



Australian  
Human Rights  
Commission

# Inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION  
TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS  
LEGISLATION COMMITTEE**

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## **1 Introduction**

1. The Australian Human Rights Commission (Commission) makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee in its Inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Bill).
2. The Commission is established by the *Australian Human Rights Commission Act 1986* (Cth) and is Australia's national human rights institution.

## **2 Summary and recommendation**

3. The Minister for Immigration and Border Protection (Minister) currently possesses a number of powers under the *Migration Act 1958* (Cth) to refuse to grant visas or to cancel visas. The Bill would amend these powers in a number of ways. This submission is primarily addressed to the following changes that would be effected by the Bill:
  - a. Increasing the circumstances in which a person would fail the 'character test'<sup>1</sup>
  - b. Providing for mandatory visa cancellation in certain circumstances where a person is suspected of failing the character test<sup>2</sup>
  - c. Increasing the Minister's powers to cancel visas for providing incorrect information
  - d. Giving the Minister further personal, non-delegable, non-compellable, and non-merits-reviewable powers to cancel a visa where:
    - i. a person does not meet the character test<sup>3</sup>
    - ii. a person gives incorrect information in relation to a visa<sup>4</sup>
    - iii. a circumstance relevant to the grant of the visa no longer exists.<sup>5</sup>

These powers may in some circumstances be used to overturn decisions of independent merits tribunals, including certain findings of fact.
4. The Commission is concerned that the Bill lowers the threshold for refusal and cancellation of visas, while also increasing the Minister's personal cancellation powers, in a manner that cannot be justified. This will increase the likelihood of people suffering arbitrary detention and unjustified interference with their family life.
5. On this basis, the Commission recommends that the Bill not be passed.

## **3 Background**

6. In June 2013, the Commission published a Background Paper reviewing the human rights issues raised by the visa refusal and cancellation provisions

contained in s 501 of the Migration Act (which contains the ‘character test’ provisions).<sup>6</sup> In that paper, the Commission described the impact visa cancellation or refusal may have on the human rights of those affected. Matters of particular concern to the Commission include:

- a. the risk that people refused visas, or whose visas are cancelled, may be subject to arbitrary detention in immigration detention facilities (including prolonged or indefinite detention), contrary to article 9(1) of the International Covenant on Civil and Political Rights (ICCPR)<sup>7</sup>
  - b. the risk of separation from children and other family members due to a person’s detention and/or removal from Australia, resulting in possible breaches of articles 17 and 23 of the ICCPR.
7. This submission draws on the analysis contained in the Background Paper. While that paper was concerned with the impact of visa cancellations and refusals under s 501 of the Migration Act, the human rights analysis it contains applies equally to decisions to refuse or cancel visas under other provisions of the Migration Act.

#### **4 Arbitrary Detention and Interference with Family**

8. This submission primarily addresses the effect the Bill may have under articles 9(1), 17 and 23 of the ICCPR.
9. Article 9(1) of the ICCPR relevantly provides:
- Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
10. Under article 9(1) of the ICCPR, the Australian Government has an obligation not to subject any person to arbitrary detention, including for immigration control purposes.<sup>8</sup> Detention can be arbitrary even though it is provided for by law; arbitrariness in this context includes concepts of ‘inappropriateness, injustice and lack of predictability’.<sup>9</sup> Detention will also be arbitrary if it is a disproportionate response to a legitimate aim,<sup>10</sup> and/or if it continues beyond a period for which the Australian Government can provide appropriate justification.<sup>11</sup>
11. Under article 17 of the ICCPR, all people have the right to be free from ‘arbitrary or unlawful interference’ with their family.<sup>12</sup> Also, article 23(1) of the ICCPR provides that ‘[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State’. In some circumstances, the refusal or cancellation of a person’s visa leading to their subsequent detention and/or removal from Australia could result in Australia being in breach of its obligations under those articles.<sup>13</sup>
12. In addition, article 3 of the Convention of the Rights of the Child (CRC) requires that in any decision involving a child, the best interests of the child shall be a primary consideration.<sup>14</sup>

13. If a non-citizen in Australia holds a visa which is cancelled, they thereby become an unlawful non-citizen. They are then liable to mandatory immigration detention under s 189 of the Migration Act, until such time as they are removed from Australia (unless the Minister decides to exercise one of his personal, non-compellable powers to intervene).
14. Both detention in an immigration detention facility, and deportation can constitute an interference with family life. In some circumstances, this can amount to a violation of articles 17 and 23 of the ICCPR. Long-term permanent residents who have their visas cancelled may be removed from Australia and sent to a country where they have spent little time (or never lived); where they do not speak the language; and where they have few or no social or family connections. They may also face separation from their children, family and friends in Australia.<sup>15</sup>
15. Visa refusal or cancellation is particularly significant for persons who face a risk of persecution, torture, or inhuman or degrading treatment in their country of origin. Expulsion of people in such circumstances is contrary to Australia's international non-refoulement obligations under the Refugee Convention,<sup>16</sup> the Convention against Torture (CAT),<sup>17</sup> and the ICCPR.<sup>18</sup>
16. In the Statement of Compatibility with Human Rights prepared in relation to the Bill, the Commonwealth has reaffirmed its commitment not to expel people in violation of its non-refoulement obligations.<sup>19</sup> The Commission welcomes this commitment. However, where the visa of a person who cannot be returned to their country of origin is cancelled, the person faces indefinite detention under s 189 of the Migration Act, which can amount to violation of article 9(1) of the ICCPR.<sup>20</sup> Australia's mandatory detention policies have resulted in some refugees being detained either in closed detention facilities, or in community detention, for over five years.
17. A detailed discussion of these issues can be found in the Commission's Background Paper.

## **5 The Purposes of the Bill and the Statement of Compatibility with Human Rights**

18. The Commission commends the Commonwealth for preparing a thorough Explanatory Memorandum and a detailed Statement of Compatibility with Human Rights in relation to the Bill. The Statement of Compatibility identifies a number of human rights that are potentially affected by the proposed legislation, including articles 9(1), 17 and 23 of the ICCPR, and article 3 of the CRC. However, the Commission considers that the reasoning in the Statement of Compatibility is not as expansive as it could be in assessing how limitations on human rights are justified, and in particular in its analysis of whether those limitations are necessary and proportionate to achieving a legitimate objective.
19. The Statement of Compatibility acknowledges that the changes to visa refusal and cancellation powers implemented by the Bill will lead to people being detained. It also acknowledges that they may result in separation of the family unit. However it argues that these results will be proportionate to achieving

legitimate objectives of the government. It also states that human rights considerations, including consideration of articles 9(1), 17 and 23, may be taken into account by the exercise of discretions either not to refuse or cancel a visa, or various personal discretionary powers of the Minister to, for instance, release a person from immigration detention.

20. The Commission considers that the Statement of Compatibility fails to demonstrate that the Bill is necessary and proportionate to achieve a legitimate objective, and therefore to demonstrate that the restrictions it imposes on human rights are justified.<sup>21</sup>
21. The principal justifications for the Bill are stated to be:
  - a. to respond to ‘the significant changes in the environment relating to the entry and stay of non-citizens in Australia since mid to late 1990s’;
  - b. ‘ensuring that noncitizens do not pose a risk to the Australian community;’ and
  - c. to reflect the ‘government’s and the Australian community’s low tolerance for criminal, non-compliant or fraudulent behaviour by those who are given the privilege of holding a visa to enter and stay in Australia.’<sup>22</sup>
22. The third of these objectives can not be viewed as a legitimate reason to restrict the fundamental rights and freedoms described in the ICCPR. It does not fall within any of the recognised justifications for the limitation of human rights.
23. There is nothing in the Explanatory Memorandum or the Statement of Compatibility with Human Rights that demonstrates that the Bill is necessary to achieve the other two objectives described in paragraphs a) and b) above.
24. The Explanatory Memorandum states that the provisions of the Bill arise ‘in part from the Review of the Character and General Visa Cancellation Framework (the Review) conducted by the Department of Immigration and Border Protection in 2013.’<sup>23</sup> The Commission sought a copy of this Review during the preparation of this submission but was informed by the Department that it was not publicly available.
25. The only detail that is given in the supporting materials of the alleged changes in the ‘environment relating to the entry and stay of non-citizens in Australia’ is on the following lines:

‘Australian migration patterns and processes have changed significantly since the introduction of [the] cancellation provisions with higher volumes of limited stay visa holders coming to Australia and streamlined processes facilitating entry for tourism, economic and other purposes’.<sup>24</sup>
26. The Commonwealth already possesses extensive visa cancellation powers (these are discussed in more detail in the following sections of this submission). Nothing in the supporting materials substantiates the claim that these powers have been shown to be insufficient by virtue of changed ‘migration patterns and processes.’

27. In these circumstances, no satisfactory account has been provided of how the ‘changes in the environment relating to the entry and stay of non-citizens in Australia’ justify further limitations on human rights.
28. The final justification given for the new provisions is the need to protect the Australian community from risk. This need is said to be heightened by ‘modern jurisprudence.’<sup>25</sup> This remark appears to be primarily directed at the approach Australian Courts have taken to interpreting current cancellation powers.
29. As noted above, the Commonwealth already possesses wide-ranging powers to refuse and cancel visas. The circumstances in which the Statement of Compatibility states visas should be able to be cancelled, but cannot, are circumstances such as where:
  - a. a person poses no ‘actual risk’ (only a ‘possible risk’)<sup>26</sup>
  - b. there is no ‘objective evidence’ that a person poses a risk to the community<sup>27</sup>
  - c. a person may have committed a crime, though that has not been proved.<sup>28</sup>
30. The Commission considers that none of these factors could justify the passage of laws that may restrict human rights.
31. While the Commission welcomes statements from the Commonwealth to the effect that it intends to consider human rights implications in the exercise of various discretionary powers, the approach it has manifested in the Bill and supporting materials in relation to the question of when restrictions on human rights are justified indicates that administrative measures are unlikely to guarantee that such restrictions are proportionate.
32. The Commission considers that the current powers in the Migration Act already give the Commonwealth ample power to regulate non-citizens in Australia and to protect the Australian community from any risks that might be posed by non-citizens.
33. For these reasons, the Commission considers that the restrictions which the Bill would impose on human rights cannot be characterised as necessary and proportionate to achieving legitimate objectives.
34. The Commonwealth’s current visa refusal and cancellation powers are discussed below in the context of the changes effected by the Bill.

## **6 Visa Refusal and Cancellation – the ‘character test’**

35. Section 501 of the Migration Act currently provides that the Minister may refuse or cancel a visa if a person fails the ‘character test.’ A person does not pass the character test if they fall within any of the grounds specified in subsections 501(6)(a) to (d). These grounds can be grouped into five broad categories:
  - a. substantial criminal record

- b. conviction for immigration detention offences
  - c. association with persons suspected of engaging in criminal conduct
  - d. past and present criminal or general conduct
  - e. significant risk of particular types of future conduct.<sup>29</sup>
36. The Minister may refuse to grant a visa to a person under section 501(1) if the person does not satisfy the Minister that he or she passes the character test.
37. A person's visa may be cancelled under section 501(2) of the Migration Act if:
- a. the Minister reasonably suspects that the person does not pass the character test, and
  - b. the person does not satisfy the Minister that they pass the character test.
38. The power in subsections 501(1) and 501(2) can be exercised by the Minister personally, or by a delegate of the Minister. In practice, certain departmental officers usually act as the Minister's delegates in making such decisions.
39. The Minister may refuse to grant a visa or may cancel a person's visa under subsection 501(3) of the Migration Act if:
- a. the Minister reasonably suspects that the person does not pass the character test and
  - b. the Minister is satisfied that the refusal or cancellation is in the national interest.
40. This power can only be exercised by the Minister personally. 'National interest' is not defined – it is a matter for the Minister to determine what constitutes the national interest in making a decision about whether to refuse or cancel a person's visa.
41. The Minister has additional personal powers to refuse or cancel visas under ss 501A and 501B of the Migration Act.
42. The Bill would extend the circumstances in which a visa applicant or holder would fail the character test in a number of ways. Those that are of most concern to the Commission are described below.

### **6.1 Posing a risk to the Australian Community**

43. Section 501(6)(d) of the Migration Act currently provides that a person fails the character test if there is a 'significant risk' that if they entered or remained in Australia, they would:
- a. engage in criminal conduct in Australia
  - b. harass, molest, intimidate or stalk another person in Australia
  - c. vilify a segment of the Australian community



- d. incite discord in the Australian community or in a segment of that community, or
  - e. 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.<sup>30</sup>
44. This provision already allows a person to be refused a visa, or for their visa to be cancelled, not on the basis of proof of any wrongdoing, but rather on a suspicion that that person may commit wrongful acts in the future.
45. The Bill would amend s 501(6)(d) by deleting the word ‘significant.’<sup>31</sup> As a consequence, a person would be liable to have their visa cancelled, or their application for a visa refused, if the Minister is satisfied that they pose *any* risk of the activities described above.
46. The Explanatory Memorandum states that it is intended that the provision will not capture a person who poses only a ‘minimal or trivial likelihood of risk’.<sup>32</sup> However, even if the provision is interpreted in that way, it still sets the threshold of risk at a very low level. That is particularly so given that there is no requirement that the conduct at risk of occurring be serious.
47. The fact that a person is suspected of posing a slight risk of committing a minor offence should not automatically enliven the visa cancellation power. That is particularly so in circumstances where actual conviction of a criminal offence will only enliven the cancellation power if it results in a term of imprisonment of 12 months or more.
48. In addition, the Commission is concerned that making a non-citizen liable for visa cancellation on the basis of a slight risk that they may incite discord in a segment of the community could have a serious and unjustified chilling effect on the freedom of expression of visa holders. Freedom of expression is protected by article 19 of the ICCPR, and may only be subject to such limitations as are necessary and proportionate to achieving a legitimate objective.

## **6.2 Other amendments to the character test**

49. The Bill would make a number of other changes to the circumstances in which a person will fail the character test, including:
- a. where the Minister reasonably suspects a person is or has been involved in people smuggling, people trafficking, genocide, crimes against humanity, war crimes, torture or slavery (whether or not they have been convicted of any offence)<sup>33</sup>
  - b. where a person in Australia or a foreign country has been charged or indicted for genocide, crimes against humanity, war crimes, torture or slavery (whether or not they have been convicted of any offence).<sup>34</sup>

50. The effect of these provisions is to enable the Minister to refuse or cancel a visa on the basis of conduct that would, if proved, constitute criminal conduct, but in the absence of any conviction.
51. It is unclear why these provisions are necessary. In the event that there is evidence that a person has committed these crimes, they should be prosecuted for them. In the event that they are charged in a foreign jurisdiction, they can, where appropriate, be extradited to face those charges.
52. The Bill would also increase the circumstances in which a person would fail the character test on the grounds of having a 'substantial criminal record', to include the following:
  - a. Where they have been convicted either in Australia or in a foreign court of a sexual offence involving a child (regardless of the severity of the conduct)
  - b. Where they have been sentenced to multiple terms of imprisonment, which collectively amount to a duration of over 12 months (this is being reduced from two years)
  - c. Where a person has been assessed by the Australian Security Intelligence Organisation to be a 'risk to security'
  - d. Where an Interpol notice is in force in relation to a person
  - e. Where a person has not been convicted of a serious criminal offence despite having performed 'criminal acts', because they were mentally unfit to plead to the charge.
53. The Commission considers that none of these amendments have been shown to be necessary or proportionate to achieve a legitimate aim. The Minister already has the power to cancel a person's visa where he is satisfied that the person would pose a substantial risk to the community, or where they have been convicted of a serious criminal offence.

## **7 Mandatory Visa Cancellation – failing the 'character test'**

54. Currently, the Minister may refuse to grant a person a visa, or may cancel a visa, if they are satisfied the person does not pass the character test. The relevant powers are discretionary. These powers are described in section 7 above.
55. In addition to these discretionary powers, the Bill would introduce a new s 501(3A) into the Migration Act, under which the Minister would be *obliged* to cancel a visa if:
  - a. the Minister is satisfied the person does not pass the character test because they have been sentenced to a term of imprisonment of 12 months or more<sup>35</sup> or they have been convicted of a 'sexually-based offence involving a child'; and

- b. the visa holder is currently serving a term of imprisonment.<sup>36</sup>
56. The rules of natural justice would not apply to a decision under s 501(3A).
57. If the Minister cancels a visa under s 501(3A), he will be obliged, 'as soon as [is] practicable', to give notice of his decision to the affected person, and invite that person to make submissions about the potential revocation of the decision.
58. The Minister will then have a discretionary power to revoke the cancellation if:
- a. the Minister is satisfied that the person satisfies the character test; or
  - b. the Minister is satisfied that there is another reason why the original decision should be revoked.<sup>37</sup>
59. Decisions about whether or not to revoke a cancellation decision will be reviewable by the Administrative Appeals Tribunal.<sup>38</sup>
60. The Commission has two principal concerns with this proposed scheme of mandatory cancellations:
- a. it will inevitably lead to mandatory detention in immigration detention facilities
  - b. it will alter the test for whether a visa should be cancelled. Ultimately it is probable that the provision will result in more people's visas being permanently cancelled.

## **7.1 Mandatory detention**

61. It is true that the new s 501(3A) will only apply to those who are serving custodial sentences. At the time of the mandatory cancellation of their visa, they are already detained. However, the effect of the cancellation will be to ensure they remain detained until such time as the cancellation/revocation of cancellation process is finalised, even if their term of imprisonment ceases before that time.
62. It is clear that the purpose of the provision is to ensure that people in this situation are kept in detention. In his second reading speech, the Minister stated that the new mandatory cancellation scheme:
- will deliver the key benefit of providing a greater opportunity to ensure noncitizens who pose a risk to the community will remain in either criminal or immigration detention until they are removed or their immigration status is otherwise resolved.<sup>39</sup>
63. Further, the Bill itself provides that where a person is, as a result of the mandatory cancellation of a visa, detained in immigration detention, any such period of detention is lawful. That is so even where the cancellation is subsequently revoked.<sup>40</sup> Thus the provisions of the Bill expressly contemplate that the passage of the Bill could result in mandatory immigration detention for those whose visas should not, on the merits, be cancelled.

64. As discussed above, immigration detention for short periods may be justified where it is shown to be necessary and proportionate to achieving a legitimate objective. To demonstrate that detention is justified to mitigate a risk an individual may pose to the community, it will be necessary to conduct an individualized assessment of the risk posed. The mandatory nature of the visa cancellation under proposed s 501(3A) means that no such assessment can take place prior to the decision to detain a person.
65. Section 501(3A) will increase the likelihood of non-citizens being subject to arbitrary detention contrary to article 9(1) of the ICCPR.

## **7.2 The test for cancellation**

66. At present, a person who fails the character test will nevertheless not have their visa cancelled unless the Minister (or a delegate) exercises a discretion. In considering whether to exercise that discretion, the Minister may consider the personal circumstances of the visa holder. In the absence of any decision, the default position is that a visa holder will retain their visa.
67. Under proposed s501(3A), this position will be reversed. If the criteria laid down in that provision are met, a visa must be cancelled. While the personal circumstances of the visa holder can be taken into account in considering whether it is appropriate to revoke the cancellation, cancellation will be the default position. There will be an effective onus on a former visa holder to satisfy the decision-maker that it is appropriate to revoke the cancellation decision. It is likely that this will increase the number of visa cancellations made on character grounds.

## **8 Visa Cancellation under s 109 and s 116 of the Migration Act**

68. The Bill would also extend the Minister's powers to cancel visas for 'non-compliance', including giving incorrect information, in relation to a visa application, and on account of changed circumstances.
69. Under s 109 of the Migration Act as it stands, the Minister may cancel a visa if the visa holder is 'non-compliant'. A person will be non-compliant if they, *inter alia*, supply incorrect information or provide 'bogus documents' in the course of making an application for a visa. The Minister may cancel a visa under s 109 whether the 'non-compliance' was deliberate or inadvertent.
70. Under s 116 of the Migration Act, the Minister may cancel a visa in a number of circumstances, including:
  - a. any circumstances which permitted the grant of the visa no longer exist,
  - b. a visa condition has not been complied with.
71. The Bill would insert new subs 116(1AA) and (1AB) into the Migration Act. Subs 116(1AA) would allow the Minister to cancel a visa if the Minister were not satisfied of a visa-holder's identity. Subs 116(1AB) would allow the Minister to cancel a visa if the visa holder gave any incorrect information to an official, and

that information was ‘taken into account in, or in connection with’ making a decision enabling a person to apply for a visa or a decision to grant the person a visa.

72. The Commission is concerned at extremely broad scope of proposed subs 116(1AB). For instance:
- a. it would allow a visa to be cancelled, on the basis that incorrect information had been given with respect to a *previous* visa application. The incorrect information given might be irrelevant to whether the person is entitled to the visa they currently hold.
  - b. it would not on its face require that the provision of incorrect information be deliberate
  - c. the incorrect information need not have been determinative in the assessment of the previous visa application. All that would be required is that the information had been ‘taken into account in connection with’ a decision to grant a visa.
73. Section 116 of the Migration Act does not currently empower the Minister to cancel a permanent visa if the holder of that visa is in the migration zone and was immigration cleared on last entering Australia.<sup>41</sup> That proviso will not apply to visas cancelled under subs 116(1AA) and 116(1AB). These provisions will therefore allow the Minister to cancel the visa of a permanent visa holder who is in Australia, exposing them to immigration detention and deportation.
74. The scope of proposed subs 116(1AB) indicates that it is not targeted at the cancellation of visas granted to persons who were not entitled to them. Nor can it be characterised as being designed to protect members of the Australian community from any risk posed by individual visa-holders. In fact, the stated purpose of the provision is ‘to provide that incorrect information must not be given to the Department at any time’.<sup>42</sup> The Explanatory Memorandum states that ‘this reflects the reasonable expectation that non-citizens provide correct information during all of their transactions with the department, and are honest and truthful at all times.’<sup>43</sup> In other words, it appears that the provision is designed to punish those who supply incorrect information in their dealings with the Department – even where they do not intend to do so. Given the serious consequence of cancellation on the human rights of visa holders, the Commission considers that s 116(1AB) cannot be characterised as being necessary and proportionate to achieving a legitimate purpose.
75. The Bill would also amend subs 116(1)(e) of the Migration Act. Currently, that subsection allows the Minister to cancel a visa if he or she is satisfied that the presence of the visa holder in Australia ‘is, or would be, a risk to the health, safety or good order of the Australian community’. The Bill would amend the subsection to allow the Minister to cancel a visa if he or she is satisfied that the presence of the visa holder:

is or may be, or would or might be, a risk to:

- (i) the health, safety or good order of the Australian community or a segment of the Australian community; or
- (ii) the health or safety of an individual or individuals.<sup>44</sup>

76. This represents a significant lowering of the threshold required to enliven the cancellation power. The explanatory memorandum makes clear that the purpose of the provision is to allow cancellation where the Minister is satisfied there is a 'possibility that [a] person... might be a risk... as well as where there is demonstrated to be an actual risk'.<sup>45</sup> The concept of 'risk' is itself conjectural; a 'possibility of a risk' amounts to a possibility of a possibility. That is a threshold so low arguably any person could meet it.

## **9 New Ministerial refusal and cancellation powers**

77. The Bill would also introduce a number of new Ministerial powers to cancel visas:

- a. Proposed s 501BA would give the Minister power to set aside a decision made by a delegate or by the Administrative Appeals Tribunal to revoke a decision to cancel a visa under s 501(3A). The Minister would be able to substitute a decision to cancel a visa if he or she is satisfied that:
  - i. the person does not satisfy the character test for one of the reasons stipulated in s 501(3A), and
  - ii. it would be in the national interest to cancel the visa.
- b. Proposed s 133A would give the Minister power to set aside a decision made by a delegate, the Refugee Review Tribunal, the Migration Review Tribunal, or the Administrative Appeals Tribunal, not to cancel a visa under s 109 of the Migration Act, and to substitute it with a decision to cancel the visa.
- c. Proposed s 133C would give the Minister power to set aside a decision made by a delegate, the Refugee Review Tribunal, the Migration Review Tribunal, or the Administrative Appeals Tribunal, not to cancel a visa under s 116 of the Migration Act, and to substitute it with a decision to cancel the visa.

78. These powers would only be able to be exercised personally by the Minister. He would not be obliged to afford natural justice when considering their exercise. They would not be subject to merits review.

79. The Commission has previously expressed its concerns about the extent of the Minister's personal discretionary powers under the Migration Act, both with respect to visa cancellation and otherwise.<sup>46</sup>

80. Perhaps the most concerning aspect of these new powers is that under s 133A(3) and s 133C(3), the Minister would be able to overturn decisions of appellate tribunals including the AAT. That would be so even when the AAT has

declined to cancel a visa because it was satisfied that the grounds which would enliven the cancellation power did not exist. This would give the Minister power, without holding a hearing, to overturn a finding of fact made after a full hearing by an independent appellate tribunal.

81. The Explanatory Memorandum states that it is appropriate to give these powers to the Minister, because:

Ultimately, the community holds the Minister responsible for decisions within his portfolio, even where those decisions have resulted from merits review. Therefore, it is appropriate that the Minister have the power to be the final decision-maker in the public interest.<sup>47</sup>

82. It is not clear why this principle, even if it were accepted, makes the Minister better qualified to make findings of fact than an independent tribunal. Placing powers such as these in the hands of an elected representative risks decisions with serious human rights implications being made for politicised purposes, rather than being made on the merits of the individual case.

83. The Commission has on a number of previous occasions made recommendations that the Minister's personal, non-reviewable powers under the Migration Act should be reduced, and measures put in place to provide for transparent, accountable decisions which are subject to review.<sup>48</sup>

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<sup>1</sup> Schedule 1, Items 1-16.

<sup>2</sup> Schedule 1, Item 8.

<sup>3</sup> Schedule 1, Item 17.

<sup>4</sup> Schedule 2, Item 12.

<sup>5</sup> Schedule 2, Item 12.

<sup>6</sup> Australian Human Rights Commission, *Background Paper: Human Rights Issues Raised by Visa Refusal or Cancellation under Section 501 of the Migration Act* (June 2013), available at: <https://www.humanrights.gov.au/publications/background-paper-human-rights-issues-raised-visa-refusal-or-cancellation-under-section> (viewed 23 October 2014).

<sup>7</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). At <http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html> (viewed 23 October 2014).

<sup>8</sup> Human Rights Committee, *General Comment No 8: Right to liberty and security of persons (Art. 9)* UN Doc A/37/40, Annex V (1982), para 1. At

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/f4253f9572cd4700c12563ed00483bec?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument) (viewed 23 October 2014). See also Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997), at

<http://www.unhcr.org/refworld/docid/3ae6b71a0.html> (viewed 23 October 2014); Human Rights Committee, *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002), at

<http://www.unhcr.org/refworld/docid/3f588ef00.html> (viewed 23 October 2014); Human Rights Committee, *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003). At <http://www.unhcr.org/refworld/docid/404887ee3.html> (viewed 23 October 2014).

<sup>9</sup> Human Rights Committee, *Van Alphen v Netherlands*, Communication No. 305/1988, UN Doc A/45/40 Vol. II (1990), Annex IX sect. M (1990), para 5.8. At

[http://www.bayefsky.com/docs.php/area/jurisprudence/node/4/filename/117\\_netherlands305vws](http://www.bayefsky.com/docs.php/area/jurisprudence/node/4/filename/117_netherlands305vws) (viewed 23 October 2014).

<sup>10</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, 92 [152]. See also Human Rights Committee, *A v Australia*, note 63, para 9.2; M Nowak, *UN Covenant on Civil and Political Rights - CCPR Commentary* (1993) p 172.

<sup>11</sup> Human Rights Committee, *C v Australia*, note 63, para 8.2.

<sup>12</sup> ICCPR, art 17(1).

<sup>13</sup> See Human Rights Committee, *Nystrom et. al v Australia*, Communication No. 1557/2007, UN Doc CCPR/C/102/D/1557/2007 (2011), paras 7.7 to 7.11. At [http://www.bayefsky.com/docs.php/area/jurisprudence/node/4/filename/australia\\_t5\\_ccpr\\_1557\\_2007](http://www.bayefsky.com/docs.php/area/jurisprudence/node/4/filename/australia_t5_ccpr_1557_2007) (viewed 23 October 2014). For a relevant international example, see also the judgment of the Grand Chamber of the European Court of Human Rights in *Maslov v Austria* [2008] ECHR 1638/03 (23 June 2008). There, the Court held that the deportation of a youth who had spent the majority of his childhood in Austria constituted a violation of his right to respect for his private and family life.

<sup>14</sup> Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). At <http://www.austlii.edu.au/au/other/dfat/treaties/1991/4.html> (viewed 23 October 2014).

<sup>15</sup> See Commission Background Paper, note 7, pp. 11-12.

<sup>16</sup> Opened for signature 28 July 1951, 189 UNTS 137, (entered into force 22 April 1954), as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (Refugee Convention). At <http://www.austlii.edu.au/au/other/dfat/treaties/1954/5.html> (viewed 23 October 2014).

<sup>17</sup> Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (CAT). At <http://www.austlii.edu.au/au/other/dfat/treaties/ATS/1989/21.html> (viewed 23 October 2014).

<sup>18</sup> See Commission Background Paper, note 7, pp. 14-15.

<sup>19</sup> Statement of Compatibility with Human Rights, p. 27.

<sup>20</sup> See Commission Background Paper, note 7, pp. 13-15.

<sup>21</sup> The circumstances in which States may derogate from the rights described in the ICCPR are outlined in the Siracusa Principles (United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985).), Available at <http://www1.umn.edu/humanrts/instreet/siracusaprinciples.html> (accessed 27 October 2014).

<sup>22</sup> Second Reading Speech for the Migration Amendment (Character and General Visa Cancellation) Bill 2014, Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 2014 (proof), p. 4 (the Hon Scott Morrison MP, Minister for Immigration and Border Protection).

<sup>23</sup> Explanatory Memorandum, p. 1.

<sup>24</sup> Statement of Compatibility, p. 1.

<sup>25</sup> Statement of Compatibility, p. 2.

<sup>26</sup> Statement of Compatibility, p. 4.

<sup>27</sup> Statement of Compatibility, p. 4.

<sup>28</sup> Statement of Compatibility p. 3.

<sup>29</sup> *Migration Act 1958* (Cth), s 501(6).

<sup>30</sup> *Migration Act* s 501(6)(d).

<sup>31</sup> Schedule 1, Item 11.

<sup>32</sup> Explanatory Memorandum, p. 10 [46].

<sup>33</sup> Schedule 1, Item 10, proposed s 501(6)(ba).

<sup>34</sup> Schedule 1, Item 12, proposed s 501(6)(f).

<sup>35</sup> Including a death sentence or a sentence of imprisonment for life.

<sup>36</sup> Schedule 1, Item 8.

<sup>37</sup> Item 18, proposed s 501CA(4).

<sup>38</sup> Item 4, proposed s 500(1)(ba).

<sup>39</sup> Second Reading Speech. See also Explanatory Memorandum, p. 8 [34].

<sup>40</sup> Item 18, proposed s 501CA(6).

<sup>41</sup> *Migration Act*, s 117(2).

<sup>42</sup> Explanatory Memorandum, p. 25 [19].

<sup>43</sup> Explanatory Memorandum, p. 25 [19].

<sup>44</sup> Schedule 2, Item 4.

<sup>45</sup> Explanatory Memorandum, p. 24 [13].

<sup>46</sup> See eg Commission Background Paper, note 7, p. 20.

<sup>47</sup> Explanatory Memorandum, p. 27 [42].

<sup>48</sup> Commission Background Paper, note 7, p. 20; Human Rights and Equal Opportunity Commission, *Submission to the Joint Standing Committee on Migration Inquiry into Immigration Detention in Australia* (2008), paras 104-107. Available at [http://humanrights.gov.au/legal/submissions/2008/20080829\\_immigration\\_detention.html](http://humanrights.gov.au/legal/submissions/2008/20080829_immigration_detention.html) (viewed 23 October 2014).