

28 October 2014

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

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

Due date for submissions: 28 October 2014

Dear Committee Secretary

The Migration Amendment (Character and General Visa Cancellation) Bill 2014

Submission by the Refugee Advice & Casework Service (Aust) Inc.

The Refugee Advice & Casework Service (**RACS**) is a community legal centre that provides free legal advice and assistance to people seeking refugee status in Australia. It is a specialised refugee legal centre and has been assisting asylum-seekers on a not-for-profit basis since 1988.

RACS would like to make comments in relation to a number of proposals contained in the *Migration Amendment (Character and General Visa Cancellation) Bill 2014* (the **Bill**) that are relevant to our service, and particularly as they affect asylum seekers in Australia.

A summary of our comments and position is also attached at the end of this submission.

1. Introduction

Visa cancellation and refusal of visa applications on character grounds have especially serious consequences for people to whom Australia has protection obligations because visa cancellation or refusal can result in indefinite detention of the person. Even where a person's visa is cancelled or refused, Australia cannot return a person to their home country if they would face persecution or significant harm.

RACS supports a visa cancellation and character assessment system which protects the Australian community from harm as a result of criminal conduct. However, in order to uphold the integrity of this system, the system must have adequate procedural safeguards to ensure that decisions are fair and just, and that individuals are not unfairly or arbitrarily detained for the rest of their lives.

Adequate procedural safeguards might include:

- transparency and consistency in the decision-making process, and limiting the role of unfettered discretionary powers;
- procedural fairness requirements, including giving notice to individuals of the grounds upon which adverse decisions are likely to be made to enable a meaningful response to be provided; and
- a system of independent review, rather than decisions being subject to absolute Ministerial discretion.

RACS believes that the existing system of visa cancellation and refusal on character grounds does not contain adequate procedural safeguards, and the amendments in this Bill further reduce these safeguards.

2. “Reasonable suspicion” of involvement in criminal conduct or “association” with persons involved in criminal conduct

The Bill amends section 501 of the *Migration Act 1958* (Cth) to broaden the grounds on which a person is deemed not to pass the character test. Additional grounds will include:

- The Minister “reasonably suspects” that the person has been or is a member of a group or organisation, or has an association with a group or person that has been or is involved in criminal conduct;¹
- The Minister “reasonably suspects” that the person has had involvement in people smuggling, trafficking in persons, genocide and other crimes against humanity, whether or not the person has been convicted of an offence.²

RACS considers “reasonable suspicion” is an unacceptably low standard, because it does not require the Minister to engage in any meaningful assessment of circumstances or evidence relating to the alleged conduct. There are not adequate procedural safeguards to ensure that situations where a person may be mistakenly or falsely accused or suspected of criminal conduct are properly considered and subject to meaningful independent review.

RACS believes that the standard should be raised to one of “reasonable belief” to require the Minister to have evidence for believing that a person has engaged in, or been associated with groups or persons who have engaged in, criminal conduct. Such a standard would be justified in light of the serious consequences of cancellation for a visa holder. The standard

¹ Proposed s 6(b).

² Proposed s 6(ba).

of “reasonable belief” would bring this definition into harmony with other provisions of the Act.

RACS also believes that to ensure consistency and accountability in decision-making, the Minister should be required to provide publically accessible guidelines as to how these provisions are applied.

RACS also holds serious concerns about the creation of a ground for failing the character test based on a person’s “association” with a group or person involved in criminal conduct. This term is incredibly broad and could include people who are related to another person in some way but do not have any involvement in or connection to the criminal conduct. RACS believes that this term should be redefined to only capture individuals who are the subject of a judicial finding of being guilty of criminal conduct.

3. Lowering the threshold of “significant risk” to “risk” when considering whether a person would engage in certain conduct

The Bill proposes to lower “significant risk” to “risk” for section 501(6)(d), which refers to the degree of risk that the person would engage in criminal conduct, harass or stalk others, vilify the community, “incite discord” or “represent a danger”.

The amendments potentially attach very significant consequences (including deportation and indefinite detention) to an assessment of a “risk” that a person may engage in certain conduct in the future. RACS believes that this threshold is disproportionately low given the potential seriousness of the consequences and the inherently speculative nature of the decision making process. Furthermore, there is no guarantee that a decision to cancel a visa based on these grounds would be subject to meaningful external review, given the Minister’s personal powers.

RACS currently has extensive experience in advising our clients who are required to sign a Code of Behaviour as a condition of their bridging visa of what is meant by criminal conduct.

Asylum seekers who arrived by boat have been required to sign and comply with a Code of Behaviour as a condition of holding a bridging visa since 14 December 2013³. The condition (PIC 4022) applies for all applicants for BVEs who are over 18 and who hold or previously held a BVE granted by the Minister under s 195A. Anyone who has had a BVE cancelled due to criminal conduct or a breach of the code of behaviour is prevented from applying for a further bridging visa.

Criminal conduct is very broad under current condition 8564 for RACS clients holding Bridging Visa Es. It can include being suspected or accused of any criminal activity.

It is not required that a person be charged, or convicted of an offence. Criminal conduct currently can include driving offences, drinking alcohol in a public place, being too loud in public, failing to have a bus or train ticket, or parking a vehicle in the wrong spot.

³ <http://www.comlaw.gov.au/Details/F2013L02102/Download>.

RACS clients who are required to sign a Code of Behaviour must already cooperate with all lawful instructions given to them by the police and government officials, and must never lie to government officials. Suppose a police officer asks an asylum seeker something personal. Suppose they ask something embarrassing. Suppose a rogue police officer tells an asylum seeker to do something unreasonable. They must obey, or their bridging visa may be cancelled.

A Bridging Visa may be cancelled for infringing a road law, for parking for over two hours in a two hour zone, for not moving on quickly enough after a police officer tells you to, for not cooperating quickly enough with police who try to search you, for not opening up about private personal things with a culturally insensitive government official.

On the current Code of Behaviour asylum seekers and refugees must not engage in behaviour that is “inconsiderate” activities. They can’t engage in “anti-social” or “disruptive” activities. They can’t be “disrespectful”. To harass means to “continually... irritate” someone.

Disruptive means to “cause disorder” or to “disturb someone or something”. The Code of Behaviour RACS’ clients are subject to is already of breathtakingly wide scope in terms of all that is caught in provisions that proscribe disturbing people... or things.

Being “anti-social” in the Code of Conduct can include “spitting”, “swearing in public”, or other actions people “might find offensive”.

Asylum seekers subject to the Code of Behaviour can currently lose their freedom in the blink of an eye and the changes contained in this Bill propose to extend that further beyond those who have signed a Code of Behaviour but to indeed anyone who holds a visa on the basis of suspicion only and on the basis of a lowered test of “risk” rather than “significant risk”.

RACS is concerned that, rather than using our existing and robust criminal laws to deal with criminal acts, visa cancellation powers are proposed to be broadened in this Bill to allow cancellation of visas, and the resulting indefinite detention or deportation, for mere suspicion of future conduct including trivial criminal offences and actions that are not in fact criminal offences.

These provisions do not contain adequate safeguards against situations where a person may be mistakenly or falsely accused or suspected of engaging in anti-social behaviour, including accusations motivated by personal disputes or racial or religion discrimination. It would impossible to be confident, if the proposed changes contained in this Bill pass, that people affected by these situations would have a proper opportunity to put forward their case in reply before an independent decision maker.

4. Extending the character test to include those who do not receive a sentence because of their mental health

The Bill proposes to extend the character test to people who have a substantial criminal record but have not received a sentence on the basis of issues surrounding their mental health, and who as a result have been detained in facility or institution. This would mean that someone who has serious mental health issues and is deemed unfit by the court to give a plea would fail the character test and be liable to visa cancellation or refusal, resulting in indefinite detention for people to whom Australia has protection obligations.

This provision can have serious implications for people from refugee backgrounds who have mental health issues and who commit a crime on the basis of behaviour which took place during a mental health episode.

It is widely acknowledged that people from refugee backgrounds often face a range of mental health issues due to a combination of previous experiences of torture and trauma, long periods of detention in Australia, prolonged separation from family, uncertainty about their future, and long delays in processing of their cases. We have observed that these factors are having an extremely negative effect on our clients' mental health.

RACS believes it is fair to expect that the same standards that would be applied before criminal courts in relation to mental health episodes would be applied by decision-makers in relation to cancellation of visas.

5. Inability to satisfy the Minister as to identity

The Bill proposed to allow the Minister to cancel a visa if he or she is not satisfied as to the visa holder's identity.⁴ RACS is cognisant of the importance of establishing a person's identity for upholding the integrity of the migration program. However, RACS is concerned that the proposed provisions do not contain adequate procedural safeguards to ensure that individuals who have legitimate difficulties in providing evidence of their identity are not caught by these provisions. In particular, RACS believes that these provisions are likely to unfairly impact on people from refugee backgrounds who often have legitimate reasons for being unable to obtain evidence of their identity and for whom visa cancellation or refusal is likely to result in indefinite detention.

For example, RACS has several clients who are from the Rohingya ethnic group who, according to the UNHCR, are among the world's most persecuted people. Many Rohingya people have never been issued with any identity documents by the Burmese authorities and Burma (Myanmar) refuses to grant the Rohingya people citizenship, leaving them stateless. Retention of identity documents is a major problem for Rohingyas for both historical and political reasons. According to one commentator:

“So far as the individual Rohingyas are concerned, it has been always difficult for them to individually prove the existence of their fore-parents before 1823 C.E. Because 1) Their individual documentary evidences have either been systematically destroyed or confiscated by the rulers in the country. 2) Most of Rohingyas have either been uneducated or been made so. They couldn't keep these evidences in their hands. 3) For decades, Rohingyas have been made to move from place to

⁴ Proposed s 116(1AA).

place. They have lost their documents meanwhile. There could be many reasons on top of that.”⁵

RACS is concerned that this new ground for general visa cancellation does not contain adequate safeguards to ensure that people with legitimate reasons for being unable to satisfy the Minister as to their identity are not caught by these provisions, which may result in indefinite detention.

6. Expansion of ministerial discretion

Several of the proposed amendments in the Bill expand the role of personal ministerial decision making powers in the context of visa cancellation and refusal. The Bill gives power to the Minister to override any tribunal decisions including the AAT, MRT and the RRT in relation to decisions not to cancel or not to refuse. In addition, the Bill proposes to exclude natural justice requirements from the exercise of ministerial powers. RACS believes that this expansion is unnecessary and undermines the integrity of the visa cancellation and refusal systems.

RACS holds serious concerns about these amendments given the fact that the exercise of such powers may result in indefinite detention of people to whom Australia has protection obligations. RACS believes that decision making powers which have the potential to deprive individuals of their fundamental right to freedom, for an indefinite period of time, must be subject to adequate procedural safeguards to ensure that such powers are not used unfairly or arbitrarily.

7. Arbitrary detention

Several of the proposed amendments in the Bill propose to lower the thresholds for deciding when a person’s visa may be cancelled, to increase the scope of discretionary powers which do not require meaningful assessment of evidence, and to remove or reduce the scope of independent review of decisions to cancel a person’s visa.

RACS believes that these provisions have the potential to result in the arbitrary detention of individuals, and in particular of people to whom Australia has protection obligations including refugees, in breach of Australia’s obligations under Article 9(1) of the ICCPR.

Where a person’s visa has been cancelled under section 116 or 501, or refused under section 501, the person will become an unlawful non-citizen (unless they also hold a protection visa or another type of visa specified in the Migration Regulations)⁶ and will be subject to mandatory immigration detention. Pursuant to the Migration Act, such persons must be detained until they are either granted a new visa or removed from Australia.⁷

In the past, where complaints have been submitted by individuals who have been held in detention for prolonged or indefinite periods, the Australian Human Rights Commission

⁵ MS Anwar, ‘1982 Citizenship Law of Burma: Is or Isn’t it Applicable Today?’, *Rohingya Vision – Rohingya Media Network*, available at: <http://www.rvisiontv.com/1982-citizenship-law-of-burma-is-or-isnt-it-applicable-today-2/> [accessed 8 November 2013].

⁶ Migration Act 1958 (Cth), ss 13, 14, 501E, 501F(3).

⁷ Migration Act 1958(Cth), ss 189(1), 196(1).

(AHRC) has found that prolonged and indefinite detention constituted arbitrary detention, in breach of article 9(1) of the ICCPR.⁸

Further, in August 2013, the UN Human Rights Committee found that the indefinite detention of a group of 46 refugees with adverse assessments was inflicting serious psychological harm upon them, amounting to cruel, inhuman or degrading treatment under article 7 of the ICCPR and was arbitrary contrary to article 9(1) of the ICCPR.⁹ Again in June 2013, the UNHCR found that the practice of mandatory and indefinite detention on Manus Island was arbitrary and therefore in breach of the ICCPR.¹⁰

Decisions based on discretionary considerations and personal ministerial powers inherently lack accountability and transparency, and a person seeking review is likely to face significant difficulties when seeking to access the information upon which a decision is made and to challenge the validity of relying upon that information in the decision making process.

For these reasons, RACS believes that systems for visa cancellation and refusal, which can result in indefinite detention of individuals, must have strong procedural safeguards for guiding decision making and ensuring transparency and accountability. Without these safeguards, there is a significant risk that detention resulting from such decision making processes will be arbitrary and in breach of Australia's international legal obligations.

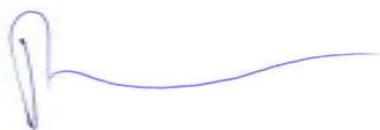
8. Conclusion

RACS would welcome any opportunity to provide further information to the Committee in relation to any aspect of the Bill or this submission.

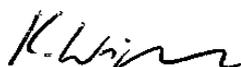
Sincerely

REFUGEE ADVICE AND CASEWORK SERVICE (AUST) INC

Per:



Tanya Jackson-Vaughan
Executive Director



Katie Wrigley
Principal Solicitor

⁸ See, for example Human Rights and Equal Opportunity Commission, Report of an Inquiry into a Complaint of Acts or Practices Inconsistent With or Contrary to Human Rights (Report No. 13) (2001). available at http://humanrights.gov.au/legal/humanrightsreports/hrc_report_13.html. This view has also been held by the United Nations Human Rights Committee in a number of cases. See, for example UN Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997).

⁹ Australian Human Rights Commission (2013) *Asylum seekers, refugees and human rights – Snapshot report*, available at https://www.humanrights.gov.au/sites/default/files/document/publication/snapshot_report_2013.pdf

¹⁰ UNHCR, UNHCR Monitoring Visit to Manus Island, note 155, para 60

This submission is an example of how community legal centres utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and to prevent some problems from arising altogether. Federal Government changes to Community Legal Services Program funding agreements in mid 2014 restrict policy and law reform that community legal centres can undertake with Federal Government funds. These restrictions have the potential to deprive Government and others from valuable advice and information and reduce efficiency and other improvements in the legal system. For more information please see <http://www.communitylawaustralia.org.au/law-reform-and-legal-policy-restrictions/>

9. Summary of comments

- RACS opposes the standard of “reasonable suspicion” in the proposed additional grounds for failing the character test under section 501(6), which relate to “reasonable suspicion” that a person has been or is involved in, or is associated with persons or a group involved in, certain criminal conduct.
- RACS believes that the proposal to lower the threshold for assessing the degree of risk that a person would engage in criminal and other conduct from “significant risk” to “risk” in the context of the character test is inappropriate because such a low standard is disproportionate to the severity of the consequences of deeming that a person fails the character test, which may include indefinite detention.
- RACS believes that it is inappropriate to extend the character test to include persons who have a criminal record but who do not receive a sentence for reasons relating to mental health.
- RACS is concerned that the proposed new ground for general visa cancellation when the Minister is not satisfied as to a person’s identity does not contain adequate safeguards to ensure that people with legitimate reasons for being unable to satisfy the Minister as to their identity are not caught by these provisions, which will generally result in detention and in some cases, indefinite detention.
- RACS holds concerns about the expansion of personal ministerial decision making powers in relation to visa cancellation and refusal and the exclusion of the rules of natural justice from the exercise of those powers, given that the exercise of such powers will generally result in detention, and may result in indefinite detention of people to whom Australia has protection obligations.
- RACS is concerned that the lack of procedural safeguards in the visa cancellation and refusal systems may result in arbitrary detention of individuals, in breach of Australia’s international legal obligations.
- RACS believes that visa cancellation and refusal decision making processes must have adequate procedural safeguards including:
 - transparency and consistency in the decision-making process, and limiting the role of unfettered discretionary powers;
 - procedural fairness requirements, including giving notice to individuals of the grounds upon which adverse decisions are likely to be made to enable a meaningful response to be provided; and
 - a system of independent review, rather than absolute ministerial discretion.