



4 March 2015

Ms Sophie Dunstone, Committee Secretary  
Legal and Constitutional Affairs Legislation Committee  
PO Box 6100, Parliament House  
Canberra ACT 2600  
Australia

By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Committee Secretary,

**Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016**

We welcome the opportunity to comment on Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016.

This Bill adversely impacts upon the legislative framework governing the character provisions of the *Migration Act 1958*. It further embeds the lack of fairness and increases the broad, discretionary Ministerial powers to refuse a person's visa which were brought in by the *Migration Amendment (Character and General Visa Cancellation) Act 2014*.

Our submission focuses on the impact of these provisions in relation to:

- a. The extension of visa cancellation powers relating to people serving a term of imprisonment;
- b. Removing procedural fairness safeguards including denying critical information regarding the length of a person's detention and their ability to apply for another visa;
- c. Broadening the definition of 'character concern';
- d. Increasing the risk of indefinite detention for people recognised as refugees, but who fail the character test;
- e. Allowing the Minister to assume the role of the court in assessing criminal conduct.

Our submission regarding these issues is attached. Thank you for the opportunity to contribute to this important inquiry and please do not hesitate to contact Melinda Jackson, Principal Solicitor

Yours sincerely

Kon Karapanagiotidis, CEO

## Introduction

- 1 The Asylum Seeker Resource Centre (**ASRC**) protects and upholds the human rights, wellbeing and dignity of asylum seekers. We are the largest provider of aid, advocacy and health services for asylum seekers in Australia. Most importantly, at times of despair and hopelessness, we offer comfort, friendship, hope and respite.
- 2 We are an independent, registered non-governmental agency and we do not receive any direct program funding from the Australian Government. We rely on community donations and philanthropy for 95 per cent of our funding. We employ over 80 staff and rely on over 1200 dedicated volunteers. We deliver services to over 1,500 asylum seekers at any one time.
- 3 Our submission is based on 14 years of experience working with asylum seekers in Victoria.
- 4 As set out below, the ASRC opposes the passage of the Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016 (**the Bill**).

## The Migration and Maritime Powers Amendment Bill (No. 1) 2015 [Provisions]

- 5 This Bill exactly reflects Schedule 2 of the Migration and Maritime Powers Amendment Bill (No. 1) 2015 [Provisions] (**Migration and Maritime Powers Bill**), which was considered by this Committee and the Senate, and subsequently returned to the House of Representatives with amendments. As such, parts of the ASRC's submission on Migration and Maritime Powers Bill remain relevant to this inquiry.<sup>1</sup>
- 6 The ASRC notes that the Parliamentary Joint Committee on Human Rights (**PJCHR**) considered the Migration and Maritime Powers Bill in its *Thirtieth Report of the 44<sup>th</sup> Parliament*,<sup>2</sup> requesting responses from the Minister for Immigration and Border Protection (**the Minister**) over concerns that it raised in respect of the Bill's compatibility with human rights. The PJCHR considered the Minister's responses in its *Thirty-Fourth Report of the 44<sup>th</sup> Parliament* (wherein it concluded its examination of the Bill),<sup>3</sup> noting that Schedule 2 engages the following rights and obligations:
  - a. *non-refoulement* obligations: the Minister's non-compellable powers are insufficient protection against *non-refoulement*, and international law is very clear that administrative arrangements are insufficient to protect against unlawful *refoulement*;<sup>4</sup>
  - b. the right to liberty: while Schedule 2 does not make a number of amendments to cancellation powers introduced by the Character Act, it reduces important procedural safeguards;<sup>5</sup>
  - c. the right to freedom of movement: although the Minister disagrees, the PJCHR considers freedom of movement applies to both citizens and permanent residents that have lived in Australia for a long time and regard Australia as their 'own country';<sup>6</sup>
  - d. the obligation to consider the best interests of the child: certain provisions, such as those relating to the discretionary visa revocation process and mandatory visa cancellation, do not appear to provide for consideration of the best interests of the child;<sup>7</sup> and

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<sup>1</sup> Asylum Seeker Resource Centre, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration and Maritime Powers Amendment Bill (No. 1) 2015 [Provisions] 8 October 2015.

<sup>2</sup> Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44<sup>th</sup> Parliament* (10 November 2015) 28-52.

<sup>3</sup> Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44<sup>th</sup> Parliament* (23 February 2016), 29-64.

<sup>4</sup> *Ibid* [2.142].

<sup>5</sup> *Ibid* [2.127].

<sup>6</sup> *Ibid* [2.157].

<sup>7</sup> *Ibid*, see for example [2.171]-[2.172].

- e. the right to equality and non-discrimination: the mandatory visa cancellation of individuals sentenced to 12 months or more in prison is likely to disproportionately affect individuals with mental health concerns, which establishes *prima facie* that there may be indirect discrimination.<sup>8</sup>

7 The ASRC endorses the findings of the PJCHR and believes the Bill should not be passed, whilst it remains inconsistent with human rights principles.

#### **Developments since passage of the *Migration Amendment (Character and General Visa Cancellation) Act 2014***

8 The amendments proposed under this Bill relate to a range of character-related provisions, specifically visa cancellation on 'character grounds'. In December 2014, the *Migration Amendment (Character and General Visa Cancellation) Act 2014 (the Character Act)* made significant amendments to the character provisions and created new powers to refuse or cancel visas on 'character grounds'. At the time of the consideration of that legislation, the ASRC raised its significant concerns to this Committee in relation to those changes (in a submission dated 31 October 2014), which included:

- Increase of ministerial powers to cancel visas without proper procedural safeguards in place;
- Significant reduction in the threshold for visa cancellations, including removal of the need for a 'significant' risk, and on the basis of 'reasonable suspicion' ;
- Capacity of the Minister to reverse, at his discretion, a decision by a merits review tribunal;
- Mandatory cancellation which does not permit the consideration of individual circumstances; and
- Significant risk of decisions resulting in indefinite detention (based on a 'reasonable suspicion' that an individual may be subject to a character cancellation) or breach of Australia's non-refoulement obligations.

9 Since the introduction of the Character Act, in the ASRC's experience, these concerns have been substantiated. There has been a significant increase in the number of individuals whose visas are cancelled and they are placed in detention as a result of these provisions. Often the character cancellation relates to criminal charges prior to any determination of a court conviction, but also for people who have not been charged with any offence, pursuant to the association provisions of the character test. There are also a number of people in detention whose criminal charges have been dropped; at present they remain in detention indefinitely and are only released after sustained advocacy. These changes brought in by the Character Act undermine the fundamental principles of the criminal justice system which apply to all other Australians.

10 The ASRC also notes that there have been significant numbers of mandatory cancellations under the provisions of s 5013A, which provide that people in prison who are convicted of certain offences must have their temporary or permanent visa cancelled. The mandatory cancellation usually occurs just days before a person is scheduled to be released from prison, and they are then transferred directly to immigration detention facilities. Due to the protracted timeframes for decisions on cancellations and revocations, many people then face the prospect of remaining in detention for months or years after their custodial sentence has been completed. This extended period of detention or imprisonment goes beyond the criminal penalty envisaged by the court for the crime.

11 Further, the ASRC has observed that the increasing use of the character cancellation powers under section 501 is conflicting with Australia's *non-refoulement* obligations. Where a person has been found to be owed refugee status (under the Refugees Convention or complementary protection framework) but their visa has been refused or cancelled under character grounds, a person faces the prospect of indefinite detention as a legal and practical consequence of the cancellation decision.

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<sup>8</sup> Ibid [2.186]-[2.187].

- 12 The cases of *NBMZ*<sup>9</sup> and *NBNB*<sup>10</sup> concerned such persons. The statutory framework provides that unlawful non-citizens must be detained and removed from Australia “as soon as practicable”.<sup>11</sup> Pending removal or deportation they must remain in detention unless granted a visa.<sup>12</sup> Where there is no country to which they can be removed, and no category of visa for which they can apply, they are said to be detained “indefinitely”.<sup>13</sup> The ASRC believes that the prevalence of character cancellations will lead to growing numbers of refugees who are required to be detained indefinitely, and that the amendments to the character provisions should be considered in this respect.
- 13 In summary, developments since the passage of the Character Act highlight the problems associated with the broad changes to the character provisions, and on this basis the ASRC recommends the Australian government carefully consider any further changes.

### **Visa cancellation powers for people in prison**

- 14 The current Bill will further entrench the unfairness of the provisions in the Character Act, by extending their application to the Minister’s power to cancel a visa granted by a delegate or by a decision of the AAT (s 501BA). Item 7 extends the application of subsections 192(1) and (4) of the Migration Act – concerning the detention of visa holders whose visas are liable for cancellation – to a person serving a sentence of imprisonment.<sup>14</sup>
- 15 The ASRC is concerned about the use of a broad, discretionary power where the Minister may overturn a decision of a review tribunal. The Minister’s power is exempt from the rules of natural justice (s 501CA(3)) and will be exercised to ‘trump’ the considered decision on the merits of a review tribunal. The ASRC believes that a lawful decision of a Tribunal should be subject only to judicial review, which is an option available to the Minister, rather than a use of a discretionary power. The amendments proposed in this Bill would extend the Minister’s cancellation powers even further, and are unnecessary in light of the broad powers which already exist in the Migration Act, which provide for the Minister to cancel a person’s visa in the national interest (s 501(3)).
- 16 The proposed amendments in this Bill would mean that those subject to the Minister’s cancellation power could be detained if there is a mere ‘reasonable suspicion’ that their visa will be subject to cancellation under the Minister’s power. Like the amendments ushered in by the Character Act, this section effectively makes a determination that a person has been involved in criminal conduct despite the absence of a criminal conviction. Section 501CA(3) of the Migration Act effectively allows the Minister to assume the role of the court in assessing criminal conduct, replacing a proper criminal court process with an administrative process.

### **Procedural fairness**

- 17 The Bill also removes important procedural safeguards for people in immigration detention. Item 8 extends the application of sub-section 193(1)(a)(v) of the Migration Act –concerning the application of law to certain non-citizens while they remain in immigration detention – to a person serving a sentence of imprisonment.<sup>15</sup> Subsection 193(1)(a)(v) provides that sections 194 and 195 do not apply to a detainee, such that an officer is *not* required to inform a detainee of:

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<sup>9</sup> *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1.

<sup>10</sup> *NBNB v Minister for Immigration and Border Protection* (2014) 220 FCR 44

<sup>11</sup> *Migration Act 1958* (Cth) (the **Act**), ss 189 and 198. .

<sup>12</sup> Section 196.

<sup>13</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562.

<sup>14</sup> Pursuant to sub-s 501(3A).

<sup>15</sup> *Ibid.*

- a. their ability to apply for a visa whilst in detention, subject to certain time constraints;<sup>16</sup> or
- b. the provisions relating to the duration of their detention.<sup>17</sup>

- 18 The justification for this denial of procedural fairness is set out in the Explanatory Memorandum: a person will generally have previously had their visa cancelled by a delegate under subsection 501(3A), and, in so being detained under section 189, will be informed of sections 195 and 196 at that point.<sup>18</sup> This prior cancellation and detention under section
- 19 However, the ASRC believes this is entirely insufficient justification for the removal of an important procedural safeguard for people who are presently deprived of their liberty. It also infringes rule of law principles, which require that the law is readily known and available, and certain and clear.<sup>19</sup> The ASRC believes that all people in immigration detention should be informed of the reason for their detention and their rights in relation to detention. The ASRC also notes that the cancellation and detention
- 20 The particular vulnerability of people in detention should be taken into account, including the following considerations:
- a. Due to the trauma of being detained, it cannot be assumed that applicants would know the timeframes in which they have to make a further application or remember such timeframes, as their previous cancellation and detention under s501(3A) may have occurred some time ago;
  - b. There are serious barriers for legal representatives accessing detention centres, including onerous requirements imposed by Border Force, remote location of many centres, the poor technological facilities and lack of appropriate interview spaces;
  - c. Due to the lack of government funding for immigration legal advice – compounded with accessibility issues, it is highly unlikely that the person in detention has access to external legal advice;
- 21 Given the potentially life-threatening consequences of removal if no other application is lodged, asylum seekers should not be intentionally deprived of information relating to the further options open to them and should have a full opportunity to exercise the rights available to them. It is not onerous for the Department to inform people of their rights: the stated justification in the Explanatory Memorandum is disproportionate to the potential consequences. People in detention must be advised about their rights to apply for any visas, otherwise they may be detained or their detention continued because they were not informed of their options.
- 22 The ASRC recommends that all people in detention be provided with information relevant to their detention, including information concerning the length of their detention and access to legal advice and representation.

### **Definition of ‘character concern’**

- 23 The Bill seeks to amend the definition of section 5C which relates to ‘character concern’. Proposed subsections 5C(1)(bb) or 5C(1)(bc) of the Bill would amend the definition of ‘character concern’ to include circumstances where the Minister or the Minister’s delegate has made a determination based on reasonable suspicion that the person has been involved in certain conduct (mirroring subsections 501(6)(b) and 501(6)(ba) of the Migration Act, as introduced by the Character Act). The definition at

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<sup>16</sup> At s 195.

<sup>17</sup> At s 196.

<sup>18</sup> Explanatory Memorandum, [25].

<sup>19</sup> Law Council of Australia, Rule of Law Principles (March 2011) (‘LCA Rule of Law Principles’), available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>.

section 5C is relevant in relation to the disclosure of personal identifying information because such information can only be lawfully disclosed as a permitted disclosure in relation to individuals who are a 'character concern'. The proposed amendment will mean that a broader range of individuals can have their personal information lawfully identified, which potentially infringes their right to privacy.

## **Conclusion**

- 24 Whilst the amendments proposed in this Bill are consequential to the Character Act enacted in December 2014, it is important to note that those earlier provisions significantly increased ministerial power, lowered the threshold for visa cancellations and purported to negate the application of natural justice. Extending their operation further cements the unfairness of the original amendments to circumstances that include the Minister's power, which is only reviewable in the Federal Court.
- 25 The ASRC reiterates its opposition to changes proposed to further extend the character provisions of the Migration Act beyond their already broad scope. Whilst the Bill remains inconsistent with human rights principles, rule of law and procedural fairness obligations, this Bill should not be passed. Taking into account the serious consequences of these changes, being potential deprivation of liberty, the proposed amendments are disproportionate. The ASRC believes this Bill would also create further inconsistency with Australia's obligations of *non-refoulement*, and have a serious effect on refugees and asylum seekers. The ASRC believes this Bill should not be passed.