



SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

MIGRATION AMENDMENT (STRENGTHENING THE CHARACTER TEST) BILL 2021

The Refugee Council of Australia (RCOA) is the national peak body for refugees, people seeking asylum, and the organisations and individuals who work with them. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, people seeking asylum and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

We welcome the opportunity to restate our significant concerns about this Bill for a third time. We have consistently expressed our profound concerns about the continuing expansion of executive powers under the visa cancellations framework, and the undermining of safeguards and independent scrutiny. This new version of the Bill introduces minimal changes to the previous versions, changes which do not address our ongoing concerns.

We have raised in submissions to this Committee on two previous occasions, and to the Joint Standing Committee on Migration, our strong concerns that the exponential increase in visa cancellations has resulted in refugees languishing in indefinite detention. We have also consistently stated our concern that such legislation undermines the rule of law and the principle of equality of the law.

This Bill continues these lamentable trends. The Bill it adds nothing to the existing sweeping powers of the Government to protect the safety of Australian citizens, and presents significant concerns regarding indefinite detention, family separation, and potential refoulement (returning refugees to harm). Non-citizens could be held in indefinite detention or deported without any form of substantive independent review, as there is no right to review by the Administrative Appeals Tribunal if the decision is made personally by a Minister. Even if the Tribunal can review the decision, this can be overturned by the Minister.

It is the role of Parliament to preserve the constitutional principles of the rule of law, equality of law, and separation of powers. It is also its role to defend the norms that have made our Australian society one of the most successful multicultural societies in the world, including the norms of non-discrimination, respect for others, and fairness in its treatment of non-citizens. This Bill undermines these vital principles.

We again reiterate our concerns with this Bill and strongly recommend it not be passed.

We also endorse the submission of the Visa Cancellation Working Group, of which RCOA helped established and is a member.

1 Adding to a draconian framework

1.1 We have previously expressed profound concerns about the scope of the current visa cancellations framework in several inquiries, most recently in our detailed submission to the Joint Standing Committee on Migration's inquiry into the review process for visa cancellations.¹ Those concerns include:

- For refugees, the risk (and reality) of indefinite detention, as although their visas have been cancelled, they cannot be forced to return to another country without Australia being in breach of its international legal obligations of *non-refoulement* and the Migration Act². However, indefinite detention itself in this context also breaches Australia's international legal obligations.
- The mandatory nature of cancellations, meaning that people are detained without consideration of context, and are forced to wait on a review of the cancellation decision only once they are detained, and often after months or years in detention.
- The lack of adequate safeguards in the process, including the lack of independent legal advice, very strict and tight timelines for appeal, and inadequate communication of the effect of visa cancellations (especially for people for whom English is not their first language).
- The delays encountered in the review process, and the inadequate policies to ensure people's detention is reviewed appropriately.
- The extraordinary level of Ministerial discretion and intervention, with the Minister being able to overturn the decisions of an independent tribunal or to avoid the tribunal's review by personally making decisions, and to also make ministerial guidelines.

1.2 In this context, the claim that this Bill would serve to protect the national interest is nonsense. The Government already has extraordinary powers to cancel or refuse visas based on character. The Explanatory Memorandum to this Bill suggests that it is intended to capture individuals with links to organised crime, outlaw motorcycle gangs, and those who murder, assault, sexually assault or burglarise. However, all these offences are already captured in the existing framework. Section 501 of the *Migration Act* already gives the Minister and his/her delegate broad powers to cancel a person's visa, including if a decision maker, having regard to any past and present criminal or general conduct, decides that a person is not of good character.³

1.3 For refugees, the consequence of a visa cancellation is indefinite detention, as they cannot be returned to their country of origin without breaching our *non-refoulement* obligations. There are already many refugees subject to such indefinite detention, which is itself a breach of our international legal obligations, including the protection of the right of liberty under Article 9 of the International Covenant on Civil and Political Rights. As we have previously submitted to the Joint Standing Committee on Migration, cancelling such visas does not serve any legitimate purpose, as such people cannot be removed.

1.4 We have heard that visas are being cancelled without people being detained. Instead, these people are left without a valid visa in the community, without the right to work and without other

¹ Refugee Council of Australia, *Inquiry into the Review Processes Associated with Visa Cancellations Made on Criminal Grounds* (Submission, Joint Standing Committee on Migration, 27 April 2018)

<<https://www.refugeecouncil.org.au/publications/submissions/visa-cancellations-reviews/>>. See also Refugee Council of Australia, *Migration Amendment (Character and General Visa Cancellation) Bill 2014* (Submission, 4 March 2016)

<<https://www.refugeecouncil.org.au/r/sub/1410-Character.pdf>>; Refugee Council of Australia, *Migration Amendment (Character Cancellation Consequential Provisions) Bill 2016* (Submission, 4 March 2016)

<<http://www.refugeecouncil.org.au/publications/submissions/character-cancellation-consequential-provisions/>>.

² If Australia owes *non-refoulement* obligations in respect of the person, e.g. because they are refugees, they cannot be removed, and so they must remain in detention as per s 197C of the Migration Act.

³ For a detailed explanation of the existing visa cancellation powers under section 501 see the Visa Cancellation Working Group's submission to this inquiry, which RCOA endorses.

means to support themselves. Such enforced destitution is also a breach of our international obligations.

1.5 Further, the existing framework undermines the constitutional principles of the rule of law and separation of powers. It empowers a single person — the Minister for Immigration — with the right to detain a person indefinitely without the right to a fair process under our criminal system. Under this Bill, that person could be detained even if they have not been ordered to serve a sentence by a judge. This is exactly the kind of tyranny that the rule of law was evolved to defend against.

2 Findings from previous inquiries

2.1 Earlier versions of this legislation have already been considered by the Senate Standing Committee for the Scrutiny of Bills, the Parliamentary Joint Committee on Human Rights, the Senate Legal and Constitutional Affairs Legislation Committee, as well as a wider inquiry by the Joint Standing Committee on Migration. It has received significant scrutiny, with many bodies highlighting ongoing concern with the proposals.

2.2 The Parliamentary Joint Committee on Human Rights noted that its concerns are “consistent with its previous findings in relation to substantially similar measures”.⁴ It found that much of the legislation was not justified:

- “[I]n circumstances where the minister may already cancel or refuse a person's visa where a person has committed an offence that would fall within the definition of 'designated offence', it is not clear that the measures are necessary...”⁵
- “[T]he mandatory nature of detention of persons who have had their visa cancelled, in the absence of any opportunity to challenge detention in substantive terms, means that expanding the bases on which visas may be cancelled increases the risk of a person being arbitrarily deprived of liberty. If this were to apply to children, this would also risk being incompatible with the rights of the child.”⁶
- There is a risk the measure will be incompatible with a number of human rights, including the rights to liberty, to return to one's own country, to the protection of family; the rights of the child, and the prohibitions on the expulsion of aliens without due process and on non-refoulement.
- It is not sufficient for measures to be “desirable or convenient”: the objective must be pressing and substantial, something which the Committee considers has not been established.⁷

2.3 The Senate Standing Committee for the Scrutiny of Bills has said, reiterating its previous scrutiny concerns:⁸

- “The committee notes that in light of the already broad discretionary powers available for the minister to refuse to issue or cancel the visa of a non-citizen, the explanatory materials have given limited justification for the expansion of these powers by this bill.”⁹

⁴ Parliamentary Joint Committee on Human Rights, Report 15 of 2021, [1.89].

⁵ PJCHR, Report 15 of 2021, [1.60]; see also [1.88].

⁶ PJCHR, Report 15 of 2021, [1.63].

⁷ PJCHR, Report 15 of 2021, [1.88].

⁸ Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 18 of 2021, [1.78].

⁹ SCSB, Scrutiny Digest 18 of 2021, [1.86].

- The Bill “raises scrutiny concerns as to whether the measure unduly trespasses on rights and liberties.”¹⁰

2.4 It is difficult to comprehend why the Bill continues to be advanced, given these concerns.

3 ‘Potential’ sentences, not actual sentences

3.1 This Bill increases the circumstances under which a person can have their visa cancelled or refused under the character test of section 501 of the Migration Act 1958. The Bill proposes that a person will fail the character test if they have been convicted of any offence involving:

- Violence, including threat, robbery, and low-level assaults;
- Non-consensual conduct of a sexual nature, including the sharing of an intimate image;
- Breach of a court or tribunal order made to protect a person, including inadvertent breaches, regardless of the nature of the breach;
- Use or possession of a weapon (anything where a person intends or threatens to use that thing to inflict bodily injury).

In addition, the offence must have a *possible* sentence of two years or more, even if the person received a lesser sentence (or no sentence at all). This significantly increases the risk that refugees and vulnerable people will be detained or deported, including for minor offences.

3.2 A key change made by this Bill is that people will automatically fail the character test based on *possible* court sentences, rather than the sentence that they receive. A court, of course, can hear and receive evidence and consider the overall context of the offence and the offender. By converting the threshold from an actual to a potential sentence, the Bill removes all these considerations from the ‘character’ test. For example, some offences which would fall under this category include:

- verbal threats,¹¹ such as telling a person you want to slap them, or sending a text that you will punch the person’s new partner, if that conduct causes harm to a person’s mental health;
- assault, such as grasping a person by the sleeve if that conduct causes harm to a person’s mental health;
- any form of contravention of an intervention order,¹² including where the offender was approached by the protected person, or responded to a text from that person;
- a minor sharing an intimate image of their girlfriend or boyfriend, and¹³
- Any *attempted* offence of the nature stipulated, being an offence not carried out.

3.3 The new test would essentially remove all consideration of what happened in a court, and rather refer only to what a State legislature in Australia had decided to enact at one point in time. As noted by the Law Institute of Victoria, there is no necessary correspondence between the potential length of a sentence and the seriousness of a crime.

3.4 Many offences that carry potential sentences of two years or more are far from the kind of ‘serious’ offence indicated by the Explanatory Memorandum. According to the Law Institute of Victoria, shoplifting, a teen sharing intimate images with a girlfriend or boyfriend, damaging property, verbal threats, or dangerous driving would all satisfy this test, even if a judge decided not to give them a prison sentence at all. The effect of this would be to lower the level of offending that would

¹⁰ SSCSB, Scrutiny Digest 18 of 2021, [1.87].

¹¹ *Crimes Act 1986* (Vic), s 21.

¹² *Crimes (Family Violence) Act 1987*, s.22(1).

¹³ *Summary Offences Act 1966*, s.41DA.

trigger an automatic cancellation to an absurd level, which would surely upset rather than protect community expectations.

4 Children and other vulnerable community members

4.1 There is nothing in this Bill that prescribes any differential treatment for children. While the Explanatory Memorandum suggests that their visas will be cancelled only in 'exceptional circumstances', the Bill does not spell out what they are or any legislative process to ensure that consideration. Indeed, it is clear from the Explanatory Memorandum that the Bill contemplates that some children will be subject to indefinite detention or removal because of this Bill. This is consistent with political commentary which suggests the Bill is intended to be used in relation to children.

4.2 The Explanatory Memorandum suggests that it is consistent with our international legal obligations to children. However, the immigration detention of children is never permitted under international law,¹⁴ so this Bill would clearly be in breach of our obligations to children.

4.3 The Bill would also affect other vulnerable community members, including the spouses of refugees, because it would also make anyone who 'aids and abets', induces or is 'in any way (directly or indirectly) knowingly concerned in, or a party to' any of the offences subject to visa cancellation.¹⁵ The breadth of this is extraordinary, and the fear that this provision would cause, even if it is not enforced, would put already vulnerable members of our community under enormous stress.

Recommendation 1

RCOA recommends that this Bill should not be passed.

¹⁴ Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on Deprivation of Liberty of Migrants* (No Advanced edited version, 7 February 2018) <https://www.ohchr.org/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf>, [40].

¹⁵ See proposed sections 5C(3)(v)-(viii), s 7AA(a)(v)-(viii).