Australian National University

ANU COLLEGE OF LAW: MIGRATION LAW PROGRAM

Building 5 Fellows Road Acton
Canberra ACT 0200 Australia

Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014

Introduction

The ANU Migration Law Program within the Legal Workshop of the ANU College of Law specialises in developing and providing programs to further develop expertise in Australian migration law. These include the Graduate Certificate in Australian Migration Law and Practice which provides people with the necessary knowledge, skills and qualifications to register as Migration Agents, and the Masters of Law in Migration Law. The Legal Workshop also provides Continuing Professional Development opportunities for Registered Migration Agents.

The academic staff of the Migration Law Program consists of specialists in migration law, with experienced practitioners, lecturers and researchers. The Migration Law Program is also engaged in developing research into the practical operation of migration law and administration in Australia, and has previously provided submissions and presented evidence to a number of conferences, seminars and Parliamentary Committee inquiries.

This submission is authored by
Sudrishti Reich
Christine Giles
Andrew Bartlett

Summary

1. The legislation being considered by the Committee seeks to implement a very large number of changes to the *Migration Act 1958* (Cth) (the Act) which would dramatically expand the power of the Minister and his or her delegates to cancel a visa or refuse a visa application.

2. The Bill overall represents a significant lowering of the threshold on what constitutes a failure to pass the character test and a watering-down of the principles and protections of natural justice in the administrative application of the consequences of failing the character test.

3. The main rationales given to justify these wide-ranging changes are firstly that the character provisions and the general visa cancellation provisions in the Migration Act have been little changed since the 1990s, and secondly that "the environment in relation to the entry and stay in Australia of non-citizen has changed dramatically, with higher numbers of temporary visa holders entering Australia." (Explanatory Memorandum, Outline)

4. The authors of this submission respectfully submit that these stated rationales do not provide an adequate justification for making such major changes, particularly given these changes have the potential to dramatically disrupt the lives of hundreds of people who are long-term residents in Australia as well as further hundreds of Australian citizens indirectly impacted.

5. The fact that the character provisions and visa cancellation powers in the Migration Act have been little changed for so long does not in itself mean there is anything wrong with those powers. If anything, it suggests they are working perfectly adequately at achieving what they are intended for, particularly given that many people are regularly having their visas cancelled under these provisions each year.

6. Likewise, the fact that there has been a dramatic increase in the number of people entering and residing in Australia on temporary visas does not in any way explain why there should be greater powers or greater ease to cancel those visas. If anything, the fact that our migration

program has been deliberately modified in a way which now expects hundreds of thousands of people to live, work and study here for long-term periods on visas which are labelled as temporary creates a greater obligation on us as a society to ensure these people who contribute so much to our economy and society are given just as much of a fair go when it comes to such a major event as the proposed removal of their right to live in Australia.

7. It is stated in the Explanatory Memorandum (EM) that: '*The review concluded that while the character and visa cancellation (and refusal) framework was generally sound, it was clear there remained a small number of non-citizens who were not effectively and objectively being captured for consideration*.' (EM, Attachment A, p1) This acknowledgement that the character and visa cancellation system is fundamentally sound and working is significant. The sweep of changes introduced by the Bill is therefore clearly targeted at 'a small number of non-citizens'. We don't have access to the details about how or why this small number of individuals cannot be covered by the existing character test and cancellation powers. Nevertheless, it seems clear that the Bill is a case of a sledgehammer being used to crack a nut.

8. The detrimental impact of the amendments on the principles of natural justice in administrative decision making, and on the integrity of the principles underpinning the criminal justice system (including the critical nexus between crime and punishment through sentencing) we submit are too high a price to pay. As a migration nation, Australia should be ensuring that the many hundreds of thousands of people we encourage here each year as residents have a right to challenge visa cancellations and refusals using a just and transparent process.

9. The proposed amendments if passed will mean that many more non-citizens will not pass the Character Test. The Explanatory Memorandum states: *particularly in the offshore refusal caseload, there are many visa applicants who have serious criminal histories, whose aggregate sentences fall between 12 and 24 months.* (EM Paragraph 5C(2)(d)) However, refusal is not the same as cancellation, in terms of both the impact on the visa holder, especially a long-term resident, and the potential impact on Australian citizens. In our submission, justification for the need to refuse more visas should not be used to increase the number of people who do not pass the character test for cancellation purposes.

10. The perceived or actual need to strengthen the basis upon which an application for a visa can be refused is not a legitimate reason for treating visa cancellation in the identical way. Australia has a sovereign right to determine who can enter and settle here. However, in our submission, once a non-citizen has been permitted to enter and settle in Australia, the decision to expel that person should not be reached in the same way as a decision to refuse to grant a visa. To treat both situations in a similar way fails to recognise the significant impact of visa cancellation on a resident, particularly a long-term resident.

11. The authors of this submission therefore **recommend** that the Bill as it stands not be passed by the Senate.

Overview

12. This Bill seeks to make a large number of changes to a system which already provides very wide powers, particularly in situations where the Minister wishes to use their own discretionary powers and apply the 'national interest' test. The government has pointed out that the existing character provisions in Part 9 of the Migration Act are basically unchanged since 1999. It is worth noting in this context that even those provisions were seen at the time as being dangerously broad, risking injustice and unjust process.

13. In the Senate Committee report examining the Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1997, Labor Senators Bolkus and McKiernan made a number of criticisms of the Bill, including stating that "the character test is too prescriptive" (page 40), while another Labor Senator, Barney Cooney, stated that the measures put "ease of administration, and economic factors ahead of equity and due process." (page 47)

14. The fact that there were significant concerns expressed and dangers highlighted when the existing character provisions were adopted over fifteen years ago should give pause to any efforts to make more changes to those powers which significantly reduce the rights of visa holders, including very long-term residents of Australia.

15. Some examples of how the existing character provisions have been used since they were adopted also give reason to question the wisdom of expanding these powers further, particularly in areas which preclude natural justice or merits review.

16. The most notorious instance of the use of the character provisions involved Dr Mohamed Haneef, who had his visa cancelled and was thus subject to detention on grounds which were subsequently found by the Clarke Inquiry to be spurious, relying on evidence which was completely deficient.

17. As with many skilled migrants to Australia, Dr Haneef was on a temporary visa. In his second reading speech on this Bill, the Minister justified the introduction of a lower threshold for cancelling temporary visas as being "reflective of the lower tolerance for behavioural concerns in the temporary visa context." Nowhere is it explained why there should be a lower tolerance for behavioural concerns for temporary visa holders. It is important to emphasise that many people reside in Australia for many years whilst still holding a visa that is deemed to be 'temporary'. In conjunction with other changes proposed in this Bill, it is possible that were these changes in place, Dr Haneef would not have been able to fight and reverse the clearly unjust cancellation of his visa. The reasons that the Courts gave in overturning the character based cancellation of Dr Haneef's visa – namely that innocent association is not enough to fail the character test - are still as valid as ever and should not be overturned by the amendments to s501(6)(b).

18. This submission will focus on some of the key expansions of government power contained in the Bill, including looking at how well or otherwise those changes comply with Australia's international legal obligations.

19. Some of the key changes in the Bill:

- introduces mandatory cancellation without notice
- makes innocent association with a group or person a basis for failing the character test
- makes reasonable suspicion rather than satisfaction as to objective facts the threshold
- makes being charged with certain crimes, without need for a conviction, sufficient to fail the character test
- bars access to merits review

- lowers the test of risk from actual risk to mere possibility of a risk
- gives additional personal powers to the Minister to cancel a visa without natural justice and without review
- gives additional personal powers to the Minister to overturn decisions of a merits review body

Mandatory cancellation

20. New **subsection 501(3A)** introduces a new mandatory cancellation power. The effect of the provision is that where the person is serving a sentence of imprisonment and the Minister is satisfied that the person does not pass the character test because of having a 'substantial criminal record' (on the basis of paras (7)(a), (b) or (c)) or because of failing new para 501(6)(e) (sexual offences involving children), then the Minister MUST cancel their visa. Under new subsection 501(5), the rules of natural justice do not apply. Hence, the cancellation is done without notice and without allowing the visa holder to make representations concerning whether or not they pass the character test or whether their visa should be cancelled.

21. According to the Explanatory Memorandum (EM), the rationale for the amendment is that 'a decision to cancel a person's visa is made before the person is released from prison, to ensure that the non-citizen remains in criminal detention or, if released from criminal custody, in immigration detention while revocation is pursued.' (EM, para 34)

22. We submit that this purpose can be achieved without the need to resort to a mandatory cancellation power. Given the elements of the character test that trigger subsection 501(3A), in the great majority of cases the visa holder will be serving a minimum period of 12 months imprisonment. This should provide adequate time for the Minister to pursue cancellation under either of the existing cancellation powers: s501(2) or 501(3). Whether or not the cancellation is mandatory or discretionary is not relevant to the intention of the amendment as explained in the EM. The essence of the concern appears to be to allow cancellation to happen expeditiously so that there is no chance of the prisoner being released upon serving their sentence. The Minister's existing personal power to cancel, without notice, under s501(3) already adequately serves this function.

23. Mandatory powers suffer from innate weaknesses and can lead to unfair and unintended consequences. In acknowledgment of this, recent legislative reform has removed both a mandatory cancellation power and an automatic cancellation provision from the Migration Regulations and Migration Act. In April 2013, the regulation providing for mandatory cancellation of a student visa where the visa holder had not maintained course attendance and progress, or where they had breached their visa condition limiting work, was repealed with these cancellation grounds moving back into the discretionary cancellation framework. (*Migration Legislation Amendment Regulation 2013 (No. 1))* In the Explanatory Statement for the amending regulations, the reform was explained: *"*This will enable decision makers to take the circumstances of the student into account before deciding whether cancellation is warranted. This will provide greater fairness to Student visa holders." And "This provides the Minister with the discretion to consider the circumstances of the student and to decide if cancellation is warranted based on the merits of the case put forward." (*Migration Legislation Amendment Regulation 2013 (No. 1)*, Explanatory Statement, p21)

24. By contrast to the reform of the student visa cancellation regime, the new mandatory cancellation power prevents the Minister from taking the circumstances of the visa holder (and other affected persons, such as children) into account before deciding whether cancellation is warranted. Without notice, the visa holder cannot inform the Minister of all relevant matters. Without discretion, the Minister's hands are tied and, even if in possession of important relevant information, he or she cannot alter the mandated outcome of cancellation.

25. Specifically, the Minister cannot take into account the primary considerations identified in Ministerial Direction No. 55 for deciding whether or not it is appropriate for the visa holder to forfeit their visa. These primary considerations are:

a) Protection of the Australian community from criminal or other serious conduct;

b) The strength, duration and nature of the person's ties to Australia;

c) The best interests of minor children in Australia;

d) Whether Australia has international non-refoulement obligations to the person.

26. The legislation relating to cancellation should reflect the need to protect the Australian community. It needs also to allow for a proper consideration and balancing of the other primary considerations, particularly when these involve the best interests of minor children and Australia's obligations under international human rights conventions.

27. Direction No. 55 recognises that the length of time that a non-citizen has been contributing to the Australian community and the duration and strength of their ties to Australia are important considerations in the exercise of the discretion to cancel. Under the new mandatory cancellation section how long someone has been a non-citizen member of the Australian community, and even whether they came to Australia as an infant, cannot be considered. This will lead to results where the Australian community is being protected, by banishment, from persons who are themselves products of our society.

28. Department of Immigration statistics (set out in the table below) on the numbers of 'warnings' of consideration of cancellation compared with the numbers of actual cancellations indicate that with the removal of prior notice and the opportunity to respond, literally hundreds more visa holders will have their visas cancelled each year.

Visa cancellation decisions under section 501 Migration Act 1958, 2006-2013

Warnings	334	617	149	864	1146	1240	888
Cancellations	116	103	86	58	132	157	139

Sources: Department of Immigration and Multicultural Affairs, Annual Reports, 2006-2007; Department of Immigration and Citizenship, Annual Reports, 2007-2013. (figures and table sourced from by Grewcock, M (2014 forthcoming) "Re-inventing the Stain – Bad character and criminal deportation in contemporary Australia", in S.Pickering and J.Ham (eds) *The Routledge Handbook of Migration and Crime*, pp.121-138. Note: research in this chapter was funded by ARC grant DP110102453)

29. The acknowledged automatic effect of visa cancellation without notice and without discretion is that the non-citizen will be subject to immigration detention as soon as their period of criminal incarceration is complete. This is undesirable for a number of reasons. The extension of a non-citizen's incarceration for an administrative purpose (to allow time for the revocation and review process following mandatory cancellation) is incompatible with the principles of the criminal justice system, where a sentence is supposed to reflect the

seriousness of the offence and likely breaches Article 12 of the International Covenant on Civil and Political Rights (ICCPR) (see para 65 of this submission).

30. It also means that such persons will not get the opportunity for rehabilitation and reintegration through parole. This becomes problematic if, following the revocation/appeal process, the cancellation decision is revoked and the person is at that time released back into the community. It is also problematic for any destination country if the visa cancellation decision stands and the non-citizen is removed from Australia, as we are deporting our 'problem' people to another country.

Conclusion on mandatory cancellation power

31. Introducing a mandatory cancellation power requires cogent and compelling evidence-based reasons. Mandatory cancellation will result in greater numbers of residents having their visas cancelled in circumstances where the AAT, the Minister or a delegate applying the current Ministerial Direction No. 55 would not proceed to cancellation. The inability of the Minister to exercise discretion will inevitably lead in some cases to harsh and unfair outcomes (outcomes that the Australian community would find unfair in the circumstances). We **submit** that the introduction of a new mandatory cancellation power into the migration legislation is a retrograde step, particularly as there appears no demonstrable need for such a provision since existing powers more than adequately meet the purpose.

Impact on the principles and practices of criminal justice

32. The character test framework in the Migration Act for visa refusal and cancellation intersects with the criminal justice framework. We consider that the amendments introduced by the Bill exacerbate the blurring of the boundaries between criminal law and migration law and, in particular, represent an 'increase in Executive and administrative decision-making at the expense of criminal justice due process.' (see Grewcock, M (2014 forthcoming) "Re-inventing the Stain – Bad character and criminal deportation in contemporary Australia", in S.Pickering and J.Ham (eds) *The Routledge Handbook of Migration and Crime,* pp.121-138)

33. For instance, under s501(3A), anyone in gaol who has been sentenced to 12 months imprisonment must have their visa cancelled. Having one's visa cancelled for failing the character test because of having a substantial criminal record effectively means permanent banishment from Australia. (This is the effect of Special Return Criterion 5001 in *Migration Regulations 1994*, Schedule 5.) This serious and life-time immigration consequence of having received a 12 month sentence is disproportionate. It amounts to a secondary punishment on the offender. The sentence imposed by the court is the penalty for the crime. Banishment is a harsher and additional penalty.

34. As noted above, s501(3A), which is specifically designed to ensure ongoing detention of prisoners even beyond the non-parole period of their sentence, denies these persons the opportunity for parole. In *R v Shrestha* ((1991) 173 CLR 48; 100 ALR 757) the High Court found that denying prisoners parole on the basis of their residency status was discriminatory and not in the best interests of the national or international community:

> *' ... In so far as the submission involves an assertion that the community is not concerned with the rehabilitation of a prisoner who has no ties with this country and who will be deported when released from gaol, it takes a blinkered view of community concerns and interests and unjustifiably confines them within strict territorial limits. This country has a direct and significant interest in the well-being and rehabilitation of all who are detained within its gaols, whether or not their origins, ties or future prospects lie in this or in some other country. It also has a responsibility, both moral and under international treaty, to treat all who are subjected to criminal proceedings in its courts or imprisonment in its gaols humanely and without discrimination based on national or ethnic origins (see, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, (1965), Art.5(a); Reg. v. Binder [1990] VicRp 50; (1990) VR 563, at pp 569-570). To deny foreign offenders of the kind in question the opportunity for the amelioration of their situation and the incentive for reform and rehabilitation which the parole system offers is not to differentiate by reference to degrees of criminality or prospects of rehabilitation. It is to discriminate against prisoners of that class because of their origins, their place of residence and their family ties.'* (Deane, Dawson and Toohey JJ, para 7)

New elements in the character test – s501(6)

35. New para 501(6)(e) provides that a person won't pass the character test if a court in Australia or a foreign country has convicted the person of one or more sexually based offences involving a child or found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction. Failing the character test on this ground is a basis for mandatory cancellation under new s501(3A). Therefore cancellation will occur without a proper assessment of all the circumstances of the case (including the offence and the sentence imposed and balancing the actions of the offender against the risk to the community).

36. We are concerned that a serious and presumably unintended consequence of this amendment is that children may be caught by the provision. Clearly the provision is aimed at protecting the community from child sex offenders yet given the terms of the paragraph, sexually active minors may also have their visas cancelled. For example, a 16 year old boy who has sex with his 14 year old girlfriend could easily fall foul of this provision, as could teenagers engaging in the relatively common practice of sending, receiving and sharing naked phots of themselves and other teenagers they know.

37. Another aspect of concern is that this amendment is intended to apply irrespective of the level of penalty or orders made in relation to the offence. (see EM p49 and Attachment A, p2) The court has heard all the evidence and taken it into account in determining penalty and is in the best position to impose a penalty that reflects the seriousness of the charge. If it convicts and discharges or imposes no conviction, this is a reflection of the sentencing considerations that must be taken into account, and is evidence that the offending is at the lower end of the scale. These factors cannot be considered in exercising the discretion not to cancel because mandatory cancellation would apply under s501(3A).

General visa cancellation amendments

38. With regard to amended **para 116(1)(e)**, we support the extension of the cancellation ground where the visa holder represents a risk to not just the community but to the health or safety of an individual or individuals. For the reasons canvassed in other parts of this submission, we do not support the lowering of the threshold for this ground from actual risk to the mere possibility of a risk.

Subdivision FA – additional personal powers for Minister to cancel on s109 or 116 grounds

39. Cancellation under both Subdivision C (incorrect information) and Subdivision D (general power: s116) allow for notice to and response by the visa holder. As these are discretionary powers, the response can address both whether or not the alleged ground for cancellation exists and also, even if it does exist, any reasons for why the visa should nevertheless not be cancelled (see s107(1)(b)(ii) and s119(1)(b)). The matters that must be considered by the Minister on this latter point are actually prescribed for the purposes of s109.

40. Yet, under the new personal powers of the Minister there is no requirement for the Minister when cancelling a visa to consider any relevant matters that go to whether or not cancellation is appropriate in all the circumstances. He is only required to be satisfied as to 'the public interest'. When it comes to the possibility of having a cancellation decision made by the Minister under s133A(3) or 133C(3) revoked, the only grounds on which the Minister has power to revoke is where the person satisfies the Minister that the ground for the cancellation does not exist. That is, there is no possibility for the person to satisfy the Minister that in all the circumstances of the case (including, for instance, the best interests of a child or children affected by the cancellation) the visa should be reinstated.

41. This omission is likely to lead to harsh consequences and unfairness as the power is designed to be exercised swiftly and at times will be taken without the possibility of having access to the fullest facts. Despite being a decision made in haste, the consequences cannot be reversed even in the light of compelling evidence. For these reasons we **submit** that the provisions in their current form should not be supported.

Merits review

42. There are a number of provisions in the Bill which allow the Minister to cancel a non-citizen's visa without recourse to merits review as well as new provisions which specifically empower the Minister to overturn decisions of a merits review tribunal. The rationale for this is that '*the community holds the Minister responsible for decisions within his portfolio, even where those decisions have resulted from merits review. Therefore, it is appropriate*

that the Minister have the power to be the final decision-maker in the public interest.' (EM, Schedule 2, para 42, p27)

43. We **submit** that these provisions should not be supported as they create further inroads into the essential first tier review of administrative decision-making. Elimination of merits review, and the neutering of the decisions of merits review tribunals, is antithetical to transparency and independent scrutiny in administrative decision-making. This becomes of more importance since cases where the Minister personally involves himself will tend to be politically loaded.

44. While it may be argued that it is the Executive, and ultimately the Minister, who is responsible, it is a slippery slope in the fair and impartial administration of executive decision-making for review of decisions to be so limited. Furthermore, there is no direct accountability for personal decisions made by the Minister. A further consequence of eliminating merits review is that it will increase the caseload on the courts, and diminish real opportunities for access to justice, as access to the judicial system has higher barriers than access to merits review and consequently many residents affected will have no real recourse to independent review of the decision. We **recommend** that should these provisions proceed they should be amended to provide that the Minister must advise Parliament of each exercise of his personal power – in the same way that this is required when the Minister exercises his personal power to grant a visa under s351 and s417 of the Act.

The impact on long term residents

45. Generally speaking, permanent residents who have been in Australia for more than ten years cannot be deported (s201 of the Act). However, the protection offered by this section has been circumvented by the use of s501, which is not so limited. It is submitted that it was not the intention, when s180A (the forerunner to s501) was inserted into the Act in 1992 (inserted by *Migration (Offences and Undesirable Persons) Amendment Act 1992* (Cth) s5) that the powers contained therein be used to cancel the visas of long-term permanent residents. The amendment was made in response to a legal challenge to the Minister's use of the existing public interest power to exclude non-Australian members of the Hell's Angels Motor Cycle Club. Parliamentary debate focussed solely on the need to exclude unwanted

immigrants and visitors. (Foster, Michelle: An "Alien" by the Barest Threads - The Legality of the Deportation of Long-term Residents from Australia (2009) UMelbLRS 26 at pg508 quoting the then Minister for Immigration, Local Government and Ethnic Affairs, Mr Gerald Hand)

46. The cancellation power contained in s501 was explained by Moore and Gyles JJ in Nystrom's case: (Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs (2005) FCAFC 121 (1 July 2005) para 21)
Checking of the character of offshore applicants is difficult. If it transpires that a mistake was made in granting a visa because of inadequate information concerning character, it is not surprising that there would be a ready power of cancellation when further information comes to hand.

47. This provision was not introduced as a means of expelling long-term residents who could not lawfully be deported. The Senate Legal and Constitutional References Committee have recommended that the practice of using s501 to cancel permanent resident visas 'should not be applied to people who arrived as minors and have stayed for more than ten years.' (Senate Legal and Constitutional References Committee, Parliament of Australia, Administration and Operation of the Migration Act 1958 (2006) Recommendation 58)

48. Moore and Gyles JJ in Nystrom's case indicated that a review of the approach to long-term residents was warranted noting 'it is difficult to envisage the bona fide use of s 501 to cancel the permanent absorbed person visa of a person of over 30 years of age who has spent all of his life in Australia'. (para 26)

49. The Commonwealth Ombudsman reported (Administration of S 501 of The Migration Act 1958 as it Applies To Long-Term Residents, Report by the Commonwealth and Immigration Ombudsman, Prof. John McMillan, under the Ombudsman Act 1976 Report No. O1|2006):
3.78 … It was not apparent at the time the new powers were introduced that s 501 would actively be used to make visa cancellation decisions. Nor was it apparent that the section would apply to people whose parents had brought them as babies or young children to settle in Australia. In at least some if not many instances, the children had not taken out Australian citizenship simply because they, or their parents on their behalf, did not get around to

applying for citizenship. They did not realise the possible consequences of this oversight. Nor is it irrelevant that the criminal conduct on which the visa cancellation decisions were based occurred in Australia, sometimes during the formative years of a child's development, for which an Australian court had imposed a sentence that had been served.

3.79 It was not made explicit in either the Explanatory Memorandum to the 1998 Migration Amendment Bill, or the Second Reading speech by the then Minister, that s 501 was to apply to long-term permanent residents, outside the operation of s 200 and 201 of the Act. In concluding his Second Reading Speech the then Minister stated:
'This bill sends a clear and unequivocal message on behalf of the Australian community. The Australian community expects that non-citizens coming to Australia should be of good character. To discharge this expectation, the government must be able to act quickly and decisively, wherever necessary, to remove non-citizens who are not of good character.'

3.80 This statement could be read as applying to people who had come, or intended to come, to Australia as adults and who had demonstrated through their behaviour that they were not of good character. It is unlikely that those reading the statement would assume that it referred primarily to people whose parents had brought them as babies or young children to settle in Australia.

50. In consequence, the Ombudsman made the following recommendation:
Recommendation 7:
That DIMA review the application of ss 200–201 and s 501 with a view to providing advice to government on whether s 501 should be applied to long-term permanent residents. In particular, the review could examine whether it would be appropriate to raise the threshold for cancellation under s 501 in relation to permanent residents. One option that should be considered by DIMA in that review is whether visa holders who came to Australia as minors and have lived here for more than ten years before committing an offence should not be considered for cancellation under s 501 unless either:
the severity of the offences committed is so grave as to warrant consideration for visa cancellation, or
the threat to the Australian community is exceptional and regarded as sufficiently serious to warrant consideration for visa cancellation.

51. Long term residents who arrived in Australia as young children are products of Australian society. Moore and Gyles JJ observed that Nystrom's conduct was *no worse than many of his age who have also lived as members of the Australian community all their lives but who happen to be citizens. Apart from the dire punishment of the individual involved, it presumes that Australia can export its problems elsewhere*. (para 29) As Foster points out, our society takes responsibility for the behaviour of the individuals produced by our community. Criminal behaviour is punished not by banishment but by imprisonment, followed by eventual reintegration into society. (Foster (2009) pg 500) Moore and Gyles JJ were critical that Australia would presume to export our problems elsewhere. (para 29)

Human rights impacts and obligations under international law

52. Australia is a signatory to various international treaties and conventions. It is recognised that the obligations under these international instruments do not form part of our domestic law unless they are directly implemented by statute.

53. However, the proposed amendments in this Bill must be compatible with the human rights and freedoms declared by the instruments set out in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. These international instruments include:

- the International Covenant on Civil and Political Rights (ICCPR)
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- the Convention on the Rights of the Child (CROC)

54. Although these instruments have not been incorporated into Australian law, the High Court has found that *ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention: (*Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh (1995) HCA 20; (1995) 128 ALR 353; (1995) 69 ALJR 423; (1995) EOC 92-696 (extract); (1995) 183 CLR 273 (7 April 1995) per Mason CJ and Deane J, para 34)

55. It is our submission that some of the proposed amendments are not compatible with the human rights and freedoms declared by these instruments.

The impact on long term residents

Article 7
No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

56. It is arguable that expulsion of long term residents itself may breach Article 7. The United States District Court has held that removal 'inflicted unusually cruel and harsh punishment on the non-citizen in cases where it caused "a probable life term of separation from his home, family, job and adopted country". (Sara A Rodriguez, 'Exile and the Not-So-Lawful Permanent Resident: Does International Law Require a Humanitarian Waiver of Deportation for the Non-Citizen Convicted of Certain Crimes?' (2005) 20 Georgetown Immigration Law Journal 483, 501–2, quoting Beharry, 183 F Supp 2d 584, 602 (Weinstein J) (EDNY, 2002)).

57. Article 12(4) of the ICCPR provides that '(n)o one shall be arbitrarily deprived of the right to enter his own country.' Foster points out: *It has been established that there is a cogent argument that long-term residents, particularly those who arrived as children, have made Australia their 'own' for the purposes of international law.* (Foster (2008) pg 526)
It is of particular concern that where minor Australian citizen children are dependent upon the visa holder, cancellation of that visa can mean the children must leave Australia as well. They are effectively removed in spite of their status as Australian citizens.

The impact on children and family

58. The law as it currently stands, and the proposed amendments, reflect the need to protect the Australian community. Policy allows other considerations to be taken into account in exercising the discretion to cancel the visa of a non-citizen who does not satisfy the decision-maker that they pass the Character Test. (Direction No. 55 under Section 499, Visa refusal and cancellation under s501)

59. In our submission, the legislation relating to visa cancellation should reflect not only the need to protect the Australian community but also the other primary considerations currently recognised in Part A of Direction No 55. Otherwise there is a risk of breaching Articles of the ICCPR relating to the interests of children and the family.

60. The mandatory cancellation envisaged by the proposed s501(3A) does not allow for any other considerations to be taken into account.

Article 3
In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 23
The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 9
States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

61. In Winata and Li v Australia, CCPR/C/72/D/930/2000, 16 August 2001 the Human Rights Committee considered a complaint from a 13 year old Australian citizen and his parents who were to be deported from Australia. The Committee concluded that the removal would constitute arbitrary interference with the family, contrary to article 17 and article 23 in respect to the parents and child and a violation of article 24 in relation to the child Barry Winata due to a failure to provide him with the necessary measures of protection as a minor. It is incumbent on the State party to demonstrate additional factors justifying the removal of both parents that go beyond a simple enforcement of its immigration law in order to avoid a characterisation of arbitrariness. (para 7.3).

62. In 2003 the Human Rights Commission recommended that non-citizens should only be expelled from Australia when there is a greater interest at stake than that of protecting the family. (Human Rights Commission (1983) Report No 4 – Human Rights and the Deportation of Convicted Aliens and Immigrants, para 29)

63. In a dissenting judgement, Murphy J stated: 'Breaking-up families is generally regarded as inhumane and uncivilized. It was one of the worst aspects of slavery, and is a horrifying feature of literature about the American slave colonies and States, and the Queensland blackbirding and forced labour of "kanakas"'. (Pochi (1982) 151 CLR 101, 115) His Honour found that in this case, where an alien migrant had a spouse and children living with him in Australia, exercising the power so as to break-up the family would be 'inhumane and uncivilized' concluding that it was an improper exercise of power to order the deportation in circumstances which would either break-up the family or compel the Australian wife and children to leave Australia'. (pg 116)

Mandatory Cancellation and the ICCPR

64. In our submission, the proposed requirement for mandatory cancellation where the Minister is satisfied that the person does not pass the character test and the person is in prison may breach Article12 of the ICCPR.
Article 12:

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

65. The proposed process aims to ensure that a visa holder who does not pass the Character Test is not released from custody prior to the visa being cancelled. An alternative to the mandatory regime is for the department to ensure that cancellation proceedings start within short time of the sentence commencing, allowing the visa holder to respond to notice of cancellation while still in custody.

66. Otherwise, in our submission, the process may result in a visa holder who is due for release long before the visa status is resolved spending additional time in prison or immigration detention. It is arguable that this would be punitive and in some circumstances, arbitrary. The process of seeking a revocation, applying for merits review of a refusal, or judicial review where appropriate would be a lengthy process, during which the ex-visa holder would remain either in custody or immigration detention.

Article 14(7)

(n)o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

67. We note that the High Court has held that the question is not ultimately whether the effect of the law is punitive, but rather whether one of the purposes of the law is punitive, as explained by McHugh J in Re Woolley; Ex parte Applicants M276/2003 ('Re Woolley'). In the context of deportation, Foster has argued that a convincing argument can be made that the effect of the law is indeed punitive, thus giving rise to the 'rebuttable inference' that the purpose of the law is to inflict punishment (Pg 532). Whether this is correct or not, there is certainly an argument to be made that causing people to spend indeterminate additional periods in detention is punitive. It is also our submission that this additional period of detention may amount to arbitrary detention. We envisage three possibilities: one where the ex-visa holder is exhausting his legal remedies before being removed, the second where a decision has been made that the ex-visa holder cannot be removed due to Australia's non-refoulement obligations, and the third where there is a delay in removing the ex-visa holder for other reasons.

68. Article 9 was considered by the Commissioner for Human Rights in the case of Mr XY where his indefinite detention pending deportation was found to be arbitrary. (No. 22 - Report of an inquiry into a complaint by Mr XY concerning his continuing detention despite having completed his criminal sentence (2002))

Article 9

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

69. The Commissioner stated reasons for his preliminary finding:
5.12 ... I note that the respondent has not provided any objective evidence regarding the complainant's likelihood of recidivism or an assessment of the complainant's rehabilitation in prison. In any case, I consider that the complainant has served his custodial sentence, and like anyone else, should be released. The fact that the respondent considers that there is a

possibility the complainant may re-offend, is not a legitimate basis for continuing to keep him in custody.

5.13 The Department's primary consideration has been the type of crimes committed by the complainant and the possibility of his presenting himself for deportation if released, as well as the Department's view on his suitability for detention in Immigration Detention Centres. I consider that the complainant continues to be punished for crimes for which he has completed the sentence imposed upon him by the criminal courts.

5.14 I am of the preliminary view that there is no realistic indication that the complainant will be deported soon and thereby released and that his continued detention in Albany Regional Prison is unjust and unreasonable.

70. The Commissioner referred to a number of cases: *In A v Australia (9) the Human Rights Committee stated that detention was arbitrary if it was "not necessary in all the circumstances of the case" and if it was not a proportionate means to achieving a legitimate aim. They further stated in Spakmo v Norway (10) that to comply with article 9, an action "must not only be lawful, but also reasonable and necessary in all the circumstances."*

The Human Rights Committee in Van Alphen v The Netherlands (11) confirmed that there are various factors which may render an otherwise lawful detention arbitrary. It said that: "arbitrariness is not to be equated with "against the law" but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime."

Furthermore, the jurisprudence of the Human Rights Committee has established that even if the initial detention is not arbitrary, a subsequent period of detention may become arbitrary; for example, when one has regard to the length of the detention. (12)

71. The EM states that non-refoulement obligations are considered as part of a decision to cancel a visa under character grounds. This begs the question, as a decision not to cancel won't be made on this basis. Instead, the ex-visa holder may remain in indefinite detention.

Cancellation without notice and denial of procedural fairness

72. It is proposed to increase the Minister's power to make a personal decision to cancel a visa, thus depriving the non-citizen of the right to merits review. Judicial review is only available on limited grounds due to the operation of the Privative Clause regime in Part 8 of the Act.

73. It is also proposed that the Minister may over-ride a decision of a delegate or the AAT to revoke a mandatory cancellation under a new s133C(5). The rules of natural justice would not apply to such a decision, nor would it be reviewable on the merits.

Article 2(3)

Under Article 2(3) Australia has agreed:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; and
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy …

74. The remedies provided for by merits review lessen in significance where the Tribunal's decision can be substituted by that of the Minister. In addition, the proposed new s501(5) provides that the rules of natural justice, and the Code of Procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under new subsection 501(3A).

Other potential breaches flowing from the proposed s501(6)(b)

75. The ex-visa holder will be ineligible for a Bridging Visa and must be detained under s189. It is arguable that this is a potential breach of Article 9, given that the ex-visa holder may have committed no crime and only be an unlawful non-citizen due to administrative actions taken under the new s501(6)(b).

76. The EM states: *The intention is that membership of the group or organisation alone is sufficient to cause a person to not pass the character test. Further, a reasonable suspicion of such membership or association is sufficient to not pass the character test. There is no requirement that there be a demonstration of special knowledge of, or participation in, the suspected criminal conduct by the visa applicant or visa holder.*

77. This includes people who have not been convicted of any offence, and who have associated with people who have not been convicted of an offence. In our submission, this is a breach of a number of Articles of the International Covenant on Civil and Political Rights (ICCPR).

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.'

Article 22

Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests

Conclusion

78. In conclusion, the authors of this submission **recommend** that the Bill as it stands not be passed by the Senate, as the need for such major changes has not been demonstrated, while the large expansion of government powers combined with breaches of international human rights obligations and the removal of rights of visa holders provide a real risk of significant injustices occurring.