



4 March 2016

Committee Secretary  
Senate Legal and Constitutional Affairs Committee

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Dear Committee Secretary

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

The Refugee Advice & Casework Service (**RACS**) is a specialist refugee community legal centre and has been assisting people seeking safety in Australia on a not-for-profit basis since 1988.

RACS welcomes the opportunity to comment on provisions of the *Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016* (Cth) (the **Bill**). Our submission focuses on those provisions that affect our clients.

We note that the bill contains the same amendments that were set out in Schedule 2 of the *Migration and Maritime Powers Amendment Bill (No. 1) 2015* (Cth). We would like to use this opportunity to expand on the concerns we raised in our submission<sup>1</sup> to this Committee in relation to that Bill.

### **1. Summary**

The Bill proposes to further modify provisions of Australian law that were subject to significant amendments in 2014 that had adverse consequences for asylum seekers and other non-citizens in Australia.

While many of the amendments proposed in the Bill are for the purpose of improving coherency and consistency or resolving legislative oversights, they also compound the unfairness caused by some of the changes made in 2014.

Provisions of the *Migration Act 1958* (Cth) (the **Act**) that relate to cancellation of visas were significantly overhauled by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) (the **Character Act**). In relation to the amendments contained

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<sup>1</sup> Refugee Advice and Casework Service, Submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into the Migration and Maritime Powers Amendment Bill (No. 1) 2015 [Provisions] 8 October 2015.

in the Character Act legislation RACS and other submitters to the Committee variously cited concerns about:<sup>2</sup>

- the lowering of the thresholds for visa cancellation or refusal on character grounds;
- the introduction of mandatory visa cancellation provisions which do not allow for due consideration of individual circumstances;
- the expansion of the Minister's personal discretionary powers to overturn decisions of the Administrative Appeals Tribunal or Departmental officers;
- bars on access to merits review; and
- the risk of prolonged and indefinite detention of refugees.

We submit that a number of the provisions in the current Bill will adversely impact large numbers of people and do not contain adequate procedural fairness safeguards. On that basis we oppose the passage of the Bill.

## 2. Impact of the proposed Bill

There was a dramatic rise in the number of people in immigration detention as a result of visa cancellations in the period following the passage of the Character Act. The most recent statistics released by the Department show that over half of the detention population were detained due to visa cancellations.<sup>3</sup> While these statistics do not reveal the provisions under which the visas were cancelled, they demonstrate that a significant number of people have been detained under the Character Act.

The proposed amendments to the definition of *character concern* in section 5C of the Act are another example of the extension of the changes implemented by the Character Act. In bringing the definition of *character concern* into line with the character test as amended by the Character Act, the Bill significantly expands the scope of the application of *character concern*. The relevant definition currently specifies that a non-citizen is of character concern if, for example:

- (d) in the event that the non-citizen were allowed to enter or to remain in Australia, there is a significant risk that the non-citizen would:
  - (i) engage in criminal conduct in Australia; or
  - (ii) harass, molest, intimidate or stalk another person in Australia; or
  - (iii) vilify a segment of the Australian community; or
  - (iv) incite discord in the Australian community or in a segment of that community; or
  - (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

Schedule 2 would omit the word *significant* in the first part of this definition such that a person would face the impossible task of showing that there is no risk in order to avoid the application of the definition.<sup>4</sup> The definition is also expanded significantly in other ways that we addressed in our submission on the Character Act.<sup>5</sup>

<sup>2</sup> Senate Legal and Constitutional Affairs Committee, Inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014, available at <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Character\\_and\\_Visa\\_Cancellation\\_Bill\\_2014/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Character_and_Visa_Cancellation_Bill_2014/Report)> (accessed 2 October 2015).

<sup>3</sup> Department of Immigration and Border Protection, Australian Government, 'Immigration Detention and Community Statistics Summary', (31 January 2016) 4 <<https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-31-jan-2016.pdf>>.

<sup>4</sup> Schedule 1 Items 1-2.

<sup>5</sup> Senate Legal and Constitutional Affairs Committee, Inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014, Submission 2: Refugee Advice and Casework Service, 28 October 2014, 1-5, available at <http://www.aph.gov.au/DocumentStore.ashx?id=de448c40-85f4-4c6f-b932-a21c2160fe40&subId=301185> (accessed 2 March 2016).

The expansion of the definition of 'character concern' would not only see more people detained following the cancellation of their visas, but would also contribute to the numbers of people found to be refugees who remain in detention due to the refusal of visas on character grounds. This framework is of particular importance to RACS' clients, former clients and other refugees and asylum seekers in Australia because Australian law allows the period of detention resulting from cancellation to continue indefinitely.

Another example of the impact of the expanded definition of 'character concern' is the way this provision could capture the most minor offences committed by people in immigration detention. This could also result in large numbers of refugees facing the prospect of indefinite detention.

The effect of a person satisfying this definition of character concern includes the disclosure of their personal information by the Department for certain permissible purposes under section 336E. The proposed expansion of the definition could therefore make the disclosure of the personal information in accordance with section 336E lawful in relation to almost any non-citizen. While we acknowledge that the proposed definition would be consistent with the form of the character test as amended by the Character Act, this demonstrates the incredible breadth of potential application of these definitions.

The Department's detention statistics illustrate that the average time people spend in detention has significantly increased, standing at 457 days as at 31 January 2016, an increase from 200 days in 2012.<sup>6</sup>

Considering these numbers and average times in detention, the claim that the proposed provisions would be of low impact,<sup>7</sup> as articulated in the Committee's report of November 2015 on the Migration and Maritime Powers Bill, is unsupported. With knowledge of the impact that indefinite detention has on a client's mental and physical health, any expansion of the power to cancel or refuse visas on such grounds cannot be said to be of low impact, nor the now numbers affected, small.

The Statement of Compatibility with Human Rights that accompanies the Explanatory Memorandum to the Bill cites Departmental processes for review and the Minister's non-compellable powers (to allow a visa application or grant a visa) as measures that protect against arbitrary detention. In the context of the trend toward greater Ministerial discretion to cancel or refuse a visa and fewer opportunities for meaningful oversight or review of those decisions, RACS considers it inappropriate to rely on non-compellable discretions or departmental policy to protect against arbitrary detention. As a matter of course effective safeguards should be contained within the legislation itself.

### 3. Procedural fairness

RACS considers that the provisions proposed in the Bill exacerbate some of the existing failures in relation to procedural fairness in the framework for character cancellation and refusal. Examples of this are the amendments in the Bill that would broaden the application of s 501BA, which contains the Minister's new power to overturn (without natural justice requirements) decisions of the Administrative Appeals Tribunal or Departmental officers to revoke a mandatory cancellation decision.<sup>8</sup>

<sup>6</sup> Department of Immigration and Border Protection, Australian Government, 'Immigration Detention and Community Statistics Summary', (31 January 2016) 4 <<https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-31-jan-2016.pdf>>.

<sup>7</sup> The Senate Legal and Constitutional Affairs Legislation Committee Migration and Maritime Powers Amendment Bill (No.1) 2015 [Provisions] [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Maritime\\_Powers\\_Bill/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Maritime_Powers_Bill/Report) (at 2.22).

<sup>8</sup> For example, Items 5-8 of the Bill.

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RACS also opposes the removal of the requirement of an officer to inform a detainee the subject of s 198(1)(a)(v) which contains their right to apply for certain visas within a two day timeframe and of information pertaining to the duration of their detention. The rationale for the removal of this safeguard of procedural fairness is inadequate. In our experience, there are many reasons that a detainee would be unaware of their rights despite an officer informing them of those rights at the initial time of detention.

We note that the Committee's report of November 2015 on the Migration and Maritime Powers Bill stated in principle their view that "people in immigration detention should be appraised of their legal rights."<sup>9</sup>

These reasons include the difficulties faced by many people in detention who have backgrounds of torture and trauma and resulting mental health issues; compounded by the effects of continued detention (or in many cases re-detention) as the result of visa cancellation or refusal.

Further, detainees are faced with numerous barriers in accessing legal advice. This is in part due to the significant overhaul in government funding for immigration legal advice, as well as difficulties faced by clients in knowing which services to access for assistance. The closure of a number of detention centres across Australia has also meant that a majority of people are detained in remote areas, such as Christmas Island, Wickham Point and Yongah Hill. As well as being remote, these centres are also inadequately equipped in relation to telephone and internet access, making communication with legal representatives very difficult. RACS opposes the erosion of procedural fairness contained in item 8 of the Bill.

RACS supports the principle that migration laws should be prospective and transparent, and we consider that it is a fundamental principal of the rule of law that the government in all its actions is bound by rules that are fixed and certain. This position would be offended by the passage of legislation with reference to Items 10, 11, 12, 20 and 21.

RACS endorses the comments made by the Law Council of Australia in their submission relating to the concerning situation where non-citizens have been detained despite the absence of a final conviction by a criminal court. We support the view that this constitutes a departure from the rule of law.

We echo our previous submissions in relation to the Character Bill that while RACS supports a visa cancellation system which protects the Australian community from harm flowing from serious criminal conduct, that system must have adequate procedural safeguards to ensure that decisions are fair and just, and that people are not detained unfairly or arbitrarily.

Please do not hesitate to contact us for further information or clarification.

Sincerely,  
REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC  
Per:

Sarah Dale  
Solicitor | Migration Agent (MARA Reg. No. 1279354)

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<sup>9</sup> The Senate Legal and Constitutional Affairs Legislation Committee Migration and Maritime Powers Amendment Bill (No.1) 2015 [Provisions]  
[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Maritime\\_Powers\\_Bill/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Maritime_Powers_Bill/Report) (at 2.30).