

CHAPTER 1

Introduction and Background

Referral of the inquiry

1.1 The Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Bill) was introduced into the House of Representatives by the Minister for Immigration and Border Protection (Minister), the Hon Scott Morrison MP, on 24 September 2014.¹

1.2 Pursuant to a recommendation of the Selection of Bills Committee, on 25 September 2014, the Senate referred the provisions of the Bill to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 24 November 2014.²

Conduct of the current inquiry

1.3 In accordance with usual practice, the committee advertised the inquiry on its website and wrote to a number of organisations and individual stakeholders inviting submissions by 28 October 2014. Details of the inquiry were placed on the committee's website at http://www.aph.gov.au/senate_legalcon.

1.4 The committee received 13 submissions in response to this inquiry. The submissions are published on the committee's website and are listed at Appendix 1 to this report. The committee did not hold a public hearing for this inquiry and as a result the inquiry was done on the papers.

Purpose of the bill

1.5 In his Second Reading Speech, the Minister described the main purpose of the Bill as:

...to strengthen the character and general visa cancellation provisions in the Migration 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 considered for visa refusal or cancellation. The bill also introduces a mandatory cancellation power for non-citizens who objectively do not pass the character test and are in prison.³

1.6 The Minister also noted that the Bill would serve three key functions:

- to broaden the character test and allow the Minister to require an agency of a State or Territory to disclose specified personal information relating to the capacity of a visa holder or applicant to satisfy the character test;

1 *Votes and Proceedings*, No. 68-24 September 2014, p. 845.

2 *Journals of the Senate*, No. 56-25 September 2014, p. 1506.

3 *House of Representatives Hansard*, 24 September 2014, p. 10,325.

- to amend the general visa cancellation provisions of the *Migration Act 1958* (Cth) (Act) so as to enhance measures for dealing with non-citizens who present a risk to Australia, introduce lower thresholds for cancelling temporary visas and introduce stronger personal ministerial decision-making powers of cancellation; and
- to introduce a provision for mandatory visa cancellation for a non-citizen who objectively does not pass the character test and is serving a full-time custodial sentence.⁴

1.7 The Explanatory Memorandum (EM) referred to the recommendations of the Review of the Character and General Visa Cancellation Framework (Review) conducted by the Department of Immigration and Border Protection (the Department) in 2013 and noted that the Bill aims to implement these recommendations. The Review recommended amendments to the Act to better address the commission of particular types of criminal activity and migration fraud by non-citizens.⁵

1.8 As stated by the Minister, the current general visa cancellation framework and the character framework have been in place since 1994 and 1999 respectively, without significant change. However, since that time, the manner in which non-citizens have entered and stayed in Australia has changed dramatically, with higher volumes of temporary visa holders in Australia and streamlined processes facilitating entry. The Minister reasoned that 'facilitation of entry at the visa application stage needs to be complemented with strong visa cancellation grounds and processes at the post visa grant stage to ensure the integrity of the migration program' and pointed out that:

Entry and stay in Australia by noncitizens is a privilege, not a right, and the Australian community expects that the Australian government can and should refuse entry to noncitizens, or cancel their visas, if they do not abide by Australian laws. Those who choose to break the law, fail to uphold the standards of behaviour expected by the Australian community or try to intentionally mislead or defraud the Australian government should expect to have that privilege removed.⁶

The current law pertaining to visa cancellation and refusal

1.9 The Act defines an unlawful non-citizen as a non-citizen who is living within the migration zone but who does not hold a valid visa or is not an 'allowed inhabitant of the Protected Zone'.⁷ Visa holders who have had their visas cancelled under the provisions of the Act become unlawful non-citizens upon the cancellation of their visas. The Minister or a delegate may cancel a visa or refuse a visa application under various provisions including under the character test framework⁸ and the general

4 *House of Representatives Hansard*, 24 September 2014, pp 2-3.

5 Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014, p. 1.

6 *House of Representatives Hansard*, 24 September 2014, p. 10,325.

7 Sections 13 and 14 of the *Migration Act 1958* (Cth).

8 Section 501 of the *Migration Act 1958* (Cth).

cancellation framework of the Act.⁹ An unlawful non-citizen must be detained¹⁰ and then, as soon as is reasonably practicable removed from Australia¹¹ unless the person is personally granted a visa by the Minister¹² or successfully applies for a protection visa, both of which would be contingent on the person showing that they can pass the character test.¹³

The character test

1.10 If a person cannot satisfy the Minister that he or she satisfies the character test the Minister may refuse to grant that person a visa or, where the person has an existing visa, the Minister may cancel the visa.¹⁴ When deciding whether to exercise the discretionary power to cancel a visa on character grounds the decision-maker is bound to follow the guidelines set out in Ministerial Direction No 55.¹⁵ The guidelines specify the primary considerations and other considerations for visa holders and visa applicants respectively. Primary considerations that apply to both groups are the protection of the Australian community, the nature and seriousness of the conduct that led to the character evaluation, the risk to the Australian community of the person committing further offences or engaging in other serious conduct, the best interests of any children affected by the decision and Australia's non-refoulement obligations.¹⁶ A further primary consideration that only affects visa holders is the strength, duration and nature of the visa holder's ties to Australia.¹⁷ Other considerations include, but are not limited to, the potential impacts on family members, Australian business interests and members of the Australian community, and, with regard to visa holders, the extent of impediments that the visa holder may face if removed from Australia.¹⁸

1.11 At present, where the Minister reasonably suspects that the relevant person does not pass the character test and the Minister deems that a refusal or cancellation would be in the national interest, the Minister may personally decide to refuse to issue

9 Part 2 Division 3 of the *Migration Act 1958* (Cth).

10 Section 189 of the *Migration Act 1958* (Cth).

11 Section 198 of the *Migration Act 1958* (Cth).

12 Section 195A of the *Migration Act 1958* (Cth).

13 Department of Immigration and Border Protection, *Fact Sheet 85 – Removal Pending Bridging Visa*, at <https://www.immi.gov.au/media/fact-sheets/85removalpending.htm> (accessed 13 November 2014); Department of Immigration and Border Protection, *Fact Sheet 61 – Seeking Protection Within Australia*, at <http://www.immi.gov.au/media/fact-sheets/61protection.htm#e> (accessed 13 November 2014). See also subsections 501(1) of the *Migration Act 1958* (Cth).

14 Subsections 501(1) and 501(2) of the *Migration Act 1958* (Cth).

15 *Direction No 55 made under section 499 of the Migration Act 1958* (Cth).

16 Section 2 of *Direction No 55 made under section 499 of the Migration Act 1958* (Cth).

17 Section 2 Para 9.2 of *Direction No 55 made under section 499 of the Migration Act 1958* (Cth).

18 Section 2 Paras 10 and 12 of *Direction No 55 made under section 499 of the Migration Act 1958* (Cth).

a visa to or cancel the visa, and this decision is not subject to the rules of natural justice.¹⁹

1.12 The character test is found in subsection 501(6) of the Act and provides that a person does not satisfy the character test if:

- the person has a substantial criminal record;²⁰
- the person has been convicted of an offence committed while in immigration detention, while escaping from immigration detention or while a fugitive;
- the person has, or has had, an association with an individual, group or organisation suspected of having been, or being, involved in criminal conduct;
- the person is found to be not of good character, having regard to the person's past and present criminal conduct;
- the person is found to be not of good character, having regard to the person's past and present general conduct; or
- the person, while in Australia, poses a significant risk²¹ of:
 - engaging in criminal conduct in Australia;
 - harassing, molesting, intimidating or stalking another person in Australia;
 - vilifying a segment of the Australian community;
 - inciting discord in all or part of the Australian community; or
 - representing a danger to all or part of the Australian community.²²

Current policy

1.13 As noted above, the power of the Minister to refuse or cancel a visa on the basis that a person does not pass the character test is discretionary. It follows that if a visa holder or visa applicant does not pass the character test, it does not necessarily mean that the person's visa will be cancelled or refused. Decisions to cancel or refuse visas on the basis of the character test are made after a full consideration of all the

19 Subsections 501(3)-(5) of the *Migration Act 1958* (Cth).

20 For the purposes of the character test a person is considered to have a substantial criminal record if that person: has been sentenced to death or life imprisonment; sentenced to a term of imprisonment of 12 months or more; sentenced to two or more terms of imprisonment (whether on one or more occasions), where the total of those terms is two years or more; or acquitted of an offence on the grounds of either unsoundness of mind or insanity and, as a result, the person has been detained in a facility or institution: Subsection 501(7) of the *Migration Act 1958* (Cth).

21 Paragraph 5 of Annex A to *Direction No 55 made under section 499 of the Migration Act 1958 (Cth)* provides that the 'significant risk' grounds are enlivened if there is evidence that suggests that there is more than a minimal or remote chance that the person will engage in the relevant conduct and there must be a significant risk that the person will engage in that conduct in the future, not that he or she has engaged in that conduct in the past.

22 Subsection 501(6) of the *Migration Act 1958* (Cth).

circumstances of the case. As part of this process, where appropriate, visa holders and visa applicants are given the opportunity to respond to information that the Minister or the Department will use to decide whether or not to cancel or refuse the visa.²³ Where a decision to refuse or cancel a visa is made by a delegate of the Minister, that decision is subject to merits review and judicial review.²⁴ However, where a decision is made by the Minister in a personal capacity, the merit of that decision is not subject to review.²⁵

The general visa cancellation framework

1.14 The Minister is empowered by section 109 of the Act to cancel a visa when, after giving notice to the visa holder,²⁶ the Minister is satisfied that the visa holder failed to comply with the relevant sections of the Act on provision of information.²⁷ A further cancellation provision is found at subsection 116(1) of the Act which specifies grounds upon which the Minister may cancel a visa, including where any circumstances which permitted the grant of the visa no longer exist and where the presence of the visa holder in Australia is, or would be, a risk to the health, safety or good order of the Australian community.²⁸ A permanent visa may not be cancelled under section 116 if the visa holder is within Australian territory and was immigration cleared on last entering Australia.²⁹

1.15 Section 138 of the Act provides that a decision to cancel or not cancel a visa, or a decision to revoke or not revoke the cancellation of a visa, becomes final at the time that a record of the decision is made and the Minister has no power to vary or revoke the decision once the decision is final.³⁰

Structure and key aspects of the Bill

1.16 The Bill is comprised of two schedules. Schedule 1 proposes to amend provisions of the Act relating to the character test and Schedule 2 proposes to amend the general visa cancellation framework of the Act.

Amendments to the character test provisions

1.17 The Bill proposes to make substantive changes to the character test provisions in the Act. The key changes to subsection 501(6) include:

23 Department of Immigration and Border Protection, *Fact Sheet 79 - The Character Requirement*, at <https://www.immi.gov.au/media/fact-sheets/79character.htm> (accessed 20 October 2014).

24 The merits and judicial review frameworks are incorporated into Parts 5 and 8 of the *Migration Act 1958* (Cth) respectively.

25 Subsection 338(2) of the *Migration Act 1958* (Cth).

26 Notice is to be given under section 107 of the *Migration Act 1958* (Cth).

27 Section 109 of the *Migration Act 1958* (Cth). The relevant sections relating to the provision of information are sections 101-105 of the *Migration Act 1958* (Cth).

28 Paragraphs 116(1)(a) and 116(1)(e) of the *Migration Act 1958* (Cth).

29 Subsection 117(2) of the *Migration Act 1958* (Cth).

30 Section 138 of the *Migration Act 1958* (Cth).

- redefining the threshold of risk required under paragraph 501(6)(d), from 'a significant risk' to 'a risk'³¹ that the person would engage in the specified conduct if allowed to enter or remain in Australia;³² and
- providing that a person does not pass the character test if:
 - the Minister reasonably suspects that the person has been or is involved in people smuggling, trafficking in persons, genocide, a crime against humanity, a war crime, a crime involving torture or slavery or another crime of serious international concern;
 - the person has been charged or indicted for genocide, a crime against humanity, a war crime, a crime involving torture or slavery or another crime of serious international concern;
 - the Minister reasonably suspects that the person was or is a member of a group or organisation or associated with a group organisation or person, and the Minister reasonably suspects that the group, organisation or person is or has been involved in criminal conduct;
 - the person has been convicted, found guilty or had a charge proven against him or her for a child sex offence in an Australian court;
 - the person has been assessed by the Australian Security Intelligence Organisation as posing a direct or indirect risk to security; or
 - an Interpol notice is in force in relation to the person and it is reasonable to infer from that notice that the person would present a risk to part or all of the Australian community.³³

1.18 With regard to the term 'substantial criminal record' as used in subsection 501(7), the Bill proposes to:

- redefine the term to include people who have been sentenced to two or more terms of imprisonment that add up to 12 months or more (rather than two years or more, as is currently the case) and clarify that, when calculating the term of sentences, concurrent sentences (whether whole or part) are to be considered as separate sentences;³⁴

31 The EM states that the intention behind the deletion of the word 'significant' from this provision is to clarify 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': Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014, p. 10.

32 Schedule 1 item 11 of the Migration Amendment (Character and General Visa Cancellation) Bill 2014.

33 Schedule 1 items 10 and 12 of the Migration Amendment (Character and General Visa Cancellation) Bill 2014.

34 Schedule 1 items 1, 13 and 15 of the Migration Amendment (Character and General Visa Cancellation) Bill 2014.

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- clarify that a sentence may only be disregarded if the person has been pardoned and the effect of the pardon is that the person is considered to have never been convicted of the relevant offence;³⁵ and
 - provide that a person is considered to have a substantial criminal record if a court has found that he or she committed an offence but was unfit to plead and as a result he or she was detained in a facility or institution.³⁶

1.19 The Bill proposes to insert a new mandatory ground for visa cancellation. If this provision were inserted, the Minister would have to cancel the visa:

- where a person is serving a full-time custodial sentence for an offence against an Australian law; and
- where the person has at some point been found guilty of a child sex offence, or sentenced to death, life imprisonment or a term of imprisonment of 12 months or more.³⁷

1.20 The mandatory cancellation would not be subject to natural justice, but the Minister would be compelled to notify the person of the cancellation and invite representations. The Bill also proposes to provide the Minister with a power to revoke a cancellation decision. A decision not to revoke, although notifiable, would not be subject to merits review or judicial review.³⁸ Where a decision to revoke a mandatory cancellation is made by a decision-maker that decision might then be set aside personally by the Minister if the Minister is satisfied the cancellation is in the national interest and the affected person had at some point been found guilty of a child sex offence, or sentenced to death, life imprisonment or a term of imprisonment of 12 months or more. Such a decision would not be subject to natural justice or reviewable.³⁹

1.21 Finally, through the amendments to the character framework, the Bill proposes to include a provision allowing the Minister to require the head of an agency of a State or Territory to disclose to the Minister specified information relating to the character of the relevant person.⁴⁰

35 Schedule 1 item 16 of the Migration Amendment (Character and General Visa Cancellation) Bill 2014.

36 Schedule 1 item 14 of the Migration Amendment (Character and General Visa Cancellation) Bill 2014.

37 Schedule 1 items 8 and 9 of the Migration Amendment (Character and General Visa Cancellation) Bill 2014.

38 Schedule 1 items 18, 20 and 21 of the Migration Amendment (Character and General Visa Cancellation) Bill 2014.

39 Schedule 1 items 17, 20 and 24 of the Migration Amendment (Character and General Visa Cancellation) Bill 2014.

40 Schedule 1 item 25 of the Migration Amendment (Character and General Visa Cancellation) Bill 2014.

Amendments to the general visa cancellation framework

1.22 The first key amendment to the general visa cancellation framework involves the insertion of Subdivision FA containing new personal powers of the Minister to cancel visas (but not special purpose visas) where the Minister is satisfied that there are grounds for cancellation, the visa holder fails to convince the Minister that the grounds do not exist and it would be in the public interest to cancel the person's visa. The new subdivision also proposes that were the Minister to personally cancel a visa, the visa holder would not have recourse to a review, but the Minister would retain a power to revoke the decision to cancel.⁴¹ If the Minister were to personally cancel the visa of a person under this subdivision, the proposed amendments would limit the category of visa that the person could apply for in the future.⁴²

1.23 The second key amendment would allow the Minister to cancel a visa of a visa holder if the presence of that person in Australia is or may be, or would or might be, a risk to one or more individuals or to all or part of the Australian community.⁴³ This amendment lowers the threshold of risk from a definite risk to a possible risk, thereby expanding the discretionary power of the Minister to cancel a temporary visa on these grounds.⁴⁴

1.24 Other key amendments involve other changes to section 116 of the Act. These changes would:

- empower the Minister to cancel any visa (temporary or permanent) if he or she is not satisfied as to the visa holder's identity; and
- allow the Minister to cancel any visa (temporary or permanent) if he or she is satisfied that incorrect information was given by or on behalf of the visa holder to a specified person and that information was taken into account in, or in connection with, the making of a decision to grant the visa to the holder or to enable the holder to apply for the visa.⁴⁵

Acknowledgement

1.25 The committee thanks the organisations and individuals who made submissions to the inquiry.

41 Schedule 2 items 1, 12 and 18-21 of the Migration Amendment (Character and General Visa Cancellation) Bill 2014.

42 Schedule 2 item 2 of the Migration Amendment (Character and General Visa Cancellation) Bill 2014.

43 Schedule 2 item 4 of the Migration Amendment (Character and General Visa Cancellation) Bill 2014.

44 *House of Representatives Hansard*, 24 September 2014, p. 3.

45 Schedule 2 items 3, 5 and 9 of the Migration Amendment (Character and General Visa Cancellation) Bill 2014.