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TO: **The Hon Ian Macdonald**
Chairperson
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

3 November 2014

Dear Mr Macdonald,

Migration Amendment (Character and General Visa Cancellation) Bill 2014

The Law Institute of Victoria (LIV) welcomes the opportunity to provide comment on the Migration Amendment (Character and General Visa Cancellation) Bill 2014. The LIV is grateful for the extension that was granted to 3 November 2014.

Please find attached our submission.

Yours sincerely,

Katie Miller
President (Acting)
Law Institute of Victoria

LAW INSTITUTE VICTORIA

Migration Amendment (Character Test and General Visa Cancellation) Bill 2014

SUBMISSION TO THE SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Date: 3 November 2014

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INTRODUCTION

1. The Law Institute of Victoria (LIV) is pleased to provide a submission to the Senate Committee on Legal and Constitutional Affairs on the Migration Amendment (Character and General Visa Cancellation) Bill 2014 (the Bill).
2. The LIV is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 17,000 members. The LIV's Administrative Law and Human Rights Section Migration Law and Refugee Law Reform Committees are made up of legal practitioners experienced in immigration and refugee law, many of whom have extensive experience in the operation of the character test in s 501 of the *Migration Act 1958* (Cth) (Migration Act).

Executive Summary

3. LIV members have expressed concern about a number of the proposed amendments to the character and general cancellation provisions of the Migration Act in the Bill:
   - The proposed amendments will extensively expand the Minister for Immigration and Citizenship's (the Minister) personal powers to cancel or revoke a visa and substantially lower the character test failure threshold.
   - The current provisions in the Migration Act already provide strong and broad cancellation powers and processes sufficient for the Government to protect the Australian community and the proposed amendments are therefore unnecessary and excessive.
   - The proposed amendments in the Bill leave limited room for consideration of merits of individual cases, particularly with regards to the changes involving substantial criminal records. These changes may dramatically affect the human rights and procedural fairness available to a person who falls within this section.
   - Independent evidence and/or research should have been undertaken to justify the changes to the Bill are necessary. No research has been made available publically. The Explanatory Memorandum provides that the amendments aim to limit risk to the Australian community yet these amendments are punitive and disproportionate to the harm that the Bill seeks to avoid. There is little evidence provided of the connection between the conduct which fails the Character test and the risk sought to be mitigated (for example non-citizens found not guilty of a crime but placed in a mental health facility would now fail the character test and it is not clear why they would prove a greater risk to Australian citizens than Australian citizens facing the same situation). The LIV questions whether the limitation of rights and procedural fairness afforded to non-citizens are necessary and proportionate.
   - The proposed changes also fail to recognise that a number of the person(/s) affected by the proposed amendments have resided in Australia for significantly long periods, in many instances from childhood. Many non-citizen residents come from areas in the region such as New Zealand and Fiji who may have little or no connection with their country of citizenship.

- The Bill reduces the protection of Australian permanent residents increasing the reasons (whether or not important to their current visa) which could justify the cancellation of their residency. The proposed changes put non-citizens at a perpetual risk of visa cancellation and confer on the Minister and his delegates a disproportionate amount of power to be exercised at any time at their discretion. In effect permanent residency is no longer permanent.
- The Explanatory Memorandum states that the amendments are intended to better capture visa holders who raise integrity concerns. The scope of the changes detailed above goes beyond this aim and are likely to capture visa holders who:
    - have no integrity concerns and have simply provided incorrect information, or
    - where a cancellation ground has been decided by the Minister personally or a delegate with little basis or without the requisite expert knowledge or opinion.
- The amendments proposed in the Bill could also lead to increased periods of detention as there are often difficulties involved in removing certain person(/s) to their home countries (such as protection visa holders). The proposed amendments may also be in breach of Australia's international obligations and damage Australia's reputation internationally.

4. The LIV urges the Senate Committee on Legal and Constitutional Affairs to recommend that the Bill not be passed in its entirety.

LIV CONCERNS WITH PROPOSED AMENDMENTS – CHARACTER TEST AMENDMENTS

5. Currently under the Migration Act, all non-citizen visa applicants/holders (regardless of mode of arrival and length of stay) must be assessed against the character requirement contained in section 501. Under this provision, a visa may be refused or a non-citizen's visa may be cancelled if they do not satisfy the Minister or the Minister's delegate that they pass the 'character test'.
6. The proposed amendments further expand the already broad scope of the character test and expand the power of the Minister far beyond what is necessary for the Government to achieve its policy objective of '*protecting the Australian Community from the risk of harm by non-citizens'*.
7. The proposed amendments introduced by this Bill that attempt to broaden the power to refuse to grant, or to cancel a visa, on character grounds under section 501 include the following:
    a. Association with an organization (6)(b)
    b. At risk rather than significant risk (6)(d)
    c. Prisoners having no right of appeal who are in prison on 'any' offence and with a subjectively tested 'substantial criminal record' 3A
    d. Abnegation of Ministerial decision to ASIO or an Interpol Notice 6 (g) and (h)

Proposed new section 501(6)(b) - Association

8. The proposed paragraph 501(6)(b) provides that a person will not pass the character test if:

    > The Minister reasonably suspects … a person has been or is a member of a group or organisation or has had or has an association with a group, organisation or person and that the group, organisation or person has been or is involved in criminal conduct … whether or not the person, or another person, has been convicted of an offence.

9. The intention of this amendment is to lower the threshold of evidence required to show a person is a member of a criminal or terrorist organisation, such that a reasonable suspicion that a person is a member of such a criminal association would be sufficient for them to fail the character test. The proposed amendment, as it is currently worded, would allow for a visa cancellation on the basis of a person's association with another person who may **not** have been convicted of any criminal offence but whom the Minister reasonably suspects has been involved in criminal conduct without having to establish whether the non-citizen is aware of this or not.
10. The LIV believes that this provision is unnecessarily broad and would provide the Minister with discretion to cancel the visa of a non-citizen in a range of possible scenarios that does not pose a risk to the Australian community, for example:
    - entering their church where the priest was under investigation for a child sex offence;
    - associating with a family member or friend who was involved in criminal conduct (as was the case with Dr Haneef);

- attending a group viewing of a current television series that has been illegally downloaded (with no convictions); or
- attending a political rally that may have associations with criminal or terrorist organisation or be attended by others with such associations.

11. The proposed provision provides the Minister with a power which has significant consequences (the cancellation of a visa), of broad application, with a very low threshold of satisfaction (reasonable suspicion). It puts non-citizens in an impossible position when engaging with their community: failure to perform full background checks on the people and organisations they are associating with could put them at risk of visa cancellation. This threat would be significantly disruptive to the cohesiveness of our community and poses a greater threat than that which section 501 seeks to remedy.

Proposed new section 501(6)(d) – Risk no longer significant

12. The proposed amendments to paragraph 501(6)(d) lower the threshold from 'significant risk' to 'risk' of the potential of a person engaging in criminal conduct or harassment who represents a danger to the Australian community or 'risks' being involved in activities disruptive to the Australian community.
13. This is an extremely low threshold for an already broad provision. The explanatory memorandum provides that the 'intention is that the level of risk required is more than minimal or trivial likelihood of risk, without requiring the decision maker to prove that it amounts to a significant risk'. Of concern is that the proposed amendment provides no means of certainty or any limit to a quantifiable risk. Any non-citizen could theoretically meet the ordinary meaning of 'risk' - being any possibility or chance and would otherwise be difficult to satisfy the Minister against this threshold. The LIV believes the 'risk' threshold is too broad and unspecific and suggests that the amendment needs to quantify or characterize the nature of the risk required to engage the section.

Proposed new section 501(3A) – No right of appeal and now any offence plus substantial criminal record

14. The proposed new section 501(3A) introduces a new ground for mandatory cancellation without notice, where a person is serving a full time sentence of imprisonment for **any** offence and the Minister is satisfied that the person has a 'substantial criminal record'. This is not a decision that is reviewable by the AAT. Under these new provisions, a person's only recourse in relation to such a decision would be to seek to have the decision revoked. Even if a delegate or the AAT makes a decision to revoke the cancellation of a person's visa, the Minister has an extended power to set aside the revocation decision. The Explanatory Memorandum states:

> The intention of this amendment is that a decision to cancel a person's visa is made before the person is released from prison, to ensure that the non-citizen remains in criminal detention or, if released from criminal custody, in immigration detention while revocation is pursued.

15. The clause appears to have been introduced in order to avoid the rush to cancel a visa before an offender is released from custody. However, it is unclear from the Explanatory Memorandum why

procedural fairness should not be granted in such cases or why the person should remain detained upon completing their sentence whilst awaiting a revocation decision.

16. The LIV has a number of concerns about this proposed section including:

    - The provisions do not specify the time period in which there is a capacity to make submissions on revocation.
    - It is unfair to cancel a visa in circumstances where the visa holder will have limited access to any form of legal representation and may not be afforded the time to prepare a proper response.
    - The proposed section is seeking to introduce legislation that will confer extraordinary power on a Minister to remedy an administrative issue that could be appropriately dealt with in the Department's own processes.
    - The provision denies natural justice which can only be justified where a decision must be made urgently to preserve a position or prevent something happening. This clearly would not be the case when an individual is incarcerated for more than 12 months and a decision could be made earlier in their period of detention.

17. The powers conferred in the proposed section apply to all sentences currently being served. Accordingly, every non-citizen who is serving a sentence of imprisonment of more than 12 months will have their visa cancelled. Their only option is to make representations as to why the cancellation decision should be revoked.

18. The proposed section provides that decisions are substantially immunised from judicial review. As the Minister does not need to 'enter the fray' before cancelling a visa, and need only consider information put to him by the Applicant for non-revocation, the Minister (and any delegate) avoids much of the risk of legal error, and the risk of breaching natural justice obligations. However, as the Minister must give a statement of reasons for a non-revocation decision, any misunderstanding of the law or procedural unfairness may still be able to be corrected but at considerable expense to a person affected if able to obtain legal representation and would also involve a further period of detention.

19. The LIV is of the view that the current provisions allowing for the cancellation of a visa on character grounds pursuant to section 501 are already sufficient to ensure that the visa of a person who poses a real risk of harm to the Australian community can be cancelled before their release from prison and to ensure that they are detained in immigration detention while merits appeals are being conducted. The mandatory cancellation provisions are, in our view, unnecessary to achieve the stated policy intention. They do not allow a decision maker to take into account any matters, other than the visa holder's imprisonment. Further, it is not really possible to predict how this new power might be exercised as it can vary depending on the Minister delegated such power.

Proposed new sub-sections 501(6)(g) and (h) – External body to make decision

20. The proposed expansion of the character test with new subsections 501(6)(g) and (h) is of particular concern. The proposed new paragraph 501(6)(g) provides that a person will not pass the character test where they have been assessed by the Australian Security and Intelligence Agency ('ASIO') as directly or indirectly a risk to 'security' (within the meaning provided for under s 4 of the *Australian Security and Intelligence Organisation Act 1979*). Proposed new paragraph 501(6)(h) provides that a

person will not pass the character test in circumstances where an 'Interpol Notice' has been issued and is in force in relation to the person, 'from which it is reasonable to infer that a person would present a risk to the Australian community.'

21. New paragraph 501(6)(g) is a significant cause of concern in that it defers the Minister's assessment regarding the risk posed by a non-citizen entirely to an external body (being ASIO) without the Minister or non-citizen being permitted to effectively examine the basis for any negative assessment. As it stands, non-citizens have highly circumscribed access to 'natural justice' in relation to the issuance of security assessments by ASIO in the context of visa applications. A non-citizen is not entitled to know the complete basis for, or even contents of, an adverse security assessment issued by ASIO. Security assessments in the context of visa applications are routinely comprised of one or two sparse sentences which do not meaningfully reveal the basis for the assessment. Non-citizens are precluded from seeking review of migration decisions arising from adverse security assessments in the AAT. A limited avenue of review presently exists for non-citizens who have been issued with adverse security clearances and have also been assessed as engaging Australia's protection obligations – in the form of the 'Independent Reviewer of Adverse Security Assessments'. The process offered through the Independent Reviewer has been roundly criticised for being insufficiently independent and circumscribed, in that the Review can only issue 'recommendations' to ASIO and cannot reverse assessments. In any case, the Reviewer is only available to the limited number of persons who engage Australia's protection obligations and not other visa applicants. We also note that the current government has indicated its intention to abolish the Reviewer altogether. In these circumstances, we are concerned about the lack of transparency and effective review of assessments issued by ASIO that will result in a person automatically failing the character test, under new subsection 501(6)(g).

22. As was observed by the High Court in *Plaintiff M47 of 2012 v Director General of Security* [2012] HCA 46, ASIO operates on a vastly expanded definition of 'security' which captures conduct that may not routinely be considered a risk or threat to Australian citizens or the public. For example, the definition of 'security' in 4 of the *ASIO Act* includes 'the carrying out of Australia's responsibilities to any foreign country' in relation to various acts (including espionage, sabotage, politically motivated violence, promotion of communal violence). The High Court observed in *Plaintiff M47* that the *ASIO Act* does not set a threshold of risk that will result in the issuance of an adverse security assessment. The result is that a person may be issued with an adverse security assessment in circumstances where they present a negligible risk of certain conduct – not in Australia, but hypothetically in another country. In this sense, ASIO's definition of 'security' is not necessarily tied to a concrete assessment of actual risk to the Australian community and citizens, which should in fact be the real object of the Minister's powers under s 501 of the *Migration Act.*

23. We are further concerned regarding proposed new subsection 501(6)(h) which provides that a person will be taken not to pass the character test in circumstances where an Interpol notice is in force in relation to that person, and from the notice 'it is reasonable to infer that a person would present a risk to the Australian community.' While the proposed wording of the new subsection implies that the existence of the notice does not in itself mean a person will fail the character test, and further analysis is required as to whether it is possible to infer 'that a person would present a risk to the Australian community', the Explanatory Memorandum paints quite another picture. The terms of the Explanatory Memorandum tend to suggest that the 'inference' that a person poses a risk to security will automatically arise from the issuance of an Interpol notice, stating as follows:

> *The purpose of new paragraphs 501(6)(g) and (h) of the Migration Act is to acknowledge that* ***a person who is the subject of an adverse ASIO assessment or Interpol notice is likely to represent a threat to the security of the Australian community or a segment of that community****. These amendments ensure that a person objectively does not pass the character test if either of these provisions apply to them,*

without the need to further assess them against the subjective criteria in subsection 501(6) of the Migration Act.

24. The unreliability of information contained in Interpol notices has been broadly discussed following the case of Egyptian asylum seeker Sayed Ahmed Abdellatif in 2013. In Mr Abdellatif's case, it was found that an Interpol 'Red Notice' issued in relation to him at the request of the Egyptian government contained baseless information that he had been convicted of 'serious terrorism charges including murder and explosives possession.' Commenting on Mr Abdellatif's case, former Minister for Immigration Brendan O'Connor observed that Interpol notices were 'often wrong' and routinely contained false information, citing notices that had been issued in the past against Australian citizens in error. Interpol's processes for the issuance of 'notices' are largely dependent upon information provided by member states - the organisation undertakes few, if any, procedures to assess the veracity of information provided by member states as the basis for the issuance of a notice. Media reports indicate that Interpol has issued 'red notices' in relation to unfounded or politically motivated charges against nationals of states such as Russia, Belarus, Turkey, Venezuela, Sri Lanka and Indonesia. No independent review or appeal mechanism exists to challenge notices issued by Interpol. A limited internal review mechanism exists in the form a request to the 'Commission for the Control of Interpol's Files' ('CCF'), however the CCF has the power to remove notices only under strictly limited circumstances. In these circumstances, where Interpol's processes for issuing notices have been internationally impugned and are susceptible to abuse for political purposes by member states, such notices cannot provide a sound basis for any finding regarding the 'character test'.

LIV CONCERNS WITH PROPOSED AMENDMENTS – GENERAL VISA CANCELLATION AMENDMENTS

25. The proposed amendments broaden the power in relation to general visa cancellations and to cancel a temporary or permanent protection visa and greatly expand the role of the Minister in these decisions. The Explanatory Memorandum provides limited assessment of the impact of the amendments to general visa cancellation provisions, which is concerning given the potential impact of this section to a greater amount of potential visa holders than s 501.
26. Again the LIV is concerned that the proposed amendments will provide the Minister disproportionate personal decision-making powers in this area.

Proposed new section 116(1)(a) –Change in circumstances

27. The Bill repeals previous paragraph 116(1)(a) and inserts a new paragraph. This section relates to the cancellation of visas where the basis on which the visa was granted no longer exists and the changes broaden the basis for this cancellation significantly, to include any circumstances which *'wholly or partly'* formed the decision to grant the visa. This provides a delegate with a greater scope to use this power to cancel visas which are affected by this provision, and makes it clear that the circumstances need not be the sole reason for the grant of the visa. This new paragraph provide delegates of the Minister with a far reaching**, retrospective** power to determine whether a particular fact or circumstance exists during the period of the visa, and whether the circumstances ever existed or existed at the time of grant of a visa.
28. This provides delegates with a significant scope to make determinations on these factors. In addition, these sections make it very clear that any information, whether or not *wholly or partly* part of the decision-making process, would be relevant. This effectively allows a delegate to revisit a decision to grant a visa at any time. The LIV does not support the introduction of this power, as it undermines the finality of administrative decisions.

Proposed new section 116(1)(e) – Risk to Australian community

29. The Bill also repeals paragraph 116(1)(e) and inserts a new paragraph. The new paragraph provides a delegate of the Minister with the power to cancel a visa where the presence of the non-citizen '***may be, or would or might be'*** a risk to the health, safety or good order of the Australian community, a segment of the Australian community, or an individual or individuals. In comparison, the current section 116(1)(e) requires an assessment of whether a visa holder *'is, or would be* a *risk to the health, safety or good order of the Australian community'.*
30. The changes to section 116(1)(e) are extremely broad, and provide a major discretion to decision makers to make an assessment of the public health risk presented by a visa holder and whether something might happen as a result of the visa holder's presence in Australia. The test has been

reduced to whether the visa holder *'may be, or would or might be'* a risk to the persons specified. These changes allow a visa to be cancelled on the basis of speculation or hypothetical situations which may never eventuate. It is unclear what remedies, if any, would be available to someone whose visa was cancelled on the basis of a false speculation or situation that never eventuated.

31. The amendments proposed to section 116(1)(e) provide that persons who are deemed to be, or may be a risk to the Australian community or an individual could have their visa cancelled by the Minister. This effectively provides for discrimination on the basis of disability or illness in cancellation of a visa, with little medical foundation for a decision being required

32. It also introduces a vast discretion for decision makers to make uninformed medical opinions in relation to visa holders, and whether their condition presents this low level of possible or potential risk to the community. This conceivably adds a second medical criteria, which is not overseen by law (compared to the Public Interest Criteria 4005 and 4007 medical provisions, which are subject to an opinion of the Medical Officer of the Commonwealth and assessed on a financial basis) and which is assessed by decision makers who are not medical professionals and not trained in assessing such a risk.

33. In addition, the introduction of these amendments may act as a disincentive for non-citizens to seek medical treatment, on the basis that they may fear that their visa will be cancelled if the results are adverse.

34. The combination of lower thresholds, broader powers and more limited review introduced by this section significantly increases the risk of decisions made under this section being affected by jurisdictional error, including decisions made for an improper purpose.

Proposed new section 116(1)(1AA) - Identity

35. The Bill introduces new subsection 116(1)(1AA) which provides that the Minister (or a delegate) may cancel a visa if he or she is ***'not satisfied'*** as to the visa holder's identity. This includes where there is any doubt as to the person's identity, based on two or more documents. This section provides further powers for the Minister personally to cancel a visa where the Minister is not satisfied of the visa holder's identity. This is a very low level test, and applies where there is any doubt as to the person's identity, whether or not this is important to the application or presents any specific concern as to the person and their background.

36. Issues of identity are often complex and undergo change for a variety of different reasons. Identities are often defined by the ways in which other people and governments identify individuals and record information about them. Official records can often conflict with what individuals understand their identity to be.

Example
Many cultures have different naming conventions that may not easily fit into standard forms or reflect government documents. In Southern India children are given initials that represent the place of their birth and are given their fathers first name (which is different again for a girl). In this situation they do not technically have a surname and may face some innocent confusion when filling out applications. This information may not be consistent with documents from overseas authorities.

37. These amendments greatly expand the current provisions. The Explanatory Memorandum and the proposed amendment indicate that the identity of the person, or the consequence of the doubt as to their name or identity, do not have to be of material importance to the visa which has been granted. An example of where this may apply is where a person has failed to disclose a previous name by which they have been known, even where this is not of any importance or of a sinister nature, and is simply an oversight.

38. Of further concern, the information relating to identity does not need to be material to the grant of the visa or continued eligibility in relation to the visa. Even if the visa were not cancelled on the basis of the identity provisions under section 116(1)(1AA), this same example could then come within the ambit of section 116(1)(1AB) and the provision of incorrect information.

Proposed new section 116(1)(1AB) – Incorrect information

39. The Bill also inserts new subsection 116(1)(1AB). This new section provides that the Minister may cancel *'a current visa'* if he or she is satisfied that incorrect information was given to an officer, authorised system, the Minster, any other person or Tribunal performing a function or purpose under the Migration Act; and that incorrect information was taken into account or in connection with a decision that enabled the person to make a valid visa application or a decision to grant a visa to that person.

40. This section is extremely broad in its application, and provides that any visa holder who has provided any form of incorrect information in the course of a visa application or a previous visa application could face cancellation of their current visa.

41. The proposed new section does not specify that the incorrect information has to be material to the visa applied for or granted. It appears that it only needs to have been *'taken into account'* which arguably could include unsubstantial and clerical mistakes and is unnecessarily broad.

42. This section could potentially cover a situation where incorrect information, whether important or not to the grant of the visa, has been provided to a third party organisation for an entirely different purpose than that relevant to the visa applicant. The scope of organisations to whom incorrect information can be provided to enliven this new section is concerning. This could include any organisation performing a function under the Act, for example Centrelink, the Australian Federal Police, Medicare and/or skill assessing authorities. It is open to interpretation where no specific definition of what organisations would actually be deemed is noted in the legislation. The LIV recommends this should be specified, as the current broad scope of the legislation provides little certainty to visa holders or delegates as to what is considered to be covered.

43. Also of concern is the fact that this section applies retrospectively. This section can be used to cancel a current visa held by an applicant where the information was provided in relation to any other visa or other application made in the past. This affects information *'which enabled the person to make a valid **application** for a visa'* as well as a decision to grant a visa. The fact that this applies to applications which may have been withdrawn is highly concerning, and effectively prevents applicants from rectifying an application where incorrect information may have been inadvertently provided, or provided by a third party who is culpable for the error.

44. This allows for past visa information to be used in a current application, whether or not the information is relevant to the present visa which is held by the applicant. This has significant implications. For example, cancellation would be possible for a visa holder who holds a 457 visa granted on the basis of correct information who has, in the past, withdrawn a 485 visa application

lodged on his or her behalf by a migration agent where the migration agent, as a result of their negligence or mistake, provided incorrect information.

45. Punishing a visa holder in this way, for an issue which has no bearing on their eligibility for the current visa which is held, is unfair and unreasonable. It also does not allow for a person to get any benefit from withdrawing an application.

Proposed new section 117(1) – Permanent resident

46. The Bill amends section 117(1) to provide that a permanent residence visa can be cancelled by the Minister using their personal power under sections 116(1AA) or (1AB) (discussed above).This is a major legislative change, and provides an extremely far reaching power to the Minister to cancel a permanent residence visa held by an applicant where incorrect information has been provided or where the identity of the person is not satisfactory.

New section 133A – Minister's personal powers to cancel visas on section 109 grounds

47. The Bill inserts a new subdivision, Subdivision FA which includes ss 133A-133F (discussed below).

48. New section 133A introduces a personal power for the Minister to cancel a visa on section 109 grounds. This provides the Minister with the power to cancel a visa where notice has been given under section 107 in relation to a ground of cancellation under section 109 if the Minister is satisfied the ground for cancellation exists and that it would be in the public interest to cancel the visa. No discretion is referred to in relation to this power and it is not subject to natural justice procedures referred to under Subdivision C of the Act. It also allows the Minister to make a decision that the grounds exist even where a Tribunal has determined that the ground does not exist or where discretion not to cancel the visa has been exercised. Sections 133A(7) and (8) provides that the power in 133A(1) or (3) is exercisable by the Minister personally, and that the Minister does not have a duty to consider whether or not to exercise the power.

49. The introduction of Section 133A provides further powers solely for the Minister to cancel a visa on section 109 grounds (grounds for cancellation under this section are non-compliance with any of sections 101-105) despite any alternate ruling or decision made by a delegate or Tribunal as to whether the ground for cancellation existed and/or whether discretion not to cancel the visa was exercised. The Bill fails to outline how these changes will work in practice and whether the Minister will be able to manage these decisions individually.

50. This provides non-citizens with no certainty as to their circumstances, and reduces the rights of the visa holders to procedural fairness and the right of response. This section simply requires the Minister to believe that the decision to cancel the visa, despite any merits review process or previous decision is in the "public interest" and that he or she is personally satisfied that the ground for canceling the visa exists. This provides an unfettered discretion on the part of the Minster to make a value judgement as to whether grounds for cancellation exist, despite any prior decision made to this effect. This section also draws upon the concept of the public interest, which is not defined and is difficult to independently review.

51. Section 133A is not subject to natural justice principles. Cancellation could therefore occur without warning and without a right of reply prior to the action of cancellation. This is concerning from a procedural fairness standpoint. The power of the Minister to cancel a visa without providing an opportunity to respond, and on the basis of third party information, means that a visa holder could be placed in a position where they are granted a Bridging Visa E immediately after a determination has been made with no warning.
52. This is an unnecessarily punitive approach, and deprives a large number of potential visa holders with any right of response or consideration of their options following a threatened cancellation. The Minister has a choice to provide a right of response to the visa holder after cancellation has occurred, however this does not provide substantive procedural fairness as the decision has already been made and occurs after the fact. In addition, this requires applicants to hold a Bridging Visa E whilst in the community, which could affect future options and attract the three year bar in PIC 4014.
53. There seems to be little justification or examples of why the Minister should have this power to cancel a visa in these circumstances. This does not provide any real or perceived benefit to the Australian community if the visa holder remains in the community with a Bridging Visa E whilst the response is considered. It simply punishes a visa holder without notice, deprives work, travel and study rights, and makes their situation uncertain.

New section 133B – All information relevant & retrospective

54. New section 133B confirms the scope of the information intended to be considered by the Minister when determining whether non-compliance has occurred, and clarifies that any information, whether deliberate or inadvertent, is still covered by section 133A. This is entirely punitive, and makes it clear that the intention of this legislation is to punish visa holders, regardless of the effect of the information provided on the Australian community or on the visa application. This provides no room for honest mistakes or oversights to be made by visa applicants or by migration agents, which is an extremely large burden to bear in lodging a visa application. It also would seem to penalise those who may have been affected by negligent or fraudulent migration agents.
55. Section 113B(1) is highly concerning in its retrospective application, particularly in relation to visas which have previously been held by a non-citizen in addition to non-compliances with any present visa conditions.

New section 133D – Time frame for visa cancellations

56. New section 133D prescribes a specific time frame for visa holders to respond to visa cancellation or notice of visa cancellation, and that any information received after the specified time is not required to be considered by the Minister. This seems to conflict with other sections within the Act that allow for procedural fairness, such as 57 of the Migration Act which provides that any information provided prior to a decision being made must be taken into account for the purposes of an application. As a result, visa holders will receive less procedural fairness in cancellations provisions than in applications. To avoid the application of this section, the Minister may seek to cancel visas and then provide an opportunity of respond, which is highly punitive as detailed above. It also leaves little time for lawyers to properly assist given the timeframes or for potential persons affected by this to seek proper legal advice.

New section 133E – Right of response only after cancellation

57. The right of response under section 133E may only be exercised once the cancellation has occurred. If a family is in immigration detention by this time, their ability to exercise their human rights will be dramatically impacted.

58. If a Bridging Visa E is granted, this affects the visa holder's future options to return (given that a 3 year re-entry bar will apply if the Bridging Visa E is held for 28 days or more) as well as deprive the applicant and any family members of the ability to work, study or travel. This has particular implications for dependent children of school age. Also at present, a person is eligible to be granted a Bridging Visa E if their visa has been cancelled under section 116, however no mention has been made of amendments to the Bridging Visa E clauses to reflect the new sections introduced in this Bill. This indicates people in these circumstances may find themselves in detention.

59. Recommendation

The LIV questions whether the loss of rights and procedural fairness afforded to non-citizens as a result of this proposed Bill is in Australia's interest and urges the Senate Committee on Legal and Constitutional Affairs to recommend that the Bill not be passed in its entirety.