

Chapter 1

Introduction

Referral of the inquiry

1.1 The Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016 (Bill) was introduced into the House of Representatives by the Minister for Immigration and Border Protection, the Hon Peter Dutton MP, on 10 February 2016.

1.2 On 25 February 2016, pursuant to a report of the Selection of Bills Committee, the Senate referred the provisions of the Bill to the Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 16 March 2016.

1.3 The reasons for referring the Bill outlined in the Selection of Bills Committee report were to 'further investigate potential impacts and unintended consequences of the bill',¹ and consider concerns that 'the Bill seeks to significantly expand the scope upon which the minister may cancel a visa on character grounds'.²

Conduct of the inquiry

1.4 Details of the inquiry, including a link to the Bill and other related documents, were made available on the committee's website.³ In accordance with usual practice, the committee wrote to a number of organisations and individuals, inviting submissions to the inquiry by 4 March 2016.

1.5 The committee received eight submissions to the inquiry, which are listed at Appendix 1. All submissions were published on the committee's website. The committee did not hold a public hearing. The committee thanks the Department of Immigration and Border Protection (department) and the other organisations that submitted to the inquiry.

Purpose of the Bill

1.6 The Bill seeks to amend the *Migration Act 1958* (Act) 'to give full effect to the substantive amendments made by the Migration Amendment (Character and General Visa Cancellation) Act 2014' (Character Act):⁴

1 Senate Selection of Bills Committee, *Report No. 2 of 2016*, 25 February 2016, Appendix 3.

2 Senate Selection of Bills Committee, *Report No. 2 of 2016*, 25 February 2016, Appendix 4.

3 Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Visa_Cancellation_Bill (accessed 10 March 2016).

4 The Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 10 February 2016, p. 12.

The measures proposed in the Bill will amend the legal framework in the Migration Act to ensure that it will be interpreted consistently with original policy intention, and also that the legal framework operates effectively as intended. These changes are necessary to ensure that the character cancellation provisions throughout the Migration Act operate consistently.⁵

Background

1.7 The Character Act amended the Act to 'strengthen the character and general visa cancellation provisions and reform the approach to the cancellation of visas of non-citizens who are in prison'.⁶

1.8 One effect of the Character Act was to broaden the character test by inserting new grounds upon which a person would not pass the character test.

1.9 A separate bill, the Migration and Maritime Powers Amendment Bill (No. 1) 2015 (Migration and Maritime Bill), was introduced into the House of Representatives on 16 September 2015. It was amended and passed by the Senate on 23 November 2015. It remains before the House of Representatives.⁷

1.10 Schedule 2 of the Migration and Maritime Bill is almost identical to the current Bill.⁸

1.11 The committee conducted an inquiry into the Migration and Maritime Bill and tabled its report on 10 November 2015.⁹ That report considered the same provisions considered in this report.

1.12 In that report, the committee recommended that the Maritime and Migration Bill be passed, subject to the following recommendation:

The committee recommends that the explanatory memorandum to the Bill be amended to clarify the operation of the retrospective provisions of the Bill and the safeguards around the impact of these provisions on young people and people with a cognitive impairment.¹⁰

5 Department of Immigration and Border Protection (DIBP), *Submission 8*, p. 4.

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

7 See: Parliament of Australia, *Migration and Maritime Powers Amendment (No. 1) Bill 2015*, http://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r5532 (accessed 10 March 2016).

8 The committee understands the only difference is that the Bill omits the words 'or application' from sub-item 22(5) of Schedule 2 of the Migration and Maritime Bill.

9 Senate Legal and Constitutional Affairs Legislation Committee, *Migration and Maritime Powers Amendment Bill (No. 1) 2015* [Provisions], November 2015.

10 Senate Legal and Constitutional Affairs Legislation Committee, *Migration and Maritime Powers Amendment Bill (No. 1) 2015* [Provisions], November 2015, p. 22.

Overview of the Bill

1.13 The Explanatory Memorandum (EM) states that the provisions of the Bill 'are technical and consequential amendments arising out of the Character Act'.¹¹

1.14 The Bill seeks to ensure that 'character related provisions are dealt with consistently throughout the Migration Act'.¹²

1.15 Items 1-3 of the Bill amend the definition of 'character concern' in section 5C of the Act to reflect the wording of the character test at subsection 501(6). Item 4 clarifies 'when, for the purposes of "character concern", a non-citizen has a substantial criminal record'.¹³

1.16 The Explanatory Memorandum (EM) states that 'the purpose of these amendments is to ensure consistency between the definition of 'character concern' with the amendments made to the character test in subsection 501(6) by the Character Act'.¹⁴

1.17 The definition of 'character concern' is relevant to the lawful disclosure of identifying information, as provided for in section 336E of the Act. According to the EM, the amendments:

...have the potential to increase the overall number of non-citizens who meet the definition of character concern and who may therefore have a personal identifier disclosed, where that disclosure is a permitted disclosure under the Migration Act.¹⁵

1.18 The wording of the character test, as at subsection 501(6), is at Appendix 2.

1.19 Item 8 of the Bill would remove application of sections 194 and 195 to people detained under subsection 189(1) due to the cancellation or refusal of their visa by the minister personally under section 501BA. This means that officers would not be required to inform the person of the timeframe within which they may apply for a visa, nor that they must be kept in immigration detention until they are granted a visa or removed from Australia.¹⁶

1.20 Items 10, 11, and 20 clarify the circumstances in which unlawful non-citizens must be removed or excluded from Australia.¹⁷

1.21 Item 12 clarifies that certain matters are under the jurisdiction of the Federal Court and not the Federal Circuit Court.¹⁸

11 Explanatory Memorandum of the Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016 (EM), Attachment A, p. 15.

12 EM, p. 1.

13 EM, p. 4.

14 EM, p. 4.

15 EM, p. 5.

16 EM, p. 6.

17 EM, pp 7-9, 10-11.

1.22 Item 21 clarifies that confidential information that is relevant to the exercise of powers under sections 501BA and 501CA receives the same level of protection as confidential information that is relevant to the exercise of other character cancellation powers, those being sections 501, 501A, 501B or 501C.¹⁹

1.23 The Bill commences the day after receiving Royal Assent. However, under item 22, items 10, 11, 12, 20 and 21 are applied retrospectively: they would apply to decisions and invitations made, and information communicated, before or after commencement.²⁰

Consideration by the Parliamentary Joint Committee on Human Rights

1.24 The Parliamentary Joint Committee on Human Rights (PJCHR) considered the Bill in its *Thirty-fifth report of the 44th Parliament*. In that report, the PJCHR referred to its previous consideration of the Migration and Maritime Bill, since Schedule 2 of that Bill is almost identical to the Bill.²¹

1.25 The PJCHR first considered the Migration and Maritime Bill in its *Thirtieth report of the 44th Parliament*.²² In that report it requested advice from the minister, which was published and commented upon in the PJCHR's *Thirty-fourth report of the 44th Parliament*.²³

1.26 After considering the minister's responses the PJCHR:

- (a) concluded that provisions of the bill are incompatible with the right to liberty, Australia's non-refoulement obligations under international law, and the obligation to consider the best interests of the child²⁴;
- (b) concluded that provisions of the bill 'may be incompatible with the right to freedom of movement in relation to Australian permanent residents with longstanding or otherwise strong ties to Australia'²⁵; and
- (c) was unable to conclude the provisions of the bill are compatible with the right to equality and non-discrimination on the basis of disability.²⁶

18 EM, p. 9.

19 EM, p. 11.

20 EM, pp 12-13.

21 Parliamentary Joint Committee on Human Rights (PJCHR), *Human rights scrutiny report: Thirty-fifth report of the 44th Parliament*, 25 February 2016, p. 2.

22 PJCHR, *Human rights scrutiny report: Thirtieth report of the 44th Parliament*, 10 November 2015, pp 28-52.

23 PJCHR, *Human rights scrutiny report: Thirty-fourth report of the 44th Parliament*, 23 February 2016, pp 29-65.

24 PJCHR, *Human rights scrutiny report: Thirty-fourth report of the 44th Parliament*, 23 February 2016, p. 44, 46, 52.

25 PJCHR, *Human rights scrutiny report: Thirty-fourth report of the 44th Parliament*, 23 February 2016, p. 50.

Consideration by the Scrutiny of Bills Committee

1.27 The Scrutiny of Bills Committee (SBC) considered the Bill in its *Alert Digest No. 2 of 2016*, dated 24 February 2016.

1.28 The SBC noted that the EM states that the Bill comprises 'technical and consequential amendments' arising out of the Character Act.²⁷ The SBC commented that:

In one sense this is an accurate description of the proposed amendments as they concern matters which may appear consistent with the intentions behind the substantive changes made by the Character Act. However, the amendments also operate in ways which increase the impact or reach that the existing regime for detention under the Migration Act will have.²⁸

1.29 The SBC referred to its previous concerns with elements of the Character Act, and noted that the provisions of the Bill 'do not in any way address the concerns expressed earlier by the committee'.²⁹

1.30 The SBC also expressed concern that insufficient reasoning had been provided to justify the retrospective application of some provisions in the Bill.³⁰

1.31 The SBC sought the minister's advice in relation to the issues it raised regarding the Character Act and the Bill.³¹ At the time of drafting this report, the minister's response was not available.

26 PJCHR, *Human rights scrutiny report: Thirty-fourth report of the 44th Parliament*, 23 February 2016, pp 55-56.

27 Senate Standing Committee for the Scrutiny of Bills (SBC), *Alert Digest No. 2 of 2016*, 24 February 2016, p. 65.

28 SBC, *Alert Digest No. 2 of 2016*, 24 February 2016, p. 65.

29 SBC, *Alert Digest No. 2 of 2016*, 24 February 2016, pp 65-66.

30 SBC, *Alert Digest No. 2 of 2016*, 24 February 2016, pp 67-69.

31 SBC, *Alert Digest No. 2 of 2016*, 24 February 2016, p. 67.

