

CHAPTER 3

Conclusions and Recommendations

3.1 The committee notes that the main intent of the Bill is to strengthen the character and general visa cancellation provisions in the *Migration Act 1958 (Cth)* so as 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 aims to introduce a mandatory cancellation power for non-citizens who objectively do not pass the character test and are in prison.¹

3.2 The committee also notes that, while the nature of Australia's migration program has changed dramatically over the past two decades, the relevant frameworks in the Bill have not been substantially changed to reflect this change.² Generally speaking, the committee considers that the provisions Bill represent a sound and justifiable approach to the need to update the relevant frameworks in the Act so as to bring them into line with the current migration program.

3.3 The committee acknowledges the criticisms of the provisions of the Bill made in submissions to the inquiry. These criticisms mainly focus on the lowering of thresholds in relation to the character test and general visa cancellation, the introduction of a mandatory cancellation process into the character framework, the introduction of new personal ministerial powers to cancel and refuse visas and potential human rights issues that may result from the proposed amendments.

3.4 The committee considers that the criticisms of a broader character test and general visa cancellation framework are unfounded. A determination under either of these frameworks is discretionary and, when made by any person other than the Minister acting in a personal capacity, the determination is subject to a review process. This provides sufficient checks and balances to ensure a fair outcome. The committee does concede that in the interests of clarity the government may wish to consider a more specific and detailed definition of the terms 'people smuggling offence' and 'sexually-based offences involving a child'.

3.5 The committee notes that the proposed mandatory cancellation process is designed to create a streamlined process to provide a greater opportunity to ensure non-citizens who pose a risk to the community remain in detention until their immigration status is resolved or they are removed. The committee notes that although the mandatory cancellation process is not discretionary the decision to revoke the cancellation is discretionary and, therefore, where that decision is made by any person other than the Minister in a personal capacity it is subject to merits review and judicial review. Further, even if a decision not to revoke is made by the Minister in a personal capacity, the committee accepts that the Minister would take into account all relevant

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

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

factors including, for example, the seriousness of the criminal activity, and Australia's obligations under international law.³

3.6 The committee is mindful of the arguments against the proposed introduction of new ministerial personal powers. The arguments centre around the fact that a decision taken personally by the Minister is not reviewable on its merits. The committee observes that the Minister would be required to act lawfully and in accordance with the legislation when exercising proposed new ministerial powers and a decision taken by the Minister personally would still be subject to judicial review. The committee takes the view that this review system provides sufficient safeguards against any abuse or error associated with the exercise of these proposed powers.

3.7 The committee acknowledges the human rights concerns raised by submitters. However, the committee notes that the Statement of Human Rights attached to the EM stated that '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, or whether to revoke a mandatory cancellation decision'.⁴ The current guidelines in *Ministerial Direction No 55* affirm Australia's commitment to upholding its human rights obligations with particular reference to non-refoulement, the International Convention on Civil and Political Rights and the Convention on the Rights of the Child. The committee acknowledges that these guidelines are not binding when determining matters under the general visa cancellation framework but considers that the guidelines could be extended to apply to cancellation decisions made under the general visa cancellation framework.

Recommendation 1

3.8 The committee recommends that the current *Direction No. 55 made under section 499 of the Migration Act 1958 (Cth)* be updated and extended so as to reflect the proposed amendments to the *Migration Act 1958 (Cth)* and, in particular, to ensure the direction applies to cancellation decisions made under the general visa cancellation framework.

Recommendation 2

3.9 Subject to recommendation 1, the committee recommends that the Senate pass the Bill.

Senator the Hon Ian Macdonald Chair

3 See Department of Immigration and Border Protection, *Answers to Written Questions on Notice*, p. 5 [Q. 8].

4 Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014, Attachment A p. 6.