



Australian Government
Department of Immigration and Border Protection

SECRETARY

28 October 2014

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary

**Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry
into the Migration Amendment (Character and General Visa Cancellation) Bill 2014**

Thank you for the opportunity to provide comment to the Senate Legal and Constitutional Affairs Committee for the inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014.

I have enclosed the department's submission to the inquiry.

The contact officer in my department is Kath Dunham, Director, Character and Cancellation Framework Section

Yours sincerely

Michael Pezzullo



Australian Government
Department of Immigration and Border Protection

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

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1. Introduction

The Department of Immigration and Border Protection welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Character and General Cancellation) Bill 2014 (the Bill), following the introduction of the Bill into the House of Representatives on 24 September 2014.

The Bill will strengthen the character and general visa cancellation provisions in the *Migration Act 1958* (the Act) to ensure that non-citizens who commit crimes in Australia, pose a risk to the Australian community or represent an integrity concern are appropriately identified and considered for visa refusal or cancellation. The Bill also introduces a new mandatory cancellation power for non-citizens who objectively do not pass the character test on specified grounds and are in prison.

2. Background

The current legislative framework for the character and general visa cancellation provisions has been in place for some time. The character provisions in the Act have been in place since 1999, while the general visa cancellation provisions under sections 109 and 116 have remained largely unchanged since 1994, which has meant that many of the existing provisions are no longer reflective of modern jurisprudence. Australian migration patterns and processes have also changed significantly since the introduction of these cancellation provisions with higher volumes of limited stay visa holders coming to Australia and streamlined processes facilitating entry for tourism, economic and other purposes.

In 2012, the Department of Immigration and Border Protection began conducting an internal Review of the Character and General Visa Cancellation Framework (the Review) to evaluate the effectiveness of the provisions in the current environment. This was completed at the end of 2013. The Review was an internal Departmental project. The Review made a number of recommendations that amendments be made to the Act to strengthen the integrity of the migration programme and better capture cohorts of non-citizens for visa cancellation consideration, including particular kinds of criminal activity and other behaviour by non-citizens, such as engaging in migration fraud.

3. Key Measures in the Bill

Character provisions of the Act

In relation to the character provisions, the purpose of this Bill is to amend the Act to address a range of identified issues and gaps in the current legislation and to reform the approach to character cancellation consideration for non-citizens in prison:

- Under the existing provisions non-citizens in prison who do not pass the character test can be released from prison prior to a character visa cancellation or a refusal process being finalised. This has meant that criminals who may potentially present a risk to the community can reside lawfully in the community while this consideration takes place. The proposed mandatory cancellation process assists in ameliorating this risk.
- Under the existing provisions, the character test is not effective in capturing particular cohorts of concern. Therefore, amendments proposed ensure the following cohorts of non-citizens will objectively fail the character test:
 - any non-citizen convicted or otherwise found guilty of a sexually based offence involving a child;

- non-citizens who receive an aggregate sentence of 12 months or more (reduced from 24 months), including multiple and/or concurrent sentences;
 - non-citizens suspected or accused of engaging in genocide, crimes against humanity, war crimes, crimes involving torture or slavery and other crimes of serious international concern; and
 - non-citizens who are the subject of an adverse security assessment, or certain Interpol Notices.
- In addition, amendments are proposed to strengthen the more subjective elements of the character provisions, such as:
 - lowering the threshold of the 'significant risk' ground to 'risk' of a non-citizen engaging in certain behaviours;
 - lowering the threshold of the current association ground to 'reasonable suspicion';
 - including membership of a group in the association ground; and
 - including that a non-citizen does not pass the character test based on involvement in certain activities such as;
 - war crimes (where an indictment by an international court has not occurred);
 - people smuggling; or
 - people trafficking.
 - In order to keep step with the current environment and modern jurisprudence, the amendments also put beyond doubt that:
 - where a non-citizen receives a pardon, but the effect of the pardon is not to nullify or quash the conviction, but was merely to relieve the person of the consequences of the conviction, these non-citizens do not pass the character test; and
 - a non-citizen who is found not fit to plead due to a serious mental illness, but the offence was proven and of a serious nature, and they were detained in a facility or institution will not pass the character test. This more effectively covers the various ways in which jurisdictions within Australia address court and sentencing proceedings for mentally ill people who commit a serious crime.
 - Information from various State and Territory agencies, including those responsible for justice administration, law enforcement and correctional institutions, is crucial to determinations as to whether specific individuals pass or do not pass the character test. Difficulties have arisen because legislation in the States and Territories does not recognise the Commonwealth's right to obtain relevant information about a non-citizen who may not pass the character test in order for a decision to be made about whether to refuse to grant or to cancel that person's visa under section 501. This is due to the lack of uniformity in the privacy legislation of the Commonwealth and the States and Territories. The proposed amendments provide the basis for formal information sharing arrangements to be put in place to ensure that non-citizens potentially liable for character consideration are better identified.

General cancellation provisions of the Act

In relation to the general visa cancellation provisions, the purpose of this Bill is to amend the Act to address a range of identified issues/gaps in the current legislation and to strengthen integrity in the migration programme.

- Under the existing provisions, the general visa cancellation grounds are not effective in capturing particular cohorts of concern, particularly in relation to the provision of incorrect information or where there are identity concerns. Therefore, amendments proposed introduce new cancellation grounds where:
 - a non-citizen provides incorrect information in non-statutory processes, such as entry interviews, refugee status assessments, or in processes relevant to the Minister considering the grant of a visa or the allowing of a visa application using his or her personal powers under the Act. Currently only incorrect information provided in a statutory process can be considered; and
 - the Minister or delegate is not satisfied about a non-citizen's identity. Currently there are difficulties in finding that a cancellation ground is enlivened where there is conflicting identity information provided by the non-citizen.
- The Bill will also strengthen the existing cancellation grounds by clarifying that:
 - the Minister may cancel a visa under paragraph 116(1)(a) of the Act in circumstances where a decision to grant the visa was based on a particular fact or circumstance that did not exist (as well as where the decision was based wholly or partly on a particular fact or circumstance that no longer exists); and
 - the Minister may cancel a visa under paragraph 116(1)(e) of the Act if the presence of its holder in Australia is or may be, or would or might be, a risk to the health, safety or good order for the Australian community or a segment of that Australian community, or the health or safety of an individual or individuals.
- The Bill will provide for new personal decision-making powers for the Minister under the general cancellation provisions by:
 - ensuring that a personal decision of the Minister to cancel a visa relying on the grounds in sections 109 and 116 of the Act are not merits reviewable; and
 - providing the Minister with the power to set aside a decision of a delegate or review tribunal in the public interest.

These key measures across the character and general cancellation provisions are designed to strengthen the existing cancellation powers (and refusals on character grounds) to ensure that non-citizens are appropriately captured for visa cancellation where they:

- may be of character concern and present a risk to the Australian community; or
- present a risk to the integrity of the Migration Programme.