RILC Refugee & Immigration Legal Centre Inc

Submission to the Senate Legal and Constitutional Affairs Committee:
Migration Amendment (Character and General Visa Cancellation) Bill 2014

1 Introduction – Refugee and Immigration Legal Centre

1.1 The Refugee and Immigration Legal Centre (**RILC**) is a specialist community legal centre providing free legal assistance to asylum-seekers and disadvantaged migrants in Australia.[1] Since its inception over 25 years ago, RILC and its predecessors have assisted many thousands of asylum seekers and migrants in the community and in detention.

1.2 RILC specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. We are a contractor under the Department of Immigration and Border Protection's Immigration Advice and Application Assistance Scheme (**IAAAS**). RILC has substantial casework experience and is a regular contributor to the public policy debate on refugee and general migration matters.

1.3 We welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Migration Amendment (Character and General Visa Cancellation) Bill 2014* (**the Bill**). The focus of our submissions and recommendations reflects our experience and expertise as briefly outlined above.

2 Outline of submission

2.1 RILC accepts that a robust statutory framework governing character requirements for visa cancellation and refusals is essential to regulate the entry and stay in Australia of non-citizens. However, RILC is profoundly concerned with the amendments proposed in the Bill for the following reasons:

- **No compelling case for changes:** No convincing policy rationale has been made out as to why the proposed amendments are necessary.
- **Denial of fair hearing:** Collectively, the proposed amendments would deny many persons affected a fair hearing of their case, a fundamental right owed to all persons in Australia.
- **Supplanting function of merits review:** They would increase the extent of the Minister's personal non-compellable powers, thereby supplanting the function of administrative review.
- **Disproportionate response:** They would create a statutory framework with the capacity to impose significant consequences that are entirely disproportionate to the particular character concerns that a person may be viewed as having or, merely suspected of having.
- **Increase in prolonged and indefinite detention:** In combination with Australia's system of mandatory detention, these measures would lead to significantly increased numbers of persons being held in immigration detention for extended periods and, for those found to be owed protection obligations, indefinite detention.
- **Diminished capacity to 'defend' against cancellation:** For those persons who have already been subject to penalties through the criminal justice system, the proposed amendments

[1] RILC is the amalgam of the Victorian office of the Refugee Advice and Casework Service ("RACS") and the Victorian Immigration Advice and Rights Centre ("VIARC") which merged on 1 July 1998. RILC brings with it the combined experience of both organisations. RACS was established in 1988 and VIARC commenced operations in 1989.

would lead to increased time in detention and a diminution of their capacity to put forward a comprehensive response as to why cancellation of their visa should be revoked.

- **Denial of due process protections for permanent residents:** For permanent residents, these proposed measures represent a fundamental and radical shift in policy regarding the ordinary entitlement to being protected from expulsion from Australia without due process.
- **Imposition of additional 'punishment':** The proposed amendments would impose, in effect, additional punishments of mandatory detention and permanent removal from Australia.

2.2 For the reasons set out in this submission, RILC recommends that the provisions of this Bill do not pass.

3 No compelling case

3.1 No compelling policy rationale has been put forward by the government to warrant such fundamental changes to the statutory framework governing character issues for non-citizens in Australia. It is RILC's experience that the current scheme is already more than sufficient to meet the government's stated policy intent.

3.2 The Explanatory Memorandum states that "the environment in relation to the entry and stay in Australia of non-citizens has changed dramatically, with higher numbers of temporary visa holders entering Australia for a variety of purposes." However, we note that the new measures proposed by the Bill actually increase the number of cancellation powers aimed at permanent residents, and it is these persons who generally suffer the greatest hardship in these circumstances as they usually have much stronger personal ties to Australia, Australian citizen children, partners, other close family and friends. While the Explanatory Memorandum refers to the government's intention to combat migration fraud, RILC considers that the proposed measures go far beyond this objective.

3.3 The Bill proposes to create additional personal non-delegable powers for the Minister, and extend existing powers to intervene and over-rule decisions made by the Department and/or Tribunals to refuse or cancel visas with which he or she does not agree. In RILC's view, the proposed expansion of the Minister's unfettered personal powers is entirely unnecessary and, in practice, would severely compromise justice for individuals by denying access to primary and merits review administrative decision making processes which have procedural safeguards aimed at ensuring a fair hearing of their case. No compelling case has been made out to warrant these amendments.

4 Denial of a fair hearing

4.1 The proposed amendments would, in practice, lead to a significant proportion of persons affected being denied a fair hearing of their case - a fundamental right owed to all persons in Australia - including by broadening the Minister's personal non-compellable powers.

4.2 An essential element of any legal or administrative process in Australia that adversely affects a person's interests is a real and meaningful opportunity for that person to present his or her case,

be told the substance of the case to be answered, and be given an opportunity of replying to it.[2] The amendments proposed by the Bill seek to strip persons of this opportunity in many cases.

4.3 By denying a person a fair hearing, the risk of an incorrect and unjust outcome is significantly increased. This is particularly concerning given the very serious consequences that would be likely to follow. For some persons, it could well mean forced and permanent separation from immediate family, such as spouse and dependent children. For other persons who have been found to be owed protection obligations, it may mean being held in immigration detention indefinitely.

4.4 The amendments relevant in this respect are as follows:

4.5 Mandatory cancellation under new section 501(3A)

4.5.1 New subsection 501(3A) provides that the Minister *must* cancel a visa if the Minister is satisfied that the visa holder does not pass the character test because they have a substantial criminal record (as set out in subsection 501(7)) or because they have committed a sexually based offence against a child, and the person is serving a sentence of imprisonment. This cancellation would occur *without notice* to the person affected.

4.5.2 The amendments propose that an affected person could seek revocation of this mandatory cancellation without notice under a 'revocation process' in new subsection 501CA. Additionally the amendments provide for the time period(s) to apply for the revocation, and the statutory requirements for that revocation request, to be prescribed in the Migration Regulations 1994 (**the Regulations**).

4.5.3 One of RILC's principal objections to the proposed mandatory cancellation mechanism is that it would apply within the context of mandatory detention. That is, as a person without a visa, his or her detention would continue beyond the term of imprisonment. In our opinion, this continued detention would inevitably adversely impact on the person's ability to access a fair hearing of their case to have that cancellation revoked.

4.5.4 In RILC's experience, persons held in prisons are often not promptly notified of such immigration decisions. Additionally, persons in prisons and those in immigration detention face many major obstacles to obtaining professional representation and assistance for such processes which include:

(i) geographical isolation (immigration detention centres and prison facilities are often in remote areas where legal and migration representatives are not available);

(ii) financial hardship (professional fees for such assistance can be significant);

(iii) as relatively few legal representatives and migration agents practice in this field, and only a tiny number do so for no fee, people will find it next to impossible to access legal advice assistance and representation, particularly given that prescribed timeframes are likely to be very short as is currently the case, for example, in applying for merits review for visa cancellation under s501(2); and

[2] *Kioa v West* [1985] HCA 159 CLR 550 per Mason J at 582

(iv) often the person may suffer from physical or mental medical conditions that may inhibit their ability to locate a suitable representative.

4.5.5 In RILC's experience, people in prison or detention often find it extremely challenging to comply with the very tight time frames under the current law for seeking review of character cancellation decisions and, in some cases, people lose the opportunity to have decisions reviewed because of the difficulties for prisoners of receiving and sending mail within the prison system.

4.5.6 Further, in our experience, character cancellation decisions may be highly legally and/or procedurally and/or factually complex. In order to adequately present a case to a delegate or the Minister, regard must be had to specific legislative instruments and statutory criteria, and a significant amount of supporting evidence needs to be provided about the person's character and personal circumstances. We note that it would be highly unusual for the individual concerned to be in a position to present his or her case in the way required by the delegate or Minister where they are constrained by imprisonment or detention.

4.5.7 Given this, RILC considers that the mandatory cancellation proposed would not only deprive individuals of an opportunity to present their case in a comprehensive manner, but also that it would likely lead to more people missing the strict statutory deadlines or failing to comply with the other procedural requirements necessary to advance the process and obtain a revocation decision.

4.5.8 RILC also notes the obvious problems inherent with the revocation process where the same office (and possibly, same individual) responsible for making that decision is also made responsible for determining whether that decision should be revoked.

4.5.9 The amendments propose a right of merits review for decisions made by delegates but deny review for those decisions made by the Minister personally. In RILC's experience, the legislative framework governing merits review of character decisions by the Administrative Appeals Tribunal (**AAT**) is highly complex and also contains very strict time frames in which to act. For the same reasons identified above, we envisage that there would be significant obstacles preventing those in detention subject to the mandatory cancellation process from accessing professional assistance for the merits review process (even if eligible).

4.5.10 Moreover, where a decision is made by a delegate of the Minister or the AAT to revoke the original decision to cancel the visa, the Minister can still set aside this decision and cancel the visa where he believes this is in the 'national interest', the meaning of which is also determined by the Minister.

4.5.11 For these reasons, RILC strongly believes that the proposed framework for mandatory cancellation would deprive persons of the right to have their case heard in a fair, just and meaningful way. Finally, as discussed further below, the amendments also propose to radically lower the threshold for character cancellation (from two years to 12 months, and by providing that concurrently served sentences are to be counted independently). This would expose a significantly increased number of persons to this unfair and unjust process.

4.6 Ministerial powers and denial of due process

4.6.1 The Bill proposes to provide the Minister with additional personal decision making powers to intervene and also over-ride and bar decisions by delegates and the AAT. These new powers also seek to expressly deny persons affected by these decisions natural justice in many instances. This unwarranted and unprecedented expansion of personal powers of the Minister would also lead to persons being denied a real and meaningful opportunity to present and explain their case before a decision is made on it.

4.6.2 Decisions of a delegate of the Minister to cancel or refuse a visa under section 501 of the Act are reviewable by the AAT. Currently, personal decisions of the Minister to cancel or refuse a visa under section 501 are not reviewable by the AAT, *except for* decisions of the Minister to cancel or refuse a visa based on Articles 1F, 32 or 33(2) of the 1951 Convention Relating to the Status of Refugees, as amended by the 1967 Protocol (**the Refugee Convention**) (exclusion on the basis of serious criminality or national security). Justice Hayne in *Plaintiff M47-2012*[3] stated the following in relation to these arrangements:

> *The reason for the Act marking off this class of decision for a special process of review is readily apparent. A decision of this kind will lead to the expulsion from Australia of a person who has been found to be a refugee within the meaning of Art 1 of the Convention.* ***Marking off decisions of this kind for special review processes reflects a legislative recognition of important aspects of the international obligations Australia has undertaken****.*[4] *[emphasis added]*

4.6.3 Contrary to this, the Bill proposes to amend paragraph 500(1)(c) to remove the 'special process of review' for these Refugee Convention related decisions. The Bill seeks to remove this recognition of important international obligations and, in doing so, places persons subject to it at risk of expulsion, potentially back to countries where they face harm, without adequate procedural safeguards.

4.6.4 The Bill also seeks to provide the Minister with over-riding personal, non-delegable, powers: not to revoke a mandatory cancellation that occurred under section501(3A); and to set aside a decision by a delegate or the AAT to set aside a mandatory cancellation decision under section.501(3A). New subsection 501BA(3) provides that the rules of natural justice do *not* apply to such decisions. The Explanatory Memorandum states that natural justice is not necessary as it would have already been provided to the person through the revocation process available under s 501CA. Critically, this ignores the likelihood of the Minister relying on additional adverse information that had not already been put to the non-citizen in making his or her decision personally.

4.6.5 The Bill also proposes to create new broad personal powers of the Minister to intervene and make first-instance decisions, or over-rule decisions by delegates, the Migration Review Tribunal (**MRT**) and the Refugee Review Tribunal (**RRT**), for many other visa cancellation grounds. These extensions of powers are proposed through new sections 133A(3) (Minister's personal powers to cancel visas on section 109 grounds) and 133C(3) (Minister's personal powers to cancel visas on section 116 grounds) and also deny natural justice in many instances.

[3] *v Director General of Security* [2012] HCA 46 (5 October 2012)
[4] at [194]

4.6.6 The Explanatory Memorandum explains that the result of the Bill will be "larger numbers of non-citizens being captured for consideration of visa cancellation" and that "[a]ny questions of proportionality will be resolved by way of comprehensive policy guidelines on matters to be taken into account when exercising the discretion to cancel a person's visa…".[5] Together with the Bill's amendments excluding review of many decisions and also expressly denying natural justice, for many people affected, the result would be a fundamental denial of the basic right to a fair hearing. For others, who may have protection claims against their initial country of origin, they would be liable to indefinite detention or risk being removed from Australia and exposed to serious human rights abuses. In this latter regard, Australia's international obligations will hinge on the personal discretion of the Minister, without any transparent statutory process or safeguards.

4.6.7 The Human Rights Statement acknowledges that Article 13 of the International Covenant on Civil and Political Rights (**ICCPR**)[6] (procedural protection for aliens from expulsion) applies to cancellation decisions because cancellation can lead to expulsion.[7] The Human Rights Statement asserts that Article 13 will be complied with because judicial review will continue to be available to visa-holders subject to cancellation. However, the scope of judicial review is narrow and confined to errors of law which excludes consideration of the relevant facts. It is extremely costly. In RILC's view, judicial review does not satisfy the requirements of Article 13 of the ICCPR. The Human Rights Committee (which monitors implementation of the ICCPR by its State parties) has found in similar relevant contexts that States are under an obligation to provide an effective remedy, which allows for evaluation *of the facts* and legal grounds of an expulsion order (or decision leading to an expulsion order). This means that merits review should continue to be available.[8]

4.6.8 These over-riding veto powers of the Minister, and the express denial of natural justice in his or her decision-making processes, would lead to a fundamental denial of a right to a fair hearing for many persons affected. Further, as submitted previously, decisions to cancel a visa based on character are inherently highly factually and legally complex and have significant implications for not only the non-citizen and his well-being and safety but also his or her family members (who may be Australian citizens), and Australia's international obligations more generally.

5 Disproportionate consequences

5.1 The Bill's amendments would create a statutory framework with the capacity to impose significant penalties that are entirely disproportionate to the particular character concerns that a person is regarded as having or merely suspected of having. Many of the Bill's new or adjusted thresholds, definitions or grounds for refusal/cancellation have in common the fact that the Minister can unilaterally decide when and why a particular threshold or criterion is met, without needing to consider, or show, that there is objective evidence behind his or her

[5] at p6
[6] Article 13 of the ICCPR states: "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."
[7] See: page 13 of the Statement
[8] UNHCR Policy and Evaluation Unit, New Issues in Refugee Research, Research Paper No. 132: *Protecting refugees and asylum seekers under the International Covenant on Civil and Political Rights* (2006).

belief. The Minister's broad discretionary powers, without judicial oversight, mean that more people would be caught by the character test or subject to cancellation or refusal of visas with all their attendant grave consequences, particularly for long-term residents and refugees, on the basis of much less evidence than currently required now, or because of the imposition of more subjective criteria.

5.2 The consequences will be dealt with in more detail below, at sections 5.8 and 6. Briefly however, the consequences that a visa refusal or cancellation could entail for a person are:

- removal from home, family, business or employment, education or other opportunities in Australia;
- prolonged detention and, for those who are owed protection obligations, indefinite detention;
- the removal of the guarantee of *non-refoulement* enshrined in law through the provision of a permanent visa; and,
- in respect of the Australian government, the breaching of international obligations, such as those of *non-refoulement*, freedom of movement and respect for family unity.

5.3 The amendments relevant in this respect are:

5.4 Broadening of the definition of "substantial criminal record"

5.4.1 The Bill amends the meaning of "substantial criminal record", significantly lowering the threshold. This substantial reduction in the standard is provided for by two measures. Currently, having a "substantial criminal record" includes two or more sentences (whether or one or more occasions) which add up to a term of two years or more in prison. The Bill cuts this in half, providing that two or more sentences totaling only 12 months or more are sufficient. The threshold is then further lowered by providing for sentences that are served concurrently to be counted cumulatively to form the total period of imprisonment to be counted. At present, sentences are not counted as additional sentences if served concurrently.

5.4.2 Collectively, these measures would operate to subject permanent and temporary residents of Australia, many of whom may have spent large portions of their life in Australia and have Australian citizen family members, to mandatory cancellation on the basis of conviction and imprisonment for relatively minor offences such as: using indecent language in a public place; being drunk in a public place; drinking liquor on public transport.

5.4.3 Under the proposed amendments, persons who accumulated short terms of imprisonment totaling more than 12 months would have their visas automatically cancelled without notice, meaning that they would either be transferred on completing their prison sentences to immigration detention, or if such sentences were suspended, they would be detained and placed in immigration detention regardless of compelling intervening factors such as serious mental health problems or responsibility for Australian citizen children.

5.4.4 For these reasons, it is RILC submission that the proposed reduction in the threshold necessary to invoke the character test, and the proposed mandatory cancellation scheme, gives rise to a situation which is disproportionate to the stated policy intent of protecting the

community from the risk of serious criminals being released from prison before cancellation decisions have been finalised.

5.5 Lower evidentiary thresholds in the character test

5.5.1 Currently, the Minister can refuse or cancel a visa where he reasonably suspects that the person does not pass the character test and the person does not satisfy the Minister that he passes the test. The current character test is set out at section 501(6) of the Act:

> *Character test*
>
> *(6) For the purposes of this section, a person does not pass the **character test** if:*
> *(a) the person has a substantial criminal record (as defined by subsection (7));or*
> *(aa) the person has been convicted of an offence that was committed:*
> *(i) while the person was in immigration detention; or*
> *(ii) during an escape by the person from immigration detention; or*
> *(iii) after the person escaped from immigration detention but before the person was taken into immigration detention again; or*
> *(ab) the person has been convicted of an offence against section 197A; or*
> *(b) the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or*
> *(c) having regard to either or both of the following:*
> *(i) the person's past and present criminal conduct;*
> *(ii) the person's past and present general conduct;*
> *the person is not of good character; or*
> *(d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:*
> *(i) engage in criminal conduct in Australia; or*
> *(ii) harass, molest, intimidate or stalk another person in Australia; or*
> *(iii) vilify a segment of the Australian community; or*
> *(iv) incite discord in the Australian community or in a segment of that community; or*
> *(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.*
>
> *Otherwise, the person passes the **character test**.*

5.5.2 <u>The association limb: section 501(6)(b)</u>

5.5.2.1 The Bill lowers the threshold of evidence required for the Minister's decision that a person does not pass the character test under the association limb in section 501(6)(b). Currently, a person must have, or must have had, in the past an association with a suspected criminal group or individual. The Bill proposes to remove the evidentiary requirement that a person actually have or had a connection with such individuals or groups. Instead the Minister need only <u>reasonably suspect</u> that they have such an association with a group reasonably suspected to be criminal.

5.5.2.2 The Explanatory Memorandum states at [41] that the intention behind this amendment is to ensure:

> *…that membership of the group or organisation alone is sufficient to cause a person to not pass the character test. Further, a reasonable suspicion of such membership or association is sufficient to not pass the character test. **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.** [Emphasis added].*

5.5.2.3 The Explanatory Memorandum thus clearly envisages that a visa applicant or holder may not actually know about, or participate in any of the *suspected* criminal behaviour of the individual or group with which he or she is associated with. It is possible that an involuntary association, such as family membership or association by proximity, may be sufficient to result in the refusal to grant a visa.

5.5.2.4 Moreover, this ground, as amended, knows no equivalent in other international or domestic laws and results in punishment of a visa holder or applicant without guilt or, at the very least, without proof or the process of testing of guilt. Guilt by association does not occur in any other relevant context. Mere association with a criminal is not sufficient to give rise to charges let alone a conviction and prison sentence in criminal law. Nor is association with a criminal or terrorist or even membership of such an organisation alone sufficient to found exclusion from protection under the Refugee Convention in refugee law.[9]

5.5.2.5 Given the gravity of the consequences of visa cancellation or refusal, it is entirely inappropriate that an assessment by the Minister leading to such consequences is able to be made only on suspicion or conjecture and without an objective evidentiary basis.

5.5.3 <u>The risk to the community: section 501(6)(d)</u>

5.5.3.1 The Bill lowers the threshold of risk to the community which, when posed, results in a failure to pass the character test. While we do not dispute that a necessary and legitimate task for government is protection of the Australian community, we are concerned about the lowering of the risk level from 'significant risk' to mere 'risk' given the consequences of failure to meet the character test for a visa applicant or visa holder.

5.5.3.2 At [46], the Explanatory Memorandum sets out the purpose of this amendment:

> *…to clarify the threshold of risk that a decision maker can accept before making a finding that the person does not pass the character test in relation to paragraph 501(6)(d) of the Migration Act. The intention is that the level of risk required is more than a minimal or trivial likelihood of risk, without requiring the decision-maker to prove that it amounts to a significant risk.*

5.5.3.3 The threshold of risk is clearly very low, as all that would be required is any level of risk beyond a minimal or trivial likelihood of risk. In our submission, this leaves room for exclusion from eligibility for a visa where risk is just above a bare minimum and may never be realised. Such levels of risk are capable of being contained – if this is even necessary – by less drastic, more proportionate means. In our submission, the consequences at stake for a visa applicant or holder should determine the threshold of evidence and the level of satisfaction that the Minister must hold. This would reflect requirements of proportionality.

5.5.3.4 By way of example, we turn to section 501(6)(d)(v), which provides that a significant risk that a person would represent a danger to the Australian community or segment thereof will lead to a refusal or cancellation of a visa. This is the limb currently used by the Minister to decide whether visa applicants assessed as risks to national security pass the character test.

[9] See UN High Commissioner for Refugees, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, available at: www.refworld.org/docid/3f5857684.html, at [18]-[20]; and UN High Commissioner for Refugees, *UNHCR Statement on Article 1F of the 1951 Convention*, July 2009, available at: www.refworld.org/docid/4a5de2992.html, at 2.2.2 and 4.1.

It is also the current legislative counterpart of Articles 32 and 33 of the Refugee Convention which deals with refugees who pose a risk to the security of a host nation. The proper function of this section of the Act was discussed in *Plaintiff M47*.[10] We note the findings of Justice Hayne, who held, in relation to a submission of the Defendants that section 501 requires proof of a lower standard than Article 33(2) of the Convention, that:

> *The second reason to reject this submission is that it assumed, wrongly, that s 501 can be applied on the basis of unfounded suspicion or suggestion, without recognition of the consequences that flow from its application, whereas the application of Art 33(2) would require clear and cogent proof of a serious threat to national security. But a decision to refuse to grant a protection visa relying on either Art 32 or Art 33(2), as a species of s 501 decision, cannot be made unless, in a case where security is at issue, the decision-maker is satisfied that the person concerned is a risk to national security. It is elementary that, as Dixon J said in Briginshaw v Briginshaw [210]:*
>
> *"reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved.* ***The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal****." [emphasis added].*

5.5.3.5 For certain visa applicants or visa holders, the consequences flowing from a particular finding are grave indeed: likely prolonged or indefinite detention in Australia for the foreseeable future, and a denial of protection from *refoulement* which is enshrined in Australian domestic law.

5.6 Additional grounds in the character test

5.6.1 In addition to the current grounds set out at paragraph 5.5.1 of this submission, the Bill proposes six additional grounds to the character test. This section of the submission covers three of these additional grounds which raise particular concerns in relation to the broadening of the criteria to the point where unproven allegations of wrongdoing lead to grossly disproportionate outcomes.

5.6.2 <u>Reasonable suspicion of involvement in certain acts, regardless of criminal conviction</u>

5.6.2.1 Section 501(6)(ba)(i)-(iii) of the Bill inserts the following new ground on which basis a person may fail the character test: where "the Minister reasonably suspects that the person has been or is involved in conduct" constituting an offence of people-smuggling or an "offence of trafficking in persons, the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern, *whether or not the person or another person has been convicted of an offence* constituted by the conduct".

5.6.2.2 All of the offences listed above (with the exception possibly of the vague and undefined 'crime of serious international concern') are capable of charge and conviction within the Australian legal system, even where the constituent acts of the crime took place overseas. Pursuit of these charges through the criminal system allows for free legal assistance to defend charges, a presumption of innocence until proven guilty, a right to be heard and other features of due process, and if conviction ensues, a finite sentence of punishment.

[10] *Plaintiff M47/2012 v Director General of Security* [2012] HCA 46.

5.6.2.3 By contrast, the Bill allows for the severe consequences entailed by a visa refusal or cancellation without the need for the facts and elements of the offence to be proven to a criminal standard, and without the provision of basic procedural safeguards owed to all defendants within the Australian legal system.

5.6.2.4 In RILC's submission, the ability to use this ground in the absence of a conviction is an undermining of the rule of law and could amount to a violation of human rights obligations in both process (denial of fair trial rights[11]) and result (potential consequence of prolonged and arbitrary detention or of *refoulement*).

5.6.2.5 Further, in relation to refugee claimants, the Refugee Convention contains an in-built exclusionary mechanism to deny refugee protection to claimants for whom *there are serious reasons for considering* that they have committed crimes including crimes against humanity, war crimes, crimes against peace, and serious non-political crimes. The standard of proof required, unlike the Bill, reflects the serious consequences that the denial of protection entails. A UNHCR statement on Article 1F of the Convention provides:

> *The 1951 Convention sets a **high standard of proof** for establishing that an individual has committed or participated in the commission of acts covered by Article 1F, requiring "serious reasons for considering" that the individual has committed or participated in the commission of such acts. Although the application of the exclusion clause does not require a "determination of guilt" in the criminal justice sense, and therefore, the standard of proof required would be less than "proof of guilt beyond reasonable doubt", **it must be sufficiently high to ensure that refugees are not erroneously excluded**. The words "serious reasons for considering" should thus be construed in line with their plain meaning, and require a high standard of proof, in light of the serious consequences of exclusion and the need to preserve and adhere to the object and purpose of Articles 1F of the 1951 Convention. **Thus, in UNHCR's view, reliable, credible and convincing evidence, going beyond mere suspicion or allegation, is required to demonstrate that there are "serious reasons for considering" that individual responsibility exists.**[12] [Emphasis added]*

In this regard, we also note the guidance from the UNHCR, which notes the caution with which Article 1F should be applied:

> *As with any exception to human rights guarantees, and given the possible serious consequences for the individual, the exclusion clauses enumerated in Article 1F should always be interpreted in a restrictive manner and applied with utmost caution, and in the light of the overriding humanitarian character of the 1951 Convention.*[13]

5.6.2.6 Moreover, this limb contains a general catch-all category at the end: crimes that are otherwise of international serious concern. This begs the question of what would be considered a crime of international serious concern, and who decides which crime qualifies as such. RILC is concerned that the absence of a definition for this ground would mean that people suspected of committing less serious crimes would also be affected by this provision.

5.6.3 Existence of charges in Australia or overseas for involvement in certain acts

5.6.3.1 Section 501(6)(f) proposes an additional ground to the existing character test: where "the person has, in Australia or a foreign country, been charged with or indicted for one or more of the following: (i) the crime of genocide; (ii) a crime against humanity; (iii) a war crime;

[11] For example, see Articles 13 and 14 of the ICCPR and Article 32 of the Refugee Convention.
[12] UNHCR Statement on Article 1F of the 1951 Convention, issued July 2009.
[13] Ibid, page 7.

(iv) a crime involving torture or slavery; and (v) a crime that is otherwise of serious international concern.

5.6.3.2 As above, this limb of the Bill allows for punishment where no conviction has been entered for the crimes listed, and also repeats the catch-all ground of "a crime that is otherwise of serious international concern".

5.6.3.3 This ground proposes the failure of the character test where charges for the crimes listed have been laid or successfully pursued in foreign countries. This makes no allowance for politically motivated prosecutions, which not infrequently occur and, in fact, have formed the basis for claims for refugee status for RILC clients and other asylum-seekers in the past. A tried and tested method for the silencing and punishment of perceived dissenters by non-democratic states is to accuse the dissenter of gross conduct in an attempt to legitimise the subsequent harsh punishment.

5.6.3.4 The wording of this ground also does not permit consideration of legitimate defences to such crimes; for example, where a person may have acted criminally under duress. Duress constituting an immediate threat to life or safety, or the life or safety of another, is a recognised defence to the international crimes listed in this sub-section.[14]

5.6.4 Assessment by ASIO of direct or indirect risk to national security

5.6.4.1 Section 501(6)(g) of the Bill provides that a person will not pass the character test where the person "has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*)".

5.6.4.2 We strongly object to the addition of this ground. The existing section 501(6)(d)(v) already deals with the circumstances where an adversely security assessed person represents a risk to the community. It has been acknowledged that an adverse security assessment is not synonymous with a risk to the Australian community and, therefore, the specific inclusion of an adverse ASIO assessment is unnecessary, and has the effect of lowering the threshold of risk which would trigger a failure of the character test.

5.6.4.3 The Explanatory Memorandum states that the purpose of this new ground is to avoid the application of other grounds of the character test to a person who has received an adverse security assessment because the application of other grounds will not always lead to a failure to pass the character test. Instead, it is wrongly contended that a person subject to an adverse ASIO assessment will represent a threat to the Australian community or a segment thereof. See [55]:

> *The purpose of new paragraphs 501(6)(g)…of the Migration Act is to acknowledge that a person who is the subject of an adverse ASIO assessment…**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 [this provision applies] to them, **without the need to further assess them against the subjective criteria in subsection 501(6)** of the Migration Act. [emphasis added]*

[14] Article 31 of the Rome Statute of the International Criminal Court.

5.6.4.4 Section 4 of the ASIO Act has been recently interpreted by the full bench of the High Court in *M47*, and was not read to be necessarily equal to a risk to the Australian community in all cases. All seven judges held that the section 4 definition of security was broader in scope than Article 33(2), which allows for *refoulement* of a refugee who poses a danger to security of the country in which he or she is or to that community.[15] Justice Bell held:

> ASIO is a specialist intelligence organisation that carries out an assessment of risk including indirect risk to security as defined in its Act. **That assessment involves a different and lesser threshold than the determination of whether there is a significant risk that a person presents a danger to the Australian community or a segment of it**.[16] [emphasis added]

5.6.4.5 Further, the definition of security in section 4 does not contain any guidance as to the level of risk to security a person adversely assessed by ASIO is predicted to present. As noted by French CJ in *Plaintiff M47*, "[t]he word 'security' as defined in the ASIO Act does not in terms set a threshold level of risk necessary to support an adverse assessment".[17]

5.6.4.6 A person with an adverse security assessment does not automatically pose a risk to the community and, in the absence of such a risk, RILC submits that such persons should not be automatically subject to the grave consequences of a failure to pass the character test.

5.6.4.7 RILC has additional concerns about adverse ASIO assessments, leading to automatic failure of the character test. The ASIO process is a secret one, which relies on secret evidence and does not permit an applicant to know, verify or respond to the evidence against him or her. The applicant does not know the standard of risk against which the assessment is made, nor what standard the evidence that ASIO relies on must meet. It is also by its nature a speculative assessment, predicting a future risk.

5.6.4.8 The failure of the character test triggers the discretion of the Minister to refuse or cancel a visa. Where this discretion is triggered by the existence of an adverse assessment, even where an applicant may be heard before the exercise of the discretion, it will be almost impossible for the applicant to adequately and fairly prosecute their case because of the secret and flawed nature of the original ASIO assessment. A response to an ASIO assessment is, without exaggeration, a 'stab in the dark'. The inclusion of this ground as a means of refusing or cancelling visas represents a compounding of the original denial of due process incurred in the ASIO assessment. Under current arrangements, a person subject to an adverse ASIO assessment is afforded the opportunity to argue that the fact of the assessment does not mean that there is a significant risk that they will be a danger to the Australian community. In RILC's view, no case has been made out for the change proposed in the Bill.

5.7 New powers to cancel under section 116 of the Act.

5.7.1 New subsection 116(1)(1AB) proposed by the Bill provides:

> *Subject to subsections (2) and (3), the Minister may cancel a visa (the current visa) if he or she is satisfied that:*
> *(a) incorrect information was given, by or on behalf of the person who holds the current visa,*

[15] See French J at [126]; Gummow J at [126]; Hayne J at [204]-[206]; Heydon J at [319]; Crennan J at [399]; Kiefel J at [433]; and Bell J at [489].
[16] At [489].
[17] At [68].

to:

(i) an officer; or
(ii) an authorised system; or
(iii) the Minister; or
(iv) any other person, or a tribunal, performing a function or purpose under this Act; or
(v) any other person or body performing a function or purpose in an administrative process that occurred or occurs in relation to this Act; and

(b) the incorrect information was taken into account in, or in connection with, making:
(i) a decision that enabled the person to make a valid application for a visa; or
(ii) a decision to grant a visa to the person; and

(c) the giving of the incorrect information is not covered by Subdivision C.

This subsection applies whenever the incorrect information was given and whether the visa referred to in subparagraph (b)(i) or (ii) 21 is the current visa or a previous visa that the person held.

5.7.2 This amendment means that any incorrect information given in connection with a visa, whether given by the visa holder or another party, or in relation to the current visa or not, may result in the cancellation of the current visa. The Bill mandates an almost impossible standard of correctness, and one which may be outside the control of the visa applicant given that information furnished by others may count against their own 'integrity'.

5.7.3 Many of RILC's clients are asylum-seekers or refugees, who, as a result of trauma and past experience may not be able to provide consistent and full evidence. In this regard, we make particular reference to the Refugee Review Tribunal's Guidance on the Assessment of Credibility which provides:

> *1.27 Traumatic experiences including torture may impact on a number of aspects of an applicant's case including the timeliness of an application, compliance with immigration laws, or the consistency of statements since arrival in Australia…*
>
> *1.30 A person may forget dates, locations, distances, events and personal experiences due to lapse of time or other reasons. A person may not reveal the whole of his or her story because of feelings of shame, for fear of endangering relatives or friends or because of mistrust of persons in positions of authority.*[18] *[Emphasis added]*

5.7.4 Moreover, by virtue of the nature of the process, refugees and asylum-seekers may not be able to reach an 'objective' threshold of truth because, due to the exigencies of the process, where multiple accounts must be given to different audiences, variations in the accounts are inevitable.

5.7.5 In refugee law, while there is a duty on a refugee applicant to tell the truth, it is recognised that an applicant for refugee status may not be able to provide full evidence to the standard expected in other legal fora and that inconsistencies may abound. Consequently, credibility is determined by reference to the material facts, rather than encouraging an expectation of consistency and truth in all peripheral matters. Even where an account is entirely untrue, if there are objective reasons indicating that the applicant has a well-founded fear of persecution, that person is deserving of refugee protection. Given that these circumstances are understood and inbuilt into refugee law, RILC does not accept that a refugee visa-holder should be subjected to indefinite detention, which, by its nature, becomes punitive, through

[18] MRT-RRT *Guidance on the Assessment of Credibility*, March 2012, available at www.mrt-rrt.gov.au/Conduct-of-reviews/Legislation,-policies-and-guidelines.aspx.

the cancellation of their visa, merely by provision of what is considered to be false information.

5.7.6 We note guidance from Professor James Hathaway and Dr Michelle Foster, leading refugee academics, who have synthesised years of case-law from multiple common and civil law jurisdictions to conclude:

> *First, the decision maker must be sensitive to the fact that most refugees have lived experiences in their country of origin which give them good reason to distrust persons in authority. They may thus be less than forthright in their dealings with immigration and other officials, particularly soon after their arrival in an asylum state.*[19]

And, quoting from an Australian case:

> *In any event, some degree of inconsistency over time – especially when testimony is given through (often different) interpreters – is nearly inevitable:*
>
> *As anyone with even a passing familiarity with litigation will know, to have to give a decision-maker three or more separate versions of the basis for a claim is an invidious position to find oneself in, even in the case of an honest witness. All the more so when the accounts have been provided by a person who…has required the assistance of an interpreter. It is inevitable that each version will be slightly different, and may even be very different once the impact of the interpreter is taken into account.*[20]

It is for this reason that we regard the Bill's amendments as presenting an unattainable standard of exactness and correctness, which will guarantee the consideration whether to cancel a visa arising on many occasions where the visa-holders have done no wrong.

5.7.7 We also refer in particular to the comments of Foster J in *Guo v Minister for Immigration and Ethnic Affairs*:

> *It is well to remember that self-contradictory statements and apparent evasiveness, although of obvious importance, do not necessarily require a conclusion that the witness is being untruthful in those aspects of his or her evidence or more significantly that the whole of his or her evidence should be rejected. Exaggeration or even fabrication of parts of a witness' evidence does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony. Where proof beyond reasonable doubt is required, self-contradiction, inconsistency and evasiveness may, of course, give rise to sufficient doubt to warrant the rejection of evidence. However, in cases where only a real possibility need be shown, care must be taken that an over stringent approach does not result in an unjust exclusion from consideration of the totality of some evidence where a portion of it could reasonably have been accepted.*[21] *[Emphasis added]*

5.7.8 Such principles have also been incorporated by the RRT in their *Guidance on the Assessment of Credibility*, which states that the rejection of some evidence before the Tribunal on account of a lack of credibility may not lead to the rejection of an applicant's claim for refugee status.[22] Furthermore, even if the Tribunal disbelieves an applicant's claims, the Tribunal must still consider whether, on any other basis asserted, a well-founded fear of persecution

[19] James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, 2nd ed, (Cambridge, Cambridge University Press, 2014), at pages 145-146.
[20] Ibid, at pages 146-147, citing from *W375/01A v Minister for Immigration and Multicultural Affairs* (2002) 67 ALD 757.
[21] *Guo v Minister for Immigration and Ethnic Affairs* (1996) 64 FCR 151. These comments were cited with approval by the Full Federal Court in *W375/01A*, see n 21 above.
[22] Refugee Review Tribunal *Guidance on the Assessment of Credibility*, above n 19 at [1.11].

exists.[23] Indeed, many Australian cases have accepted the principles here outlined, and the proposed amendments amount to an attack on established refugee jurisprudence.[24]

5.8 Consequences of visa refusal/cancellation

5.8.1 A failure to pass the character test results in ineligibility for the grant of a visa and, in turn, either ineligibility under Australian law[25] for release from detention, or liability for detention and removal.[26] Protracted and even indefinite detention[27] will be faced by some visa applicants who are owed protection obligations. We elaborate on detention as a specific consequence in the following section, section 6.

5.8.2 People who are owed protection obligations may also be at risk of *refoulement* to persecution in the absence of a grant of a protection visa. Despite the statement in the Explanatory memorandum that *refoulement* will not occur), this statement of intention in a pre-legislative preparatory document does not safeguard against removal in the way that a visa grant does, particularly as it will not bind future governments.

5.8.3 For migrants and refugees alike, the broad powers in the Bill may result in the separation of a family unit and adverse effects on any children involved. We welcome the fact that the government's Human Rights Compatibility Statement sets out the relevant protections of the family unit and children in international law[28] and stated that such considerations "generally weigh heavily" against cancellation or refusal, though these considerations can be outweighed by the need to secure the safety of the Australian community. However, in RILC's view, for Australia to meet its international obligations, that risk to the community *must* objectively exist and be sufficiently serious in order to outweigh these important rights. The Bill does not provide such limitations on the exercise of the personal Ministerial powers.

5.8.4 The Bill thus also provides scope for discretionary decision-making where the potential remains for the important rights of children and members of family units to be outweighed by the government's focus on the integrity of the Migration Program. In RILC's view, it is preferable not to open such considerations to such highly personalized and potentially whimsical decision-making in the first place, without clear objective criteria and procedural safeguards.

6 Detention

6.1 In combination with Australia's system of mandatory detention, the proposed amendments would lead to significantly increased numbers of persons being held in immigration detention for extended periods and, for those found to be owed protection obligations, indefinite detention.

[23] Ibid, citing *Abebe v The Commonwealth* (1999) 197 CLR 510 per Gummow and Hayne JJ at [192] and Kirby J at [211].
[24] In addition to cases already cited here, see for example the following cases upholding the principle that mistruths do not negate the provision of refugee status and therefore a visa: *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 134 FCR 85; *Singh v Minister for Immigration and Multicultural* Affairs [1998] FCA 1394; and *Zhang v Minister for Immigration and Multicultural Affairs* [2001] FCA 1048.
[25] Section 196(1) of the Migration Act 1958.
[26] In the absence of the exercise of a personal, non-compellable discretion vested in the Minister for Immigration and Citizenship.
[27] Which is unlawful at international law: see Articles 9(1) and (3) of the ICCPR.
[28] For example, Articles 3, 5 and 9 of the Convention on the Rights of the Child and Articles 17, 23, and 24 of the ICCPR.

6.2 The Act provides for a system of mandatory detention. If a person does not hold a visa they must be detained[29] and held there pending the occurrence of one of the following four events: removal from Australia; removal to a regional processing country; deportation; or the grant of a visa.[30] Further, for persons who have had visas refused or cancelled on character grounds the only visas they are permitted to apply for are a Protection (Class XA) visa and a Bridging (Removal pending) visa. However, to be eligible for the grant of these visas to be released from immigration detention, the person must meet the character requirements.

6.3 For those who have had a visa cancelled under other cancellation powers, such as s.109 (incorrect information) or s.116 (other cancellation powers), these persons are generally barred from applying for almost all other visas.[31]

6.4 The only other way in which a person can obtain a visa to be released from detention is if the Minister personally grants them one using his or her personal non-delegable and non-compellable power to do so in s.195A.

6.5 The proposed legal framework governing mandatory detention and visa eligibility would mean that persons who have had visas refused or cancelled may be liable to extended periods of detention followed by removal or deportation from Australia. In this regard, RILC is profoundly concerned that the amendments, as currently drafted, have the following four serious consequences:

- The number of persons held in *indefinite detention* would increase due to persons found to be owed protection obligations (who cannot legally be removed from Australia) being affected by the proposed mandatory cancellation regime and expanded scope of cancellation.
- A much greater number of persons will be held in immigration detention as a consequence of the proposed expansion in scope of the character and other cancellation schemes, including the Minister's powers and bars on access to merits review;
- Persons sentenced to terms of imprisonment, many of whom may have committed relatively minor offences, would remain in detention following the conclusion of their penal sentences due to the mandatory cancellation scheme.

6.6 Indefinite detention

6.6.1 Persons who are found to be owed protection obligations by Australia are generally not able to be removed from Australia as this would constitute *refoulement*, a breach of Australia's international obligations. Following this, for those persons found to be refugees or be otherwise owed protection[32] removal or deportation from Australia is not an option and, without a visa to reside in the community, they are consigned to indefinite detention.

6.6.2 Indefinite detention of persons, including those who may be victims of torture and trauma and who may have significant physical and mental health conditions, is cruel and inhumane.

[29] See: s.189(1)
[30] See: s.196(1)
[31] See: s.48(1)
[32] Including under the complementary protection criteria inserted by the *Migration Amendment (Complementary Protection) Act 2011*.

Further, in August 2013, the Human Rights Committee found Australia's indefinite detention of refugees with adverse security assessments to be unlawful according to Article 9(1) and (4) of the ICCPR[33] and to constitute inhuman treatment in contravention of Article 7.[34]

6.6.3 The government has sought to justify this detention policy as part of its sovereign right to control entry and residence in Australia, citing the United Nations Human Rights Committee's General Comment 15. However, the Human Rights Committee does not protect this right without limits. In our submission, indefinite detention amounts to inhuman treatment, which is not permitted by the ICCPR. Paragraph [5] of General Comment [15] states:

> *However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.*

6.6.4 The amendments proposed by the Bill will lead to greater numbers of persons held in indefinite detention and this policy is directly contrary to the Human Rights Committee directive that: "[i]ndividuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion."

6.6.5 For persons affected, the only mechanism by which a person could be granted a visa, and consequentially be able to leave immigration detention, is the Minister's personal non-compellable discretion. There is no legislative mechanism to compel the Minister to consider the exercise of his discretion or to compel release. There is no automatic review of the ongoing lawfulness of detention. The Minister's discretionary power to release people from detention is not subject to any judicial oversight. For these reasons, RILC does not consider this to be a viable qualification to indefinite detention.

6.6.6 RILC currently acts for a number of clients who are being held in indefinite detention. It is our observation that the adverse effects of this legal limbo on these people is profound. Some clients have now been detained for more than five years and all of them continue to suffer grave hardship and severely detrimental effects to their physical and mental health. Many have been separated from their partners, children and other family without means to support or be reunited with them. Those without immediate family are prevented from forming relationships. The over-whelming majority of them suffer from serious mental health conditions that are caused, or have been greatly exacerbated by, their status and day-to-day life as an indefinite detainee. The severe harm to individuals known to be caused by indefinite detention is manifest and has been well documented.

[33] Ibid, paragraph 10.4: "the State party has not, in the Committee's opinion, demonstrated on an individual basis that their continuous indefinite detention is justified. The State party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's need to respond to the security risk that the adult authors are said to represent. Furthermore, the authors are kept in detention in circumstances where they are not informed of the specific risk attributed to each of them and of the efforts undertaken by the Australian authorities to find solutions which would allow them to obtain their liberty. They are also deprived of legal safeguards allowing them to challenge their indefinite detention."

[34] Ibid, paragraph 10.7: "The Committee considers that the combination of the arbitrary character of the authors' detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant."

6.7 Implications of increased numbers of persons in detention

6.7.1 Collectively, the proposed amendments will substantially increase the number of persons exposed to character and other kinds of visa cancellation. Further, the mandatory cancellation regime for persons convicted of criminal offences would result in all of those affected being transferred to immigration detention on completing their prison terms. Currently, many of these persons are permitted to remain in the community while the Department of Immigration and Border Protection (**the Department**) and/or Minister consider the cancellation of their visas.

6.7.2 As detailed earlier in this submission, in RILC's extended experience, people held in prisons and immigration detention centers face significant obstacles in being able to present their case to the Department or Minister in a comprehensive and meaningful manner. Those living in the community are far better placed to access information and assistance (such as from community organisations like RILC) which allow them to present their case in a way that addresses the complex legal criteria, and also to navigate the necessary procedures.

6.7.3 It is our submission that these measures would not only increase the burden on the already stretched immigration detention framework and cause unnecessary harm and hardship to the people affected, but it will also result in people being denied the opportunity to present their case in a way that allows the Department/Minister to make a fair and just decision and one that is the preferred outcome for the Australian community as a whole.

7 Additional punishment

7.1 For those persons who have been subject to penalties through the criminal justice system, the proposed amendments will inevitably impose, in effect, additional punishment.

7.2 In RILC's view, it is likely that some people, who have already served a term of imprisonment, will then be subjected to prolonged detention and further separation from immediate family and their community while cancellation and any revocation processes are carried out. In RILC's experience, these procedures, and arrangements for removal, may take a considerable amount of time.

7.3 By virtue of their continued detention, the members of this group will be subject to the barriers to accessing legal representation and to full and equal participation throughout the process, as set out above in this submission.

7.4 The mandatory cancellation of visas of this group removes the finality of the prison sentence imposed by criminal law, which was intended and specifically judged by an expert criminal decision-maker to be sufficient penalty proportionate to the crime.

7.5 Moreover, it ignores and interferes with a fundamental purpose underlying criminal justice: the rehabilitation of wrongdoers. The proposed amendments assume that a person serving a prison sentence is not rehabilitated and has no chance of being rehabilitated and effectively imposes additional punishment on the person for the original offence.

8 Permanent residents

8.1 Recognition of status of permanent residents

8.1.1 For permanent residents, these proposed measures represent a fundamental and radical shift in policy regarding the basic entitlement to being protected from expulsion from Australia without due process. This is evident from the following:

- The Bill purports to extend the application of a number of cancellation powers to permanent visas where previously permanent residents of Australia would have been exempt;

- The combination of the broadening in scope of cancellation powers applying to permanent visas, the significant lowering of cancellation thresholds, and the denial of a fair hearing, will expose permanent residents that may have spent a significant portion of their life in Australia, and who have Australian citizen family, to being expelled without the opportunity of a fair hearing of their case.

8.1.2 The statutory and policy framework governing Australia's immigration system has long-since recognised that permanent residents generally have significantly stronger and more compelling ties to Australia than temporary residents. Residents of Australia are exactly that; and they call Australia home. A significant proportion of permanent residents have family living here in Australia, and many have Australian citizen children. Recognition of this resident status is enshrined in the Act and Regulations in contexts such: access to merits review for adverse decisions; eligibility to sponsor family members and relatives for temporary and permanent visas; and a significantly higher visa criteria threshold for the grant of a permanent visa relative than that for a temporary visa.

8.1.3 In recent years, RILC has observed that the migration pathways to permanent residence in Australia have become much more limited, for all of the categories of visa within the Migration Program and Refugee and Humanitarian Program. At present there is no better example of this heightened perception of this status relative to temporary entrants than the current government's policy on Temporary Protection visas.

8.1.4 Current advice of the Department states that a permanent resident has most of the rights and entitlements of a citizen, apart from being eligible to vote and an automatic right to re-enter Australia without a visa.[35] The recognition of the extensive rights of permanent residents, and their status in the Australian community, is also evident in other government policy, legislation and also by foreign governments. For example:

- children born to parents, where at least one of which is a permanent resident of Australia, automatically acquire Australian citizenship at birth by operation of law;[36]

- permanent residents can access the National health scheme (Medicare);

- permanent residents are eligible for Australian consular assistance overseas;[37]

[35] 'Australian permanent resident information', Department of Immigration and Border Protection website – at http://www.immi.gov.au/Live/Pages/australian-permanent-resident-information.aspx [accessed 31/10/2014]
[36] *Australian Citizenship Act 2007*
[37] Australian Consular Operations Handbook, Part 2: Consular services: welfare of Australians overseas, Department of Foreign Affairs and Trade

- permanent residents are eligible in many circumstances to access welfare benefits from Centrelink;
- permanent residents are eligible for an Australian Travel Document in many some instances;
- some permanent residents are eligible to defer payment of their student contribution under the HECS-HELP scheme;
- permanent residents are eligible for employment with many state, territory and federal government agencies;
- permanent residents have the right to travel to New Zealand without applying for a New Zealand visa. (This right is granted by the New Zealand government); and
- permanent residents of Australia have unrestricted rights to live, work and study in New Zealand. (This right is granted by the New Zealand government).

8.1.5 Despite these extensive rights afforded to permanent residents, which match those granted to Australian citizens in all but a few contexts, the proposed amendments seek to deny many of these members of the Australian community the opportunity to essentially tell their story before being detained and expeditiously expelled from the country (and potentially to another foreign country with which they may have little or no connection, and may not speak the language). This fundamental denial of due process for permanent residents of Australia is inconsistent with both the rule of law and longstanding policy on the rights of these persons in Australia.

8.1.6 Removal from Australia is final. Once a person is removed from Australia upon visa cancellation, any chance of them ever returning is extremely limited under the current statutory framework. The Act and Regulations provide for numerous legal bars to persons in these circumstances from returning to Australia, even for a short visit (for example, to visit Australian citizen children or for a family member's funeral). For the overwhelming majority of persons expelled on character grounds, they would not be able to meet the character requirements for any offshore visa. Those who had their visa cancelled on other grounds, would face a significant exclusion period, and would have difficulty satisfying the Department that they should be granted another visa. Finally, for those permanent residents who have been granted protection in Australia, or who arrived on offshore humanitarian visas, it may mean being confined to an immigration detention center indefinitely, without any prospect of release, without first being afforded the opportunity of a fair hearing of their case.

8.1.7 In RILC's experience representing and assisting permanent resident clients with visa cancellation processes, many have little or no personal, familial or cultural connection to their country of nationality. Many moved to live in Australia when they were young children and do not have family in their home country or speak the necessary language(s) required to live there. A number of them have Australian citizen children and partners, and had never thought of themselves as anything other than Australian. RILC acknowledges that many temporary visa holders also suffer significant hardship by having their visa cancelled and being removed from Australia. However, in our experience, the harm caused to permanent residents by this process is generally significantly more.

8.2 Breach of Australia's international obligations

8.2.1 In addition to the increased risk of Australia breaching its international *non-refoulement* obligations by denying persons a fair and just hearing of their case and the potential for this to result in Australia wrongly returning persons who face being killed or serious human rights abuses in the other country, the proposed amendments also heighten the risk of Australia breaching the international principle of family unity and other international obligations relating to children.

8.2.2 Significantly, broadening the scope of cancellation powers, including the Minister's own personal powers, together with the denial of a fair and robust decision-making process for all persons affected, would result in increased number of Australian citizen children being unnecessarily separated from their parents and other family members .

8.2.3 The principle of family unity has long since existed as a central component in internal human rights instruments and jurisprudence. Beginning with the Universal Declaration of Human Rights[38], which states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State", most international instruments dealing with human rights contain similar provisions for the protection of the unit of a family.

8.2.4 States are obliged to act, including in the making of laws and in administrative decision-making, in accordance with this principle. This obligation derives from the following international instruments to which Australia is a signatory (among others):

- The Convention on the Rights of the Child, articles 3, 12, 9, 10 and 22 (CROC);
- The International Covenant on Civil and Political Rights, articles 17, 23 and 24;
- The International Covenant on Economic, Social and Cultural Rights, article 10.

8.2.5 It is on this basis that RILC also submits that the proposed amendments are inconsistent with the principle of family unity in that they heighten the risk of Australia breaching its associated international obligations.

8.2.6 Moreover, states that are signatories to CROC are obliged to ensure that the best interests of the child is a paramount consideration in all actions by that state affecting him or her.[39] We further note that this obligation specifically extends to "*legislative*, judicial and administrative proceedings".[40] The UN Committee on the Rights of the Child has advised that, when a child's relations with his or her parents are interrupted by migration, preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification.[41]

8.2.7 Article 9 of the CROC specifically obliges states to ensure that a child is not separated from his or her parents against their will, except where it is deemed in their best interests. We submit that the amendments, as drafted, would lead to a heightened risk of children being

[38] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html [accessed 11 September 2014]
[39] UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken a s a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, at [1] - available at: http://www.refworld.org/docid/51a84b5e4.html [accessed 11 September 2014]
[40] Ibid, at [27] to [31]
[41] Ibid, at [66]

separated from their parents where it would not, in all of the circumstances, be in their best interests.

8.2.8 We note that Article 12 of the CROC requires that children be given the right to say what they think should happen when adults are making decisions that affect them and to have their opinions taken into account. No provision is made in the proposed amendments to accommodate this obligation. In fact, the amendments proposed for mandatory cancellation on character grounds, together with the expanded personal powers of the Minister to make cancellation decisions on section 109 grounds and section 116 grounds without affording natural justice, will militate against children being able to express their views or have them represented in these processes. In particular, RLC is very concerned to note that the amendments propose, for family unit members, visa cancellation by operation of law pursuant to section 140 of the Act, where visas are cancelled by the Minister personally and where the Minister's cancellation is without natural justice. In these circumstances, it is not apparent how Australia's obligations under the CROC are to be fulfilled.

Conclusion

For the reasons set out above, RILC recommends that the Bill not be passed.