28 October 2014

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email only: legcon.sen@aph.gov.au

Attention: Committee Secretary

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

We thank you for the opportunity to contribute submissions to the Senate Legal and Constitutional Affairs Legislations Committee in relation to its inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014 ("the Bill").

As you may be aware Southern Communities Advocacy Legal and Education Services ("SCALES") is a Community Legal Centre working predominately in the Rockingham Kwinana region south west of Perth, Western Australia. It has a strong track record in a human rights based approach to legal practice. Murdoch School of Law in collaboration with SCALES runs a clinical legal education program in which students are able to work alongside SCALES' legal practitioners and migration agents to assist clients and contribute to law reform.

SCALES has a number of concerns about the effect of the amendments raised in the Bill and our submissions **enclosed** outline these concerns in detail.

Please do not hesitate to contact us should you require any further information.

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

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## SCALES and the Murdoch Clinical Legal Education Program

Southern Communities Advocacy Legal and Education Services ("**SCALES**") is a Community Legal Centre working predominately in the Rockingham Kwinana region south west of Perth, Western Australia. It has a strong track record in a human rights based approach to legal practice. This approach and the work that SCALES does has been recognized in a number of awards and commendations including a National Australian Human Rights Award.[1]

Murdoch School of Law in collaboration with SCALES runs a clinical legal education program in which students are able to work alongside SCALES' legal practitioners and migration agents to assist clients and contribute to law reform. This clinical legal education program has also received many accolades, including a National Citation from the Australian Teaching and Learning Council. This submission was prepared by the students from Murdoch's clinical legal education program, SCALES and Associate Professor Mary Anne Kenny.

## Introduction

SCALES welcomes the opportunity to make submissions in relation to the proposed amendments to the *Migration Act 1958* ("**the Act**") and the relevant character provisions as proposed by the *Migration Amendment (Character and General Visa Cancellation) Bill 2014* ("**the Bill**").

SCALES understands the necessity of all visa applications and visa holders being subject to the *Character Test* and relevant provisions, however we would argue the proposed amendments (as discussed below) are unduly broad in their scope and have the potential to limit genuine refugees and asylum seekers access to protection visas and asylum in Australia.

[1] SCALES won the law category of the Australian Human Rights Commission's awards in 2002.

The description of the Bill states it is "broadening the power to refuse to grant or to cancel a visa on character grounds; allowing the Minister to require a state or territory agency to disclose personal information relevant to the *Character Test*; providing for lower thresholds for cancelling temporary visas; strengthening ministerial decision making powers in relation to general visa cancellation provisions; and introducing a mandatory visa cancellation for certain non-citizens who do not pass the *Character Test*".[2]

We submit the proposed amendments to s 116 of the Act raise concerns that they could lead to a cancellation of a visa in breach of our obligations under *1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol,* and Australia is a party to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and *the International Covenant on Civil and Political Rights and its Second Optional Protocol*[3].

In response to the terms of reference, this submission will cover the following issues:

i. the insertion of a new mandatory ground for cancellation of a visa without notice;
ii. the introduction of a new limb of the character test under s 501(6);
iii. the narrowing of the substantial criminal record test under s 501(7);
iv. the discretionary scope of what is defined as having an *association* with a particular group and the mere test of suspicion;
v. the issue of *revocation* of a decision to cancel a visa, its reversed onus of proof and the right to review the decision that decides against revocation of the cancellation; and
vi. cancellation under subsection 116.

[2] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) 2
[3] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171

## 1. Item 8: Schedule 1 - After subsection 501(3)

Schedule 1, item 8 of the Bill proposed to insert new subsections 501(3A) and 501(3B) in Part 9 of the Act.[4] These subsections strengthen the Minister's powers to refuse to grant or cancel a visa on character grounds by:[5]

> [I]nserting a new mandatory ground for the cancellation without notice of a visa under section 501 of the Migration Act that will apply where:
>
> - the person is serving a full-time sentence of imprisonment for an offence against the law of the Commonwealth, a State or a Territory; and
> - the Minister is satisfied that the person has a substantial criminal record (and so does not pass the character test) because they have been sentenced to death, sentenced to imprisonment for life, or sentenced to a term of imprisonment of 12 months or more.

The Explanatory Memorandum for the Bill states this amendment was proposed with the intention of ensuring that the non-citizen, who objectively does not pass the character test, "remains in criminal detention, or if released from criminal custody, in immigration detention while revocation is pursued."[6]

We submit that this amendment is unnecessary given that in practice, the Notice of Intention to Cancel ('**NOIC'**) is given while the non-citizen is still serving their sentence in criminal detention. For example, in a briefing note written by National Legal Aid to the Deputy Secretary of Civil Justice & Legal Services Group, they stated that:[7]

> There has been a significant increase in the number of NOICs issued over the last 4 years in particular. For example, Legal Aid NSW receives an average of about 10 requests for assistance per month, *with 99% of these requests coming from people in prison*.

Furthermore, in the 2011 Audit Report of the Department of Immigration and Citizenship ('**DIAC'**), the Australian National Audit Office found that, between July 2009 and June 2010, 85% of visa holder cases

[4] Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) Sch 1, [8]
[5] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) 2
[6] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) [34].
[7] National Legal Aid, Submission to the Attorney-General's Department, Civil Justice & Legal Services Group AGD, *NLA Submission to Visa Cancellation – Implications for Access to Justice,* 12 September 2012, 2 (emphasis added).

were finalised prior to the earliest date of release from prison and 100% of visa holder cases were finalised within 180 days of issuing the NOIC.[8] This indicates that such an amendment proposed by schedule 1, item 8 of the Bill is unnecessary.

## 2. Item 10: Schedule 1 – Paragraph 501(6)(b)

The proposed amendments include a new subsection 501(6)(b), and it is our view that this subsection seeks to broaden the established definition of association with an unfairly wide scope and so allow the Minster broader discretion to refuse to grant a visa on grounds that the person does not satisfy the Minister that the person passes the *Character Test*.[9]

The Explanatory Memorandum discusses that *association* is an additional ground by which a person does not pass the *Character Test* if 'the Minister reasonably suspects that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and the group, organisation or person has been or is involved in criminal conduct.'[10]

We would submit that use of the word **'may'** already connotes that the power is discretionary to the Minister, it is a special and personal power, that only he can exercise.[11] In support of our submissions we rely on the authority of *Minister for Immigration & Citizenship v Haneef*.[12] This case was an appeal by the Minister against the decision of Spencer J to set aside the Minister's decision to cancel Dr Haneef's visa on character grounds.[13]

> "On 2 July 2007 Dr Haneef, who was working as a doctor in Queensland, was arrested by the Australian Federal Police following the attempted terrorist bombings in London on 29 June 2007. After being detained and questioned on 14 July, Dr Haneef was charged with having intentionally provided resources (a SIM card) to a terrorist organisation which included his second cousins, Dr Sabeel Ahmed and Dr Kafeel Ahmed.

[8] Australian National Audit Office, *Administering the Character Requirements of the Migration Act 1958* (23 June 2011) <http://www.anao.gov.au/~/media/Uploads/Audit%20Reports/2010%2011/201011%20Audit%20Report%20No%2055.pdf> 82-83.
[9] Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) Sch 1, [10]
[10] Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) Sch 1, [10]
[11] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) [38]-[41]
[12] *Minister for Immigration & Citizenship v Haneef* [2007] FCAFC 203
[13] Ibid

> On 16 July 2007, Dr Haneef was granted bail by a Queensland magistrate. Immediately after bail was granted, the Minister cancelled his visa pursuant to s 501(3) of the *Migration Act 1956* (Cth) on the grounds that Dr Haneef did not pass the '*Character Test*' because he had had or had 'had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct', namely his cousins. The Full Federal Court unanimously upheld the decision of Spencer J that the Minister had fallen into jurisdictional error by misinterpreting the *Character Test* and applying a test that was too wide and therefore incorrect."[14] The charges against Dr Haneef were dismissed due to evidentiary issues, but Dr Haneef's visa was still cancelled and he was detained.

We submit that the proposed drafting of the amendment, and the test of *reasonably suspected* coupled with the discretionary power of the word may, is too broad and lowers the evidentiary threshold by which an applicant can be found to have or have had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been of is involved in criminal conduct.[15] The decision in *Haneef*[16] found that *association* as referenced in section 501(6) (b) of the Act must mean an *association* that is criminal in nature and not an innocent association.[17] An innocent association would not constitute bad character and would not give rise to cancellation of a visa for failing the *Character Test*.[18]

We are gravely concerned the proposed amendment may be too broad. It could lead to an interpretation that an association regardless of how innocent it was, would permit cancellation of a visa, for reasons that association to an individual of, or the group or organisation alone is sufficient to cause a person to not pass the *Character Test*. In the case of *FVHQ v MIAC*[19] the applicant faced the issue of association as he had previously worked for the KhAD, the former Afghan security service. The applicant was only a security guard in the service, and this was held as an innocent association and the applicant was not deemed to have failed the *Character Test*. Under the proposed amendments if a case with analogous facts was

[14] Australian Human Rights Commission, *Human Rights Law Bulletin Volume* 22 (December 2007 – March 2008) Australian Human Rights Commission<https://www.humanrights.gov.au/human-rights-law-bulletin-volume-22>; Law Council of Australia, *Mohamed Haneef* Case (2008) Law Council Of Australia <http://www.lawcouncil.asn.au/lawcouncil/index.php/10-divisions/145-mohamed-haneef-case>

[15] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth)

[16] *Minister for Immigration & Citizenship v Haneef* [2007] FCAFC 203

[17] Ibid

[18] Ibid

[19] *FVHQ v MIAC* [2010] AATA 1032

considered, the proposed amendments to the Act and the intention of the amendments to allow cancellation of the visa or refusal of application for a visa on character grounds for reason of association[20] would succeed and the applicant would fail the *Character Test* based on his association and the grant of a visa would be refused.

That the test of "reasonable suspicion" of such membership or association is sufficient to not pass the *Character Test* is deeply concerning coupled with the proposal that there will be no requirement that there be a demonstration of special knowledge or, of participation in, the suspected criminal conduct by the visa applicant or visa holder.[21]

We submit the findings of Spencer J held that the association must go beyond a familial connection. We submit that the scope of this provision is too broad and can include for example family ties, past relationships or former acquaintances to be deemed as associations. Associations of these types prima facie are innocent; a visa should not be cancelled or refused on the assumed criminality of a person's associations when there is no evidence of their assumed individual criminal conduct. As above, the individual will not be required to adduce evidence of the involvement, and we submit this should not give rise to a cancellation of visa of refusal to grant a visa simply due to satisfying the low evidentiary burden.

The lowered evidentiary burned of this subsection puts undue focus on a person's conduct and the reasonably suspected criminality of it, and this is contrary to an individual's right to freedom of association and expression.

In support of this submission we refer to the submissions made by the Law Council of Australia to the Clarke Inquiry into the case of Dr Mohamed Haneef;

> "No public purpose is served by vesting in the Minister an unfettered discretion to cancel a visa based on an association that may have ended many years ago, was only fleeting, only reflected a familial connection, or was the product of a purely professional relationship. Broad, unfettered

[20] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) [38]-[41]
[21] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) [41]

> discretions of that kind encourage sloppy research and lazy decision making and for that reason can never serve to protect the Australian community."[22]

## 3. Item 12: Schedule 1 - After paragraph 501(6)(d)

The Bill also proposed to amend s 501(6) of the Act by including subsection 501(6) (e), which provides that:[23]

> [A] person does not 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.

Furthermore, the Bill proposed that if someone were fail the character test under the new s 501(6) (e), and they are currently serving a sentence of imprisonment then they **must** have their visa cancelled by the Minister in accordance with the new s 501(3A) discussed above.[24]

There is no definition of the term "sexually based offences involving a child". This is extremely concerning. There are a range of state based offences and Commonwealth offences which possibly fall into this category. The Explanatory Memorandum of the Bill states that it may include "offences such as child sexual abuse, indecent dealings with a child, possession or distribution of child pornography, internet grooming, and other non-contact carriage services offences."[25] However this definition is not exhaustive and may cover a range of offences that do not coincide with the objectives of the Act. This means that it includes a range of offences which can range in their degree of seriousness.

There is no explanation provided by the Minister in his Second Reading Speech nor in the Explanatory Memorandum for the inclusion of a reference to these kinds of offences.

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[22] The Hon Mr Clarke QC, *Clarke Inquiry into the case of Dr Mohamed Haneef* (16 May 2008) Law Council of Australia < http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/LawCouncilSubmissiontoHaneefInquiry-Final.pdf>, 5

[23] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) [48] (emphasis included).

[24] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) [56].

[25] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) [49].

By way of example of the problem with such a definition is in relation to the activity known as "sexting". Sexting is the activity, commonly practiced by young people, of exchanging explicit images or posting such material online for the purpose of making a joke or to bully or harass another person.[26] Under the current Australian laws, sexting may give rise to child-pornography related offences. There have been cases in Australia whereby children between the age of 13 and 17 are prosecuted for sending or receiving explicit photos or videos of children under 18 years old.[27] For example, in July 2011, two 17-year-old teenagers were charged with child pornography offences and placed on the sex offender register for being caught with "raunchy images of girls" sent to them via "sexting".[28] The Law Reform Commission of Western Australia Australia argued in their final report on the sex offender registration scheme established by the *Community Protection (Offender Reporting) Act 2004* (WA) ('**CPOR Act**'), that although sexting could be done for sinister reasons, such conduct does not necessarily amount to "sexually deviant or sexually abusive behaviour".[29] We agree with the Commission's argument and further submit that an unclear definition of the term "sexually based offences involving a child" may cause unnecessary harm. For example, a 17-year-old non-citizen living in Australia who was sent a nude image by their 15-year-old boyfriend or girlfriend may be convicted of child pornography offences even though the their friend willingly took the photograph themselves and texted it.

As such, we argue that by referring to a specific class of offences without clearly defining the scope may lead to a cancellation of a visa removed for offences where the level of seriousness falls in the lower end of the spectrum. For example, continuing from our previous hypothetical scenario, if the 17-year-old non-citizen was found to be engaging in consensual sexual relations with a 15-year-old girlfriend/boyfriend in Australia, by definition, they would be guilty of a "sexually based offence involving a child"; as the girlfriend/boyfriend is considered to be a minor.[30] Subsequently, the young person would fail the character test under s 501(6) (e) of the Act and could be subject to cancellation proceedings.

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[26] Law Reform Commission of Western Australia, 'Community Protection (Offender Reporting) Act 2004: Final Reprort' (Final Report, Project no 101, 2012) 29.

[27] Victoria Williams, '*Sexting, adolescents and the criminal law*' (September 2012) <http://www.lrc.justice.wa.gov.au/_files/Seminar%20notes%20-%20V%20Williams.pdf> p 10-11.

[28] Nicole Brady, '*Sexting' Youths Placed on Sex Offenders Register* (24 July 2011) The Age (Victoria) <http://www.theage.com.au/victoria/sexting-youths-placed-on-sex-offenders-register-20110723-1hugu.html>.

[29] Ibid

[30] Child Family Community Australia, *Age of Consent Laws* (November 2013) Australian Institute of Family Studies <https://www3.aifs.gov.au/cfca/publications/age-consent-laws>.

In a submission to the Law Reform Commission of WA Justice Reynolds, the President of the Children's Court of Western Australia, advised the Commission that:[31]

> The Children's Court deals with young persons who have committed sex offences who have committed sex offences of various kinds, of various levels of seriousness, and committed in varying sets of circumstances. […] Whilst that conduct may well be unlawful, the particular offender and the circumstances of the particular offence may not fit the individual and the type of cases that the [CPOR Act] was intended to catch. There may be no sign at all of sexual deviancy, force, power imbalance or paedophilia.

We further submit that it is unnecessary to specify this type of offence in the Act as serious offences would already be caught by the "substantial criminal record" test found in the existing s 501(7) of the Act. Under the existing s 501(7), a person is considered to have a substantial criminal record if:[32]

- they have been sentenced to death;
- sentenced to imprisonment for life;
- sentenced to a term of imprisonment of 12 months or more;
- sentenced to 2 or more terms of imprisonment where the total of those terms is 2 years or more; or
- the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity and as a result been detained in a facility or institution.

In most cases involving such a serious offence, it is highly likely for the court to sentence the accused to a term of imprisonment of 12 months or more.[33] Therefore, we found that it is unnecessary to specify these offences when they would be easily caught by the "substantial criminal record" test found in s 501(7) of the Act.

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[31] Law Reform Commission of WA, above n 8, 107.
[32] *Migration Act 1958* (Cth) s 501(7).
[33] See *Furber v The Queen* [2008] WASCA 233 where the applicant, who resided in Australia on a long-stay business visa, was sentenced to cumulative terms of imprisonment aggregating 15 months after having been convicted of importing child pornography and attempting to export child pornography.

We understand that whether or not a person passes the character test will then depend on the sentence given by the court. However, the above statement by Justice Reynolds shows the importance of the court's discretion in determining these matters.

## 4. Item 13: Schedule 1 - Paragraph 501(7)(d)

Schedule 1, item 13 of the Bill proposed to change s 501(7)(d) of the *Migration Act 1958*, which addresses the issue of substantial criminal record.[34] The section currently states that, a person has a substantial criminal record if "the person has been sentenced to 2 or more terms of imprisonment (whether on one or more occasions), where the total of those terms is 2 years or more".[35] The Bill proposed to omit "(whether on one or more occasions), where the total of those terms is 2 years" and substitute it with the phrase: "where the total of those terms is 12 months".[36]

The Explanatory Memorandum states that this amendment was made to ensure that:[37]

> [R]epeat or serial offenders who may have been sentenced to a series of lesser terms of imprisonment for multiple offences at the lower end of the scale but which cumulatively had up to a period of 12 months or more, objectively do not pass the character test.

The Bill does not use the term **cumulative** sentence. This is an example of a cumulative sentence

> If a person is sentenced to nine months' imprisonment for the most serious charge and three months' imprisonment for a second charge to be served cumulatively, a total of 12 months will be served:
>
> Charge 1 = 9 months
>
> Charge 2 = 3 months to be served cumulatively
>
> Total effective sentence = 12 months

The way that the Bill is drafted it could be applied to **concurrent** sentences as well. This is an example of a concurrent sentence

[34] Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) Sch 1, [13].
[35] *Migration Act 1958* (Cth) s 501(7)(d).
[36] Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) Sch 1, [13].
[37] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) [59].

> If a person is sentenced to nine months' imprisonment for the most serious charge and three months' imprisonment for a second charge to be served concurrently, a total of 12 months will be served:
>
> Charge 1 = 9 months
>
> Charge 2 = 3 months to be served concurrently
>
> Total effective sentence = 9 months

This is a description of the difference between concurrent and cumulative sentences from the Sentencing Advisory Council.[38]

> ### Why Concurrency and Cumulation?
>
> When sentencing an offender for more than one offence, the court must ensure that the sentence handed down is just and appropriate given the overall criminality of the offending behaviour. This is called the totality principle.
>
> Without concurrency, offenders might face sentences that are disproportionate to the offending behaviour. Disproportionate sentences can have a crushing effect on offenders, by destroying any expectation of a useful life upon release.
>
> ### How Does the Court Decide on Concurrency and Cumulation?
>
> ….
>
> Generally, a court will order multiple sentences arising from the one incident to be served concurrently, for example when various charges arise from a single bank robbery.
>
> A court will generally order sentences arising from separate incidents, or involving multiple victims, to be served partially or wholly cumulatively. Cumulation reflects the increased criminality associated with multiple offences or victims.
>
> These sentencing practices are not absolute. In all cases, the court must weigh up the total effective sentence with the overall criminality of the offending behaviour in order to determine a fair outcome.

It is our submission that this is unduly lowering the threshold for offences that can be captured by the character test. The correct balance was as the legislation exists currently.

We fear that the consequence of a lowered threshold is that it makes it extremely easy for a non-citizen's to be subject to cancellation proceedings on the grounds of their criminal record. This is especially concerning

[38] http://www.sentencingcouncil.vic.gov.au/about-sentencing/sentencing-process/concurrency-and-cumulation

when in 2011 the Australian National Audit Office found that "DIAC's approach to identifying and processing character cases is *primarily focused on the substantial criminal record element* of the test."[39]

## 5. Item 18: Schedule 1 - After section 501C insert new section 501CA

Under the proposed subsection 501CA(1)[40] if the Minister makes a decision under section 501(3A) (*person serving sentence of imprisonment)* to cancel a visa that has been granted to a person, the person affected by the decision must be given notice and then be *invited* to give representations to the Minister why this cancellation should be revoked. We submit this proposed subsection is concerning as it shifts the onus to the applicant the subject of the original decision to apply for revocation of the decision to cancel.

The Explanatory Memorandum states[41] the subsection creates the right or an *invitation* for the person the subject of the decision to cancel to make representations to the Minister about the revocation of the original decision after being given notice, but only then is it that the Minister may choose to revoke the decision under the proposed subsection 501CA(4) and only *if* the Minster after consideration of the person's representations is satisfied the person also passes the character test, and there is not an additional or "another reason" why the original decision should not be revoked. This is a very broad discretionary power that the Minister may choose to exercise only after the applicant has provided their representations as to why the Minister should allow revocation of the original decision and if there is not some other additional ground that may mean the original decision should be revoked.[42]

## 6. Item 3: Schedule 2 - Paragraph 116(1)(a)

We submit the proposed amendments to this subsection 116(1)(a)[43] may possibly have negative impact upon any potential holders of the current Temporary Safe Haven Visa proposed Temporary Protection Visas ("TPVs") and Safe Haven Enterprise Visas ("SHEV")[44] It is our submission that this amendment not

[39] Australian National Audit Office, *AdMinistering the Character Requirements of the Migration Act 1958* (23 June 2011) <http://www.anao.gov.au/~/media/Uploads/Audit%20Reports/2010%2011/201011%20Audit%20Report%20No%2055.pdf> 68 [4.17] (emphasis added).
[40] Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) Sch 1, [18]
[41] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) [88]-[96]
[42] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) [93]
[43] Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) Sch 2, [3]
[44] These visas are part of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

be supported or at the least amended to ensure it does not apply to any current or proposed protection or safe haven visas.

The cancellation powers in s 116 apply to holders of temporary visas. The Explanatory Memorandum states that amongst other powers, the amendments to subsection 116(1)(a) will enable the Minister to cancel a visa if the Minister is satisfied that the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or no longer exists.[45] The power contained in s 116 gives rise to a discretionary power to cancel.

A person who is the holder of a TPV or SHEV potentially could have their visa cancelled under this section if, for example, there was a change in the country situation in their home country. This may occur if the person had claimed they faced persecution at the hands of a particular government and that government loses power.

A person who has been granted a TPV or SHEV has been found to be a person to whom Australia owes non-refoulement obligations. They have either been found to be a refugee or owed complementary protection. A cancellation of their visa on the basis of a change of fact is problematic.

These individuals will have their cases re-examined at the end of the period of their temporary visas to assess whether or not they still qualify for the visas. It is at that time an appropriate examination of their claims can take place. A mere change in the country of origin does not mean a person would cease to be a refugee or should have another visa refused.

At international law a person does not simply cease to be a refugee because there has been a change in the situation of their country of origin. There is a specific provision in the Refugee Convention that provides

[45] Explanatory Memorandum, Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth) Sch 2, [6]-[10]

for the cessation of refugee status.[46] The cessation provisions contained in Article 1C (5) and (6) of the Refugees Convention.[47] are as follows;

> This Convention shall cease to apply to any person falling under the terms of section A if:
> (5) He can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; …
> (6) Being a person who has no nationality, he is, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, able to return to the country of his former habitual residence; ...[48]

Interpretation of Article 1C(5) has been developed in the UNHCR Handbook,[49] and the conclusions of the Executive Committee of the High Commissioner's Programme ("ExCom"), especially ExCom Conclusion 69.[50] Ex Com Conclusion 69, suggests the change must be "fundamental, stable, and durable"[51]

The UNHCR Handbook discussion of Article 1C(5) is cursory:

> *"Circumstances" refer to fundamental changes in the country, which can be assumed to remove the basis of the fear of persecution.* ***A mere possibly transitory change in the facts surrounding the individual refugee's fear, which does not entail such major changes of circumstances, is not sufficient to make this clause applicable****. A refugee's status should not in principle be subject to frequent review to the detriment of his sense of security, which international protection is intended to provide."*

[46] It is acknowledged that the re-examination of a TPV at the end of a period does not involve a consideration of cessation but is rather a reconsideration of their protection claims as per the High Court decision in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53 (15 November 2006)

[47] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) Art 1C(5), (6)
[48] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) Art 1C(5), (6)
[49] *HANDBOOK ON PROCEDURES AND CRITERIA, at para. 135*
[50] *Executive Committee of the High Commissioner's Programme,* Conclusion No. 69 (AfzaliLIII) on Cessation of Status (1992) *(visited Mar. 16, 1999)*
[51] Id at para. 19

Not only must there be fundamental change, but it must be stable (effective) and durable. The Executive Committee notes that "a situation which has changed, but which also continues to change or shows signs of volatility is not by definition stable, and cannot be described as durable."[52]

It is our submission that were the terms of this amendment to apply to temporary visas issued to those found to be refugees then cancellation of their visas on the basis of a change of circumstances or fact in whole or in part could lead to the cancellation of a visa that violates these principles. While the cancellation process is one that is a discretionary process and an individual's claims for protection could be considered as part of that process it is a clearly inappropriate mechanism to be used for these visas and they should be excluded.

It is also concerning to note that the proposed s 133C now allows the Minister to personally cancel visas under s 116 and will not allow a person to seek merits review of such a decision.

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[52] para. 21