



# Multicultural Youth Advocacy Network Australia (MYAN)

## Submission to the Senate Legal and Constitutional Affairs Legislation Committee for Inquiry on Migration Amendment (Strengthening the Character Test) Bill 2018

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December 2018

## MYAN Australia - Inquiry on Migration Amendment (Strengthening the Character Test) Bill 2018

### About MYAN

Multicultural Youth Advocacy Network Australia (MYAN) is the national peak body representing the rights and interests of young people from refugee and migrant backgrounds and those who work with them.

MYAN works in partnership with young people, government and non-government agencies at the state and territory and national levels to ensure that the particular needs of young people from refugee and migrant backgrounds are recognised, and to support a coherent and consistent approach to addressing these in policy and service delivery. MYAN undertakes a range of policy and sector development activities, and supports young people to develop leadership skills and networks.

Young people from refugee and migrant backgrounds demonstrate high levels of resilience and resourcefulness and have the potential to be active participants in and contributors to Australian society. However, they can face particular barriers to accessing services and opportunities, including language, culture, limited social capital and unfamiliarity with Australian systems and processes (including the service system), racism and discrimination. These factors can place them at a social and economic disadvantage within Australian society, which can mean they are at higher risk of social and economic isolation. MYAN believes that a targeted approach to policy and service delivery is essential to addressing these barriers.

MYAN has developed the *National Youth Settlement Framework* to support a targeted and consistent approach to addressing the needs of newly arrived young people settling in Australia.

### About this submission

MYAN welcomes the opportunity to provide information to the Senate Legal and Constitutional Affairs Legislation Committee's Inquiry into Migration Amendment (Strengthening the Character Test) Bill 2018 (The Bill).

MYAN endorses the submission made by the Visa Cancellations Working Group and would like to expand on issues concerning young people affected by the visa cancellations regime with this brief submission. This submission focuses on young people from refugee and migrant backgrounds aged 12 to 24, and specifically on young people aged 18 and under who might be impacted by the changes brought upon with the proposed Bill.

### Recommendations

MYAN recommends that;

1. The Bill be rejected in its current form.
2. Legislation and guidance on visa cancellations explicitly require consideration of the circumstances of an individual young person (for all young people up to age 25) before reaching a decision to cancel their visa.
3. As a minimum, any reference to visa cancellations in legislation and guidance explicitly excludes children/young people under the age of 18 from such processes.
4. Adopt a youth justice approach to respond to anti-social and criminal behaviour amongst the small number of young people from migrant and refugee backgrounds

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who are engaged in criminal behaviour, and cease using the visa cancellations regime to respond to youth offending.

5. Avoid 'double penalisation' of young people who have already served their sentence within the criminal justice system. Rather than cancel young people's visas, strengthen the efforts of the youth justice system to divert and rehabilitate young people engaged in offending behaviour.
6. That the Committee request information from the Department of Home Affairs on the number and ages of young people aged 18 and under whose visas have been cancelled, and gather information on the "best interest determination" procedures undertaken, in order to better understand the impact that visa cancellation has on young people's lives.

#### **A. Lack of focus on individual circumstances of young people:**

In recent years, the criminal activity of a small number of young people, including some from refugee and migrant backgrounds, has attracted a great deal of media attention<sup>1</sup> and community concern in Australia. For example, concerns for community safety in Victoria have risen amid an increase in the violent nature and frequency of certain offences among a small group of young repeat offenders.<sup>2</sup>

MYAN recognises the need to address community safety concerns with appropriate, targeted responses and welcomes public consultations as part of the process for determining both the extent of the problem and the solutions required. **MYAN is however concerned that there is little space in the existing legislation on visa cancellations and guidance that calls on the Minister (and/or his delegate) to consider the circumstances of an individual young person.**<sup>3</sup> The proposed bill decreases the already limited opportunity available under the existing procedures for an assessment of the personal circumstances.

While young people who are impacted by visa cancellations may not have lived in Australia for decades, MYAN understands the majority of young people who have been impacted by this regime have spent their formative years in Australia – they have been raised in Australia as part of our community and society.

**While MYAN does not call for abolishing of the visa cancellations system completely, we believe that in using such a procedure, there must be consideration for individual circumstances of young people before reaching a decision.** This requires a thorough, clear and consistent process which should be undertaken by specifically trained personnel/experts that have an

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<sup>1</sup>For a recent example on this see, Henriques-Gomes, L (2018) *Channel Seven accused of fear-mongering over 'African gangs' story*, *The Guardian*. Available at: <https://www.theguardian.com/media/2018/jul/09/channel-sevens-african-gangs-beat-up-prompts-fear-among-african-australians>.

<sup>2</sup>MYAN Australia (2017) *MYAN Submission to the Joint Standing Committee on Migration: Inquiry into Settlement Outcomes*. Melbourne: MYAN. p. 42.

<sup>3</sup>MYAN Australia (2017) *MYAN Submission to the Joint Standing Committee on Migration: Inquiry into Settlement Outcomes*. Melbourne: MYAN. p. 42.

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understanding of the impact of settlement on young people as well as an understanding of adolescence as a critical transitional period in a person's lifespan.<sup>4</sup>

Recommendations:

1. *The Bill be rejected in its current form.*
2. *Legislation and guidance on visa cancellations explicitly require consideration of the circumstances of an individual young person (for all young people up to age 25) before reaching a decision to cancel their visa.*

**B. Transitory nature of youth offending:**

Propositions under the proposed Bill regarding visa cancellations for young people under 18 raise serious concerns, given the evidence on the transitory nature of youth offending. The broad literature on youth offending recognises that factors such as socio-economic disadvantage and exclusion leave young people at increased risk of offending behaviour.<sup>5</sup>

It is well documented that adolescents are more susceptible to peer influence and risk-taking behaviour than are adults, as a result of this stage of their biological, mental and emotional development.<sup>6</sup> For most young people, offending is episodic, transitory and unlikely to continue into adulthood<sup>7</sup> as they 'grow out' of offending and have 'law-abiding lifestyles as young adults'.<sup>8</sup> As a result, suitable approaches to addressing offending among young people focus on diversion and rehabilitation – recognising that young people are likely, with appropriate intervention, to be successfully diverted from this behaviour, especially if the underlying factors placing them at risk are addressed.

**In light of the above evidence on transitory nature of offending, MYAN strongly believes that at a minimum any reference to visa cancellations in legislation should explicitly exclude children/young people under the age of 18 from such processes.**

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<sup>4</sup> An important example to how such an understanding could be incorporated is the different approaches taken in youth justice in Australia with an understanding of the transitory nature of juvenile and youth crime. According to Australian Institute of Criminology, "*in some instances, juveniles' convictions may not be recorded. This strategy aims to avoid stigmatising juveniles and assist juveniles to 'grow out' of crime rather than become entrenched in the criminal justice system. In most jurisdictions, for example, juveniles who participate in a restorative justice conference and complete the requisite actions resulting from the conference (such as apologising to the victim and/or paying restitution), do not have a conviction recorded, even though they have admitted guilt. Similarly, in some jurisdictions, a juvenile can be found guilty of an offence without being convicted. ... It is important to consider in this context the extent to which juveniles' psychosocial immaturity affects their pleading decisions in court.*" For more see, Richards, K (2011) *What makes juvenile offenders different from adult offenders? Trends & issues in crime and criminal justice series, no. 409.* Australian Institute of Criminology.

<sup>5</sup> MYAN (2017), *Submission to the Joint Standing Committee on Migration: Inquiry into Settlement Outcomes.* Melbourne: Multicultural Youth Advocacy Network (MYAN), p. 44-45.

<sup>6</sup> Hemphill, S. A. & Smith, R. (2010). *Preventing youth violence: What does and doesn't work and why? An overview of the evidence on approaches and programs.* Report prepared for the Australian Research Alliance for Children and Youth, Canberra.

<sup>7</sup> JSS (2015). *An escalating problem: Responding to the increased remand of children in Victoria.* Melbourne: JSS.

<sup>8</sup> Richards, K (2011) *What makes juvenile offenders different from adult offenders? Trends & issues in crime and criminal justice series, no. 409.* Australian Institute of Criminology. According to Richards, "*Research on adolescent brain development demonstrates that the second decade of life is a period of rapid change, particularly in the areas of the brain associated with response inhibition, the calibration of risks and rewards and the regulation of emotions ... It appears that adolescents not only consider risks cognitively (by weighing up the potential risks and rewards of a particular act), but socially and/or emotionally ... It has been recognised that young people are more at risk of a range of problems conducive to offending—including mental health problems, alcohol and other drug use and peer pressure—than adults, due to their immaturity and heavy reliance on peer networks ... Progression through puberty has been shown to be associated with statistically significant changes in behaviour in both males and females and may be linked to an increase in aggression and delinquency.*"

Recommendation:

3. As a minimum any reference to visa cancellations in legislation and guidance explicitly exclude children/young people under the age of 18 from such processes.

C. The youth justice system is functioning well and provides robust responses to youth crime:

Youth justice issues require a youth justice response. The broad youth justice literature has driven the development of a very specific and targeted approach to responding to youth offending in Australia that focuses on early intervention, diversion, rehabilitation and age-appropriateness<sup>9</sup>. These approaches are built on evidence that shows punitive measures are likely to worsen the likelihood of reoffending among young people by further isolating them from the community, rather than addressing the underlying factors impacting offending behaviour.<sup>10</sup>

MYAN, in its engagement with the Australian Government and the Australian Parliament in relation to previous inquiries on this issue<sup>11</sup>, has echoed the Australian Human Rights Commission's recommendation that **visa cancellations should "not be used as a means to address 'anti-social behaviour' amongst young people from migrant and refugee backgrounds"**<sup>12</sup> as cancelling visas is not a valid criminal justice response. Increasing the focus on such punitive policies and legislation changes, as a means to punish the small minority who break the law, has the potential to negatively impact settlement for many children and young people, their families and communities. A lack of security about the future and sense of belonging are key factors contributing to social isolation and disengagement.

The youth justice approaches undertaken in Australia are consistent with the principles of the Convention on the Rights of the Child and other associated human rights covenants to which Australia is a party, and thus apply equally to young people from refugee and migrant backgrounds. **A young person's visa or residency status should not negate or minimise**

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<sup>9</sup> Early intervention and prevention strategies work to provide stronger and earlier access to youth programs that address the causes of disadvantage. To address the underlying challenges and vulnerabilities placing some refugee and migrant young people at greater risk will require targeted responses, including programs and initiatives that keep young people in school; support successful education to work transitions; that strengthen community cohesion and mend relationships between young people and their communities; support engagement in sport and recreation and; more broadly, investment in youth-centred and family-aware approaches in policy and service delivery.

<sup>10</sup> Sentencing Council of Victoria (2016); Williams et al. (2009).

<sup>11</sup> MYAN Australia (2018) *Submission to the Joint Standing Committee on Migration for Inquiry on Review processes associated with visa cancellations made on criminal grounds*, available at: <https://www.aph.gov.au/DocumentStore.ashx?id=ee0ae269-01c4-45fb-90c7-80e9890fb62c&subld=565327>, and MYAN Australia (2018) *Submission to the Joint Standing Committee on Migration for Inquiry on Review processes associated with visa cancellations made on criminal grounds: Additional Information*, available at: <https://www.aph.gov.au/DocumentStore.ashx?id=9bfc22fb-d24c-4c65-92ff-044b0e9072fa&subld=565327>.

<sup>12</sup> Australian Human Rights Commission (2017) *Inquiry into Migrant Settlement Outcomes*, Australian Human Rights Commission *Submission to the Joint Standing Committee on Migration*. Available at [https://www.humanrights.gov.au/sites/default/files/AHRC%2020170131%20Final\\_AHRC%20Submission\\_Migrant%20Settlement%20Outcomes.pdf](https://www.humanrights.gov.au/sites/default/files/AHRC%2020170131%20Final_AHRC%20Submission_Migrant%20Settlement%20Outcomes.pdf), p. 5.

consideration of the youth justice approaches (including diversion and rehabilitation options) first.<sup>13</sup>

Shifts in youth offending over time, including downward trends in overall youth crime across Australia, demonstrate that while youth justice systems may experience challenges<sup>14</sup>, these are not new and in the main current approaches have demonstrated that they are flexible and capable of responding.<sup>15</sup>

#### Recommendation:

4. *Adopt a youth justice approach to respond to anti-social and criminal behaviour amongst the small number of young people from migrant and refugee backgrounds who are engaged in criminal behaviour, and cease using the visa cancellations regime to respond to youth offending.*

#### **D. The 'double penalisation' of young people under the current visa cancellations regime, and its undermining of efforts in the youth justice system:**

**MYAN does not support the use of the character test leading to visa cancellation as a tool for addressing issues arising from refugee and migrant young people's engagement in criminal offending.**

Young people who demonstrate anti-social behaviour and engage in criminal conduct are sentenced in line with the response of the criminal justice system and serve their sentence. Young people who have already served their sentence, including through the youth justice system, face double penalisation through the visa cancellation regime, despite thorough processes of youth justice systems. This undermines the efforts of the youth justice system, which is focused on rehabilitation and diversion, with an aim to ensure these young people re-engage with social life and become active and contributing members of the society.

As an example of how the youth justice system operates, the youth parole board in Victoria implements thorough scrutiny before determining the release of these young people on parole. Parole board has '*interests of/risk to the community*' among its primary considerations before reaching a decision and requires a detailed parole plan which must be prepared by a parole officer providing comprehensive information about the young person's current status and plans for living in the community on parole, including managing the risk of re-offending, accommodation, education/employment, professional support (counselling), supervision and compliance with special conditions. Young people on parole must also abide by youth parole

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<sup>13</sup> Additionally, the *Racial Discrimination Act 1975 (Cth.)* Part II, Section 5, adds to the broad prohibition of racial discrimination the term 'immigrant status'. This provision makes it possible for persons who experience unfair treatment due to their immigrant status, a relatives or an associates, to obtain protections under the Act.

<sup>14</sup> See Victorian Auditor-General's Report for a recent review of Victorian youth justice system. Victorian Auditor-General's Report (2018) *Managing Rehabilitation Services in Youth Detention*. Independent assurance report to Parliament 2018-19: 4. Available at: <https://www.audit.vic.gov.au/sites/default/files/2018-08/20180808-Youth-Detention.pdf>.

<sup>15</sup> Victorian youth offending rates have fallen significantly among some groups previously singled out as 'problematic', such as those born in Somalia. See MYAN (2017) *Submission to the Joint Standing Committee on Migration: Inquiry into Settlement Outcomes*. Melbourne: Multicultural Youth Advocacy Network (MYAN), p. 69-70. For overview, see Sutherland & Millsteed (2016).

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orders which have core terms and conditions that are prescribed in the Victorian Children, Youth and Families Regulations 2007.<sup>16</sup>

The proposed Bill furthermore undermines the efforts of the youth justice system as regardless of the length of sentence given to young people, it will open the doors of visa cancellation for increasing number of young people who committed ‘*designated offences*’ with a potential sentence of not less than two years, regardless of the actual sentence given to the young people.<sup>17</sup>

MYAN believes the current efforts of the youth justice system should be supported and further developed to respond to the needs of a small group of young people from refugee and migrant backgrounds - to reintegrate them into society and pursue their aspirations and fulfil their potential as active members of and positive contributors to Australian society.

Recommendation:

5. *Avoid a ‘double penalisation’ of young people who have already served their sentence within the criminal justice system. Rather than cancel young people’s visas, strengthen the efforts of the youth justice system to divert and rehabilitate young people engaged in offending behaviour.*

**E. Lack of data on young people and transparency of best interest determination process:**

The Explanatory Memorandum of the proposed Bill argues that “*the best interests of the child are, and will remain to be, a primary consideration in any decision whether to refuse or cancel a child’s visa on character grounds. As such, the refusal or cancellation of a child’s visa on these grounds would only occur in exceptional circumstances.*”<sup>18</sup>

While the Memorandum argues that the cancellation of a child’s visa only occurs in exceptional circumstances, MYAN is aware of several visa cancellations of young people aged 18 and under, and is concerned about the lack of publicly available national data demonstrating the extent of young people under the age of 18 facing such consequences. The process and methods of “best interest determination” that should be conducted before visa cancellation of these young people aged 18 and under is also not transparent.

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<sup>16</sup> State of Victoria, Department of Health and Human Services (2016) *Youth Parole Board Annual Report 2015–16*. Available at: [https://www.parliament.vic.gov.au/file\\_uploads/Youth\\_Parole\\_Board\\_Annual\\_Report\\_2015-16\\_L2jN9RxM.pdf](https://www.parliament.vic.gov.au/file_uploads/Youth_Parole_Board_Annual_Report_2015-16_L2jN9RxM.pdf), pp. 4 and 9.

<sup>17</sup> Visa Cancellation Working Group (2018) *Submission to the Inquiry on Migration Amendment (Strengthening the Character Test) Bill 2018, Submission 13*, p. 8. Available at: <https://www.aph.gov.au/DocumentStore.ashx?id=87aafc62-5375-45d9-bc26-30f2da59902b&subId=663345>

<sup>18</sup> Parliament of Australia (2018) Migration Amendment (Strengthening The Character Test) Bill 2018, Explanatory Memorandum, p. 13. Available at: [https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6214\\_ems\\_7da208f1-0723-41ac-9ec0-fcc0eceaaf8c/upload\\_pdf/688011.pdf;fileType=application/pdf](https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6214_ems_7da208f1-0723-41ac-9ec0-fcc0eceaaf8c/upload_pdf/688011.pdf;fileType=application/pdf)

Recommendation:

6. *That the Committee request information from the Department of Home Affairs on the number and ages of young people aged 18 and under whose visas have been cancelled, and gather information on the “best interest determination” procedures undertaken, in order to better understand the impact that visa cancellation has on young people’s lives.*