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Ms Sophie Dunstone
Committee Secretary
Senate Standing Committees on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Ms Dunstone

Submission – Character and General Visa Cancellation Bill 2014

The Asylum Seeker Resource Centre (ASRC) thanks the Legal and Constitutional Affairs Legislation Committee (the Committee) for the ability to make a submission to the parliamentary Inquiry into the **Migration Character and General Visa Cancellation Bill 2014 (the Bill)**.

The ASRC is concerned about a number of the proposed amendments to the character and general cancellation provisions of the Migration Act in the Bill.

The amendments will significantly increase the Minister's personal powers to cancel or refuse to grant visas, giving him powers to override decisions made by independent review bodies. Further, these amendments significantly lower the character test threshold and increase a range of situations where visas may be cancelled for minor reasons.

In the context of asylum seekers and refugees, these proposed amendments have particularly grave consequences, as a personal decision by the Minister may find that individual in either indefinite detention or returned to face persecution.

The ASRC opposes the Bill in its entirety and recommends that the bill not be passed.

Please find following the ASRC's submission to the Inquiry. The ASRC also endorses the submission of the Refugee Council of Australia (RCOA).

Thank you for the opportunity to participate in this important inquiry.

Kon Karapanagiotidis OAM, CEO

Background

The Asylum Seeker Resource Centre (ASRC) protects and upholds the human rights, wellbeing and dignity of asylum seekers. We are the largest provider of aid, advocacy and health services for asylum seekers in Australia. Most importantly, at times of despair and hopelessness, we offer comfort, friendship, hope and respite.

We are an independent, registered non-governmental agency and we do not receive any direct program funding from the Australian Government. We rely on community donations and philanthropy for 95 per cent of our funding. We employ just 53 staff and rely on over 1000 dedicated volunteers. We deliver services to over 1,500 asylum seekers at any one time.

Our submission is based on 13 years of experience working with asylum seekers in Victoria.

The proposed amendments

The ASRC is concerned about a number of the proposed amendments to the character and general cancellation provisions of the Migration Act in the Bill. The amendments will significantly increase the Minister's personal powers to cancel or refuse to grant visas, giving him powers to override decisions made by independent review bodies. Further, these amendments significantly lower the character test threshold and increase a range of situations where visas may be cancelled for unacceptably minor reasons.

In the context of asylum seekers and refugees, these proposed amendments have particularly grave consequences, as a personal decision by the Minister or a decision based on minimal evidence of even suspicion can result in an individual facing either indefinite detention or returned to face persecution.

The current suite of cancellation and refusal powers in the Migration Act more than adequately protect the security of the Australian community.

This Bill seeks to significantly and unnecessarily expand these powers and will lead to decision making that is not bound by the rule of law and which lacks transparency and accountability. Such an erosion of appropriate checks and balances is a concern to the community.

Further, these powers are likely to lead to a climate of fear and suspicion in communities, as little is required by way of substantiating many of the extended cancellation and refusal powers. Most concerning, these changes will lead to the indefinite detention of refugees or their return to serious harm or death.

The ASRC strongly opposes the Bill in its entirety and recommends the bill not be passed.

Key issues

- Ministerial powers increased without proper procedural safeguards
- Association test threshold lowered, so innocent associations can result in cancellation
- 'Identity' cancellation power introduced, disproportionately affecting asylum seekers
- 'Incorrect information' cancellation power introduced, disproportionately affecting asylum seekers
- 'Change in circumstances' cancellation power introduced, disproportionately affecting asylum seekers
- Unnecessary and unduly harsh lowering of the character test threshold
- Significant risk of decisions resulting in indefinite detention or breach of Australia's non-refoulement obligations

1. Ministerial powers increased without proper procedural safeguards

The Bill introduces a significant new personal power for the Minister to override a decision of a delegate of the Minister or the Administrative Appeals Tribunal (AAT)¹ and cancel a visa if the Minister considers a range of situations to have occurred.

The powers introduced are alarming and the ASRC believes that in a democracy no individual should hold as much as power as this Bill proposes the Minister for Immigration and Border Protection (DIBP) to hold.

These powers puts the Minister's decisions beyond the reach of the courts and requires limited or no procedural fairness to be afforded to applicants. The Minister does not sufficiently justify the need for this power. Stating that the Minister has 'responsibility for the portfolio'² and that 'from time to time there may be a situation'³ that would justify these wide-ranging powers is grossly inadequate.

The Bill introduces a new range of situations where the Minister must cancel a visa.⁴ This captures situations where the Minister is satisfied the person has a substantial criminal record and the person is currently serving a full time sentence. Section 501CA then provides the Minister with a power to 'revoke' the decision to cancel if he or she is satisfied there are circumstances that allow for the revocation.

Decisions under this section are not subject to merits review by the AAT. The Explanatory Memorandum does not provide explanation as to why a denial of procedural fairness is needed in these circumstances and given the 'mandatory' requirement of cancellation in a variety of circumstances the ASRC believes this amendment is not fair, reasonable or necessary.

For asylum seekers and refugees, decisions about cancellation and refusal of visa can have life and death decisions and it is only appropriate that decisions with such consequences undergo appropriate levels of scrutiny and review.

The ASRC is opposed to the introduction of these new Ministerial powers and is concerned that they will allow this and future governments to carry out their political will of the day rather than allowing decisions to be passed through appropriate checks and balances.

2. 'Association' cancellation power threshold reduced

The introduction of this section 501(6)(b) extends the association power in the character test, so that the Minister now need only 'reasonably suspect' an association with a person that has or is engaged in criminal conduct before he can refuse to grant or cancel a visa.

The threshold of 'reasonably suspect' is an inappropriately low burden for the Minister to discharge before he can exercise this power. It requires little by way of evidence on the part of the Minister to establish the association and in fact could result in innocent associations or friendships with a person being used as a legitimate means of cancelling a visa.

Further, the person or organisation suspected of the criminal conduct need not have had a criminal finding against them before the association can be one that invokes the cancellation power.

A well-known High Court case, *Haneef*⁵ considered such situations. In that case, Dr Haneef argued that an innocent association is not enough. In that case, the then Minister for Immigration argued that any association *is* sufficient, including being a 'friend'. In fact, it was stated that an innocent association was enough. The Court disagreed and found that the association test should not include professional, social or familial relationships and that there needed to be some link between the association and the suspected criminal conduct.

¹ Schedule 2 Item 12.

² Explanatory Memorandum, *Migration Amendment (Character and General Visa Cancellation) Bill 2014*, 27.

³ Explanatory Memorandum, *Migration Amendment (Character and General Visa Cancellation) Bill 2014*, 28.

⁴ Section 501(3A).

⁵ *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273 (21 August 2007).

The Minister is now directly seeking to undermine the Haneef decision, so that a 'reasonable suspicion' of the association, regardless of whether the person has "knowledge of, or participated in the suspected criminal conduct"⁶ is sufficient grounds to refuse or cancel a visa.

This means that the following associations could be captured by this proposed new 'association' cancellation power:

- Family members of a woman reasonably suspected of engaging in criminal conduct.
- Conducting business with a businessperson who is suspected to have engaged in criminal conduct.
- Attending the same playgroup session as a parent suspected of engaging in criminal conduct.
- Women who have experienced domestic violence.
- Children who have experienced domestic violence.
- A person attending a public rally where groups suspected of engaging in criminal conduct are in attendance.

The variety of innocent associations that would be captured under this provision is so broad that it would likely give the Minister justification of cancelling the visas of a large proportion of non-citizens in Australia.

Not only is the proposed threshold too low but these further changes highlight the lack of appropriate procedural safeguards and transparency needed for this power, given the grave consequences for asylum seekers such as indefinite detention or being returned to face persecution if this decision is wrong or indeed based on an innocent association.

In light of these consequences it is inappropriate to lower the association test threshold to one of 'reasonably suspect'. The current association cancellation power is broad enough already and captures a sufficiently wide number of situations.

3. 'Identity' cancellation power introduced disproportionately affects asylum seekers and refugees

The proposed section 116(1AA) introduces a new Ministerial power to cancel a visa when the Minister is not satisfied as to the visa holder's identity. No guidance is offered as to the types of information or evidence the Minister will take into account when exercising this test.

Given the reality of seeking asylum, this proposed section has the potential to disproportionately affect asylum seekers and refugees due to the nature of their experiences and journey to Australia.

Over the past 13 years, the ASRC Human Rights Law Program has worked with over 3000 asylum seekers. Our experience shows that there are certain fundamental facts about the reality of seeking asylum which affect the ability of asylum seekers to produce identity or other documentation, including:

- Many asylum seekers regularly flee their homes in a hurry, without the time to collect their identity and other documents.
- Asylum seekers are often forced to flee for their lives by whatever means necessary, including the use of false documents.
- Governments routinely seek to control minorities and opposition groups by denying them passports.
- Requesting identity documents after an asylum seeker has fled their country can raise interest in that person and their family remaining in their home country, making such inquiries too dangerous to carry out.

⁶ Explanatory Memorandum, *Migration Amendment (Character and General Visa Cancellation) Bill 2014*, 9.

Article 31 of the Refugee Convention clearly reflects these truths, stating that asylum seekers should not be penalised for arriving without valid travel documents⁷. Australia's own Refugee Review Tribunal ("RRT") also takes these truths into account in its *Guidance on the Assessment of Credibility* ("Credibility Guidelines") also takes these facts into account, recognising that "the use of false documents does not necessarily mean that an applicant's claims are untrue"⁸ and recognising that the assessment of identity and involves an entire assessment of an individual's claims.

The Explanatory Memorandum states that a person must "always provide correct information about their identity"⁹ and that this provision is designed to capture circumstances such as when the Minister receives inconsistent or contradictory information or for any other reason.¹⁰

This explanation reveals a fundamental lack of understanding of the context of asylum seekers and refugees and ignores international guidance in this area of law. Of further concern is the fact that the cancellation provision does not allow for an explanation to be offered before the Minister cancel the visa. This has the real potential to lead to the cancellation of protection visas due to their very experiences of needing to flee their home country.

Case Study 1 - The difficulty of documentation when fleeing harm

Pa is a man from Myanmar. While at university he organised a protest that was supported by an opposition party. During the protest government officials arrived and started arresting all of Pa's classmates. Pa managed to run and hide in the house of a friend from the political party.

The next day Pa found out that his house had been raided, his brother was arrested and police were looking to arrest Pa as well. Knowing people who had been detained and tortured without charge for years, Pa realised he had to flee Myanmar. While in hiding, his friend organised a tourist visa to Australia for Pa and completed all the English paperwork. Pa could not read English and so did not understand what was being submitted but he was told he had to sign and, having no other option, Pa did.

Pa sought asylum and discovered that his friend submitted false documents which related to his identity with his tourist visa application. Pa couldn't explain where these documents came from as his friend did it all for him. At the RRT Pa's story was accepted and the issues with the inconsistencies in documents were accepted as having happened as Pa described. RRT found Pa to be a refugee and Pa was granted a protection visa.

Under these proposed amendments it is possible for the Minister to cancel Pa's protection visa because there is inconsistent or contradictory information that relates to his identity. This is despite the RRT believing Pa's explanation about the documents.

⁷ <http://www.unhcr.org/419c778d4.html>

⁸ Refugee Review Tribunal, *Guidance on the Assessment of Credibility*, section 9.4, available at <http://www.mrt-rrt.gov.au/Files/HTML/CredibilityGuidance-GU-CD.html>

⁹ Explanatory Memorandum, *Migration Amendment (Character and General Visa Cancellation) Bill 2014*, 24.

¹⁰ Explanatory Memorandum, *Migration Amendment (Character and General Visa Cancellation) Bill 2014*, 24.

Case study 2 - The difficulty of documentation when fleeing harm

Rodrigue is a man from the Democratic Republic of Congo. Rodrigue's father was involved in politics and discovered some high level corruption by the opposition party. Rodrigue's father was killed by political opponents and his family went into hiding. Rodrigue managed to obtain a false Liberian passport which he used to travel out of DRC to Australia.

After arriving in Australia, Rodrigue applied for asylum and explained his true identity from the beginning. It was accepted that Rodrigue had used the false identity and passport as a means of escaping. It was also accepted that it was not possible for Rodrigue to obtain identity documents from DRC as this may put his remaining family in further danger. He was found to be a refugee and granted a protection visa.

Under these proposed amendments it is possible for the Minister to cancel Rodrigue's protection visa because the Minister does not have identity documents that relates to Rodrigue's identity in DRC. This is despite the RRT believing Rodrigue's explanation about his identity.

4. 'Incorrect information' cancellation power introduced disproportionately affects asylum seekers and refugees

The proposed section 116(1AB) introduces a further Ministerial power to cancel a visa when incorrect information was supplied in a visa application.

It is the experience of the ASRC and of the refugee law sector more generally, that individuals may submit incorrect information in their initial visa application to come to Australia as a means of fleeing. Asylum seekers flee danger, persecution, torture and the threat of death by whatever means necessary.

The ASRC is also aware of a range of reasons by information is withheld and false information is provided when applying for protection. Reasons why this may occur include:

- A lack of understanding as to what is relevant.
- A lack of appropriate immigration advice.
- Shame or guilt about past experiences, for example, rape.
- Fear of authorities.
- Trauma resulting in an avoidance or disassociation of experiences.
- Other mental health and cultural factors inhibiting disclosure.

The amendment states that it does not matter whether the incorrect information provided was 'deliberate or inadvertent'¹¹. In light of the fact that asylum seekers regularly flee by whatever means possible including trusting others to act on their behalf, this is unduly harsh and could result in refugees having their protection visas cancelled due to the information provided by a helping friend when that person needed to flee.

This amendment does not have an adequate safeguard to ensure those with reasonable and legitimate explanations as to why incorrect information was provided are not captured by this provision.

¹¹ Section 133B(3)(b).

Case Study 3 - Why false information is presented

Mohamed is a man from Iran. When he was 19 he realised he was gay. At 25 Mohamed found an underground gay group and one day he finally struck up the courage to attend. While at the meeting a community group came in yelling hateful things at the men. It quickly turned violent but Mohamed managed to run away. Arriving at his high school friends' house, Mohamed was very afraid. He knew he had been seen. He was sure he would be beaten to death or arrested if he showed his face again as he had read about this happening in the media.

Luckily, Mohamed's friend knew someone who could obtain a tourist visa for him to come to Australia. Knowing that he had no other option to escape, Mohamed paid money and stayed in hiding while the visa was processed.

Now Mohamed is seeking asylum in Australia and he has found out false documents were submitted with his tourist visa application. One of these documents was a marriage certificate. Mohamed can't explain where this document came from as another person prepared all the documents.

Under these proposed amendments the Minister could refuse to grant or cancel his visa because he provided incorrect information at an earlier visa stage, even though it was accepted that he would be persecuted on return to Iran.

Case study 4 - Why incorrect information is presented

Tariq fled Iran due to his sexuality. To admit he was homosexual in Iran would mean being placed immediately in prison, and possible death sentence. When Tariq arrived in Australia and was asked to give his reason for seeking asylum in an interview without legal advice, he used religion as reason to flee.

He was scared that the information about him being gay would be given to Iran and that he'd be returned and persecuted. Or that his information would be used against his family. After seeing a torture and trauma counsellor in a trusted environment, the young man discussed his sexuality and revealed true reason he'd fled.

Under these proposed amendments it is possible for the Minister to cancel Tariq's visa because he provided incorrect information at an early stage of his application.

5. 'Change of circumstance' cancellation power introduced which disproportionately affects asylum seekers

The proposed section 116(1)(a) introduces a new retrospective power for the Minister to cancel a visa if he or she is satisfied that 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.

This new Ministerial power significantly increases the scope of the Minister's visa cancellation powers and does so in a way that means long after a visa has been granted, a change in circumstances beyond the control of a refugee may result in their protection visa being cancelled.

Such increased power will undermine the certainty offered by Australia's current migration scheme.

Consider the following scenario:

Hypothetical case study

Sydney is from Zimbabwe. In 2008 he was studying in Australia when his family who were supporters of the Movement for Democratic Change (MDC). During the election period Sydney's father was arrested, beaten and interrogated. Sydney's family fled to South Africa and they have never heard from his father since. Sydney was wanted by his family to go back to Zimbabwe and in 2008 Sydney applied for a protection visa. He has since been granted this visa, completed his studies, married and he has a three year old and one year old child. The situation in Zimbabwe now appears to have improved for MDC supporters.

Under this proposed changes, it would be possible for the Minister to cancel Sydney's visa because a 'particular fact or circumstance' that his protection visa grant was 'wholly or partly' based upon, being the dangerous situation for MDC supporters and their families in Zimbabwe, no longer exists. Sydney would then have to return to Zimbabwe, leaving behind his wife and two children.

It is entirely possible and likely that situations such as the above could occur. Refugee decisions are temporal and cannot predict the long-term future or situation in a particular country. They require a decision maker to find that there is a real risk at that time that should the person be returned, they will face persecution.

Given the temporal nature of decision, it is likely that 5, 10, or 20 years after the grant of a protection visa grant, the situation will have changed and the Minister's proposed power under this section will be invoked. Such constant uncertainty and unpredictability will result in the undermining of the security offered by protection visas. It has the potential to uproot lives built on many years of living in the community and has the potential to require parents to leave their Australian citizen children behind.

In light of such significant and extraordinary consequences, the ASRC does believe the Government has in any way sufficiently justified such an amendment. In fact, the Explanatory Memorandum only points to the obligation individuals have to provide correct answers or information, whereas the changes proposed capture situations where changes occur beyond the control of an individual. Further, the types of circumstances and period of which these circumstances can be considered has not been explained.

This amendment is wholly unnecessary.

The ASRC opposes the change in Schedule 2 Item 3 and in particular rejects the introduction of a power for the Minister to cancel visas based on future circumstances that may occur beyond the control of individuals.

6. Lowered threshold for the Character test

The Bill proposes a range of changes to the character test which serve to lower the threshold required before it is engaged and increase the number of people likely to be captured by its provisions, including asylum seekers.

The ASRC is of the view that the character test is already unduly harsh for asylum seekers and that amendments are wholly unnecessary.

The ASRC has witnessed the impact of the current character test on asylum seekers, where people have been held in detention due to character concerns as a result of low-level property damage, such as breaking a widow or computer following many years in detention. This has seen people anxiously awaiting trial where the charges have subsequently been dropped and therefore no character concerns are ultimately found.

Case study 5 – The result of already harsh character test provisions

A young male asylum seeker has been in detention in Australia for 4 years. He was found to be refugee and security cleared. He was charged with destroying Commonwealth property (a window) while in detention. He pled guilty and was given good behaviour bond with no conviction recorded. He is now being told that he possibly will not be eligible for a visa as he fails the character test due to a broken window.

What is most alarming about the Bill is that the changes to the character test further extend the power of the Minister to refuse or cancel a visa in a range of circumstances.

For example, the threshold of risk has been lowered from 'significant risk' to 'risk' in the character test, so that a person fails where there is a risk that a person may engage in particular types of conduct warranting the refusal of entry into Australia¹²

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.

The Bill also seeks to amend the meaning of 'substantial criminal record' so that a person engages this provision when they have been sentenced to 12 months or more of prison, rather than 2 years.¹³

In light of the consequences of a refusal to grant or a visa cancellation, these are both unnecessarily low thresholds and ones that will invite a broad and open interpretation. The expanded powers may be inappropriately applied to individuals who do not pose a genuine or significant risk to the community.

The consequences of lowering the threshold are particularly concerning for asylum seeker who may be returned to harm if their visa is cancelled or refused.

In addition, section 501(6) has been further amended so that those with a current Interpol notice that reasonably infers a risk to the Australian community will also fail the character test.

This amendment is deeply concerning in light of the ASRC's experience that oppressive regimes such as Ethiopia, China and Iran often use their criminal justice system as a means of targeting and persecution opponents and minorities.

False charges are regularly made and these charges can at times result in Interpol notices. It is therefore very likely that asylum seekers fleeing their home countries and who have been accused of crimes will see their protection visas cancelled or refused because of the continuing nature of the persecution they fear, being a current Interpol notice.

It is entirely unacceptable that the persecution carried out by a state, which results in an Interpol notice, may be the very thing that causes an asylum seeker or refugee's protection visa to be cancelled.

The ASRC knows of particular situations where states use these international mechanisms to ensure individuals of interest to that regime are returned to them. The ASRC has had cases that involve this particular scenario but due to the highly sensitive nature of these cases we are unable to provide further information in the form of a case study.

¹² Proposed section 501(6)(d).

¹³ Section 501(7)(d)

7. Breach of refoulement obligations

As the above demonstrates, these changes increase the likelihood that asylum seekers will have their protection visas cancelled or refused. This will mean that asylum seekers and refugees will increasingly find themselves in situations of indefinite detention.

Further, we wish to bring attention to a provision in the Migration and Maritime Powers Legislations Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Caseload Bill). The Caseload Bill proposes a new section 197C, which allows for situations where an individual can be removed from Australia even when they engage Australia's non-refoulement obligations. This means that while this Bill creates a range of situations where a refugee's protection visa may be cancelled, the Caseload Bill allows for the situation where that person is returned home despite the real risk that they will be seriously harmed.

Australia's Migration regime would allow refugees who have innocent associations with people suspected of committing a crime or who have provided false information as a means of escaping their home to be sent home to face persecution.

Conclusion

The consequence for refusing or cancelling a visa for an asylum seeker can be devastating and life shaping. The amendments in this Bill should be read in recognition that asylum seekers and refugees are amongst those that these amendments affect.

In light of the grave consequences the ASRC firmly submits that the changes delegate too much individual discretion and power to the Minister, unreasonably lower the thresholds for cancellation or refusal and all do so without sufficient justification from the Minister.

The ASRC opposes the Bill in its entirety and recommends the bill not be passed.

The ASRC endorses the submission of the Refugee Council of Australia.