



Refugee Council of Australia

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

MIGRATION AMENDMENT (CHARACTER AND GENERAL VISA CANCELLATION) BILL 2014

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing over 200 organisations and around 1,000 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback on the *Migration Amendment (Character and General Visa Cancellation) Bill 2014*. We have a number of concerns regarding the potential impacts of this legislation on refugee and humanitarian entrants. In particular, we believe that the Bill would allow visas to be cancelled unjustly or unnecessarily, potentially resulting in prolonged indefinite detention; provide the Minister with an inappropriate level of discretion to refuse or cancel visas and overturn decisions of tribunals; and permit sharing of sensitive information without due regard for privacy concerns. We also question the need for the proposed changes given that the Minister already has considerable existing powers to cancel visas under the *Migration Act 1958*.

1. Risk of indefinite detention

- 1.1. RCOA's primary concern relating to this Bill is that the introduction of broader visa cancellation powers could result in prolonged indefinite detention. This is a particularly significant risk for individuals towards whom Australia has protection obligations because, unlike other individuals to whom the broadened cancellation powers could apply, they cannot be removed from Australia due to the risk that they may face persecution or other forms of serious harm in their country of origin. Should their visa be cancelled, they may face indefinite detention with no prospect of release in the foreseeable future. Stateless people are also at particularly high risk of prolonged indefinite detention in these circumstances due to the fact that they are not recognised as nationals by any country and therefore cannot be repatriated, even voluntarily.
- 1.2. While the Statement of Compatibility with Human Rights accompanying this Bill notes that mechanisms exist to prevent indefinite and arbitrary detention of people whose visas may be cancelled under this legislation, RCOA believes that these mechanisms are inadequate. Due to the lack of a legislative time limit on immigration detention, the absence of a regular system of judicial oversight and the limited grounds on which detained individuals can challenge the lawfulness of their detention, there are few avenues through which people facing indefinite detention can seek to be released.
- 1.3. For example, refugees who have received adverse security assessments or who have had their visas cancelled or refused on character grounds have no avenues for release from detention. Some of these individuals have now been detained for in excess of four years and are expected to remain in detention for the foreseeable future. This situation has had a devastating impact on the mental health and wellbeing of the individuals concerned. In 2013, the ongoing detention of these refugees was found by the United Nations Human Rights Committee to be in breach of Australia's obligations under Articles 7 and 9 of the International Covenant on Civil and Political

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Rights (prohibiting cruel, inhuman and degrading treatment and arbitrary detention respectively). Clearly, existing mechanisms designed to prevent indefinite and arbitrary detention have been ineffective in the case of these refugees.

- 1.4. RCOA is concerned that the broadened cancellation powers – which, as discussed in further detail below, do not allow for adequate review in all cases and permit visa cancellation in circumstances where an individual may not actually present a risk to the community – could result in further cases of refugees facing prolonged indefinite detention with no prospect of release, in violation of Australia’s international human rights obligations. We believe it is imperative that the expansion of visa cancellation powers be coupled with effective mechanisms to mitigate the risk of prolonged indefinite detention. In the absence of such mechanisms, we do not believe that the Bill strikes an appropriate balance between managing potential risks to the community and preventing arbitrary detention.

2. Introduction of new mandatory cancellation powers

- 2.1. It is RCOA’s position that legislative provisions on visa cancellation should allow for flexibility in decision-making so as to mitigate the risk of prolonged indefinite detention and ensure that cancellation powers are exercised only in cases where an individual presents a genuine risk. We are therefore concerned by the introduction of new mandatory cancellation powers in certain circumstances.
- 2.2. While we acknowledge that these new powers will apply only in limited circumstances, the fact that they are mandatory will inevitably limit flexibility in decision-making. In addition, as the new powers permit visa cancellation without notice being given to the visa holder and do not allow the visa holder to seek merits review if the powers are exercised by the Minister personally, there is a risk that visa holders subject to mandatory cancellation may not be accorded procedural fairness.
- 2.3. The Explanatory Memorandum accompanying this Bill states that the purpose of these mandatory powers is to ensure that a person who may pose a risk to the community can remain in detention. However, as the Minister already has significant cancellation powers under the existing provisions of the *Migration Act* – which have already been considerably expanded in recent times through the *Migration Amendment (Strengthening the Character Test and Other Provisions) Act 2011* – RCOA questions whether there is any need to introduce mandatory powers given their potentially negative consequences. Unless there is compelling evidence demonstrating that existing powers are inadequate to mitigate risks to the community and that other options for managing such cases in a more flexible manner would be insufficient, RCOA is of the view that mandatory powers should not be introduced.

Recommendation 1

RCOA recommends that the provisions of the Bill relating to the introduction of mandatory cancellation powers not be passed.

3. Lowering of thresholds for cancellations

- 3.1. RCOA is troubled by a number of provisions of the Bill which seek to lower the thresholds for visa cancellation, potentially allowing for visas to be cancelled in circumstances where an individual may not actually present a risk to the community. In our view, these powers are too broad and the safeguards too limited to prevent visas being cancelled unjustly or unnecessarily.
- 3.2. For example, the proposed amendments to Section 501(6) of the *Migration Act* would permit visa cancellation in circumstances where an individual has, or is believed to have, some kind of association with a group, organisation or person who has been or may have been involved in criminal conduct – regardless of whether the individual had been involved in such conduct themselves or was aware that their associate had been so involved. Indeed, the Explanatory Memorandum clearly states that “there is no requirement that there be a demonstration of

special knowledge of, or participation in, the suspected criminal conduct by the visa applicant or visa holder”.

- 3.3. RCOA believes that this would be highly problematic. The case of Dr Mohamed Haneef clearly demonstrated the hazards of making inferences about a person’s character based on their perceived associations with others. In addition, individuals fleeing from situations of persecution, conflict or insecurity or from areas controlled by non-state armed groups may inadvertently and through no fault of their own come to have an association with a person or group that has been involved in criminal activity, which under the proposed amendments would render them liable for visa cancellation.
- 3.4. The amendments to this Section of the Act would also permit visa cancellation in circumstances where the Minister “reasonably suspects” an individual has been involved in criminal activity or has an association with someone who has been involved in criminal activity. In effect, these amendments would allow visas to be cancelled on the basis of suspicion alone, regardless of whether the person has been charged or convicted with an offence or whether any evidence exists to suggest that they have been involved in criminal conduct or have an association with someone who has.
- 3.5. In addition, there is potential for the expanded powers to be inappropriately applied to individuals who do not pose a genuine or significant risk to the community. Indeed, the amendments to Section 501(6)(d) of the Act specifically remove the requirement that the risk to community safety must be “significant” in order for the person’s visa to be cancelled. While the Explanatory Memorandum states that “the intention is that the level of risk required is more than a minimal or trivial likelihood of risk”, the legislation itself imposes no such requirements.
- 3.6. Similar concerns arise in relation to lowering the threshold for determining whether a person who has been sentenced to multiple prison terms has a “substantial criminal record” from two years to 12 months of cumulative imprisonment. In practice, these amendments could see individuals who have been convicted of minor, non-violent crimes and who do not pose any significant risk to community safety facing indefinite immigration detention.
- 3.7. RCOA also has specific concerns relating to the inclusion of involvement in people smuggling offences in the criteria for visa cancellation under the expanded powers. The amendments to Australia’s people smuggling legislation made through the *Anti-People Smuggling and Other Measures Act 2010* significantly broadened the scope of people smuggling offences in Australia, to the point of criminalising acts which are humanitarian in nature and which lack any criminal intent. As such, we are concerned that the Bill would permit visa cancellation in circumstances where a person has acted without criminal intent.
- 3.8. For example, the crime of supporting the offence of people smuggling under Section 233D of the *Migration Act* could apply to a person in Australia who sends money to a relative overseas to enable them to purchase fake travel documents so as to escape from a dangerous situation. It could also apply to a person who sends money to relatives overseas which is then paid to a smuggler, even if they had intended the money to be used for an entirely different purpose (such as to meet basic living costs) and were not aware that it would be used to facilitate people smuggling. Under the expanded cancellation powers, these people could have their visas cancelled on the grounds that they had committed a people smuggling offence.
- 3.9. RCOA acknowledges that the people smuggling offences introduced in 2010 may not have been intended to apply to individuals in the circumstances such as those described above. Regardless of their intention, however, these provisions were drafted in a manner which was simply too broad to prevent their being applied unjustly or unnecessarily – a shortcoming which, in RCOA’s view, equally applies to some provisions of this Bill. Given the serious consequences which can stem from visa cancellation (as outlined in Part 1 of this submission), RCOA believes that the thresholds for cancellation must be set at a level sufficient to ensure that they apply only to individuals who pose a genuine and significant risk.

Recommendation 2

RCOA recommends that provisions relating to thresholds for visa refusal or cancellation should require that the individual concerned poses a genuine and significant risk.

4. New cancellation powers under Sections 109 and 116

- 4.1. RCOA is concerned by the introduction of personal ministerial powers to cancel visas under Sections 109 and 116 of the *Migration Act*. The Statement of Compatibility with Human Rights accompanying this Bill states that the Minister's new personal powers are intended to be used in "limited situations where there is a clear public interest requirement and where there is a justifiable reason to limit access to merits review in the public interest". In the Bill itself, however, the criteria for the exercise of these powers are very broad, requiring only that the Minister be satisfied that grounds for cancellation exist and that cancellation would be in the "public interest".
- 4.2. Of particular concern are amendments which expand the Minister's powers to cancel visas in cases where a visa holder provides incorrect information. These powers extend not only to statutory visa application processes but also to non-statutory processes such as entry interviews and non-statutory refugee status assessments. As stated in the Explanatory Memorandum, these amendments are based on the expectation that "non-citizens provide correct information during all of their transactions with the department, and are honest and truthful at all times". In the case of people fleeing persecution, however, the provision of incorrect information may not necessarily indicate dishonesty but instead may be a reflection of their vulnerable situation and difficulties they often face in articulating their protection needs.
- 4.3. It often takes time for asylum seekers to develop trust in decision-makers to the point that they feel comfortable divulging their stories. For example, survivors of sexual violence and other forms of torture and trauma often find it difficult and distressing to recount their experiences and may not initially reveal all information relevant to their claims due to feelings of shame or fear. In other cases, asylum seekers may unintentionally provide incorrect information, or fail to provide relevant information, due to mental health issues, the impacts of trauma, language barriers and lack of understanding of Australia's immigration processes and systems. Under the proposed amendments, individuals in these circumstances could have their visas cancelled without access to merits review, despite the fact that they did not intend to provide misleading information and may have compelling claims for protection.
- 4.4. The Explanatory Memorandum asserts that the introduction of these new personal powers is necessary to provide the Minister with the means to cancel visas in circumstances which necessitate quick and decisive action. However, RCOA questions whether the Minister's considerable existing cancellation powers are insufficient to allow for quick and decisive decision-making in these circumstances. Unless clear evidence can be presented demonstrating the need for the new powers, RCOA is of the view that they should not be introduced.

Recommendation 3

RCOA recommends that the provisions of the Bill relating to the introduction of personal ministerial powers to cancel visas under Sections 109 and 116 of the Migration Act 1958 not be passed.

5. Review of decisions

- 5.1. RCOA is troubled by proposed provisions allowing the Minister to set aside and substitute decisions of review tribunals relating to visa cancellations. The criteria for the exercise of these personal powers are again very broad, relying on the Minister's personal assessment of an individual case and an undefined "national interest" test rather than objective evidence. RCOA believes that these provisions would grant the Minister an inappropriate level of discretion in overturning the findings of review tribunals and would thereby significantly undermine the rule of law and the purpose of independent merits review.

- 5.2. Similar concerns arise in relation to the provisions introducing personal ministerial powers to cancel visas under Sections 109 and 116 of the *Migration Act*. As decisions to cancel visas through the exercise of personal powers are not merits reviewable, the broad application of these personal powers (as discussed in Part 4 of this submission) is of particular concern. While the proposed amendments do allow the person subject to visa cancellation to make representations to the Minister about revocation of the decision, we do not believe that this provides an adequate substitute for independent merits review.
- 5.3. Finally, RCOA wishes to note that the existing limitations in the *Migration Act* on access to merits review in cases where the Minister exercises personal powers were developed in the context of a narrower range of cancellation powers. For example, the Minister's personal powers to refuse or cancel visas on national interest grounds under Section 501(3) of the *Act* rely on the character test criteria – which, as noted in Part 3 of this submission, would be significantly broadened by this Bill. As such, we believe that the existing limitations on review may be need to be revised in light of the new provisions. Consequently, as the new personal powers introduced by this Bill use the restrictions associated with existing personal powers as their benchmark, limitations on review under the new powers may also require reconsideration.

Recommendation 4

RCOA recommends that:

- *Decisions to refuse or cancel visas should, in general, be subject to independent merits review; and*
- *Existing limitations on review in cases where the Minister exercises personal powers to refuse or cancel a visa should be reconsidered in light of the new provisions introduced by this Bill.*

6. Privacy concerns regarding sharing of information

- 6.1. RCOA believes that further clarification is needed as to the operation of new provisions on disclosure of information by State and Territory agencies to the Minister. The Statement of Compatibility with Human Rights claims that these provisions are necessary due to the “lack of uniformity in the privacy legislation of the Commonwealth and the States and Territories”. However, neither the Bill nor the Explanatory Memorandum provides sufficient information as to how privacy will be protected under the new provisions.
- 6.2. Privacy and confidentiality are of critical importance to people fleeing persecution. For these individuals, the revelation of information about their whereabouts and activities in Australia could place not only them, but also family members and friends still living in their country of origin, at serious risk. As such, it is all the more important their personal information is used, disseminated and stored with sufficient regard for confidentiality.
- 6.3. Under the proposed amendments, however, it is not clear how the information obtained from State and Territory agencies will be used by the Minister and other decision-makers, with whom it will be shared, how (and for how long) it will be stored and what oversight or reporting requirements will be in place to protect privacy and safeguard against misuse of the information. Moreover, the amendments clearly stipulate that State and Territory agencies are not excused from complying with requests for information from the Minister on the grounds that doing so would contravene privacy laws.
- 6.4. Given the potential risks associated with inappropriate disclosure of sensitive personal information, RCOA is of the view that no new mechanisms should be introduced for obtaining information about visa holders or applicants unless they are accompanied by a clear legislative framework regulating the use of information.

Recommendation 5

RCOA recommends that provisions of the Bill relating to information sharing with State and Territory agencies be expanded to include a clear regulatory framework governing the use, dissemination and storage of the information shared.