

Chapter 2

Key issues

2.1 Submissions received by the committee canvassed a wide range of views regarding the Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016 (Bill).

2.2 Some submitters referred to concerns regarding the Migration and Maritime Powers Amendment Bill (No.1) 2015 (Migration and Maritime Bill) or the Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Character Bill).¹

2.3 On this point, the Department of Immigration and Border Protection (department) submitted that:

The amendments in this Bill are consequential to the substantive amendments made by the Character Act. They do not expand visa cancellation powers or the grounds upon which a person may have their visa cancelled. They also do not alter the detention framework already established in the Migration Act. Nor does this Bill propose any changes to the mandatory cancellation and revocation powers. These amendments merely give full effect to those made by the Character Act and ensure that the character provisions operate consistently throughout the Migration Act.²

2.4 The committee notes that it has previously considered the Migration and Maritime Bill and the Character Bill. It tabled reports into those bills on 10 November 2015 and 24 November 2014, respectively. This report only refers to those bills and their resulting legislation—the Character Act—to the extent they are relevant to the Bill.

2.5 The following concerns regarding the provisions of the Bill are considered in this chapter:

- (a) the definition of 'character concern';
- (b) the implications of visa cancellation; and
- (c) the retrospective application of certain provisions.

Definition of 'character concern' (items 1-3)

2.6 Some submitters expressed concern that the amended definition of 'character concern' is too broad. The Asylum Seeker Resource Centre (ASRC) submitted that 'the proposed amendment will mean that a broader range of individuals can have their personal information lawfully identified, which potentially infringes their right to

1 For example, Refugee Council of Australia, *Submission 1*, p. 1; Asylum Seeker Resource Centre (ASRC), *Submission 2*, p. 6; Law Council of Australia (LCA), *Submission 3*, p. 3; NSW Council for Civil Liberties (NSWCCL), *Submission 4*, p. 3; Refugee Advice and Casework Service (RACS), *Submission 5*, p. 1; Refugee Legal (RL), *Submission 7*, pp 1-2.

2 Department of Immigration and Border Protection (department), *Submission 8*, p. 3.

privacy'.³ The Refugee Advice and Casework Service (RACS) added that the amended definition could make the disclosure of personal information lawful in relation to 'almost any non-citizen'.⁴

2.7 The committee acknowledges that an increase in visa cancellations has occurred since the character test was introduced.⁵

2.8 Submitters also expressed specific concern about the omission of the word 'significant' from the existing term 'significant risk' in paragraph 5C(1)(d).⁶ Liberty Victoria (LV) submitted that:

Any risk that a non-citizen would engage in the specified conduct would mean their identifying information could be disclosed without repercussion under s 336E. The previous threshold – 'significant risk' – at least put a degree of severity of risk as a barrier to disclosure... In operation, this is likely to make the release of personal information significantly easier in that such release would no longer be the subject of criminal sanction under s 336E.⁷

2.9 The Law Council of Australia (LCA) added that the amended definition would introduce subsection 5C(1)(g) into the Act, allowing a determination of character concern to be based on an ASIO risk assessment.⁸ The LCA advocated 'for refugees with adverse security assessments to have the same access to merits review of such assessments as Australian citizens'.⁹

2.10 Additionally, the LCA expressed concerns, echoed by the NSW Council for Civil Liberties (NSWCCL),¹⁰ that:

The proposed amendment would allow consideration of the fact that a non-citizen has, either in Australia or a foreign country, been simply charged with or indicted for a specified offence (without the need for a finding of guilt or conviction by a court).¹¹

2.11 Furthermore, the LCA noted that these charges or convictions could be from foreign courts, submitting that this:

3 *Submission 2*, p. 6.

4 *Submission 5*, p. 3.

5 *Submission 2*, p. 3; *Submission 3*, p. 7; *Submission 4*, p. 3.

6 See, for example, *Submission 3*, pp 9-10; *Submission 4*, p. 3; *Submission 5*, p. 2; Liberty Victoria (LV), *Submission 6*, p. 2.

7 *Submission 6*, p. 2.

8 *Submission 3*, p. 17.

9 *Submission 3*, pp 17-18.

10 *Submission 4*, p. 3.

11 *Submission 3*, p. 15.

...may be problematic as Australia has international human rights obligations which require it not to be complicit in criminal investigations and trials which do not comply with accepted fair trial principles.¹²

2.12 In order to ensure that there had been fair legal processes, the LCA suggested applying similar safeguards to those in the *Mutual Assistance in Criminal Matters Act 1987* (Mutual Assistance Act), which:

...require that a foreign country's request for assistance must be refused if for example, a person may be punished for a "political offence", or on the basis of characteristics including race, religion, nationality or political opinions, or could be tortured.¹³

2.13 The NSWCCCL recommended that the Privacy Commissioner be asked to consider the Bill regarding its amendments to the definition of 'character concern'.¹⁴ Additionally, the LCA encouraged the committee to seek assurances from the department that a Privacy Impact Assessment is not necessary.¹⁵

2.14 The EM acknowledges that the Bill broadens the definition of 'character concern', but that 'the policy intention is that the definition of character concern be consistent with the character test in subsection 501(6)'.¹⁶ The EM further notes that the proposed amendments:

...do not alter the framework or existing safeguards which govern the collection, use, and disclosure of identifying information. The robust privacy protection framework in Part 4A of the Migration Act, which creates a series of rules and offences that govern access to, disclosure of, modification of and destruction of identifying information (including personal identifiers) are not amended by this Bill.¹⁷

2.15 The department also referred to the committee's inquiry into the Character Bill, where the committee considered the then proposed character test, which the current Bill would reflect in the amended definition of 'character concern'.¹⁸ The committee's report stated that:

The committee considers that the criticisms of a broader character test and general visa cancellation framework are unfounded. A determination made under either of these frameworks is discretionary and, when made by any person other than the Minister acting in a personal capacity, the

12 *Submission 3*, p. 18.

13 *Submission 3*, p. 18.

14 *Submission 4*, p. 4.

15 *Submission 3*, pp 7-8.

16 EM, p. 5.

17 EM, p. 5.

18 *Submission 8*, p. 4.

determination is subject to a review process. This provides sufficient checks and balances to ensure a fair outcome.¹⁹

Ministerial discretion

2.16 Some submitters expressed concern that the amended definition of 'character concern' would afford too much discretion to the minister.²⁰

2.17 The LCA, ASRC and LV were concerned that if the minister 'reasonably suspects' a person has been engaged in certain criminal conduct, then the person would be determined to be of character concern.²¹

2.18 The LCA stated that this process:

effectively allows the Minister to assume the role of the court in assessing criminal conduct, supplanting what would ordinarily be a criminal court process in determining whether a person has engaged in certain conduct, with an administrative law process to make the same determination.²²

2.19 The ASRC similarly stated that this process 'effectively makes a determination that a person has been involved in criminal conduct despite the absence of a criminal conviction'.²³ LV added that the person in question 'is not convicted and is entitled to the presumption of innocence'.²⁴

2.20 Both the NSWCCCL²⁵ and the LCA expressed further concern that 'association' was undefined, stating:

...there are no criteria under the Migration Act or the Bill which need to be considered by the Minister in the process of determining whether a group or organisation has been involved in criminal conduct, and there is no definition of what is meant by "association", or limits imposed on how recent the association has to be in order to be a relevant consideration.²⁶

2.21 The LCA further posited that this is a rule of law issue, because 'the absence of publicly available, binding criteria...mean[s] that it will be difficult for individuals to know in advance whether their conduct might attract visa refusal or cancellation'.²⁷

2.22 The department reiterated that the definition of 'character concern' is relevant to the disclosure of personal identifiers under subsection 336E, submitting that:

19 Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Character and General Visa Cancellation) Bill 2014 [Provisions]*, p. 27.

20 For example, *Submission 7*, p. 2.

21 *Submission 2*, p. 4; *Submission 3*, pp 14-16; *Submission 6*, p. 2.

22 *Submission 3*, p. 15.

23 *Submission 2*, p. 4.

24 *Submission 6*, p. 2.

25 *Submission 4*, p. 3.

26 *Submission 3*, p. 16.

27 *Submission 3*, p. 16.

The amendments in this Bill do not propose to alter the framework or safeguards governing the collection, use or disclosure of personal information, or the current requirements for the security of personal identifiers.²⁸

Implications of visa cancellation

2.23 Submitters raised concerns about the implications of a visa cancellation, including:

- (a) information provided to certain detainees;
- (b) possible detention on visa cancellation grounds; and
- (c) the protection of confidential information in court proceedings.

Information provided to certain detainees (item 8)

2.24 As explained in paragraph 1.19, item 8 of the Bill would mean that officers would not be required to inform certain detainees 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.²⁹

2.25 Submitters opposed this amendment, arguing that it was important for people in this situation to be made aware of applicable legal processes.³⁰

2.26 The ASRC stated that the 'particular vulnerability of people in detention' should be considered.³¹ The RACS suggested several reasons why those affected may not otherwise be aware of the applicable legal processes, including lack of access to legal advice.³²

2.27 The LCA submitted that there does not appear to be 'sufficient justification for denying a person in this situation a fundamental aspect of their right to procedural fairness'.³³ The ASRC wrote that 'the stated justification in the Explanatory Memorandum is disproportionate to the potential consequences'.³⁴

2.28 Submitters argued that it would not be onerous for the department to provide the relevant information.³⁵ The ASRC added that failing to do so would infringe 'rule

28 *Submission 8*, p. 5.

29 EM, p. 6.

30 *Submission 2*, p. 5; *Submission 3*, p. 8; *Submission 4*, p. 4; *Submission 5*, p. 4; *Submission 7*, p. 2.

31 *Submission 2*, p. 5.

32 *Submission 5*, p. 4.

33 *Submission 3*, p. 10.

34 *Submission 2*, p. 5.

35 *Submission 2*, p. 5; *Submission 3*, p. 11; *Submission 4*, p. 4.

of law principles, which require that the law is readily known and available, and certain and clear'.³⁶

2.29 The EM states:

The policy position is that a person whose visa is cancelled personally by the Minister under section 501BA does not need to be informed of these matters. This is because a person will have previously had their visa cancelled by a delegate under subsection 501(3A), and so will have been detained under section 189 and informed of sections 195 and 196 at that point.³⁷

2.30 Further, the department submitted that the Bill 'will ensure that the consequences attached to all personal decisions of the minister on character grounds are consistent'.³⁸

Possible detention on visa cancellation grounds

2.31 The NSWCCCL emphasised the implications of visa cancellations:

[Visa cancellation] should only be used in the most serious cases. Visa cancellation can result in permanent exclusion from Australia. In circumstances where a visa is cancelled and a person cannot be deported to a third country, the effect is indefinite detention.³⁹

2.32 The ASRC and RACS also expressed concern about mandatory indefinite detention resulting from the Character Act, which would be supported by the Bill.⁴⁰

2.33 The NSWCCCL expressed specific concern about item 9, which would amend subsection 196(4) of the Act to include 'a reference to all the relevant provisions under which a visa can be cancelled on character grounds'.⁴¹ The NSWCCCL argued that 'legislation which can result in indefinite mandatory detention is contrary to fundamental principles of democratic societies'.⁴²

2.34 However, as stated above, the department told the committee that the amendments in item 9 would 'ensure that the consequences attached to all personal decisions of the minister on character grounds are consistent'.⁴³

2.35 The EM also explains that:

This gives effect to the policy intention that a person whose visa has been cancelled on character grounds...is to be kept in immigration detention

36 *Submission 2*, p. 5.

37 EM, p. 6.

38 *Submission 8*, p. 5.

39 *Submission 4*, p. 3.

40 *Submission 2*, pp 3-4; *Submission 5*, pp 2-3.

41 EM, p. 7.

42 *Submission 4*, p. 4.

43 *Submission 8*, p. 5.

unless a court finally determines that the detention is unlawful or that the person is not an unlawful non-citizen.⁴⁴

Confidential information in court proceedings (item 21)

2.36 The LCA and LV raised concerns about amendments under item 21, regarding the protection of confidential information in legal proceedings.⁴⁵

2.37 Currently, the Act allows the Federal Court or Federal Circuit Court to make orders to ensure confidential information relating to certain categories of visa cancellation is not disclosed to the applicant, their legal representative, or any other member of the public.⁴⁶ The proposed amendments expand the relevant categories of visa cancellation to ensure that:

confidential information...that is relevant to the exercise of a power under section 501CA or 501BA receives the same level of protection as the confidential information that is relevant to the exercise of a power under section 501, 501A, 501B or 501C.⁴⁷

2.38 The LCA stated that the Bill 'prevents the applicant from effectively challenging the basis on which their visa has been cancelled due to their unawareness of the evidence used against them'.⁴⁸ LV submitted that 'it is anathema to the rule of law that a person should appear before a court to meet a case about which he or she is not fully informed'.⁴⁹

2.39 In response, the department noted that the Bill merely improves consistency in the Migration Act in order to give full effect to the original policy intention.⁵⁰ The department also referred to the importance of protecting confidential information, submitting that 'these amendments strengthen protection for criminal intelligence and related information that is critical to decision making under sections 501BA and 501CA of the Migration Act'.⁵¹

Retrospective application

2.40 Item 22 of the Bill would provide for the retrospective application of the provisions proposed in items 10, 11, 12, 20, and 21.

2.41 As discussed in paragraph 1.23, these items would be applied retrospectively: they would be applied to decisions and invitations made, and information communicated, before or after commencement.

44 EM, p. 7.

45 *Submission 3*, pp 13-14; *Submission 6*, p. 2.

46 EM, p. 11.

47 EM, p. 11.

48 *Submission 3*, p. 14.

49 *Submission 6*, p. 2.

50 *Submission 8*, p. 4.

51 *Submission 8*, p. 7.

2.42 The LCA referred to the committee's comments on retrospectivity in the Migration and Maritime Bill, and argued that:

Although it appears that this Committee's recommendation on that Bill regarding retrospectivity has been considered in the drafting of the Explanatory Memorandum for the current Bill, the Law Council's concern in respect of retrospectivity and other provisions remain.⁵²

2.43 The LCA referred to its *Rule of Law Principles*, which state that 'the law must be both readily known and available, and certain and clear'.⁵³ Applied to the Bill, the LCA stated that:

...this principle means that visa holders should be informed about whether and how their visa may be cancelled, and the availability of review associated with the cancellation of their visa.⁵⁴

2.44 The RACS similarly stated that:

...migration laws should be prospective and transparent, and we consider that it is a fundamental principal of the rule of law that the government in all its actions is bound by rules that are fixed and certain.⁵⁵

2.45 The NSWCCCL stated that it opposes retrospective legislation 'as a matter of principle', and the RCOA expressed concern that the retrospective provisions of the Bill lacked 'adequate justification'.⁵⁶

2.46 The LCA submitted that the retrospective provisions could cause adverse consequences, including that matters already before the Federal Circuit Court may be affected and that 'visa holders may have their visa cancelled for previous actions or omissions that did not give rise to a cancellation at the time'.⁵⁷

2.47 The EM provides reasoning to justify the retrospective application of each relevant sub-item under item 22. For example, in relation to item 12, the EM states:

This amendment does not reach back and change what the law was before commencement and so is not retrospective in that sense. It applies after commencement in relation to non-citizens who are the subject of a section 501BA or 501CA decision made before commencement.⁵⁸

2.48 Additionally, the minister stated in his second reading speech:

This bill will also give full effect to the policy of mandatory cancellation, by putting beyond doubt that a noncitizen who is the subject of a mandatory character cancellation decision is available for removal from Australia if

52 *Submission 3*, p. 3.

53 *Submission 3*, p. 12.

54 *Submission 3*, p. 12.

55 *Submission 5*, p. 4.

56 *Submission 4*, p. 4; *Submission 1*, p. 3.

57 *Submission 3*, p. 13, p. 9.

58 EM, p. 13.

they do not seek revocation within the relevant time period, or are unsuccessful in having their visa reinstated... Finally, this bill demonstrates this government's clear and continuing commitment to ensuring that noncitizens who pose a risk to the Australian community are dealt with effectively, efficiently and comprehensively.⁵⁹

Committee view

2.49 As noted in paragraphs 1.10 to 1.12, the committee has previously considered the provisions of the Bill during its inquiry into the Migration and Maritime Bill in 2015.

2.50 The committee does not consider that submissions to this inquiry have raised significant new issues; the concerns raised are substantially similar to those outlined during the committee's inquiry into the Migration and Maritime Bill.

2.51 The committee's views on the Bill remain consistent with its previous findings in relation to the Migration and Maritime Bill. In that report, the committee stated that:

Throughout the inquiry, the committee heard concerns that the [Migration and Maritime] Bill potentially breaches Australia's international law obligations. The department assured the committee—most vehemently in respect of Schedule 4—that the Bill does not breach, and is consistent with, those obligations. The committee accepts this advice...⁶⁰

2.52 The committee acknowledges submitters' concerns that the amended definition of 'character concern' may infringe non-citizens' privacy. However, the committee notes that the Attorney-General's Department and the Office of the Australian Information Commissioner were consulted regarding the Migration and Maritime Bill, which included the provisions of the Bill. Moreover, as the committee's report on the Migration and Maritime Bill stated, 'the low impact of the Bill and the existence of robust privacy safeguards led to the conclusion in a privacy threshold assessment that a Privacy Impact Assessment was not necessary'.⁶¹

2.53 The committee further notes that the amended definition would merely align the definition of 'character concern' in subsection 5C(1) with the existing criteria of the character test at subsection 501(6) of the Act.⁶² In that context, the amendments have precedent and would increase coherence and consistency in the Act.

2.54 Similarly, with regards to the amendments proposed in item 8, the committee refers to its report into the Migration and Maritime Bill, where it noted that:

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

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

61 Senate Legal and Constitutional Affairs Legislation Committee, *Migration and Maritime Powers Amendment Bill (No. 1) 2015 [Provisions]*, November 2015, p. 8.

62 EM, pp 4-5.

...current subsection 193(1) sets out a number of categories of non-citizens in immigration detention to whom section 194 and 195 do not apply. In this context, the measure proposed in item 8...is not unusual, although in principle the committee is of the view that people in immigration detention should be appraised of their legal rights.⁶³

2.55 With regard to the retrospective application of certain items in the Bill, the committee acknowledges the concerns raised by submitters, which include the relevant provisions' potentially adverse impact on non-citizens and that certain acts or omissions made by a non-citizen in the past may take on unforeseen significance.

2.56 In its report on the Migration and Maritime Bill, the committee recommended that 'the Explanatory Memorandum to the Bill be amended to clarify the operation of the retrospective provisions of the Bill'.⁶⁴ The committee is aware that the EM for the current Bill includes information intended to clarify the operation of the retrospective provisions of the Bill; however, the committee remains of the view that further clarification is required.

Recommendation 1

2.57 The committee recommends that the government consider amending the Explanatory Memorandum to further clarify the operation of the retrospective provisions of the Bill.

2.58 Subject to Recommendation 1, the committee recommends that the Senate pass the Bill.

Recommendation 2

2.59 Subject to the preceding recommendation, the committee recommends that the Bill be passed.

**Senator the Hon Ian Macdonald
Chair**

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

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