

The Senate

Legal and Constitutional Affairs
Legislation Committee

Migration Amendment (Character and General
Visa Cancellation) Bill 2014 [Provisions]

November 2014

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Recommendations

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.

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.

- 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.

CHAPTER 2

Key issues

2.1 This chapter discusses the key issues raised in submissions and evidence in relation to the provisions contained in each of the two schedules to the Bill. It considers the proposed amendments to the character test framework and then the proposed amendments to the general visa cancellation framework. The chapter also separately considers the proposed expansion of ministerial powers that will affect both frameworks.

Introduction

2.2 Submitters have raised various matters in relation to the Bill. A variety of submissions questioned the utility of the proposed changes.¹ In contrast, the Department expounded that the proposed amendments are necessary and could be justified on the grounds that they are 'aimed at addressing a range of identified issues and gaps in the current legislation'.²

Protection of the Australian Community

2.3 The Statement of Compatibility with Human Rights in the EM stated:

The Australian Government is committed to protecting the Australian community from the risk of harm by non-citizens. The Government has a low tolerance for criminal, non-compliant or fraudulent behaviour by non-citizens and should be able to refuse entry to people, or cancel their visas, where they have committed serious crimes or present a risk to the community. Facilitation of entry needs to be complemented with strong cancellation powers and processes to ensure that the Government's ability to protect the Australian community and maintain the integrity of the Migration Programme is maintained into the future.³

2.4 The Police Federation of Australia reiterated this opinion, stating that the proposed amendments are justified on grounds that they 'ensure that the migration regime is properly enforced in a manner that best protects the Australian community'.⁴

1 Multicultural Development Association, *Submission 3*, p. 2; Refugee Council of Australia, *Submission 5*, p. 1; ANU College of Law: Migration Law Program, *Submission 6*, p. 2; Southern Communities Advocacy Legal and Education Services, *Submission 7*, p. 2; Australian Human Rights Commission, *Submission 8*, p. 3; Asylum Seeker Resource Centre, *Submission 11*, p. 2; Law Institute of Victoria, *Submission 12*, p. 1; Refugee & Immigration Legal Centre, *Submission 13*, p. 1.

2 Department of Immigration and Border Protection, *Submission 4*, p. 3; Department of Immigration and Border Protection, *Answers to Written Questions on Notice*, p. 5 [Q. 6]. See also Police Federation of Australia, *Submission 1*, p. 4.

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

4 Police Federation of Australia, *Submission 1*, p. 4.

2.5 The Refugee Advice & Casework Service (RACS) supported 'a visa cancellation and character assessment system which protects the Australian community from harm as a result of criminal conduct', but they contended that in order to uphold the integrity of the migration system, 'the system must have adequate procedural safeguards to ensure that decisions are fair and just'.⁵ This argument was echoed by other submitters such as the Asylum Seeker Resource Centre (ASRC) which opined that the 'current suite of cancellation and refusal powers in the Migration Act more than adequately protect the security of the Australian community'.⁶

2.6 Some submitters argued that the proposed amendments overshoot the mark of protecting Australian nationals from harm.⁷ The ANU Migration Law Program submitted that the character and visa cancellation system is fundamentally sound and working and that the 'sweep of changes introduced by the Bill is therefore clearly targeted at a small number of non-citizens'.⁸ The Southern Communities Advocacy Legal and Education Services (SCALES), although accepting the necessity of subjecting visa applications to the character test and general visa cancellation provisions, argued that the proposed amendments 'are unduly broad in their scope and have the potential to limit genuine refugees and asylum seekers access to protection visas and asylum in Australia'.⁹ Finally, some submitters claimed that, if implemented, the Bill could lead to the unjust cancellation of visas which could seriously effect visa holders and lead to a climate of fear and suspicion in communities.¹⁰

Character test

2.7 In its submission to the Inquiry the Department detailed the prevailing circumstances that support the introduction of the proposed changes:

The character provisions of the Act have been in place since 1999, while the general visa cancellation provisions under section 109 and 116 have remained largely unchanged since 1994, which have meant that many of the current measures are not reflective of modern jurisprudence. Australian migration patterns and processes have also changed significantly since the

5 Refugee Advice & Casework Service, *Submission 2*, p. 2.

6 Asylum Seeker Resource Centre, *Submission 11*, p. 2.

7 Multicultural Development Association, *Submission 3*, p. 2; Law Institute of Victoria, *Submission 12*, p. 1; Refugee & Immigration Legal Centre, *Submission 13*, p. 1. See also Refugee Advice & Casework Service, *Submission 2*, p. 3; ANU College of Law: Migration Law Program, *Submission 6*, p. 10.

8 ANU College of Law: Migration Law Program, *Submission 6*, p. 3.

9 Southern Communities Advocacy Legal and Education Services, *Submission 7*, p. 2. See also Multicultural Development Association, *Submission 3*, p. 2; Asylum Seeker Resource Centre, *Submission 11*, p. 2.

10 Refugee Council of Australia, *Submission 5*, pp 1, 3; ANU College of Law: Migration Law Program, *Submission 6*, p. 4; Australian Human Rights Commission, *Submission 8*, p. 3; Asylum Seeker Resource Centre, *Submission 11*, p. 2; Refugee & Immigration Legal Centre, *Submission 13*, p. 3.

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.¹¹

2.8 As noted in Chapter 1, the Bill proposes to broaden the character test by amending existing provisions and adding new grounds upon which a person may fail the character test. The Bill also proposes to introduce a mandatory cancellation power into the character test framework. Many submitters opposed these proposed changes to the character test.

2.9 The ANU College of Law: Migration Law Program (ANU Migration Law Program) submission included a table (Table 2.1 below) which reproduced departmental statistics outlining the number of warnings issued under the character framework and the number of cancellations over a seven-year period. In the year 2012–13, a total of 37,926 visas were cancelled.¹² In contrast, Table 2.1 shows the relatively small cohort of people who had their visas cancelled under the character framework.¹³

Table 2.1: Visa cancellation decisions under Migration Act 1958 s 501, 2006-13

	2006-7	2007-8	2008-9	2009-10	2010-11	2011-12	2012-13
Warnings	334	617	149	864	1146	1240	888
Cancellations	116	103	86	58	132	157	139

2.10 The Department commented on the relatively small cohort to which the amendments would apply by stating that:

The proposed amendments are not designed to necessarily result in large increases in the number of people whose visa applications are refused and/or whose visas are cancelled. While it is expected the cohort of non-citizens who will be affected by this amendment are relatively small the criminality and risk posed by this cohort to the Australian community is significant.¹⁴

Broadening of the character test

2.11 As noted in Chapter 1, the Bill proposes to broaden the character test by lowering the thresholds applicable to existing provisions and introducing five new

11 Department of Immigration and Border Protection, *Submission 4*, p. 3.

12 Department of Immigration and Border Protection, *Australia's Migration Trends 2012–13*, p. 80 at <http://www.immi.gov.au/pub-res/Documents/statistics/migration-trends-2012-13.pdf> (accessed 13 November 2014).

13 Table 2.1 has been taken from ANU College of Law: Migration Law Program, *Submission 6*, p. 8.

14 Department of Immigration and Border Protection, *Answers to Written Questions on Notice*, pp 2-3 [Q. 4].

grounds under which a non-citizen may be deemed to fail the character test. The most controversial changes to existing provisions are the amendments to paragraphs 501(6)(b) and 501(6)(d) and the proposed changes to the definition of substantial criminal record.

2.12 Questioning whether the proposed changes should be applied irrespective of whether the non-citizen is a visa applicant or a visa holder, the ANU Migration Law Program suggested that:

...refusal is not the same as cancellation, in terms of both the impact on the visa holder, especially a long-term resident, and the potential impact on Australian citizens...once a non-citizen has been permitted to enter and settle in Australia, the decision to expel that person should not be reached in the same way as a decision to refuse to grant a visa.¹⁵

2.13 The Department explained that the decision to cancel or refuse a visa under the character framework is discretionary and may only be made after considering the binding guidance provided by *Ministerial Direction No 55*. This Direction contains different considerations to which decision makers must have regard in deciding whether to refuse to grant or cancel a visa for visa holders and visa applicants respectively, in recognition of the fact that a non-citizen holding a substantive visa will generally have greater ties to the community, and an expectation that they will be permitted to remain in Australia for as long as their visa remains in effect.¹⁶

Proposed amendment to paragraph 501(6)(b)

2.14 The proposed amendment to paragraph 501(6)(b) would mean that any non-citizen would fail the character test if the Minister reasonably suspects him or her of being a member of or having an association with a group or organisation suspected of criminal conduct. This would have the effect of lowering the threshold from a proven association to a suspected association. RACS argued that this would entail an unacceptably low standard of proof, as it would not require the Minister to engage in any meaningful assessment of circumstances or evidence. RACS argued that the standard should be raised to one of reasonable belief, to require the Minister to justify his or her belief through provision of evidence.¹⁷

Proposed amendment to paragraph 501(6)(d)

2.15 The proposed amendment to paragraph 501(6)(d) would mean that a person would fail the character test if he or she were to pose a risk of engaging in specified conduct or representing a danger to all or part of the Australian community. The Law

15 ANU College of Law: Migration Law Program, *Submission 6*, pp 3-4.

16 Department of Immigration and Border Protection, *Answers to Written Questions on Notice*, pp 10-11 [Q. 24].

17 Refugee Advice & Casework Service, *Submission 2*, p. 2. See also Refugee Council of Australia, *Submission 5*, p. 3; ANU College of Law: Migration Law Program, *Submission 6*, p. 5; Southern Communities Advocacy Legal and Education Services, *Submission 7*, pp 5-8; New South Wales Council for Civil Liberties, *Submission 9*, pp 6-7; Asylum Seeker Resource Centre, *Submission 11*, pp 3-4; Law Institute Victoria, *Submission 12*, p. 3.

Institute Victoria (LIV) submitted that any non-citizen could theoretically fall short of this provision and thereby fail the character test. As a result, visa holders and applicants could be left in a state of uncertainty with regard to their migration status.¹⁸ Submissions claimed that, if the amendment were implemented, the provision would be too broad, as a decision about whether or not a person passes the character test could be based on a suspicion that the person may behave in a particular way. Submissions reasoned that without the implementation of adequate safeguards, this standard would not be justifiable, given the serious consequences of visa cancellation or refusal.¹⁹

2.16 The EM noted that the relevant threshold would be one of 'more than a minimal or trivial likelihood of risk'.²⁰ However, submitters argued that the legislation itself imposes no such requirements.²¹ Additionally, the current guidelines incorporated into *Ministerial Direction No 55* specify that the grounds in paragraph 501(6)(d) of the Act are currently 'enlivened if there is evidence suggesting that there is more than a minimal or remote chance' of the person engaging in the relevant conduct.²² It follows that, as implied in the EM, the proposed amendment does not amount to a substantive change; it simply clarifies the existing law.

2.17 The Department also submitted that:

This amendment gives primacy to the protection of the Australian community and is particularly important in the offshore visa context. In considering whether a non-citizen should be granted a visa to come to Australia, there is an expectation that the non-citizen will not cause or threaten harm to either individuals or the Australian community. Where there is information that suggests that a visa applicant presents more than a minimal or remote risk of causing harm to an individual or the broader Australian community, it is entirely appropriate that the non-citizen's visa application be considered for refusal under subsection 501(1) of the Act.²³

Proposed broadening of the definition of substantial criminal record

2.18 Under the proposed amendments to the Act, a person would be considered to have a substantial criminal record if he or she were sentenced, cumulatively or

18 Law Institute of Victoria, *Submission 12*, p. 4. See also Refugee Advice & Casework Service, *Submission 2*, p. 4; New South Wales Council for Civil Liberties, *Submission 9*, p. 15.

19 Refugee Advice & Casework Service, *Submission 2*, pp 4, 9; Australian Human Rights Commission, *Submission 8*, p. 9; Law Institute of Victoria, *Submission 12*, p. 4; Refugee & Immigration Legal Centre, *Submission 13*, pp 9-10.

20 Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014, p. 10.

21 Refugee Council of Australia, *Submission 5*, p. 3; Asylum Seeker Resource Centre, *Submission 11*, p. 9.

22 Subparagraph 5(2) of Annex A to *Direction No 55 made under section 499 of the Migration Act 1958 (Cth)*.

23 Department of Immigration and Border Protection, *Answers to Written Questions on Notice*, p. 2 [Q. 2].

concurrently, to prison terms totalling 12 months (whether the sentences were handed down on one or more occasion). The Refugee & Immigration Legal Centre (RILC) made the point that this amendment would reduce the threshold for defining when a person has a substantial criminal record.²⁴

2.19 The New South Wales Council for Civil Liberties (NSWCCL) pointed out that some jurisdictions institute mandatory penalties for criminal offences, no matter how trivial the offence, and that the tendency in criminal law is for penalties to increase.²⁵ NSWCCL argued that it follows that, should the amendments come into force, a person could be held to fail the character test under paragraph 501(6)(a) for committing one or more relatively minor non-violent crimes.²⁶

2.20 The Department explained that the current provisions which define whether a person has a substantial criminal record for the purposes of the character test do not capture particular cohorts of concern. The Department submitted that proposed amendments are necessary to ensure that these particular cohorts of non-citizens of concern are captured and, as such, objectively fail the character test.²⁷

2.21 The Bill also proposes to provide that a person will be 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. RACS submitted that, as people from refugee backgrounds often face mental health issues, this amendment may have serious repercussions on the way in which that cohort is treated by decision makers.²⁸ In contrast, the Department submitted that the proposed amendment is justified as it would more effectively cover 'the various ways in which jurisdictions within Australia address court and sentencing proceedings for mentally ill people who commit a serious crime'.²⁹

Reasonable suspicion of involvement in or being charged with specified crimes

2.22 In relation to the proposed provisions on the commission of crimes of serious international concern, the Australian Human Rights Commission (AHRC) submitted that the effect of these provisions would be to enable the Minister to refuse or cancel a visa on the basis of suspected conduct that would, if proved, constitute criminal conduct. This could be done in the absence of any conviction. The AHRC stated that it could not ascertain why these provisions would be necessary given that, where there is sufficient evidence that a person has committed one of these crimes, he or she would

24 Refugee & Immigration Legal Centre, *Submission 13*, p. 7. See also Southern Communities Advocacy Legal and Education Services, *Submission 7*, p. 12.

25 New South Wales Council for Civil Liberties, *Submission 9*, pp 12, 17.

26 Refugee Council of Australia, *Submission 5*, p. 3; New South Wales Council for Civil Liberties, *Submission 9*, pp 12, 17; Refugee & Immigration Legal Centre, *Submission 13*, p. 7.

27 Department of Immigration and Border Protection, *Submission 4*, pp 3-4.

28 Refugee Advice & Casework Service, *Submission 2*, p. 4.

29 Department of Immigration and Border Protection, *Submission 4*, p. 4.

be charged and prosecuted for the crime and if found guilty and sentenced he or she would fail the character test under the existing paragraph 501(6)(a).³⁰

2.23 Both the Refugee Council of Australia (RCOA) and NSWCCCL had specific concerns relating to the proposed inclusion of involvement in people smuggling in the criteria for failing the character test.³¹ The RCOA submitted that amendments made through the *Anti-People Smuggling and Other Measures Act 2010 (Cth)* 'significantly broadened the scope of people smuggling offences in Australia, to the point of criminalising acts which are humanitarian in nature and which lack any criminal intent' (such as sending money to a relative overseas to help them escape from persecution). RCOA argued that the proposed changes in the Bill would therefore mean that a person may be held to fail the character test in circumstances where he or she has acted without criminal intent.³²

2.24 In support of the proposed amendments, the Department submitted that they are necessary and justified to ensure that non-citizens suspected of crimes of serious international concern are captured by the character framework and, as such, would objectively fail the character test.³³

Sexually based offences involving a child

2.25 The proposed new provision where a person fails the character test if he or she is charged with a sexually based offence involving a child and the charge is proven has been criticised by submitters. Submitters noted their concerns that there is no corresponding legislative definition of the term "sexually based offences involving a child" and therefore sexually-active children may be caught by this provision. For example, it was argued that a 16-year old who has sex with his or her 14-year old partner or a teenager who sends, receives or shares naked photos of him or herself could be accused of committing sexually based offences involving a child.³⁴

2.26 The EM stated that the amendment is intended to apply irrespective of the level of penalty or orders made in relation to the offence.³⁵ The ANU Migration Law Program submitted concerns that this would appear to ignore the fact that a court

30 Australian Human Rights Commission, *Submission 8*, p. 10. See also Refugee Advice & Casework Service, *Submission 2*, p. 2; New South Wales Council for Civil Liberties, *Submission 9*, p. 15; Refugee & Immigration Legal Centre, *Submission 13*, pp 10-11.

31 Refugee Council of Australia, *Submission 5*, p. 3; New South Wales Council for Civil Liberties, *Submission 9*, p. 15.

32 Refugee Council of Australia, *Submission 5*, p. 3.

33 Department of Immigration and Border Protection, *Submission 4*, pp 3-4.

34 ANU College of Law: Migration Law Program, *Submission 6*, p. 11; Southern Communities Advocacy Legal and Education Services, *Submission 7*, pp 8-9. See also New South Wales Council for Civil Liberties, *Submission 9*, pp 12-13.

35 Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014, p. 49 and Attachment A p. 2.

would have heard all the evidence and should therefore be in the best position to impose a penalty that reflects the seriousness of the charge.³⁶

2.27 The EM acknowledged that, currently, these offences may be dealt with under subsection 501(6) of the Act, but stated that the aim of this addition was to remove the subjectivity from this assessment in cases where the non-citizen does not fail the substantial criminal record test.³⁷ The Department also confirmed that:

In the unlikely event that a youth involved in relatively minor offences has their visa mandatorily cancelled, that non-citizen would be able to seek revocation of the mandatory cancellation. A decision to revoke is discretionary, and would take into account, for example, the seriousness of the offending involved.³⁸

ASIO-assessed risks to security

2.28 The LIV suggested that the proposed addition of paragraph 501(6)(g) to the character framework would have the effect of deferring 'the Minister's assessment regarding the risk posed by a non-citizen to an external body (being ASIO) without the Minister or non-citizen being permitted to effectively examine the basis for any negative assessment'.³⁹ Both the LIV and the RILC stressed that there is no formal definition of the threshold of risk which is needed to support an adverse assessment and, given that an adverse risk assessment may be made to assist in the carrying out of Australia's responsibilities to a foreign country, it would be possible for a non-citizen to become the subject of a negative risk assessment even if he or she posed no actual risk to the Australian community or citizens.⁴⁰

2.29 The Department stated that the purpose of the proposed provision 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 a segment of the Australian community. The Department submitted that this means that the new ground simply provides an objective basis on which to find that a person does not pass the character test. When considering whether to exercise the discretion to cancel or refuse a visa the decision maker would then consider the objective fact of a negative assessment together with any other relevant considerations.⁴¹

36 ANU College of Law: Migration Law Program, *Submission 6*, p. 11.

37 Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014, p. 50.

38 Department of Immigration and Border Protection, *Answers to Written Questions on Notice*, p. 6 [Q. 12].

39 Law Institute of Victoria, *Submission 12*, p. 6.

40 Law Institute of Victoria, *Submission 12*, p. 6; Refugee & Immigration Legal Centre, *Submission 13*, pp 12-13.

41 Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014, p. 11; Department of Immigration and Border Protection, *Answers to Written Questions on Notice*, p. 11 [Q. 25].

Subject of an Interpol notice

2.30 Submissions questioned the reliability of Interpol notices and expressed concerns about the use of an Interpol notice as a ground under which a non-citizen may be found to fail the character test.⁴² The LIV acknowledged that the wording of the proposed paragraph implies that the existence of a notice would not in itself cause a person to fail the character test as further analysis would be required to infer that the person presents a risk to the Australian community. However, the LIV questioned the value of Interpol notices as a mechanism to assess risk given that the content of notices is largely dependent upon information provided by member states, Interpol rarely undertakes procedures to assess the veracity of the information provided by member states and the review mechanisms for a notice are neither independent nor comprehensive.⁴³

2.31 As with an ASIO assessment, the Department explained that the purpose of the proposed provision would be to acknowledge that a person who is the subject of an Interpol notice is likely to represent a threat to the security of a segment of the Australian community. It follows that the inclusion of this new ground for failing the character test would ensure that people in this cohort do not avoid scrutiny under the character test framework. The Department confirmed that:

The existence of an Interpol notice in respect of a person will not, of itself, mean that the person does not pass the character test. The veracity and reliability of the Interpol notice would be a relevant consideration in terms of determining whether it was reasonable to infer that the person would present a risk to the Australian community or a segment of that community.⁴⁴

Mandatory visa cancellation under the character test

2.32 Proposed subsection 501(3A) would provide that the Minister would have to cancel a visa in specified circumstances. The Department justified proposed subsection 501(3A) by submitting that:

Under existing provisions non-citizens in prison who do not pass the character test can be released from prison prior to the character visa cancellation or 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.⁴⁵

42 Liberty Victoria, *Submission 10*, p. 2; Asylum Seeker Resource Centre, *Submission 11*, p. 9; Law Institute of Victoria, *Submission 12*, p. 7.

43 Law Institute of Victoria, *Submission 12*, pp 6-7.

44 Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014, p. 11; Department of Immigration and Border Protection, *Answers to Written Questions on Notice*, p. 11 [Q. 26]. See also Department of Immigration and Border Protection, *Submission 4*, pp 3-4.

45 Department of Immigration and Border Protection, *Submission 4*, p. 3.

2.33 RCOA accepted that this process is only proposed to apply in limited circumstances but still questioned the need for such a provision arguing that:

...provisions on visa cancellation should allow for flexibility in decision-making so as to mitigate the risk of prolonged indefinite detention and ensure that cancellation powers are exercised only in cases where an individual presents a genuine risk.⁴⁶

2.34 Some submitters argued that a mandatory cancellation process would effectively result in a reversal of the onus of proof, as it would require an affected person to justify why his or her visa should not be cancelled.⁴⁷ Submitters also argued that this change is unnecessary as there is no compelling need to introduce mandatory powers given that the Minister currently holds sufficient discretionary powers to efficiently cancel the visa of an incarcerated non-citizen.⁴⁸

2.35 However, the Department described circumstances where a non-citizen prisoner with a serious criminal history may be released from prison before his or her visa is cancelled. The Department stated that this can occur where a non-citizen spends a significant time in remand prior to sentencing, and this period is taken as time served by the sentencing judge. As a result, the non-citizen may only spend a short time in prison and this could result in the Department only becoming aware of the case shortly before the person is released upon completion of his or her sentence.⁴⁹ Further, the Department explained that:

[The current discretionary powers of the Minister]...necessitate the provision of natural justice to a non-citizen at the front end of the process. This can be a time consuming and lengthy process and where a non-citizen comes to the attention of the immigration department toward the end of their sentence, means that a risk exists that a decision about whether or not to cancel their visa will not be made before the non-citizen is released into the community at the completion of their sentence. This is unacceptable where such a person poses a risk to the safety of the Australian community because they have a substantial criminal record on the specified bases...⁵⁰

2.36 Some submissions insisted that cancellation of a visa on character grounds could be equated to an effective banishment from Australia and, in certain circumstances such as where Australia owes non-refoulement obligations to a visa

46 Refugee Council of Australia, *Submission 5*, p. 2.

47 Southern Communities Advocacy Legal and Education Services, *Submission 7*, p. 13; Australian Human Rights Commission, *Submission 8*, p. 12.

48 Refugee Council of Australia, *Submission 5*, p. 2; ANU College of Law: Migration Law Program, *Submission 6*, pp 6-7; Southern Communities Advocacy Legal and Education Services, *Submission 7*, p. 4; Law Institute of Victoria, *Submission 12*, pp 4-5.

49 Department of Immigration and Border Protection, *Answers to Written Questions on Notice*, p. 5 [Q. 10].

50 Department of Immigration and Border Protection, *Answers to Written Questions on Notice*, p. 5 [Q. 9].

holder, it may amount to indefinite detention.⁵¹ The ANU Migration Program considered this to be punitive and advanced that the proposed mandatory cancellation process could have the effect of further blurring the boundaries between criminal law and migration law, such that the mandatory cancellation process may be judicially interpreted as creating a form of a double punishment.⁵²

2.37 The Department clarified that where a person's visa is cancelled under this provision, the affected person may seek revocation of the decision and if the decision not to revoke is taken by a delegate, this would be subject to a merits review. Moreover:

In deciding whether or not to revoke the cancellation of the visa...the Minister or delegate would take into account all relevant factors including, for example, the seriousness of the criminal activity, and Australia's obligations under international law...The cancellation of a visa under [this] proposed subsection...is not concerned with convicting or punishing the visa holder for the crime for which they have been convicted. Rather, [it]...is concerned with ensuring that the person is kept in immigration detention until such time as the cancellation decision is revoked or otherwise set aside, or the immigration status of the person is otherwise resolved.⁵³

Disclosure of information to the Minister

2.38 The Statement of Compatibility with Human Rights attached to the EM explained that the proposed section 501L was included in the Bill to address difficulties in information sharing, as the legislation of some States and Territories does not recognise the authority of the Commonwealth to obtain information that may be relevant to a determination under the character framework. Formalising a power to obtain information was recommended by the ANAO *Audit Report No.55 2010–11*.⁵⁴ The Department stated its belief that formal agreements with the relevant States and Territories would not be possible, or not without risk, and that the new enforcement powers under the Australian Privacy Principles may not provide the Department with sufficient coverage.⁵⁵

51 Refugee Advice & Casework Service, *Submission 2*, p. 1; Refugee Council of Australia, *Submission 5*, p. 1; ANU College of Law: Migration Law Program, *Submission 6*, pp. 9-10, 20; Asylum Seeker Resource Centre, *Submission 11*, p. 1; Refugee & Immigration Legal Centre, *Submission 13*, p. 6.

52 ANU College of Law: Migration Law Program, *Submission 6*, p. 10. See also Liberty Victoria, *Submission 10*, p. 1; Refugee & Immigration Legal Centre, *Submission 13*, pp 2, 19.

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

54 Australian National Audit Office, *Audit Report No.55 2010–11: Administering the Character Requirements of the Migration Act 1958*.

55 Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014, Attachment A p. 12; Department of Immigration and Border Protection, *Submission 4*, p. 4.

General visa cancellation

2.39 The main proposals for changing the general visa cancellation framework concentrate on proposed amendments to section 116 of the Act. Specifically, the Bill proposes to make one key amendment and add two key provisions to that section.

Risk to health, safety and good order of the community

2.40 The ANU Migration Law Program noted its support for the extension of paragraph 116(1)(e) to include risks posed to individuals, and not just risks posed to the community. However, it did not support the lowering of the threshold for this ground from actual risk to the mere possibility of a risk.⁵⁶ Similarly, the AHRC argued that this provision would represent a significant lowering of the threshold needed to engage a cancellation power, stating:

The concept of 'risk' is itself conjectural; a 'possibility of a risk' amounts to a possibility of a possibility. That is a threshold so low arguably any person could meet it.⁵⁷

2.41 The submission of the LIV echoed the concerns of the AHRC and observed that the proposed amendment could provide for discrimination on the basis of a disability or illness. LIV argued that as there is no requirement that a decision on whether a person posed a risk to the health of the community would need to be based on medical facts and the relevant condition would only need to present a low level of risk to the community. The submission also suggested that the amendment might act as a disincentive for non-citizens to seek medical treatment on the basis that they may fear that their visa would be cancelled if the diagnosis was adverse.⁵⁸

2.42 The Department explained that this amendment would only be a clarification of existing provisions and is necessary to ensure that the particular cohort of non-citizens who fall foul of this proposed amendment is appropriately captured for visa cancellation. The Department stated that the current provision:

...already allows for the cancellation of a person's visa on the ground that they have a communicable disease, where that disease poses a risk to the health of the Australian community. Issues such as the communicability of the disease, treatment options and mortality rates are now, and would continue to be, important considerations in determining whether a person should have their visa cancelled on the basis of their posing a risk to the health of the Australian community.⁵⁹

56 ANU College of Law: Migration Law Program, *Submission 6*, p. 11.

57 Australian Human Rights Commission, *Submission 8*, p. 14.

58 Law Institute of Victoria, *Submission 12*, p. 9.

59 Department of Immigration and Border Protection, *Submission 4*, p. 5; Department of Immigration and Border Protection, *Answers to Written Questions on Notice*, p. 2 [Q. 3].

Inconsistent disclosures relating to identity

2.43 As noted in Chapter 1, proposed subsection 116(1AA) 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. The RACS submission was cognisant of the importance of establishing a person's identity to uphold the integrity of the migration program. However, RACS was concerned that the proposed provision would not include adequate procedural safeguards to ensure that individuals who have legitimate difficulties in providing evidence of their identity are not caught by this proposed amendment.

2.44 Submissions suggested that this provision would unfairly impact on people from refugee backgrounds, who often have legitimate reasons for being unable to obtain evidence of their identity.⁶⁰ To this extent, the LIV observed that:

Issues of identity are often complex and undergo change for a variety of different reasons. Identities are often defined by the ways in which other people and governments identify individuals and record information about them. Official records can often conflict with what individuals understand their identity to be.⁶¹

2.45 The NSWCCCL questioned the need for the proposed new subsection by noting that Division C of Part 2 of the Act already permits cancellation of a visa where information supplied by the applicant is false. NSWCCCL argued that if contradictory information about identity had been given then, as a matter of logic, that information is false, making the proposed subsection 116(1AA) redundant.⁶²

2.46 The EM highlighted that the migration program is based on a presumption that 'non-citizens provide correct information during all of their transactions with the department, and are honest and truthful at all times.'⁶³ As a consequence, the Department stated that the proposed amendment is necessary to allow the cancellation of visas of those who have not been honest and truthful.⁶⁴ The Department submitted that this proposed amendment is necessary to put beyond doubt that the Minister may cancel a visa if not satisfied as to a person's identity, providing an example of where the existing provisions fail in this regard because they:

...do not capture a situation in which a visa holder has provided two or more contradictory pieces of information about their identity. In such cases, it may not be possible for the Minister or delegate to form a conclusion

60 Refugee Advice & Casework Service, *Submission 2*, pp 5-6; Multicultural Development Association, *Submission 3*, pp 3-4; Asylum Seeker Resource Centre, *Submission 11*, pp 4-6.

61 Law Institute of Victoria, *Submission 12*, p. 9.

62 New South Wales Council for Civil Liberties, *Submission 9*, p. 17.

63 Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014, p. 25.

64 Department of Immigration and Border Protection, *Submission 4*, p. 5.

regarding which document or piece of information is genuine, and in relation to which document non-compliance occurred.⁶⁵

Incorrect information provided during the migration process

2.47 Submitters have pointed out that if the proposed amendment relating to the provision of incorrect information were adopted it might unfairly affect asylum seekers. Submitters argued that when first engaging with the migration program asylum seekers may be faced with an ongoing fear of persecution, mental health issues or overarching pragmatic needs, such as need to facilitate safe passage to Australia. These submitters stated that incorrect information provided by an asylum seeker may be a reflection of their vulnerable situation and may arise from procedural difficulties that stem from things such as language barriers; as such, the provision of incorrect information may be the result of a misunderstanding, and not be indicative of intentional dishonesty.⁶⁶

2.48 By contrast, the Department explained that, at present, only incorrect information provided in a statutory process can be considered in the cancellation process and, as such, a non-citizen who provides incorrect information in non-statutory processes, such as at an entry interview or a refugee status assessment, is not caught by the general cancellation framework. Therefore, the Department justified this proposed amendment on grounds that the amendment would secure the integrity of the migration program, making processes more internally consistent.⁶⁷

Expansion of personal ministerial powers

2.49 The Bill proposes to expand the personal powers of the Minister both within the character framework and the general visa cancellation framework of the Act. Some submitters argued that there has been little justification for the introduction of these new personal powers and they appear to be unnecessary.⁶⁸ It was submitted that an expansion of personal ministerial powers would effectively undermine the rule of law by denying procedural fairness to an affected party and limiting the right of

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

66 Multicultural Development Association, *Submission 3*, pp 3-4; Refugee Council of Australia, *Submission 5*, p. 4; Australian Human Rights Commission, *Submission 8*, p. 13; Australian Human Rights Commission, *Submission 8*, p. 13; New South Wales Council for Civil Liberties, *Submission 9*, p. 18; Asylum Seeker Resource Centre, *Submission 11*, pp 6-7; Refugee & Immigration Legal Centre, *Submission 13*, pp 14-15.

67 Department of Immigration and Border Protection, *Submission 4*, p. 5.

68 Asylum Seeker Resource Centre, *Submission 11*, p. 3; Law Institute of Victoria, *Submission 12*, pp 11-12; Refugee & Immigration Legal Centre, *Submission 13*, p. 2.

review to a judicial review.⁶⁹ Further, submitters argued that, given the lack of procedural safeguards incorporated into the proposed provisions, the proposed new powers have the potential to undermine the integrity of the visa cancellation and refusal frameworks as they may be used for political purposes.⁷⁰

2.50 In response to this argument, the Department emphasised that:

The Minister is required to act lawfully and in accordance with the legislation in exercising his personal powers. Where the Minister makes a personal decision to refuse to grant or cancel a visa without notice, the non-citizen may seek revocation of that decision. In addition, Minister's decisions are judicially reviewable.⁷¹

2.51 As the proposed new powers would be exercisable by the Minister in a personal capacity, the LIV queried how the Minister would be able to manage these individual decisions.⁷² Further, the AHRC queried how the Minister would be better qualified to make findings of fact than an independent tribunal.⁷³

2.52 The EM stated that the government is ultimately responsible for ensuring that decisions reflect community standards and expectations.⁷⁴ The Department reiterated this point, noting that:

Merits review tribunals are required to determine what is the correct or preferable decision based on the merits of the case before them. The personal powers of the Minister in the Act (both the existing powers and the new powers) recognise that the Australian community ultimately holds the Minister responsible for decisions within his or her portfolio, even where those decisions have resulted from merits review. Therefore, it is appropriate that merits review not be available in respect of decisions that are made by the Minister personally. These amendments do not affect a

69 Refugee Council of Australia, *Submission 5*, pp 2, 4-5; ANU College of Law: Migration Law Program, *Submission 6*, p. 22; New South Wales Council for Civil Liberties, *Submission 9*, pp 7-8; Liberty Victoria, *Submission 10*, p. 1; Asylum Seeker Resource Centre, *Submission 11*, pp 2-3; Law Institute of Victoria, *Submission 12*, pp 11-12; Refugee & Immigration Legal Centre, *Submission 13*, p. 2. See also Multicultural Development Association, *Submission 3*, p. 4.

70 Refugee Advice & Casework Service, *Submission 2*, pp 2, 6; ANU College of Law: Migration Law Program, *Submission 6*, p. 13; Australian Human Rights Commission, *Submission 8*, p. 15; Asylum Seeker Resource Centre, *Submission 11*, p. 3.

71 Department of Immigration and Border Protection, *Answers to Written Questions on Notice*, p. 8 [Q. 15], [Q. 17].

72 Law Institute of Victoria, *Submission 12*, p. 11.

73 Australian Human Rights Commission, *Submission 8*, p. 15.

74 Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014, p. 27.

non-citizen's capacity to seek judicial review of a decision to cancel their visa.⁷⁵

2.53 ANU Migration Law Program challenged whether this provided sufficient justification for the new provisions, submitting that the proposed new powers would make further inroads into the first-tier review of administrative decision making, thereby undermining transparency and potential for independent scrutiny. It suggested that if these provisions proceed:

...they should be amended to provide that the Minister must advise Parliament of each exercise of his personal power—in the same way that this is required when the Minister exercises his personal power to grant a visa under s351 and s417 of the Act.⁷⁶

2.54 The Department responded to this suggestion by stating that it would be:

impractical to create an additional requirement for the Minister to report on an intention to make a consideration under section 501, particularly where a cancellation or refusal decision may not result from that consideration...Given that decisions to refuse to grant or cancel a visa without notice can be made quickly and in the national interest, it would not be possible to advise Parliament of an intention to consider the making of a decision in these circumstances.⁷⁷

Human Rights issues

2.55 An attachment to the EM contains a statement of compatibility with Australia's international human rights obligations. The statement notes that:

This amendment Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.⁷⁸

2.56 The statement goes on to explain that the proposed amendments do not change the framework within which the character and general cancellation powers function in that, generally, when the powers are enlivened the Minister will retain discretion over whether to cancel a visa or refuse an application. Furthermore, where a person's visa is cancelled by means of a mandatory cancellation provision, the person will generally be afforded natural justice, or at very least he or she will be invited to

75 Department of Immigration and Border Protection, *Answers to Written Questions on Notice*, p. 7 [Q. 14].

76 ANU College of Law: Migration Law Program, *Submission 6*, p. 13. See also New South Wales Council for Civil Liberties, *Submission 9*, pp 7-9; Australian Human Rights Commission, *Submission 8*, p. 15.

77 Department of Immigration and Border Protection, *Answers to Written Questions on Notice*, p. 8 [Q. 16].

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

make representations to the Minister and the Minister will retain a power to revoke the mandatory cancellation.⁷⁹

2.57 The main points of concern raised by submissions were in relation to the rights contained in the International Convention on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC).

Civil and Political Rights

2.58 Article 9 of the ICCPR provides that everyone has a right to liberty which should not be taken away except in accordance with the law. As such, it prohibits arbitrary detention or detention that does not have a legitimate purpose.⁸⁰

2.59 As noted in Chapter 1, visa holders who have had their visas cancelled under the provisions of the Act must be detained and then removed from Australia unless granted a visa. Submissions have noted that as some non-citizens in this predicament would be owed a right to non-refoulement, or may be stateless, these people could be held in immigration detention indefinitely and this would appear to breach Article 9 of the ICCPR.⁸¹

2.60 The Statement of Compatibility with Human Rights in the EM explained that:

This Bill does not limit a person's right to security of the person and freedom from arbitrary detention...these amendments present a reasonable response to achieving a legitimate purpose under the Covenant—the safety of the Australian community and integrity of the migration programme...The Government has processes in place to mitigate any risk of a person's detention becoming indefinite or arbitrary through: internal administrative review processes; Commonwealth Ombudsman Own Motion enquiry processes, reporting and Parliamentary tabling; and, ultimately the use of the Minister personal intervention powers to grant a visa or residence determination where it is considered in the public interest.⁸²

2.61 Articles 19, 21 and 22 of the ICCPR respectively provide for the rights of freedom of expression, peaceful assembly and freedom of association. The AHRC submitted its concerns that the proposed amendment to paragraph 501(6)(d) could make a non-citizen liable for visa cancellation on the basis of a risk that they may incite discord in a segment of the community. The AHRC argued that this could have

79 Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014, Attachment A, pp 4-5.

80 See Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014, Attachment A p. 5.

81 Refugee Advice & Casework Service, *Submission 2*, pp 6-7; ANU College of Law: Migration Law Program, *Submission 6*, p. 23; Australian Human Rights Commission, *Submission 8*, p. 5; Refugee & Immigration Legal Centre, *Submission 13*, pp 17-18.

82 Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014, Attachment A p. 6. See also Department of Immigration and Border Protection, *Answers to Written Questions on Notice*, p. 9 [Q. 18], [Q. 19].

'a serious and unjustified chilling effect on the freedom of expression of visa holders'.⁸³

2.62 In a similar vein, the ANU Migration Law Program and the SCALES have argued that the proposed amendment to paragraph 501(6)(b) could impinge on a non-citizen's rights to peaceful association and freedom of association.⁸⁴

2.63 The Statement of Compatibility with Human Rights in the EM acknowledged these potential concerns but stated:

These amendments are targeted...for the purpose of protecting the Australian community from the risk that people...may present to national security, public order, public safety, public morals, and the protection of the rights and freedoms of others. While the effect of these amendments effectively prohibits or creates a disincentive for the membership of particular organisations, any restrictions this amendment may present on a person are seen as reasonable, proportionate, and necessary and aimed at achieving a legitimate objective...to protect the Australian community.⁸⁵

Rights relating to families and Children

2.64 Article 3 of the CRC provides that decisions made by public institutions should be taken with the best interests of the child in mind. Articles 17 and 23 of the CRC aim to protect the unity of the family unit. The AHRC noted that detention and deportation may result in a child being separated from his or her family unit or parent contrary to his or her best interests. Under the proposed amendments, long-term permanent residents may have their visas cancelled and then be removed from Australia, leaving children and family in Australia.⁸⁶

2.65 The Statement of Compatibility with Human Rights in the EM acknowledged that, although a cancellation decision may result in the separation of the family unit, rights relating to families and children will be taken into account when a cancellation decision is made or after a request for revocation of a mandatory cancellation is made. In other words, the relevant decision maker will weigh family considerations against other factors such as the risk the person presents to the Australian community.⁸⁷

83 Australian Human Rights Commission, *Submission 8*, p. 9.

84 ANU College of Law: Migration Law Program, *Submission 6*, p. 23; Southern Communities Advocacy Legal and Education Services, *Submission 7*, pp 8-9.

85 Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014, Attachment A pp 9-10.

86 Australian Human Rights Commission, *Submission 8*, p. 5. See also Refugee & Immigration Legal Centre, *Submission 13*, pp 3, 16, 22.

87 Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014, Attachment A p. 7.

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.

Dissenting Report of the Australian Greens

1.1 The Australian Greens strongly oppose the amendments proposed in the Migration Amendment (Character and General Visa Cancellation) Bill 2014. The Bill hands unprecedented power to the Minister of the day to cancel and refuse to grant a person a visa. This will have serious consequences for everyday Australians and could result in indefinite detention should the person be unable to return to their country of origin due to fear of persecution or serious harm.

1.2 This Bill, among other things:

- unjustifiably expands the Minister's discretionary powers;
- significantly lowers the character test threshold;
- introduces mandatory visa cancellation without notice to the individual;
- makes innocent association with a group a basis for failing the character test;
- makes 'reasonable suspicion' the threshold for cancellation or refusal;
- bars the access to merits review; and
- could result in the indefinite detention of individuals.

1.3 Submitters to the inquiry have warned the Senate against the amendments proposed in this Bill and have recommended that the Bill not be passed.

1.4 The rationales provided by the government are not adequate for making such drastic changes. Simply stating that the character provisions have remained unchanged since 1999 is not sufficient, particularly when the current legislation is far reaching in its ability to revoke or cancel visas.

1.5 The fact that the character provisions have not been changed for some time does not mean that there is anything inherently wrong with them; rather it suggests that the current laws have been working more than adequately.¹

1.6 These amendments will give the Minister unprecedented power to determine when to refuse or cancel a visa and will bar merits review. In particular the Minister will have the power to revoke a visa if incorrect information was provided at the time of application, retrospectively apply the new criteria to past visa grant decisions and overrule AAT, MRT and RRT decisions. None of these decisions will be reviewable. Should this Bill pass there will be no checks and balances in place which may result in incorrect decision being made.

1.7 Provisions to significantly lower the risk thresholds are particularly concerning. The practical implications of these amendments will see individuals visas cancelled in circumstances where they may not actually present a risk to the community, as was the case with Dr Mohamed Haneef.²

1 ANU College of Law: Migration Law Program, *Submission 6*, p. 2.

2 Refugee Council of Australia, *Submission 5*, p. 3.

1.8 The provisions will enable visa cancellation on the grounds of association, will apply a 'risk' threshold rather than a 'significant risk' threshold and will also permit the Minister to cancel a visa if he/she 'reasonably suspects' an individual has been involved in criminal activity. These powers are unnecessary, far too broad and do not offer appropriate safeguards.

1.9 As noted by the Asylum Seeker Resource Centre³ and the Refugee Council of Australia⁴ this Bill will have serious implications for asylum seekers and refugees. A personal decision by the Minister to cancel a visa may result in an individual facing indefinite detention as, unlike other individuals to whom the broadened cancellation powers apply, they cannot be removed from Australia due to fears of persecution or serious harm.

1.10 Similarly, the amendments that will grant the Minister the power to cancel a visa if he/she is not satisfied of the visas holder's identity or when incorrect information has been provided at the time of application will disproportionately affect asylum seekers. These amendments fail to recognise the realities of fleeing persecution and may result in those in genuine need of protection being subjected to indefinite detention or returned to danger.

1.11 The amendments will have significant implications on long term residents. As noted by the ANU College of Law, the decision to expel a 'person should not be reached in the same way as a decision to refuse to grant a visa. To treat both situations similar fails to recognise the significant impact of visa cancellation on a resident, particularly a long term resident⁵ with family ties and a livelihood in Australia.

1.12 The Australian Greens submit that the amendments proposed in this Bill are unnecessary and have not been sufficiently justified by the Minister for Immigration and Border Protection. The amendments hand unprecedented and unchecked power to the Minister of the day and unreasonably lower the threshold for visa cancellation or refusal.

Recommendation 1

The Australian Greens recommend that provisions relating to thresholds for visa refusal or cancellation should require the individual to pose a significant risk.

Recommendation 2

The Australian Greens recommend that visa cancellation and refusal decision making processes should be subject to independent merits review.

3 Asylum Seeker Resource Centre, *Submission 11*.

4 Refugee Council of Australia, *Submission 5*.

5 ANU College of Law: Migration Law Program, *Submission 6*, p. 4.

Recommendation 3

The Australian Greens recommend that in light of the amendments existing limitations on review of cases of Ministerial discretion should be reviewed.

Recommendation 4

The Australia Greens recommend that this Bill be opposed by the Senate.

Senator Sarah Hanson-Young

Australian Greens

Appendix 1

Public submissions

- 1 Police Federation of Australia
- 2 Refugee Advice & Casework Service (Aust) Inc
- 3 Multicultural Development Association (Queensland)
- 4 Department of Immigration and Border Protection
- 5 Refugee Council of Australia
- 6 The ANU College of Law: Migration Law Program
- 7 SCALES Community Legal Centre
- 8 Australian Human Rights Commission
- 9 New South Wales Council for Civil Liberties
- 10 Liberty Victoria
- 11 Asylum Seeker Resource Centre (ASRC)
- 12 Law Institute of Victoria
- 13 Refugee & Immigration Legal Centre Inc
- 14 Chief Minister of the Australian Capital Territory, Katy Gallagher MLA

Appendix 2

Answers to written questions on notice

Answers to questions on notice

- 1 Department of Immigration and Border Protection, answers to written questions on notice (received 18 November 2014)

