



Australian Government
**Department of Immigration
and Border Protection**

Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration and Maritime Powers Amendment (No. 1) Bill 2015

October 2015

Table of Contents

1. Introduction	3
Measures in the Bill	3
2. Reasons for Referral / Principle Issues for Concern	3
Meaning of 'character concern' and 'substantial criminal record' – amendments to section 5C of the Migration Act.....	4
3. Other Measures in the Bill	5
Measures in Schedule 1 to the Bill.....	5
Other key measures in Schedule 2 to the Bill	5
Measures in Schedule 3 to the Bill.....	7
Measures in Schedule 4 to the Bill.....	8

1. Introduction

The Department of Immigration and Border Protection welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the *Migration and Maritime Powers Amendment (No.1) Bill 2015* (the Bill), following the introduction of the Bill into the House of Representatives on the 16 September 2015.

This submission provides a response to the reasons for referral / principle issues for concern raised by the Selection of Bills Committee and will also briefly explain the measures included in the other Schedules to the Bill.

Measures in the Bill

The measures in the Bill are intended to:

- ensure that when the department attempts to remove someone from Australia, up until the point the person successfully enters the destination country, the person can be returned to Australia without a visa, and if they are so returned, then certain application bars (which would otherwise no longer apply because the person left Australia) will continue to apply;
- ensure that when the Migration Act provides for a visa to cease, that visa will cease whether or not it is in effect at that time (with one exception);
- make a number of character related amendments to improve coherency and consistency in the Migration Act, in line with amendments made by the *Migration Amendment (Character and General Visa Cancellation) Act 2014*;
- ensure that fast track applicants who are refused protection visas on certain character or security grounds, can apply for merits review in the Administrative Appeals Tribunal;
- clarify that when a protection visa application is made on a person's behalf, and that person is then refused the visa, the person cannot apply for a further protection visa regardless of whether the application is made on the same or different grounds to the original application. This will ensure that the protection visa application bar in section 48A applies consistently across all protection visa applications; and
- confirm that powers under the *Maritime Powers Act 2013 (Cth)* (the Maritime Powers Act) are able to be exercised in the course of passage through or above the waters of another country in a manner consistent with the United Nations Convention on the Law of the Sea.

Further detail on each of these measures is included in Part 3 of this submission.

2. Reasons for Referral / Principle Issues for Concern

The Bill was referred to the Legal and Constitutional Affairs Legislation Committee by the Selection of Bills Committee. The reasons for the referral / principal issues for consideration by the Committee were identified in the Selection of Bills Committee Report No.12 of 2015 as:

- concern the amendment to extend the definition of who can be determined to be of 'character concern' to a person the Minister reasonably suspects is a member of an organisation which has been involved in criminal conduct, whether or not the person has been convicted of an offence (this refers to item 1 of Schedule 2 to amend paragraph 5C(1)(b) of the Migration Act; and
- the amendment to extend the definition of 'substantial criminal record' to someone who has been found unfit to plead and detained in an institution where found guilty on evidence (this refers to item 4 of Schedule 2 to amend subsection 5C(2) the Migration Act).

For the reasons outlined below, the Department feels that these issues are not substantially different to ones previously considered by the committee in relation to amendments in the Character Act. Those amendments were considered and recommended by the Committee.

Meaning of 'character concern' and 'substantial criminal record' – amendments to section 5C of the Migration Act

The legislative amendments to subsections 5C(1) and (2) proposed in Schedule 2 to the Bill align the definition of 'character concern' with the 'character test' in subsection 501(6) and 'substantial criminal record' in subsection 501(7) of the Migration Act. Subsection 501(6) and 501(7) were amended by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Character Act) on 11 December 2014 (further information below in '2. Key measures in Schedule 2 to the Bill').

The Character Act made amendments to broaden the 'character test' and the associated definition of a 'substantial criminal record' by adding additional grounds on which a person will fail the character test, including where a person has been found by a court to not be fit to plead in relation to an offence, but found on the evidence that the person committed the offence and as a result the person was detained in a facility or institution. The amendments also lowered the threshold of evidence required to show that a person who is a member of a group or organisation involved in criminal conduct or is a person involved in war crimes, people smuggling or people trafficking, does not pass the character test.

The intention of these amendments was to ensure that the character test is reflective of modern jurisprudence in matters of mental health and to lower the threshold of evidence so that membership of a criminal group or organisation alone is sufficient to cause a person to not pass the character test. In their report dated 24 November 2014, the Legal and Constitutional Affairs Committee considered criticism in submissions to the inquiry of the changes to the character test by the Character Act, and assessed them to be unfounded. The Committee's report concluded that the discretionary decision-making framework of the character cancellation powers is subject to a review process that provides sufficient checks and balances to ensure a fair outcome in character decision-making¹.

The definition of 'substantial criminal record' for when a person is of 'character concern' in subsection 5C(2) was amended as part of the 2014 Character Act changes to reflect the changes that were made to the 'aggregate sentence' limb of the character test in subsection 501(7). These further amendments will ensure that the definition of 'character concern' captures as broad a range of behaviours as the new grounds inserted by the Character Act in section 501.

Where a non-citizen is of character concern, subparagraph 336E(2)(a)(iii) of the Migration Act relevantly permits the disclosure of identifying information where the disclosure would be for the purpose of data-matching to identify non-citizens who have a criminal history or who are of character concern. Paragraph 336E(2)(ec) of the Migration Act permits disclosure of identifying information for the purpose of identifying non-citizens who have a criminal history or who are of character concern.

As such, in response to the issues raised concerning the extension of 'character concern' and 'substantial criminal record', the effect of the amendment is that there is likely to be a small number of non-citizens who meet the amended, broader definition of character concern and

¹ The Senate Legal and Constitutional Affairs Legislation Committee Report on the *Migration Amendment (Character and General Visa Cancellation) Bill 2014*, page 27 (paragraph 3.4 – 3.6).

substantial criminal record and who may therefore have a personal identifier disclosed in accordance with the permitted disclosure provisions of the Migration Act. However, the extension of those definitions is no broader than the current definition of the 'character test' in subsection 501(6) and 'substantial criminal record' in subsection 501(7) of the Migration Act as amended by the Character Act. As provided above, those amendments were previously considered and recommended by the Committee, as part of the Character Act, to be passed by the Senate.

3. Other Measures in the Bill

Measures in Schedule 1 to the Bill

Schedule 1 to the Bill amends the Migration Act to provide that an unlawful non-citizen whose removal under section 198 of the Migration Act is aborted (ie. whose removal cannot be completed, or whose removal is completed but the person does not enter the country to which they are removed), can lawfully return to Australia without a visa.

The amendments also ensure that a person will be taken to have remained in the migration zone for the purposes of section 48 and 48A of the Migration Act, which means that any bar on making a valid application under those sections will continue to apply.

Other key measures in Schedule 2 to the Bill

Background

The schedules to the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Character Act) commenced on 11 December 2014, and made a range of amendments to the Migration Act to significantly strengthen the character and general visa cancellation provisions to ensure that non-citizens who commit crimes in Australia, pose a risk to the Australian community or represent an integrity concern are appropriately considered for visa refusal or cancellation. The Character Act also introduced mandatory cancellation of visas held by non-citizens in prison who do not pass certain limbs of the character test, a revocation power specifically for mandatory cancellation decisions, and a new power for the Minister to personally set aside, in the national interest, a decision made by his delegate or the AAT to revoke a mandatory cancellation decision.

Following commencement of the Character Act, the department identified a number of consequential amendments required to give full effect to the substantive amendments made to the Migration Act. The measures proposed in the Bill will strengthen and clarify the legal framework in the Migration Act to ensure that it will be interpreted consistently with original policy intention, and also ensure 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. In addition to the amendments to subsections 5C(1) and (2) of the Migration Act discussed above, the following are other key measures amended by Schedule 2 to the Bill.

These amendments do not propose to alter the framework within which the various powers are used or any of the safeguards governing the collection, use and disclosure of personal information. Nor does this Bill alter the current requirements for the security of personal identifiers.

Amendments to add references to section 501BA into the Migration Act.

Section 501BA was inserted into the Migration Act by the Character Act. Under section 501BA the Minister can personally set aside a decision of a delegate of the Minister or the Administrative Appeals Tribunal (AAT) under section 501CA to revoke the cancellation of a visa under subsection 501(3A). This power is non-delegable and can only be exercised when the Minister is satisfied that the cancellation of the visa is in the national interest and the person does not pass certain limbs of the character test.

The proposed amendments will insert a reference to section 501BA into paragraphs 118(f), 191(2)(d), subsections 192(1) and 192(4) and subparagraph 193(1)(a)(iv) of the Migration Act, to ensure that all visa cancellation and detention provisions that currently apply to cancellation decisions under section 501 and 501A also apply to cancellation decisions under section 501BA.

Amendments to section 198 of the Migration Act

The Bill proposes amendments to section 198 of the Migration Act to add a reference to section 501CA in subsection 198(2A), and also to insert a removal power, subsection 198(2B), for non-citizens who have had their visa cancelled under section 501(3A) and the cancellation has not been revoked.

The effect of the amendments is to put beyond doubt that a non-citizen whose visa has been cancelled either personally by the Minister or by a delegate of the Minister under subsection 501(3A), will be available for removal from Australia.

Amendments to judicial review provisions in sections 476 and 476A of the Migration Act

The Bill proposes to include a reference to a decision made by the Minister personally under section 501BA or 501CA in sections 476 and 476A of the Migration Act, to ensure that a decision made by the Minister personally under section 501BA or 501CA is reviewable by the Federal Court rather than the Federal Circuit Court. The Federal Court, rather than the Federal Circuit Court, already has the power to review character-related decisions made by the Minister personally under 501, 501A, 501B and 501C, including 501(3A), which is the decision that may also lead to a decision of the Minister personally under 501CA and 501BA. This is because it is appropriate that judicial review of a personal decision by the Minister is undertaken by an appropriate court.

Insertion of references to subsection 501CA(4) into AAT provisions under section 500 of the Migration Act

The Bill proposes amendments to insert references to subsection 501CA(4) of the Act in several subsections of section 500 of the Act. These amendments will ensure that a person who wishes to seek review of a decision of a delegate of the Minister under section 501CA of the Act, not to revoke the cancellation of their visa under subsection 501(3A), is in the same position as a person who wishes to seek review of a decision of a delegate of the Minister under section 501, in that both will be subject to the same procedural rules in section 500 that govern merits review of decisions by the AAT.

Amendments to section 503 of the Migration Act

The purpose of section 503 of the Migration Act is to prevent non-citizens who have had a visa refused or cancelled on character grounds from remaining in, or re-entering, Australia for a period of time determined by the Migration Regulations, and to discourage non-citizens from breaching

Australia's criminal laws. The Bill seeks to ensure people who have had their visas cancelled by the Minister personally under section 501BA of the Migration Act should be in the same position as other people who have had their visa application refused or cancelled under section 501, 501A or 501B.

Amendments to sections 503A and 503B of the Migration Act

The Bill proposes to add references to sections 501BA and 501CA into sections 503A and 503B of the Migration Act. These amendments will ensure the protection of confidential information provided by a gazetted agency that is relevant to the exercise of power under sections 501BA and 501CA, and allow the Federal Court and the Federal Circuit Court to make orders protecting this information from the applicant, the legal representative of the applicant, or any other member of the public in legal proceedings. This will ensure that confidential information used in section 501BA and 501CA decision-making receives the same level of protection as confidential information that is relevant to the exercise of a power under section 501, 501A, 501B or 501C.

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.

Amendments to sections 501E and 501F of the Migration Act

The Bill proposes to insert a reference to section 501BA of the Migration Act in paragraph 501E(1)(a) and subsection 501F(1) of the Migration Act. The effect of the amendments is that a person whose visa has been cancelled personally by the Minister under section 501BA is prevented from making a further visa application while they are in the migration zone, and any visa application they have made is taken to be refused (unless it is an application for a protection visa or a visa specified in the Migration Regulations). Further, any other visa that the person holds is taken to be cancelled, provided it is neither a protection visa nor a visa specified in the Migration Regulations.

These provisions already apply to people in respect of whom decisions have been made under sections 501, 501A and 501B of the Migration Act. Extending the provisions in sections 501E and 501F to people who have had their visas cancelled personally by the Minister under section 501BA of the Migration Act protects the community from harm by non-citizens who have already been assessed as posing a risk.

Measures in Schedule 3 to the Bill

Schedule 3 to the Bill provides for a number of minor amendments to the Migration Act:

Part 1 of Schedule 3 makes a small amendment to subsection 48A(1C) of the Migration Act. The amendment clarifies that a person who has previously been refused a protection visa application that was made on their behalf (e.g. because they were a minor at the time), cannot make a further protection visa application, irrespective of the ground on which the further protection visa application would be made or the criteria which the person would claim to satisfy, and irrespective of the grounds on which the previous protection visa application was made. This was always the policy intention; the amendment is necessary to address an oversight as contingent arrangements were not made between the *Migration Legislation Amendment Act (No.1) 2014* (the MLA Act) which inserted subsection 48A(1AA) and the *Migration Amendment Act 2014* (the MA Act), which inserted subsection 48A(1C).

Items 3 and 9-11 of Part 2 of Schedule 3 amend the Migration Act to clarify and ensure that a **fast track applicant** who is refused a protection visa on certain character or security grounds is able to make an application for review of the decision to the Administrative Appeals Tribunal.

Item 4 of Part 2 of Schedule 3 makes a small technical amendment to correct a referencing error in relation to maritime crew visas.

Items 5 – 8 of Part 2 of Schedule 3 provide that the events described in sections 82, 173 and 174 of the Migration Act which will cause a visa to cease to be in effect (ceasing events), will also cause a visa that is held but not in effect to be taken to have ceased to be in effect (subject to one exception). This amendment will ensure that a ceasing event (in sections 82, 173 and 174) will generally cause a visa to cease, in the sense of ceasing to exist, regardless of whether the visa was in effect at the time of the event.

Measures in Schedule 4 to the Bill

Schedule 4 to the Bill amends section 40 of the Maritime Powers Act to confirm that powers under that Act are able to be exercised in the course of passage through or above the waters of another country in a manner consistent with the Convention.

Section 40 of the Maritime Powers Act allows for the exercise of powers in another country, including through or above waters that form part of that country, in defined circumstances. This section requires clarification to confirm the ability to exercise powers under the Maritime Powers Act in circumstances where vessels or aircraft are permitted or entitled under the Convention to exercise various rights through or above those waters.

The amendments clarify the exercise of those powers in those circumstances.