

The Senate

Legal and Constitutional Affairs
Legislation Committee

Migration Amendment (Visa Revalidation and
Other Measures) Bill 2016 [Provisions]

November 2016

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Table of contents

| | |
|--|------------|
| Members of the committee | iii |
| Recommendations | vii |
| Chapter 1 | 1 |
| Introduction and background | 1 |
| Background and purpose of the bill | 1 |
| Overview of the provisions of the bill..... | 3 |
| Concerns raised by the Scrutiny of Bills committee | 5 |
| Financial implications | 5 |
| Compatibility with human rights..... | 6 |
| Conduct of the inquiry..... | 6 |
| Structure of this report..... | 6 |
| Acknowledgements | 7 |
| Chapter 2 | 9 |
| Key issues | 9 |
| Schedule 1 - Revalidation check for certain visas..... | 9 |
| Schedule 2 – Cessation of visas that are not in effect | 20 |
| Schedule 3 – Contactless immigration clearance | 21 |
| Committee view..... | 22 |
| Dissenting report by the Australian Greens | 25 |
| Conclusion | 26 |
| Appendix 1 | 29 |
| Public Submissions | 29 |

Recommendations

Recommendation 1

2.61 The committee recommends that the Senate pass the bill.

Chapter 1

Introduction and background

1.1 On 10 November 2016, the Senate referred an inquiry into the provisions of the Migration Amendment (Visa Revalidation and Other Measures) Bill 2016 (the bill) to the Senate Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 28 November 2016.¹

1.2 The Senate Selection of Bills Committee recommended that the bill be referred to the committee for inquiry to further investigate the potential impacts of the bill and seek views from affected stakeholders.²

Background and purpose of the bill

1.3 The Minister for Immigration and Border Protection, the Hon Peter Dutton MP (the Minister) introduced the bill into the House of Representatives on 19 October 2016. In his second reading speech, he stated that the bill's provisions would support two key government initiatives in his portfolio, namely:

...initiatives which seek to promote Australia as an attractive destination...[and measures that] facilitate the use of enhanced technology to improve the traveller experience at the Australian border.³

1.4 The Minister stated that the bill contributes to the government's commitment to boosting the Australian tourism sector, noting that the sector provides employment for around 600,000 people and contributes more than \$120 billion to the domestic economy.⁴ Moreover, he also noted the new class of visa would encourage repeat visits by Chinese business travellers, which would also benefit the wider Australian economy.⁵

The trial of 10-year visas

1.5 One government measure aimed at increasing the number of tourists visiting Australia is the introduction of a 10-year visa for holidaymakers and businesspeople.

1 *Journals of the Senate*, No. 15, 10 November 2016, p. 448.

2 Senate Selection of Bills Committee, *Report No. 8 of 2016*, 10 November 2016, Appendix 5.

3 The Hon Peter Dutton, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 19 October 2016, p. 2433.

4 The Hon Peter Dutton, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 19 October 2016, p. 2433.

5 The Hon Peter Dutton, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 19 October 2016, p. 2433.

In his second reading speech, the Minister noted the positive effects for the tourism industry and the Australian economy more generally that would stem from this initiative:

The introduction of a 10-year visitor visa will encourage repeat visits by genuine tourists and businesspeople choosing Australia as their preferred destination.⁶

1.6 This new class of visa will be trialled in a pilot program for Chinese nationals commencing in December 2017.⁷ This measure was initially proposed by the government's 2015 *White Paper on Developing Northern Australia*, alongside other measures to encourage Chinese tourists and business travellers, which included the ability to lodge visa applications online, as well as the provision of a fast-track visa approval service with a 48-hour turnaround.⁸

The use of 'SmartGates' to enhance immigration processing

1.7 Some Australian airports currently allow some passengers arriving from overseas to self-process through immigration clearance, by presenting an ePassport to a 'SmartGate kiosk'. This kiosk captures biometric information, such as the underlying bone structure of the face, distances between facial features such as eyes, nose, mouth and ears, which is then checked against a person's ePassport to identify the traveller.⁹

1.8 In his second reading speech, the Minister commented that in 2014-15 around six million people self-processed using SmartGates, of a total of more than 19 million arrivals into Australian airports. Additionally, he observed that improvements to the current system made by the provisions of the bill would help meet any future increase of the number of visitors to Australia, which is forecasted to rise by almost 25 per cent in the next four years.¹⁰

6 The Hon Peter Dutton, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 19 October 2016, p. 2433.

7 This initiative was announced on 17 June 2015 by the Hon Peter Dutton MP, Minister for Immigration and Border Protection, the Hon Andrew Robb MP, Minister for Trade and Investment, and Senator the Hon Michaela Cash, Assistant Minister for Immigration and Border Protection. See the *Joint Media Release – New Pilot Visa to Boost Australian Tourism*, 17 June 2015.

8 Commonwealth of Australia, *Our North, Our Future: White Paper on Developing Northern Australia* (2015), p.11.

9 Department of Immigration and Border Protection, 'Arrivals SmartGate: frequently asked questions' available at www.border.gov.au/Trav/Ente/GoIn/Arrival/Smartgateor-ePassport (accessed 23 November 2016).

10 The Hon Peter Dutton, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 19 October 2016, p. 2434.

1.9 This future need, the Minister suggested, had informed the government's plans to increase the use of the SmartGate technology in the future to enhance the experience of travellers, whilst also delivering efficiencies to Commonwealth:

As part of the 2015-16 budget, the government committed \$93.7 million to the Seamless Traveller initiative, which included the expansion of SmartGates, and when fully implemented, we expect 90 per cent of travellers will self-process through these gates.¹¹

Overview of the provisions of the bill

1.10 The bill consists of three schedules amending the *Migration Act 1958* (the Migration Act) that would:

- introduce a new revalidation check framework for visas, initially pertaining to a pilot of the proposed 10-year visa for visitors from China (Schedule 1);
- clarify when a visa 'ceases to be in effect' under the Act (Schedule 2); and
- enable the use of contactless technology to clear travellers coming through the immigration clearance system (SmartGate) (Schedule 3).¹²

Revalidation check for visas (Schedule 1)

1.11 Given the long timeframe of the new 10-year visa, the Minister noted that it was likely the personal circumstances of some visa holders would change over the period their visa was valid. To manage potential risks this may pose he stated that Schedule 1 of the bill:

...introduces a mechanism that will allow for the department to seek revalidation of certain information from visa holders over the life of the visa, either through a 'routine' revalidation or a 'public interest' revalidation.

This 'revalidation' will be used to ensure that visa holders continue to meet genuine temporary entrant, identity, health, character, passport, national security and other criteria over the 10-year period.¹³

1.12 Moreover, the Minister also noted that a further potential risk was that 'a serious incident overseas' could necessitate a reassessment of a number of individuals holding certain visas. Given this, he provided more detail on the 'public interest revalidation check', which would be used:

11 The Hon Peter Dutton, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 19 October 2016, p. 2434.

12 The Hon Peter Dutton, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 19 October 2016, pp. 2433-2434.

13 The Hon Peter Dutton, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 19 October 2016, pp. 2433-2434.

...to manage specific, serious, or time-critical risks in relation to an identified cohort of visa holders. In such circumstances, issuing a personal ministerial revalidation requirement will immediately prevent specified visa holders from being able to travel to and enter Australia until they successfully revalidate their visa.¹⁴

Cessation of visas that are not in effect (Schedule 2)

1.13 Schedule 2 proposes amendments to the Act that would clarify the circumstances under which a visa can cease to be in effect. The Minister stated in his second reading speech that, while most visas come into effect at the time they are granted, there are a small number of visa classes that do not come into effect immediately. The Minister highlighted that the bill would clarify aspects of the current Act as:

There is currently ambiguity as to whether a 'ceasing event' under sections 82, 173 and 174 of the Migration Act can apply to a visa that has been granted, but not in effect.

The amendments contained within schedule 2 will ensure that, subject to limited exceptions, a visa will cease if a relevant ceasing provision applies to it, even if the visa is not in effect at the relevant time.¹⁵

1.14 The Minister stated that this was a key measure to support the new revalidation check framework introduced by the bill, especially as it would 'increase the number of persons who may hold a visa that is not in effect at a particular time'.¹⁶

Enhancing immigration clearance (Schedule 3)

1.15 Schedule 3 of the bill would introduce provisions to enhance the use of facial recognition technology by airport 'SmartGates'. These provisions would remove:

...the requirement for travellers to present a travel document for identity purposes, such as a passport, unless requested to do so by a clearance officer or an authorised system. The identity of a traveller will be confirmed using a unique biometric identifier, such as a facial image instead of document based checks. SmartGates embedded with contactless technology will be gradually rolled out to major airports from May 2017. The gradual roll out will minimise disruptions to Australian Border Force operations and traveller processing.¹⁷

14 The Hon Peter Dutton, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 19 October 2016, p. 2433.

15 The Hon Peter Dutton, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 19 October 2016, p. 2434.

16 The Hon Peter Dutton, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 19 October 2016, p. 2434.

17 Explanatory Memorandum, p. 3.

Concerns raised by the Scrutiny of Bills committee

1.16 The committee is aware that the Senate Scrutiny of Bills Committee has raised concerns about the proposed amendments made by the bill and sought further clarification from the Minister on a number of matters, namely:

- Why the revalidation check is linked to whether there is any 'adverse information' about the visa holder, rather than whether they still met the requirements for the initial grant of the visa (Item 4, proposed subsection 96a);¹⁸
- Why the legislation does not define 'adverse information', which would provide more certainty for visa holders who could be subject to revalidation checks (Item 4, proposed subsection 96a);¹⁹
- Why the proposed ministerial power to subject a person to a revalidation check is expressed to relate to a visa of a prescribed kind, without providing details of, or limits to, the types of visas that may be prescribed (Item 4, proposed subsection 96B(1));²⁰
- Why a legislative instrument setting out a specified class of persons who are to complete revalidation checks should not be subject to disallowance in the Parliament (Item 4, proposed subsection 96E(1));²¹ and
- Whether the decisions made under a proposed new subdivision BA of Division 3 of Part 2 of the Act will be reviewable, which is not explained in the Explanatory Memorandum (Item 4).²²

1.17 The committee understands that, at the time of writing, the Scrutiny of Bills Committee has not received comments from the Minister on these issues.

Financial implications

1.18 The Explanatory Memorandum includes a financial impact statement which states that the amendments made by the bill would result in increased Commonwealth

18 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2016*, 9 November 2016, p. 25.

19 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2016*, 9 November 2016, p. 25.

20 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2016*, 9 November 2016, p. 26.

21 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2016*, 9 November 2016, p. 26.

22 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 8 of 2016*, 9 November 2016, pp. 27-28.

revenues. These would be delivered by amendments made by Schedules 1 and 3 of the bill, with Schedule 2 having a 'low financial impact'.²³

1.19 The Explanatory Memorandum forecasts that the Visa Application Charge (VAC) introduced under Schedule 1, would have a net impact of \$33.5 million in administered revenue over the forward estimates from 2016-17.²⁴

1.20 Regarding Schedule 3 of the bill, the Explanatory Memorandum states that improvements to contactless automated immigration clearance technology (SmartGates) are expected to save the Commonwealth \$32.9 million a year in compliance costs.²⁵

Compatibility with human rights

1.21 The Explanatory Memorandum states that the bill is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.²⁶

Conduct of the inquiry

1.22 Details of the inquiry were advertised on the committee's website, including a call for submissions by 18 November 2016, as well as links to the bill and relevant documents.²⁷ The committee also wrote to some individuals and organisations directly, inviting them to make submissions.

1.23 The committee received six submissions, which are listed at appendix 1 of this report. These submissions are available on the committee's website.

Structure of this report

1.24 This report consists of two chapters:

- This chapter provides a background and overview of the bill, as well as the administrative details of the inquiry.
- Chapter 2 sets out the concerns that were raised by submitters to the inquiry, as well as the committee's views and recommendations.

23 Explanatory Memorandum, p. 3.

24 Explanatory Memorandum, p. 3.

25 Explanatory Memorandum, p. 3.

26 Explanatory Memorandum (Attachment A), p. 48.

27 The committee's website can be found at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs

Acknowledgements

1.25 The committee thanks all submitters to this inquiry, particularly noting the short timeframe given to them for the lodgement of submissions.

Chapter 2

Key issues

2.1 This chapter discusses the key provisions of the Migration Legislation Amendment (Visa Revalidation) Bill 2016 (the bill).

2.2 First it outlines the key issues raised by submitters to the inquiry, which overwhelmingly addressed provisions contained in Schedule 1 of the bill. It then provides an outline the provisions of Schedules 2 and 3 of the bill.

2.3 Lastly, this chapter sets out the committee's views and recommendations.

Schedule 1 - Revalidation check for certain visas

2.4 The Explanatory Memorandum outlines the proposed amendments that would be made by Schedule 1 of the bill, which would establish a visa revalidation framework within the *Migration Act 1958* (the Migration Act). This would include:

...a general power for the Minister to require, from time to time, a person who holds a visa of a prescribed kind to complete a revalidation check. There will be an additional personal non-compellable power for the Minister to determine by legislative instrument, if he or she thinks it is in the public interest, that a specified class of persons holding a visa of a prescribed kind must complete a revalidation check for the visa.

The amendments will provide that a person will pass a revalidation check if the Minister is satisfied that there is no adverse information relating to the person, or it is reasonable to disregard that adverse information. The consequences of a person failing to complete or pass a revalidation check may be that the visa will cease to be in effect, depending on their circumstances, by operation of law. If a person's visa has previously ceased to be in effect, they can subsequently complete and pass the revalidation check during the visa period and their visa will come back into effect.¹

Support for the revalidation framework

2.5 The introduction of the visa revalidation framework would support the trial of a new 10-year multiple entry Visitor visa for Chinese nationals.²

2.6 The Department of Immigration and Border Protection (the department) submitted that the framework would deliver economic dividends for the Australian tourism sector by boosting the numbers of Chinese tourists and businesspeople coming to Australia.³

1 Explanatory Memorandum, p. 2.

2 See Explanatory Memorandum, p. 48; also see the Hon Peter Dutton, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 19 October 2016, p. 2433.

3 *Submission 2*, p. 3.

2.7 The department also noted that the provisions of the bill would simplify immigration processes for visitors, while maintaining the integrity of Australia's security system:

This framework simplifies visa processes for frequent travellers whilst managing specific, serious, or time critical risks to the Australian community and individual circumstances which may change through the visa validity period. The new framework will support the proposed trial of the new 10 year validity visitor visa to ensure that, among other things, only genuine visitors retain the right to travel to and enter Australia.⁴

2.8 The Migration Institute of Australia (MIA) recognised that it was reasonable to expect visas with longer periods of validity, including the new 10-year multiple entry visa, to be subject to revalidation checks, as:

Visa holders' personal circumstances can undergo any number of changes over time and the longer the visa validity, the greater the opportunity for unforeseen or undesirable changes to occur.

Revalidation at biannual intervals and through the processes specified in this Bill appear reasonable and appropriate without being overly onerous within the circumstances.⁵

Issues raised by submitters to the inquiry

2.9 Submitters raised a number of issues about the introduction of the visa revalidation scheme by Schedule 1 of the bill. These issues will be discussed in turn, and include:

- claims there is currently insufficient information available about the nature, conditions and implementation of the new 10-year visa for Chinese nationals;
- allegations that the bill does not limit the revalidation scheme to holders of the new 10-year multiple entry visa, which means revalidation tests could be extended to other classes of visa in the future;
- the suggestion that 'adverse information', which can be used by the Minister of Immigration and Border Protection (the Minister) to determine revalidation checks for certain visa holders, is insufficiently defined in the bill and supporting regulations;
- the view that ministerial powers to determine 'public interest revalidation checks' may not be subject to robust accountability and scrutiny mechanisms in the Migration Act;
- claims the bill lacks provisions for reviews of decisions made under the visa revalidation framework, and concerns that natural justice is not guaranteed to be afforded to individuals subject to negative visa revalidation assessments; and

4 *Submission 2*, p. 3.

5 *Submission 3*, p.3.

- the perception that there may already be existing powers in the Migration Act to address potential security and public interest concerns regarding 10-year visitor visas.

Insufficient information about the new visa

2.10 The Law Council of Australia (Law Council) advised the committee that it was difficult to assess the potential impact of revalidation checks, given that:

...the visa referred to in the Explanatory Memorandum does not currently exist, and there are no details as to the criteria which must be satisfied for that visa, or the conditions which may or must be imposed. The Law Council is of the view that without this information, the breadth of the power conferred by Schedule 1 of the Bill cannot be fully appreciated.⁶

2.11 At the recent Supplementary Estimates hearing of this committee, the Secretary of the Department of Immigration and Border Protection, Mr Michael Pezzullo, and Acting Commissioner of the Australian Border Force, Mr Michael Outram, provided information about new types of visas, including the 10-year visa for Chinese visitors to Australia:

By the end of 2016, the Department will have implemented a number of new and innovative tourist visa products: first, a Lodgement in Simplified Chinese and second, a 10-year validity Visitor (Subclass 600) visa - which allows multiple entries and a three-month stay period. The visa will commence as a pilot in China for a fee of AUD \$1000.⁷

2.12 The committee notes that the Law Council's submission includes an overview of the nature and conditions of the 10-year visa, which are all drawn from the Explanatory Memorandum, including that it:

- is a 10 year visa, applying to tourism and business visitor activities;
- will allow for multiple entries and up to a three-month stay period after each entry during the validity period of the visa (with no more than 12 months cumulative stay in a 24 month period);
- will initially only be available to applications who are nationals of the People's Republic of China;
- costs AUD1000 as the visa application charge; and
- will be marketed as a premium product to attract high value frequent travellers.⁸

6 *Submission 4*, p. 12.

7 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection and Mr Michael Outram, Acting Commissioner, Australian Border Force, Written Opening Statement tabled at the Legal and Constitutional Affairs Legislation Committee Estimates Hearing (tabled 17 October 2016). Also note that more information about the general Visitor visa (subclass 600) is available on the department's website at www.border.gov.au/Trav/Visa-1/600- (accessed 24 November 2016).

8 *Submission 4*, pp. 5-6.

2.13 The department clarified that the new Frequent Traveller stream of the Visitor (subclass 600) commenced on 19 November 2016, which will provide for the pilot of the longer multiple entry visas for Chinese nationals. It also directed the committee to further detail in the new regulations supporting this visa, which the Federal Executive Council endorsed on 10 November 2016.⁹

The revalidation framework is not limited to the new 10-year visa

2.14 Some particular submitters raised concerns that the bill does not explicitly link the scheme to any visa type, despite the claim it is designed to support the integrity of the new 10-year visitor visa. This means the revalidation framework could potentially be used to review and rescind other classes of visa. For example, the Law Council of Australia questioned 'whether the Bill is necessary, justified and proportionate to achieving a legitimate purpose', given that:

...the Bill has a substantially broader application than was intended or expressed in the Explanatory Memorandum or the Minister's Second Reading Speech.¹⁰

2.15 The Andrew & Renata Kaldor Centre for International Refugee Law (Kaldor Centre) advised the committee that the revalidation framework 'has the potential to adversely impact on *all* visa holders'. Even though the Kaldor Centre noted that it was most likely that it could be used regarding holders of temporary visas, it noted the potential for it to be applied to all classes of visas, including permanent visas granted to refugees.¹¹

2.16 The Law Council also advised the committee that ministerial powers under the proposed subsection 96B(1) may not be limited to the new visa:

The definition of a 'prescribed kind' of visa is not defined within the Bill, nor is it limited to the proposed new longer validity visitor visa. A 'prescribed kind' of visa could potentially be any visa as deemed by the Minister. As a visa of a 'prescribed kind' can be specified in regulations which then refer to an Instrument which defines the subclass or class of visa, the Bill has the potential to all classes of visas.¹²

2.17 Moreover, the Law Council noted there were no time limitations imposed by the amendments made by the bill, which made it possible that:

...these proposed powers could be exercised many years after a person has been granted permanent residence. The fact that that many people will have moved address in that period will mean that many people may not be

9 See Migration Legislation Amendment (2016 Measures No. 5) Regulation 2016 www.legislation.gov.au/Details/F2016L01745 (accessed 21 November 2016). Department of Immigration and Border Protection, Response to the Law Council of Australia's submission to the Senate Legal and Constitutional Affairs Committee in relation to the Migration Amendment (Visa Revalidation and Other Measures) Bill 2016 (Attachment A), [p. 1].

10 *Submission 4*, pp. 8-9.

11 *Submission 1*, p. 1. 12

Submission 4, p. 9.

aware that that a notice requiring them to complete a revalidation check has been issued. In practical terms their visas will then cease to be in effect when they travel internationally.¹³

2.18 The department provided further information about the scope of the bill's provisions, noting that only the new Subclass 600 (Visitor) visa will be prescribed for the purposes of requiring a revalidation check. The department explained why the power to prescribe which visa could be subject to a revalidation check process has not been limited, as follows:

Flexibility had been provided as other longer validity visa products may be implemented in the future. The revalidation framework may be an appropriate mechanism to manage identified risks in these products. Limiting the types of visas that can be prescribed would restrict the ability to use the revalidation framework to reduce red tape and manage risks associated with newly developed or reformed visa products.¹⁴

2.19 The department also noted proposed regulations under the new provisions that would specify that:

For the purposes of subsection 96B(1) of the Act, a Subclass 600 (Visitor) visa in the Frequent Traveller stream is a prescribed kind of visa.

For the purposes of subsection 96E(1) of the Act, a Subclass 600 (Visitor) visa in the Frequent Traveller stream is a prescribed kind of visa.¹⁵

2.20 Moreover, the department made it clear there were no proposals to extend the new provisions to other visas, and that any future changes to the *Migration Regulations 1994* would be subject to parliamentary scrutiny and disallowance:

It is not proposed that the amendments to the *Migration Regulations 1994* (Migration Regulations) to prescribe these visas will include a power to make a legislative instrument to specify additional visas. Further, as any amendments to the Migration Regulations would themselves be subject to disallowance, there would be parliamentary oversight of any proposal to include such an instrument making power (or to add further visas to the Revalidation scheme).¹⁶

13 *Submission 4*, p. 15.

14 Department of Immigration and Border Protection, Response to the Law Council of Australia's submission to the Senate Legal and Constitutional Affairs Committee in relation to the Migration Amendment (Visa Revalidation and Other Measures) Bill 2016 (Attachment A), [p. 1].

15 Department of Immigration and Border Protection, Response to the Law Council of Australia's submission to the Senate Legal and Constitutional Affairs Committee in relation to the Migration Amendment (Visa Revalidation and Other Measures) Bill 2016 (Attachment A), [p. 2].

16 Department of Immigration and Border Protection, Response to the Law Council of Australia's submission to the Senate Legal and Constitutional Affairs Committee in relation to the Migration Amendment (Visa Revalidation and Other Measures) Bill 2016 (Attachment A), [p. 2].

Lack of a robust definition of 'adverse information'

2.21 The Explanatory Memorandum provides some guidance regarding adverse information that could be used to inform a revalidation check, noting it may cover information that includes, but is not limited to, if a person:

- has been convicted of an offence since the grant of the visa;
- may present a health concern to the Australian community;
- no longer intends to stay in Australia for temporary or tourism purposes; or
- may present a security risk to the Australian community.¹⁷

2.22 The Law Council noted that Regulation 1.13A of the *Migration Regulations 1994* defines 'adverse information' in broad terms, which include 'a wide range of activity, not just committed by the person themselves, but also a person associated with that person'.¹⁸ It observed that, under the revalidation checks proposed by the bill:

The adverse information also does not need to relate to: (a) the criteria that the person met to be granted the visa in the first place; or (b) factors/matters which would potentially expose the person to visa cancellation under existing powers of the Act. Conceivably this could relate to something as simple as a parking fine. As drafted, the Law Council is concerned that 'adverse information' is too broad to be meet its intended purpose to protect the Australian community due to the risks associated with longer validity visitor visas.¹⁹

2.23 The Kaldor Centre argued that the broad definition of 'adverse information' in the bill, could:

...enable the government to impose surveillance measures on temporary, and possibly, permanent visa holders. It undermines the long-standing rationale and stability of Australia's migration system, which is premised on the notion that once a person has been issued a visa, he or she is entitled to have that visa be in effect until the visa period expires (subject to any grounds for visa cancellation).²⁰

2.24 Given this, the Kaldor Centre argued that the introduction of these provisions could have negative effects for recipients of refugee visas:

For example, [a requirement to complete a visa revalidation check] would require a refugee to respond to information relating to a change in circumstances in their country of origin, or a health problem, or a minor traffic infringement. It means that a refugee potentially has to continually validate his or her claims for protection, and information supplied may be

17 Explanatory Memorandum, p. 11.

18 *Submission 4*, p. 10.

19 *Submission 4*, p. 10.

20 *Submission 1*, p. 1.

used to cancel a visa. This is likely to have significant consequences for refugees' ability to adjust to life in Australia, to feel safe and well-integrated in the community, and to recover from trauma or general stress associated with the reasons for flight and/or experiences as an asylum seeker.²¹

2.25 The department provided further information to the committee about the nature and scope of 'adverse information' that could be considered by the Minister in making determinations. It highlighted that 'adverse information' had to be defined broadly to 'allow for flexibility in addressing future changes in both domestic and global circumstances', and commented that a Minister could 'disregard adverse information when reasonable'. It noted that conditions for accepting or disregarding adverse comment could include:

...circumstances relevant to the assessment of the genuine temporary entrant criteria, including consideration of both the personal circumstances of the applicant in their home country and general conditions in the home country that might encourage them to remain in Australia. These conditions include:

- economic disruption, including shortages, famine, or high levels of unemployment, or natural disasters in the applicant's home country;
- civil disruption, including war, lawlessness or political upheaval in the applicant's home country; or
- emerging public health and safety risks identified in the visa holder's country of citizenship or long term residence.²²

The extent of ministerial powers

2.26 The Explanatory Memorandum sets out the powers of the Minister to determine that certain visa holders must complete a 'public interest revalidation check' under new subsection 96E(1):

The public interest test is intended to be broad and flexible to allow the Minister to consider any factor that he or she considers relevant when deciding whether to make a determination under new subsection 96E(1). For example, the Minister may consider the public health and safety of the Australian community or particular individuals, national security, the economic wellbeing of Australia, the circumstances in a person's home country, the risk of overstaying or other factors, or combination of factors, determined to be relevant to the particular circumstances.²³

2.27 Additionally, proposed subsection 96B(1) states that:

21 The Kaldor Centre also suggested that adverse findings against refugees under the provisions of the bill 'may also raise issues of incompatibility with article 1C of the Refugee Convention (cessation of refugee status)'. See *Submission 1*, p. 2.

22 Department of Immigration and Border Protection, Response to the Law Council of Australia's submission to the Senate Legal and Constitutional Affairs Committee in relation to the Migration Amendment (Visa Revalidation and Other Measures) Bill 2016 (Attachment A), [pp. 1-2].

23 Explanatory Memorandum, p. 21.

The Minister may, from time to time, require a person who holds a visa of a prescribed kind (however described) to complete a revalidation check for the visa.²⁴

2.28 The MIA expressed reservations about the extent of the personal powers that could be granted to the Minister by section 96E(1) of the bill, if enacted:

The MIA believes that circumstances could emerge that could provide the Minister at that time with unfettered power to determine classes of person who must submit to revalidation checks. For example, if the Government of the day held a majority in both the Upper and Lower Houses of the Federal Parliament, any legislative instrument changing the classes of persons specified in such an instrument, may have an easy path to approval.

At worst, the Minister's powers could be used to significantly skew this interpretation of the 'public interest' and to significantly and retrospectively change the eligibility characteristics for passing the revalidation test. Unlikely as it may seem at this time, this could be extrapolated to discriminate against large numbers of long term visa holders lawfully living in Australia, preventing them from revalidating their visas and requiring them to leave the country.²⁵

2.29 The Law Council pointed out that the bill does not contain any threshold requirements for the Minister to invoke discretionary powers. It flagged concerns that the lack of a threshold for the exercise of ministerial discretion may be at odds with existing visa cancellation powers contained in the Migration Act:

...[under the amendments the Minister has] a power that can be used at large against any person who holds a visa of a 'prescribed kind', entirely at the discretion of the Minister.

This is at odds with all the visa cancellation powers which exist in the Migration Act under Subsections 109, 116, 133A, 133B, 134, 137Q, and 501 (and related powers). For each of those cancellation powers, the Migration Act prescribes specific adverse matters/facts of which the Minister must be satisfied before the discretion can be exercised.²⁶

2.30 This concern was shared by the Kaldor Centre, which observed that bill does not define 'public interest' and that this 'in practice this would give the Minister considerable discretion to impose checks on any number of visa holders'.²⁷ The Law Council also noted this extension of the Minister's discretionary powers, and highlighted that the Migration Act itself does not contain a definition of 'public interest'.²⁸

24 Explanatory Memorandum, p. 12.

25 *Submission 3*, p. 3.

26 *Submission 4*, p. 13.

27 *Submission 1*, p. 2.

28 *Submission 4*, p. 13.

Ministerial accountability and the scrutiny of decisions

2.31 Proposed subsection 96E(3) of the bill sets out the provision that a Minister can make a determination it is in the public interest for certain a class of visa holders to complete a revalidation check (a public interest revalidation check). This stipulates that, following such determinations:

...the Minister must cause to be laid before each House of the Parliament a statement that:

- states that the Minister has made the determination; and
- sets out the Minister's reasons for making the determination, referring in particular to the Minister's reasons for thinking that the making of the determination is in the public interest.²⁹

2.32 The Explanatory Memorandum states that this:

...provides a mechanism for the Minister to ensure that there is public and political accountability to the Parliament regarding the exercise of the power in new subsection 96E(1), in particular over the reasons that the Minister thinks the making of the determination was in the public interest.³⁰

2.33 Some submitters recognised that the powers of the minister under the bill are not completely unfettered, as the amendments do contain some accountability and scrutiny mechanisms to ensure discretionary powers are not abused. For instance, despite its concerns over some elements of the bill, the MIA recognised that 'this Amendment contains a variety of checks and balances within the prescribed processes.'³¹

2.34 The Law Council drew the committee's attention to potential limitations to the ability of the Parliament to apply appropriate scrutiny to Ministerial decisions made under new provisions proposed by the bill:

It is the current approach in migration matters for the regulations to refer to the wording such as 'those visa subclasses as specified in a legislative instrument'. An attempt to make regulations for the purposes of the 'prescribed kind' of visa in the Bill would be a decision made by the determination of the Minister. Consistent with section 44 of the Legislative Instruments Act 2003 (Cth), these regulations would not be disallowable. This potentially limits capacity to scrutinise the broader impacts of the Bill if passed.³²

2.35 However, the Explanatory Memorandum states that parliamentary scrutiny of ministerial decisions would be possible under the tabling provisions:

29 Explanatory Memorandum, pp. 22-23

30 Explanatory Memorandum, p.23

31 *Submission 3*, p. 3. These concerns raised by the MIA are outlined earlier in this chapter.

32 *Submission 4*, p. 9.

While a legislative instrument made under new subsection 96E(1) is not subject to disallowance, the tabling provisions will still ensure that the Parliament can scrutinise the Minister's decision and provide comment on such a determination through a motion of disapproval or other mechanism.³³

2.36 The department clarified that any regulations applying revalidation checks to visas other than the new Frequent Traveller stream of the Visitor (subclass 600) would be subject to the disallowance process:

There would be Parliamentary scrutiny over which visas, or the types of visas, that were prescribed for the revalidation check framework through the disallowance process. If the Parliament considered it was inappropriate for a visa which has been prescribed to be subject to the revalidation check process, a motion could be moved to disallow that regulation.³⁴

2.37 The department also noted that a flexible approach would provide for:

...consideration of the visa holder's ongoing compliance with the conditions of their visa, as well as consideration of information relevant to any new grounds for visa cancellation that are introduced in the future under the *Migration Act 1958* (the Migration Act).³⁵

Reviews of findings under the visa revalidation framework

2.38 Some submitters observed that it is not clear whether adverse decisions made under the visa revalidation framework are reviewable. For instance, the Kaldor Centre noted:

While the ultimate decision to cancel a visa may be subject to administrative and judicial review, it does not appear that the decisions as to whether a person passes the revalidation check would be.³⁶

2.39 The Law Council also raised concerns that there was no explicit acknowledgement in the bills that natural justice would be afforded to visa holders subject to negative assessments, who wished to seek a review of decisions.³⁷ It set out the issues this may raise, as follows:

33 Explanatory Memorandum, p. 23

34 Department of Immigration and Border Protection, Response to the Law Council of Australia's submission to the Senate Legal and Constitutional Affairs Committee in relation to the Migration Amendment (Visa Revalidation and Other Measures) Bill 2016 (Attachment A), [p. 1].

35 Department of Immigration and Border Protection, Response to the Law Council of Australia's submission to the Senate Legal and Constitutional Affairs Committee in relation to the Migration Amendment (Visa Revalidation and Other Measures) Bill 2016 (Attachment A), [p. 2].

36 *Submission 1*, p. 2.

37 The Law Council described natural justice as 'the common law rule that a decision maker must provide the opportunity for a person whose rights, interests or legitimate expectations are affected by a decision to understand the basis for the decision and to be heard'. See *Submission 4*, p. 10.

While not specifically excluding natural justice, the Law Council is concerned that the revalidation check under proposed section 96B may give rise to natural justice issues. Under proposed section 96D it is not clear that the long term validity visa holder would be provided with reasons or be heard following a decision that a 'visa ceases to be in effect'.³⁸

2.40 Given this, the Law Council recommended that the bill be amended:

...to expressly provide that natural justice is afforded to those affected by a visa revalidation decision and that administrative review rights are not curtailed. This would require that the Minister inform the person subject to the visa revalidation of the nature and precise content of any 'adverse information' on which a decision is based and allow opportunity for the person to respond.³⁹

2.41 Regarding the provision of natural justice to individuals undergoing visa revalidation checks, the department commented:

The cancellation powers in the Migration Act include a mechanism to provide natural justice to a visa holder in relation to adverse information, either in the form of a NOICC (Notice of Intention to Consider Cancellation) or through the request for revocation of visa cancellation process. This means that where the Department of Immigration and Border Protection (the Department) is aware of such information, adequate powers exist to take appropriate action.⁴⁰

Existing powers under the Migration Act

2.42 The Law Council advised the committee that the Migration Act and Regulations may already provide adequate powers to address any concerns about safeguarding the integrity of Australian immigration system when the new 10-month visitor visa is introduced, citing provisions that:

- A visa holder can be required to inform of any change of their contact details – see for example conditions 8505, 8506 and 8513.
- A temporary visa can be cancelled if it is later determined that:
 - i. the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or that no longer exists; or
 - ii. the decision to grant the visa was based, wholly or partly, on the existence of a particular fact or circumstance, and that fact or circumstance did not exist.

38 *Submission 4*, p. 11.

39 *Submission 4*, p. 11.

40 Department of Immigration and Border Protection, Response to the Law Council of Australia's submission to the Senate Legal and Constitutional Affairs Committee in relation to the Migration Amendment (Visa Revalidation and Other Measures) Bill 2016 (Attachment A), [p. 3].

- A temporary visa can also be cancelled if the holder has not complied with the conditions of their visa.
- Any visa (whether temporary or permanent) can be cancelled on the basis that a bogus document, or false or misleading information in a material particular, was provided as part of a visa application (Public Interest Criteria 4020).
- With respect to protection, refugee and humanitarian visas, the Minister has extensive cancellation powers under subsections 5H(2), 36(1C), 36(2C) and section 501 of the Migration Act.⁴¹

2.43 The Law Council also noted that similar regimes for the automatic cancellation of certain visas, such as the provisions enacted by the *Migration Legislation Amendment (Student Visas) Act 2012*, had been abandoned by the Commonwealth. It suggested that '[a]utomatic cessation of visas is an inefficient tool for managing visa compliance, consistent with the commentary in the Knight Review [Strategic Review of the Student Visa Program (2011)]'.⁴²

2.44 In response to these concerns, the department stated that:

There is no existing head of power in the Migration Act that is broad enough to require a visa holder to provide updated information on their personal circumstances for the purpose of ascertaining the existence of any such adverse information. This would be required to enable the Minister to be satisfied that the visa holder continued to meet health, character, security, genuine temporary entrant and other criteria that would normally be considered at the time of visa grant over the visa period.⁴³

The short timeframe for inquiry into the bill

2.45 The Law Council considered that 'one week is insufficient time for consultation on the Bill, which will grant substantial additional powers to the Minister'. It noted that a longer reporting time 'would have enabled [the committee] to obtain the views of a much wider range of organisations and individuals affected by the Bill'.⁴⁴

Schedule 2 – Cessation of visas that are not in effect

2.46 Currently, section 82 of the Migration Act sets out when a visa ceases to be in effect, including in cases when:

- a visa holder leaves Australia because of a deportation order;

41 *Submission 4*, pp. 13-14.

42 *Submission 4*, pp. 14-15.

43 Department of Immigration and Border Protection, Response to the Law Council of Australia's submission to the Senate Legal and Constitutional Affairs Committee in relation to the Migration Amendment (Visa Revalidation and Other Measures) Bill 2016 (Attachment A), [p. 3].

44 *Submission 4*, pp. 12-13.

- a bridging visa ceases because the holder has another type of visa come into effect; or
- the holder of a visa valid for a particular period or date leaves Australia after that period or date.

2.47 The Explanatory Memorandum further outlines examples in which amendments introduced by proposed 82A would apply, as well as the policy intention of these legislative changes:

A common example of where this may occur is in the case of a bridging visa that has been granted to a person in association with an undecided application for another substantive visa, where a non-citizen might travel offshore and return to Australia whilst holding a different substantive visa.

The policy intention is that the bridging visa that is out of effect should continue to be held by the person, so that if a decision has not been made on the undecided application when the person's substantive visa ceases following their return to Australia, the bridging visa will come into effect to maintain the person's lawful status until a decision is made on the outstanding application.⁴⁵

2.48 Submitters raised no concerns specifically addressing provisions contained in Schedule 2 of the bill.

Schedule 3 – Contactless immigration clearance

2.49 The department set out the advantages of contactless technology in enhancing the use of SmartGates in immigration processes:

These immigration clearance measures amend the Migration Act to enable the use of 'contactless' technology to clear travellers through the automated immigration clearance system, SmartGate, which is an authorised clearance authority under the Migration Act. Contactless technology is an enhancement to SmartGates at both departure and arrival, and uses leading edge technology to confirm a traveller's identity, removing the SmartGate's reliance on document based checks to confirm identity.⁴⁶

2.50 The department emphasised that the use of SmartGates was voluntary, and that individuals could choose to be processed by an immigration officer.⁴⁷ Moreover, the department highlighted both the security and economic benefits of the improvement of automated immigration clearance systems:

With increased automation, Australian Border Force resources can be diverted from manual processing tasks to focus on managing border threats and minimising vulnerabilities. This enhancement provides stronger

45 Explanatory Memorandum, p. 37.

46 *Submission 2*, p. 5.

47 *Submission 2*, p. 5.

security measures and contributes to the economic development of Australia through faster and more efficient traveller facilitation.⁴⁸

2.51 No concerns about Schedule 3 were raised by submitters to the inquiry.

Committee view

2.52 The committee is satisfied that the provisions of the bill would achieve the stated goals of supporting the trial of 10-year multiple entry visas for Chinese nationals wishing to visit Australia for tourism and business purposes.

2.53 Tourism is one of Australia's largest sectors, contributing around \$120 billion to our national economy. Within this, China is Australia's largest source of tourists, who contribute over \$5 billion to the Australian economy annually.⁴⁹

2.54 Expediting visas for Chinese visitors will clearly deliver benefits for the tourism industry in the future, and through this contribute substantially to the Australian economy more generally.⁵⁰

2.55 The committee understands that the bill's proposed provisions would also assist in streamlining the Australian immigration system, which faces significant challenges in the near future, exemplified by forecasts that suggest there will be a 25 per cent increase to the number of visitors to Australia over the next four years.

2.56 Given this, the committee considers that the bill will go some way to making it more convenient for many visa holders to enter Australia, as well as reducing red tape and costs for the Commonwealth.

2.57 The committee understands that concerns have been raised by submitters to the inquiry about the visa revalidation system introduced by the bill. Additionally, the committee has considered evidence that argues the bill does not include robust mechanisms to ensure that determinations made by the minister are subject to appropriate scrutiny and accountability.

2.58 However, the committee is satisfied that the proposed measures are necessary and justified, and will lead to good outcomes for both the integrity of the Australian immigration system and the national economy.

2.59 The committee notes that any decision made by the minister to make determinations for certain classes of visa holders to be subject to public interest revalidation checks requires that the minister table a statement in both Houses of Parliament justifying the decision. This provision would ensure that decisions made by the Minister are subject to appropriate scrutiny by Parliament.

48 *Submission 2*, p. 5.

49 The Hon Malcolm Turnbull MP, Prime Minister, *Remarks at the 16th Annual Tourism and Transport Forum Leadership Summit*, 23 November 2016.

50 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, The Hon Andrew Robb MP, Minister for Trade and Investment, and Senator the Hon Michaela Cash, Assistant Minister for Immigration and Border Protection, *Joint Media Release – New Pilot Visa to Boost Australian Tourism*, 17 June 2015.

2.60 The committee encourages government to consider that public interest revalidation checks made by the Minister be subject to disallowance by the Senate.

Recommendation 1

2.61 The committee recommends that the Senate pass the bill.

Senator the Hon Ian Macdonald

Chair

Dissenting report by the Australian Greens

1.1 The Australian Greens have serious concerns with the proposed Migration Amendment (Visa Revalidation and Other Measures) Bill 2016 (the bill), and so consider that the bill should not be passed by the Senate.

1.2 The Explanatory Memorandum claims the bill will amend the *Migration Act 1958* (Migration Act) to support the new 10-year multiple entry Visitor visa for Chinese nationals, which is scheduled to be trialled from December 2016.¹

1.3 However, the amendments contain significant changes to the Migration Act that could affect all visas offered by the Commonwealth. Most troublingly, this could make all Australian visas—no matter whether temporary or permanent—subject to the unchecked discretionary powers of the Minister for Immigration (the Minister).

1.4 The Greens endorse the findings of the Law Council's submission, which were underpinned by the conviction that:

The Bill appears to be neither necessary nor proportionate to its intended objective, in that it has the potential to apply to all classes of visas, not just the proposed longer validity visitor visa.²

1.5 The Greens also agree with some submitters that the proposed visa has not been adequately set out by the government, even though its pilot program is imminent. This makes it difficult to assess the need for or nature of the amendments made by the bill. As the Law Council noted:

...the visa referred to in the Explanatory Memorandum does not currently exist, and there are no details as to the criteria which must be satisfied for that visa, or the conditions which may or must be imposed. The Law Council is of the view that without this information, the breadth of the power conferred by Schedule 1 of the Bill cannot be fully appreciated.³

1.6 It is clear that the bill, should it be enacted, would grant an unprecedentedly broad range of discretionary powers to the Minister, without government having sufficiently explained their intended purpose or defining key terms. The bill places no limits on or definition of what types of 'prescribed visas' the Minister can subject to a 'public interest revalidation check'.⁴ As highlighted by the main committee report, the term 'public interest' remains undefined by the bill, as well as the broader Migration

1 *Explanatory Memorandum*, p. 21.

2 *Submission 4*, pp. 8-9.

3 *Submission 4*, p. 12.

4 Law Council of Australia, *Submission 4*, p. 7; ANU College Of Migration Law, *Submission 6*, p. 2;

Act and supporting regulations. The term 'revalidation check' itself is also undefined.⁵ Lastly, the bill insufficiently defines 'adverse information', which provides too much discretionary power to the Minister to determine the type of information used to assess visa holders undergoing revalidation checks.⁶

1.7 The extent of Ministerial discretion, combined with the unsatisfactory definitions of key terms, means the Minister could potentially use the bill's amendments to unfairly discriminate against a large number of visa holders lawfully living in Australia, both on temporary and permanent visas.

1.8 The Australian Greens reject the lack of scrutiny that could be applied to decisions made under the provisions of the bill, particularly to require certain classes of persons to submit to revalidation checks. In this, the Minister could make legislative instruments that are not subject to disallowance by the Parliament, even if they have to be tabled in both houses. This could potentially mean the Senate is unable to scrutinise far-reaching decisions that could affect all persons residing in Australia as temporary or permanent residents.⁷

1.9 The Australian Greens share the Kaldor Centre's concerns that the bill has the potential to adversely affect refugees through the unchecked powers it confers on the Minister. We also find it troubling that the bill contains no assurances that a person who fails a revalidation check would have access to appropriate reviews of the determination and fairness of the assessment process.⁸

1.10 Lastly, we concur with the Law Council, which provided a comprehensive outline of the existing powers under the Migration Act that are adequate to oversee the trial of the new 10-year multiple entry visa for Chinese nationals.⁹

Conclusion

1.11 The Australian Greens find that the bill would unreasonably extend the Minister's discretionary powers, and that key terms in the legislation are not sufficiently defined.

1.12 Moreover, we note that the Explanatory Memorandum claims this legislation is being introduced to support the trial of new 10-year Visitor visas for Chinese nationals. However, this claim cannot be sustained, given the provisions of the bill

5 Migration Institute of Australia, *Submission 3*, p. 2; Law Council of Australia, *Submission 4*, p. 9.

6 Kaldor Centre, *Submission 1*, p. 2.

7 Migration Institute of Australia, *Submission 3*, p. 3; Law Council of Australia, *Submission 4*, p. 9.

8 Kaldor Centre, *Submission 1*, pp. 2-3; *Civil Liberties Australia*, pp. 1-2.

9 *Submission 4*, pp. 13-14.

could be applied, if enacted, to require the holder of *any* Australian visa to undergo a revalidation check.

1.13 Regarding this visa, the Australian Greens consider there is already sufficient provision in the Migration Act to ensure its trial, beginning in December 2016, does not compromise the Australian visa system.

Recommendation 1

1.14 The Australian Greens recommend that the bill be rejected by the Senate.

Senator Nick McKim

Australian Greens

Appendix 1

Public Submissions

| Submission Number | Submitter |
|--------------------------|---|
| 1 | Kaldor Centre |
| 2 | Department of Immigration and Border Protection |
| 3 | Migration Institute of Australia (MIA) |
| 4 | Law Council of Australia |
| | a) Response to Law Council Submission by DIBP |
| 5 | Civil Liberties Australia |
| 6 | Australian National University College of Law Migration Law Program |

