



Australian Government

**Department of Immigration
and Border Protection**

Inquiry into the Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016

**Senate Legal and Constitutional Affairs Legislation
Committee**

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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 Amendment (Character Cancellation Consequential Provisions) Bill 2016* (the Bill), following the introduction of the Bill into the House of Representatives on 10 February 2016.

The measures in the Bill are intended to make a number of character related amendments to improve consistency in the *Migration Act 1958* (Migration Act), in line with amendments made by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Character Act).

This submission provides a response to the reasons for referral / principal issues for concern raised by the Selection of Bills Committee and will also provide further information about the measures included in the Bill.

Portfolio Submission

Reason for Referral / Principal issue for consideration

The reasons for referral / principal issues for consideration by the Committee identified in the Selection of Bills Committee Report No.2 of 2016 are:

- To further investigate potential impacts and unintended consequences of the Bill; and
- 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, including the automatic cancellation of visas on certain grounds and additional Ministerial power to set aside decisions by the Administrative Appeals Tribunal (AAT).

Objective of the Bill

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.

Background

The 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 or her 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 by the Character Act to the Migration Act. 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 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.

This Bill does not seek to introduce new cancellation powers, or expand the grounds upon which a visa may be cancelled. Nor does the Bill introduce any additional Ministerial powers to set aside decisions by the Administrative Appeals Tribunal. The key measures in the Bill are described in more detail below.

Meaning of 'character concern' – amendments to section 5C of the Migration Act

The legislative amendments to subsections 5C(1) and (2) proposed in 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. Subsections 501(6) and 501(7) were amended when the Character Act commenced on 11 December 2014.

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 be satisfied that a person who is a member of a group or organisation involved in criminal conduct does not pass the character test, and inserted an additional ground on which a person does not pass the character test where the Minister reasonably suspects that the person is involved in war crimes, people smuggling or people trafficking, whether or not the person was convicted of an offence for such conduct.

The intention of those 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 the Minister's reasonable suspicion of a person's involvement in the above-mentioned conduct 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 Legislation Committee considered criticism of the changes to the character test by the Character Act put forward in submissions to the inquiry, 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 'character concern' in subsection 5C(2) was amended by the Character Act to reflect the changes that were made to the 'aggregate sentence' limb of the character test in subsection 501(7). The further amendments being proposed by this Bill will ensure that the

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).
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definition of 'character concern' captures the full range of behaviours in the new grounds in subsections 501(6) and (7) inserted by the Character Act.

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, the effect of the amendment is that there may be a small number of non-citizens who meet the amended, broader definition of character concern 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. 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.

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 AAT under section 501CA to revoke the mandatory 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) and 191(2)(d), subsections 192(1), 192(4) and 196(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. This will ensure that the consequences attached to all personal decisions of the Minister on character grounds are consistent.

Amendments to section 198 of the Migration Act

Section 198 of the Migration Act contains provisions which set out when and in what circumstances an unlawful non-citizen must be removed from Australia. The Bill proposes amendments to section 198 of the Migration Act to add a reference to section 501CA into the existing removal provision at subsection 198(2A). The Bill also proposes to insert a removal power specific to non-citizens who have had their visa cancelled under section 501(3A) and have not sought revocation of that cancellation, or who sought revocation and the cancellation was not revoked, at new subsection 198(2B).

While the existing removal powers provide for the ability to remove non-citizens in this cohort, the government is of the view that it is preferable to have a specific removal power 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 once it is clear that the person's visa cancellation will not be revoked.

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

The Bill proposes to amend 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 already has the power to review character-related decisions made by the Minister personally under 501, 501A, 501B and 501C. The Federal Court has experience with dealing with matters relating to character and section 501 and this amendment will address the anomaly of certain personal decisions being reviewed by a different court. In this regard, the government considers that it is important that there is consistency in judicial review of Ministerial decisions.

Insertion of references to subsection 501CA(4) into AAT review provisions in 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 Migration Act. These amendments will ensure that a person who wishes to seek review of a decision of a delegate of the Minister under subsection 501CA(4) of the Migration 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

Among other things, section 503 of the Migration Act prevents 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 1994* (Migration Regulations). The Bill proposes to include Minister's decisions under section 501BA as decisions to which section 503 of the Act applies. This amendment will ensure that people who have had their visas cancelled by the Minister personally under section 501BA of the Migration Act will 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

Broadly speaking, section 503A of the Migration Act protects the disclosure of confidential information communicated to an authorised migration officer by a gazetted agency that is relevant to the exercise of a power under section 501, 501A, 501B or 501C. Gazetted agencies include the Australian Federal Police, State and Territory police forces and the Australian Crime Commission. Section 503B broadly provides that if confidential information is given to the Department by a gazetted agency that is relevant to the exercise of a power under section 501, 501A, 501B or 501C, and the information is relevant to proceedings before the Federal Court or Federal Circuit Court, either of those courts can make orders to protect the disclosure of that information.

The Bill proposes to amend sections 503A and 503B of the Migration Act by including references to sections 501BA and 501CA. 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 into 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.