



12 August 2019

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs

Dear Secretary

Inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2019

Thank you for the opportunity to make a submission to this inquiry.

I recognise that it is appropriate, in principle, for the government to regulate the presence of non-citizens in Australia by reference to character and risk to the community. However, I have four key concerns with the Strengthening the Character Test Bill ('the Bill'):

- The proposed amendments do not serve any identifiable policy goal, and would increase pressures on decision-makers and the criminal and administrative justice systems;
- The retrospective application of the Bill raises rule of law concerns;
- The proposed amendments run the risk of damaging relations with other countries, in particular New Zealand;
- The proposed amendments are inconsistent with Australia's international human rights obligations, and will disproportionately affect vulnerable groups including refugees in a way that is out of step with other jurisdictions.

For these reasons, my view is that the Bill should not be passed. I also endorse the more comprehensive submissions made by the Visa Cancellations Working Group, of which the Kaldor Centre is a member.

1. The proposed amendments do not serve any identifiable policy goal, and would increase pressures on decision-makers and the criminal and administrative justice systems

Regulation of the presence of non-citizens in Australia in a way that mitigates risk to the community is an important aspect of executive power. However, it is important to balance the need for such regulation with the severe consequences that visa cancellation can have for permanent residents and their family. For instance, a person who has their visa cancelled may face permanent separation from their dependent children, spend extended periods of time in immigration detention pending removal, or



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be removed to a foreign country they have never lived in as an adult, where they may have no connections and no understanding of the national language or culture.

Moreover, Australia already has a broad and flexible visa cancellation regime under the *Migration Act 1958* (Cth). In this context, it is particularly important that changes to the existing regime are supported by clear and strong policy justifications.

The Statement of Compatibility with Human Rights, attached to the Bill's Explanatory Memorandum, says that the Bill's objective is to 'provide a specific and objective ground to consider cancellation or refusal of a visa where a non-citizen has been convicted of a serious crime,' and that this 'aligns with community expectations that non-citizens who have committed serious offences should not be allowed to remain in the Australian community'.ⁱ

In my view, these statements do not provide a clear and strong justification for the amendments proposed in the Bill. On the contrary, the proposed amendments are poorly adapted to achieving the aims stated in the Statement of Compatibility.

Section 501 of the *Migration Act* in its current form provides for mandatory visa cancellation where a person has been sentenced to one or more terms of imprisonment totalling at least 12 months.ⁱⁱ Additionally, it provides for broad ministerial discretion to cancel a person's visa in a range of other circumstances, including where the Minister reasonably suspects that the person is not of good character, having regard to their past or present criminal or general conduct.ⁱⁱⁱ This existing mechanism already enables discretionary visa cancellation in all of the circumstances that constitute 'designated offences' under the Bill. Given this, the need to establish a new category of 'designated offence' is not clear.

The Statement of Compatibility says that the benefit of prescribing 'designated offences', for which conviction leads to automatic failure of the character test, is that this would provide a 'clearer and more objective basis for refusing or cancelling the visa of a non-citizen whose offending has not attracted a sentence of 12 months or more, but who nonetheless poses an unacceptable risk to the safety of law-abiding citizens and non-citizens'.^{iv}

At face value, this may appear reasonable. It is, however, problematic because no clear rationale has been provided for *how* it would help to improve community safety to deem a person to have failed the character test if they have been convicted of a 'designated offence,' irrespective of the sentence imposed. As the Visa Cancellations Working Group notes in its submission, the standard proposed in the Bill would result in a person being deemed to fail the character test on the basis of conduct that is not broadly regarded as 'serious offending.' For example, a person would be deemed to fail the character test if they are convicted of making a verbal threat to slap a person,^v a criminal act that would typically be regarded as minor in nature. Other conduct, which would typically be regarded as much more serious offending, such as trafficking commercial



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quantities of drugs, would not lead to automatic failure of the character test.^{vi}

If the Bill is passed, the Minister would have a discretion to cancel a person's visa where they have been convicted of threatening to slap another person. The Minister would also have the discretion to cancel a person's visa where they have engaged in commercial drug trafficking. However, conviction of the threat to slap would *in and of itself* form an 'objective basis' for visa cancellation, even if no sentence had been imposed by a court. By contrast, cancelling a person's visa on the basis of drug trafficking – unless a sentence of 12 months or more had been imposed – would require consideration of whether this offence, taken in context, indicated that they were not of good character.

This is a strange standard, that does not seem well-adapted to ensuring community protection. The current standard, which provides a sentence-based threshold for automatic visa cancellation, and fully allows for visa cancellation where this threshold has not been met but a person's conduct nonetheless indicates that they pose an unacceptable risk to the community, is far preferable. This is underlined by the fact that the majority of the public submissions to the Joint Standing Committee on Migration's 2017 inquiry into migrant settlement outcomes expressed the view that the current character and cancellation provisions in the *Migration Act* were an 'adequate way of addressing non-citizens who have been involved in criminal activities'.^{vii}

In addition, the proposed amendments are impractical. They are, for instance, likely to dissuade people from pleading guilty to criminal offences, because *any conviction* of a designated offence, irrespective of sentence, will lead to deemed failure of the character test. This will place increased strain on the criminal justice system, where a large number of cases are currently resolved by way of guilty plea.^{viii} Burdens on administrative decision-makers and the administrative justice system as a whole will also increase, for the detailed reasons set out by the Visa Cancellations Working Group in its submission.

2. The retrospective application of the Bill raises rule of law concerns

The retrospective application of the Bill raises concerns about its compatibility with the rule of law. One of the most important aspects of the rule of law is that a person is entitled to act in accordance with the law at the time that they committed their actions. No penalty should apply in respect of conduct that was not subject to a penalty at the time it was committed. The Bill, if passed, would deem a large number of people to have failed the character test on the basis of prior convictions that attracted no sentence, or a very light sentence. The risk of a penalty of visa cancellation and removal from Australia is likely to increase as a result of this change. This is undesirable, particularly in light of the extreme negative consequences that visa cancellation can have on an individual and their family, and the lack of a clear policy rationale for the proposed changes or their retrospective element.



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3. The proposed amendments run the risk of damaging relations with other countries, in particular New Zealand

Additionally, the proposed amendments run the risk of damaging relations with other countries. This is clearly evident from the submission to this Committee's 2018 inquiry into this Bill made by the Government of New Zealand, which notes that the introduction of mandatory visa cancellation in 2014 has been corrosive to the Australia-New Zealand relationship, and expresses concern about the expansions proposed in the Bill.^{ix} As the New Zealand Government noted in its submission,^x while it is appropriate to provide for the removal of non-citizens on community safety grounds in some circumstance, and it is appropriate for the Australian Government to determine the thresholds that should apply, in line with community standards, it is also incumbent upon the Australian Government to assume responsibility for the criminal offending of long-term residents, some of whom have lived in Australia since early childhood and who, irrespective of formal citizenship, have no substantive connection with any country besides Australia. People in this category are products of Australia in every practical sense, and are most appropriately managed through the criminal justice system and rehabilitative measures, not through the migration system.

4. The proposed amendments are inconsistent with international human rights obligations, and will disproportionately affect vulnerable groups including refugees in a way that is out of step with other jurisdictions

The proposed amendments would be inconsistent with a number of Australia's international human rights obligations. As the Parliamentary Joint Committee on Human Rights noted in its report on the 2018 version of this Bill, the measures proposed in the Bill are likely to be incompatible with Australia's non-refoulment obligations, the right to liberty and the protection of the family and the obligation to consider the best interests of the child as a primary consideration. The PJCHR also noted that there is a risk that the proposed measures may also be incompatible with other rights, including the prohibition on expulsion without due process and freedom of movement.^{xi}

To the extent that the measures proposed in the Bill would lead to an increase in the number of visas cancelled, it is likely to have a disproportionate effect on a number of vulnerable individuals, including minors, Aboriginal and Torres Strait Islanders, those with mental illness, and those from refugee or asylum seeker backgrounds. I echo the detailed submissions made to this effect by the Visa Cancellations Working Group.^{xii}

With respect to the impact on refugees and asylum seekers, the amendments proposed in the Bill are likely to further erode Australia's compliance, through domestic law, with its undertakings under international law, which prohibit the forcible return of refugees and asylum seekers to countries in which they are liable to be subjected to persecution. It is likely that the Bill, if passed, will lead to an increase in the number of visa cancellations for refugees and asylum seekers owed non-refoulement obligations. One consequence of this is that it will lead to an increase in the number of refugees and



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asylum-seekers subject to indefinite detention, where there is no country to remove them to. It may also lead to an increase in the number of people who are removed to countries where they face likely persecution, in violation of Australia's non-refoulement obligations. Removal in such circumstances is provided for under s 197C of the *Migration Act*, despite Australia's international obligations.

Additionally, the extended reliance on foreign criminal convictions is likely to have a disproportionately harsh effect on refugees and people seeking asylum who have been subject to forms of persecution in their home country in the form of wrongful and politically motivated criminal convictions. In conjunction with the inadequate protections against non-refoulement in the *Migration Act*, the measures proposed in the Bill run the risk of providing a basis for refugees fleeing such political persecution to be returned to the very countries they have fled, seeking safety.

Australia's visa cancellation laws with respect to refugees and people seeking asylum are out of step with those in comparator jurisdictions. For instance, New Zealand does not allow the deportation or removal of refugees, except where this would be permitted under Article 32(1) or Article 33 of the Refugee Convention. Additionally, refugees and protected persons may not be deported to any place where there are substantial grounds for believing they would be subjected to torture, arbitrary deprivation of life or cruel treatment.^{xiii} Similarly, the United Kingdom does not permit deportation of a person where this would breach obligations under the Refugee Convention.^{xiv} In the United States, non-citizens may not be deported to a country if they can establish that it is 'more likely than not' that their 'life or freedom would be threatened in that country because of [their] race, religion, nationality, membership in a particular social group, or political opinion.'^{xv}

Yours sincerely,

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ⁱ Explanatory Memorandum, to the Migration Amendment (Strengthening the Character Test) Bill 2019, Attachment A, 11.

ⁱⁱ *Migration Act 1958* (Cth) ss 501(6)(a); 501(7)(c); 501(3A).

ⁱⁱⁱ *Migration Act 1958* (Cth) ss 501(6)(c); 501(2).

^{iv} Explanatory Memorandum, to the Migration Amendment (Strengthening the Character Test) Bill 2019, Attachment A, 10.

^v This would constitute an offence under s 21 of the *Crimes Act 1986* (Vic)

^{vi} See Visa Cancellations Working Group, *Submission to the Migration Amendment (Strengthening the Character Test) Bill 2019*, 15.

^{vii} Joint Standing Committee on Migration, Parliament of Australia, *No one teaches you to become an Australian: Report of the inquiry into migrant settlement outcomes* (2017) 154 [7.144].



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- ^{viii} See Visa Cancellations Working Group, *Submission to the Migration Amendment (Strengthening the Character Test) Bill 2019*, 19.
- ^{ix} Government of New Zealand, *Submission to the Migration Amendment (Strengthening the Character Test) Bill 2018*, [5].
- ^x Ibid, [6]-[7].
- ^{xi} Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report* (Report 1 of 2019), 69-97.
- ^{xii} See Visa Cancellations Working Group, *Submission to the Migration Amendment (Strengthening the Character Test) Bill 2019*, 9-10; 21-24; 25-30.
- ^{xiii} *Immigration Act 2009* (NZ), s 164.
- ^{xiv} *Immigration Act 1971* (UK), s 3(6).
- ^{xv} See *Immigration and Nationality Act of 1952*, 8 USC § 1231(3); US Department of Justice, *Fact Sheet – Asylum and Withholding of Removal Relief* (15 January 2009), 6, <https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf>



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