



Migration and Maritime Powers Amendment Bill (No. 1) 2015 [Provisions] (Cth)

Senate Legal and Constitutional Affairs Legislation Committee

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Law Institute of Victoria

National Human Rights Committee

Migration Law Committee

Executive Summary

1. The Migration and Maritime Powers Amendment Bill (No. 1) 2015 [Provisions] (Cth) (**the Bill**) aims to strengthen and clarify the legal framework in the *Migration Act 1958* (Cth) and *Maritime Powers Act 2013* (Cth) as it relates to the Government's ability to cancel the visas of non-citizens and remove them from Australia. Key amendments in the Bill relate to: the removal and return of non-citizens; cancellations of visas on the basis of character concerns; and compliance with and subjective assessment of Australia's obligations under the *United Nations Convention on the Law of the Sea*¹ (**UNCLOS**).
2. The Law Council supports attempts to strengthen and clarify the application of these complex Acts. However, it considers that the Bill's proposed amendments depart from accepted rule of law and procedural fairness standards, and as a result, may adversely affect protection claims made by asylum seekers, in some circumstances risking *refoulement*.
3. The Law Council considers that the rationale put forward for the amendments does not justify departure from the rule of law and procedural fairness standards, or the increase in Ministerial discretion.
4. The Law Council therefore opposes the passage of this Bill. Instead, the Law Council recommends that the provisions of the Migration Act relating to the cancellation of non-citizens' visas and their subsequent removal are amended to accord with rule of law and procedural fairness standards.
5. However, if the Committee is minded to recommend the Bill is passed, the Law Council suggests the following amendments:
 - (a) The proposed amendments in Schedule 1 are not passed;
 - (b) The Privacy Commissioner consider the relevant provisions of the Bill, given that a broad range of personal identifiers will now be able to be legally disclosed in respect of a wider range of non-citizens;
 - (c) The proposed amendments in Schedule 2 are further amended to ensure they comply with the rule of law and procedural fairness, such that:
 - (i) all detainees the subject of subsection 193(1)(a)(v) are provided with information relevant to their detention, including information concerning the length of their detention and access to legal advice and representation; and
 - (ii) all detainees the subject of subsection 198(2A) are provided with a reasonable timeframe within which to seek legal advice on whether they should pursue merits review and/or judicial review of the decision to cancel their visa.
 - (d) The proposed amendments in Schedules 2 and 3 of the Bill that apply retrospectively are amended such that they only apply prospectively;

¹ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

- (e) The proposed amendments and existing provisions of the Migration Act relating to 'character of concern' are amended such that:
- (i) determination of involvement in criminal conduct under proposed subsections 5C(1)(bb) and 5C(1)(bc) and under section 501 of the Migration Act should only flow after a conviction by an independent, impartial and competent court or tribunal;
 - (ii) the term 'serious international concern', set out in proposed subsection 5C(1)(f) and in section 501 of the Migration Act, is defined;
 - (iii) the association provisions in paragraph 501(6)(b) of the Migration Act are repealed and proposed paragraph 5C(1)(bb) of the Bill is removed. In the alternative, the Migration Act should be amended to include explicit criteria that the Minister must be satisfied of, before determining that a group or organisation is involved in criminal conduct and such conduct should be of a sufficient level of seriousness;
 - (iv) non-citizens with adverse security assessments have the same access to merits review of such assessments as Australian citizens under the *Australian Security and Intelligence Organisation Act 1979* (Cth); and
 - (v) the Minister or delegate is required to be satisfied that the conviction in a foreign country for the purposes of sections 501 and 5C of the Migration Act has occurred on the basis of fair trial principles and does not involve matters such as those grounds listed for refusal under the Mutual Assistance Act.
- (f) In Schedule 4:
- (i) the proposed subsection 40(2) is amended to ensure compliance with Australia's obligations under UNCLOS; and
 - (ii) the proposed subsection 40(3) is not passed.

Introduction

6. The Law Council welcomes the opportunity to provide the following comments to the Senate Committee as part of its inquiry into the provisions of the Bill.
7. The Bill was introduced into the House of Representatives on 16 September 2015. It amends the Migration Act and Maritime Powers Act to strengthen the Government's ability to cancel the visas of non-citizens and remove them from Australia.
8. The Law Council has a number of concerns with the Bill and for that reason, recommends against its passage in its current form. The Law Council's concerns relate to: the attempted removal of non-citizens which may amount to effective statelessness; the extension of application of certain visa cancellation provisions to new groups; retrospective amendments to the Migration Act; the Minister assuming the role of the courts in assessing criminal conduct; the disclosure of information in relation to the cancellation and character provisions; the administrative review of mandatory cancellation of visas and fast-track decisions; and compliance with and subjective assessment of Australia's obligations under the Law of the Sea.
9. Rather than the passage of the Bill, the Law Council recommends that the provisions of the Migration Act relating to the cancellation of non-citizen visas and their subsequent removal are amended to accord with the rule of law and procedural fairness standards. The Law Council makes a number of recommendations for possible amendments to the Bill if the Committee is minded to recommend its passage.

Attempted removal and effective statelessness

10. The proposed amendments to the Migration Act in Schedule 1 of the Bill will ensure that when an attempt is made to remove a non-citizen from Australia to a destination country, but the non-citizen does not actually enter the destination country for some reason and is returned to Australia, the non-citizen can be returned to Australia without a visa and will be taken to be continuously in the migration zone.
11. As set out in the Explanatory Memorandum, the amendments are intended to cover circumstances where:
 - (a) a removal is attempted but not completed as it fails to satisfy the requirements under section 198 – new subsection 42(2A)(d); or
 - (b) a removal is completed under section 198, but the non-citizen does not enter the destination country – new subsection 42(2A)(da).²
12. The Explanatory Memorandum offers the following rationale for the amendments:

A need to return to Australia a non-citizen who has been removed, or is in the process of being removed, could arise for a number of reasons. For example - the non-citizen could be refused entry to a transit country, an aircraft could be forced mid-flight to return to Australia, the Government could decide to cancel

² Explanatory Memorandum, Migration and Maritime Powers Amendment Bill (No. 1) 2015 [Provisions] (Cth), [14] ('Explanatory Memorandum'), available at: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5532ems_3bb387b0-5bc3-449e-9b1b-a7d7ab72dfa7%22.

*the removal in response to an Interim Measures Request from the United Nations, or despite being successfully removed from Australia the non-citizen could be refused entry into the destination country.*³

13. The amendments to section 48 at Items 3-5 bar non-citizens in the circumstances outlined above from applying for a particular visa by characterising these non-citizens as continuously in the migration zone, despite their attempted removal.
14. The amendments to section 48A at Items 6-8 provide that the non-citizens in the circumstances outlined above are unable to make further applications for a protection visa because they are characterised as being continuously in the migration zone, such that the refusal or cancellation of their visa continues to have effect despite their attempted removal.
15. The Law Council and one of its Constituent Bodies, the Law Institute of Victoria (**LIV**) are concerned about the effect of these amendments on non-citizens, particularly asylum seekers. Under these changes, asylum seekers who are refused a protection visa and are then subject to an unsuccessful attempted removal will not be able to apply for another protection visa. This is problematic for the following reasons:
 - (a) if the destination country is the asylum seeker's only country of nationality, and it refuses to allow the entry of the asylum seeker, this effectively renders the asylum seeker stateless. There is also the potential that this could lead to arbitrary detention under international law whilst the Australian Government looks for an alternative destination country;⁴ and
 - (b) an aborted removal may trigger new protection claims that would require a new assessment of that person's application. For example, the destination country may share information concerning an asylum seeker's attempted removal with a country where that individual's associates or family members may be targeted and persecuted. This may in itself provide further evidence to substantiate the asylum seeker's claim for protection, potentially changing the outcome if permitted to lodge a new claim.
16. The Law Council also notes that any attempt to remove a person from Australia should be subject to consideration of international *non-refoulement* obligations.⁵

³ Ibid [26].

⁴ The Law Council notes that there is a substantial body of jurisprudence from the United Nations Human Rights Committee that Australia's mandatory immigration detention policy is in breach of the protection against arbitrary deprivation of liberty under Article 9 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 277 (entered into force 23 March 1976) ('the ICCPR') – see for example: *A v Australia* Communication No 560/1993, Views adopted 3 April 1997; *Bakhtiyari v Australia*, Communication No 1069/2002, Views adopted 29 October 2003; *T v Australia*, Case No 706/1996, Views adopted on 4 November 1997; *Shams v Australia* Communications Nos 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004, Views adopted 11 September 2007; *C v Australia*, Communication No 900/1999, Views adopted 28 October 2002. However, the Law Council also notes that the High Court has found that, provided the Minister for Immigration retained the intention of eventually deporting such people, the detention would be valid even if it was potentially indefinite: *Al-Kateb v Godwin* (2004) 219 CLR 562 and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664.

⁵ This is despite the introduction of section 197C by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), which purports to provide that an officer's duty to remove an unlawful non-citizen from Australia is not affected by any *non-refoulement* obligations that Australia might have. Australia's *non-refoulement* obligations arise under the following instruments to which it is party: the *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) and the *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) (collectively, 'the Refugee Convention'); the ICCPR; the *Second Optional Protocol to the International*

Recommendation:

- **The proposed amendments in Schedule 1 are not passed**

Extension of application of certain visa cancellation provisions to new groups

17. The policy intent behind the amendments to Schedule 2 of the Bill is to ensure that the mandatory cancellation powers introduced with the *Migration Amendment (Charter and General Visa Cancellation) Act 2014 (Cth)* (**Character Act**) are reflected comprehensively throughout the Migration Act.⁶
18. The LIV previously expressed its concern with the amendments to the Migration Act by the Character Act.⁷ In particular, its concerns related to amendments that substantially broadened the grounds on which a non-citizen's visa could be refused or cancelled, such as:
- (a) section 501(6)(b) which lowered the threshold of evidence required to demonstrate that a person is a member of a criminal or terrorist organisation;
 - (b) section 501(6)(d) which lowered the threshold from 'significant risk' to 'risk' of a person engaging in criminal conduct or harassment and who represents a danger to the Australian community or 'risks' being involved in activities disruptive to the Australian community; and
 - (c) section 501(6)(g) and (h) which provides that a person will not pass the character test where they have been assessed by the Australian Security and Intelligence Organisation (**ASIO**) as directly or indirectly a risk to security, or where an Interpol Notice has been issued from which it is reasonable to infer that a person would present a risk to the Australian community.
19. The Law Council and LIV are therefore concerned by the expansion of the definition of 'character concern' at Items 1-4 of the Bill to be consistent with the existing character test at section 501.⁸ The Law Council's particular concerns will be discussed below.
20. The Law Council also refers to its submission to this Committee on the *Migration Amendment (Strengthening Biometrics Integrity) Act 2015 (Cth)*. The Law Council raised concerns with the collection of personal identifiers with this Committee before

Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, opened for signature 15 December 1989, GA res 44/128 (entered into force 19 July 1991); the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); and the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 3 (entered into force 2 September 1990).

⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 September 2015, 20 (Peter Dutton) ('Second Reading Speech'), available at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F842ee7d9-89d4-4e4f-bc93-045b018bbeb2%2F0043%22>.

⁷ See: Law Institute of Victoria, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Charter and General Visa Cancellation) Bill 2014, 3 November 2014, available at: <http://www.liv.asn.au/getattachment/0d3282a8-36af-4c5d-96aa-ee2d7b56e5e0/Migration-Amendment-Character-and-General-Visa-Can.aspx>.

⁸ Explanatory Memorandum, [55].

the Act was passed.⁹ In light of the introduction of broad collection powers for personal identifiers brought in under that Act, it is concerning that the amendments in Item 1 of Schedule 2 of the Bill will widen the scope for the collection of personal identifiers even further.

21. In the Law Council's submission on that Bill, it recommended a privacy impact statement be conducted by the Privacy Commissioner with adequate time for consultation. The Law Council and LIV therefore recommend that the Privacy Commissioner also consider the relevant provisions of this Bill, given that a broad range of personal identifiers will now be able to be legally disclosed in respect of a wider range of non-citizens.
22. Item 7 extends the application of subsections 192(1) and (4) of the Migration Act – concerning the detention of visa holders whose visas are liable for cancellation – to a person serving a sentence of imprisonment.¹⁰ The amendments extend the application of this provision to section 501BA which empowers the Minister to cancel a visa following a non-adverse decision by a delegate or the Administrative Appeals Tribunal (AAT).
23. The LIV has noted that, since the Character Act was introduced in late 2014, members of the LIV have reported that a significant number of people have been placed in detention, even before charges have been determined by the courts. This amendment is similar to those previous amendments in the Character Act as it allows delegates to detain non-citizens prior to assessing their ability to meet the character requirements in section 501 of the Migration Act.
24. The Law Council and the LIV are therefore concerned that the practical effect of this amendment will result in a greater rate of detention of non-citizens for extended periods of time. Further, the LIV has raised concern that the use of a low threshold of proof requiring an officer merely to 'reasonably suspect', combined with the very broad discretionary grounds of section 501BA (where the Minister is satisfied in the national interest), may lead to the detention of some non-citizens in circumstances where it is not justified.
25. Item 8 also extends the application of sub-section 193(1)(a)(v) of the Migration Act – concerning the application of law to certain non-citizens while they remain in immigration detention – to a person serving a sentence of imprisonment.¹¹ Subsection 193(1)(a)(v) provides that sections 194 and 195 do not apply to a detainee, such that an officer is *not* required to inform a detainee of:
 - (a) their ability to apply for a visa whilst in detention, subject to certain time constraints;¹² or
 - (b) the provisions relating to the duration of their detention.¹³

⁹ The non-citizen would need to be assessed by ASIO to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth)) – see: Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Strengthening Biometrics Integrity) Bill 2015 (Cth), 10 April 2015, available at: <http://www.lawcouncil.asn.au/lawcouncil/images/2968 - Strengthening Biometrics Integrity Bill 2015.pdf>. The non-citizen would need to be assessed by ASIO to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth)).

¹⁰ Pursuant to sub-s 501(3A).

¹¹ Ibid.

¹² At s 195.

¹³ At s 196.

26. The justification for this denial of procedural fairness is set out in the Explanatory Memorandum:

*...because a person will generally have previously had their visa cancelled by a delegate under subsection 501(3A), and so will have been detained under section 189 and informed of sections 195 and 196 at that point.*¹⁴

27. However, the Law Council and LIV consider that this does not appear to be a sufficient justification for denying a person in this situation a fundamental aspect of their right to procedural fairness. The LIV considers that it is not onerous for the Department of Immigration and Border Protection (**the Department**) to provide the person with notice of timeframes within which they can apply for a further visa and information pertaining to the duration of their detention. Even if the detainee has previously been informed of their rights, there is no adequate explanation provided as to why they could not be informed again after a new decision is made by the Minister, in order to guarantee procedural fairness.

28. Further, some detainees may have difficulty in understanding their legal options and rights for various reasons, such as restricted access to information and/or legal advice and representation while in detention, lack of familiarity with the legal system, or unfamiliarity with the English language. This is further compounded by the strict limits on timeframes for applications in detention and lack of access to legal advice.¹⁵

29. The Law Council's *Asylum Seeker Policy* sets out key rule of law standards and principles applying to the detention of asylum seekers.¹⁶ For example, the Policy provides that decisions to detain or extend detention should be subject to procedural safeguards, including informing asylum seekers of the reasons for, and their rights in relation to, their detention.¹⁷ The Law Council has published *Principles Applying to Detention in a Criminal Law Context*¹⁸ that are also relevant to the amendments proposed by this Bill.

30. Item 10 amends the Migration Act to insert an additional category of persons whose visa has been cancelled into subsection 198(2A). This subsection requires the removal of a non-citizen where the Minister has refused to grant a visa or has cancelled their visa,¹⁹ and where this person has failed to make representations under section 501C about the refusal or cancellation of their visa, or their representations have been rejected by the Minister.

¹⁴ Explanatory Memorandum, [69].

¹⁵ The Law Council has previously raised concerns about access to legal advice and representation – see for example: Law Council of Australia, 'Law Council concerned by removal of IAAAS Funding' (Media Release, 2 April 2014), available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1409_-_Law_Council_concerned_by_removal_of_IAAAS_Funding.pdf. The Law Council's *Asylum Seeker Policy* also stipulates that all people seeking protection in Australia should have access to legal assistance to understand their legal rights and the legal processes that apply to the determination of their protection status: Law Council of Australia, *Asylum Seeker Policy*, (6 September 2014), [5], [7(b)], [9(c)] and [10(c)], ('LCA Policy'), available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker_Policy_web.pdf.

¹⁶ At [10]. See also: Law Council of Australia, *Principles Applying to the Detention of Asylum Seekers*, (22 June 2013), available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Final_PDF_18_Oct_Asylum_Seekers_Principles.pdf.

¹⁷ LCA Policy, [10(g)].

¹⁸ Law Council of Australia, *Principles Applying to Detention in a Criminal Law Context*, (22 June 2013), available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Final_PDF_18_Oct_13_Criminal_Detention_Principles.pdf.

¹⁹ To whom sub-s 193(1)(a)(iv) applies, such that the Minister has personally refused to grant the person a visa or whose visa has been cancelled under ss 501, 501A or 501B.

31. Section 501C currently requires the Minister to afford procedural fairness where a visa is cancelled on character grounds pursuant to subsection 501(3), or where the Minister sets aside a non-adverse decision of a delegate or the AAT with the effect of cancellation on character grounds pursuant to section 501A(3).
32. The amendment adds to subsection 198(2A) the procedural fairness provisions under section 501CA, which concerns the Minister's cancellation of a visa where the person is serving sentence of imprisonment, pursuant to subsection 501(3A).
33. The Law Council and the LIV are concerned that this amendment may result in the deportation of a person serving a sentence of imprisonment whose visa has been cancelled before they have had the opportunity to seek judicial review of the cancellation. It is noted by the LIV that if this person – or indeed a person whose visa is cancelled on character grounds or whose visa has been cancelled by the Minister on character grounds in place of a non-adverse decision – does not make a representation within the required time, then they are not afforded access to merits review (as this is a Ministerial decision) and their only option is to pursue judicial review.
34. As noted above, as it may be difficult for detainees to gain access to legal advice and representation, it is likely that a detainee's decision to pursue judicial review will be delayed. The LIV has observed that, as a consequence, this amendment is likely to lead to an increase of applications for urgent injunctions to prevent removal.

Recommendation:

- **The Privacy Commissioner consider the relevant provisions of this Bill, given that a broad range of personal identifiers will now be able to be legally disclosed in respect of a wider range of non-citizens; and**
- **The proposed amendments are further amended to ensure they comply with the rule of law and procedural fairness, such that:**
 - **all detainees the subject of subsection 193(1)(a)(v) are provided with information relevant to their detention, including information concerning the length of their detention and access to legal advice and representation; and**
 - **all detainees the subject of subsection 198(2A) are provided with a reasonable timeframe within which to seek legal advice on whether they should pursue merits review and/or judicial review of the decision to cancel their visa.**

Retrospective amendments to the Migration Act

35. The Law Council considers that the retrospective measures in the Bill do not comply with rule of law principles. Principle 1 of the Law Council's Rule of Law principles²⁰ states that:

The law must be both readily known and available, and certain and clear.

36. In the context of the current Bill, this principle means that visa holders should be informed about whether and how their visa may be cancelled, and the availability of review associated with the cancellation of their visa.

37. The Law Council is concerned that the Bill changes the legal framework that currently applies to visa holders such that they may have their visa cancelled for previous actions or omissions that did not give rise to a cancellation at the time.

38. Schedules 2 and 3 have their own complex application provisions.

Schedule 2

39. The amendments made by Item 10 are set out above. Owing to the retrospective nature of this amendment, the Law Council is concerned that a situation could arise where a person serving a sentence of imprisonment may have failed to make representations to the Minister or the Minister's delegate about the refusal or cancellation of their visa as stipulated in section 501CA, not realising the failure to do so would lead to their removal, pursuant to the proposed amendments to section 198(2A).

40. Item 11 inserts into the Migration Act new section 198(2B), which creates an obligation to remove a person whose visa was cancelled by the delegate of the Minister (rather than the Minister or the Minister's delegate, as in Item 10) on the grounds that they were serving a sentence of imprisonment and whose representations to the Minister under section 501CA have failed.

41. As above, owing to the retrospective nature of this amendment, the situation could arise where a person serving a sentence of imprisonment may have failed to make representations to the Minister or the Minister's delegate about the refusal or cancellation of their visa as stipulated in section 501CA, not realising the failure to do so would lead to their removal under section 198(2B).

42. Item 12 amends section 476 of the Migration Act such that the Federal Circuit Court does *not* have the jurisdiction to review a privative clause decision²¹ made under sections 501BA or 501CA.

43. The effect of this amendment is that the procedural fairness provisions under section 501CA (concerning a decision by the Minister or the Minister's delegate to cancel the visa of a person serving sentence of imprisonment), and the Minister's personal power under section 501BA (to set aside a non-adverse decision relating to the visa of a

²⁰ Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011) ('LCA Rule of Law Principles'), available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>.

²¹ Defined at s 474(2) as 'a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not)', other than a decision referred to in subsections (4) or (5).

person serving a sentence of imprisonment) will not be reviewable by the Federal Circuit Court.

44. Although this brings these sections into line with other character decisions made under the Act, such that they are reviewable only by the Federal Court, the retrospective nature of this amendment is concerning, as changes to the legal framework may affect matters already before the Federal Circuit Court.
45. Item 20 amends subsection 503(1)(b) of the Migration Act to expand the category of people not entitled to enter Australia or to be in Australia at any time during the period determined under the regulations to include people whose visas have been refused or cancelled personally by the Minister under section 501BA.
46. Currently, this provision applies to people whose visas have been refused by the Minister or delegate on character grounds pursuant to section 501, or where the Minister has personally set aside and substituted a decision pursuant to sections 501A or 501B.
47. The retrospective application of this amendment means that people whose visas have been refused or cancelled by the Minister or the Minister's delegate on the grounds that they were serving a sentence of imprisonment, will not be entitled to enter Australia or to be in Australia from the date the decision was made, even where that decision was made prior to the commencement of the provision. This effectively retrospectively permits actions to detain or remove from Australia people whose visas have been cancelled owing to their sentence of imprisonment.
48. Item 21 amends subsections 503A(1), (2) and 503B(1) to expand the category of people whose personal information can be used for the purposes of the cancellation of their visa.
49. Currently subsections 503A and 501B provide that if certain confidential information is given to Departmental officers that is relevant to the exercise of a power to cancel a visa, and the information is relevant to proceedings before the Federal Court or the Federal Circuit Court, the courts can make orders to ensure that the information is not disclosed to the applicant, their legal representative, or any other member of the public.
50. The amendments expand the category of people affected by these provisions to people whose visas are cancelled by the Minister on character grounds pursuant to subsection 501(3); by the Minister or delegate in place of a decision of a delegate or the AAT pursuant to section 501A(3); or by the Minister or delegate where the person is serving a sentence of imprisonment, pursuant to subsection 501(3A).
51. The Law Council is concerned by this provision, as it prevents the applicant from effectively challenging the basis on which their visa has been cancelled due to their ignorance of the evidence used against them. The retrospective nature of this amendment is also concerning, as changes to the legal framework may affect matters already before the Federal Circuit Court.

Schedule 3

52. Part 1 of Schedule 3 retrospectively applies amendments from 25 September 2014. The policy intention is that a person who has previously been refused a protection visa application that was made on their behalf cannot make a further protection visa application.

53. The *Migration Amendment Act 2014* (Cth), which received Royal Assent on 27 May 2014, amended the Migration Act to clarify that a non-citizen who has been refused a protection visa, or has had a protection visa cancelled, cannot apply for a further protection visa while in the migration zone. This amendment was made in response to *SZGIZ v Minister for Immigration and Citizenship*,²² where the Full Federal Court held that section 48A does not prevent a non-citizen making a further protection visa application based on a criterion which did not form the basis of a previous unsuccessful protection visa application. This judgment was contrary to the policy intent of the section.
54. The *Migration Legislation Amendment Act (No.1) 2014* (Cth), which received Royal Assent on 24 September 2014, also amended the Migration Act to further clarify that a non-citizen in the migration zone who does not hold a substantive visa and since last entering Australia was refused a visa for which an application was made on his or her behalf, cannot apply for a further protection visa whilst in the migration zone. This includes circumstances in which an applicant may not have known of, or understood the nature of, the application because they had a mental impairment, or because they were a minor at the time the visa application was made.
55. Although these amendments in the Bill give effect to the policy intent of the Migration Amendment Act 2014 and the Migration Legislation Amendment Act (No.1) 2014, the retrospective nature of this amendment is concerning, as it may affect protection visa applications that are already in train, but not finally determined. In addition to being contrary to the rule of law – that the law must be both readily known and available, and certain and clear – the retrospective nature of this amendment may also risk *refoulement* of people with a legitimate claim for protection and therefore put Australia in breach of its international obligations.

Recommendation:

- **The proposed amendments in Schedules 2 and 3 of the Bill that apply retrospectively are amended such that they only apply prospectively**

Minister assuming the role of the courts in assessing criminal conduct

56. Australia has a sovereign right to determine whether non-citizens who cause harm to individuals or the Australian community are allowed to enter and/or remain in Australia.²³ However, it is important to ensure that Australia does not unnecessarily refuse or deny visas to non-citizens who pose no threat to Australia, as visa refusal or cancellation may involve significant consequences for the individual (including detention and deportation²⁴), families, communities and potentially Australia's

²² [2013] FCAFC 71 (3 July 2013).

²³ The competence of States to regulate the entry of non-citizens may be considered a customary international law norm – see Chetail, Vincent, 'The transnational movement of persons under general international law – Mapping the customary law foundations of international migration law' in Vincent Chetail and Celine Bauloz (eds) *Research Handbook on International Law and Migration* (Edward Elgar, 2014), 27-28. This sovereign right may also be limited by principles of international law.

²⁴ An unlawful non-citizen must then be detained (section 189 of the *Migration Act 1958* (Cth)) and as soon as is reasonably practicable removed from Australia (section 195A of the *Migration Act 1958* (Cth)) unless they

business interests. Any proposed visa cancellation scheme on character grounds should therefore involve effective procedural safeguards to ensure:

- (a) innocent persons are not inadvertently refused entry or to remain in Australia; and
- (b) lawful and correct decisions and the maintenance of public confidence in the scheme.

57. A difficulty with the proposed amendments in Schedule 2 of the Bill is that they build on a problematic section 501 of the Migration Act. This section allows refusal or cancellation of a visa on character grounds in circumstances where the Minister (and in some circumstances also the Minister's delegate) effectively makes a determination that a person has been involved in criminal conduct despite the absence of a criminal conviction. Refusal or cancellation may as a matter of discretion follow where the Minister reasonably suspects the person has been engaged in certain conduct (such as being a member of an organisation involved in criminal conduct or being involved in war crimes, people smuggling or people trafficking).²⁵ The provision depends on uncertain criteria and effectively removes the right to be presumed innocent until proved guilty and according to law. Section 501 of the Migration Act effectively allows the Minister to assume the role of the court in assessing criminal conduct, supplanting what would ordinarily be a criminal court process in determining whether a person has engaged in certain conduct, with an administrative law process to make the same determination.
58. Proposed subsections 5C(1)(bb) or 5C(1)(bc) of the Bill would amend the definition of 'character concern' to include circumstances where the Minister or the Minister's delegate has made a determination based on reasonable suspicion that the person has been involved in certain conduct (mirroring subsections 501(6)(b) and 501(6)(ba) of the Migration Act, as introduced by the Character Act). The effect of the amendment is to broaden the definition of character concern so that a wider range of non-citizens may be required to disclose personal identifiers.²⁶ Accordingly, the amendments may require disclosure of personal identifiers in circumstances where a person is presumed guilty contrary to the rule of law.
59. Equally problematic is proposed subsection 5C(1)(f), which mirrors subsection 501(6)(f), as introduced by the Character Act. The proposed amendment would allow consideration of the fact that a non-citizen has, either in Australia or a foreign country²⁷, been simply charged with or indicted for a specified offence²⁸ (without the need for a finding of guilt or conviction by a court). The specified offences include 'a crime that is otherwise of serious international concern', which is unhelpfully broad and ambiguous.
60. A concern therefore arises that the scheme may be used to avoid the long-standing judicial procedures for testing and challenging evidence in criminal trials that normally apply before a person is presumed to have engaged in unlawful conduct. This may increase the likelihood of error and mean that innocent persons are mistakenly

are granted a visa, such as a protection visa, which is contingent on the person demonstrating they pass the character test.

²⁵ Paragraphs 501(6)(b) and (ba) of the *Migration Act 1958* (Cth).

²⁶ 'Personal identifier' is defined in subsection 5A(1) of the *Migration Act 1958* (Cth).

²⁷ The inclusion of foreign courts in this subsection is also concerning given the differing standards of justice and evidence which may apply in foreign courts.

²⁸ Including genocide, a crime against humanity, a war crime, a crime involving torture or slavery, and a crime that is otherwise of serious international concern.

captured. For this reason, consideration of involvement in criminal conduct under section 5C(1) should ideally only occur after a conviction by a court.

61. The Law Council therefore recommends that if the Committee is minded to pass the Bill, it and section 501 of the Migration Act are amended to properly align with fundamental legal principles. Ideally, 'criminal conduct' and 'conduct constituting an offence' should only be relevant considerations in relation to the determination of 'character concern' under section 5C(1) after a conviction by an independent, impartial and competent court or tribunal.

Recommendation:

- **Determination of involvement in criminal conduct under proposed subsections 5C(1)(bb) and 5C(1)(bc) and under section 501 of the Migration Act should only flow after a conviction by an independent, impartial and competent court or tribunal; and**
- **Define 'serious international concern', set out in proposed subsection 5C(1)(f) and in section 501 of the Migration Act.**

Association with Criminal Group or Organisation

62. Current paragraph 501(6)(b) of the Migration Act provides that a person may not satisfy the character test where the Minister or the Minister's delegate reasonably suspects that a person is a member of a group or organisation, or has had or has an association, with a group, organisation or person, involved in criminal conduct. The effect of proposed paragraph 5C(1)(bb) of the Bill would be to allow the collection of personal identifiers from such persons.
63. However, there are no criteria under the Migration Act or the Bill which need to be considered by the Minister in the process of determining whether a group or organisation has been involved in criminal conduct, and there is no definition of what is meant by 'association', or limits imposed on how recent the association has to be in order to be a relevant consideration.
64. The absence of publicly available, binding criteria to be applied to the determination of organisations as being involved in criminal conduct mean that it will be difficult for individuals to know in advance whether their conduct might attract visa refusal or cancellation. This uncertainty also leads to lack of transparency and accountability and gives rise to concern that innocent associations could attract criminal liability. Paragraph 501(6)(b) of the Migration Act and proposed paragraph 5C(1)(bb) of the Bill are therefore inconsistent with the rule of law, which requires that the law be readily known and available, and certain and clear.²⁹
65. In the absence of a constitution, corporate plan or some other statement of an organisation's goals and mandate, a determination that a group or organisation is or has been involved in criminal conduct necessarily involves the attribution of defining characteristics and commonly shared motives or purposes to a group of people based on the activities of certain individuals within the group.

²⁹ LCA Rule of Law Principles, Principle 1..

66. The result is that a person who has been or is a member of a group or organisation, or has an association with such group or organisation could be determined to be of 'character concern' if another member of that group or organisation is involved in criminal conduct, even when the person who was involved in criminal conduct is not the leader of the group, or when such conduct is not accepted by other members as representative of the group.
67. As the Law Council has often pointed out, the issue of attribution is significant because the members of any organisation are rarely a homogenous group who think and talk as one. On the contrary, although possibly formed around a common interest or cause, organisations are often a battleground for opposing ideas, and may represent a forum in which some members' tendencies towards violent ideology can be effectively confronted and opposed by other members. The result is likely to be the legitimisation of a process of guilt by association.
68. Given these concerns, the Law Council considers that conferring a broad executive discretion for the Minister to determine that a particular group or organisation is involved in criminal conduct is unacceptable, particularly in circumstances where the consequences are to limit freedom of association and to expose non-citizens to the possibility of being deemed of character concern.

Recommendation:

- **Repeal the association provisions in paragraph 501(6)(b) of the Migration Act and remove proposed paragraph 5C(1)(bb) of the Bill. In the alternative, the Migration Act should be amended to include explicit criteria that the Minister must be satisfied of, before determining that a group or organisation is involved in criminal conduct and such conduct should be of a sufficient level of seriousness.**

Adverse Security Assessments

69. Item 3 of Schedule 2 of the Bill seeks to introduce subsection 5C(1)(g) into the Act, which would allow determination of character concern to be based on consideration of a risk assessment conducted by ASIO.³⁰
70. The Law Council considers this to be concerning in light of the reasons outlined above (regarding the need for consideration of criminal conduct to be based on a conviction) as well as the fact that non-citizens have limited opportunities to seek review of adverse security assessments.
71. While the Security Appeals Division of the AAT has the power to review adverse security assessments, access to the AAT is denied to people who are not Australian citizens or holders of a permanent visa or a special purpose visa.³¹ Accordingly, refugees with adverse security assessments cannot access merits review in the AAT.³²

³⁰ The non-citizen would need to be assessed by ASIO to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth)).

³¹ *Australian Intelligence Organisation Act 1979* (Cth), s36

³² Australian Human Rights Commission, [Tell Me About: Refugees with Adverse Security Assessments](#) (2013)

72. The Law Council has consistently advocated for access to effective merits and judicial review for this cohort of refugees.³³ The Law Council has repeatedly called for refugees with adverse security assessments to have the same access to merits review of such assessments as Australian citizens. This is reflected in the Law Council's Rule of Law Principles Applying to Detention of Asylum Seekers which provides:

8.6 Asylum seekers who are subject to adverse security assessments must be given the opportunity to be informed of the case against them, the opportunity to be heard and the right to seek a review of the adverse security assessment and any decision based on the assessment.

a. Meaningful review requires that such a person must be given sufficient information to know the basis for their assessment.

b. Where national security concerns preclude full disclosure of the reasons for the assessment, mechanisms must be available to allow for partial disclosure.

c. Adverse security assessments should be subject to periodic internal review.

d. The State should determine alternatives to detention that are appropriate in the light of the specific security risk posed if an adverse security assessment is upheld. Special consideration should be given to the wellbeing of the children of any asylum seekers against whom an adverse security assessment is made.³⁴

Recommendation:

- **Amend the *Australian Security and Intelligence Organisation Act 1979 (Cth)* to permit non-citizens with adverse security assessments to have the same access to merits review of such assessments as Australian citizens.**

Convictions and charges from Foreign courts

73. Currently paragraphs 501(6)(e) and (f) of the Migration Act allow for a person to fail the character test based on certain convictions and charges from foreign courts. The effect of proposed paragraphs 5C(1)(e) and 5C(1)(f) of the Bill would be to allow the collection of personal identifiers from such persons.

74. Paragraphs 501(6)(e) and (f) of the Migration Act and proposed paragraphs 5C(1)(e) and 5C(1)(f) of the Bill may be problematic as Australia has international human rights obligations which require it not to be complicit in criminal investigations and trials which do not comply with accepted fair trial principles.³⁵ An example of the operation of this principle are certain safeguards in the *Mutual Assistance in Criminal Matters Act 1987 (Cth)* which require that a foreign country's request for assistance must be refused if for example, a person may be punished for a 'political offence', or on the basis of characteristics including race, religion, nationality or political opinions, or could be tortured.³⁶

³³ See also LCA Policy, [20].

³⁴ Law Council of Australia, *Policy Statement on Principles Applying to the Detention of Asylum Seekers*, 22 June 2013, p. 6.

³⁵ ICCPR, art 14.

³⁶ Section 8, *Mutual Assistance in Criminal Matters Act 1987 (Cth)*.

75. If the proposed amendment is to be pursued, the Minister or delegate should be satisfied that the conviction in a foreign country has occurred on the basis of fair trial principles and does not involve matters such as those grounds listed for refusal under the Mutual Assistance Act.

Recommendation:

- **Amend the Migration Act to require the Minister or delegate to be satisfied that the conviction in a foreign country for the purposes of sections 501 and 5C has occurred on the basis of fair trial principles and does not involve matters such as those grounds listed for refusal under the Mutual Assistance Act.**

Administrative review of mandatory cancellation of visas and fast-track decisions

76. The amendments relating to the administrative review of fast-track decisions are found at Schedule 3 of the Bill.

77. The fast track process for assessing protection claims was introduced by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) in December 2014. The Act established the Immigration Assessment Authority (IAA) within the Refugee Review Tribunal, which now sits as the Migration & Refugee Division within the AAT. The fast track process applies only to all unauthorised maritime arrivals who arrived on or after 13 August 2012 and whose visa status has not yet been finally determined, replacing the existing refugee status determination process that is currently available to these applicants and their children. However, some people – excluded fast track review applicants – are excluded from this process entirely

78. The Law Council raised concerns with the fast track process with this Committee during its inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) before its enactment.³⁷

79. Item 3 of the current Bill replaces the Note at section 5(1) of the Migration Act to ensure that the AAT can review certain character or security based decisions to refuse to grant a protection visa to a fast track review applicant.³⁸ The Law Council and the LIV supports this amendment.

80. Items 6-8 provide that the events described in sections 82, 173 and 174 of the Migration Act, that cause a visa that is in effect to cease, will as a general rule, cause a visa that is held, but not in effect, to be taken to cease. As an exception to this

³⁷ Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), 5 November 2014, available at: http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2898_-_Migration_and_Maritime_Powers_Legislation_Amendment_Resolving_the_Asylum_Legacy_Caseload_Bill_2014.pdf.

³⁸ A 'fast track applicant' is defined at subsection 5(1) and means a fast track applicant who is not an excluded fast track review applicant, which is also defined at subsection 5(1). Both definitions were introduced by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) in December 2014.

general rule, a visa that is not in effect will not be taken to cease as a result of the holder leaving Australia. The Law Council and the LIV supports this amendment. It addresses the administrative burden of reinstating a dormant Bridging Visa when a person travels overseas.

Compliance with the Law of the Sea

81. Schedule 4 of the Bill amends the *Maritime Powers Act 2013* (Cth) to enable powers to be exercised in the territorial waters of another country insofar as it is done in accordance with the UNCLOS.
82. The Law Council notes that, in accordance with the rule of law, States must comply with their international obligations.³⁹ This includes avoiding inconsistencies between their international legal obligations and their domestic laws and policies. In addition to those specific obligations under UNCLOS, a State must interpret and perform its treaty obligations in good faith pursuant to the Vienna Convention on the Law of Treaties.⁴⁰
83. Although the High Court has found that international human rights instruments to which Australia is party do not automatically give rise to enforceable legal rights or obligations under Australian domestic law,⁴¹ and while it is within the power of the legislature to decide to change the application of international obligations,⁴² Australia may be liable at the international level for breaches of instruments to which it is party.
84. The proposed amendments allow the Minister or the Minister's delegate to determine whether or how UNCLOS applies to vessels in foreign waters, in order to exercise powers in those waters.
85. The rationale for this amendment is that it confirms 'the government's clear intent that powers under the Maritime Powers Act are able to be exercised in the course of passage through or above the waters of another country' consistently with UNCLOS.⁴³
86. However, the Law Council is concerned that the proposed amendments:
 - (a) may misinterpret the meaning of 'passage' at Article 18 of UNCLOS;⁴⁴ and
 - (b) makes the application of UNCLOS a subjective determination for the decision maker, rather than an objective assessment, pursuant to new subsection 40(3).

³⁹ LCA Rule of Law Principles, Principle 8.

⁴⁰ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 arts 26, 31.

⁴¹ *Minister for Immigration v Teoh* (1995) 183 CLR 273 and *Dietrich v The Queen* (1992) 177 CLR 292.

⁴² See for example: *Al-Kateb v Godwin* (2004) 208 ALR 124, [19] (Gleeson CJ): 'Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.'

⁴³ Second Reading Speech, 21.

⁴⁴ Further analysis of this Article can be found at: Don Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing, Oxford, 2010), Chapter 10(V). See also: Andrew & Renata Kaldor Centre for International Refugee Law, Submission to Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration and Maritime Powers Amendment Bill (No 1) 2015, 6 October 2015, available at: <file:///C:/Users/Nicola/Downloads/Submission01%20Legal%20and%20Constitutional%20Affairs%20Migration%20and%20Maritime%20Bill.pdf>.

This amendment raises the prospect of incompatibility with Australia's obligations under UNCLOS where the Minister or delegate, deliberately or inadvertently, misinterprets UNCLOS. This could result in Australia exercising powers over vessels in foreign waters where it is unlawful under international law.

87. The Law Council is therefore concerned that the Bill:

- (a) removes a court's power to determine whether an act is consistent with UNCLOS;
- (b) increases Ministerial discretion and empowers the Minister to declare that turn backs and tow backs are consistent with UNCLOS based on a subjective, rather than objective, assessment; and
- (c) could place people that are the subject of these powers at risk of *refoulement*, contrary to Australia's international obligations.

Recommendation:

- **Proposed subsection 40(2) is amended to ensure compliance with Australia's obligations under UNCLOS**
- **Proposed subsection 40(3) is not passed**

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive as at 1 July 2015 are:

- Mr Duncan McConnel, President
- Mr Stuart Clark AM, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Mr Morry Bailes, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.