof in some foreign countries. Any regular writer of Amnesty International urgent action letters is familiar with cases where people have been found guilty on the basis of evidence obtained by torture, or where they have been found guilty apparently ins spite of clear evidence to the contrary. Even the United States is not free from this problem. There have been more than 100 cases in the United States where

a verdict of murder has been followed by the sentence of execution, yet the convicted person was subsequently proven to be innocent (sometimes after their deaths).

In no case where the character test involves reference to foreign convictions should the visa holder or applicant be deprived of the right of appeal on the merits of the case to the AAT.

There are difficulties too with sentences in Australia. Some states and territories have from time to time instituted mandatory penalties, with the 'three strikes and you are out' kind being the most egregious.

Under such laws, visa holder might be convicted of three trivial crimes, and sentenced to a year in prison. Such crimes might include shoplifting, or graffiti—indeed in New South Wales, such crimes can be punished by three-year jail sentences.

New South Wales also has mandatory sentences for 'one punch killings". As was argued during the debate on that law, a person in a bar might shirtfront another, committing thus a minor assault, and the victim, stepping back, could fall over an obstacle and hit his head on the bar—and die. A sentence of eight years then follows automatically.

Finally, there is the culture of '"being tough on crime"—the retreat of weak politicians in the face of pressure from bigoted media commentators. If this continues, there will be more and more offences which do not show the kinds of bad character envisaged by the Explanatory Memorandum which nevertheless carry large penalties.

This group of items shows clearly why a provision which compels the minister to cancel a visa is foolish. Like mandatory penalties for crimes, it will always lead to injustice.

And it shows that there must always be an appeal available on the merits of the case.

Item 4 with Item 18.

Item 18 is thus vital. It requires the minister to give his or her reasons for cancelling the visa under subsection 501(3A) to the former visa holder. He must invite the person to make representations to him seeking revocation of the decision, either showing that the person after all satisfies the character test, or that there is another reason for the minster's "decision"—remember it is mandatory—to be revoked. It will, however, prove difficult in some of the above examples for the person to prove his or her case.

The Explanatory Memorandum at item 18 avers that the decision not to revoke the visa cancellation can appealed on the merits of the case to the AAT, on the basis of Item 4. However, Item 4 permits decisions by a delegate, *but not decisions by the minister*, to be appealed. In view of the complexities noted above, is vital that decision by the minster not to revoke the visa cancellation can also be appealed.

Recommendation 7. Schedule 1 Item 3, limiting access to the AAT, should be rejected.

Recommendation 8. Schedule 1 Item 8, proposing to mandate the minster's cancellation of a visa, should be rejected.

Recommendation 9. All decisions by the minister concerning the character test should be subject to appeal on the merits of the cases. In particular, Schedule 1 Item 18 should be amended to ensure that a refusal by the minister to revoke a decision, mandatory or otherwise, can be appealed, by leave, to the Federal Court. If that process is rejected, then Item 18 should be amended to permit an appeal on the merits to the AAT instead.

Recommendation 10. If it is intended that the convictions referred to in subs. 501(7) and the proposed 501(6)(e) include decision of foreign courts, then there should be introduced a restriction that the actions that led to the sentence would constitute a crime if committed in Australia, and that the offence is one that would carry a like penalty in an Australian court.

Recommendation 11. If instead the process proposed by items 3,4,7,8,12,17 and 18 of Schedule 1 is to be instituted, item 18 should be amended to permit an application by leave to the Federal Magistrate's Court, or failing that, to the AAT, against the minister's refusal to revoke the cancellation of a visa.

Schedule 1 Item 5.
For reasons already given, this restriction on the availability of an appeal to the AAT should not be enacted. Minsters are not infallible. That applies also to the decision of a minister to declare a person excluded, under s.502.

Recommendation 12. The restrictions on appeal in Schedule 1 Item 5 should not be proceeded with.

Schedule 1 Item 6.
If the changes recommended so far are made to the bill, Item 6 enable an appeal to the AAT against a decision to declare the person excluded. It should therefore be supported.

Recommendation 13. Item 6 should be supported, provided the previous changes to the bill have been made.

Schedule 1 Item 9. If Item 8 is rejected, Item 9 is unnecessary. If Item 8 and its associated changes are retained, this item would delay the provision of natural justice to a person in prison (possibly on remand). There is no reason for this, other than to authorise the vindictiveness and mistakes made in cases like that of Dr. Haneef.

Recommendation 14. Item 9 should be rejected.

II. Changes to the character test.

October marks the thirteenth anniversary of the deaths of two refugees, who were sent to their fates when their stories were not believed. At least one of them was killed by the people he said would do so, the other probably was. This marked the beginning of a campaign of

demonisation of asylum seekers, and an obsession with weeding out the cheats. The idea was pressed that if three is any doubt at all, asylum seekers should be sent back. The result has been that some dozens have died. We know by now that if we try to catch every possible cheat in our nets, we will refoul many genuine cases.

Now, in an effort to further avoid our obligations, it is proposed that people will be denied protection on the basis of a revised character test.

We should know by now that if we make the character test too strong, we will send people back to their deaths or keep them indefinitely detained--people who would fit into our society as well as a great many people who live in it peaceably enough in spite of their strong views.

Schedule 1 Item 10.
This item lowers the threshold of the proof required that a person is a member of or has or has had an association with another person (or an organisation or group) which the minster reasonably suspects is or has been involved in criminal conduct. The new requirement is only that the minster reasonably suspects that the person has such an association.

The existing provision is already deficient. It is enough that the person has had an association. It is true Ministerial Direction 55 requires a delegate of the minster to assess the nature of the association, the degree and frequency of the association, and the duration of the association.[8] This direction should be incorporated into the Act.

In his 'Statement of Compatibility with Human Rights' which forms part of the Explanatory Memorandum, the Minister avers that at present a high level of certainty is required that a person has an association, and this made if difficult to "capture" such people.

It should not be difficult to prove an association. Is the Minister suggesting that when he or his delegate does not know whether a person has really met another on several occasions, they should be able to act as if they do?

The item is condemned in addition by the Explanatory Memeorandum itself, which asserts 'There is no requirement that there be a demonstration of special knowledge of, or participation in, the suspected criminal conduct by the visa applicant or visa holder'.

Recommendation 15. Proposed new subparagraph 501(6)(b), contained in Schedule 1 Item 10, should be rejected. Instead, Ministerial Direction 55 should be incorporated into the Act.

Proposed subparagraph 501(6)(ba) adds trafficking in persons, torture, slavery or crimes of serious international concern to the character test. These are appropriate, although making the threshold reasonable suspicion rather than at least truth on the balance of probabilities is not.

[8] By implication, if a person removes him or herself from the association upon learning of the criminal conduct or the other person or group, there is no blot on the character of the person.

But the item also adds 'people smuggling'. CCL has concerns about the people smuggling law, expressed in a submission to the Committee in relation to its inquiry concerning the Deterring People Smuggling Bill 2011. We wrote then:

'3. If there is a moral fault in people smuggling, it is not in assisting refugees to arrive in Australia by boat—after all, there appears to be no problem with assisting refugees to arrive by air—but in the use of unsafe boats for the purpose. It is that which might be penalised—but only when there is a means by which refugees can be kept safe, and can know that they will steadily progress to the head of a queue and ultimately be given access to safe havens.

'4. While refugees, having fled persecution, find themselves in unsafe camps with polluted water supply, at risk of cholera, dysentery, rape and murder, they will, properly, seek to move on. Those who assist them should not be demonised on that account.'[9]

This continues to be the CCL position. Legitimate assistance to refugees to escape to a genuinely safe country should not be criminalised, and those convicted under the present law should not be held to have failed the character test unless they have deliberately set the lives of asylum seekers at risk.

Recommendation. 16. Proposed subparagraph 501(6)(ba) should be modified to remove the words 'the minister reasonably suspects', and to remove the reference to people smuggling, substituting, if it is thought appropriate, a reference to endangering the lives of asylum seekers by the provision of unsafe ships.

Schedule 1 Item 11.

Item 11 removes the word 'significant' from s.501(6)(d). The effect is to ensure that a person will fail the character test if there is *any* risk (other than a trivial risk) that a person would

- engage in criminal conduct in Australia; or
- harass, molest, intimidate or stalk another person in Australia; or
- vilify a segment of the Australian community; or
- incite discord in the Australian community or in a segment of that community; or
- represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

Although trivial or minimal risks would not be included as a matter of standard interpretation, it is doubtful whether anybody could demonstrate that there was no risk, other than a trivial risk but less than a significant risk, that they might incite discord in a section of the community.

Recommendation 17: Item 11 should be omitted from the Bill.

[9] Submission to the Legal and Constitutional Committee of the Senate concerning the Deterring the People Smuggling Bill2011.

Schedule 1 Item 12

Item 12 inserts four provisions into the character test.
We have commented on paragraph 501(6)(e) above. As noted there, the proposed paragraph needs to be nuanced to ensure that an overseas conviction is for an action that would be an offence in Australia; and the appeal process should permit a person to show that such a conviction was unjust. The appeal should be specifically guaranteed, and be available whether the relevant decisions about the test are made by the minster or by his or her delegate.

Proposed paragraph 501(6)(f).
This paragraph provides that a person may be found to have failed the character test if he or she has been charged with or indicted for any of six kinds of crime. These are covered by the Refugee Convention, and the crimes are horrible.

However the Convention requires that the person has *committed* the relevant crimes, not that they have been charged with them. The constitutional validity of the proposed measure must therefore be in doubt.

Moreover, the Convention is correct. A person must be able to demonstrate that the charges were unjustified. And that bar should not be set too high. They should not have to prove that they did not commit the crimes in question.

Recommendation 18. Proposed paragraph 501(6)(f) should be amended to read 'the person has committed one or more…'

Proposed paragraph 501(6)(g).
At present a person who has received a visa can be interned because of an adverse security assessment by ASIO. There is no entitlement to a hearing on the merits of such an assessment, and generally no full explanation is given of the grounds on which it is made. It is notorious that in excess of 30 people languish in detention under that provision.

This provision provides that a person fails the character test if such as assessment is made. Their visa may accordingly be withdrawn, and they are liable to being deported, or if Australia's obligations not to refoul the person are applicable, to indefinite detention.

Recommendation 19. Either proper procedures should be put in place to contest adverse assessment by ASIO, or proposed paragraph 501(6)(g) should be removed from the bill.

Schedule 1 Item 13 and Item 15.

CCL has expressed concerns in relation to the Telecommunications Interception and Access Act that quite trivial crimes are subject to a *three-year* penalty in Australia.[10] As noted above, there has also been a tendency for penalties to be increased. Accordingly we believe that paragraph 501(7(c) and the proposed subsection 501(7a) should be the subject of a separate inquiry into the impact of penalty creep on this and other legislation.

Recommendation 20. Items 13 and 15 should be rejected pending a separate inquiry into penalty creep on this and other legislation.

Schedule 1 Item 14.
It is to be remembered in this context that people are being made psychologically ill by the treatment they receive in detention centres. This provision should be given more consideration than CCL can do in the time available.

Recommendation 21. Either proper procedures should be put in place to contest adverse assessment by ASIO, or proposed paragraph 501(6)(g) should be removed from the bill.

Schedule 2.

Further notes on the details of item 12.

Schedule 2 Item 4.
This item proposes that a visa may be refused on the grounds that the applicant '*may be, would be or might be'* a risk to the health safety or good order of the Australian community, or of a segment thereof; or may, would or might be a risk to the health or safety of an individual member of that community. (Our emphasis).

The italicised segment supposes a double lowering of the bar for refusal. Even though trivial or merely philosophical possibilities would not be included, the proposed paragraph could be applied to almost anyone. It is a recipe for the arbitrary rejection of an applicant, and should itself be rejected.

Recommendation 20: that item 4 should be rejected, as a recipe for the arbitrary rejection of visa applicants.

Schedule 2 Item 5.
Division C of part 2 of the Act already permits cancellation of a visa if the information supplied by the applicant was false. If, as the Explanatory Memorandum supposes, contradictory information was given, then as a matter of logic, that information is false. In that respect, proposed subsection 116(1AA) is redundant. The circumstances in which a visa might properly be reconsidered are if false

[10] CCL submission to the Legal and constitutional Committee of the Senate Inquiry into Comprehensive Revision of the Telecommunications (Access and Interception) Act 1079

information was relied upon when it was granted. That is provided for in proposed subsection 116(AB).

But the situation is worse. It is to be remembered that refugees arrive from countries where revealing their identities may lead to their own deaths, or those of their relatives. Until they have received independent and competent legal advice, and until they are sure that the lives of their relatives will not be set at risk, they are quite likely to give incorrect information. Unhappily, they are not being given such advice before being interviewed. The demand of the Explanatory Memorandum that they always provide correct information before, during or after the visa application in process is not, as the Explanatory Memorandum says, a reasonable expectation. It is utterly unreasonable.

There has been at least one occasion in the past where doubt was placed on a refugee's claims to identity, on the basis of linguisticists' assertions about the forms of language the person spoke, and his knowledge of local geography. He was sent back to his country of origin, and returned to the place where he said he had come from.

Recommendation 21: That item 5 be rejected in respect of proposed subsection 116(1AA) as being redundant in part, and unreasonable in the expectations it relies upon. In consequence, item 9 should also be rejected.

Schedule 2 Item 7.
Mandating the minster's action, when that is to ensure that a visa is cancelled, is always mistaken. Allowing regulations to determine when the minster's actions are so mandated is a device for avoiding responsibility, scrutiny and blame, and, to a degree, bypassing parliament. Further, no indication is given in the Explanatory Memorandum about what is envisaged. There is no point in the Act saying 'may' if regulations can turn that into 'must'.

Recommendation 22: That Item 7 should be rejected, as a mere device for avoiding responsibility and blame.

Schedule 2 Item 17.
If item 12 is rejected, as it should be, item 17 will go with it. But in the alternative, this amendment would give an officer of the Department or a police officer, the right to detain a visa holder if the officer reasonably suspects that the minster may decide to override a decision of the AAT. This is pure fantasy. A minister who could be reasonably predicted to override a decision of the AAT (rather than, say, urging the arrest of the visa holder under the auxiliary crime sections of the Criminal Code) would be a minister who is not acting reasonably.

Recommendation 23: Item 17 should be rejected, since it supposes an officer could reasonably predict that the minster may decide to override a finding by the AAT.

Schedule 2 Items 18, 19, 20 and 21.

These items are designed to remove appeals to the Migration Review Tribunal when the minster (not a delegate of the minister) makes a personal decision to cancel a visa. The intention is to prevent merits review of the minister's decisions.

The consequences of these decisions by the minster are that a non-citizen (the person) will be detained (if in Australia) and then deported—unless he or she has been found to be a refugee, in which case the person may be detained indefinitely. Nobody should be subjected to this without merits review. Ministers make mistakes—they are but human. Their advisors make mistakes. Members of the Federal Police make mistakes. Sometimes they all make mistakes together.

On the face of it, then, merits review is imperative.

Now the Explanatory Memorandum argues :

1. The government is ultimately responsible for ensuring that decisions reflect community standards and expectations.

2. It is incongruous that decisions relating to national security, foreign interests, the health, safety and good order of the Australian Community, "the integrity of the Migration Programme" should be subject to full merits based administrative review.

It makes the same two claims four times.

The first claim is false. That responsibility lies with the Parliament, and ultimately with the people.

The second claim is strange. Section 411 of the Act has permitted review by the Refugee Review Tribunal of decisions concerning crimes against peace, war crimes, crimes against humanity, serious non-political crimes, acts contrary to the purposes and principles of the United Nations, national security, public order, expulsion and dangers to security. No "incongruity" has been felt over that for some time. The Refugees Convention itself requires in effect that due process to be offered to refugees before they are expelled *on matters of national security*, except in urgent situations. (No reservations are permitted on these matters.)

The claim of incongruity is thus a new claim, dreamed up for lack of any serious argument, in support of a power grab.

Recommendation 24: Items 18, 19, 20 and 21 should be rejected.

Martin Bibby MA, BD, PhD
Executive member, New South Wales Council for Civil Liberties

October 28, 2014