

# Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016

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## **Senate Legal and Constitutional Affairs Legislation Committee**

**4 March 2016**

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## Table of Contents

<b>Executive Summary</b> .....	<b>3</b>
<b>Legislative history</b> .....	<b>5</b>
<b>The Law Council’s additional concerns</b> .....	<b>7</b>
<b>Extension of application of certain visa cancellation provisions to new groups</b> .....	<b>9</b>
<b>Retrospective amendments to the Migration Act</b> .....	<b>12</b>
<b>Minister assuming the role of the courts in assessing criminal conduct</b> .....	<b>14</b>
Association with Criminal Group or Organisation.....	16
Adverse Security Assessments .....	17
<b>Convictions and charges from Foreign courts</b> .....	<b>18</b>
<b>Attachment A: Profile of the Law Council of Australia</b> .....	<b>20</b>

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## Executive Summary

1. The Law Council welcomes the opportunity to provide the following comments to the Senate Legal and Constitutional Affairs Committee (**the Committee**) as part of its inquiry into the Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016 (**the Bill**).
2. The Bill 2016 aims to ensure that mandatory visa cancellation related powers are reflected consistently and comprehensively throughout the *Migration Act 1958* (Cth) (**Migration Act**), according to the original intent of changes made to the Migration Act by the *Migration Amendment (Charter and General Visa Cancellation) Act 2014* (Cth) (**Character Act**).<sup>1</sup>
3. This Bill reflects Schedule 2 of the Migration and Maritime Powers Amendment Bill (No. 1) 2015 [Provisions] (**Migration and Maritime Powers Bill**), previously considered by the Committee and the Senate, and returned to the House of Representatives with amendments. The Law Council made a submission to this Committee on that Bill, and its submissions and concerns therefore remain relevant to the Bill before the Committee's current inquiry.<sup>2</sup>
4. The Law Council notes that the Committee previously examined the provisions of the Bill in its inquiry into the Migration and Maritime Powers Bill. Although it appears that this Committee's recommendation on that Bill regarding retrospectivity has been considered in the drafting of the Explanatory Memorandum for the current Bill, the Law Council's concern in respect of retrospectivity and other provisions remain.
5. The Law Council generally supports attempts to strengthen and clarify the operation and application of the Migration Act. However, it considers that the Bill's proposed amendments depart from accepted rule of law and procedural fairness standards, and as a result, may adversely affect protection claims made by asylum seekers, in some circumstances risking *refoulement*. Furthermore, the rationale put forward for the amendments does not justify this departure, or the increase in Ministerial discretion.
6. The Law Council therefore opposes the passage of this Bill. Instead, it recommends that the provisions of the Migration Act relating to the cancellation of non-citizens' visas are amended to accord with rule of law and procedural fairness standards.
7. However, if the Committee is minded to recommend the passage of the Bill, the Law Council suggests the following amendments:
  - (a) the proposed amendments are further amended to ensure they comply with the rule of law and procedural fairness, such that:
    - (i) all detainees the subject of subsection 193(1)(a)(v) are provided with information relevant to their detention, including information concerning the length of their detention and access to legal advice and representation; and

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<sup>1</sup> Commonwealth, Parliamentary Debates, House of Representatives, 10 February 2016, 12 (Peter Dutton), available at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F7ef9bd10-ec92-4de4-9372-a92d6a12d7ef%2F0022%22>.

<sup>2</sup> Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration and Maritime Powers Amendment Bill (No. 1) 2015 [Provisions], 16 October 2015, available at: <http://www.lawcouncil.asn.au/lawcouncil/images/3069 - MA MP Amm No 1 2015.pdf>.

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- (ii) all detainees the subject of subsection 198(2A) are provided with a reasonable timeframe within which to seek legal advice on whether they should pursue merits review and/or judicial review of the decision to cancel their visa;
  - (b) the proposed amendments that apply retrospectively are amended such that they only apply prospectively in law and in practice. If it is determined that it is appropriate for the measures to be retrospective in effect, the Law Council recommends that further clarification is needed in the Explanatory Memorandum to justify the measure;
  - (c) the proposed amendments and existing provisions of the Migration Act relating to 'character of concern' are amended such that:
    - (i) determination of involvement in criminal conduct under proposed subsections 5C(1)(bb) and 5C(1)(bc) and under section 501 of the Migration Act should only flow after a conviction by an independent, impartial and competent court or tribunal;
    - (ii) the term 'serious international concern', set out in proposed subsection 5C(1)(f) and in section 501 of the Migration Act, is defined;
    - (iii) the association provisions in paragraph 501(6)(b) of the Migration Act are repealed and proposed paragraph 5C(1)(bb) of the Bill is removed. In the alternative, the Migration Act should be amended to include explicit criteria that the Minister must be satisfied of, before determining that a group or organisation is involved in criminal conduct and such conduct should be of a sufficient level of seriousness;
    - (iv) non-citizens with adverse security assessments have the same access to merits review of such assessments as Australian citizens under the *Australian Security and Intelligence Organisation Act 1979* (Cth); and
    - (v) the Minister or delegate is required to be satisfied that the conviction in a foreign country for the purposes of sections 501 and 5C of the Migration Act has occurred on the basis of fair trial principles and does not involve matters such as those grounds listed for refusal under the *Mutual Assistance in Criminal Matters Act 1987* (Cth).

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## Legislative history

8. This is the second occasion on which the Government has sought to introduce the provisions contained in the Bill. The provisions were first proposed in Schedule 2 of the Migration and Maritime Powers Bill, which was introduced on 16 September 2015.
9. Schedule 2 of the Migration and Maritime Powers Bill aims to strengthen and clarify the legal framework in the Migration Act and *Maritime Powers Act 2013* (Cth) as it relates to the Government's ability to cancel the visas of non-citizens and remove them from Australia. Key proposed amendments relate to: the removal and return of non-citizens; cancellations of visas on the basis of character concerns; and compliance with and subjective assessment of Australia's obligations under the *United Nations Convention on the Law of the Sea*.<sup>3</sup>
10. This Committee inquired into the Migration and Maritime Powers Bill and reported on it to the Parliament on 10 November 2015. The Law Council made a submission to that inquiry and stated that rather than meeting its objective; the proposed changes in the Bill depart from accepted rule of law and procedural fairness standards, and as a result, may adversely affect protection claims made by asylum seekers, in some circumstances risking *refoulement*, contrary to Australia's obligations under international human rights law.
11. The Law Council's main concerns included:
  - (a) the extension of application of certain visa cancellation provisions to new groups;
  - (b) retrospective amendments to the Migration Act; and
  - (c) the Minister assuming the role of the courts in assessing criminal conduct.
12. On 10 November 2015, this Committee reported on the Bill, recommending the passage of the Bill subject to the recommendation that:

*The Explanatory Memorandum to the Bill be amended to clarify the operation of the retrospective provisions of the Bill and the safeguards around the impact of these provisions on young people and people with cognitive impairment.*<sup>4</sup>
13. The Migration and Maritime Powers Bill currently remains before the House of Representatives, having been returned to the House following amendments passed by the Senate, which are unrelated to Schedule 2.<sup>5</sup>

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

<sup>4</sup> Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Migration and Maritime Powers Amendment Bill (No. 1) 2015 [Provisions]* (November 2015), vii ('Committee Report').

<sup>5</sup> The proposed amendments:

- (a) strengthen section 4AA of the Migration Act, to read: *The Parliament affirms as a principle that no minor is to be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a minor must be in conformity with the law and must only be used as a measure of last resort and for the shortest appropriate period of time.* The principle would be given practical effect by mandating that the Minister make a determination, as soon as practicable, but in any case within 30 days, that a minor is to reside at a specified place, instead of being detained in immigration detention;
- (b) create an offence for failure to report a 'reportable assault', punishable with a maximum pecuniary penalty of \$10,800;

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14. On 10 February 2016, the Government re-introduced the previous Schedule 2 Migration and Maritime Powers Bill amendments into the House of Representatives in the form of the current Bill. It did so on the same basis as the previous Bill – that is, that the amendments only make ‘minor’ or ‘consequential’ amendments to the character provisions of the Migration Act.
  15. The Explanatory Memorandum for the current Bill appears to be in largely similar terms as its predecessor with some minor changes in response to recommendations by this Committee on the issue of retrospectivity in the Migration and Maritime Powers Bill.
  16. Although it appears that this Committee’s recommendation has been considered in the drafting of the Explanatory Memorandum for the current Bill, the Law Council’s concern in respect of retrospectivity in the Migration and Maritime Powers Bill, and other concerns in respect of the Schedule, remain.
  17. The Law Council’s concerns relate to: the extension of application of certain visa cancellation provisions to new groups; retrospective amendments to the Migration Act; the Minister assuming the role of the courts in assessing criminal conduct; and the disclosure of information in relation to the cancellation and character provisions. The Law Council recommends against the passage of the Bill in its current form.
  18. Rather than the passage of the Bill, the Law Council recommends that the provisions of the Migration Act relating to the cancellation of non-citizens visas are amended to accord with the rule of law and procedural fairness standards. The Law Council makes a number of recommendations for possible amendments to the Bill if the Committee is minded to recommend its passage.
  19. The Law Council reiterates its earlier submissions to the Committee below. Further, since the Committee’s report on the Migration and Maritime Bill, the Parliamentary Joint Committee on Human Rights (**PJCHR**) has considered the Migration and Maritime Powers Bill,<sup>6</sup> noting that Schedule 2 engages the following rights and obligations:
    - (a) *non-refoulement* obligations: the Minister for Immigration and Border Protection’s (**the Minister**) non-compellable powers are insufficient protection against *non-refoulement*, and international law is very clear that administrative arrangements are insufficient to protect against unlawful *refoulement*,<sup>7</sup>
    - (b) the right to liberty: while Schedule 2 does not make a number of amendments to cancellation powers introduced by the Character Act, it reduces important procedural safeguards;<sup>8</sup>

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- (c) increase the transparency and accountability of immigration detention facilities both in Australia and in regional processing countries; and
  - (d) permit a person to disclose or use ‘protected immigration detention facility information’ (information or a document that was obtained in the course of their employment and which relates to a detention facility) if the person reasonably believes that the disclosure or use would be in the public interest. This amendment reverses amendments to the Migration Act made by the *Australian Border Force Act 2015* (Cth).

<sup>6</sup> Parliamentary Joint Committee on Human Rights, *Thirtieth Report of the 44<sup>th</sup> Parliament* (10 November 2015) 28-52; Parliamentary Joint Committee on Human Rights, *Thirty-Fourth Report of the 44<sup>th</sup> Parliament* (23 February 2016), 29-64 (‘PJCHR Report’)

<sup>7</sup> PJCHR Report, [2.142].

<sup>8</sup> *Ibid* [2.127].

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- (c) the right to freedom of movement: although the Minister disagrees, the PJCHR considers freedom of movement applies to both citizens and permanent residents that have lived in Australia for a long time and regard Australia as their 'own country';<sup>9</sup>
  - (d) the obligation to consider the best interests of the child: certain provisions, such as those relating to the discretionary visa revocation process and mandatory visa cancellation, do not appear to provide for consideration of the best interests of the child;<sup>10</sup> and
  - (e) the right to equality and non-discrimination: the mandatory visa cancellation of individuals sentenced to 12 months or more in prison is likely to disproportionately affect individuals with mental health concerns, which establishes *prima facie* that there may be indirect discrimination.<sup>11</sup>

20. The Law Council commends the PJCHR's report to the Committee, noting that these concerns would also apply to the Bill the subject of the Committee's current inquiry.

## The Law Council's additional concerns

21. The Law Council has received additional feedback from its Migration Law Committee on the provisions contained within this Bill since its submission to the Committee on the Migration and Maritime Powers Bill. It also takes this opportunity to respond to the Committee's report on the Migration and Maritime Powers Bill.

22. The Migration Law Committee notes that since the amendments to the Migration Act by the Character Act, there have been significant numbers of automatic cancellations under section 5013A. This has resulted in the National Character Consideration Centre (**NCCC**) currently experiencing a high volume of requests for revocation. Applications for revocation are currently being prioritised by the date that applicants go into immigration detention. The length of time taken to prepare each application for the Minister's consideration varies.

23. The Migration Law Committee observes that the consequence of these changes is that both the Department of Immigration and Border Protection (**the Department**) and the Minister's Office are unable to keep up with the processing of character consideration cancellations due to the increased number of cancellations following the Character Act. It considers that further changes to the Migration Act are likely to cause further administrative burden on the Department and increased costs due to longer periods of detention, as well as the adverse consequence of prolonged detention for detainees.

24. The Law Council acknowledges that the Attorney-General's Department and the Australian Information Commissioner were consulted prior to the Migration and Maritime Bill's introduction into the Parliament.<sup>12</sup> This Committee's report on that Bill stated that 'the low impact of the Bill and the existence of robust privacy safeguards led to the conclusion in a privacy threshold assessment that a Privacy Impact Assessment was not necessary'.<sup>13</sup> This assessment is likely to apply to the current Bill

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<sup>9</sup> Ibid [2.157].

<sup>10</sup> Ibid, see for example [2.171]-[2.172].

<sup>11</sup> Ibid [2.186]-[2.187].

<sup>12</sup> Committee Report, [2.24].

<sup>13</sup> Committee Report, [2.24].

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as it is in similar terms to Schedule 2 of the Migration and Maritime Bill. However, the Law Council encourages the Committee to seek the same assurances from the Department in relation to the Bill the subject of the Committee's current inquiry.

25. The Migration Law Committee is also concerned that the practical effect of the amendment at Item 7 – that extends the application of subsections 192(1) and (4) of the Migration Act concerning the detention of visa holders whose visas are liable for cancellation to a person serving a sentence of imprisonment – will result in a greater rate of detention of non-citizens for extended periods of time. Further, the use of a low threshold of proof requiring an officer merely to 'reasonably suspect', combined with the very broad discretionary grounds of section 501BA (where the Minister is satisfied in the national interest), may lead to the detention of some non-citizens in circumstances where it is not justified.
26. In respect of Item 8 – that extends the application of sub-section 193(1)(a)(v) of the Migration Act concerning the application of law to certain non-citizens while they remain in immigration detention to a person serving a sentence of imprisonment – the Migration Law Committee observes that there is also no Government funding for legal assistance available to people in this situation. The Committee considers that there are significant repercussions of these types of cancellations, including that less access to procedural fairness guarantees may amount to departure from Australia's international human rights obligations. It also considers that it would be an insignificant burden on the Department to ensure all detainees are afforded procedural fairness.
27. The Migration Law Committee has also observed, in respect of Item 10 – that requires the removal of a non-citizen where the Minister has refused to grant a visa or has cancelled their visa, and where this person has failed to make representations under section 501C about the refusal or cancellation of their visa, or their representations have been rejected by the Minister – that there have been a number of cases where, due to a lack of understanding on the part of the applicant of the limited time available for contesting a visa cancellation, detainees have missed their opportunity to contest this decision. The Committee observes that this may be a result of the fact that detainees often have to wait until they can access free or pro bono legal assistance before considering the options available to them.
28. In terms of retrospective amendments in the Bill, as noted, the Committee recommended that the Explanatory Memorandum to the Migration and Maritime Powers Bill be amended to clarify the operation of the retrospective provisions of that Bill.<sup>14</sup> The Explanatory Memorandum to the current Bill expands on the retrospective nature of the Bill in accordance with the Committee's previous recommendation.<sup>15</sup> In respect of the introduction of a new removal power and amendment to the existing removal power under subsection 198(2A), the Explanatory Memorandum to the Bill currently before the Committee states:

*These amendments do not reach back and change what the law was before commencement and so are not retrospective in that sense. The amendments apply after commencement to establish a clear removal power where a non-citizen's visa was mandatorily cancelled under subsection 501(3A) and the*

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<sup>14</sup> Committee Report, Recommendation 1, vii.

<sup>15</sup> Explanatory Memorandum, Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016, [61]-[78] ('Explanatory Memorandum'), available at: [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5615\\_ems\\_a261c3d2-75e2-4eae-ac76-c59e07cca158%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5615_ems_a261c3d2-75e2-4eae-ac76-c59e07cca158%22).

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*non-citizen either did not seek revocation within the statutory timeframe under section 501CA, or was unsuccessful in seeking revocation.*<sup>16</sup>

29. Although the Explanatory Memorandum has been amended, it only explains that the Bill is not retrospective in the sense that it changes the law before commencement. This does not adequately address why retrospectivity is considered to be a proportionate measure. If despite the Law Council's concerns, it is determined that it is appropriate for the measures to be retrospective in effect, the Law Council recommends that further clarification is needed in the Explanatory Memorandum to justify the measure.
30. The Explanatory Memorandum also fails to address the Committee's recommendation in respect of discussion of safeguards around the impact of these provisions on young people and people with cognitive impairment.<sup>17</sup>
31. The Law Council therefore remains concerned with the way in which the amendments will operate in practice, such that visa holders may have their visa cancelled for previous actions or omissions that did not give rise to a cancellation at the time. This gives rise to risk of *refoulement* of people with genuine need for protection.
32. For the Committee's information and convenience, the Law Council reproduces its previous submissions on these provisions below, which it considers remain relevant to the Committee's consideration of this Bill.

## Extension of application of certain visa cancellation provisions to new groups

33. As noted above, the policy intent behind the Bill the subject of the Committee's current inquiry is to ensure that the mandatory cancellation powers introduced with the Character Act are reflected comprehensively throughout the Migration Act.
34. As set out in the Law Council's submission to the Committee on the Migration and Maritime Powers Bill, one of the Law Council's Constituent Bodies, the Law Institute of Victoria (**LIV**), previously expressed its concern with the amendments to the Migration Act by the Character Act.<sup>18</sup> In particular, its concerns related to amendments that substantially broadened the grounds on which a non-citizen's visa could be refused or cancelled, such as:
  - (a) section 501(6)(b) which lowered the threshold of evidence required to demonstrate that a person is a member of a criminal or terrorist organisation;
  - (b) section 501(6)(d) which lowered the threshold from 'significant risk' to 'risk' of a person engaging in criminal conduct or harassment and who represents a danger to the Australian community or 'risks' being involved in activities disruptive to the Australian community; and

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<sup>16</sup> Ibid, [67].

<sup>17</sup> Committee Report, Recommendation 1, vii.

<sup>18</sup> See: Law Institute of Victoria, Submission to Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Charter and General Visa Cancellation) Bill 2014, 3 November 2014, available at: <http://www.liv.asn.au/getattachment/0d3282a8-36af-4c5d-96aa-ee2d7b56e5e0/Migration-Amendment-Character-and-General-Visa-Can.aspx>.

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- (c) section 501(6)(g) and (h) which provides that a person will not pass the character test where they have been assessed by the Australian Security and Intelligence Organisation (**ASIO**) as directly or indirectly a risk to security, or where an Interpol Notice has been issued from which it is reasonable to infer that a person would present a risk to the Australian community.
35. The Law Council is therefore concerned by the expansion of the definition of 'character concern' at Items 1-4 of the Bill to be consistent with the existing character test at section 501.<sup>19</sup>
36. Item 7 extends the application of subsections 192(1) and (4) of the Migration Act – concerning the detention of visa holders whose visas are liable for cancellation – to a person serving a sentence of imprisonment.<sup>20</sup> The amendments extend the application of this provision to section 501BA which empowers the Minister to cancel a visa following a non-adverse decision by a delegate or the Administrative Appeals Tribunal (**AAT**).
37. As set out in the Law Council's submission on the Migration and Maritime Powers Bill, since the Character Act was introduced in late 2014, members of the LIV have reported that a significant number of people have been placed in detention, even before charges have been determined by the courts and in some instances, the person has later been found not guilty of the offence. This amendment is similar to those previous amendments in the Character Act, as it allows delegates to detain non-citizens prior to assessing their ability to meet the character requirements in section 501 of the Migration Act.
38. Item 8 also extends the application of sub-section 193(1)(a)(v) of the Migration Act – concerning the application of law to certain non-citizens while they remain in immigration detention – to a person serving a sentence of imprisonment.<sup>21</sup> Subsection 193(1)(a)(v) provides that sections 194 and 195 do not apply to a detainee, such that an officer is *not* required to inform a detainee of:
- (a) their ability to apply for a visa whilst in detention, subject to certain time constraints;<sup>22</sup> or
  - (b) the provisions relating to the duration of their detention.<sup>23</sup>
39. The justification for this denial of procedural fairness is set out in the Explanatory Memorandum: a person will generally have previously had their visa cancelled by a delegate under subsection 501(3A), and, in so being detained under section 189, will be informed of sections 195 and 196 at that point.<sup>24</sup>
40. As this Committee has noted in its report on the Migration and Maritime Powers Bill, the Law Council considers that this does not appear to be a sufficient justification for denying a person in this situation a fundamental aspect of their right to procedural fairness.<sup>25</sup> The Law Council reiterates its earlier submissions to the Committee, namely, that:

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<sup>19</sup> Explanatory Memorandum, [12].

<sup>20</sup> Pursuant to sub-s 501(3A).

<sup>21</sup> *Ibid.*

<sup>22</sup> At s 195.

<sup>23</sup> At s 196.

<sup>24</sup> Explanatory Memorandum, [25].

<sup>25</sup> Committee Report, [2.27].

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- (a) it is not onerous for the Department to provide a detainee with notice of timeframes within which they can apply for a further visa and information pertaining to the duration of their detention, and this would guarantee procedural fairness; and
  - (b) some detainees may have difficulty in understanding their legal options and rights for various reasons, such as restricted access to information and/or legal advice and representation while in detention, lack of familiarity with the legal system, or unfamiliarity with the English language. This is further compounded by the strict limits on timeframes for applications in detention and lack of access to legal advice.<sup>26</sup>

- 41. The Law Council also cited its *Asylum Seeker Policy* in its earlier submission, which provides that decisions to detain or extend detention should be subject to procedural safeguards, including informing asylum seekers of the reasons for, and their rights in relation to, their detention.<sup>27</sup>
- 42. Although the Committee considered that the measure proposed in Item 8 of Schedule 2 to the Migration and Maritime Powers Bill (that correspond to Item 8 of the Bill the subject of the Committee's current inquiry) are not unusual in its report on that Bill, the Committee agreed in principle that 'people in immigration detention should be appraised of their legal rights'.<sup>28</sup> The Law Council therefore reiterates its earlier position.
- 43. Item 10 amends the Migration Act to insert an additional category of persons whose visa has been cancelled into subsection 198(2A). This subsection requires the removal of a non-citizen where the Minister has refused to grant a visa or has cancelled their visa,<sup>29</sup> and where this person has failed to make representations under section 501C about the refusal or cancellation of their visa, or their representations have been rejected by the Minister.
- 44. Section 501C currently requires the Minister to afford procedural fairness where a visa is cancelled on character grounds pursuant to subsection 501(3), or where the Minister sets aside a non-adverse decision of a delegate or the AAT with the effect of cancellation on character grounds pursuant to section 501A(3).
- 45. The amendment adds to subsection 198(2A) the procedural fairness provisions under section 501CA, which concerns the Minister's cancellation of a visa where the person is serving sentence of imprisonment, pursuant to subsection 501(3A).
- 46. As noted in its submission in the Migration and Maritime Powers Bill, the Law Council is concerned that this amendment may result in the deportation of a person serving a sentence of imprisonment whose visa has been cancelled before they have had the opportunity to seek judicial review of the cancellation. If this person – or indeed a

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<sup>26</sup> The Law Council has previously raised concerns about access to legal advice and representation – see for example: Law Council of Australia, 'Law Council concerned by removal of IAAAS Funding' (Media Release, 2 April 2014), available at: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1409\\_-\\_Law\\_Council\\_concerned\\_by\\_removal\\_of\\_IAAAS\\_Funding.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1409_-_Law_Council_concerned_by_removal_of_IAAAS_Funding.pdf). The Law Council's *Asylum Seeker Policy* also stipulates that all people seeking protection in Australia should have access to legal assistance to understand their legal rights and the legal processes that apply to the determination of their protection status: Law Council of Australia, *Asylum Seeker Policy*, (6 September 2014), [5], [7(b)], [9(c)] and [10(c)], ('LCA Policy'), available at: [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker\\_Policy\\_web.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AsylumSeeker_Policy_web.pdf).

<sup>27</sup> LCA Policy, [10(g)].

<sup>28</sup> Committee Report, [2.30].

<sup>29</sup> To whom sub-s 193(1)(a)(iv) applies, such that the Minister has personally refused to grant the person a visa or whose visa has been cancelled under ss 501, 501A or 501B.

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person whose visa is cancelled on character grounds or whose visa has been cancelled by the Minister on character grounds in place of a non-adverse decision – does not make a representation within the required time, then they are not afforded access to merits review (as this is a Ministerial decision) and their only option is to pursue judicial review.

47. As noted above, as it may be difficult for detainees to gain access to legal advice and representation, it is likely that a detainee’s decision to pursue judicial review will be delayed. As a consequence, this amendment is likely to lead to an increase of applications for urgent injunctions to prevent removal.

**Recommendation:**

- **The proposed amendments are further amended to ensure they comply with the rule of law and procedural fairness, such that:**
  - **all detainees the subject of subsection 193(1)(a)(v) are provided with information relevant to their detention, including information concerning the length of their detention and access to legal advice and representation; and**
  - **all detainees the subject of subsection 198(2A) are provided with a reasonable timeframe within which to seek legal advice on whether they should pursue merits review and/or judicial review of the decision to cancel their visa.**

## Retrospective amendments to the Migration Act

48. Principle 1 of the Law Council’s *Rule of Law Principles* states that:

*The law must be both readily known and available, and certain and clear.*<sup>30</sup>

49. As previously stated to this Committee in respect of the Migration and Maritime Powers Bill, in the context of the current Bill, this principle means that visa holders should be informed about whether and how their visa may be cancelled, and the availability of review associated with the cancellation of their visa.
50. The amendments made by Item 10 are set out above. Owing to the retrospective nature of this amendment, the Law Council is concerned that a situation could arise where a person serving a sentence of imprisonment may have failed to make representations to the Minister or the Minister’s delegate about the refusal or cancellation of their visa as stipulated in section 501CA, not realising the failure to do so would lead to their removal, pursuant to the proposed amendments to section 198(2A).
51. Item 11 inserts into the Migration Act new section 198(2B), which creates an obligation to remove a person whose visa was cancelled by the delegate of the Minister (rather than the Minister or the Minister’s delegate, as in Item 10) on the grounds that they were serving a sentence of imprisonment and whose representations to the Minister under section 501CA have failed.

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<sup>30</sup> Law Council of Australia, *Rule of Law Principles* (March 2011) ('LCA Rule of Law Principles'), available at: <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/PolicyStatementRuleofLaw.pdf>.

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52. As above, owing to the retrospective nature of this amendment, the situation could arise where a person serving a sentence of imprisonment may have failed to make representations to the Minister or the Minister's delegate about the refusal or cancellation of their visa as stipulated in section 501CA, not realising the failure to do so would lead to their removal under section 198(2B).
  53. Item 12 amends section 476 of the Migration Act such that the Federal Circuit Court does *not* have the jurisdiction to review a privative clause decision<sup>31</sup> made under sections 501BA or 501CA.
  54. The effect of this amendment is that the procedural fairness provisions under section 501CA (concerning a decision by the Minister or the Minister's delegate to cancel the visa of a person serving sentence of imprisonment), and the Minister's personal power under section 501BA (to set aside a non-adverse decision relating to the visa of a person serving a sentence of imprisonment) will not be reviewable by the Federal Circuit Court.
  55. Although this brings these sections into line with other character decisions made under the Migration Act, such that they are reviewable only by the Federal Court, the retrospective nature of this amendment is concerning, as changes to the legal framework may affect matters already before the Federal Circuit Court.
  56. Item 20 amends subsection 503(1)(b) of the Migration Act to expand the category of people not entitled to enter Australia or to be in Australia at any time during the period determined under the regulations to include people whose visas have been refused or cancelled personally by the Minister under section 501BA.
  57. Currently, this provision applies to people whose visas have been refused by the Minister or delegate on character grounds pursuant to section 501, or where the Minister has personally set aside and substituted a decision pursuant to sections 501A or 501B.
  58. The retrospective application of this amendment means that people whose visas have been refused or cancelled by the Minister or the Minister's delegate on the grounds that they were serving a sentence of imprisonment, will not be entitled to enter Australia or to be in Australia from the date the decision was made, even where that decision was made prior to the commencement of the provision. This effectively retrospectively permits actions to detain or remove from Australia people whose visas have been cancelled owing to their sentence of imprisonment.
  59. Item 21 amends subsections 503A(1), (2) and 503B(1) to expand the category of people whose personal information can be used for the purposes of the cancellation of their visa.
  60. Currently subsections 503A and 501B provide that if certain confidential information is given to Departmental officers that is relevant to the exercise of a power to cancel a visa, and the information is relevant to proceedings before the Federal Court or the Federal Circuit Court, the courts can make orders to ensure that the information is not disclosed to the applicant, their legal representative, or any other member of the public.

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<sup>31</sup> Defined at s 474(2) as 'a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not)', other than a decision referred to in subsections (4) or (5).

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61. The amendments expand the category of people affected by these provisions to people whose visas are cancelled by the Minister on character grounds pursuant to subsection 501(3); by the Minister or delegate in place of a decision of a delegate or the AAT pursuant to section 501A(3); or by the Minister or delegate where the person is serving a sentence of imprisonment, pursuant to subsection 501(3A).
62. The Law Council is concerned by this provision, as it prevents the applicant from effectively challenging the basis on which their visa has been cancelled due to their unawareness of the evidence used against them. The retrospective nature of this amendment is also concerning, as changes to the legal framework may affect matters already before the Federal Circuit Court.
63. The effect of such retrospective amendments is that people with a legitimate claim for protection may be at risk of *refoulement*, putting Australia in breach of its international obligations.

**Recommendation:**

- **The proposed amendments that apply retrospectively are amended such that they only apply prospectively in law and in practice. If it is determined that it is appropriate for the measures to be retrospective in effect, the Law Council recommends that further clarification is needed in the Explanatory Memorandum to justify the measure**

## Minister assuming the role of the courts in assessing criminal conduct

64. As noted in its submission to the Committee on the Migration and Maritime Powers Bill, the Law Council considers that Australia has a sovereign right to determine whether non-citizens who cause harm to individuals or the Australian community are allowed to enter and/or remain in Australia.<sup>32</sup> However, it is important to ensure that Australia does not unnecessarily refuse or deny visas to non-citizens who pose no threat to Australia, as visa refusal or cancellation may involve significant consequences for the individual (including detention and deportation<sup>33</sup>), families, communities and potentially Australia's business interests. Any proposed visa cancellation scheme on character grounds should therefore involve effective procedural safeguards to ensure:

- (a) innocent persons are not inadvertently refused entry or to remain in Australia; and

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<sup>32</sup> The competence of States to regulate the entry of non-citizens may be considered a customary international law norm – see Chetail, Vincent, 'The transnational movement of persons under general international law – Mapping the customary law foundations of international migration law' in Vincent Chetail and Celine Bauloz (eds) *Research Handbook on International Law and Migration* (Edward Elgar, 2014), 27-28. This sovereign right may also be limited by principles of international law.

<sup>33</sup> An unlawful non-citizen must then be detained (section 189 of the *Migration Act 1958* (Cth)) and as soon as is reasonably practicable removed from Australia (section 195A of the *Migration Act 1958* (Cth)) unless they are granted a visa, such as a protection visa, which is contingent on the person demonstrating they pass the character test.

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- (b) lawful and correct decisions and the maintenance of public confidence in the scheme.

65. A difficulty with the proposed amendments in the Bill is that they build on a problematic section 501 of the Migration Act. This section allows refusal or cancellation of a visa on character grounds in circumstances where the Minister (and in some circumstances also the Minister's delegate) effectively makes a determination that a person has been involved in criminal conduct despite the absence of a criminal conviction. Refusal or cancellation may as a matter of discretion follow where the Minister reasonably suspects the person has been engaged in certain conduct (such as being a member of an organisation involved in criminal conduct or being involved in war crimes, people smuggling or people trafficking).<sup>34</sup> The provision depends on uncertain criteria and effectively removes the right to be presumed innocent until proved guilty and according to law. Section 501 of the Migration Act effectively allows the Minister to assume the role of the court in assessing criminal conduct, supplanting what would ordinarily be a criminal court process in determining whether a person has engaged in certain conduct, with an administrative law process to make the same determination.
66. Proposed subsections 5C(1)(bb) or 5C(1)(bc) of the Bill would amend the definition of 'character concern' to include circumstances where the Minister or the Minister's delegate has made a determination based on reasonable suspicion that the person has been involved in certain conduct (mirroring subsections 501(6)(b) and 501(6)(ba) of the Migration Act, as introduced by the Character Act). The effect of the amendment is to broaden the definition of character concern so that a wider range of non-citizens may be required to disclose personal identifiers.<sup>35</sup> Accordingly, the amendments may require disclosure of personal identifiers in circumstances where a person is presumed guilty contrary to the rule of law.
67. Equally problematic is proposed subsection 5C(1)(f), which mirrors subsection 501(6)(f), as introduced by the Character Act. The proposed amendment would allow consideration of the fact that a non-citizen has, either in Australia or a foreign country<sup>36</sup>, been simply charged with or indicted for a specified offence<sup>37</sup> (without the need for a finding of guilt or conviction by a court). The specified offences include 'a crime that is otherwise of serious international concern', which is unhelpfully broad and ambiguous.
68. A concern therefore arises that the scheme may be used to avoid the long-standing judicial procedures for testing and challenging evidence in criminal trials that normally apply before a person is presumed to have engaged in unlawful conduct. This may increase the likelihood of error and mean that innocent persons are mistakenly captured. For this reason, consideration of involvement in criminal conduct under section 5C(1) should ideally only occur after a conviction by a court.
69. The Law Council therefore recommends that if the Committee is minded to pass the Bill, it and section 501 of the Migration Act are amended to properly align with fundamental legal principles. Ideally, 'criminal conduct' and 'conduct constituting an offence' should only be relevant considerations in relation to the determination of

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<sup>34</sup> Paragraphs 501(6)(b) and (ba) of the *Migration Act 1958* (Cth).

<sup>35</sup> 'Personal identifier' is defined in subsection 5A(1) of the *Migration Act 1958* (Cth).

<sup>36</sup> The inclusion of foreign courts in this subsection is also concerning given the differing standards of justice and evidence which may apply in foreign courts.

<sup>37</sup> Including genocide, a crime against humanity, a war crime, a crime involving torture or slavery, and a crime that is otherwise of serious international concern.

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'character concern' under section 5C(1) after a conviction by an independent, impartial and competent court or tribunal.

**Recommendation:**

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

## **Association with Criminal Group or Organisation**

70. Current paragraph 501(6)(b) of the Migration Act provides that a person may not satisfy the character test where the Minister or the Minister's delegate reasonably suspects that a person is a member of a group or organisation, or has had or has an association, with a group, organisation or person, involved in criminal conduct. The effect of proposed paragraph 5C(1)(bb) of the Bill would be to allow the collection of personal identifiers from such persons.
71. However, there are no criteria under the Migration Act or the Bill which need to be considered by the Minister in the process of determining whether a group or organisation has been involved in criminal conduct, and there is no definition of what is meant by 'association', or limits imposed on how recent the association has to be in order to be a relevant consideration.
72. The absence of publicly available, binding criteria to be applied to the determination of organisations as being involved in criminal conduct mean that it will be difficult for individuals to know in advance whether their conduct might attract visa refusal or cancellation. This uncertainty also leads to lack of transparency and accountability and gives rise to concern that innocent associations could attract criminal liability. Paragraph 501(6)(b) of the Migration Act and proposed paragraph 5C(1)(bb) of the Bill are therefore inconsistent with the rule of law, which requires that the law be readily known and available, and certain and clear.<sup>38</sup>
73. In the absence of a constitution, corporate plan or some other statement of an organisation's goals and mandate, a determination that a group or organisation is or has been involved in criminal conduct necessarily involves the attribution of defining characteristics and commonly shared motives or purposes to a group of people based on the activities of certain individuals within the group.
74. The result is that a person who has been or is a member of a group or organisation, or has an association with such group or organisation could be determined to be of 'character concern' if another member of that group or organisation is involved in criminal conduct, even when the person who was involved in criminal conduct is not the leader of the group, or when such conduct is not accepted by other members as representative of the group.

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<sup>38</sup> LCA Rule of Law Principles, Principle 1.

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75. As the Law Council has often pointed out, including in its submission to the Committee on the Migration and Maritime Powers Bill, the issue of attribution is significant because the members of any organisation are rarely a homogenous group who think and talk as one. On the contrary, although possibly formed around a common interest or cause, organisations are often a battleground for opposing ideas, and may represent a forum in which some members' tendencies towards violent ideology can be effectively confronted and opposed by other members. The result is likely to be the legitimisation of a process of guilt by association.
76. Given these concerns, the Law Council considers that conferring a broad executive discretion for the Minister to determine that a particular group or organisation is involved in criminal conduct is unacceptable, particularly in circumstances where the consequences are to limit freedom of association and to expose non-citizens to the possibility of being deemed of character concern.

**Recommendation:**

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

## **Adverse Security Assessments**

77. Item 3 of the Bill seeks to introduce subsection 5C(1)(g) into the Act, which would allow determination of character concern to be based on consideration of a risk assessment conducted by ASIO.<sup>39</sup>
78. The Law Council considers this to be concerning in light of the reasons outlined above (regarding the need for consideration of criminal conduct to be based on a conviction) as well as the fact that non-citizens have limited opportunities to seek review of adverse security assessments.
79. While the Security Appeals Division of the AAT has the power to review adverse security assessments, access to the AAT is denied to people who are not Australian citizens or holders of a permanent visa or a special purpose visa.<sup>40</sup> Accordingly, refugees with adverse security assessments cannot access merits review in the AAT.<sup>41</sup>
80. The Law Council has consistently advocated for access to effective merits and judicial review for this cohort of refugees.<sup>42</sup> The Law Council has repeatedly called for refugees with adverse security assessments to have the same access to merits review of such assessments as Australian citizens. This is reflected in the Law Council's *Principles Applying to Detention of Asylum Seekers* which provide:

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<sup>39</sup> The non-citizen would need to be assessed by ASIO to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth)).

<sup>40</sup> *Australian Intelligence Organisation Act 1979* (Cth), s36

<sup>41</sup> Australian Human Rights Commission, [Tell Me About: Refugees with Adverse Security Assessments](#) (2013)

<sup>42</sup> See also LCA Policy, [20].

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

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

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

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

d. The State should determine alternatives to detention that are appropriate in the light of the specific security risk posed if an adverse security assessment is upheld. Special consideration should be given to the wellbeing of the children of any asylum seekers against whom an adverse security assessment is made.<sup>43</sup>

**Recommendation:**

- **Amend the ASIO Act to permit non-citizens with adverse security assessments to have the same access to merits review of such assessments as Australian citizens.**

## Convictions and charges from Foreign courts

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

82. Paragraphs 501(6)(e) and (f) of the Migration Act and proposed paragraphs 5C(1)(e) and 5C(1)(f) of the Bill may be problematic as Australia has international human rights obligations which require it not to be complicit in criminal investigations and trials which do not comply with accepted fair trial principles.<sup>44</sup> An example of the operation of this principle are certain safeguards in the Mutual Assistance Act which require that a foreign country's request for assistance must be refused if for example, a person may be punished for a 'political offence', or on the basis of characteristics including race, religion, nationality or political opinions, or could be tortured.<sup>45</sup>

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

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<sup>43</sup> Law Council of Australia, *Principles Applying to the Detention of Asylum Seekers*, 22 June 2013, p. 6.

<sup>44</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 277 (entered into force 23 March 1976), art 14.

<sup>45</sup> Section 8, *Mutual Assistance in Criminal Matters Act 1987* (Cth).

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**Recommendation:**

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

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## **Attachment A: Profile of the Law Council of Australia**

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

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

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

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

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

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

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

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

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