



Refugee Council
of Australia

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

MIGRATION AMENDMENT (CHARACTER CANCELLATION CONSEQUENTIAL PROVISIONS) BILL 2016

The Refugee Council of Australia (RCOA) is the national umbrella body for refugees, asylum seekers and the organisations and individuals who work with them, representing over 200 organisations and around 1,000 individual members. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, asylum seekers and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback on the Migration Amendment Bill (Character Cancellation Consequential Provisions) Bill 2016. We note that 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 last year and has been returned to the House of Representatives with amendments. We also note, however, that there were no hearings before this Committee on the previous Bill.

RCOA made a submission into this earlier Bill and this submission restates our earlier position in relation to Schedule 2 of this Bill. Our principal concerns relating to this Bill are:

- The Bill compounds the grave unfairness of recently introduced provisions relating to powers to refuse or cancel visas on ‘character’ grounds. These changes include: automatic cancellation of visas on certain grounds, new personal powers of the Minister to set aside decisions by the Administrative Appeals Tribunal or Departmental officers, and increasing the circumstances in which a person would fail the ‘character test’.
- The powers have the practical effect of depriving a person of liberty and the right of residence in this country at the virtually unfettered discretion of the Minister, without any real review.
- In 2015, there has been a dramatic rise in the number of visa cancellations and consequent detentions. This includes refugees and asylum seekers who are now facing the prospect of indefinite detention as they cannot be removed. Indeed, this Bill expressly would require a refugee to be held indefinitely even if there is no prospect they can ever be removed, or even if the visa decision is unlawful.

1. Visa cancellations on character grounds

1.1. The *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) (Character Act) introduced new powers to refuse or cancel visas on ‘character’ grounds (that is, on grounds related to a person’s character or criminal record). The Character Act has the effect of automatically cancelling a visa if, among other things, the person was imprisoned for a sentence of 12 months or more, or was convicted of a sexually based offence involving a child (s 501(3A) of the *Migration Act 1958* (Cth)). The Character Act also creates new personal Ministerial powers to reverse decisions made by the Administrative Appeals Tribunal or an officer of the Department (see ss 133A, 133C, 501BA). In addition, the Act significantly decreased the threshold under which a person would fail the ‘character test’ and increased the Minister’s powers to cancel visas on the basis of incorrect information.

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1.2. Significant concerns about this Act were raised before this Committee by the Refugee Council of Australia (see attached) and other submitters, including the Australian Human Rights Commission.¹ These concerns included:

- The considerable risk of prolonged indefinite detention, especially in relation to refugees who cannot be removed to their country of origin due to the risk that they may face persecution or other forms of serious harm in their country of origin, and stateless people who have no country which is obliged to accept them.
- The mandatory nature of the visa cancellation powers, which significantly decreases the capacity of the system to consider the individual circumstances of a case before a person is detained
- The very low thresholds for visa cancellation, which trigger visa cancellations even in the absence of a real risk to the community, and
- The continued trend towards increasing the personal discretionary powers of the Minister, including to reverse carefully made decisions by merits review tribunals.

1.3. These concerns have increased since the introduction of the Character Act. There has been a very significant increase in the number of people being detained as a result of visa cancellations. This has included people on permanent refugee visas as well as on bridging visas, and stateless people, all of whom are now at risk of indefinite detention. As at 31 January 2016, there are 549 people being detained as a result of visa cancellations.² Although it is unclear how many of these were the result of cancellations on 'character' grounds, we understand that this would be a significant proportion.

1.4. RCOA has surveyed its members to gather initial information on his rapid increase in visa cancellations. Significant concerns so far raised include:

- Failure to recognise vulnerabilities – visa cancellations have occurred despite significant histories of psychiatric illness, disabilities, or statelessness.
- Disproportionate punishment – people have had their visas cancelled in circumstances where they were given good behaviour bonds by the court, and for drink driving.
- Unreasonable prolonging of detention – people have been subject to detention since early 2015 and have not yet been allocated an officer to process their case.
- Inadequate processes – people serving time in prisons are given very little notice (generally a day's notice) before they are moved into detention.
- Lack of access to legal advice or representation – while people are given a form to respond to the Minister within 28 days, there is a lack of free legal advice or representation.
- Unduly punitive enforcement – there have been reports of handcuffs being used, and transfers to Christmas Island.
- Increased risks in detention centres – the increased numbers of visa cancellations has led to a change in the composition of detention population.

1.5. We have already seen these visa cancellation provisions result in a death in Yongah Hill, with a refugee whose visa had been cancelled burning himself to death.³ There are also concerns that the mixing of detainees with visa cancellations contributed to the death of another young asylum seeker in August 2015.⁴

1.6. Among other things, the current Bill would:

- require a refugee to be held indefinitely even if there is no prospect they can ever be removed, or even if the visa decision is unlawful (Sch 1, item 9).
- extends a ban on most further visa applications in cases where the Minister has personally cancelled a visa (Sch 1, item 18)

¹ Australian Human Rights Commission, *Submission into the Inquiry on the Migration Amendment (Character and General Visa Cancellation) Bill 2014*, Submission No 8, 28 October 2014.

² Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary*, 31 January 2016, <http://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-31-jan-2016.pdf>

³ 'Burned Yongah Hill Afghan detainee dies in WA hospital', *WA Today*, 17 September 2015, <http://www.watoday.com.au/wa-news/burned-yongah-hill-afghan-detainee-dies-in-wa-hospital-20150916-gjoikx.html#ixzz3nHdT0IXQ>

⁴ 'Young asylum seeker dies at WA's Yongah Hill immigration detention centre', *ABC News*, 1 August 2015, <http://www.abc.net.au/news/2015-08-01/young-asylum-seeker-dies-at-yongah-hill-detention-centre/6665422>.

- automatically cancel or refuse any other visas in cases where the Minister has personally set aside a decision by the Administrative Appeals Tribunal or a Departmental officer (Sch 2, item 19)
- exclude a person for a prescribed time from entering Australia who has a visa refused or cancelled personally by the Minister under ss 501B, 501BA (Sch 1, item 20).

1.7. While the current Bill is framed as merely extending certain provisions that applied to earlier cancellation powers, RCOA is concerned that this does not reflect the lack of procedural fairness and absence of procedural safeguards in the new cancellation powers. We also express concern that some of these provisions apply retrospectively, without adequate justification.

Recommendation

RCOA recommends that this Bill not be passed.