Law Council
OF AUSTRALIA

Office of the President

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Senator Amanda Stoker
Chair
Senate Legal and Constitutional Affairs Legislation Committee
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Parliament House
CANBERRA ACT 2600

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

Dear Senator Stoker

Question on notice: Migration Amendment (Strengthening the Character Test) Bill 2019

Thank you for the opportunity to respond further to the Senate Legal and Constitutional Affairs Legislation Committee (**the Committee**) in relation to its inquiry into the Migration Amendment (Strengthening the Character Test) Bill 2019 (**the Bill**).

During the Committee hearing of 19 August 2019 regarding the Bill (**the Hearing)**, the Law Council was asked to provide a list, for all Australian jurisdictions, of the existing offences likely to be covered by the definition of 'designated offence' under proposed paragraphs 501(7AA)(a) and (b). In the timeframe available for response, the Law Council has not been in a position to provide such a list given that this is what will be relied upon if the Bill is passed. It notes that a core difficulty with the Bill is that due to the non-exhaustive, open-ended nature of the definition of 'designated offence' it is not clear which offences will be captured. The Law Council is concerned that there may be years of litigation ahead in order for the Federal Courts to establish the outside parameters of these provisions. This broad drafting forms one of the Law Council's principal concerns about the Bill.

However, the Law Council draws attention to the following illustrative examples demonstrating the overly broad scope of the offences likely to be covered.

- Possession of a prohibited weapon.[1] Under New South Wales legislation, the definition of prohibited weapon includes weapons such as a sling shot, an extendable baton and a studded glove.[2] In this regard, the Law Council further notes advice received from the Law Institute of Victoria that in Victoria, while the maximum penalty for possession, use or carriage of a prohibited weapon is imprisonment for two years in Victoria,[3] this is very rarely exercised. In the period of 1 July 2013 to 30 June 2016, of the 5,614 people found guilty of this charge,

[1] Eg, *Weapons Prohibition Act 1998* (NSW) s 7(1).
[2] Eg, *Weapons Prohibition Act 1998* (NSW), sch 1.
[3] Control of Weapons Act 1990 (Vic), s 5AA.

only 20.6 per cent received a prison sentence of any length. Only 1.2 per cent received sentences of 18 to 24 months or more.

- Common assault in some jurisdictions.[4] In this regard the Law Council also notes that the designation of offences by reference to the statutory maximum penalty tends to introduce arbitrary distinctions between states. The maximum penalty for common assault vary widely across Australian jurisdictions: 21 years' imprisonment in Tasmania;[5] five years' imprisonment in Victoria;[6] three years' imprisonment in Queensland;[7] two years' imprisonment in the Australian Capital Territory,[8] New South Wales,[9] and South Australia;[10] 18 months' imprisonment in Western Australia, and one year's imprisonment in the Northern Territory.[11]
    - In this context, the New South Wales legislation provides that:

      *'whosoever assaults any person, **although not occasioning actual bodily harm**, shall be liable to imprisonment for two years.'*[12] [emphasis added]

    - Further, in Tasmania, where common assault is punishable by up to 21 years imprisonment,[13] the definition of 'assault' is as follows:

      *'An assault is the act of **intentionally applying force** to the person of another, directly or indirectly, **or attempting or threatening by any gesture to apply such force to the person of another if the person making the attempt or threat has, or causes the other to believe on reasonable grounds that he has, present ability to effect his purpose; or the act of depriving another of his liberty.**'*[14]

      It is clear that a victim need not be actually harmed under these definitions. While assault is rightly a criminal offence and can never be condoned, this raises questions as to whether a person should automatically fail the character test based on a mere conviction – not their actual sentence – for this kind of low level offending.

- A child sharing an intimate image of their girlfriend or boyfriend without their consent (a summary offence).[15]
- Any form of contravention of an intervention order, irrespective of the level of contravention.[16]
    - In Victoria, for example, this order can include any conditions considered necessary or desirable by the court in the circumstances, including emailing or texting the protected person, or being within a specified distance of their home.[17]
    - This may also capture the breach of a family violence protection or domestic violence order by a person who is primarily a victim of family

[4] Eg, *Crimes Act 1958* (Vic), s 320.
[5] *Criminal Code Act 1924* (Tas), s 389.
[6] *Crimes Act 1958* (Vic), s 320.
[7] *Criminal Code 1899* (Qld), s 335.
[8] *Crimes Act 1900* (ACT), s 26.
[9] *Crimes Act 1900* (NSW), s 61.
[10] *Criminal Law Consolidation Act 1935* (SA), s 20.
[11] *Criminal Code* (NT), s 188(1).
[12] *Crimes Act 1900* (NSW) s 61.
[13] *Criminal Code Act 1924* (Tas), ss 184 and 389.
[14] Ibid, s 182(1).
[15] Under the *Summary Offences Act 1966* (Vic) s 41DA.
[16] *Family Violence Protection Act 2008* (Vic), s 123.
[17] *Family Violence Protection Act 2008* (Vic), s 123(2).

violence. The Queensland Law Society has raised specific concerns in this regard, noting recent reports of domestic violence orders being placed on women in Queensland who are primarily the victims of domestic abuse but are placed under such an order for retaliating against a violent partner.[18]

- Aiding, abetting, counselling or procuring the commission of an offence that is a designated offence.
    - In some jurisdictions,[19] this may capture victims of family violence, who have obtained a protection order, and can be charged with contravening the protection order if they are deemed complicit in the breach, with instigating or aiding or abetting a breach.[20] As noted by the Law Council in the Hearing, this may include a family violence victim phoning a perpetrator and asking him or her to come and collect their children from her home, in breach of the order.
- Any attempted offence of the nature stipulated.

The Law Council considers that the Department of Home Affairs (**the Department**) is best placed to provide a complete list of 'designated offences' as it is aware of the intended scope. However, the list would only be indicative, as the very unsatisfactory definition will require years of analysis by the Federal Courts to determine whether many offences in fact fall within these provisions.

The Law Council understands the Department's reasoning that the list of offences need not be prescribed in the Bill itself, as the relevant crimes will change from time to time. However, the provision of a list of offences that would currently fall under the definition is necessary to ensure that the Committee and Parliament have an understanding of the scope of the proposed legislation, and of what may be covered. The Department is well-resourced to provide an adequate list in this regard, and if it is unable to do so, this would raise concerning questions about the uncertain scope of the legislation. If neither the Department nor Parliament is certain about its breadth, this reinforces questions as to whether the Bill should indeed be passed.

It would also be beneficial, once the list is provided by the Department, to put again to the Department how many people may be impacted by the proposed change. The Law Council notes that the Department was unable to provide an answer to this question during the Committee hearing on Monday 19 August 2019.

Holding a visa – Privilege v Right

As a supplementary point, the Law Council notes that there was some discussion during the hearing about the nature of the rights and obligations attached to visas, and whether retaining a visa could classified as a 'privilege'. In this regard, the Law Council wishes to draw attention to the case of *Minister for Immigration and Border Protection v Stretton*[21], where Griffiths J held that:

> *In particular, without doubting the relevance to the exercise of that power of protecting the Australian community, it is important that the value of the statement*

[18] Hayley Gleeson, 'What happens when a domestic violence victim fights back?' *ABC* (online), 30 July 2019 <https://www.abc.net.au/news/2019-07-30/the-women-behind-bars-breaching-domestic-violenceorder/11330408>.

[19] For example, in the Australian Capital Territory and the Northern Territory this is not specifically excluded in legislation. ANROWS, *Landscapes: State of Knowledge* (December 2015).

[20] *Family Violence Act 2016 (ACT)* s 67(2)(d); *Criminal Code 2002 (ACT),* s 45.

[21] [2016] FCAFC 11.

> *of reasons is not diminished by resort to superficial aphorisms or empty rhetoric, which is illustrated by phrases such as 'expectations of the Australian community' and the 'privilege' of being a visa-holder.* ***The former concept has the potential to mask a subjective value judgment and to distort the objectivity of the decision-making process. The latter expression is simply misleading as a legal concept. Under Australian law, having the status of a visa-holder is not a privilege. Visa-holders hold statutory and non-statutory rights which are inconsistent with the notion of their status being described simply as a 'privilege'.*** *For example, many visa-holders have statutory rights of review and all visa-holders have rights relating to judicial review of adverse migration decisions. The statutory rights of a visa-holder are, of course, subject to the lawful exercise of executive powers such as those under s 501. But that fact does not justify the position of a visa-holder under Australian law being described as merely one of 'privilege' in a legal sense.*[22]

The Law Council further emphasises that all persons, whether citizens or non-citizens, are entitled to the fundamental human rights described in its submission, including the rights of the child to have his or her best interests considered as a primary consideration, and the rights to family unity. The Australian Government is obliged to protect, respect and fulfil these rights for all who are within its territory and subject to its jurisdiction, regardless of their citizenship status.

Application to First Nation Australians

Further, the Law Council wishes to address any uncertainty regarding the question of whether character test provisions have been applied to First Nations Australians. The Law Council notes examples of the following cases, where this has in fact occurred.

Hands v Minister for Immigration and Border Protection [2018] FCAFC 225

Mr Hands arrived in Australia from New Zealand in 1974 when he was three years old.[23] He had not applied for Australian citizenship because he believed his mother had applied for him on his behalf when he was small.[24] He lived in Australia on an absorbed person visa since 1994.[25] Mr Hands left home when he was twelve or thirteen years old to be taken in by a family of the Wallaga Lake Aboriginal community. He is husband to an Aboriginal wife, father and grandfather to Aboriginal children, a labourer on Aboriginal projects and sportsman on Aboriginal football teams. His community considers him one of their own, a Koori man of the South Coast of New South Wales.[26]

In 2016, Mr Hands was convicted in the Local Court at Batemans Bay for domestic violence-related offences and sentenced to imprisonment for 12 months.[27] This caused the mandatory cancellation of his visa under subsection 501(3A) of the *Migration Act 1958* (Cth) (**the Act**).

[22] *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 [70] [emphasis added].
[23] *Hands v Minister for Immigration and Border Protection [2018] FCAFC 225* [3]; James Barrett, 'The Deportation of an Aboriginal Man Frustrated: Hands v Minister for Immigration and Border Protection' on *AUSPUBLAW* (13 March 2019**)** <https://auspublaw.org/2019/03/the-deportation-of-an-aboriginal-man-frustrated/>.
[24] Ibid [4].
[25] Ibid.
[26] Ibid [15-17].
[27] Ibid [5].

The Assistant Minister was tasked with the decision of whether or not to revoke the mandatory cancellation of Mr Hands' visa under subsection 501CA(4). The Assistant Minister considered a number of factors in determining whether or not to revoke the mandatory cancellation of Mr Hands' visa, including the 'human consequences' of his removal, such as the effect on his family and on his community.[28] However, ultimately the Assistant Minister decided not to revoke the visa cancellation.[29] This decision was appealed to the Federal Court for judicial review, which found that the decision, though it may seem 'harsh or even "cruel"' was within 'the Assistant Minister's area of decisional freedom and is not arbitrary or capricious'.[30]

This decision was appealed by Mr Hands to the Full Court of the Federal Court, which allowed the appeal. Amongst other observations, the Court made the following findings:

> *The separation of Mr Hands from his community, his wider family, his partner, his children, grandchildren and step-grandchildren is a life-changing decision, potentially life-destroying. The statements [made by the Assistant Minister] that he "may experience some emotional and psychological hardship" and "may experience short term hardship, [but] would be capable of settling in New Zealand without undue difficulty" were simply incapable of being reasonably made by any decision-maker, there being no evidence at all to support them, and all evidence being to the contrary to a reasonable decision maker… The making of the findings, without any material to found them, given their central importance in the reasoning, is a sufficient basis to conclude that there has been jurisdictional error.*[31]
>
> *The complaint [was that] there had been a failure to take into account the representations in relation to [Mr Hand's] identification and acceptance by the Aboriginal community as an Aboriginal person, and the nature of his ties to the Aboriginal community... A significant body of submission was put to the primary judge (and on appeal) about the nature or definition of Aboriginal status: by reference to descent, self-identification and community acceptance… Nearly 30 years after the Royal Commission into Aboriginal Deaths in Custody, two decades after the Stolen Generations Report, and after nearly forty years of recognition of land rights based on Aboriginal community of title, it is surely now part of Australian society's cultural awareness and appreciation that kinship, family and community lie at the heart of Aboriginal society, underpinning its laws, rules, and social behaviour… Mr Hands' place in that community and the effect on the Aboriginal community of his removal were matters of significant importance. They were not considered or barely considered by the Assistant Minister. This was in circumstances where the countervailing consideration so heavily relied on by the Assistant Minister was the protection of the Australian community. That national conception and ideal, brought down to everyday human terms, is the community on the South Coast of New South Wales and, given the nature of Mr Hands' offending, principally the local Aboriginal community.*[32]

Love v Commonwealth of Australia; Thoms v Commonwealth of Australia

The following is an outline of the facts of a case currently before the High Court of Australia:

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[28] Ibid [22].
[29] Ibid [24].
[30] Ibid 42.
[31] Ibid [45 – 46].
[32] Ibid [49– 50].

*Mr Love is a citizen of Papua New Guinea (**PNG**), where he was born in 1979. His mother was a citizen of PNG and his father is a citizen of Australia. Mr Love's father was born in the Territory of Papua to a Papuan mother and an Aboriginal Australian father. From the age of five Mr Love held an Australian permanent residency visa and since the age of six he has resided continuously in Australia…*[33]

In 2018 Mr Love was sentenced to imprisonment for 12 months for an offence of assault occasioning bodily harm, with court-ordered parole to commence on 10 August 2018. On 6 August 2018 a delegate of the Minister for Home Affairs cancelled Mr Love's visa under subsection 501(3A) of the Act on the bases that: (1) Mr Love was serving a sentence of full-time imprisonment, and (2) Mr Love had been sentenced to a term of imprisonment for 12 months or more. On the day on which his parole commenced, Mr Love was released from prison into the custody of Border Force officers, who took him directly to an immigration detention facility. This was done pursuant to section 189 of the Migration Act, on suspicion that Mr Love was an unlawful non-citizen. Mr Love was released from immigration detention on 27 September 2018, when a delegate of the Minister for Home Affairs revoked the cancellation of Mr Love's visa.

Mr Thoms is a citizen of New Zealand who was born in that country in 1988 to an Aboriginal Australian mother and a New Zealand father. He has resided in Australia since 1994. In 2018 Mr Thoms was sentenced to imprisonment for 18 months, for a crime of assault occasioning bodily harm. On 27 September 2018 the Minister for Home Affairs cancelled Mr Thoms' visa under subsection 501(3A) of the Act (on the same bases on which Mr Love's visa was cancelled). The next day, Mr Thoms commenced court-ordered parole. Like Mr Love, however, Mr Thoms was immediately placed in immigration detention by Border Force officers...[34]

Each party seeks the payment of damages for false imprisonment, on the basis that his being held in immigration detention was (and is) unlawful. Mr Thoms also seeks to be released from immigration detention. The Plaintiffs argue that section 189 of the Migration Act cannot apply to them, since they have a special connection to Australia such that neither of them is an 'alien' within the meaning of subsection 51(xix) of the Australian Constitution.[35]

Ministerial Discretion

As discussed during the Hearing, the increase in cancellation cases has led to an increase in workload on the Minister when his personal powers are enlivened. A discussion occurred about the case of Chetcuti.[36] The facts of this case were:

The appellant was 73 years old. He was born in Malta and arrived in Australia in 1948 at the age of two. He held an Absorbed Person visa. In 1993, he was convicted of the murder of his wife and sentenced to 24 years imprisonment. In

[33] *Love v. Commonwealth of Australia; Thoms v. Commonwealth of Australia*, Case no B43/2018 and B64/2018. High Court of Australia, *Current Cases*: *Case Information* (Web Page) <http://www.hcourt.gov.au/assets/cases/02-Brisbane/b43-2018/Love-Thoms_SP.pdf>.
[34] Ibid.
[35] Ibid.
[36] *Chetcuti v Minister for Immigration and Border Protection* [2019] FCAFC 112

2011, he was convicted of assault occasioning bodily harm upon his cell mate and was sentenced to two years imprisonment (served concurrently).

In March 2017, the Minister purported to cancel the appellant's visa under s 501(2) of the Act. The appellant sought judicial review of that decision. In the days before the hearing, the Minister decided to consent to his decision being quashed.

The Department put in place arrangements with the Minister's office that would allow the Minister to make a fresh cancellation decision following the quashing of the March 2017 decision. A written submission and attachments of about 130 pages were provided to the Minister on 14 August 2017.

On the same morning, a judge of the Federal Court ordered that the Minister's purported decision of 2017 be quashed. The Minister was notified no earlier than 10.14 am on 14 August 2017 that the order had been made. At 10.25 am on the same day, the Minister made a fresh decision to cancel the appellant's visa in the national interest under section 501(3) of the Act. The decision was made no more than 11 minutes after he was notified of the order.

The Minister determined to cancel Mr Chetcuti's visa in the national interest under section 501(3) of the Act. He adopted the statement of reasons prepared for him. He determined that as the appellant had been sentenced to a term of imprisonment of 12 months' imprisonment or more, he had a substantial criminal record within section 501(7)(c) and failed the character test under section 501(6)(a) of the Act.

The Minister then considered whether the cancellation of the appellant's visa would be in the national interest. The Minister took into account the nature and seriousness of the appellant's criminal conduct and the risk he posed to the Australian community. He also considered the exercise of his discretion under s 501(3) of the Act. The Minister took into account the interests of the appellant's grandchildren; the expectations of the Australian community; the strength, nature and duration of the appellant's ties to Australia; and the extent of impediments he would face if he moved from Australia to Malta. He concluded that the cancellation of Mr Chetcuti's visa was in the national interest.

The appellant did not allege that the Minister's reasons themselves demonstrate any jurisdictional error. He argued that that the Minister committed jurisdictional error by failing to give proper, genuine and realistic consideration to the merits of the decision

The Court majority[37] agreed that a decision-maker must give proper, genuine and realistic consideration to the merits of the case, including by the application of an active intellectual process. It quashed the Minister's decision to cancel the appellant's visa.

The Law Council hopes that this additional information assists the Committee in conducting its inquiry. It would also like to take the opportunity to provide an amended submission (attached) in which a few minor typographical errors have been addressed. None of these amendments alters the submission in substance. Please contact Ms Leonie Campbell, Deputy Director of Policy, or at

[37] Ibid, Murphy and Rangiah JJ; O'Callaghan J dissenting.

in the first instance, if you require further information or clarification.

Yours sincerely

Arthur Moses SC
President