



Law Council
OF AUSTRALIA

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

Senate Legal and Constitutional Affairs Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the assistance of the Migration Law Committee and the Law Society of South Australia in the preparation of this submission.

Introduction

1. The Law Council welcomes the opportunity to provide the following comments to the Senate Legal and Constitutional Affairs Committee (**Senate Committee**) in respect of its inquiry into the Migration Legislation Amendment (Visa Revalidation and Other Measures) Bill 2016 (the Bill) [Provisions] (the Inquiry).
2. The primary effect of Schedule 1 of the Bill is to establish a visa revalidation framework within the *Migration Act 1958* (Cth) (the Migration Act). Visa holders will have to revalidate information either within a specified period (a routine revalidation check) or if the minister determines that it is in the public interest (a public interest revalidation check).
3. The Law Council has a number of concerns with Schedule 1 of the Bill. Those concerns include the:
 - Bill appears to be neither necessary nor proportionate to its intended objective, in that it has the potential to apply to all classes of visas, not just the proposed longer validity visitor visa;
 - Bill grants a broad range of powers to the Minister, with limited or no explanation as to their intended purpose;
 - Bill provides capacity for the Executive to make legislative instruments that are not subject to disallowance by the Senate,¹ potentially impacting upon all persons residing in Australia as temporary or permanent residents;
 - presence of powers in the existing structure of the Migration Act and Regulations, which already provide adequate powers to address the concerns raised in the Explanatory Memorandum and the Minister's second reading speech; and
 - insufficient information on the establishment of the proposed longer validity visa.
4. On the above grounds the Law Council recommends against passage of Schedule 1 of the Bill.
5. The Law Council would be pleased to put forward possible amendments to Schedule 1 of the Bill if more detail was provided on the proposed validity visitor visa. According to the Explanatory Memorandum the longer validity visitor visa:
 - is a 10 year visa, applying to tourism and business visitor activities;
 - will allow for multiple entries and up to a three-month stay period after each entry during the validity period of the visa (with no more than 12 months cumulative stay in a 24 month period);
 - will initially only be available to applications who are nationals of the People's Republic of China;
 - costs AUD1000 as the visa application charge; and

¹ Section 44 of the *Legislative Instruments Act 2003* (Cth).

- will be marketed as a premium product to attract high value frequent travellers.
6. In only drawing upon information contained in an Explanatory Memorandum, it is difficult to sufficiently assess the impact of the revalidation check.
 7. As such, the Law Council recommends that Schedule 1 of the Bill not progress until the regulations establishing the new validity visitor visa are provided and the above concerns are addressed, particularly narrowing the scope of the Bill so it only applies to the proposed longer validity visa.

Overview of the Proposed Changes

8. The Bill amends the *Migration Act 1958* (the Act) to establish a framework which requires certain visa holders to revalidate certain information, either within a specified period (a routine revalidation check) or if the minister determines that it is in the public interest (a public interest revalidation check).

Powers upon an Individual Person

9. The Minister will have a discretion to require a person who holds a visa of a prescribed kind to complete a revalidation check for the visa under proposed subsection 96B(1). No limit on the type of visa subject to this proposed power appears in the Bill. The only reference point is section 5 of the Migration Act which states "*prescribed means prescribed by the regulations*". This refers to the Migration Regulations 1994 (Cth) (the Migration Regulations).
10. A revalidation check is defined in proposed subsection 96(1) to mean "a check as to whether there is any adverse information relating to a person who holds a visa". The request for a revalidation check must:
 - be in writing under proposed subsection 96B(2);
 - specify how the person is to complete the revalidation check for the visa, the period within which the person must complete that check, and the effect of proposed subsections 96C and 96D as discussed below: s 96B(3); and
 - provide a response time of at least 14 days after the date of the letter under proposed subsection 96B(4).
11. If a person who holds a visa is required to complete a revalidation check, if they hold a visa, and the person passes a revalidation check, then the Minister must inform the person that their visa remains in effect under proposed subsection 96C. Under proposed subsection 96A(2) a person passes a revalidation check if the Minister is satisfied that:
 - there is no adverse information relating to the person; or
 - it is reasonable to disregard any such adverse information.
12. A person's visa will cease to be in effect if a person who holds a visa is required to complete a revalidation check and either fails to complete a revalidation check within the specified period or completes the check within the specified period but does not pass that check at a particular time ("the check time") under proposed subsection 96D(1).
13. The time that the person's visa will cease will depend upon their location at certain points in time:
 - if the person is in the migration zone at the end of the specified period or check time, their visa will cease when the person leaves Australia if at the time

of that departure they have not passed a revalidation check for the visa under proposed subsection 96D(2); and

- if the person is not in the migration zone at the end of the specified period or check time, their visa ceases to be in effect at the end of that period under proposed subsection 96D(3).
14. If a person's visa ceases to be in effect under proposed subsections 96D(2) or (3) the Minister must inform the person in writing of that cessation under proposed subsection 96D(4).
 15. If a person holds a visa that has ceased to be in effect under proposed subsections 96D(2) or (3) and the person later passes a revalidation check for the visa, the visa comes into effect again under proposed subsection 96D(5). The Minister must inform the person in writing of that matter under proposed subsection 96D(7). A person who holds a visa may be required to complete a revalidation check: (a) at any time during the visa period or after that visa has otherwise ceases; and (b) more than once during the visa period under proposed subsection 96J.

Powers upon a Class of Individuals

16. The Bill also proposes a separate power whereby the Minister acting personally can apply the revalidation check power against a class of persons. This may be done in the following circumstances:
 - If the Minister thinks it is in the public interest to do so, by legislative instrument the Minister may determine that a specified class of persons holding a prescribed visa must complete a revalidation check: s 96E(1).
 - Any such determination must be tabled before both Houses of Parliament within 185 sitting days under subsections 96E(3)-(5).
 - As soon as practicable after such a determination is made, the Minister must give written notice to each person who falls within the specified Class stating that the determination has been made, specifying how the person is to complete the revalidation check and setting out the effect of proposed sections 96G and 96H, under proposed section 96F.
17. Proposed sections 96G and 96H operate in a manner similar to proposed subsections 96D(2) and (3) as far as when those visas cease to be in effect. A person who holds a visa may be required to complete a revalidation check: (a) at any time during the visa period or after that visa has otherwise ceases; and (b) more than once during the visa period under section 96J.

Purpose and Effect of the Bill

Application of the Bill to all Visas

18. The Law Council queries whether the Bill is necessary, justified and proportionate to achieving a legitimate purpose. Principally, the Law Council is concerned that the Bill has a substantially broader application than was intended or expressed in the

Explanatory Memorandum or the Minister's Second Reading Speech. According to the Explanatory Memorandum, Schedule 1 establishes a visa revalidation framework that:

"...will establish a general power for the Minister to require, from time to time, a person who holds a visa of a prescribed kind to complete a revalidation check...

....

"This revalidation framework is intended to support the proposed introduction and trial of a new longer validity Visitor visa that is being created in response to the White Paper on Developing Northern Australia".

19. According to the Minister's Second Reading Speech:

"Schedule 1 to the bill contains amendments to the Migration Act to introduce a visa revalidation requirement. This will support the pilot of the proposed new 10-year validity visa to ensure that only genuine visitors retain the right to travel to and enter Australia"

20. Proposed subsection 96B(1), which seeks to amend the *Migration Act 1958* (Cth) (the Migration Act), states that:

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

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

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

23. The Law Council has previously raised concerns over changes to the Migration Act and related regulations that provide substantial discretionary powers to the Minister: for example with regards to the character test in subsection 501(1) of the Migration Act.² This Bill appears to give rise to similar rule of law issues.

² Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016, 4 March 2016. Available at: https://www.lawcouncil.asn.au/lawcouncil/images/3124_-_MA_Character_Bill_2016.pdf.

Revalidation Check and Adverse Information

24. "Revalidation check" is defined in the Bill as:

"a check as to whether there is any adverse information relating to a person who holds a visa"

25. *Migration Regulations 1994 - Reg 1.13A* defines adverse information in broad terms, covering a wide range of activity, not just committed by the person themselves, but also a person associated with that person. The adverse information also does not need to relate to: (a) the criteria that the person met to be granted the visa in the first place; or (b) factors/matters which would potentially expose the person to visa cancellation under existing powers of the Act. Conceivably this could relate to something as simple as a parking fine. As drafted, the Law Council is concerned that "adverse information" is too broad to be meet its intended purpose to protect the Australian community due to the risks associated with longer validity visitor visas.

Legal Rights for Visa Holders

26. In *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11, Griffiths J at 70 referred to the importance of maintaining rights of review with regard to migration matters:

"..In particular, without doubting the relevance to the exercise of that power of protecting the Australian community, it is important that the value of the statement of reasons is not diminished by resort to superficial aphorisms or empty rhetoric, which is illustrated by phrases such as "expectations of the Australian community" and the "privilege" of being a visa-holder. The former concept has the potential to mask a subjective value judgment and to distort the objectivity of the decision-making process. The latter expression is simply misleading as a legal concept. Under Australian law, having the status of a visa-holder is not a privilege. Visa-holders hold statutory and non-statutory rights which are inconsistent with the notion of their status being described simply as a "privilege". For example, many visa-holders have statutory rights of review and all visa-holders have rights relating to judicial review of adverse migration decisions. The statutory rights of a visa-holder are, of course, subject to the lawful exercise of executive powers such as those under s 501. But that fact does not justify the position of a visa-holder under Australian law being described as merely one of "privilege" in a legal sense."

27. Natural justice comprises the common law rule that a decision maker must provide the opportunity for a person whose rights, interests or legitimate expectations are affected by a decision to understand the basis for the decision and to be heard. The Law Council has long been concerned about attempts to limit natural justice under the Migration Act. For example, subsections 133A(4), 133C(3) and 134A already provide that natural justice does not apply to visa cancellation decisions.³

³ Law Council of Australia, Submission to the Australian Law Reform Commission Interim Report into Traditional Rights and Freedoms - Encroachment by Commonwealth Laws, 9 October 2015. Available at: http://www.lawcouncil.asn.au/lawcouncil/images/3065_-_Interim_Report_into_Traditional_Rights_and_Freedoms.pdf.

Additionally, the Minister is not required to consider proportionality when cancelling a visa.

28. While not specifically excluding natural justice, the Law Council is concerned that the revalidation check under proposed section 96B may give rise to natural justice issues. Under proposed section 96D it is not clear that the long term validity visa holder would be provided with reasons or be heard following a decision that a "visa ceases to be in effect".
29. A breach of natural justice rules is grounds for judicial review under section 5(1)(a) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Judicial review is fundamental to the common law tradition and is an essential tool for the preservation of liberty of the subject and vindication of human rights. Removing access to the Courts is the corollary to increased Executive power.⁴ The Law Council has observed in the migration spaces that even where judicial review is provided, its effectiveness is vitiated because Executive powers are increasingly broad and discretionary. It is also widely recognised that, strong and effective administrative review promotes better primary decision-making.
30. The Law Council recommends that, if the Bill is passed, it be at least amended to expressly provide that natural justice is afforded to those affected by a visa revalidation decision and that administrative review rights are not curtailed. This would require that the Minister inform the person subject to the visa revalidation of the nature and precise content of any 'adverse information' on which a decision is based and allow opportunity for the person to respond.
31. The Law Council maintains its primary position that the Bill should not be passed in its present form, before the scope of additional powers to be conferred on the Minister is better defined.

Scope of the Powers under the Bill

32. As drafted, the limits upon the exercise of the powers under sections 96B (upon an individual) and 96E (upon a Class of persons) are as follows in relation to the scope of people affected:
 - For an individual: the type of visa held must be prescribed in the Regulations.
 - For a Class of person: the Class of person must be determined in a legislative instrument, the type of visa held must be prescribed in the Regulations, and the Minister must be satisfied that it is in the national interest.
 - The required documentation: the Minister must inform the person in writing that they are required to pass a revalidation check and include certain limited information.
33. No other limits are set out upon the proposed power.

⁴ *Church of Scientology v Woodward* (1982) 154 CLR 25, 70 (Brennan J).

34. The Explanatory Memorandum states that the revalidation framework is intended to support the proposed introduction and trial of a new longer validity visa. It continues on to state:

"The revalidation framework provides a mechanism to require visa holders to routinely update the information they have previously provided to the Department of Immigration and Border Protection through their secure online account as their circumstances change, including contact and passport details.

The framework is also designed to manage the risks to the Australian community that may arise in the context of longer validity Visitor visas, including a person's individual circumstances changing over time, or in the event of a serious incident occurring overseas which may create a situation where it is in the public interest to reassess a visa holder's individual circumstances in light of such an event.

The amendments will allow the government to ensure that visa holders continue to meet the health, character, security and other requirements for entry to Australia."

35. The Law Council is of the view that this outline is not an accurate description of the provisions contained in the Bill. Principally, in that there is no limitation on the revalidation check powers being used against the holder of any type of visa under the Migration Act or Regulations.
36. Further, the visa referred to in the Explanatory Memorandum does not currently exist, and there are no details as to the criteria which must be satisfied for that visa, or the conditions which may or must be imposed. The Law Council is of the view that without this information, the breadth of the power conferred by Schedule 1 of the Bill cannot be fully appreciated.

Legislative Standards and Scrutiny Processes

37. The Law Council understands that parliamentary committees tasked with legislative scrutiny are often subject to significant time and resources constraints. However, the Law Council is particularly concerned with the scrutiny process for the Bill. The Bill was referred to the Senate Committee on 10 November 2016 with request that a report be provided by 28 November 2016. The closing date for submissions was 18 November 2016. The reason for the urgency and consequent lack of reasonable legislative process is not explained in either the Explanatory Memorandum or Second Reading Speeches.
38. The Law Council is of the view that one week is insufficient time for consultation on the Bill, which will grant substantial additional powers to the Minister. Additionally, the Law Council is concerned with the impact such tight time frames place upon the resources of the Senate Committee Secretariat. The Australian Law Reform

Commission in its Traditional Rights and Freedoms – Encroachment by Commonwealth Laws Report⁵ concluded that:

...the mechanisms and processes for the scrutiny of laws for compatibility with rights and freedoms could be further improved by:

...

increasing the time available for scrutiny committees to conduct its scrutiny...

39. The Law Council is of the view that substantially more time should have been granted for the Senate Committee to review the Bill. Additional time would have enabled Senate Committee members to obtain the views of a much wider range of organisations and individuals affected by the Bill.
40. The Law Council in its most recent submission to the Senate Committee on the Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 raised similar concerns with insufficient consultation times.⁶

What Evidence of Concern is Needed?

41. The Law Council notes that the Bill does contain any threshold requirement before the Minister's discretion is invoked. Instead this is a power that can be used at large against any person who holds a visa of a "prescribed kind", entirely at the discretion of the Minister.
42. This is at odds with all the visa cancellation powers which exist in the Migration Act under Subsections 109, 116, 133A, 133B, 134, 137Q, and 501 (and related powers). For each of those cancellation powers, the Migration Act prescribes specific adverse matters/facts of which the Minister must be satisfied before the discretion can be exercised.

Existing Powers available in the Migration Act

43. The Law Council considers that the existing structure of the Migration Act and Regulations already provide adequate powers to address the concerns raised by the Minister in the Explanatory Memorandum and the Minister's second reading speech. For example:
 - A visa holder can be required to inform of any change of their contact details – see for example conditions 8505, 8506 and 8513.
 - A temporary visa can be cancelled if it is later determined that:

⁵ Australian Law Reform Commission, Traditional Rights and Freedoms – Encroachment by Commonwealth Laws (ALRC Report 129), 2 March 2016. Available at: <https://www.alrc.gov.au/publications/freedoms-alrc129>.

⁶ Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee, Migration Legislation Amendment (Regional Processing Cohort) Bill 2016 [Provisions], 14 November 2016. Available at: http://www.lawcouncil.asn.au/lawcouncil/images/3207_-_Migration_Legislation_Amendment_Regional_Processing_Cohort_Bill_2016.pdf.

- i. the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or that no longer exists; or
 - ii. the decision to grant the visa was based, wholly or partly, on the existence of a particular fact or circumstance, and that fact or circumstance did not exist.
- A temporary visa can also be cancelled if the holder has not complied with the conditions of their visa.
 - Any visa (whether temporary or permanent) can be cancelled on the basis that a bogus document, or false or misleading information in a material particular, was provided as part of a visa application (Public Interest Criteria 4020).
 - With respect to protection, refugee and humanitarian visas, the Minister has extensive cancellation powers under subsections 5H(2), 36(1C), 36(2C) and section 501 of the Migration Act.

44. Accordingly, the Law Council cannot see a need for the new powers proposed by the Bill. The Law Council is of the view that the stated intention of the Explanatory Memorandum could be met by the imposition of specific visa conditions on the proposed new subclass of visa.

45. Further, the proposed powers dispense with the protections, limits and oversights imposed upon the Minister by the entire structure of the Migration Act in relation to the cancellation of visas. These protections, limits and oversights are incorporated into the Migration Act to avoid wide discretion of the sort proposed by this Bill.

Notification Concerns

46. In the absence of any specific procedural notification provisions in the Bill, the Law Council suspects that the existing notification provisions contained in subsections 494 to 494D of the Migration Act will apply in relation to the obligation upon the Minister to notify the person (or Class of persons) of their requirement to pass a revalidation check.

47. The methods by which the Minister can notify a person are set out in section 494B with deemed notification periods specified in section 494C, as follows:

Method of notification	Deemed Receipt
Giving to the person by hand	At the time the document is handed to the person
Handing to a person who is at the last residential or business address provided to the Minister by the person for the purpose of receiving documents; and who appears to live or work there; and who appears to be	At the time the document is handed to "a person"

at least 16 years of age	
Dating the document and despatching by prepaid post within 3 business days to: (a) the last address for service provided to the Minister by person for the purposes of receiving documents; or (b) the last residential or business address provided to the Minister by the person for the purposes of receiving documents	7 working days from the date of the document (if sent from a place in Australia to another place in Australia); or Otherwise 21 calendar days from the date of the document
By fax, email or other electronic means	At the end of the day that the document is sent

48. During the processing of a visa application, a visa applicant has a positive obligation to keep the Department informed of any change to their residential address under subsection 52(3A). Further, some temporary visas (such as student visas, for example) are issued subject to a visa condition requiring the holder to live at a specified address or to notify the Department of any change of address. However, these conditions attach to only a limited number of classes of temporary visas, and no permanent visas. As such, no holder of a permanent visa and few holders of temporary visa have any obligation to keep the Department informed of changes to their contact details.
49. As there is no time limitation in Bill, these proposed powers could be exercised many years after a person has been granted permanent residence. The fact that that many people will have moved address in that period will meant that many people may not be aware that that a notice requiring them to complete a revalidation check has been issued. In practical terms their visas will then cease to be in effect when they travel internationally.

Comparisons with the earlier ‘automatic cancellation’ of Student Visas under s 137J of the Migration Act

50. The Law Council makes the observation that a similar scheme with regard to the automatic cessation of visas by operation of law has previously been abandoned by the Parliament.
51. The *Migration Legislation Amendment (Student Visas) Act 2012* abolished the automatic cancellation of student visas under section 137J of the Act. Under this scheme, student visas were automatically cancelled following the issuing of a notice under section 20 of the *Education Services for Overseas Students Act 2000* (Cth), which had the effect of automatically cancelling the holder’s student visa 28 days after the issue of the notice. The Explanatory Memorandum to the 2012 Bill stated as follows:

The Bill addresses the findings of the Knight Review, which found that the 'automatic cancellation regime is patently not working as a compliance and integrity tool and is in fact hindering the effective use of available student compliance resources'. The Bill will allow for consistency in the treatment of alleged breaches of the student visa condition relating to unsatisfactory course attendance or course progress, enabling each case to be considered on its merits. This will lead to fairer outcomes for student visa holders. It will also reduce the administrative burden associated with students who attend an office of the Department of Immigration and Citizenship to stop the automatic cancellation process or apply for revocation of a cancellation. This will allow integrity resources to be more strategically targeted towards risk.

52. The Law Council views the proposed scheme under the Bill as comparable. Automatic cessation of visas is an inefficient tool for managing visa compliance, consistent with the commentary in the Knight Review.⁷

⁷ Michael Knight, Strategic Review of the Student Visa Program, 2011. Available at: <https://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/2011-knight-review.pdf>.