New South Wales
Council for Civil Liberties

NSWCCL SUBMISSION

MIGRATION AMENDMENT (CHARACTER CANCELLATION CONSEQUENTIAL PROVISIONS) BILL 2016

4 March 2016

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About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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NSW CCL opposes this Bill.

This Bill is expressed to contain consequential provisions needed to ensure the visa cancellation powers granted to the Minister under the Migration Amendment (Character and General Visa Cancellation) Act 2014 operate consistently.

We do not agree in principle with the character grounds for visa cancellation, which have been conferred on the Minister. Our reasons for this stance are set out in our submission dated 28 October 2014 to the Legal and Constitutional Affairs Committee of the Australian Senate concerning the Migration Amendment (Character and Visa Cancellation Bill) 2014. In brief:

- The procedure for applying the character test should not rest with the Minister and should be given to an independent body
- The rules of natural justice and procedural fairness should apply
- Appeals should be allowed on the merits of the case
- The character test should only apply to convictions for crimes which are regarded as serious crimes in Australia
- The option of denying visas on the character ground should not apply where a person has lived in Australia for an extended period of time

This Bill compounds the draconian visa cancellation provisions, which the Government has been pursuing. Visa cancellation is drastic punitive action against an individual. It should only be used in the most serious cases.

Visa cancellation can result in permanent exclusion from Australia. In circumstances where a visa is cancelled and a person cannot be deported to a third country, the effect is indefinite detention.

These drastic consequences can be triggered by:

- The Minister forming a view that there is *any* risk (we assume a trivial risk would be excluded as a matter of interpretation) that a person would engage in criminal conduct, harass, molest, intimidate or stalk another person in Australia
- The Minister reasonably suspecting that a person has an association with a group or person involved in criminal conduct, however this provides an extremely broad executive discretion; “association” is not defined
- A person being *charged* with serious crimes such as those relating to genocide, war crimes and crimes relating to torture or slavery (however no conviction is required and in countries which are theatres of war, there have been many cases in the past of spurious charges being brought)
- An adverse security assessment from ASIO. The operation of these assessments and the plight of those held effectively in indefinite detention has been the cause of much criticism. Extending the provisions of the Migration Act in this way is unwarranted.

According to Department of Immigration statistics of January 2016, a record of 580 people had their visas cancelled on character grounds. The number of cancellations has been rising because the Minister’s powers to cancel visas have been expanded. This Bill envisages a further expansion of these powers, which we believe is unwarranted.

We oppose the Bill as a further extension of visa cancellation powers, which we argued against in our submission on the Migration Amendment (Character and Visa Cancellation Bill) 2014. We note that similar arguments have been raised in submissions on the Migration and Maritime Powers Amendment Bill 2015. Our preferred position is that the visa cancellation powers currently in force are amended in accordance with our earlier submission.

In relation to specific sections of this Bill:

Amendments to **Section 5C Character Concern** - We oppose the further expansion of circumstances in which disclosure of personal information by the Department of Immigration and Border Protection (*DIBP*) is a permissible disclosure. At the very least, the Privacy Commissioner should be asked to consider the Bill.

Inclusion of Section 501BA in the provision (section 193) which means that a person need not be informed of time limits on application for a visa – a person should not be denied a fundamental aspect of their right to procedural fairness. It would not be onerous on the DIBP to provide notice of the relevant time limits.

Amendments to **Section 196(4),** which have the effect of extending the processes by which a person can be held in indefinite mandatory detention. These include the Minister overriding the AAT and determining that a visa holder fails the character test. Legislation which can result in indefinite mandatory detention is contrary to fundamental principles of democratic societies.

Section 22 Application of amendments – the practical effect of certain provisions means that the Bill can have retrospective operation. We oppose retrospectivity as a matter of principle.

This submission was prepared by Therese Cochrane and Dr. Martin Bibby PhD on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the Senate Legal and Constitutional Affairs Legislation Committee.

Yours sincerely,

Therese Cochrane
Secretary
NSW Council for Civil Liberties

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