

The Senate

Legal and Constitutional Affairs
Legislation Committee

Migration Amendment (Character
Cancellation Consequential Provisions)
Bill 2016 [Provisions]

March 2016

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Recommendations

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.

Recommendation 2

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

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.

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.

Dissenting Report from the Australian Greens

1.1 The Senate inquiry into the Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016 (Bill) received eight submissions in total, seven of which were from lawyers and experts in migration and the protection of civil liberties. All submissions raised serious concerns regarding this Bill, with the exception of the submission made on behalf of the government by the Department of Immigration and Border Protection.

1.2 Despite the evidence provided and concerns raised by these experts, the chair's report has recommended that this Bill be passed, subject to the recommendation that the government consider amending the Explanatory Memorandum to further clarify the operation of the retrospective provisions of the Bill.

1.3 The Australian Greens are concerned that the Bill seeks to significantly expand the scope upon which the minister may cancel a visa on character grounds.

1.4 In particular, the Australian Greens are concerned that:

- the proposed amended definition of 'character concern' is too broad and affords too much discretion on the part of the minister;
- the proposed omission of the word 'significant' from the existing term 'significant risk' in paragraph 5C(1)(d) unreasonably lowers the threshold that the minister must be satisfied of in relation to whether a person is allowed to enter or remain in Australia; and
- the proposed amendment would allow consideration of the fact that a non-citizen has simply been charged with an offence without the need for them to have been actually convicted by a court.

1.5 The Australian Greens note the committee's comment that it has previously considered the provisions of the Bill during its inquiry into the Migration and Maritime Powers Bill (No. 1) 2015 (Migration and Maritime Bill). In stating that the committee's views on the Bill remain consistent with its previous findings in relation to the Migration and Maritime Bill, the chair refers to its earlier statement 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...

1.6 The Australian Greens note that this current Bill is a direct replicate of Schedule 2 of the Migration and Maritime Bill, whereas the above comment, in particular the concerns regarding breaches of international law, pertains to Schedule 4 of the Migration and Maritime Bill. Assurances made by the department that Schedule 4 of the Migration and Maritime Bill does not breach international law are therefore not relevant to this current Bill. The Australian Greens are therefore unconvinced as to

how previous assurances by the department of this nature relate to this current Bill or address the serious concerns raised by the submissions received.

Conclusion

1.7 The Australian Greens are concerned that the chair does not appear to have appropriately responded to and addressed the concerns raised by the vast majority of experts regarding this Bill. The Australian Greens recommend that the Bill be rejected by the Senate.

Recommendation 1

1.8 The Australian Greens recommend that the Bill be rejected by the Senate.

Senator Sarah Hanson-Young
Senator for South Australia

Appendix 1

Public submissions

- 1 Refugee Council of Australia
- 2 Asylum Seeker Resource Centre
- 3 Law Council of Australia
- 4 NSW Council of Civil Liberties
- 5 Refugee Advice & Casework Service (Aust) Inc
- 6 Liberty Victoria
- 7 Refugee Legal
- 8 Department of Immigration and Border Protection

Appendix 2

Subsections 501(6) and (7) of the *Migration Act 1958*

Character test

- (6) For the purposes of this section, a person does not pass the *character test* if:
- (a) the person has a substantial criminal record (as defined by subsection (7)); or
 - (aa) the person has been convicted of an offence that was committed:
 - (i) while the person was in immigration detention; or
 - (ii) during an escape by the person from immigration detention; or
 - (iii) after the person escaped from immigration detention but before the person was taken into immigration detention again; or
 - (ab) the person has been convicted of an offence against section 197A; or
 - (b) the Minister reasonably suspects:
 - (i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and
 - (ii) that the group, organisation or person has been or is involved in criminal conduct; or
 - (ba) the Minister reasonably suspects that the person has been or is involved in conduct constituting one or more of the following:
 - (i) an offence under one or more of sections 233A to 234A (people smuggling);
 - (ii) an offence of trafficking in persons;
 - (iii) the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern;whether or not the person, or another person, has been convicted of an offence constituted by the conduct; or
 - (c) having regard to either or both of the following:
 - (i) the person's past and present criminal conduct;
 - (ii) the person's past and present general conduct;the person is not of good character; or
 - (d) in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would:
 - (i) engage in criminal conduct in Australia; or
 - (ii) harass, molest, intimidate or stalk another person in Australia; or
 - (iii) vilify a segment of the Australian community; or
 - (iv) incite discord in the Australian community or in a segment of that community; or
 - (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way; or
 - (e) a court in Australia or a foreign country has:
 - (i) convicted the person of one or more sexually based offences involving a child; or
 - (ii) found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction; or
 - (f) the person has, in Australia or a foreign country, been charged with or indicted for one or more of the following:
 - (i) the crime of genocide;

- (ii) a crime against humanity;
 - (iii) a war crime;
 - (iv) a crime involving torture or slavery;
 - (v) a crime that is otherwise of serious international concern; or
- (g) the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*); or
- (h) an Interpol notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.

Otherwise, the person passes the *character test*.

Substantial criminal record

- (7) For the purposes of the character test, a person has a *substantial criminal record* if:
- (a) the person has been sentenced to death; or
 - (b) the person has been sentenced to imprisonment for life; or
 - (c) the person has been sentenced to a term of imprisonment of 12 months or more; or
 - (d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or
 - (e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or
 - (f) the person has:
 - (i) been found by a court to not be fit to plead, in relation to an offence; and
 - (ii) the court has nonetheless found that on the evidence available the person committed the offence; and
 - (iii) as a result, the person has been detained in a facility or institution.